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# EDITORIAL

The weakening political and social economy, the increasing incidence of political and even judicial corruption, growing frustration and disillusionment among the masses due to mass poverty, mass unemployment and mass violence is throwing up more and more predicaments in which people find themselves affected by remote actors where there is no leverage to control their actions. The modern technology including computerization of every aspect of life has increased the power of the strong and powerful to manipulate the existing laws and legal entitlements. Masses are bewildered by dramatic increase in lawless violence and standardless use of force both by the agents of the government and dominant groups. Trust in law and legal methods is fast declining. The governors of the people are perceived to be unable to control the corrupt, the oppressors and the violators and are believed to be susceptible to all kinds of illegitimate pressures. For the poor and the victimized, the state, law and its agents are present as oppressors. Promise of liberation is seen as empty. Enduring loyalties to Anglo-Indian adversary jurisdiction, colonial structure of the bar, bench and police, shocking instances of administrative deviance, and growing decline in political morality have remained the pervasive feature of the Indian public life.

The question is: is law the only effective instrument of basic transformation of values and attitudes or are there other agents of social change far more crucial than law? When we employ law as a means of social transformation we somehow tend to think of law as an autonomous and self-sufficient force upon which the rest of the social order depends. Thus, we oversimplify the nature of law and exaggerate its power. But law is neither autonomous nor self-sufficient but is heavily dependant upon other institutions to accomplish its tasks. We rely heavily on formal structures of law composed of the *documents* i.e. constitution, statutes and precedents, the *apparatuses* i.e. legislatures, courts, executive departments and the *personnel* i.e. judges, lawyers, administrators, policemen. We begin to believe that a legislative enactment or a judicial decision aimed at social change would automatically be translated into corresponding social actualities.

This is, however, a mere delusion. We exaggerate the power of law because we have inadequate notion of both what law is and how it acts. Positive law supervenes upon an established social order which is supported by prior facts such as caste, religion, family, morality, habits, beliefs, attitudes, emotions and traditions. Law has to perform the task of

repairing the deficiencies in the social order. For instance law and legal action tries to eliminate social and economic inequalities, social oppression, gender-discrimination, untouchability, child-marriage, dowry, *sati*, bonded labour and caste-prejudices. These deficiencies in the social order are rooted in various social and religious institutions which law seeks to repair. Traditionally, the most conspicuous and important of these institutions have been family, education and religion which perform the crucial role of transforming human nature. These institutions exert a powerful influence upon the attitudes and behaviour of the people. The effective operation of law as an agent of change depends largely upon the support extended by other social institutions. If the institutions of family, religion and education have not been doing their job properly, law shall be missing support from them and all our attempts at social reconstruction through law will be thwarted or delayed. Law and legal action may not be able to provide the conditions of cultivation, socialisation, sense of obligation, responsibility, sympathy, fellow feeling, and other factors that mould human character in definite ways. These undertakings have to be carried on by other social agencies because they lie within the province of morality rather than law.

The question is: to what extent can law solve social problems and achieve social goals? What was said by Dean Roscoe Pound in his *Mahlon Powell Lectures* delivered in 1942 holds true even today;

Recognising the limits of the reach of law, he remarked:[1]

> When we have got so far we must pause to inquire how far, after all, the law in any of its senses can achieve this purpose (of harmonizing human demands, maintaining a social order, and furthering the course of civilizations). We must ask how far social control through politically organized society, operating in an orderly and systematic way by a judicial and administrative process applying authoritative grounds of or guides to decision by an authoritative technique, can stand by itself as self sufficient and equal by itself to the maintaining and furthering of civilization. Thus we are brought to consider the limits of effective legal action, the practical limitations which preclude our doing by means of law everything which ethical considerations or social ideals move us to attempt.

Dean Pound then proceeds to cite various 'sets of limitations' that weaken the force of legal action for social reform. The first limitation of

1. Roscoe Pound, Social Control Through Law 54 (1942).



the legal action is that redressal of grievance through legal proceeding is limited by "the necessity of appealing to individuals to set the law in motion".[2] Thus the redressal of grievances depends on individual initiative and sustained legal action. This 'ultraindividualism' of the Common Law and the Anglo-American legal tradition prevalent in the days of Roscoe Pound has to a large extent been modified by liberalizing the rules relating to *locus standi*, but the fact remains that redressal of the grievances of the poor and the victimized groups depends largely on the initiatives and the power of social activists. The second set of limits, in Pound's analysis, arises from the difficulty of ascertaining the facts at issue. Despite relaxed standards of evidence and procedure, the legal process still insists on legal formalism and adherence to accepted rules of evidence and procedure. Third, and final, limitation pointed out by Pound relates to the inability of law and legal apparatus to enforce duties, protect rights and secure redress even by a well disposed judiciary. Here he refers to "the intangibleness of many duties which are normally of great moment but defy legal enforcement."[3] He gives examples of gratitude, benevolence, and obligation to help those in distress which cannot be enforced by law. Then there are certain rights and interests which are often infringed in ways that are so subtle and difficult to establish that the law and courts cannot protect against them. Alienation of affection, domination and invasion of privacy fall under this category. Dean Pound refers to the inability of law and legal apparatus to inculcate moral righteousness. Legal machinery, according to him, cannot remedy many phases of human conduct and human relations. Law would be helpless to impose many traits of character, and modes of conduct which are morally desirable and socially useful. For character building we have to rely upon other institutions and agencies like the family, religion, education, professional and economic organisations to instill in men and women, the habits and attitudes, the modes of behaviour and the mutual respect and cooperation. It is beyond the law and legal apparatus to inculcate morality and instill the habit of conformity and obedience in men and women and to make them accomplished social persons.

A sense of responsibility is indispensable if we have to live and work together. Responsibility, again is a social virtue, a trait of character and there is very little that law can do in inculcating moral virtues. Law can, of course, make people accountable to their outward actions violating the legal rights of others. This is done by creating legal duties and imposing sanctions for violating the rules of behaviour. Inculcating moral virtue of

2. *Id.* at 60.
3. *Id.* at 55.

responsibility is the work of other social institutions which help to make people good. What would happen if family, culture, education, morality and religion fail to perform their work and their hold on individuals is weakened? The inevitable result would be that defiance of law will increase and law would lose its effectiveness.

It must therefore be acknowledged that law operates at a distance far removed from the people whose lives it governs. The other social institutions like family, school, religion and morality are in more intimate touch with human emotions and thus mould human character. Therefore, unless more intimate social institutions are strengthened to prepare men and women to be law abiding citizens with a sense of responsibility to societal values, law can never be an effective instrument of social change.

The efficacy of the legal action in achieving the goals of social justice is equally affected by the political economy and cultural policies. The politics of "cultural nationalism" nurtured through the vague and controversial conceptions of *Hindutva* appears to be working to the detriment of the interests of the *Dalits* and other oppressed classes. The economic policies of liberalization and privatization being pursued by the Indian State has failed to augment wealth in a manner which would eliminate poverty, generate growth with justice and eliminate social and economic inequalities. How can in such a setting, courts achieve social justice simply by acknowledging new positive human rights? Spreading of norms and values and creation of elaborate institutional mechanisms for generating humane, equalitarian, and rationalistic social climate and eliminate pre-capitalist feudal or semi-feudal modes of exploitation and oppression is the task of the political executive and social and economic institutions and professional organizations and not of the judges. Unfortunately, the political economy emerging in globalised India has resulted in the formation of new social classes of landowning prosperous farmers, traders, moneylenders, and bureaucrats which are controlling social and economic institutions and cultural networks and are promoting the capitalist path of development. The economic policies of liberalization and privatization pursued by successive political regimes have provided enormous resources as well as legal and normative value system favourable to the new social classes. But this has also had the negative impacts resulting in massive unemployment, pauperization, atrocities on women, children and *Dalits* and State repression. The much applauded and publicized judicial activism has not succeeded in checking the growing frustration among the exploited and oppressed classes. Mass production of rights through judicial activism has only resulted in heightened expectations from the judges that they are unable to provide relief from all



miseries and personal misfortunes. But when a stage would come when the gap between what has been promised and what has been performed would become too wide, the outcome will be only confusion, frustration and disenchantment. The courts might then lose persuasive power, draining away the credibility of judicial institutions.

It is beyond the judges to instill in men and women, the habits and attitudes, the modes of behaviour, the mutual respect and cooperation, that are indispensable to a decent social life. They can undoubtly intervene to correct any form of exclusion, discrimination, exploitation and institutional abuses. The judges have performed this task in a commendable way in upholding the ideology of rule of law. They have unmasked the repressive realities of State and law by providing access to justice to the poor and the victimized people. But the law and legal action can achieve something of real value if other social and economic institution besides law also perform their function in an efficient way in the formation of human character to make men and women acceptable social members.

While writing an editorial note to this volume I have taken the liberty of expressing some of my views about the limits of law in bringing about desired social transformation as I could not compose a full paper for this volume due to my pre-occupations. I am, on behalf of the Faculty of Law and the Editorial Committee handing over this volume of the *Review* to its readers. I thank and congratulate all the learned contributors of the papers and book reviews for their excellent contributions. I thank all my colleagues and office staff and others who undertook and successfully accomplished the task of bringing out this volume. The volume in your hand contains outstanding research articles some of which very aptly highlight the complex and intricate issues and themes of contemporary significance in the age of globalization. The Editorial Committee will, however, gladly accept any criticisms, suggestions and comments for further improvement in the quality of the *Review*.

Of course, the most difficult task had to be performed by the Editorial Committee under the able leadership of Kamala Sankaran who has been the moving force behind this noble venture. All credit goes to the Editorial Committee for the hard work and extreme patience with which its members have brought this issue. The readers will immediately notice that it has been the endeavour of Kamala Sankaran and her team to further improve the quality of the journal. Apart from Kamala Sankaran who ungrudgingly spent long hours and days in editing, correcting and organizing the manuscript, Bushan Tilak Kaul and Bal Krishan Raina equally

deserve great appreciation and thanks for performing arduous task of editing, reading the proofs and correcting the footnotes for uniformity.

In the editorial note to the volume of the last year I had expressed the hope that more and more colleagues and students will come forward by contributing their paper for the *Review*. I am glad that the response from our colleagues and students has been overwhelming for the current issue and this shows great potential and talent in our Faculty which would continue to serve as a model for other law faculties in the country in the field of legal research.

In the end I thank the proprietor of Shivam Press for doing a meticulous and professional job in the publication of this issue with a quality print, finest paper and elegant cover and design. For the errors which remain I acknowledge oversight and hold myself solely responsible.

Delhi
June 1, 2003

Parmanand Singh

# JUST FAMILY LAW: A BASIC HUMAN RIGHT OF ALL INDIAN WOMEN

*Archana Parashar*[*]

India is a country of diversity and for the most part we seem comfortable with differences. It is perhaps a part explanation for the existence of many religious personal laws, governing women of various religious communities, differently in family related matters. In this paper however, I wish to argue for one family law that will be non-discriminatory and just for all Indian women. Family law usually is not associated with a discourse of human rights but unless women gain equality of rights in personal matters they cannot be said to have the basic Human Right. In making this argument I am fully aware of the charge of essentialism and universalism. I however, make my argument in the specific context where for more than half a century a post colonial state has failed to guarantee basic equality to Indian women in the area of family relations. All religious personal laws manage to treat women less favorably than men. History of reforms within religious laws is not promising either for the majority Hindu community or the minority communities of Muslims, Christians, or Parsis. The Constitutional guarantees of sex equality and religious freedom have been interpreted by the Supreme Court in such a manner that discriminatory religious personal laws are not found to be unconstitutional. Adequate legislative changes have not been introduced as in a democratic polity the incumbent governments have chosen to politicize religion and play constituency politics. The civil society has failed women as gender and minority identities have been inseparably tied to religious identities. It is in this context that I wish to argue that we are at an impasse. Feminists and everyone else interested in social justice need to move beyond the religious/not religious characterization of the issue of family law and reconceptualise the issue as one about gender justice.

This paper is divided into three broad parts. The first section gives a brief history of the origin of the concept of religious personal laws. A close analysis of the inviolability of religious laws is examined to demon-

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strate that these arguments are more often reliant on a claim of minority identity. Discourse about the rights of minorities must take into account not only religious but gender claims as well. In the second part an argument is made that the goal of gender justice can be better achieved by law reform. In the third section a tentative model of just family law is developed.

## I. Origin of the Concept of Religious Personal Laws

Hindu, Muslim, Christian and Parsi communities are governed by their respective religious personal laws in the matters of marriage, divorce and related issues, as well as succession to property. In all these religious communities women have less than equal rights than men. Hindu law is the only religious personal law that has been extensively modified by the legislature. Hindu women have been the main beneficiaries of these changes but they have not managed to attain a complete parity of rights with men.[1] The starting point of my argument is that denial of equality to women is unjustifiable and we must argue for complete equality. The obvious stumbling block to such a position is that equality is one among many values and equality is supposedly a western value. More specifically, when equality and freedom of religion seem to be in conflict it is far from established that equality should have precedence. I wish to argue that the opposition between gender equality and freedom of religion is a false dichotomy. Religious personal laws as the quintessential expression of religions is a relatively recent development. I will endeavor to establish that religious personal laws have transformed over time and that religious freedom can be enjoyed simultaneously with granting women equality in personal matters.

India was a plural society prior to colonization by western powers. Indian society like other pre-industrial societies, did not make a separation in the institutions of religion and law. Sociological theories of modernization provide that a feudal, agricultural, rural society changes into a modern society with the separation of political, economic and social institutions. In pre-modern societies the place for production and consumption was supposed to be the household, but gradually the production of commodities and household became separated and markets arose for transactions in commodities. Thus Europe transformed into a modern, capitalist system, with the separation of the household from the place of production.[2] The

1. For details see my Women and Family Law Reform (1992).
2. See Linda Nicholson, Gender and History: The Limits of Social Theory in the Age of Family (1986); David Cheal, Family and the State of Theory (1991).



colonization of Indian society by Britain introduced ideas about such separation of institutions. Indian society at that stage had not followed the same path of development as Europe, and when British political and legal ideas were imposed they did not create another English system. The tensions resulting from the imposition of alien concepts is something that we still live with today. One such fundamental idea in European thought: the idea of public and private spheres lies at the root of the concept of Religious Personal Laws (RPLs hereafter). Public/private division is a conceptual means of organizing ideas about the rightful scope of state governance, e.g., how far the state can, or should, regulate our lives; what kinds of laws are justified; and what are the legitimate limits of state laws. The conceptual device of public/private spheres answers these questions by nominating the private sphere as the sphere of freedom - freedom from state regulation. Personal or family relations and religion conventionally fall within the private sphere.

The British administrators came to an Indian society where all aspects of life were subject to religious rules whether enforced by the political rulers or not. The English administrators in the early periods of colonization made a distinction between personal laws and all other laws. All other laws were legitimately made subject to the political state. Only the RPLs were nominated as not subject to state control because of their religious nature.[3] It is worthwhile emphasizing that this legitimization of state intervention was only ever valid for the colonizers. Any Indian in the then contemporary society would have found it incomprehensible that their religion was so constrained that it only regulated the 'personal' affairs or that the colonizers were legitimately regulating other 'non-religious' areas. Once the division between RPLs and other laws was made, it did not necessarily mean that the RPLs were left entirely unregulated. Legislative and judicial actions nevertheless transformed the nature and content of these formerly religious laws. To start with, the exact ambit of RPLs was ambiguous and changed over time. For example, initially contracts were considered a matter for religious rules but later made subject to legislation. The Hindu practice of sati was only gradually came to be regulated as the British administrators initially accepted the religious sanctity argument.[4] So too Hindu widows' remarriage, native converts' remarriage, the removal of caste disabilities, are

3. M. P. Jain, Outlines of Indian Legal History 561-2 (1966).
4. Lata Mani, *Production of an Official Discourse on Sati in early Nineteenth Century Bengal* 21 Econ. & Pol. Weekly WS 32-WS 38 (1986). She persuasively argues that the colonial discourse designated as 'religion' that part of indigenous culture which it did not choose to oppose.

examples of assumption of specific legislative authority.

English law influences came via judicial contact even in the areas of laws that were left unlegislated. The judicial officers were essentially trained in the common law system, and even when applying the rules of Hindu and Muslim laws, they necessarily interpreted them according to their understanding and training. The common law rules of evidence and procedure managed to transform the nature of religious rules. The Privy Council specifically held that the formulae of 'justice, equity and right' and 'justice and right' present in various British charters implied the application of English law if found applicable to Indian circumstances.[5] These decisions in turn formed binding precedent and thus ensured incorporation of the principles of English law into the rules of RPLs. The courts adjudicated personal matters but they gradually came to realize that the religious laws were not necessarily scriptural laws. Thus Hindu law incorporated a complex interrelation of sacred texts and actual usages or customs. While Islamic law did not give a similar importance to custom the courts recognized the customary claims of Muslims.[6] The immunity to change of RPLs thus turns out to be a fiction but it is a fiction that has a strong hold on our collective imaginations. The issue for contemporary legal thinkers is whether it is a sufficient reason for allowing the status quo to remain, especially when women are denied equality in the process.

## II. Religious or Legal Change

The dominant discourse in India, since independence from colonial rule has been whether RPLs, as an aspect of religion can be modified by a secular state. There are two kinds of objections to any modification of RPLs, one is a theological argument; the second however, relies on the public/private conceptual device to claim immunity from state regulation. If as argued above, the concept of RPLs is a construct, and the so called religious nature of RPLs does not stand up to scrutiny, it may be possible to transcend the difficulties of determining the relative powers of a secular state vis-à-vis religion.

*Theological Argument and Religious Change:* Religious autonomy or freedom of faith is undoubtedly an integral part of a Liberal democracy.

5. See *Collector of Madura* v. *Moottoo Ramalinga* 1868, 12 Moore's Indian Appeals, 397 at 436; *Mohammad Ismail* v *Lala Sheomukh* AIR 1922 PC 59.

6. *Waghela Rayasanji* v. *Sheikh Masludin* 1887, LR 14 IA at 89. Duncan Derrett, *Justice, Equity and Good Conscience* in J. N. D. Anderson (ed.), Changing Law in Developing Countries (1963), provides a detailed analysis of the effect on RPLs of the formulae of justice, equity and good conscience.



However, like all other freedoms it is not an absolute freedom. The real contention is with regard to determining how far does or should religious freedom extend. Those claiming the immutability of RPLs draw the demarcation so as to put RPLs in the sphere of religious freedom. As a corollary, any change if at all possible, will be religious in nature.

In this argument the modification of RPLs is a task of changing religious rules and the state as well as academics - whether legal, feminist or philosophers - or those seeking social justice, have no *locus standi*. The legitimate authority either to interpret, or modify such rules belongs to specific experts within different religious traditions. If the religious experts or spiritual leaders of a religious community work to 'reform' some aspects of their religious practice or doctrine, the outcome is commonly understood as religious reform. Religious reform movements are a constant feature of history but whenever religious reform happens it struggles for legitimacy vis-à-vis the traditional or orthodox versions and only ever gets partial endorsement.

However, even this partial legitimacy for the changes brought from within a tradition is a welcome development. Outsiders to the tradition, while not authorised to introduce changes, may be able to rely on such changes for pursuing social justice for women. This much is not in dispute. Problems arise when no change is forthcoming from within the religious tradition and it is argued either that the religious rules are sacrosanct and eternal or that no one else but the religious experts may introduce change if they think it is possible and necessary. This is precisely the situation we are faced with in India.

There is no scope for further argument if it is accepted that RPLs represent eternal religious rules which cannot be modified. This is an interpretation I must disregard as it is contrary to the factual evidence of changes in RPLs and as it claims an exclusivity that does not allow any possibility of debate or change. Rather than making religious change the focus of attention it is possible to restate the argument as one about gender justice. The fundamental starting point for discussion then is that gender equality is a desirable goal. It may not be subjected to any other competing goal or right. The obvious next question is whether every religion, in its personal law provisions, can be expected to embrace gender equality? If not, should it be open to the state to modify religious rules or replace them with state enacted laws? I argue that every religious tradition ought to be able to conform to this 'external' standard or lose state protection.

### *A. Religion and External Standards — Public and Private Spheres*

An obvious objection to this proposition is that whether religion is understood as eternal or a product of socio-historical change, either way it is not open to scrutiny and modification by reference to 'external' - non-religious or secular standards. This argument relies on the stance that religion is a private sphere activity and therefore, should remain free of state regulation. The separate spheres ideology has featured in various forms in political theory since the classical times. The conceptual device of public and private spheres helps demarcate the legitimate limits of state regulation and thus helps check the proliferation of state powers. An important aspect of the check on state powers is that the private sphere is the sphere of freedom - admittedly freedom from state regulation. Thus the argument that in matters of religion and therefore, religious laws the state does not have legitimate authority to intervene because these are private sphere activities.

But a vast amount of feminist literature also exists that exposes how the public/private divide keeps women under patriarchal control in the purportedly free private sphere. Carole Pateman is the most well known feminist for analyzing the ideological functions of defining women as the inhabitants of the private sphere and thus not subject to the values operative in the public sphere.[7] Family provides the most familiar illustration of this argument that as a private sphere institution it operates with values of love and altruism rather than those of individualism and competition that operate in the sphere of the market or the values of justice and equality that are supposed to organize the public sphere. Women as the inhabitants of the private sphere of family are thus denied justice and equality, and family relations are expected to be about love and giving rather than about individual rights.

Okin has most convincingly argued that the characterization of family as a private sphere institution does not mean that justice cannot be a relevant value for organizing family relations.[8] Okin's argument, I believe, has a direct relevance to the issue of the private nature of religion and religious rules of personal relations. She provides a detailed argument for making justice an operative principle in the organization of the family. I cannot reproduce the argument in all its detail, but briefly she uses Rawl's

7. Carole Pateman, THE SEXUAL CONTRACT (1988). See also Margaret Thornton (ed.), PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES (1995).
8. Susan Moller Okin, JUSTICE, GENDER AND THE FAMILY (1989).



argument that justice is the primary moral virtue. This claim is linked to a prior assumption that human society is characterized by the 'circumstances of justice'. These include the condition of moderate scarcity of resources and while people have complementary needs and interests they also make conflicting claims on natural and social resources. These claims need to be resolved by reference to rules that are just. In family relations it is equally relevant that rules of justice apply.

Thinkers who claim that in the family love or altruism and not justice are the highest values misunderstand what is meant by justice as the primary moral virtue. Justice is not the only value, and it is not antithetical to love or altruism, but justice is the most essential value. It is in the conditions of scarcity, and when interests conflict, that justice needs to be operative. For instance, maybe wives would never have an occasion to ask for their fair share of property because of the generosity and spontaneous affection of their husbands, but if they did ask for it they should be entitled to it. There is simply no reason to assume that justice somehow takes away from intimacy, harmony and love that are supposed to prevail within families.

The minority communities in India have consistently put forward this argument with regard to changes in the religious personal laws, namely, that religion, as a private sphere institution, is the exclusive concern of the community. Unlike the earlier theological version of the argument that only those with religious credentials may interpret or modify religious rules the argument here is that it is a matter for the religious community and no one else. Such religious communities making this claim are invariably minority communities as well and maintaining their distinct identity becomes merged with the argument about the religious immutability of personal laws.

### *B. Religion, Cultural Identity and Essential Capabilities*

The concept of essential capabilities is developed by Amartya Sen and utilized by Martha Nussbaum.[9] The idea that religion forms the basis of an ethical life and is an essential capability, in Sen and Nussbaum's terminology, is not controversial. What is controversial is how to balance the claims in the name of religious autonomy with other liberties/freedoms/capabilities. Nussbaum develops a nuanced argument about the scope of legitimate 'interference' with religion.[10] I will explain her argu-

9. Martha Nussbaum, WOMEN AND HUMAN DEVELOPMENT (2000), chap. 1.
10. *Id.* chapter 3 at 167-240.

ment very briefly, but I wish to disagree with her. Nussbaum says that any account of the tension between religion and women's interests that fails to recognize the complexity of both religion and women's interests is worthy of scepticism. She argues for the intrinsic value of religious capabilities then goes on to explore how religious capabilities of each person could be enhanced in constitutional regimes. The US Constitutional principles of non-establishment of religion and free exercise of religion operate together to uphold the citizen's liberty of conscience against the pressures of groups. Nussbaum agrees that we should refuse to give deference to religion when its practices harm people in areas covered by the major capabilities. However, it is difficult to determine this issue with regard to matters internal to the religion itself. When religious actors and groups claim prerogatives it is difficult to judge whether they are really talking about religion. While the principle of moral constraint may allow us to judge such claims, it is only right that such assessment should be made socially rather than by the state or the judiciary. For example, the Indian Constitution uses the political version of the principle of moral constraint, makes no pronouncements of what Hinduism is or is not, but it simply makes untouchability illegal. Socially moral constraint arguments do valuable work.

Nussbaum goes on to examine whether sex discrimination within a religion is permissible. She agrees that the very singling out of women for differential treatment in a central area of human functioning is itself unacceptable. But she then goes on to say that some choices internal to the religion should still be protected. For instance the lesser rights of women within Islam should not be modified by the state. The rationale for this is that even though the non establishment clause is meant to protect the individuals free exercise it is not always the case. In the particular historical and contemporary context of Muslims in India, state support for their religion is essential. In their specific circumstances disestablishment would amount to Muslims not being treated as equal citizens and in fact nonestablishment would be defacto a type of Hindu establishment.

I disagree with Nussbaum's suggestion that in view of the current dominance of Hindus both politically and socially it is imperative that the state refrain from modifying Islamic religious personal laws, firstly because it accepts the 'religious nature' of personal laws. This is at least a contentious issue as I have tried to show above. Secondly, it gives too much ground to the claims of religious leaders, that only they can decide whether something is internal to or an essential core of their religion. Thirdly, it gives too much weight to the claims of minority identity and not enough attention to gender justice.



The makers of the Indian Constitution acknowledged the importance of religion and guaranteed freedom of religion as a fundamental right. The authority to determine whether any matter constitutes an essential or non essential aspect of religion has at times been given to the community but at other times the matter has been scrutinized by the court. As yet there is no clear pronouncement whether RPLs form an essential part of religion that cannot be legitimately modified by the state.[11] The Supreme Court has upheld the validity of social reform legislation even with regard to what are claimed to be the essentials of a religion, e.g. the right of a Hindu denomination to decide who could enter their temple.[12] But when the Supreme Court held that maintenance provisions of the Code of Criminal Procedure 1973 were available to Muslim women as well as other women, the public reaction of a section of the Muslim community compelled legislative intervention by the government of the day.[13] The distinction between the two examples is not in the difficulty of defining the essential or core aspects of religion. Rather it is in the majority and minority status of the Hindu and Muslim communities. So too the legislative history shows that the issue is not about conflicting fundamental rights. It is the claims of minority identity that explain why the 'religious' laws of Hindus could be extensively modified but not those of minority communities. It seems obvious that the debate ought to be framed differently - rather than being about religious sanctity it is really about cultural identity which is linked to the minority status. If this reality can be accepted, then the inquiry is no longer about the legitimate authority of a secular state vis-à-vis religion but is about the responsibility of a state to safeguard the minority identity of certain communities. If so, the reasons put forward by Nussbaum for leaving alone Islamic RPLs need to be read as arguments about the claims of communities to distinct identity.

The right to maintain a distinct cultural identity is however much less clearly theorized than the right to freedom of religion. The question whether the right to a distinct cultural identity is compatible with the fundamental right of sex equality must be answered by reference to different arguments.

11. For a detailed analysis of these issues and Supreme Court judgments see Parashar, *supra* n. 1 at 217-222.
12. *Sri Venkataramana Devaru* v. *The State of Mysore*, AIR 1958 SC 255.
13. *Mohammad Ahmad Khan* v. *Shah Bano*, 1985 (1) SCALE 767. See also A. A. Engineer (ed.), THE SHAH BANO CONTROVERSY (1987).

## III. Minority Identity

Religious and minority identities intersect and give rise to the argument that whatever may be the case for the majority community at least the minority communities must be allowed immunity from state modification of their religious laws. The claim of autonomy to maintain a distinct religious identity however, simultaneously denies the option of claiming gender equality as part of that identity. This issue of minority/distinct cultural identity can only be meaningfully discussed in conjunction with the factor of gender. Historical evidence in India, and in a number of Islamic countries, is that religious community or political leaders have invariably strengthened patriarchal control over women in the name of Islam. I am not for a moment suggesting that Islam is particularly non-friendly to women. All world religions would be hard pressed to pass this test. But the argument at the moment is about the link between religious and minority status. I suggest that it is naive to believe that the religious community leaders of Muslim, or any other community for that matter, will work for attaining gender equality.

For example, the *Shah Bano* case and the enactment of the Muslim Women's (Protection of Rights on Divorce) Act 1986 (MWA), brought into open the complicity of religious community leaders and political leaders in perpetuating gender discrimination against women in the name of religion.[14] Therefore, any argument that places its faith in the respective religious communities to ensure even basic non-discrimination for women misjudges the alliance between patriarchal interests and religio-political leaders.[15] Minority identity arguments are a version of group rights even if not explicitly characterized as such. In these arguments women's rights become secondary to those of the group. Gender justice therefore, may not be achievable by pursuing distinct cultural identity. With the ascendance of postmodernism in academia, impressive theoretical arguments are made for recognizing differences. In the specific

14. The MWA was supposed to be a protective legislation in so far as divorced Muslim women could not claim ongoing maintenance from their former husbands, the maintenance of such women was declared to be a community responsibility. The claim that the Waqf Boards would discharge this community responsibility was sadly, but predictably an empty claim. Whether and how the wider Indian community might discharge this responsibility has never become an issue of public or scholarly debate.
15. This is not a problem faced only by Indian women. See for an account of women's rights under Islamic law in other contexts, Farida Shaheed, *Networking for Change: The Role of Women's Groups in Initiating Dialogue on Women's Issues* in Mahnez Afkhami (ed.), Faith and Freedom: Women's Rights in the Muslim World 78-103 (1995).



context of political and social theory, there are arguments in favour of recognizing minority cultures.[16] However, as Okin points out there is a distinction between claims of 'identity politics' and group rights. I will rely on her analysis[17] to question how group interests are constituted, whose voices are heard and who is silenced and what are the institutional mechanisms for ascertaining and enforcing such group rights? Significantly, Okin faults not only the male theorists of group rights, but feminists as well for not paying sufficient attention to the consequences flowing from recognizing group rights.

Okin argues that minority cultures that demand special protection make insufficient differentiation amongst those within a group or culture so that gender differences are not acknowledged. Moreover, the content of culture is very significantly constructed in the private sphere and the gender based constructions of cultural identity more often than not disadvantage women. Feminists who shy away from examining these issues show hyper-sensitivity to the charge of cultural imperialism and thus fall into the trap of debilitating cultural relativism.

Many proponents of cultural identity do not even expect the cultural groups to adhere to certain Liberal values, but Kymlicka does. Yet Okin shows that his injunction that any cultural group demanding group rights must not discriminate overtly against its women members does not even acknowledge the reality that most sex discrimination is informal and not overt. In most cultures strict control of women is enforced in the private sphere. For one to be able to make choices about the life one wants to lead it is not enough to have one's culture protected. Okin argues that one's place within one's culture is at least as important to the development of self respect and self esteem as that culture itself. When that culture is patriarchal the healthy development of girls is endangered.[18]

The claim that minority communities and specially women should be free to live by their RPLs places a lot of reliance on the free choice of minority women and demands that the state should enforce such freedom. In the Indian context the religio-political leaders have invariably been men, they manage to be the exclusive voice of the community and have not acquitted themselves particularly well with regard to attaining equality for women. As Uma Narayan says "Feminist commitment to autonomy or equality for women can be portrayed as 'western values' by the same

16. See for example, Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (1995).
17. See Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions* in Dan Avnon and De-Shalit Avner (eds.), Liberalism and its Practice 81-105 (1999).
18. *Id.* at 97.

fundamentalists who discern no paradox, for instance, in appropriating the language of rights when it suits their interests."[19] But it is still common place to maintain that an 'insecure' minority should be treated with caution.[20] However, that is possible only if the disadvantageous position of women is ignored. The minority identity and religious sanctity discourses come together and their conjunction gives them a 'reality' that is too obvious to be questioned. I argue that this is where deconstruction should be used by Indian feminists and legal feminists in particular, to question the legitimacy of such claims. This should not be read as denying autonomy to minority women but as an effort to make relatively genuine free choice possible.

The postmodernist emphasis on non-essentialising theorizing may help in questioning the categories of minority or religious identity but it also carries with it the danger of relativism.[21] If categories and meanings are always contingent and it is not possible to fix definite meanings for any of them, our knowledge can only be relative and always subject to revision. More over, there is no way normative standards can be posited to judge the legitimacy or even the desirability of any interpretation.[22] Thus, for a postmodernist, in the particular case of minority RPLs it is not an undisputed good to demand gender non-discrimination. Furthermore, if minority women do not ask for such change it is not for anyone else to suggest it to them for that amounts to imposition of universalist ideas. I argue that postmodern positions can and should carry the responsibility of justifying the consequences that follow from any theoretical stance.[23] In the case

19. It is not only the minority community leaders who want to withhold equality form women in the name of tradition. Uma Narayan is here talking about the Hindu fundamentalists. See Uma Narayan, DISLOCATING CULTURES: IDENTITIES, AND THIRD WORLD FEMINISM 22 (1997).
20. Bhiku Parekh, *Balancing Unity and Diversity in Multicultural Societies* in Dan Avnon and De-Shalit Avner (eds.), *supra* n. 17 at 122.
21. There is no uniformly accepted definition of postmodernism but Barrett explains that even though the term has different connotations in different disciplines it generally refers to the trend to critique universalism. Michelle Barrett, *Words and Things: Materialism and Method in Contemporary Feminist Analysis* in A. Phillips (ed.), DESTABILIZING THEORY: CONTEMPORARY FEMINIST DEBATES 210-219 (1992).
22. For example, Seyla Benhabib points out that theorists of difference do not usually point out which differences ought to be recognised. See Seyla Benhabib, *Democracy and Difference: Reflections on Rationality, Democracy and Postmodernism* 2 J. OF POL. PHILOSOPHY 6 (1994).
23. See Nicola Lacey, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 157 (1998). She mentions the following authors who combine an ethical concern with their critical analyses: Christine Littleton, *Reconstructing Sexual Equality* 75 CAL. LAW REV. 1279 (1987); Jennifer Nedelsky, *Reconceiving Autonomy* 1 YALE J.L. & FEMINISM 7-35 (1989); Iris Marion Young, THROWING LIKE A GIRL (1990).



of minority women and RPLs we have no evidence of how many women do want change. But even if, for argument's sake, it was true that minority women do not want change, the role of academics, analysts, or cultural workers[24], can hardly be to sit back and let things be. The enormity of this suggestion would become apparent if the example of RPLs was replaced with that of domestic violence. Even though at one time it was acceptable to 'not interfere' in others' domestic affairs this is no longer the case. Feminists have successfully discredited the idea that private violence is not the concern of everyone. As a consequence it now rings a bit hollow to say that domestic violence legislation amounts to an external imposition of notions of sex equality. Similarly, minority RPLs ought to be the concern of everyone interested in social justice. It has been correctly said that a non-judgmental tolerance of brutality and oppression under the guise of cultural difference or tradition is an ultimate form of ethnocentrism if not an outright ethical surrender.[25] Therefore, I argue that legal thinkers must bear the responsibility of generating a discourse of non-discrimination. The postmodern concern with essentialism and not imposing universal values should not convert into an apology for maintaining the status quo. While some postmodern analysts insist that textual analysis itself is transformative,[26] I am of the opinion that most of them do not construct any argument for social transformation. Thus in most contemporary postmodern legal critiques the existing state of affairs may be analysed but not purposively modified. That is understandable if one is a beneficiary of the present status quo but really debilitating for those unfairly burdened and oppressed.[27] In feminist legal analysis such an argument is presented by African-American writer Patricia Williams who maintains that the trashing of rights is a dangerous game for the oppressed sections of society, for rights based arguments are the only means available to them to redress their wrongs.[28]

Therefore, in the particular context of minority women and RPLs, the role of legal analysts has to be to develop arguments for ensuring gender justice and sex equality. It is worthwhile to remember that the claims of minority status and religious sanctity are also only arguments. We are the

24. The term used by Cornel West in *The New Cultural Politics of Difference* 53 OCTOBER 93-126 (1990).
25. Elizabeth Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual* 53 J. OF ANTHRO. RESEARCH 319-347 (1997) at 336.
26. Peter Goodrich, READING THE LAW (1986) esp. 218.
27. Hank Bromley, *Identity Politics and Critical Pedagogy* 39 EDUCATIONAL THEORY 207-223 (1989).
28. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights* 22 HARV. C. R.- C.L.REV. 401-447 (1987).

ones who choose to adopt some of these arguments and not others.[29] The consequences that flow from our choices are most definitely our responsibility. Thus if my theoretical stand helps maintain discrimination against minority women who else but I am complicitous in legitimizing the situation? My feminist credentials or aspirations are not enhanced by absolving myself of the charge of imperialism by not 'imposing' notions of sex equality on minority women. The task is much more complex as it involves responsible reconceptualisation of legal categories of analysis. It should be possible to avoid paternalism but still maintain an open-ended commitment to the ideal of non-discrimination for all women.

Legal feminists are in a unique position to show how the discourse of community or cultural identity holds no more promise of gender equality than that of the private sphere of religion. Therefore, just as Okin argues for extending the value of justice to the private family, I suggest a similar extension of the principle of justice to the private sphere of religion. We meet up again with the issue that 'justice' does not have a unitary meaning. At this point I wish to argue that gender justice as individual autonomy and the right to non-discrimination must be the minimum any religious tradition ought to deliver. Non-discrimination does not have to equate to sameness but at the same time different treatment of men and women must be justifiable and not amount to disadvantage or less favourable treatment.

The implication of this argument is that, in a plural society, claims in the name of religion or religious minority identity ought to be scrutinized for justice, and only then given recognition by the state. This avoids giving a carte blanche to religion, it maintains diversity in the form of distinct minority and religious identities but also opens up the possibility of attaining gender justice.

## IV. Legal Change for a Just Family Law

The discussion so far has established that the claims of religious sanctity of RPLs and the minority identity arguments are not valid reasons for refraining from creating a just family law. In a pluralistic, democratic and secular polity that can only be done by the state law. It is therefore, incumbent upon legal feminists and thinkers to create a discourse of a just

29. See for a very persuasive argument Seyla Benhabib, *Cultural Complexity, Moral Interdependence, and the Global Dialogical Community* in Martha Nussbaum and Jonathan Glover (eds.), Women, Culture and Development: A Study of Human Capabilities 235-258 (1995).



family law as a basic human right of every Indian woman. This demand for a gender just family law must be radically independent of any religious legitimation.

This is not a particularly onerous move because it treats every one equally. It does not prevent anyone from being a good Hindu, Muslim, Christian or the follower of any other religion. It does not however, invoke state support to be a devout religious person. This is not a novel suggestion either. For example, in most Roman Catholic countries the family law allows divorce while the church does not permit or recognize it.[30] No serious argument is put forward that in these instances some devout Christians' freedom of religion is curtailed. The only difference between this example and the contemporary Indian situation is that in India a dubious legitimacy is granted to the assertion that it is somehow the responsibility of the state to make one a religious person, especially if one belongs to a minority community.

Therefore it is imperative that we create a discourse that compels the state to construct a totally secular family law. In this way the state can walk away from the quagmire of RPLs. The RPLs will not be declared invalid, but nor would they be enforced by the state. This can create the possibility of achieving gender justice in family law while allowing a certain amount of religious autonomy.

Certain assumptions about the nature of law underpin such an argument for legal change and they must be explicitly articulated. Legitimation of legal knowledge is dependent on the ideas about law presented in various theories of law. Jurisprudential theories conceive abstract ideas while sociological theories posit a connection between law and any given society. I suggest that we need to adopt a sociological analysis in order to conceptualise a gender just family law.

The Indian Supreme Court has played a rather disappointing role in that it has declined to address the issue of the compatibility of religious autonomy with sex equality. The reluctance of the Supreme Court however, has not generated sustained academic critique. As a result, the possible compatibility or otherwise of two fundamental rights in the Indian constitution has remained a non-issue even in the legal scholarship. I am here primarily concerned with the failure of the legal scholars, as they are the ones who have the professional role of creating legal knowledge and

30. For a history of divorce reform see Roderick Phillips, Putting Asunder: A History of Divorce in Western Society (1988); see also Mary Ann Glendon, The Transformation of Family Law (1989).

discourse. Their exclusive task is to analyse how the legal system operates and how legal knowledge is constructed. It is disappointing that for the most part legal analysis in India remains doctrinal and focuses on the judicial pronouncements as the last word.[31] This exclusive concern with legal doctrine ignores a very rich tradition of alternative views about the relationship between law and society. Feminists, among others, have focused on the link between the kind and content of law and the prevailing socio economic structures.[32] Laws both construct and reflect social reality and for the most part law and society are mutually influenced and influence the other.

If RPLs are examined in the light of sociological theories of law it is apparent that there exists a serious misfit between such laws and contemporary society. As discussed above, RPLs are a curious amalgam of religious rules and English legal concepts. But these English legal concepts are frozen in time in the RPLs . While the English law has moved on, Indian personal laws are fossilized in the name of religious inviolability. When it is claimed that cultural identity of any minority community is absolutely entwined with such RPLs the feminists should not simply accept any such claim on its face value but they should help to deconstruct these claims. It must be emphasized again and again that we are not dealing with the religious sanctity of personal laws but with family laws that have a connection with religion. The inquiry primarily should be about the nature of law.

Maintenance of wives or former wives under various RPLs provides a suitable illustration of my argument. It is not difficult to argue that post-divorce maintenance is or should be a basic component of a non-discriminatory family law. Every society finds the means of maintaining its members. Across societies and in all historical periods economic dependence of women and children is very often the norm and the responsibility to maintain them typically belongs to the family, or more precisely to the father or the husband. In Indian society there never has been any provision for community support of women or children. Religious and social customs enjoined that a woman was always reliant on the natal or conjugal family for support. However, with time the organic unity of small societies has been eroded and the former social and community con-

31. I develop this argument in greater detail in the *Introduction*, Amita Dhanda and Archana Parashar (eds.), ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 1-26 (1999).
32. See for a concise analysis of this literature Roger Cotterrell, THE SOCIOLOGY OF LAW: AN INTRODUCTION (1984).



straints on behaviour do not operate adequately. Many single women who could formerly expect to be maintained by their families now face the likelihood of destitution. Women without family support face an unenviable prospect of hunger and poverty as very often they do not possess any skills or training for economic independence.

What does Indian society have to offer these women? In particular the RPLs present a bleak picture. There are no social welfare or community programs. The ideology of femininity, whether expressed in the ideals of middle and upper class housewife or as seclusion of women, signifying higher social and/or caste membership, prevents women from engaging in economic activity.[33] And the RPLs step in to make a mockery of their need for maintenance. Even the much-reformed Hindu law falls short of securing women's maintenance rights. Substantive provisions vacillate between portraying men and women on par with each other and equally responsible for the other's maintenance (Hindu Marriage Act 1955, Section 25), to acknowledging that the husband has the responsibility of maintaining his wife (Hindu Adoption and Maintenance Act 1956 Section 18). However, in either case the enforcement of court orders granting maintenance are notoriously difficult.[34] The limited rights given in the substantive provisions are taken away by the lack of enforcement. The Code of Criminal Procedure 1973, further makes a mockery of this need by specifying a legislative limit on the maximum amount of maintenance payable.[35] The MWA, goes furthest in capping the right to maintenance to three months or the period of *iddat*. The recent Supreme Court decision in Daniel Latifi's case[36] is a valiant effort at reading the MWA as a progressive Act but this interpretive exercise has severe limitations. It epitomizes the relative disadvantages of introducing change through judicial rather than legislative channels. The Supreme Court in declaring the MWA Constitutional simply disregarded the socio-political storm created by the decision in *Shah Bano's* case. Instead the court has interpreted the MWA as giving legislative form to the judicial view on maintenance for Muslim women incorporated in *Shah Bano* case. It has

33. Martha Chen, *A Matter of Survival: Women's Right to Employment in India and Bangladesh* in Martha Nussbaum and Jonathan Glover (eds.), *supra* n. 29 at 37-60.
34. See N. Gandhi and N. Shah, THE ISSUES AT STAKE: THEORY AND PRACTICE IN THE CONTEMPORARY WOMEN'S MOVEMENT IN INDIA (1991).
35. Ss. 125-127. Until recently the maximum amount payable was Rs 500. Amendments to the CODE OF CRIMINAL PROCEDURE 1973 in 2000 have removed the ceiling of the maximum amount.
36. *Daniel Latifi and Another* v *Union of India*. AIR 2001 SC 3958.

denied any problem with the Supreme Court interpreting the Holy Quran in *Shah Bano* and declared itself bound by the earlier interpretations.

This is all very well if we are in agreement with the interpretation of the Supreme Court and in this instance feminists can only breathe a sigh of relief that the Supreme Court has felt compelled to recognize divorced women's entitlement to a reasonable standard of living. Despite recognizing the dire necessity of adequate maintenance for a divorced woman the Supreme Court still did not articulate what might constitute "adequate" provision for a divorced woman. It also cannot ensure effective execution of maintenance orders and of course there was no occasion to consider whether adequate provision for the divorced wife would take into account the needs of children she may be responsible for.

So too in Hindu law jurisprudence despite legislative provisions maintenance is hard to obtain and generally does not amount to much.[37] In this study a survey of 93 reported cases on maintenance for the period between 1982 to 1987 showed that majority of women received up to Rs 250 per month. Many women had to support their children as well and no separate sum was awarded for the children.

Thus an Indian woman who does not have the support of a husband can expect to live on the benevolence of her father or other family members, but let her not pretend that she has a right to dignity or even subsistence maintenance. Surely this is not an acceptable state of affairs and it is incumbent upon legal feminists to expose how it is justified and explore what may be done to change it.

Legal feminists are not at the forefront of this debate about RPLs and the discourse of religious and minority identities is set by the religious and political leaders. Though the possibility of recasting this debate seems very remote, there is no option but to try. Feminists must abandon their reticence in articulating what might constitute a just family law for all women. Whether Indian laws as represented in RPLs remain frozen in the past or keep in step with a rapidly changing society will depend on how the issues are conceptualised. It is futile to go around in circles about religious sanctity of these laws or their importance in constituting minority identities. The real issue for us is to ask what a gender just family would look like.

37. See for details Neeru Sehgal, *Economic Independence for Women: The Foundation for Eradicating Sex-Based Discrimination*, Ph.D. Thesis, Faculty of Law, University of Delhi, 1991, chap. 7.



## V. A Just Family Law Incorporating Economic Independence for Women

A just family law for women in this area would at least recognize the social reality of separation whether by divorce, desertion or death. It would recognize women as the primary care givers and recognize the economic dependence of the primary care giver and the need for adequate financial support. In short, a just family law would ensure economic independence of women.[38]

Thus a just family law would not only provide for adequate maintenance and inheritance rights for women but should also recognize their right to an equal share of matrimonial property. Family law has a limited scope in that it does not create the conditions of employment but it does impact on the possibilities of engaging in such work. And it does have the exclusive role to play in reconceptualising women's care giving work as economically valuable. Economic independence has a direct bearing on women's exit options from unsatisfactory relationships, including their perceived suitability to be the custodial parent.

Two interrelated objections to this proposal are that pursuing economic independence by itself will not change the life circumstances of women. Secondly, family law by itself is an inadequate means of bringing about economic independence. The demand for economic independence for women generates immense hostility and common objections are that economic independence is a middle class urban feminists' issue, that in a poor country like India it is an irrelevant issue for the majority of women as a right to financial assistance is unlikely to be a real safeguard. A family law that accepts the possibility of separation (through divorce) undermines the social fabric as it encourages individualism over concern for family. So too a demand for property rights for all women may not be appropriate. The objections come from other equally committed feminists as well.[39]

This is a serious issue and raises a fundamental question of responsibility - by demanding economic independence for all women do the undeniably elite opinion makers have any right to 'interfere' in the lives of

38. See for a detailed version of this argument my *Human Rights: Imperatives of Theoretical Change*, 40 JILI 6-37 (1998).

39. For example, Nandita Haksar says that the demand of property rights for women in the tribal societies of North-East India, when imposed by urban feminists actually disadvantages these women. Nandita Haksar, *Human Rights Lawyering: A Feminist Perspective* in Amita Dhanda and Archana Parashar (eds.), *supra* n. 31 at 89-116.

poorer or rural women and how can they ensure that the so called just family law will empower rather than disadvantage these women? All I can say in response to such a comment is that for similarly placed men, no one, absolutely no one, makes an argument that they should be denied economic self sufficiency.

Women perform wage and unpaid work. Martha Chen has eloquently argued that gainful employment outside the home, as a wage earner affects the self image and perceived value of women. In addition to providing economic independence it serves as a means of escape from male control over female labour. It often helps increase women's bargaining power within the household and enhances their perceived value both within the household and in society more broadly.[40] Bina Agarwal has also convincingly demonstrated that most rural women show a keen interest in the issues of ownership of land and laws of inheritance.[41] Okin explores the idea that the situation of poor women in poor countries is not qualitatively different from that of most women in rich countries, but rather 'similar but worse'. She uses the concept of differential exit potentials within relationships.[42] She explains that in the affluent western countries the distribution of power within the family is linked to the differential exit factor. The typical asymmetric dependency of wives on husbands affects their potential for satisfactory exit. So too 'when circumstances of severe poverty combine with a lack of paid employment opportunities for women, increasing women's dependency on men, men's power within the family is likely to be greatly enhanced - in many cases legitimized by highly patriarchal cultural norms.'[43] The exit options theory exposes the injustice of a situation in which the assumption that women are responsible for housework and child care, the disadvantaged position of women in wage work and their vulnerability to male violence all come together to give women lesser bargaining power when their interests conflict with those of men. It should therefore, be the goal of a just family law to provide realistic exit options to women.

40. Martha Chen, *supra* n. 33 at 54.
41. Bina Agarwal, A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA, 56-57 and 421-466 (1996)
42. She uses Albert Hirschman's theory of the effects of differential exit potentials on power within relationships. See Susan Okin, *Inequalities Between the Sexes in Different Cultural Contexts* in Martha Nussbaum and Jonathan Glover (eds.), *supra* n. 29 at 274-297.
43. *Id.* at 287-288. She cites Partha Dasgupta, AN INQUIRY INTO WELL-BEING AND DESTITUTION (1993) and Amartya Sen, *Gender and Cooperative Conflicts* in Irene Tinker (ed.), PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT (1990).



I acknowledge that women are disadvantaged by a complex interaction of economic, social and political power structures and economic independence by itself will not change all other factors. Nor will legal change by itself create economic well being. But as Bina Agarwal has said it is not just an increase in women's command over economic resources but also the process by which such increase occurs that has a critical bearing on gender relations.[44] Law has a specific significance because it sets the normative standards. It is of crucial importance that normatively law upholds the standard of gender equality because then it provides the values for the transformation of other societal arrangements. The present gender hierarchies will not be dismantled by law reform only and the empowerment of women would require a whole complex of changes. But here I am addressing the role of legal thinkers. They can not take shelter behind the argument that law by itself is too insignificant a mechanism of social transformation. Law as one institution among many should uphold the ideal and in that way can be a catalyst for other institutions to transform themselves.

44. Bina Agarwal, *supra* n. 41 at 44 argues that in South Asia women's economic needs have primarily been discussed in the context of employment opportunities but it is crucial to recognise that access to land is one of the most critical factors in empowerment of rural women. She has demonstrated the stability of private land ownership in most of South Asia and how women are excluded from the ownership of this resource.

# POLYGYNY AS A VIOLATION OF WOMEN'S RIGHT TO EQUALITY IN MARRIAGE: AN HISTORICAL, COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS OVERVIEW

*Susan Deller Ross**

Over thousands of years, many religious doctrines and laws in societies around the world have allowed men to practice polygyny – that is, to have several wives at the same time. Polygyny deeply subordinates women within marriage and by that mechanism guarantees their subordination within society at large. Yet many scholars and feminists remain silent about its impact. Indeed, some even condone it.[1] Why? It appears they do not want to challenge other religions and cultures, and believe religion and culture trump women's international human rights. They are wrong, as shown below. They also ignore history's lessons.

## I. POLYGYNY IN HISTORY

While polygyny has been deeply rooted in human society, so too is the movement over time to eradicate it. The men interpreting religious doctrine or making secular law have gradually banned it for most people. The Jewish religion originally permitted it, but banned it over a thousand years ago.[2] The ancient Romans criminalized bigamy.[3] Christianity from the beginning seems to have condemned it and as it expanded its geographic reach over the first 1000 years succeeded in ending polygamy in regions where it was practiced as people there converted to Christianity.[4] When various sects attempted to institute polygyny, these early Christians quickly moved to suppress it.[5] And even the Muslim permission for polygyny represented Mohammed's effort to end the practice of a husband taking an unlimited number of wives; hence he permitted only four and cautioned further "but if you fear that you cannot be equitable, then only one."[6]

In recent history, the United States successfully enforced its laws criminalizing polygyny against Mormon men in the Church of Jesus Christ of Latter-Day Saints, bringing a rapid halt to the Church's endorsement of the practice in less than forty years (1852-1890).[7] The Russian Empire laws had allowed Muslims to practice polygyny, but it was successfully banned through decrees and laws issued in 1917, 1919, and 1926.[8] Similarly, China outlawed both polygyny and concubinage in its 1950 and 1980 Marriage Laws and Vietnam did so in 1960.[9] India banned polygyny for Hindus in 1955;[10] Uganda and Kenya followed suit in their separate Hindu marriage laws.[11]

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1. *See, e.g.*, Martha C.Nussbaum, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH ) 229-230 (2000), (stating that polygamy in the abstract is "not oppressive to women"). *But see* Susan Moller Okin, *Is Multiculturalism Bad for Women? in* Joshua Cohen et al. (eds.), Is MULTICULTURALISM BAD FOR WOMEN? 14 (1999), (arguing that polygamy is oppressive and quoting a polygnyist husband's justification that one wife is "trouble" but with several, "they are forced to be polite and well behaved[[;] [i]f they misbehave, you threaten that you'll take another wife").
2. Paula E. Hyman, *A Feminist Perspective on Jewish Fundamentalism in* Courtney W. Howland (ed.), RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 275 (1999).
3. Harry D. Krause et al., FAMILY LAW CASES, COMMENT AND QUESTIONS 46 (1998) (citing Beryl Rawson (ed.), MARRIAGE, DIVORCE, AND CHILDREN IN ANCIENT ROME (1991)).
4. Tertullian (155-220 A.D.), a Roman lawyer who converted to Christianity in Carthage and became a priest and prolific ecclesiastical author, condemned polygamy. Rev. S. Thelwall (trans.), TERTULLIAN, TO HIS WIFE, Book I, Chap. II, *available at* http://www.newadvent.org/fathers/0404.htm. St. Augustine of Hippo (354-430 A.D.), in REPLY TO FAUSTUS, Book XXII, section 47, *available at* http//:www.newadvent.org/fathers/140622.htm, explained that polygamy was once the custom but was now a crime.
5. In 1534, the Anabaptists in Germany started preaching and practicing polygamy, but were stopped a year later by Catholic armies. John D. Roth, *The Mennonites' Dirty Little Secret*, CHRISTIANITY TODAY, OCTOBER 7, 1996.
6. John L. Esposito, WOMEN IN MUSLIM FAMILY LAW 135-36 (2001) (citing and quoting QURAN (4:3)).
7. *See, e.g.,Reynolds* v. *United States*, 98 U.S. 145 (1879) (upholding conviction of Morman polygynist husband and rejecting his religious freedom defense); *Davis* v. *Beason*, 133 U.S. 333 (1890).
8. W.E. Butler, RUSSIAN LAW 395-96 (1999); John N. Hazard, LAW AND SOCIAL CHANGE IN THE U.S.S.R. 247 (1953).
9. David C. Buxbaum (ed.), CHINESE FAMILY LAW AND SOCIAL CHANGE 451 (1978); Women of China - Special Series, NEW TRENDS IN CHINESE MARRIAGE AND THE FAMILY 123 (1987); *CEDAW Country Report, Vietnam*, U.N. Doc. CEDAW/C/5Add.25 (Oct. 4, 1984).
10. Kirti Singh, *Obstacles to Women's Rights in India, in* Rebecca J. Cook (ed.), HUMAN RIGHTS OF WOMEN 380 (1994) (HINDU MARRIAGE ACT 1955).
11. *See, e.g.*, HINDU MARRIAGE AND DIVORCE ACT 1961, Cap. 214, §7(1) (prohibited for Hindus), VI LAWS OF UGANDA (rev. ed. 1964).

Two majority Muslim countries have also outlawed polygyny – Turkey in 1923 and Tunisia in 1956, as have the Ismaili Khojas of East Africa.[12] In fact, Tunisia found sources in Shari'a to justify its approach. Mohammed allowed polygamy only if the husband could treat all wives equally, and Tunisia concluded that was not possible for any man.[13] Finally, Australia[14] and some African countries have also criminalized polygyny for all within the country, whether in customary, Muslim, or statutory marriages. Burundi, Côte d'Ivoire, and Madagascar are in this category.[15]

## II. Comparative Polygyny Law: Most Countries Ban; A Few Permit

Although polygyny is banned as the crime of bigamy for all in the Americas, Europe, the countries of the former Soviet Union, China, Vietnam and Nepal,[16] and a few African countries, the national laws of

12. Esposito, *supra* note 6, at 52 (Tunisian Law of Personal Status, Art. 18); *Id.* at 101 (Turkey, Ismaili Khojas).
13. *Id.* at 101.
14. *CEDAW Country Reports, Australia,* U.N. Doc. CEDAW/C/5/Add.40 (Oct. 30, 1986) (reporting traditional Aboriginal polygamous marriages not recognized under Australian law), U.N. Doc. CEDAW/C/AUL/2 (Aug. 12, 1992) (reporting Muslims in the external territories of Australia could marry polygamously before July 1, 1992, but "the current family law regime in these territories will be replaced by Australian family law, bringing the law of marriage and divorce for all residents of the Territories, including Muslims, into line with legislation applying on the Australian mainland").
15. CEDAW Committee, *Concluding Observations: Burundi*, U.N. Doc. A/56/38, paras. 32-67 at para. 35 (Feb. 2, 2001), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.56.38,paras.32-67.En?Opendocument (1993 law amended Code of the Person and the Family to abolish polygamy); The Center for Reproductive Law and Policy, Women of the World: Laws and Policies Affecting Their Reproductive Lives: Francophone Africa 124 (1999) [hereinafter Francophone Africa] (Côte d'Ivoire) (Act No. 64-375 on marriage of Oct. 7, 1964, Official Journal No. 59 (Oct. 7, 1964), modified by Act. No. 83-800 of Aug. 2, 1983, prohibited polygamy; Penal Code, Art. 390, provides six months to three year penalty); *CEDAW Country Reports, Madagascar*, U.N. Doc. CEDAW/C/5Add.65 (June 21, 1990) (1980 Order No. 62-089, art. 7, prohibits polygamy), CEDAW/C/5/Add.65/Rev.1 (April 17, 1991) (six month to three year penalty under Article 340 of Criminal Code for polygamy).
16. *See, e.g.*, Suzana Bubic, *Family Law in Bosnia and Herzegovina, in* Andrew Bainham (ed.), 1996 The International Survey of Family Law 51, 52 (1998) [hereinafter Survey]; Anna Staneva, *Basic Issues in Bulgarian Family Law, in* Andrew Bainham (ed.), 1994 Survey 87, 88 (1996); Michael Palmer, *Caring for Young and Old: Developments in the Family Law of the People's Republic of China, 1996-1998, in* Andrew Bainham (ed.), 2000 Survey 95, 97 (2000); Jiri F. Haderka, *A Half-hearted Family Law Reform of 1998, in* Andrew Bainham (ed.), 2000 Survey 119, 122 (2000) (Czech Republic); Prof. Dr. Susanne Storm and Prof. Dr. Hans Viggo Godsk Pederson, *Denmark, in* Prof. Dr. W. Pintens (ed.), 1 International Encyclopedia of Laws: Family and Succession Law 64 (Supp. 4, May 1998) [hereinafter Encyclopedia]; M. Savolainen, *Finland, in* 2 Encyclopedia 55 (Supp. 3 Dec. 1997); Prof. Dr. Deiter Schwab *et al., Germany,* 2 Encyclopedia 49 (Supp. 12, Apr. 2001); Martha Doczi, *Family Law in Hungary, in* Andrew Bainham (ed.), 1995 Survey 197, 198 (1997); David Thor Bjorgvinsson, *General Principles and Recent Developments in Icelandic Family Law, in* Andrew Bainham (ed.), 1995 Survey 215, 217 (1997); Janis Vebers, *Latvia, in* Andrew Bainham (ed.), 1997 Survey 207, 213 (1999); Prof. Dr. Jose Antonio Marquez Gonzalez, *Mexico,* 2 Encyclopedia 45 (Supp. 13, July 2001); Prof. Dr. Gregor van der Burght, *Netherlands,* 3 Encyclopedia 50 (Supp. 18, Feb. 2002); *CEDAW Country Report, Nepal,* U.N. Doc. CEDAW/C/NPL/1 (Nov. 23, 1998); Ion Filipescu, *Family Law Developments in Romania, in* Andrew Bainham (ed.), 1996 Survey 363, 364 (1998); Prof. Miroslava Gec-Korosec and Vesna Rijavec, *Slovenia,* 3 Encyclopedia 77 (Supp. 8, Feb. 1999); Prof. Dr. Gabriel Garcia Cantero and Prof. Dr. Joaquin Rams Albesa, *Spain,* 3 Encyclopedia 95 (Supp. 11, Aug 1999); Oliver Guillod, *A New Divorce Law for the New Millennium, in* 2000 Survey 357, 358 (2000) (Switzerland); Irina V. Zhilinkova, *The Marriage Relationship in Ukraine, in* Andrew Bainham (ed.), 1994 Survey 469, 469 (1996).
17. Rebecca J. Cook (ed.), Human Rights of Women 380 (1994) (India: permitted for Muslims); Naomi Neft & Anne. D. Levine, Where Women Stand: An International Report on the Status of Women in 140 Countries 380-83 (1997-1998) (Philippines: permitted for Muslims). It is likewise permitted for minority Muslim communities in Singapore and Sri Lanka. *See infra* n. 18.
18. *See, e.g., CEDAW Country Report, Bangladesh,* U.N. Doc. CEDAW/C/C/5/ADD.34 (Apr. 11, 1986) (permitted for Muslims and Hindus); *CEDAW Country Report, Singapore,* U.N. Doc. CEDAW/C/SGP/1 (Jan. 18, 2000) (permitted for Muslims); *CEDAW Country Report, Sri Lanka,* U.N. Doc. CEDAW/C/13/ADD.18 (Jan. 24, 1989) (permitted for Muslims); Marriage Act 1904, Cap. 211, § 43, VI Laws of Uganda (rev. ed. 1964) (prohibited in civil marriages); Hindu Marriage and Divorce Act 1961, Cap. 214, § 7(1), VI Laws of Uganda (rev. ed. 1964) (prohibited for Hindus); Marriage and Divorce of Mohammedans Act 1906, Cap. 213, § 2, VI Laws of Uganda (rev. ed. 1964) (permitted for Muslims); Customary Marriages (Registration) Decree 16/1973, § 3(2) (Ug.) (permitted for customary marriages).
19. Country reports to the CEDAW Committee sometimes state that the couple may choose to be monogamous or polygynous. But since both must agree, if the wife wants monogamy and the husband polygyny, the husband prevails.



a number of countries still permit it for the majority (or sometimes, the minority – e.g. India and the Philippines)[17] of their male population. They typically do so by enacting marriage laws that vary depending on a person's religion or ethnic community as designated by birth.[18] Women born into one religion or community may be subjected to polygyny. Women born into another may not.

Uganda, Iran, and India provide examples of such systems in Africa, the Middle East, and Asia. In Uganda, customary law permits a man who marries under traditional norms to take another wife whenever he wishes and without limit. He does not have to give existing wives any notice of a new marriage to another wife, nor does such a marriage entitle an existing wife to a divorce. Most wives have no access to the statutory monogamous marriage law, because that law gives men a veto over monogamy.[19] Islamic law permits Muslim men to marry up to four wives

with the same right of veto over monogamy. In contrast, men who marry under the civil law or who are Hindu, Buddhist, a Jain or a Sikh, are barred from marrying another wife while still married to the first under criminal penalty of bigamy with five years' imprisonment. At least fifteen other African countries permit men to marry several wives[20] in systems that are often similar to Uganda's, with its separate codes for Muslim, Hindu, customary, and civil marriages.[21] Only men who enter into a civil or Hindu marriage are subject to the bigamy criminal penalty in such countries.

In Iran, a man can have four permanent wives and if he is a Shi'a Muslim, as are most Iranians, as many temporary wives as he likes; Shi'a Muslims living in many other countries receive the same legal permission.[22] A temporary marriage can be as short in duration as one hour or as long as ninety-nine years; it is a contract in which the woman agrees to have sex with the man in exchange for a predetermined sum to be paid to her.[23] The children of temporary marriages are legally recognized as legitimate but the temporary husband is not financially obligated to them or his temporary wife except for the original fixed sum.[24] At least nine other Middle Eastern countries permit polygyny,[25] although Sunni Muslims

20. The Center for Reproductive Law and Policy, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: ANGLOPHONE AFRICA 167 (1997) (Ethiopia, Ghana, Kenya, Nigeria, South Africa, Tanzania, and Zimbabwe); FRANCOPHONE AFRICA, *supra* n. 15 at 191 (Benin, Burkina Faso, Cameroon, Chad, Mali, and Senegal); *CEDAW Country Report, Malawi*, U.N. Doc. CEDAW/C/5/Add.58 (Aug. 15, 1988); *CEDAW Country Report, Namibia*, U.N. Doc. CEDAW/C/NAM/1 (Feb. 10, 1997).
21. *See supra* n. 18.
22. Parvin Darabi, *Issues Affecting Moslem Women in Iran, in* Kelly D. Askin and Dorean M. Koenig (eds.), 3 Women and International Human Rights 423 (2001) [hereinafter Darabi]. Shi'a Muslims also live in other countries such as Bangladesh, Iraq, India, Indonesia, and Pakistan. *See, e.g.*, Government of India, TOWARDS EQUALITY: REPORT OF THE COMMITTEE ON THE STATUS OF WOMEN IN INDIA 138-39 (1974).
23. Darabi, *supra* n. 22 at 429 (citing Art. 1075 of the IRAN CIVIL CODE).
24. *Id.* at 423.
25. *CEDAW Country Report, Algeria*, U.N. Doc. CEDAW/C/DZA/1 (Sept. 1, 1998); Anne H. Heindel, *Issues Affecting Middle Eastern Muslim Women: Self-Dermination and Development in Turkey, Egypt, Iran, Iraq, and Saudi Arabia, in* Kelly D. Askin and Dorean M. Koenig (eds.) 3 Women and International Human Rights 523-424 ( 2001) (Egypt) [hereinafter Heindel]; *CEDAW Country Report, Iraq*, U.N. Doc. CEDAW/C/IRQ/2-3 (Oct. 19, 1998); *CEDAW Country Report, Israel*, U.N. Doc. CEDAW/C/ISR/1-2 (Apr. 8, 1997) (Section 176 of the PENAL LAW (1977) makes bigamy a crime punishable by 5 years imprisonment, but section 179 exempts individuals who are not Jewish and section 180 exempts Jewish men "whose second marriage was permitted by a rabbinical court's judgment that underwent the specific *Halachic* procedure to make it religiously valid"); CEDAW *Country Report, Jordan*, U.N. Doc. CEDAW/C/JOR/2 (Oct. 26, 1999); *CEDAW Country Report, Libyan Arab Jamahiriya*, U.N. Doc. CEDAW/C/LBY/2 (Mar. 15, 1999); *CEDAW Country Reports, Morocco*, U.N. Doc.



(the majority of the world's Muslim population) may not marry temporary wives.

In India, the laws applying to Hindu, Christian, and Parsi men prohibit polygyny through a bigamy penalty of seven years imprisonment. The law permits Muslim men to marry up to four wives by exempting them from bigamy prosecutions.[26] In the Indian state of Goa, however, the situation is paradoxically reversed, with Muslim men covered by the bigamy law and Hindu men exempted.[27] At least nine other countries in Asia permit polygyny for Muslims, and in the case of Bangladesh and Pakistan, both Hindus and Muslims.[28] Among these nine, Thailand (majority Buddhist; minority Muslim) does not recognize polygynous marriages as a matter of law, but polygyny is not a criminal offence either.[29]

## III. THE MISSING VOICES: WOMEN

The religious doctrines and laws that permit polygyny are the work of men. Women had no role in forming them. In ancient times when most of the relevant religious doctrines were first formed, women were totally excluded from participation. The same was true when societies began

CEDAW/C/MOR/1 (Nov. 3, 1994), U.N. Doc. CEDAW/C/MOR/2 (Feb. 29, 2000); Heindel, *supra* at 533 (Saudi Arabia); *CEDAW Country Report, Yemen*, U.N. Doc. CEDAW/C/YEM/3 (Nov. 19, 1992).
26. There is no statutory law covering the Indian Muslim male's right to marry four wives. That is part of the religious law. S. 494 of INDIAN PENAL CODE 1860 exempts Muslim men having four wives from the offence of bigamy.
27. Flavia Agnes, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 147 (1999).
28. *Afghanistan, in* Robin Morgan, (ed.), SISTERHOOD IS GLOBAL 38 (1996) [hereinafter SISTERHOOD]; *CEDAW Country Reports, Bangladesh*, U.N. Doc. CEDAW/C/C/5/ADD.34 (Apr. 11, 1986), U.N. Doc. CEDAW/C/BGD/3-4 (Apr. 1, 1997); *CEDAW Country Report, Indonesia*, U.N. Doc. CEDAW/C/IDN/2-3 (Feb. 12, 1997); *CEDAW Concluding Observations: Maldives*, U.N. Doc. CEDAW/A/56/38, paras. 114-146 at para. 121 (Feb. 2, 2001), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.56.38,paras.114-146.En?Opendocument; *Pakistan, in* SISTERHOOD 526; *CEDAW Country Report, Philippines*, U.N. Doc. CEDAW/C/PHI/4 (July 25, 1996); *CEDAW Country Report, Singapore*, U.N. Doc. CEDAW/C/SGP/1 (Jan., 18, 2000); *CEDAW Country Report, Sri Lanka*, U.N. Doc. CEDAW/C/13/ADD.18 (Jan. 24, 1989); *CEDAW Country Report, Thailand*, U.N. Doc. CEDAW/C/5/Add.51 (June 12, 1987). Muslims constitute the majority in most of these countries, but the minority in the Philippines, Singapore and Sri Lanka.
29. In Thailand, a polygynous husband may only be prosecuted for perjury before the marriage registration officer. In 1997, the Thai CEDAW report noted that the country intended to record men's marital status on their computerised identity cards and to require officials to check each man's marital status before registering his marriage. *CEDAW Country Report, Thailand*, U.N. Doc. CEDAW/C/THA/2-3 (Apr. 7, 1997),

to write and publish court decisions or codify statutes. Until law schools began permitting women to attend, in the late 19th and early 20th century, there were no women lawyers anywhere in the world.

In general, not until the 20th century did women anywhere earn the right to vote and thereby the ability to influence law-making. The barriers to women's direct participation in the legislative process, however, remain high even today at the beginning of the 21st century. In most countries women constitute a negligible percentage of legislative bodies compared to their percentage of the human family; and this fact is especially true in the countries whose legislative bodies continue to support polygyny. The starting point for this discussion of women's voice is accordingly the observation that the laws now in place permitting polygyny have little to no democratic legitimacy among women.

Since the mid-19th century, however, women around the globe began fighting for legal and political change starting with both the right to vote and the status of women in the family. Women in many countries in the developing world, such as Indonesia, Pakistan and Vietnam, began fighting polygyny in various ways and sometimes achieved modest successes.[30] In the late 20th century, more and more women graduated from African, Middle Eastern, and Asian law schools and began writing scholarly analyses of the subject, participating in women's movements to reform or ban polygyny, and working for government institutions in positions that allowed them to influence the debate. An important development came from the new women anthropologists who, in a departure from past approaches, were interested in hearing the views of women living in polygynous communities.

These various advances have yielded some compelling evidence of how women in polygynous societies actually feel about it. In 1995, two women anthropologists decided the topic was worth exploring, noting the fact that "relatively little research has been done to specifically address women's attitudes toward polygyny."[31] Tanzanian women interviewed forty-three Kaguru women from a small rural community in the country's

30. *See, e.g., Afghanistan, in* SISTERHOOD, *supra* n. 28 at 40; *Algeria, in* SISTERHOOD, *supra* n. 28 at 47; *Ghana, in* SISTERHOOD, *supra* n. 28 at 256; *India, in* SISTERHOOD, *supra* n. 28 at 303; *Indonesia, in* SISTERHOOD, *supra* n. 28 at 317; *Nepal, in* SISTERHOOD, *supra* n. 28 at 462; *Pakistan, in* SISTERHOOD, *supra* n. 28 at 529, Miriam Habib, *Pakistan: Women—A Fractured Profile, in* SISTERHOOD, *supra* n. 28 at 531; *Sudan, in* SISTERHOOD, *supra* n. 28 at 649; *Vietnam, in* SISTERHOOD, *supra* n. 28 at 726.

31. Dominique Meekers & Nadra Franklin, *Women's Perceptions of Polygyny Among the Kaguru of Tanzania*, 34 ETHNOLOGY 315-27 (1995).



Morogoro region. About twenty-two per cent of women in that region were currently in polygynous marriages;[32] the percentage of men was of course much lower. Among the forty-three interviewees, thirteen were currently or had previously been in polygynous marriages, leaving thirty without personal experience but with the ability to examine the institution up close from within their small village. The interviewers asked those women who were or had been in such marriages if "they were happy when their husbands married another wife." They asked the other women "how they would feel if their husbands were to marry another wife." The women had overwhelmingly negative reactions to the institution and both groups felt the same way about it. None saw any benefits in having a co-wife. Two representative comments:

> "I don't like it. If it happens I can't avoid it, but I hate to have a co-wife. (R12, age 45)"

> "I don't want a co-wife. I don't want my children to be married to co-wives. I hated this even before I got married. Unfortunately, I was involved in this one way or the other to have a co-wife . . . . It wasn't my will . . . . (R8, age 36)"

The interviewees gave many reasons for their negative attitudes:

> "I wouldn't be happy [with a co-wife] because life would change. You know, if a husband has two wives or more then there will be no balance in love and in most cases the elder wife is the one disadvantaged. (R25)"

> "[When my husband married another wife] I was not happy . . . you are not confident about your completeness as a woman. The thought erodes your love for him. (R14)"

> ". . . Sometimes the husband scorns you. The other wife scorns you, and the husband sides with her and sees you as nothing. You must get angry! (R43, age 60)"

Many women complained about the economic deprivation polygyny creates for them and their children.

> ". . . [E]ven the budget will be higher; how are you going to progress? . . . You don't progress. Do you think it is just paying bridewealth only! . . . The needs will increase. . . . You could buy one kilogram of meat and suffice, now you have to send for

32. *Id.*

> half a kilogram. . . . I who came first have a family, the half kilogram what will it suffice? (R35)"
>
> "When I got my sixth child my husband tasted a better love from outside, this made him to concentrate with an outside woman, they had [three children]. . . . At this long period, I had a lot of problems of taking care of the family. If my children were sick I had to take care myself, for everything. I was mother and father. (R8)"[33]

Other evidence of women's attitudes toward polygyny comes from Uganda. During the early 1990s, the government solicited the input of its citizens in the course of developing what became the 1995 Constitution. The Ministry of Women in Development, in cooperation with other governmental entities and with women's non-governmental organizations (NGOs), held a series of seminars with women throughout the country to determine what they would like in the new Constitution.[34] The Ministry reported:

> A majority of the women who participated in the constitutional seminars recommended that a man should have one wife, and a husband one wife. . . . Women noted that there is a lot of suffering in polygynous homes because the man cannot love his wives equally and usually he does not have enough to provide sufficient support to his wives and numerous children. This leaves a heavy burden on women. . . .

When people cite cultural relativism as a reason for refusing to take action against polygyny, they fail to realize that their view of the culture in question flows from current laws shaped almost entirely by men and the views of religious and governmental leaders who are almost always men. Asking women what they think will refute the idea that in a given culture every person thinks alike. As the voices above document so well, many women contest the status quo. They abhor polygyny precisely because it harms their children and them so deeply in both the emotional and material spheres.

## IV. International Human Rights Law Prohibits Polygyny

International law clearly establishes that polygyny violates women's most fundamental rights and freedoms. From the beginning of the international human rights system, international law required equality before the law and in marriage. Yet many countries have failed to take effective action against polygyny, citing freedom of religion and culture as reasons for inaction.

33. *Id.*
34. Ministry of Women in Development, Recommendations Made By the Women of Uganda to the Constitutional Commission 12-20 (1991).



### *A. Women's Right to Equality Within Marriage*

The founding of the United Nations in 1945 and its subsequently-enacted human rights system have brought ever-increasing attention to the need to eradicate all forms of discrimination against women. The opening clauses of the United Nations Charter show a "determina[tion] . . . to reaffirm faith in . . . the equal rights of men and women. . . ," and Article 55 declares that the UN will "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . . . sex . . . or religion."[35] Both reflect central awareness of the reality of women's lives, profoundly different from these aspirational goals, thus necessitating concrete action to change that reality. In Article 56, UN members pledge to take both "joint" action with the UN and "separate" action to achieve their Article 55 purposes.

From the beginning, women activists focused on the goal of ending polygyny and women's subjugation within marriage. The UN Commission on the Status of Women, meeting for the first time in 1947, agreed to work for "freedom of choice, dignity of the wife, monogamy, and equal right to dissolution of marriage."[36] That goal was subsequently reflected in the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948 [hereinafter UDHR].[37] Article 16(1) proclaimed that "[m]en and women of full age . . . have the right to marry and . . . are entitled to equal rights as to marriage, during marriage and at its dissolution."

An Indian woman lawyer, Hansa Mehta, and Eleanor Roosevelt worked together to insure that the UDHR would contain women's Article 16 right to equality in marriage. Roosevelt served as Chair of the newly formed United Nations Human Rights Commission while it drafted the UDHR. Each headed one of the three working groups; no other women served on the Commission. At the time, Mehta was also advising the Indian government (again, as one of only two women) on the rights

35. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.
36. Leslie J. Harris & Lee E. Teitelbaum, Family Law 271-79 (2000).
37. UDHR, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948).

provisions of what became its 1949 Constitution.[38] There, she "battl[ed] purdah, child marriage, polygamy, [and] unequal inheritance laws, . . . striving to set these ancient customs on a course of extinction."[39] Eleanor Roosevelt also fought for women's right to equality in marriage. Indeed, she suggested adding to the right to marry, "the specification that men and women have equal rights when a marriage is dissolved."[40]

The UDHR focus on equal rights within marriage was further buttressed by the grand language of the Preamble and other articles. The Preamble spoke specifically of the United Nations' commitment to the "dignity and worth of the human person and in the equal rights of men and women." The very first article built on this core concept, and here again Hansa Mehta played a major role. Her efforts insured that Article 1 of the Declaration, which recognizes that all are born "free and equal in dignity and rights," be cast in inclusive terms. The first draft gave this right only to "men." At her insistence, the final version gave this right to "all human beings." Further commitments to women's rights to equality were reflected in Article 2 (all are entitled to the rights in the Declaration without "distinction" based on "sex"), and Article 7 ("[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law; [a]ll are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination").

The UDHR commitment to equality for women with particular reference to marriage was carried forth and amplified in two international human rights treaties. The International Covenant on Civil and Political Rights [hereinafter ICCPR] was forceful on the point.[41] Article 23(4) required that ratifying states "shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." The specific requirement that states "ensure" a particular right appears only in this article and in two other articles specifically dealing with women's rights. Article 2(1) requires states to ensure to all the rights in the ICCPR, without sex (and other) distinctions. Article 2(3) obligates states to ensure that persons whose ICCPR rights have been violated have an effective remedy. And Article

38. Mary Ann Glendon, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 90 (2001).
39. *Id.*
40. *Id.* at 93.
41. ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.



3 requires states "to ensure the equal right of men and women to the enjoyment of all civil rights set forth in the present Covenant." The ICCPR also expanded on the Declaration's requirements about marriage. Now they covered "equal rights and responsibilities," rather than simply "equal rights."

The Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter CEDAW] expanded yet again by listing the various areas of the law where married women commonly did not have equality with their husbands.[42] It requires states to "eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on a basis of equality of men and women . . . [t]he *same* right[s]":

- to enter into marriage;
- choose a spouse freely;
- during and at dissolution of marriage;
- as parents vis-à-vis their children;
- to decide on the number and spacing of their children;
- as guardians or adoptive parents;
- in personal matters, including choice of family name, profession, and occupation; and
- with regard to owning, acquiring, managing, administering, enjoying or disposing of property.

Not only does CEDAW require that men and women have the same **rights**. It also requires that men and women have the same **responsibilities**:

- during marriage and at dissolution;
- as parents; and
- as guardians, trustees, or adoptive parents.

Thus, the UDHR, ICCPR and CEDAW make an exceptionally strong commitment to equality within marriage. But few scholars and commentators have paid much attention to the right to equality in marriage (with some notable exceptions).[43]

42. CEDAW, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.
43. *See, e.g.*, Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. OF INT'L. LAW 643-709 (1990).

Although polygyny violates many different human rights of women, it violates their right to equality in marriage in the most egregious way possible. To understand that violation in depth, it is necessary to consider the common legal "rights and responsibilities" states attach to marriage in their legal systems. They include child support, child custody, spousal maintenance, spousal property ownership and control, spousal and child inheritance, spousal obligations to care for their children and each other, divorce, matrimonial property rights, spousal sexual fidelity, and sexual intercourse.

In a polygynous system, equality of rights and responsibilities as to these subjects is literally impossible. If a man has four wives, each wife has only one-fourth of a husband. Accordingly, he will be responsible to spend only one-fourth of his resources on the children he has with each of his wives, whether during marriage or at its dissolution. Each wife, in contrast, will have all of her resources available to care for the children. The same would be true for spousal care and maintenance. This math explains why the women quoted above complain so bitterly of the dearth of economic resources for themselves and their children when their husband marries another wife. With scarce resources the norm in the underdeveloped world, polygyny necessarily impoverishes the wives and their children. The wives have fewer rights than their husbands, and the husbands fewer responsibilities than their wives.

The women who were quoted also complained of their husbands' inattention to the children. Here too it is impossible for the husband to share equal responsibility with their wives for the personal attention to, emotional care for, and parental guidance of, those children. Just as each wife has a quarter of a husband, each of that wife's children has a quarter of a father. Or as one polygynous wife complained, "I was mother and father."

The countries that permit polygyny also have many marriage and divorce rules explicitly based on unequal shares or rights. For example, the inheritance rules that are designed to protect the economic well-being of surviving family members are usually built on an unequal share. Islamic law requires that any surviving female always receive one-half the share of the similarly situated male.[44] For widows and widowers who have children, the widow receives one-eighth and the widower one quarter.[45] Using this base, if a husband has four wives each will each inherit one quarter of one-eighth, or one thirty-second share. Conversely, each

44. Esposito, *supra* n. 6 at 38.
45. *Id.* at 39-40.



widower will inherit one quarter from each wife or one full share. Customary laws commonly go even further, and give the widow only the right to be cared for by her children, while the widower assumes control and ownership of all property she had.[46]

As to the right to the opportunity for legal sexual intercourse,[47] wives will necessarily have fewer rights than their husbands. If a hypothetical husband rotates his nights evenly among his four wives, and has intercourse every night, each wife will have intercourse once every four days, while he does so every day. These countries also provide very different rules for marital fidelity for husbands and wives. Husbands in customary or Shi'a marriages are legally permitted to have extra-marital sex with single women or "temporary" wives because the new woman in their lives may turn into the new (permanent) wife. Wives, however, are subject to criminal prosecution or worse (murder) for the same act, because they are seen as the property of men. Similarly, men have the right to divorce their wives for a single non-marital sexual act with another man, while the women have no such right to divorce an unfaithful husband, again because his extramarital partner may become his new wife. This further dilutes each wife's right to legally-permitted sexual intercourse.

Both the UN Human Rights Committee [hereinafter HRC] and the Committee to Eliminate Discrimination Against Women [hereinafter CEDAW Committee], the bodies that monitor compliance with the ICCPR and CEDAW, have asserted in their general comments and recommendations that polygyny violates women's rights. The HRC recommends that polygyny "should be definitely abolished wherever it continues to exist" because it violates women's dignity and constitutes inadmissible discrimination.[48] The CEDAW Committee declares that prohibition is necessary because polygyny causes "such serious emotional and financial consequences" for the wives and children.[49] And of course it deprives women

46. For example, Tanzania's Local Customary Law (Declaration) (No. 4) Order, 1963, Schedule 2, Rules of Inheritance, G.N. 436, provides in Rule 27 that "The widow has no share of the inheritance; if the deceased left relatives of his clan, her share is to be cared for by her children just as she cared for them."
47. This right is secured through such legal concepts as the suit for loss of consortium and divorce for failure to have intercourse. The responsibility to refrain from non-marital sex is enforced through criminal adultery law and divorce for adultery.
48. HRC, General Comment 28, Equality of rights between men and women (article 3), at para. 24, U.N. Doc. CCPR/C21/Rev.1/Add.10 (2000).
49. CEDAW Committee, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), at para. 14, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 90 (1994).

of their Article 16 right to equality with men in marriage, as well as their Article 5 right to be free from customary practices premised on women's inferiority.[50]

In sum, nothing could be more clear than the fact that the legal institution of polygynous marriage deprives women of their well-defined, and widely ratified, right to equality in marriage as to both rights and responsibilities.

### *B. The Right to Religious Freedom*

Within the context of Islam, the most common claim is that the right to freedom of religion trumps the right to equality within marriage. There is virtually no support for this in international human rights law, but it is intuitively attractive and persuasive to many.

The ICCPR does recognize, in Article 18(1), the right to religious freedom, including the freedom "to manifest [one's] religion or belief in worship, observance, practice and teaching." If observance or practice were construed to include the right to be governed by religious rules on marriage and divorce, the argument might carry some weight. The evidence is to the contrary. The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief lists many religious practices which are protected forms of religious freedom, but nowhere mentions the freedom to be governed by religious law.[51] In general, it protects the freedom to worship or assemble and to maintain places for doing so, have charitable and humanitarian institutions, use religious articles and materials, write about religion and teach it in suitable places, solicit funds, train and appoint leaders, observe days of rest and religious holidays and ceremonies, and to communicate with others about their religion.

But even if one were to concede that freedom of religion included the right of the state and Muslim religious leaders to impose Islamic law on all women born to Muslim parents, the religious freedom argument would still carry no weight. For the ICCPR right to religious freedom also preserves, through Article 18(3), the state's right to enact laws to limit those religious freedoms if such laws are "necessary" to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others." Given the fact that polygyny so clearly violates women's fundamental right to equality in marriage, that ground alone empowers states to limit religious freedom. The emotional and financial burdens polygyny creates for women and children also justify limiting laws to protect and enhance their safety and health.

50. *Id.*

51. G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 15) at 171, art. 6, U.N. Doc. A/36/684 (1981).



One African Supreme Court (Mauritius) has already construed its own Constitution's religious freedom guarantee (virtually identical to that in ICCPR Article 18), in conjunction with the ICCPR requirement that women have equal rights in marriage, to deny the local Muslim community the right to personal religious law governing marriage, divorce, and inheritance. Mauritus law prohibits polygyny. Muslims sought the right to be governed by Shiri'a law instead. The Supreme Court rejected their claim in *Bhewa v. Government of Mauritius*, [1991] LRC (Const) 298 (1990). The Court reasoned that the Islamic plaintiffs had

> . . . an insufficient understanding of the duality of religion and state in a secular system. The secular state is not anti-religious but recognises freedom of religion in the sphere that belongs to it. As between the state and religion each has its own sphere, the former, that of law-making for the public good and the latter that of religious teaching, observance and practice. To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion is the state religion but also the holy book of that religion is the supreme law.

Accordingly, it dismissed the plaintiffs' claim that the freedom to observe and practice their religion required the Mauritius government to enact a law imposing Islamic rules concerning marriage. The Court further observed that even if religious freedom were so construed, the Mauritius Constitution's exceptions to religious freedom (the same as those in ICCPR Article 18(3)) nevertheless permitted the country to prohibit polygamy. Indeed, international law *required* Mauritius to do so. For Mauritius had ratified the ICCPR, and Article 23(4) obligates Mauritius to ensure "the maintenance of monogamy . . . and . . . the largest measure of non discrimination against women, whether as wives or daughters."[52]

52. The Court cited Article 23(4) requiring equality in marriage, 2(1) requiring all ICCPR rights without sex distinction, 2(2) and 3 requiring legislation and effective remedies

The Court's conclusion that prohibiting polygamy does not violate freedom of religion parallels the reasoning of the United States Supreme Court a century earlier, when it ruled that a Mormon's right to religious freedom did not include the right to an exemption from the general federal criminal statute prohibiting polygyny. In *Reynolds v. United States*, 98 U.S. 145 (1879), it characterized the convicted man's argument as

> . . . introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

In a series of subsequent cases, the Court adhered to this position and upheld all federal statutes designed to bring an end to the practice of polygyny by Mormons. Strong enforcement of these statutes was eventually effective and Utah entered the United States on the condition that its Constitution prohibit polygyny. Meanwhile, the Church reinterpreted its doctrine to prohibit polygyny.

The U.S. Court's decisions have been favorably cited by other nation's courts. For example, the Bombay High Court in India twice upheld local statutes prohibiting Hindu polygyny, enacted before the national law

to give effect to all ICCPR rights, 24 requiring that minors be protected without sex discrimination against any child, and 26 requiring that all persons be equal before the law and entitled to equal protection without sex discrimination. [1991] LRC (Const) 298 (1990). The plaintiffs conceded that Mauritius' Criminal Laws, which included the 1838 PENAL CODE ORDINANCE Art. 257 banning bigamy, remained within the state's power although one plaintiff admitted he preferred that Shari'a criminal law be imposed on all Muslims in addition to Shari'a personal law.



prohibited it. In each case, it cited the U.S. Supreme Court's belief/practice distinction and holdings in support of its decision.[53]

An additional support to the position that international human rights law does not allow religion to trump equality can be found in CEDAW's structure. It contains no exception for religious or customary law. Indeed, its Article 2(e) and 2(f) enforcement provisions require laws to eliminate discrimination against women by "any person, organization or enterprise," and legislation to "modify or abolish existing laws, . . . customs, and practices which constitute discrimination against women." It is undoubtedly for this reason that so many Islamic states have ratified CEDAW with reservations as to both the Article 16 requirements for equality in marriage and Article 2's enforcement requirements.

### *C. The Right to Enjoy One's Culture*

By similar reasoning, the right to enjoy a minority culture does not trump women's equality rights either. We have already seen CEDAW's requirements concerning discriminatory laws, customs and practices. A similar provision in Article 5 requires states to adopt measures to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

Article 27 of the ICCPR does guarantee some cultural rights of minorities within a state. Of course, if the cultural practices are those of the majority, the article is simply inapplicable. But for any cultural minority, the language seems to favor them. It requires that minorities be given "the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." This provision does not exist in isolation, however. In addition to women's right to equality in marriage under Article 23(4), Article 2 guarantees that any right in the Convention must be recognized "without distinction of any kind, such as . . . sex . . . ." Similarly, Article 3 requires that states ensure "the equal right of men and women to the enjoyment of all civil and political rights set forth in the Convention." And Article 26 guarantees the right to equality before, and the equal protection of, the law without "discrimination on any ground such as . . . sex . . . ."

53. *State of Bombay* v. *Narasu Appa Mali* AIR 1952 Bom. 84; *Srinivasa* v. *Saraswati Ammal* AIR 1952 Mad. 193.

The HRC therefore states that these cultural rights "do not authorize any State, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law."[54] It requires states to "discharge their responsibilities in relation to cultural or religious practices within minority communities that affect the rights of women."[55] There can be no real argument that international human rights law allows cultural groups to continue their discrimination against women.

## V. Conclusion

As we have seen, women's right to equality within marriage has strong historic roots in the new international human rights regime that arose from the ravages of World War II. Close examination of the right to religious freedom and cultural identity reveal no exemption allowing religions and cultures to discriminate against women. Polygyny subjugates women in the most complete way possible, depriving them of that core right to dignity guaranteed to every human being and rendering them powerless vis-à-vis their husbands. It is time for post-colonial feminists and scholars to drop the veil of cultural relativism and open their eyes to the extreme harm created by laws that allow husbands to condemn their wives to polygynous marriages.

54. HRC, General Comment 28, Equality of rights between men and women (article 3), at para. 32, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).
55. *Id.*

# PLANT VARIETY PROTECTION AND FARMERS' RIGHTS: TOWARDS A BROADER UNDERSTANDING

*Philippe Cullet and Radhika Kolluru**

## I. Introduction

The protection of plant varieties by means of intellectual property rights has been a subject of increasing importance in the aftermath of the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[1] Plant variety protection in TRIPs is premised on the need to provide incentives to private sector actors to engage in plant breeding. The ultimate rationale for plant variety protection is the enhancement of food security through the provision of new improved varieties and improved availability of seeds through private sector channels.

The introduction of plant variety protection in India has significant implications since seed has traditionally been supplied overwhelmingly by farmers themselves and by the public sector, with the private sector playing a marginal role until recently in most crops. From a legal perspective, the protection of plant varieties remains an issue which is far from settled even though the Protection of Plant Varieties and Farmers' Rights Act was adopted in 2001 in compliance with TRIPs obligations. This is due to a number of reasons: Firstly, plant variety protection is an issue which goes beyond giving incentives to the private sector. In fact, while the TRIPs agreement is the direct trigger for the introduction of plant variety protection, it is not the only relevant treaty. The Biodiversity Convention and the International Treaty on Plant Genetic Resources for Food and Agriculture (PGRFA Treaty) are also of major importance.[2]

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1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, 15 Apr. 1994, 33 International Legal Materials 1197 (1994) [hereafter TRIPs Agreement].

Secondly, while plant variety protection is directly related to innovation in the field of agriculture, it must also be understood in the broader context which includes conservation of biological resources. Thirdly, plant variety protection is opposed to the idea that agricultural management should be based on the sharing of knowledge and resources. This may be criticised from a conceptual and practical point of view. However, in the context of the widespread ratification of TRIPs and the increasingly tenuous nature of farmers' hold over their resources and knowledge, it is necessary to go beyond criticism and understand the additional requirements of the current international legal system with respect to the needs of farmers and more broadly of food security for all individuals.

This article first looks at some of the reasons for the introduction of plant variety protection and examines in particular the links with food security and the reasons for introducing plant variety protection measures. The second section surveys the property rights forms that have been proposed at the international level to provide plant variety protection and examines the existing legal regime in India with regard to plant variety protection. The third section argues that India needs to do more than it has done until now to implement a plant variety protection regime which truly fosters food security, provides traditional knowledge holders with secure property rights and rethinks farmers' rights in a broader context which takes into account the imperatives of food security and agro-biodiversity conservation alongside the already implemented focus on commercialisation.

## II. Plant Variety Protection and Food Security

Plant variety protection is intrisincally linked to food security. In fact, it can only be justified if it enhances food security. This section briefly explores the notion of food security before turning to the specific issue of plant variety protection.

### *A. Food Security*

Food security can be understood at different levels, from the household to the international level.[3] It is commonly held that at present there

2. *See respectively* Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 31 International Legal Materials 818 (1992) [hereafter Biodiversity Convention] and International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 Nov. 2001 [hereafter PGRFA Treaty].



are sufficient food supplies at the international level,[4] and in the Indian context at the national level as well.[5] However, studies indicate that with increases in population, and diminishing land availability, international and national food security will be a major concern in coming years.[6] To achieve food security at the national level states require sufficient resources to either produce or import enough food to feed the whole population and an efficient distribution system to ensure everyone access. Ensuring food security at the household level implies that people must either have sufficient income to purchase food or the capacity to feed themselves directly by cultivating their own food.

Food security is directly linked to agro-biodiversity which is essential to promote resilience in farming. Reduction in diversity (through practices such as monoculture) increases vulnerability to natural forces, to pest/weed attack and other plant diseases.[7] Therefore, agro-biodiversity is of primary importance for small-holder and/or subsistence farmers as it ensures both income-generation and household food security. Agro-biodiversity also provides ecosystem services on farms, such as pollination, fertility and nutrient enhancement, and insect and diseases management and water retention and thus makes for more productive farming, decreasing the number of external inputs required.[8] Additionally, agro-biodiversity provides the raw material (or the genetic pool) for all crop-related biotechnology research and development. Diversity also has nutritional and social importance, where different varieties may contain different nutrients and health benefits or may be of differing cultural worth.

Small-holder and traditional farmers have customarily practiced farm-

3. According to Paragraph 1 of the Plan of Action of the World Food Summit, Rome, 13-17 Nov. 1996, food security exists 'when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life'.
4. See, *e.g.*, Carl F. Jordan, *Genetic Engineering, the Farm Crisis and World Hunger*52 Bioscience 523, 526 (2002) and Jose Falck-Zepeda *et al.*, Biotechnology and Sustainable Livelihoods – Findings and Recommendations of an International Consultation (ISNAR, Briefing Paper No. 54, September 2002).
5. See, *e.g.*, Indian Economic Survey 2001-2002 (2002).
6. See, *e.g.*, FAO, The State of Food Insecurity in the World 2002 ( 2002).
7. See for instance, M.S. Swaminathan, *Ethics and Equity in the Use and Collection of Plant Genetic Resources: Some Issues and Approaches* in International Plant Genetic Resources Institute , Ethics and Equity in Conservation and Use of Genetic Resources for Sustainable Food Security 7 (1997).
8. Lori Ann Thrupp, *Linking Agricultural Biodiversity and Food Security: the Valuable Role of Agrobiodiversity for Sustainable Agriculture*76 International Affairs 265, 268 (2000).

ing techniques which conserve and enhance agro-biodiversity. In order to maximise productivity and minimise risk they have made certain selections whereby they have preserved old varieties, invented new varieties and adapted existing varieties to suit their local environment, thereby enriching agro-biodiversity.[9] As a result, the promotion of such farming is relevant, not just for household food security, but also for guaranteeing food security at national and international levels as well. It is essential, therefore, that farmers retain control over plant varieties so that they may continue to innovate, improve and adapt varieties to suit changing needs and conditions.[10] Additionally, since food security and access to food is also linked to adequate income, promotion of small-holder and labour-intensive farming is essential in developing countries like India, where a large percentage of people earn their livelihood from agricultural labour.

National policy plays a vital role in countering food insecurity. The principles emanating from the human right to food form an important basis for such a policy.[11] One of the State's obligations with respect to the human right to adequate food is that it must proactively engage in activities to strengthen people's access to and utilization of resources and means to ensure their livelihood and food security.[12] This includes measures such as land reform, ensuring physical and economic access to credit, natural resources, new technologies, rural infrastructure, irrigation, and provision of explicit farmers rights through legislation. Rigorous monitoring and planning by the State is required to ensure that cash crops do not replace food crops at the cost of food security.[13] The State must also regulate private sector activities to ensure that they do not impinge on the resources of people who do not have access to sufficient food (which includes ensuring that private sector firms do not intrude on farmers

9. See J. Esquinas-Alcazar, *The Realisation of Farmer's Rights in* M.S. Swaminathan (ed.), AGRO-BIODIVERSITY AND FARMERS' RIGHTS 2 ( 1996).
10. *See, e.g.*, Objectives 3.1 and 3.4(d) of the Plan of Action *supra* n. 3.
11. The human right to adequate food has found expression in various international documents. See, *e.g.*, Art. 11 of the INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, New York, 16 Dec. 1966, reprinted in 6 INTERNATIONAL LEGAL MATERIALS 360 (1967).
12. Paragraph 15, Committee on Economic, Social and Cultural Rights, General Comment No. 12 – The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5 (1999). [hereafter General Comment on Article 11]
13. Often as consequence of fall in commodity prices brought about by wide spread industrialised farming and agricultural subsidies in the north, small farmers in developing countries are forced to abandon cultivation of food crops and switch to cash crops, in order to eke out a reasonable living. See, *e.g.*, Marcel Mazoyer & Laurence Roudart, *L'asphyxie des économies paysannes du Sud* 523 MONDE DIPLOMATIQUE 19 (Oct. 1997).



rights) and that their activities sufficiently promote agro-biodiversity.[14] The State must also ensure that there is sufficient R&D in the area of under-utilised crops of high nutritional value.[15]

### *B. Law and Policy Rationale for Plant Variety Protection*

At the outset, it must be mentioned that plant variety protection can have a narrow and broad meaning. The narrow view only considers plant variety protection from the point of view of commercial breeders and the needs of the biotechnology industry. The broader view acknowledges that there are different actors in plant variety management who deserve protection and who perform different functions, ranging from innovation (new seeds) to agro-biodiversity management.

India has had a number of reasons for introducing a plant variety protection regime. The most immediate trigger for the Plant Variety Act 2001 are the obligations undertaken in the WTO context, specifically under Article 27.3.b of the TRIPs Agreement. Article 27.3.b of TRIPs imposes on all countries the introduction of some form of intellectual property protection for plant varieties. However, it does not impose the introduction of patents and therefore leaves member states free to devise their own legal framework in this regard (*sui generis* option). While WTO membership imposed a specific deadline on India for the introduction of plant variety protection, other factors are also at play. India has, for instance, been subjected several times to the appropriation of local knowledge through patents in foreign countries (also referred to as biopiracy) in the past few years. While the introduction of intellectual property rights in the field of genetic engineering may not provide a direct counter to biopiracy, it raises the profile of traditional knowledge as an issue worthy of debate and protection. Beyond issues specifically linked to biopiracy, the development of an intellectual property rights regime related to plant varieties is generally reflective of broader trends towards the appropriation through private property rights of resources and knowledge previously deemed to be freely available to all individuals and nations. The trend towards privatisation of resources, knowledge and means of production has been tremendous in the past couple of decades. It finds expression in the field of agriculture with the progressive development of an international legal framework which favours private ownership of genetically

14. In fact failure by the State to regulate individuals or groups so as to prevent them from violating the right to food amounts to a violation of its obligations. (See Paragraph 19 of the General Comment on Article 11, *supra* n. 12).
15. Objective 3.4, Plan of Action, *supra* n. 3.

modified seeds over public access and sharing of knowledge. This has, for instance, been reflected at the national level with the increase in incentives given to the private sector seed industry.[16]

Plant variety protection can be justified by necessity, or in other words by WTO membership. Other substantive reasons also help justifying plant variety protection both from the perspective of commercial breeders, farmers and agro-biodiversity conservation. As far as commercial breeders are concerned, the rationale for the introduction of plant variety protection is that it will promote food security because genetic engineering offers humankind its only chance to significantly increase yields in coming decades in view of the shortage of arable land to produce more food for an expanding population. Interestingly, the enhancement of food security is also an argument which can be used to justify farmers' rights on farmers' varieties since protection of the latter's interests will also promote the long-term food security of the majority of the population in India. The other reasons for introducing plant variety protection include the role that farmers play in sustainably using biodiversity and specifically in developing, conserving and enhancing agricultural biodiversity.

Within this general framework, several possibilities are open to the government. It can choose to protect only commercial breeders with the introduction of patents and be fully in compliance with its TRIPs obligations. It may choose to introduce plant breeders' rights and thereby provide rights which include some exceptions in favour of other breeders and farmers. It may further choose to grant rights only to breeders but introduce a benefit-sharing scheme which, for instance, takes into account its obligations under the Biodiversity Convention. Finally, it can go beyond the preceding options and protect all relevant actors in the field of agricultural management, from farmers to local communities and panchayats to commercial breeders and state governments, an approach which takes into account not only TRIPs obligations but also all other relevant international treaties.

## III. LEGAL FRAMEWORK FOR PLANT VARIETY PROTECTION AND MANAGEMENT

The legal framework for plant variety protection includes the different treaties that India has ratified in this field and the different legislative instruments adopted to implement international commitments.

16. New Seed Policy, 1988.



### *A. International Legal Framework*

India has taken different kinds of commitments in the field of plant variety protection and management. These include a series of obligations concerning the conservation and sustainable use of biological resources as well as commitments concerning the protection of traditional knowledge and farmers' rights and a series of obligations in the field of intellectual property rights regarding the commercial use of plant varieties.

Firstly, India has ratified the Biodiversity Convention which provides the basic framework for the conservation and the use of biological resources. It affirms India's sovereignty over its biological resources but qualifies India's control with the introduction of the notion of 'common concern' which implies that the protection of biodiversity in India is of interest not only to this country but also to the international community at large. The Biodiversity Convention is noteworthy for recognising the need to conserve while also acknowledging the legitimacy of using biological resources which provide, for instance, every individual's basic food needs. The Convention also provides that governments must preserve traditional knowledge and foster its application.[17] While this provision does not mandate the recognition of the rights of traditional knowledge holders, it provides at least the lineaments of a policy framework in this regard. The Convention also regulates access to biological resources and the sharing of benefits arising from their use. It attempts to provide a framework which respects donor countries' sovereign rights over their biological and genetic resources while facilitating access by users. Access must therefore be provided on 'mutually agreed terms' and is subject to the 'prior informed consent' of the country of origin.[18] Further, the Convention provides that donor countries of micro-organisms, plants or animals used commercially have the right to obtain a fair share of the benefits derived from use. Finally, the Convention constitutes one of the few treaties which offer a specific statement on the relationship between the management of biological resources and intellectual property rights. Article 16 clearly indicates that intellectual property rights are not to undermine the working of the Convention.

Secondly, India has also ratified the PGRFA Treaty. This treaty adopts to a large extent the philosophy of the Biodiversity Convention and provides for the three interrelated goals of conservation, sustainable use

17. Art. 8.j, BIODIVERSITY CONVENTION, *supra* n. 2.
18. Art. 15, BIODIVERSITY CONVENTION, *supra* n. 2.

and benefit sharing.[19] The overall aims of the Treaty are the promotion of sustainable agriculture and food security. The Treaty is significant for radically altering the legal status of plant genetic resources in international law. While the previous instrument – the 1983 International Undertaking[20] – promoted the sharing of plant genetic resources, the new Treaty affirms states' sovereign rights over their PGRFA and condones the introduction of intellectual property rights. One of the main contributions of the PGRFA Treaty to the international legal framework is its focus on the situation of farmers, their contribution to the conservation of agro-biodiversity, the rights they have over their physical assets – for instance, seeds – and to a much lesser extent the question of traditional knowledge. More specifically, the PGRFA Treaty gives recognition to farmers' contribution to conserving and enhancing plant genetic resources for food and agriculture. It further gives broad guidelines to states concerning the scope of the rights to be protected under this heading but overall devolves the responsibility for realizing farmers' rights to member states. This includes the protection of traditional knowledge, farmers' entitlement to a part of benefit-sharing arrangements and the right to participate in decision-making regarding the management of plant genetic resources. However, the treaty is silent with regard to farmers' rights over their landraces. In fact, the 'recognition' of farmers' contribution to plant genetic resource conservation and enhancement does not include any property rights. In this context, the only rights that are recognized are the residual rights to save, use, exchange and sell farm-saved seeds. The overall significance of the PGRFA Treaty lies in the fact that it is the first treaty providing a legal framework which not only recognizes the need for conservation and sustainable use of plant genetic resources for food and agriculture but also delineates a regime for access and benefit sharing, and in this process provides direct and indirect links to intellectual property right instruments.

Thirdly, India was a founding member of the WTO and in this capacity must implement the TRIPs Agreement. TRIPs generally provides minimum levels of intellectual property rights protection in all member states. This has brought about a substantial burden of adjustment in the patents field because the Patents Act 1970 differed in significant respects from what was required under TRIPs. Among the many changes that India has had to bring in, the introduction of plant variety protection called for by article 27.3.b of TRIPs has given rise to significant debate because of the

19. Art. 1 of the PGRFA Treaty, *supra* n. 2.
20. International Undertaking on Plant Genetic Resources, Res. 8/83, Report of the Conference of FAO, 22nd Sess., Rome, 5-23 Nov. 1983, Doc. C83/REP.



choice it offers between adopting patents or a *sui generis* system. This choice has often been interpreted as implying that all countries either have to introduce patents or plant breeders' rights (PBRs). PBRs are intellectual property rights closely related to patents which were first defined in the UPOV Convention.[21] These rights grant commercial breeders exclusive rights over their inventions but include more exceptions than patents, and in particular can include exceptions in favour of other breeders' research and in favour of farmers. While PBRs constitute one alternative to patents, the *sui generis* option is not limited to PBRs and can be construed in a number of different ways, thereby allowing countries to devise a plant variety protection regime which fits their specific needs and situation while taking their other obligations into account. The inclusion of the *sui generis* option is therefore of great significance within TRIPs because it allows member states to explore alternatives to patents beyond what Articles 7 and 8 allow.[22]

Overall, the international legal framework in the field of plant variety protection and management is characterised by its lack of cohesion. While on the one hand, the Biodiversity Convention and the PGRFA Treaty attempt to provide answers to the relationship between intellectual property rights and environmental management, the TRIPs Agreement addresses intellectual property rights issues without taking into account concerns regarding environmental conservation or the management of traditional knowledge. Given that there is no international institution to ensure that different negotiations produce compatible treaties, the cohesion of different international obligations with each other must be mostly judged at the level of their implementation.[23] This is why close scrutiny of implementation legislations is imperative to ensure that all international obligations are given similar importance, with the exception of fundamental rights which by constitutional mandate ought to be given more prominence than the rest.

21. International Convention for the Protection of New Varieties of Plants, Paris, 2 Dec. 1961, as Revised at Geneva on 10 Nov. 1972, 23 Oct. 1978 and 19 Mar. 1991 (UPOV Doc. 221(E), 1996) [hereafter UPOV Convention].
22. Arts. 7 and 8 provide the broader framework within which the TRIPs Agreement must be understood and implemented and may constitute the legal basis for exceptions in favour of developing countries.
23. The Convention on the Law of Treaties, Vienna, 23 May 1969, 8 International Legal Materials 679 (1969) provides the basic framework for interpreting treaties, and includes provisions concerning the interpretation of different treaties addressing similar issues. It provides, for instance, that states must implement all their international obligations in good faith.

### *B. Domestic Legal Framework*

Significant progress has been made in recent years towards setting up a legal regime for the management of plant genetic resources. The main legislative instrument is the Protection of Plant Varieties and Farmers' Rights Act 2001 which constitutes the government's response to its obligations under Article 27.3.b of the TRIPs Agreement. The Act focuses on the establishment of plant breeders' rights and farmers' rights. The regime for plant breeders' rights largely follows the model provided by UPOV and the criteria for registration are the same as those found in UPOV, namely novelty, distinctness, uniformity and stability. The Act incorporates elements from the 1978 version of UPOV and includes some elements from the more stringent 1991 version, such as the possibility to register essentially derived varieties.

The second main aim of the Act is the introduction of farmers' rights. At this level, substantial changes were proposed by the Joint Parliamentary Committee to which the Bill was referred after its introduction in Parliament.[24] While the original version of the Bill introduced in Parliament only contained a short provision on farmers' rights, the Committee decided to add a whole new chapter on farmers' rights. As adopted, the Act seeks to put farmers' rights on a par with breeders' rights. It provides, for instance, that farmers can, like commercial breeders, apply to have a variety registered.[25] Generally speaking, the Act envisages that farmers should be treated like commercial breeders and should receive the same kind of protection for the varieties they develop.

The Act also provides two avenues for benefit sharing.[26] The first scheme allows individuals or organizations to submit claims concerning the contribution they have made to the development of a protected variety. The final decision is taken by the Authority established under the Act which determines the amount taking into account the importance of the contribution in the overall development of the variety and its commercial potential. The second benefit-sharing avenue allows an individual or organization to file a claim on behalf of a village or local community. The claim relates to the contribution that the village or community has made to the evolution of a variety.

24. See Joint Committee on the Protection of Plant Varieties and Farmers' Rights Bill, 1999, REPORT OF THE JOINT COMMITTEE (August 2000).
25. S. 16.1.d, PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT 2001 [hereafter PLANT VARIETY ACT].
26. Ss. 26 and 41, PLANT VARIETY ACT.



The Biological Diversity Act 2002 (Biodiversity Act) addresses some questions which are relevant for biodiversity management in general and plant variety management specifically. The main focus of the Act is on the question of access to resources.[27] Its response to current challenges is to assert the country's sovereign rights over natural resources. It therefore proposes to put stringent limits on access to biological resources or related knowledge for all foreigners. The Act's insistence on sovereign rights reflects current attempts by various countries to assert control over the resources or knowledge they control. While the Act focuses on preserving India's interests vis-à-vis other states in rather strong terms, its main impact within the country will be to concentrate power in the hands of the government. Indeed, Indian citizens and legal persons must give prior intimation of their intention to obtain biological resources to the state biodiversity boards.[28] The Act is even more stringent in terms of intellectual property rights since it requires that all inventors obtain the consent of the National Biodiversity Authority before applying for such rights.[29] The impact of this clause is, however, likely to be limited since patent applications are covered by a separate clause.[30] Further, the Authority has no extra-territorial authority.

Overall, the Biodiversity Act implicitly takes the position that India cannot do more than regulate access by foreigners to its knowledge base. It does, however, attempt to discipline the intellectual property rights system in some respects. As noted, it requires inventors who want to apply for intellectual property rights to seek the Authority's permission. It also authorizes the Authority to allocate a monopoly right to more than one actor. Further the Authority is also entitled to oppose the grant of intellectual property rights outside India.[31] The Act also seeks to address the question of the rights of holders of local knowledge by setting up a system of benefit sharing. The benefit sharing scheme is innovative insofar as it provides that the Authority can decide to grant joint ownership of a monopoly intellectual right to both the inventor and the Authority or the actual contributors if they can be identified.[32] However, the sharing of

27. The only substantive chapter of the BIOLOGICAL DIVERSITY ACT 2002 – Chapter II – is entitled Regulation of Access to Biological Diversity.
28. S. 7, BIOLOGICAL DIVERSITY ACT.
29. S. 6, BIOLOGICAL DIVERSITY ACT.
30. Permission of the National Biodiversity Authority must be obtained before the sealing of the patent but can be obtained after the acceptance of the patent by the patent authority. *See* S. 6.1, BIOLOGICAL DIVERSITY ACT.
31. S. 18.4, BIOLOGICAL DIVERSITY ACT.
32. S. 21.2.a, BIOLOGICAL DIVERSITY ACT.

intellectual property rights is only one of the avenues that the Authority can choose by way of discharging of its obligation to determine benefit sharing. It is also in the Authority's power to allocate rights solely to itself or a contributor such as a farmer contributor. Other forms of benefit sharing include technology transfers, benefit claimers becoming associated with research and development or the location of production, research and development units in areas where this will facilitate better living standards to the benefit claimers.

Finally, plant variety protection is also influenced by the patent legislation. While the Patents Act as adopted in 1970 dealt with patents in general and was not specifically related to biological resources, it addressed a number of issues that are of relevance in the context of PGR management. It rejected, for instance, the patentability of all methods of agriculture and was generally much more restrictive than similar laws in western countries. TRIPs has imposed significant alterations to this Act. The Patents (Amendment) Act 2002 has generally modified the Act to allow compliance with TRIPs.[33] The Amendment Act brings the duration of the rights to a uniform 20-year period and also substantially modifies the sections concerning the working of the patents by, for instance, doing away with licences of rights. The provision which seeks to oblige patentees to manufacture their inventions in India was also struck out because of the TRIPs requirement that imports should not be treated differently from products locally produced.[34] With regard to environmental protection, the Amendment Act includes some of the TRIPs exceptions related to environment and health. It also addresses the question of biopiracy by imposing the disclosure of the source and geographical origin of biological material used in a patented invention. Further, non-disclosure of the geographical origin or the anticipation of the invention in local or indigenous knowledge constitutes grounds for opposing or revoking a patent.

## IV. Plant Variety Protection for Food Security

As noted above, there are a number of different actors involved in plant variety management, all with the ultimate aim of enhancing food security. Existing conditions indicate that while a significant segment of the overall population has easy access to sufficient food, there remain crores of people whose basic food needs are not met. In an economy where employment remains mostly in the agricultural sector, it is therefore of primary importance to make sure that the legal regime which is being

33. *See* Patents (Amendment) Act 2002.
34. Art. 27, TRIPs Agreement, *supra* n. 1.



set up favours access to food for the majority of poor people and fosters farmers' control over their land, crops and knowledge. This section argues that the current legal regime does not go far enough towards empowering farmers. Further, on the basis of the new PGRFA Treaty it argues that a broader conception of farmers' rights should be adopted with a view to foster farmers' hold over their knowledge and with a view to comprehensively implement all international obligations in this field.

### *1. Assessment of the current legal regime*

The legal framework put in place until now can be looked at from two completely different angles. On the one hand, the Indian Plant Variety Act is among the most progressive plant variety protection legislations adopted by a developing country in furtherance of its TRIPs obligations. The apparent will to provide equal rights to commercial breeders and farmers is farsighted insofar as it indicates a clear understanding that the forces shaping globalisation require the assignment of property rights to all concerned actors in the different fields where appropriation is taking place. In particular, it is noteworthy for providing a clear acknowledgment that farmers' rights can be conceived as intellectual property rights, in exactly the same way as other products of human creativity. On the other hand, it appears quite likely that the chapter on farmers' rights will not be implemented. Firstly, farmers' rights were introduced as an afterthought to the first draft which contained only rudimentary farmers' rights. The Act provides only one set of criteria for registration – which are the criteria taken from the UPOV Convention for the protection of commercial breeders' varieties – and as a result, it will be extremely difficult for farmers to register their varieties even though they are entitled to it. Secondly, the decision of the Government to formally join UPOV will at least put pressure on the Plant Variety Authority to favour commercial breeders over farmers and at worst may lead to the Authority either formally or informally not implementing the provisions of the Act concerning farmers' rights. As a result, though this Act theoretically recognises farmers' rights, a lot remains to be done for farmers' rights to become a reality in the form of intellectual property rights. The protection of traditional knowledge is also taken up in the Biodiversity Act which focuses on the appropriation of Indian traditional knowledge by foreigners but does not empower holders of traditional knowledge with rights to stop unwanted appropriation within the country. Another shortcoming of the Plant Variety Act is that, though TRIPs compliant insofar as it provides for a *sui generis* option within the narrow confines of Article 27.3.b of TRIPs, it only deals with plant variety management from the point of view

of their commercialisation and fails to take into account the fact that commercial activities cannot be separated, either legally or in practice, from the conservation of agricultural biodiversity, the rights of farmers and that of the state.

Apart from the specific problem concerning farmers' rights, the current legal framework is fraught with inconsistencies which are linked to the different origins of the Acts. Each of the three legislative instruments examined above have been individual responses to specific international obligations which have been addressed by different ministries and departments according to the main focus of the concerned treaty. The result is a legal framework which lacks a sense of unity and purpose and instead comprises a collection of defensive responses to international commitments, rather than a cohesive strategy to address internal problems. Consequently, there are, for instance, a number of overlaps between the benefit-sharing regimes proposed in the Biodiversity Act and the Plant Variety Act while the Patents Act does not even acknowledge the issue of benefit-sharing despite the fact that benefit-sharing is on the whole a direct consequence of the introduction of intellectual property rights in the agricultural field.

### *2. The need for a broader conception of farmers' rights*

The preceding section indicates that there are some general and some specific problems in the adopted legal regime for plant variety management and protection. A number of these problems are of a technical nature and relate, for instance, to the lack of coordination between the different acts. One more substantive issue is the question of farmers' rights or the rights of farmers over their traditional knowledge. The need to find a more comprehensive answer to this issue has been made more pressing with the ratification by India of the new PGRFA Treaty. This importance of this treaty is linked to the fact that it directly links biodiversity conservation, biodiversity use and farmers' rights and to the fact that it constitutes a direct response to the introduction of intellectual property rights in agriculture through patents and plant breeders' rights.

The existence of different treaties separately addressing plant variety management and protection makes their joint implementation an onerous task for member states. This process must, however, be undertaken because this is exactly what international law requires, and because this constitutes one important avenue to foster food security at all levels within the country. As a result of international obligations in this field and with a view to foster food security, a comprehensive plant variety protection



regime should include the following elements: the protection of commercially relevant knowledge; the conservation and management of biological resources and plant genetic resources; the protection through property rights of traditional knowledge; and the recognition that plant variety management and protection is intrinsically linked to the fundamental human right to food. In other words, a legal regime concerning plant varieties should not stop at what is commercially useful today but should incorporate, for instance, human rights considerations linked to food security.

Given that the emphasis at the international level has generally been on defining and strengthening the rights of exclusively commercially minded actors through patents and plant breeders' rights, the definition of a broader regime need not add much to existing and well-developed rights. It should rather focus on farmers' rights and the mainstreaming of biodiversity management and traditional knowledge protection. Starting with international legal obligations, the necessity to redraft farmers' rights to make them effective has been made more pressing following the ratification of the PGRFA Treaty. While the TRIPs agreement makes no mention of the necessity to protect farmers' rights, the PGRFA Treaty – while not defining farmers' rights at the international level – specifically puts the onus on member states to make farmers' rights a reality.[35] A few of the substantive elements that make up farmers' rights are indicated in the Treaty. These include, the protection of traditional knowledge, equitable benefit sharing, and the right to participate in decisions concerning the management of plant genetic resources. In other words, the Treaty steers countries towards recognising the need for giving farmers control over their knowledge for reasons of justice as well as to foster sustainable use and conservation of plant genetic resources. However, it leaves member states free to decide on the most appropriate framework for the same. There are a number of other elements in the PGRFA Treaty which point the direction for further work in this area, both in domestic and international law. The access and benefit-sharing regime instituted under the PGRFA Treaty is, for instance, much more developed and comprehensive than the one under the Biodiversity Convention. The PGRFA Treaty also indirectly highlights that it is difficult to distinguish biological resources, genetic resources and related knowledge. Indeed, the definition of genetic resources under the Treaty includes reproductive and vegetative propagating material that contains functional units of heredity.[36] More

35. Art. 9.2, PGRFA TREATY, *supra* n. 2.
36. Art. 2, PGRFA TREATY, *supra* n. 2.

broadly, the Treaty links plant genetic resource conservation, intellectual property rights, sustainable agriculture and food security.

Some indications of the possible shape of a comprehensive farmers' rights regime at the domestic level can be given. Firstly, farmers' rights should be conceived as a positive mechanism giving traditional knowledge holders property rights and therefore full control over their knowledge. This involves allowing farmers to commercialise their own knowledge. In this sense, farmers' rights are based on the recognition that all economic actors should have commercial rights over their knowledge, and not only one specific category of inventors. A further justification for the introduction of farmers' rights is the role that property rights play in fostering the sustainable use and the conservation of resources due to the intrinsic link between the knowledge and the resource and the requirement of ownership of both to foster their conservation. In this sense, farmers' rights are perfectly suited to play a multiple role in granting full property rights to farmers which allow commercialisation if desired, in contributing to agro-biodiversity conservation, and simultaneously fostering food security at the local level. Overall, farmers' rights should be conceived from the point of view of farmers and in accordance with their view of sustainability and commercial use. If this is not achieved, there is a significant danger that farmers' rights will be used only as a way to force poor farmers to maintain agro-biodiversity for the global good of humankind with minimal personal rewards.[37]

Secondly, in the context of the multiple goals of farmers' rights, other actors involved in agro-biodiversity management should also have duties towards the promotion of food security, agro-biodiversity conservation and sustainable use. While farmers directly benefit from agro-biodiversity conservation, the global community also benefits in direct and indirect ways. This calls for the sharing of conservation obligations on an equitable basis between all actors benefiting from the exploitation of agro-biodiversity. This burden should not only be spread amongst farmers and local firms marketing seeds, foodstuffs and other crops but also at the international level, given that outside firms, individuals and eventually the international community benefit from these conservation activities.

Thirdly, the question of the introduction of farmers' rights includes important issues concerning the holders of the rights. Intellectual property

37. *Cf.* FAO Commission on Plant Genetic Resources, Revision of the International Undertaking. Analysis of Some Technical, Economic and Legal Aspects for Consideration in Stage II: Access to Plant Genetic Resources, and Farmers' Rights, Doc. CPGR-6/95/8 Supp.



rights such as patents are often conceived as purely individual rights even though in practice, they can easily be shared among several individuals or entities. Intellectual property rights can less easily lend themselves to shared management in the case of an unidentifiable number of rights holders. Farmers' rights present specific problems in this field. In some instances, specific individuals may make individual contributions to the development of a new or improved plant variety. In this situation, the model provided by individual rights can be applied in the case of farmers' rights. This case is, however, likely to be at most infrequent given that novelty is very often the product of direct or indirect collaboration between different individuals and/or communities. As a result, farmers' rights are likely to be of a communal nature. The usual intellectual property rights model is not well suited to the recognition of common property rights over knowledge because it generally seeks to individualise contributions to the development of science and technology. As a result, it will be necessary to develop new tools to take into account the special nature of knowledge pertaining to plant genetic resources. Even in cases where contributions by specific individuals can be identified, it may not be equitable to assign rights to specific individuals because the subject matter of farmers' rights is closely linked to food security which is of direct interest to each and every individual in the local community and beyond. One way to solve the problem of allocation in countries like India which have institutions of local democratic governance is to determine that panchayats or their equivalent elsewhere should be the centre/entity for locating the ownership of farmers' rights. With appropriate safeguards to ensure that panchayats do not replicate economic inequalities between members of a local community, they can constitute an appropriate institutional framework for ensuring that everyone benefits from any existing entitlements. The rationale for not following the usual individual allocation model is that knowledge pertaining to plant genetic resources is directly related to the fulfilment of basic food needs for all individuals, landowners, farmers, manual labour and non-farming individuals in a given community. Farmers' rights seek to give control to individual and local communities over their knowledge and resources. This does not imply that the rights conferred must be to the exclusion of any other similar right elsewhere. In terms of the possible commercialisation of the product, this indicates that instead of a monopoly right, all rights holders are entitled to separately manufacture and commercialise their own products without infringing anyone's right.

Fourthly, the question arises of the uses to which farmers' rights can be put. From a broad perspective, these can be summarised under 'defen-

sive' and 'positive' functions. The former will be there to help farmers fight the appropriation of their resources and knowledge with legal tools. Today, the whole of 'traditional knowledge' is deemed to be in the public domain because it cannot be assigned through patents or plant breeders' rights. Farmers' rights constitute a first step towards re-establishing a fair playing field in which all actors have claims over their knowledge. Farmers' rights will also constitute the basis for claims of benefit-sharing as recognised at the national and international levels. The positive function of farmers' rights is the most innovative and important in the long run. In a world where all resources and knowledge are being assigned, it is imperative for reasons of equity and food security that farmers and farming communities acquire control sanctioned by the law as this constitutes one of the few ways in which incentives for agro-biodiversity conservation and innovation at the local level can be maintained. The commercial use of the protected knowledge may serve as an added bonus which traditional knowledge holders may or may not use.

## V. Conclusion

The introduction of diverse forms of intellectual property rights in the agricultural field is on the whole completely novel in India and mainly linked to the necessity to comply with India's existing international obligations and to the general trend towards the privatisation of knowledge in recent decades. This new system is in complete contradiction with the previous system of agricultural management which privileged the sharing of resources and knowledge concerning plant varieties by all actors from local farmers to those at the international level. In this context, while individual property rights over state-of-the-art inventions are being strengthened in large part in response to WTO related obligations, the development of strong and effective farmers' rights is of increasing importance. This should allow them to defend their interests against fraudulent appropriation and to allow them to benefit from their own knowledge in a legal and commercial sense if they so wish. Farmers' rights should, however, not be conceived strictly along the lines of existing intellectual property rights such as patents and plant breeders' rights. In fact, while the commercialisation of food crops may be important to all actors engaged in agricultural management, it is by far not the only relevant consideration. Much broader issues such as the conservation and sustainable use of agro-biodiversity and food security for each and every individual are as important and probably much more central than commercial considerations in a field which directly concerns the fulfilment of basic food needs. In this sense, the introduction of farmers' rights fulfils a number of



significant functions both from a socio-economic and socio-ecological point of view:

- Farmers' rights contribute to making the legal system fairer by providing property rights to all relevant actors in plant variety management;
- Farmers' rights contribute to the recognition of the contribution of farmers to food security, to conservation and sustainable agro-biodiversity management and to innovation in agricultural management; and finally
- Farmers' rights will make an enormous contribution to food security by fostering control, not only over resources and land but also over knowledge for the dozens of crores of people who are directly engaged in small-scale agricultural management.

Conversely, the development of farmers' rights provides an opportunity to re-examine patents and plant breeders' rights. This should contribute to make these more 'traditional' intellectual property rights more relevant to the field of agriculture by, for instance, imposing new conditions on rights holders concerning both traditional knowledge and biodiversity conservation.

# RESOURCES AND FOLKLORE: INDIAN APPROACH TO LEGAL OBLIGATIONS

*Suman Gupta**

The economic, scientific and commercial values of traditional knowledge, traditional knowledge associated with genetic and bio-resources, and folklore have attracted widespread attention. Globalisation, new technology, and increased international trade have raised new intellectual property issues. Biotechnological revolution has made it possible for the pharmaceutical industry to take keen interest in genetic resources and traditional methods of medical care. Similarly, folklore traditions are also being exploited by various ways. These new issues have raised the question for efficient and effective protection of traditional knowledge and rights and interests of traditional knowledge holders. The World Intellectual Property Organization (WIPO) has done significant work to facilitate discussion on these new intellectual property issues regarding genetic resources, traditional knowledge and folklore. As the problem has complex legal and ethical as well as economic and social dimensions, the WIPO has established the Intergovernmental Committee on Genetic Resources, Traditional knowledge and Folklore, to provide a forum for the Member states to discuss these issues. The Intergovernmental Committee[1] was established in September 2000. In its two meetings, held so far, more than 100 States, 50 non-governmental organizations, numbers of other intergovernmental organizations along with the persons from the local communities have participated to discuss the issues concerned. At its first Session, the Committee tried to give equal weight in the discussions to each of the three elements i.e. Genetic Resources, Traditional Knowledge, and Folklore. The Committee discussed the determination of legal standards and practical measures to facilitate activities in these three fields.

## I. Protection of Genetic Resources

Issues concerning Genetic Resources and related traditional knowledge

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1. Henry Olsson, The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore WIPO/GIC/UK/CNR/VI/12 (2002)



and their relationship with intellectual property rights were in fact first mentioned in the Convention on Biological Diversity[2] (CBD), which was adopted on 5th June 1992. The objectives of the CBD are conservation of biological diversity, the sustainable using of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[3]

To fulfil these objectives, it is necessary that Member States obtain advanced technological means and measures to conserve biological diversity. The development, exploitation and commercialisation of these advanced technological means in the field of biotechnology rely on available genetic resources. The protection of intellectual property is very important in the development and exploitation of advanced technologies. Thus the CBD involves intellectual property issues in relation to access to genetic resources, bio-technical inventions and traditional knowledge. The main principles established by CBD provide that the Member States have the sovereign right to exploit their own resources pursuant to their own environmental policies[4]; that access to genetic resource shall be subject to "Prior Informed Consent" of the providing party[5]; that the benefits arising from the commercial and other utilization of genetic resources should be shared in a fair and equitable way[6] and that access to genetic resources and sharing benefits, both shall be upon mutually agreed terms, named as Contractual Agreements.[7] The Intergovernmental Committee of WIPO at its First Session adopted five Work Programs on its agenda for the solution of problems relating to Genetic Resources. They are as follows:

2. United Nations Convention on Biological Diversity (CBD) signed at Rio de Janeiro, on 5th June 1992 and came into force on 29th December 1993. India ratified it in February 1994.
3. Art. 3.
4. Art. 3
5. Art. 15 (5).
6. Art. 15(7).
7. Art. 15(7). Through its 42 Articles, the CBD recognizes national sovereignty over biological resources, calls for taking general measures for conservation and sustainable use, identification and monitoring of components of biological diversity, *in-situ* and *ex-situ* conservation, sustainable use of components of biological diversity, incentive measures, research and training, public education and awareness, impact assessment and minimizing adverse impacts, access to genetic resources on mutually agreed terms and with 'prior informed consent' of the country providing the resources. It also provides for transfer of technology including biotechnology on fair and most favourable terms from developed to developing countries.

### *A. Prior Informed Consent*

The issue of 'Prior Informed Consent' in relation to Genetic Resources and Related Traditional Knowledge has been highlighted in the CBD. The first task of the Intergovernmental Committee which is concerned with the development of appropriate provisions or guidelines for National Patent Laws to ensure consistency between the granting of patents and measures which the States have taken to control access to genetic resources deal with the issue of prior informed consent.[8] Thus, Prior Informed Consent is a condition for the granting of patents on the basis of genetic resources. This task has not so far been dealt in detail in the Intergovernmental Committee.

### *B. Patentability of Biotechnology Inventions*

The second task of Intergovernmental Committee concerns the Development of Legal Standards (in the form of Guidelines) relating to the availability and scope of patent protection to structures and compositions derived from, or isolated from, naturally occurring living organisms and also to early stage biotechnology inventions.[9] No active work has been undertaken on this issue until now.

### *C. Benefit–Sharing*

The third issue concerns benefit-sharing from the use of genetic resources. The task of Intergovernmental Committee is to develop practical and low cost mechanisms to implement benefit-sharing arrangements under multilateral system for access to genetic resources and such benefit-sharing. In this task also, the work has not progressed much.

### *D. Guide Contractual Practices*

This is a practice-oriented task where sufficient progress has been made. Guide Contractual Practices relates to development of Guidelines and Model Intellectual Property Clauses for access to genetic resources and benefit sharing. The Committee gave support for the construction of WIPO database containing information in this respect and to disseminate a questionnaire to gather information to be put into the database. The Committee believed that it would be of great practical value.

8. International Bureau of WIPO, INDUSTRIAL PROPERTY PROTECTION OF BIOTECHNOLOGICAL INVENTIONS BIOT/CE/I/1 and BIOT/CE/IV/2.
9. International Bureau of WIPO, WIPO AND INTERNATIONAL COOPERATION IN RELATION TO PATENTS WIPO/PS/KL/86/1.



### *E. Management of Genetic Resources*

The fifth task of the Committee is to take measures to improve the management of genetic resources for effective conservation. This task did not receive much support and has not been pursued till now.

## II. PROTECTION OF TRADITIONAL KNOWLEDGE

Exploitation of traditional knowledge has increased in industrial activity. Patents have been granted for inventions, which were actually not new as they reflected only previously known traditional knowledge. Local and tribal communities over generations have bred races of several food, medicinal and cash crops. The landraces bred by farming communities are the foundation material of modern plant breeding and global food security. There would be no plant breeders working on experimental farms if it were not for the prior knowledge gained from these rural and tribal communities. Thus, these people own the bio-resources in their region since it is they who maintain them and possess the knowledge of their properties and use. This traditional knowledge automatically confers on them certain rights including the right to share the benefits. This new problem asks for better protection for traditional knowledge.

### *A. Need and Importance of giving a Proper Definition to Traditional Knowledge*

While dealing with the intellectual protection to traditional knowledge, it is very important to define as precisely as possible, what the term traditional knowledge means. The definition of traditional knowledge has different meanings when used for different purposes, such as sociological, historical or legal purposes. The concept of traditional knowledge may refer to "indigenous knowledge, traditional medicine, or knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."[10] The CBD uses the term traditional knowledge as "a term used to describe a body of knowledge built by a group of people through generations living in close contact with nature." The WIPO uses the term traditional knowledge to refer to tradition based literary, artistic or scientific works; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information, etc.

10. Song Jianhua, INTELLECTUAL PROPERTY AND GLOBAL ISSUES: IP PROTECTION FOR TRADITIONAL KNOWLEDGE, ACCESS TO GENETIC RESOURCES AND FOLKLORE, WIPO/IP/DEL/02/2 (2002).

This highly diverse and dynamic nature of traditional knowledge makes it impossible to develop a single and exclusive definition of the term. The Intergovernmental Committee, at its Third Session, discussed a document on "operational definition of traditional knowledge." No conclusion was, however reached. It has been left to the Secretariat to prepare a document on the various elements, which could make up a working definition in the next session of the committee. The Committee has also decided, with consensus of members, to make efforts to delineate the scope of subject matter for the purpose of having a definition of traditional knowledge. This is necessary for assessing the availability and scope of intellectual property protection for traditional knowledge within the scope of subject matter covered by definition, and also identifying any elements of this subject matter that require additional protection.

One more reason for giving a relatively precise and exact definition and scope of the subject matter is for drafting domestic legislation and international negotiations. A definition is also necessary to differentiate it from folklore because the protection of expressions of folklore is a separate topic. In addition, the approach of some countries to protect expressions of folklore usually has some relationship with or has been incorporated in copyright law. Thus the task of the Committee is focused on these three areas – genetic resources, traditional knowledge and expression of folklore. Therefore, it is better to exclude elements related to folklore while drafting the definition of traditional knowledge for purpose of domestic legislation and further negotiations.

### *B. Means for Protection of Traditional Knowledge*

The protection of traditional knowledge received growing attention following the adoption of the CBD in 1992. The CBD seeks to encourage access to the world's genetic resources, traditional knowledge and folklore resources provided they are utilized with the informed consent of the holder of the resources and any benefits derived from the access are shared in equitable manner. However, divergences exist as to whether intellectual property rights should be applied and if applied what should be the rationale and modalities of protection; and should protection be through the establishment of a new or *sui generis* form of protection. Another alternative is the *misappropriation option*, i.e. to establish a mechanism to prevent third parties from unduly appropriating traditional knowledge. The protection of traditional knowledge concerns two distinct elements: passive protection and active protection.



Passive Protection – Integration of Traditional Knowledge into Searchable Prior Art: It requires ensuring that patents are not granted for inventions based on previously known traditional knowledge. In various cases patents have been granted for the inventions which were not new but only a slight improvement on previously known traditional knowledge. Thus, it has become important to take measures to integrate such documentation into searchable prior art for the purpose of patent examination. The Intergovernmental Committee has initiated number of activities for this purpose.[11]

Thus, traditional knowledge may be used as *prior art* in course of patent examination. The purpose is to prevent applications involving traditional knowledge from being granted patents. These measures will protect the interests and economic benefits of traditional knowledge holders, who could be individuals, families, communities, or even countries. We know that traditional knowledge has been developed by communities and distributed by oral means, and in addition there is almost no record of its documentation, so *Patent Examiners* are not able to Search and Use the related traditional knowledge to evaluate patent applications that are generated from traditional knowledge. This makes it important that the problem of documentation of traditional knowledge should be solved first.

Active Protection of Traditional Knowledge: It means the development of a *sui generis* protection system for such knowledge. The passive protection of traditional knowledge ensures that patents are not granted for those inventions that are based on previously known traditional knowledge. However, active protection ensures that traditional knowledge enjoys some kind of Intellectual Property Protection. Active Protection can be made in two ways:

1. Application of Existing Intellectual Property Standards to provide Protection for Expressions of Traditional Knowledge: It is

11. Activity 1: Preparation of an Inventory of Traditional Knowledge related Periodicals, Gazettes, Newsletters, etc. For this inventory, number of suggestions have been made such as integration of this inventory in the Minimum Documentation List of the PCT (Patent Cooperation Treaty). Inventory has to be taken into account by the International Patent Classification Task Force on the Classification of Traditional Knowledge; inventory should be uploaded on the WIPO Website.
Activity 2: Secretariat should prepare an Intellectual Property Tool Kit to facilitate the understanding of the intellectual property implications of the documentation of Traditional Knowledge.
Activity 3: Preparation of an Inventory of existing Databases on Disclosed Traditional Knowledge.

important to assess to what extent existing intellectual property system could provide protection to expressions of traditional knowledge. Such protection can be provided through the application of systems for the protection of trademarks, geographical indications, patents, copyright and related rights, trade secrets and industrial designs.[12]

2. Development of New Intellectual Property Standards for the Protection of Traditional Knowledge: It is necessary that new intellectual property tools must be developed and designed to provide additional protection to traditional knowledge, because protection by the existing standards is not complete. The existing intellectual property system does not properly protect traditional knowledge because of its particular characteristics, such as its transmission from generation to generation in constantly changing environment and furthermore the objective of existing system is the protection of private rights. As the intellectual property system is itself in a progressive stage the development of new tools may not be impossible. The WIPO Convention has taken a broad concept of intellectual property. It provides that: "[i]ntellectual property shall include existing intellectual property rights and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields". This concept provides a strong base for developing new intellectual property standards for the protection of traditional knowledge.

The Intergovernmental Committee at its Third Session explored the possible structure of a *sui generis* system for the protection of traditional knowledge. It found that certain elements need further study and more discussions. Some of these elements are: The policy objective of the

12. Trademarks: Traditional knowledge holders can have their knowledge protected through registering Collective and Certification Trademarks to establish signs under which goods manufactured in accordance with particular traditional methods or standards are sold.
Geographical Indications: Holders can also use geographical indications to protect their traditional products.
Patents: Patents could protect traditional knowledge, inventions or innovations based on traditional knowledge by filing collective patent applications through associations of traditional knowledge holders.
Copyright and Related Rights: Traditional knowledge holders can protect their "moral rights" under copyright and compilations of traditional knowledge documentation through the concept of original and non-original database protection.
Trade Secret: Traditional knowledge may also be protected by means of trade secret and law of unfair competition.



protection; the subject matter for protection; the criteria according to which such subject matter should be protected; the ownership of the rights; the rights to be granted; the means for acquisition of the rights; the administration of the rights; and the term of protection and expiry of the rights.

Thus, protection of traditional knowledge could be setup in two different tracks, the folklore track and biodiversity track. The folklore track will emphasize the cultural contexts in which traditional knowledge operates while the biodiversity track will concentrate on biodiversity associated traditional knowledge. There is also a need to explore the interaction between *sui generis system* and existing intellectual property protection system.

## III. Protection of Expressions of Folklore

Folklore is cultural heritage of a nation that is still developing in its contemporary forms. It has specific importance for developing countries, as it is a base of their cultural identity and means of self-expression within their own communities as well as in their relation with the world. So, folklore is a living, functional tradition rather than a souvenir of the past. The notion of folklore covers a number of artistic expressions in the form of songs, music, dance and handicrafts developed by the communities or individuals over the centuries in changing phenomenon.[13]

### *A. Need and the History of the Protection of Folklore*

The developing technology, particularly in the fields of sound, audio visual recording, broadcasting, cinematography and cable television has lead to exploitation of this cultural heritage. Expressions of folklore are not only commercialised without any respect for the cultural or economic interests of the communities in which they originate, but are also distorted for marketing them. The Neighbouring Rights cannot fully provide protection against the improper use of folklore, since they cannot prevent the copying of expressions of folklore that are not performed, broadcast or contained in phonograms. Furthermore, the limited duration of the protection of neighbouring rights does not fit folklore as the limited duration of copyright does not fit it. The protection of expressions of folklore by means of copyright law was undertaken in the Diplomatic Conference of Stockholm (1967) for the Revision of the Berne Convention. Article 15(4)

13. Ana Maria Pacon, The Protection of Traditional Knowledge in Peru, WIPO/IP/Del/02/4 (2002).

of the Stockholm (1967) and Paris (1971) Acts of Berne Convention says that:

(a) in the case of unpublished works where the identity of author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for the legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union that make such designation under the terms of this provision shall notify the Director General (of WIPO) by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.[14]

After this, in 1978, at the meeting of WIPO's Governing Body it was felt that very few countries had formulated legal norms to protect folklore. The International Bureau of WIPO then prepared a first draft of *sui generis* Model Provisions for an intellectual-property-type national protection of folklore against certain unauthorized uses and against distortion. This draft was submitted in Daker in 1979 to WIPO's Permanent Committee on Copyright and Neighbouring Rights. This Committee recommended that a joint WIPO/ UNESCO Working Group should be convened and should deal not only with domestic but also with international aspects of the legal protection of folklore creations. WIPO and UNESCO convened Working Group in 1980 at Geneva to study the Draft Model Provisions as well as international measures for the protection of folklore. This working group recommended that the Secretariats of WIPO and UNESCO should prepare a revised draft taking into consideration all the interventions made in Working Group. The Secretariats prepared the revised draft and submitted it in the Second Meeting of Working Group at Paris in 1981. The outcome of this meeting was submitted in 1982 to a Committee of Government Experts, convened by WIPO and UNESCO at Geneva. The Committee adopted what is now called, "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" referred as "Model Provisions".[15]

14. WIPO, INTELLECTUAL PROPERTY READING MATERIAL, Publication No.476 (E) 179-80 (1995).
15. *Ibid.*



The issue of the protection of the folklore is now also on the agenda of the Intergovernmental Committee. The Committee proposed three activities in this context: (i) Updating of the model provisions; (ii) Improving of the protection of handicrafts and other tangible expressions of folklore and (iii) Revival of the efforts to establish an international protection system. The secretariat prepared a detailed Report on the National Experiences with the Legal Protection of Folklore and proposed four activities (i) Increased legal-technical assistance to countries for a better protection of folklore; (ii) Updating of the Model Provisions; (iii) International protection of expressions of folklore in the form of a *sui generis* system and (iv)Studying the relationship between customary laws and protocols in the folklore field and the formal intellectual property system.

### *B. Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*[16]

The basic principle in providing for legal protection is maintaining a proper balance between protection against abuses of expressions of folklore and the freedom and encouragement of their further development and dissemination as well as adaptation for creating original author's works inspired by folklore. This is because, a major part of expressions of folklore forms a living body of human culture which should not be restricted in its unfolding or influence on creativity by too rigid protections.

Definition and Subject Matter of Protection: Model Provisions do not provide any definition of folklore. However Section 2 defines the term "expressions of folklore". It provides that, "expressions of folklore are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community". The use of words "expressions" and "productions" rather than "works" is to underline the fact that the provisions are *sui generis* rather than of copyright, since "works" are the subject matter of copyright. Expressions of folklore are subdivided into four groups depending on the form of "expression", namely,

16. *Id.* at 180-87.

| | | | |
|---|---|---|---|
| 1. | Expression by words | "Verbal" | folk talks, folk poetry and riddles |
| 2. | Expressions of musical sounds | "Musical" | folk songs and instrumental music |
| 3. | Expressions by the human body | "by action" | folk dances, plays and artistic form of rituals |
| 4. | Expressions incorporated in a material object | "tangible" | drawings, paintings, pottery, terracotta, woodwork, metal work etc. |

The first three groups need not be reduced to material form, i.e., words need not be written down, music need not exist in the form of musical notation and the bodily action need not exist in written choreographic notation. The fourth group called tangible expressions must be in a permanent material form, such as stone, wood, textile, gold, silver or any other metal etc.

Illicit exploitation and prejudicial actions: Section 1 of Model Provisions defines two main categories of acts against which expressions of folklore are protected. They are: Illicit exploitation and other prejudicial actions.

Illicit Exploitation: It means any utilization of expression of folklore if it is made both with gainful intent and outside its traditional or customary context without authorization by a competent authority or the community concerned. This definition means: any utilization, even with gainful intent, within the traditional or customary context is not subject to authorization; and any utilization, even by members of the community where the expression has been developed and maintained, outside that context and with gainful intent requires authorization. "Traditional Context" means using an expression of folklore in its proper artistic framework based on continuous usage by the community, for example, to use a ritual dance in its traditional context means to perform it in the actual framework of the respective rite. "Customary Context" refers to utilization of expressions of folklore in accordance with the practices of everyday life of the community, for example, usual ways of selling copies of tangible expressions of folklore by local craftsmen. A customary context develops and changes more rapidly than traditional context. Section 3 specifies various acts of utilization that requires authorization.

Other Prejudicial Actions: Section 5 of Model Provisions explains four distinct offences detrimental to interests to the use of expressions of folklore: (i) In all printed publications, and in connection with any communication to the public of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived. Non-compliance is subject to punishment under Section 6; (ii) Unauthorized utilization of an expression of folklore where authorization is required constitutes an offence; (iii) Deception of the public, by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case, is also punishable and (iv) Public utilization distorting the expression of folklore, in any direct or indirect manner, "prejudicial to the cultural interests of the community concerned" is an offence. The term "distorting" covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore published, reproduced, distributed, performed or otherwise communicated to the public by the accused. Section 6 is penal section that provides punishment.



Permitted Use: Model Provisions do not prevent indigenous communities from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation. This is necessary because keeping alive a traditional popular art is closely linked with reproduction, recitation, or performance of traditional expressions in the originating community. The requirement for authorization to adapt, arrange, reproduce, recite or perform such creations can place a barrier in the way of the natural evolution of folklore and even they could not be enforced in societies in which folklore is a part of life. This is the reason that Modern Provisions allow, "any member of a community of the country to freely reproduce or perform expressions of the folklore of his own community in their traditional or customary context, irrespective of whether he does it with or without gainful intent and even if it is done by means of modern technology provided such technology has been accepted by the community as one of the means of the evolution of its living folklore" Section 4 sets out four special cases, in which there is no need to obtain authorization even if utilization has been made against payment and outside its traditional or customary context. They are: use or utilization for purposes of education; utilization made "by way of illustration" in any original work of an author, provided that such utilization is compatible with fair practice as it is understood in the country concerned; expressions of folklore borrowed for creating an original work of an author and "incidental utilization" which includes utilization in connection with reporting on current events and utilization of images where the expression of folklore is an object permanently located in a public place.

### *C. Enforcement of the Protection of Expressions of Folklore*

Who Authorises Utilization of Expressions of Folklore: Model provisions refer to "competent authority" and "community concerned", and avoid the term "owner" of the expression. The reason is that in some countries, expressions of folklore are regarded as the national property, while in other countries, the sense of ownership of the traditional artistic heritage may be more developed in the communities themselves. Thus, in countries where aboriginal or other traditional communities are recognized as owners fully entitled to dispose off their folklore and are sufficiently organized to administer the utilization of folklore, such uses may be subject to authorization by the community itself. However, in countries, where the traditional artistic heritage of a community is considered as a part of cultural heritage of a nation/ or where the communities concerned are not organized to administer the use of their folklore themselves, "competent authorities" may give authorization (Section 9).

Process of Authorization: Section 10 provides that an authorization must be preceded by an application submitted to competent authority. The task of competent authority is to grant authorization for certain kinds of utilization, to receive applications for authorization of such utilizations, to fix and collect fees if required by law.

Use of Fee: Section 10 of Model Provisions deals with the purpose for which the collected fee must be used. The fee must be used for promoting or safeguarding the national culture and folklore. Certain percentage should go to the community concerned and rest should cover the costs of administration of the authorization system. Where fees are directly collected by the community the use of fee is also decided by the community. The State, if want to share revenue can either impose tax or share by other measures.

## IV. The Indian Approach

Biotechnology, which was confined to laboratory, has now entered into the market. Its raw material is genes, cells and living organisms like bacteria, plants and animals. The application of biotechnology in various economic sectors have made it a money-spinner, so corporate giants of the world seek control over it. The biotechnological revolution has taken place in the developed countries i.e. the developed world has the technological tools needed to convert genes to products and then to money. However, most of the world's bioresources are found in developing countries. Now, since bioresources constitute indispensable inputs for



biotechnology, and in order to overcome its limitations of raw material and to remain leaders of the commercial exploitation of genetic material the transnational corporations of the developed world have been making systematic efforts to corner the bioresources of developing countries. They have persuaded their governments to negotiate bilateral agreements and multilateral regimes. The use of bioresources is regulated through two treaties – The General Agreement on Tariffs and Trade (GATT) now revised as World Trade Organization (WTO) and the CBD.

The developed countries thus have advanced technology in the field of genetics and genetic engineering but have little or no germplasm; on the other hand developing countries are the repositories of the genetic wealth and indigenous knowledge about how to use this wealth. India is one of the germplasm-owning countries that also has a good indigenous technology. The combination of technology with germplasm, both its own, puts India in a position to take advantage in the field of biotechnology and emerge as a global leader. Furthermore, India's future prospects for development and its place in the world economy depends upon its ability to take advantage of biotechnological revolution. India is in advantageous position to do so, not only because it possesses the bulk of the world's bioresources, but also because of the immense potentialities of applying biotechnology in the field of agricultural and natural resources development.

The cases of turmeric, *basmati* and *neem* have shown that possession of all relevant information is extremely important in order to reclaim the bioresources that foreign multinationals try to usurp from us through patenting. Equally important is the prompt enactment of legislations on subjects covered under TRIPs Agreement and the CBD. This is because rights must be established before they can be exercised. The challenge to the patenting of *basmati* rice, for example, has gone by default because we have not taken legal action to claim *basmati* as a geographical designation. *Basmati* rice is associated with India and Pakistan as a product special to that region, similar to that of France with Champagne wine and Scotland with Scotch whisky. By selling *basmati* rice without an agreement with India and Pakistan, the Americans are violating the CBD, which grants countries the ownership rights over the germplasm found in their territories. The second violation is that of geographical indication, so there is a need to be vigilant on this score since we grow and market various special products that are associated with our regions like Darjeeling tea, *Alfonso* and *Dasheri* mangoes and *Shahi Leechi*. Thus, there are three areas of concern pertaining to intellectual property rights relevant to biological materials – protection of geographical indication, protection of

the germplasm and plant varieties, and the protection of biological diversity, indigenous knowledge and benefit sharing.

Protection of Geographical Indications: The protection based on geographical indications is to be found in Section 3 of TRIPs. Articles 22, 23 and 24 deal with the protection of goods that are geographically indicated. The intellectual property regime in GATT/WTO acknowledges the claim of a region over products that are associated in a special and specific way only with that region. Unless a geographical indication is protected in the country of its origin, there is no obligation under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) for other countries to extend reciprocal protection, whereas India would be required to extend protection to goods imported from other countries which provide for such protection. Furthermore, prevention of unauthorized persons from misusing geographical indication would not only protect consumers from deception but would also add to the economic prosperity of the producers of such goods and also promote goods bearing Indian geographical indications in the export market. A geographical indication is the name of a country, place or region which indicates that particular goods originating from such areas have some special characteristics which are only due to their origin in particular geographic location. These special characteristics may be due to natural factors (such as raw material, soil, climate, temperature, moisture) or the method of manufacture or other human factors. Geographical indication is regarded by the buyers as descriptive of the geographical location of origin of goods. The protection of geographical indication is necessary in commercial relations both at the national and international level because wrongful use of it can be misleading for purchasers of goods and is contrary to honest practices and the wrongdoer gains an unfair advantage over his competitors. In view of the above circumstances, it was considered necessary to have a comprehensive legislation for providing adequate protection for geographical indications and their registration, and therefore The Geographical Indications of Goods (Registration and Protection) Act 1999 was passed.[17]

The Protection of Plant Varieties and Farmers' Rights Act 2001: This legislation was necessitated by the commitments that India made in the Agreement on TRIPs when it ratified the Uruguay GATT Round in 1994. Article 27.3(b) of TRIPs which deals with the protection of the new plant

17. Geographical indications are protected through registration and through infringement proceedings by authorised users. Any person who wrongfully uses or falsely applies geographical indication or sells goods to which false geographical indication is applied can be fined up to Rs. 3 lakh and imprisonment for a term of 6 months to 3 years.



varieties offer three options: (i) protection granted by a patent; or (ii) an effective *sui generis* system; or (iii) by a combination of the two. India adopted a *sui generis* system rather than the precast UPOV model.[18] The Act provides for the establishment of an effective system for protection of plant varieties, the right of farmers and plant breeders and the development of new varieties of plants. Protection of farmers' rights is necessary for the contribution they have made in conserving, improving and making available plant genetic resources for the development of new varieties. Protection of breeders' rights is necessary for accelerated agricultural development, to stimulate investments for research and development both in public and private sector and to facilitate the growth of seed industry to ensure the availability of high quality seed and planting material to the farmers. The Act provides for benefit sharing for the tribal, rural families or individual farmers or local communities if they establish any linkage of varieties developed by them to the new protected plant varieties registered by breeders.[19]

The Biological Diversity Act 2002: India is a party to the CBD, which has the main objective of conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of utilization of genetic resources. The role of indigenous knowledge in the realm of medicinal plants is more obvious than in crop varieties. Knowledge about the characteristics of a particular plant and its properties as a healthy substance gives medicinal plants their social and economic value. This knowledge of use has been acquired through hundreds of years of experience, trial and error and incremental refinement. The communities have developed the knowledge of the plants, animals, minerals

18. International Bureau of WIPO, PROTECTION OF EXPRESSIONS OF FOLKLORE GIC/UK/CNR/VI/12.

19. Thus, the use of farmer varieties to breed new varieties will have to be paid for. The Act constitutes a National Gene Fund, which shall be applied for payment by way of benefit sharing, compensation payable to communities, expenditure for supporting the conservation and sustainable use of genetic resources and for strengthening of *panchayat* in carrying conservation and sustainable use. The Act provides that any person who is neither a breeder nor a registered agent of the variety registered under this Act shall be infringer if either he uses, sells, exports, imports or produces such variety or give identical or deceptively similar denomination to any other variety to cause confusion in the mind of public. The penalty for infringement ranges from Rs. 50,000 to 5 lakh as well as jail term from 3 months to 2 years. Thus this *sui generis* legislation places farmers' rights at par with breeders rights and acknowledges and rewards the contribution of farmers to the development of land races and therefore to the development of new varieties. Plants breeders will first pay for the genetic material or germplasm or indigenous knowledge used by them for developing new varieties.

and other natural substances in several forms like *Ayurveda* and *Siddha* or the knowledge is still with the communities that live around forests or close to nature like tribal communities, island communities and others. The Biological Diversity Act 2002 has been enacted by Parliament to provide for conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith The Act takes into account three principal areas. These are:

1. to establish ownership rights over biological resources found in the sovereign territory of India;
2. to formulate the guidelines and structure for prior informed consent according to which user party will seek the permission of authority for access to genetic resources and
3. the conditions for material and information transfer agreements have been laid down so that use of biological resources is just, equitable and sustainable.[20]

## V. Conclusion

The adequate intellectual property protection to traditional knowledge, genetic resources and folklore is very crucial for the promotion of society. The issue is new and complex, so it needs greater caution, attention and efforts. In order to foster all these three resources as an important source of creative expression, legal protection must be provided both at a national and international level, against their improper utilization or commercial exploitation. It is of paramount importance that protection should be provided beyond the frontiers of the countries of the origin, because international measures are indispensable means of extending the protection. Consequently, there is an urgent need of multilateral treaties based on national laws. The protection of folklore was on the agenda and in 1982 the WIPO/UNESCO Model Provisions on the Protection of Expressions of Folklore were adopted. The establishment of the Intergovernmental Committee by the WIPO provides an appropriate forum to discuss all these aspects in a constructive way. In this forum, it is not only the governments but also the NGOs, local communities and indigenous peoples that take part actively in the debate. The work of the Committee has already yielded some practical beneficial results, but it needs to pay greater attention to few basic elements such as documentation of traditional knowledge, recording ownership of traditional knowledge, indication to origin of genetic resources and folklore in documents relating to intellectual proterty rights. Furthermore, the possibility of developing existing intergovernmental cultural or other appropriate agreements to also cover reciprocal protection should be considered. In India, The Protection of Plant Varieties and Farmers Rights Act 2001 and The Biological Diversity Act 2002, both seek to ensure that indigenous communities are not denied their share of profits that accrue from the commercial exploitation of the genetic resources that they have conserved. These laws also do not grant intellectual property rights protection over products and processes derived from indigenous knowledge because of the rationale that knowledge that belongs to communities should not be privatised. Whatever laws may be there, implementation can only come when communities are knowledgeable and protect it themselves. No government can by itself protect this knowledge irrespective of how many institutional structures it might have. Therefore in addition to government support, community efforts and the participation of the NGOs of the region must come together.

20. The Act provides that any person who is not citizen of India, or who is a non-resident or any body corporate that has non-Indian participation shall take prior approval of the National Biodiversity Authority for obtaining any biological resource occurring in India, or knowledge associated to it or for commercial utilization or for bio-survey. Furthermore the results of any research relating to any biological resources cannot be transferred to such persons and no person can apply for any intellectual property right without approval of the authority. Whoever contravenes or attempts to contravene or abets the above provisions shall be punishable with imprisonment for a term that may extend to five years and with fine up to Rs. 10 lakhs. The Act constitutes a National Biodiversity Fund, which shall be applied to benefit sharing, conservation and promotion of biological resources and development of areas from where such biological resources or knowledge has been accessed and socio-economic development of such areas in consultation with local bodies.

# CLINICAL LEGAL EDUCATION: ISSUES OF JUSTICE+

*Ved Kumari**

## I

It is important to begin by asking whether education should be limited to the development of personal capabilities and skills that enable a person to lead a better life and to earn a livelihood, and whether the wider social purpose of ensuring justice should be left to other agencies directly entrusted with this job? It is the basic premise of this paper that education can be and should be used to promote justice in society. It is believed that only such education is just which not only equips students with the skills required for the profession but which also leads to more just results, practices and attitudes of professionals and decision makers at different levels. For education to become justice education, it must meet three tests: (a) each course should be formulated to include issues of justice in society, (b) the methods of teaching should promote the basic values of equality and respect for difference, and (c) the education should equip the student with the theory and professional skills required in the given field of learning.

Translating this concept of justice education in the field of legal education means that it is not enough for a law school to impart knowledge and skills required by a lawyer in pursuing the profession, but that education should also sensitise the student to issues of access to justice faced by the deprived sections of society and the impact of law on such sections. Students graduating from law schools spread out to various fields of governance and justice enforcement processes. Law schools therefore have an important role to play and responsibility to discharge for promoting justice through education.

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## II

In 1997,[1] the Bar Council of India (the nodal agency charged with setting standards in legal education) made mandatory a list of 21 courses,[2] which the law schools must teach together with four other compulsory practical training courses at the LL.B. level. It will be enlightening to analyse each one of these courses to find out the focus of legal education as conceived by Bar Council of India. This paper analyses the four practical training courses prescribed in the LL.B. curricula, namely, Paper I: Moot Court, Pre-trial and Preparation and Participation in Trial Proceedings; Paper II: Drafting Pleading and Conveyancing; Paper III: Professional Ethics, Accountancy for Lawyers and Bar Bench Relations and Paper IV: Public Interest Lawyering, Legal Aid and Para-Legal Services.

The Bar Council provides that Paper-I will have three components of 30 marks each and the viva voce will be for ten marks. The first component is a minimum of three moot courts to be undertaken by each student consisting of written submissions and oral advocacy. Secondly, the students are required to attend two trials in the course of their LL.B. studies and to maintain a record of various steps observed during their attendance on different days in the court assignment. Thirdly, each student is required to observe two interviewing sessions of clients at the lawyer's office / legal aid office and to record the proceedings in a diary. Each student will further observe the preparation of documents and court papers by the advocates and the procedure for filing of the suit / petition.

Paper II apart from teaching the relevant provision of law, consists of 15 exercises in drafting and 15 exercises in pleadings to be taught through class instructions and simulation exercises. The pleadings shall cover civil, criminal and conveyancing fields. Each exercise shall carry three marks each. The remaining ten 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 is to be taught with the help of the prescribed materials and 50 selective opinions of the disciplin-

1. LE (Cir. No. 4/1997).
2. Namely, Jurisprudence, Contract-I, Contract-II, Tort and Consumer Protection Laws, Family Law-I, Family Law-II, Law of Crimes, Criminal Procedure Code Juvenile Justice Act and Probation of Offenders Act, Constitutional Law, Property Law, Law of Evidence, Civil Procedure Code and Limitations Act, Legal Language/Legal Writing. Administrative Law, Company Law, Human Rights And International Law, Arbitration Counselling and Alternate Dispute Resolution Systems, Environmental Law, Labour Law, Interpretation of Statutes and Land Laws.

ary committee of the State Bar Councils and 10 judgments of the Supreme Court on the subject. Written examination in this paper will have 80 marks and the viva voce will carry 20 marks. The design and evaluation criteria of Paper IV has been left to the discretion of the law schools / colleges in consultation with the universities and State Bar Councils to be framed keeping in view the local conditions. It may be taught partly through class instructions including simulation exercises and partly through extension programs like Lok Adalat, legal aid, and legal literacy and para-legal training. The course should include lessons on negotiations and counselling, use of computers in legal work, legal research in support of public interest litigation, writing of case comments, editing of law journals and law office management. The Universities have been given a free hand to appropriately divide the marks in the paper for the different programmes evolved in the colleges under its control.

It is apparent from a perusal of these courses and the methodology prescribed for teaching that these are aimed at providing a large number of professional skills required by a lawyer relegating to the background the wider perspective and aim of ensuring that legal education should lead to just results also. If law in society is all about ensuring justice to *all*, legal education must ensure that the students develop a critical understanding of various disparities in society that result in denial of access to justice to variety of groups in society. Prof. Sathe asked the pertinent question, "Is legal education all about imparting skills of lawyering or does it also have to create a commitment to certain values?"[3] He opined

> A lawyer is not only a seller of services but he is a professional who renders services for maintaining the rule of law. He is supposed to be an officer of the court. He has to have commitment to certain values such as democracy, individual liberty, social and economic equality including gender equality and concern for the disadvantaged sections of society which will include the poor, women, the physically handicapped, children, the minorities and the dalits. Legal education has to create such a commitment.

The UGC Model Curriculum has reiterated the same saying " that legal education ought to be a device for Human Resource Development

3. S.P. Sathe, *Community Responsive Legal Education: Trends in South Asia*, Keynote Address in ROUNDTABLE DISCUSSION ON COMMUNITY RESPONSIVE LEGAL EDUCATION: TRENDS IN SOUTH ASIA, November 27-28, 2001 organised by the United States Educational Foundation in India in collaboration with Pune Law College.



in law with the object of attaining social justice and democratic development."[4]

However, even from the perspective of teaching professional lawyering skills there remains much to be desired. For example, Paper I prescribes observation as the primary method for learning stages of a case as well as for interviewing and counselling the clients, preparation of documents and papers for filing of case. It has been long recognised that students should be made active participants in learning rather than confined to the role of passive learners. Learning by observation only promotes passivity on the part of students. In addition, there are other problems with the course also. First, it poses administrative difficulties in assigning adequate teachers for supervision and in the placement of students beyond the duration of the six-month course if they have to learn the stages of a case. Secondly, presence of students during client interviews may lead to violation of the principle of client confidentiality unless due care is taken to seek client's permission and to teach the importance of this principle to the students. Papers II and III make no efforts at including any social justice component and are to be taught through classroom based activities only. Paper IV has some scope for exposing and sensitising the students to the hard realities of poverty and illiteracy, but the course design has been left to the discretion of the law school. In case a law school does opt for integrating community-based legal activities together with the other topics prescribed for the course, the workload of such students would be much higher.

There is no denying the fact that law students do need training in the practical skills required by a lawyer. However, it is possible to reformulate these courses in a manner that will ensure that students not only acquire the professional skills needed by a lawyer but are also exposed and sensitised to issues of justice for the mass of India's population that suffers from the ills of poverty, illiteracy and lack of awareness.

## III

The minimum that can be done in the current scheme of the practical training papers to introduce justice is to frame problems for moot courts on aspects relating to human rights, poverty, discrimination or displacement issues, students to observe cases involving the issues of social justice and violation of human rights and by including such issues in the instruments to be drafted by them.

4. University Grants Commission, UGC MODEL CURRICULUM LAW 13 (2001).

Law students are expected to learn practical lawyering skills in two ways, namely, classroom courses for teaching such skills and legal aid clinics. For example, in the Law Faculty in Delhi University the course on Drafting, Conveyancing, Moot Courts and Professional Ethics has teaching of skills of legal writing, argumentation and issues of professional ethics as its primary goals. The Law Faculty also has its legal aid clinic and has run its legal aid programmes in the beggars' court, juvenile court and Tihar Prison in addition to organising legal literacy camps in rural areas on a regular basis. It has been long recognised that legal aid clinics offer a large range of professional skills to students. "A variety of skills not otherwise available to the students in the traditional legal curriculum are provided by the law school clinic. These include interviewing and counselling, the association and management of human relations, fact gathering and sifting, fact consciousness and a sense of relevancy, legal research and writing, handling crises-situations and intelligent decision-making and above all an appreciation that law is only one method of solving problems and not always the best method."[5]

This paper argues for mainstreaming of legal aid clinics and other similar programs by incorporating them in the LL.B. curricula to ensure teaching of the practical skills of lawyering and generating awareness and sensitivity to the issues of access to justice by poor and deprived sections of society. Such inclusion will not only promote the Bar Council's agenda of teaching professional skills but will also ensure that more law schools undertake legal aid activities making law accessible to the poor and deprived. The legal aid clinics in law schools in India function as an adjunct social service activity rather than part of the main curriculum.[6] Involvement of students in the legal aid clinics as part of their courses has many benefits. First, it will result in the training of students in the professional skills of lawyering, (as desired by the Bar Council) through introduction of the practical training courses. Second, inclusion of the social service activity in the main curriculum gives a clear message to the students that legal aid is integral to the profession and not something which the law schools and lawyers engage in at their discretion. This realisation and perspective is necessary to serve the long recognized need for legal aid of a large population of poor who go unrepresented in the absence of sufficient number of lawyers providing free legal aid. Third, it will ensure

5. Report of the Expert Committee on Legal Aid, PROCESSUAL JUSTICE TO THE PEOPLE 157 (1973).
6. Students participate in the Legal Aid Clinics in all law schools on a voluntary basis and their work in the clinic is not assessed for examination, as is the case in courses that are part of the main curricula.



legal aid work a place of priority in the law school planning and administration and hence the functioning of legal aid clinics will not remain a labour of love of a few teachers in the law school. Finally, it will generate awareness about and sensitise the upcoming generations of lawyers to the problems of poverty and access to justice. This exposure to the unjust and difficult situations people live in during their education will lead to more sensitive and just decisions and practices by them when they assume important offices of decision making as lawyers, judges, politicians or bureaucrats. Hence, it must be compulsory for each law school to evolve projects aimed to help various sections of society living in difficult circumstances and to involve law students in them as part of their curricula. Report of the Expert Committee on Legal Aid[7] had pointed out some of the obvious benefits to the student, to the profession and to the cause of legal aid which a student legal aid clinic imparts as follows:

1. The nature of existing legal practice heavily inclined towards the rich business corporations and propertied individuals is bound to get a revision-orientation with the advent of legal aid. An expanding clientele drawn from the poor, the oppressed and the under privileged will generate new demands upon the legal profession including new skills, a value system favourable to the weaker sections and a sensitivity to injustice.
2. Given proper supervision, law students can give excellent legal aid and advice at much cheaper cost to remote villages in the country where official and professional agencies often fail to serve.
3. The legal aid clinic is an excellent medium to teach professional responsibility and a greater sense of public service. Faced with real challenging problems and conflicting value choices the student develops necessary perspective, a sense of relevancy and proportion and skills to articulate and apply rules of professional ethics in concrete situations.
4. The law school clinic is a visible and effective instrument for community education and a wide variety of far-reaching preventive legal services programmes.
5. An important by-product of inducting law students in legal aid is its potential contribution towards a better legal education, socially relevant and professionally valuable.

7. *Supra* n. 5.

## IV

An academic course in contrast with a community-based project has a clearer course structure, defined hours of work, prescribed readings, definite workload and precise assessment criteria while a community-based project evolves with the work undertaken and the progress made. Hence it is important to identify the issues that need to be addressed before a legal aid clinic or other community-based project may be converted into an academic course. How should such a course be structured? Should it be compulsory or optional? In which year of law school should the course be offered? What should be the criteria for admission to such a course? What should be the student-teacher ratio? How should the workload of students and teachers be determined? What should be the teaching methods for such a course? Where / how should one locate / develop materials for such courses? How can such courses be continually improved? How should collaboration / supervision of students / professional from other disciplines / bodies be carried out when such collaboration is essential for the success of the project? How do we assess the performance of students? How does the law school ensure continuity of the project or handing over of the work of one batch of students to subsequent batches? Where could we locate the administrative and financial support required for such projects? This article presents some thoughts on some of these aspects with a view to generate discussion and further thinking on the matter.[8]

### *A. Conceptualising Legal Aid Activity as a Taught Course*

The word legal aid has been used here as encompassing all kinds of legal aid activities in the community, including legal literacy and awareness, alternate dispute resolution, para-legal and legal aid work in judicial, quasi-judicial and administrative bodies and for the inmates of various state-run institutions.

A law school that already has a legal aid activity may begin by identifying the skills students are taught / learn by participating in that project. It may then consciously choose the skills requiring special attention and decide the methods for systematic imparting and evaluation of those skills. For example, in a typical legal aid clinic students are usually given some basic legal knowledge on the field of work of the clinic before they are sent to the community while the students learn on their own about

8. As mentioned earlier, the guidelines prescribed by the Bar Council are minimal and do not address all these questions in any details.



client interviewing and counselling, negotiation, legal research and drafting. (Empathy and awareness of the problems of the poor are prominent among many skills needed by students.) There is no structure to this learning nor any reflection and analyses on it. There is enough literature available on each one of these aspects that the students should be asked to read. The teacher should supplement this reading with role-plays and research and writing exercises. Armed with this skill the students would be able to handle the field situations better.

In case a law school is beginning afresh, it has to at the outset, as with any other course, be clear about the objectives of the course. Broadly speaking there will always be the twin objectives of teaching professional skills and serving the community. However, what needs to be identified are the particular skills the course aims to achieve and the kind of project that would be most suited to teach those skills. For example, if the school wants to focus on alternative dispute resolution, participation in lok adalats may be more suited to hone these skills than a legal literacy programme. On the other hand, a legal literacy programme may be chosen if the object is to teach legal research and writing and communication skills. Assisting the clients by drafting their documents for filing in courts or other official bodies gives opportunities to train students in drafting, pleadings and conveyancing.

It is of utmost importance to remember that all community projects leave an impact on the people whose lives they touch and the students should not be allowed to interact with community until they have shown sufficient sense of the responsibility and commitment towards the people with whom they would be interacting. Since the people whose life these projects touch are usually deprived it is the responsibility of the project directors to ensure that the students' learning projects should not result in greater disillusionment or harassment to the clients. Hence, each one of these activities in the field needs to be preceded by rigorous classroom training.

Having identified the skills and the project for those skills, the teacher needs to identify the reading material for those skills, choose the teaching method and identify or develop appropriate simulation exercises for practicing them in the classroom setting before allowing the students to interact with the live-clients. There are a good number of books, few

9. N.R.M.Menon (*ed.*) CLINICAL LEGAL EDUCATION (1998); B. Malik (ed.) THE ART OF A LAWYER (9th Ed. 1999).

Indian[9] but mostly foreign,[10] available on the subject to choose from on various aspects of trial, pre-trial, ADR and other skills required by a lawyer. Lecture and case-methods may be supplemented or substituted by brain storming, experiential, simulation, role plays, group discussion, games, pyramid, sub-groups, hypothetical problems, handouts.[11] Each one of these methods involves the students in active learning but choice of the appropriate method is crucial for success. For example, brainstorming is most appropriate for generating ideas and widening the canvas of thinking. Experiential learning stimulates learning either by making the students recall an actual experience from their lives or creating an everlasting experience in the class for generating empathy. Simulation exercises like moot courts are good for learning argumentation and communication skills, while role-plays may be used effectively for client interviewing and counselling and professional ethics. Group discussion results in the thrashing out of ideas and enables the students to work with others. Games bring in fun and sense of outshining the other while learning.[12] Pyramids start with the activity beginning with two participants and then including others through a snow balling effect. This activity may be more useful for learning fact gathering, relevancy of fact and active listening. Activities in sub-groups may provide opportunities for improving the skills of observation and critical peer evaluation. The students learn to apply the law in a given hypothetical situation. Handout or written materials supplied helps in retaining the important points of the subject.

Finally the teacher may need to determine the manner of evaluation of the students' skill and fieldwork. There are many options to choose from for evaluation of these skills. One may decide to evaluate them on the basis of their performance in simulation exercises after due practice

10. Steven Lubet, MODERN TRIAL ADVOCACY ANALYSES AND PRACTICE (1993); Roger Hydock, TRIAL THEORIES TACTICS TECHNIQUES (1991); Thomas A. Mauet, MATERIALS IN TRIAL ADVOCACY PROBLEMS AND CASES (1994); Thomas A. Mauet, TRIAL TECHNIQUES (1996); Thomas A. Mauet, MATERIALS IN PRETRIAL LITIGATION PROBLEMS AND CASES (1992); Thomas A. Mauet, PRETRIAL (1995); R. Lawrence Dessam, PRETRIAL LITIGATION LAW, POLICY AND PRACTICE (1991); Roger S. Hydock *et al*, LAWYERING PRACTICE AND PLANNING (1996) Anyone planning to procure these books may want to check up the latest editions of the same as these are revised regularly. Older editions work equally if the purpose is to learn the techniques and use them for developing one's own materials by reference to the local laws and cases applicable to one's jurisdiction.
11. *See*, M.Le Brun and R. Johnstone, THE QUITE REVOLUTION IMPROVING STUDENT LEARNING IN LAW (1994) See also, Simon Rice with Graeme Coss, A GUIDE TO IMPLEMENTING CLINICAL TEACHING METHODS IN THE LAW SCHOOL CURRICULUM (1996).
12. An interesting game developed by management professionals called Red Blue is quite popular to teach negotiation.



or they may be evaluated on the basis of their performance in a given field work activity. In the latter case, factors like initiative, participation, diligence, rapport with the client, confidence building, empathy, communication, time-management, etc. may be among the factors to be focused for evaluation rather than the outcome of their work. The best of efforts may not bear results while the least work may show best results. For example, if the students have been assigned to work for a lok adalat, it should be irrelevant for the purpose of evaluation whether the client showed up for the lok adalat or not as that may be influenced to a great extent on the client's own motivation rather than the nature of the effort put in by the student. Similarly, if the students are participating in the litigation process, they should not be judged on the outcome of the case but how they handled it. The outcome may be dependent on a variety of factors. Understanding of facts and their relevancy, knowledge of legal provisions and precedents, preparation of papers, delivery of arguments, summing up of the case, court manners and body language are more appropriate aspects to judge student's performance.

### *B. Preparing for Conducting such a Course Effectively*

For a course of this kind to be developed satisfactorily and to run effectively, the teachers conducting such courses need training, administrative and peer support.

For effective evolution of these courses four aspects need to be taken care of.

1. training of teachers in newer skills;
2. evolution of criteria for determining the teacher-student ratio and workload;
3. evolution of supervision techniques and evaluation criteria; and
4. representation by students and professional responsibility.

Until now teaching in classrooms has been limited to teaching law to the LL.B. students. The full time teachers are assigned substantive law subjects and theoretical papers and the part-time teachers who are full-time lawyers are seen as better equipped to teach the procedural law courses. Neither sets of law teachers has been 'taught' these skills. Teachers learn some skills like legal research and writing, communication, argumentation by doing it in course of their research and teaching. Similarly the lawyers also learn their skills on the job. Both need to be first convinced that such skills can be 'taught' and then learn how to teach

skills in addition to teaching law. Large scale skills training of teachers therefore is a precondition. Such training courses will need to focus not only on imparting the skills but also on how to teach those skills, impart some additional skills in developing simulation exercises such as how to write role plays, or developing negotiation / mediation problems. These courses will require coordination and cooperation of all parties involved in the operation, namely, the law school administration, teachers, students, clients, placement agency and the state bodies before whom the matter may be pending. The minimum resources that a clinical course will need include space ensuring privacy for meeting clients, communication tools like phone, stationary, travel expenses for students and other contingencies.

The training of the law teachers will be required to incorporate the following aspects:

(a) changing focus from teaching only the black letter law to interpersonal and communication skills;

(b) methods for teaching those skills;

(c) criteria for evaluation of those skills;

(d) generating materials for teaching those skills;

(e) administrative skills; and

(f) fund raising.

It is important to recognise that student-teacher ratio is crucial to the success of student centred active learning. One teacher may give a lecture to a large number of students but it is humanly impossible for one teacher to supervise umpteen numbers of subgroups of students carrying on simulation exercise in a class. Implementation of the UGC norm of one teacher to twelve students in professional courses is the absolute necessity for these courses. In addition to class teaching, the teachers teaching a clinical course in collaboration with a field agency will also be required to hold individual and group meetings to reflect on field work, seek and secure appropriate placements, training and briefing the field agency, monitoring the continued suitability of placement, monitoring and coordinating the students' attendance and work at the agency.

Moving out of students from classroom to field also requires reorientation of classroom teaching schedule. The classroom teaching in other courses will need to be limited to fewer days in the week leaving some days completely free for the students to pursue these practical courses. It will also need decisions about supervision of students in the field. It will



involve clearly indicating to the placement agency what is expected from it in terms of supervision as well as skills learning, identifying objectives of supervision and telling the students their responsibilities and the manner of supervision and evaluation criteria.

Running a live-client clinic[13] with litigation work needs issue of professional responsibility for the case clearly determined. It rests with the teacher-supervisor. As the full-time teachers are not permitted to practice, a part-time teacher willing to accept the professional responsibility will be required to be necessarily attached with the course. Amendments in the law will also be needed to allow second and third year students to present clients' cases under supervision of the teacher.

In conclusion, it only needs to be said that the challenges in running clinical courses are many. However, these challenged are not insurmountable and may be met. What is required to be recognised is that introducing justice component to legal education is necessary as the aim of legal education is to promote justice in society and not only to produce efficient lawyers.

13. In the United States one finds a large variety of models of such clinics. One common type is the clinic located at the law school. Students interview clients at the law school and pursue their cases under the supervision of the teacher – often a part time teacher in the faculty. In court-sponsored clinics the cases are assigned by the court and supervised by a public defender or by a law school staff assigned to act as attorney. The neighbourhood law office run by several staff attorneys some of whom may have teaching positions, offers yet another model for students to participate in legal aid. See, *supra* n. 5 at 159.
In the Indian context, Lok Adalats, legal aid clinics provide the examples but the students' work in such activities is not assessed for the purposes of examinations.

# LABOUR STANDARDS AND THE INFORMAL ECONOMY IN SOUTH ASIA: NEED FOR A RIGHTS-CENTRED APPROACH+

*Kamala Sankaran**

This paper examines recent trends in labour standards[1] and proposes options to deal with working conditions of those working in the informal economy. Part I of the paper briefly reviews labour standards adopted internationally in recent years. It notes the lack of adequate 'voice' for workers in the monitoring process and non-uniformity in the protection provided. Part II examines specific features of informal economies in South Asia, the relevance of labour laws and attempts of the International Labour Organisation (ILO) to deal with issues posed by the informal economy. It notes that labour standards do not extend to all sections of workers in the informal economy. Part III notes the lack of standing for those who represent workers' interests. It points to the need for inclusive definitions of 'work', 'worker' and those who represents workers' interests in labour standards.

## I LACK OF UNIFORMITY IN SCOPE AND ENFORCEMENT OF LABOUR STANDARDS

During the last few years, several measures have been adopted internationally that lay down the minimum threshold of labour standards applicable to production processes. The ILO has, since its inception in 1919, adopted a large number of Conventions and Recommendations that lay down labour standards in different areas of labour and employment.

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1. The term labour standards as used in this paper includes Conventions and Recommendations of the ILO, standards laid down by individual governments in their international trade and voluntary codes of conduct subscribed to by individual enterprises.



By June 2002 the ILO had adopted 185 Conventions and 193 Recommendations. Once adopted by the tripartite International Labour Conference, a Convention is open to ratification by member States. Ratification imposes obligations on member States, with implementation closely supervised by the ILO. A Recommendation is not open to ratification but provides a detailed guide for national action.

In 1998, in response to the growing feeling that there ought to be certain labour standards that are applicable to all members, whether or not they are willing to ratify them, the ILO adopted (with near unanimity), a Declaration on Fundamental Principles and Rights at Work and its Follow-Up (ILO Declaration).[2] The ILO Declaration calls upon member States to respect, promote and realize four fundamental principles. These are (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of of child labour; and (d) the elimination of discrimination in respect of employment and occupation. The ILO Declaration been regularly monitored by the ILO since the adoption of these universal rights at work.

Other measures, taken by individual governments and characterised as being unilateral or bilateral in scope, set out sanctions, preferences or incentives that become applicable if certain labour standards are not adhered to by a trading partner. Such measures, directed at specific countries, have been adopted by powerful trading partners such as the United States or the European Union. Examples are the Generalized System of Preferences (GSP) of the US and the European Community, the US Caribbean Basin Initiative, US Trade and Development Act, the African, Caribbean and Pacific (ACP)-European Union (EU) Lome/ Cotonou Agreements among others.[3]

Apart from these initiatives at the level of individual governments, there are several private initiatives in the form of codes of conduct drafted

2. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, International Labour Conference, 86th Session, Geneva, June 1998, available on the ILO website at http://www.ilo.org/public/english/10ilo/ilo85/dg-rep.htm.

3. THE GENERALIZED SYSTEM OF PREFERENCES 19 U.S.C. §§2461, 2462(b) (7) (1994 and Supp. III 1997); CARIBBEAN BASIN RECOVERY ACT 19 U.S.C. §§ 2701, 2702 (c)(8) (1994); TRADE AND DEVELOPMENT ACT Pub. L. No. 106-200, 114 Stat. 251; and Partnership agreement between the members of the African, Caribbean and Pacific Group of States on the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, Official Journal L 317, 15/12/2000 P. 0003.

by specific manufacturers or by independent agencies. Such codes of conduct, adopted by manufacturers voluntarily, lay down certain basic labour standards that sub-contractors in the supply chain must observe. These codes of conduct could be a policy document adopted by the enterprise which indicates a commitment on the part of the organisation to adhere to a set of principles contained therein. Some voluntary codes of conduct incorporate provisions to monitor the implementation of minimum standards within the supply chain. Voluntary initiatives also include social labelling to ensure that goods are produced adhering to certain minimum standards. A well-known example is 'RUGMARK' that informs the consumer about the nature of the production process in making the product. These have often been initiated at the behest of consumer organisations in developed countries, drafted independently or in collaboration with businesses, and less often, with trade union inputs.[4]

There is no uniformity, across these different initiatives, about what constitutes minimum labour standards. Early initiatives, such as the US GSP, talked of 'internationally recognised workers' rights' without linking such rights to those defined by the ILO.[5] 'Internationally recognized workers' rights' defined in the US GSP include the right of association; the right to organise and bargain collectively; prohibition on the use of any form of forced or compulsory labour; minimum age of employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[6] Such 'internationally recognized workers' rights' do not refer to ILO labour standards and do not necessarily overlap with internationally recognised core labour standards identified by the ILO. However, more recent initiatives in the voluntary codes of conduct specifically cite certain ILO Conventions on the subject.[7]

As noted above, the ILO Declaration deals with four important areas dealing with trade unions rights, elimination of forced labour, child labour

4. For a comprehensive review of these initiatives see George Tsogas, LABOR REGULATION IN A GLOBAL ECONOMY 61-84 (2001). See also Lance Compa and Tashaia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct* 33 COLUM. J. TRANSNAT'L L. 663 (1995); Karen Travis, *Women in Global Production and Workers Provisions in U.S. Trade Laws* 17 YALE J. INT'L L. 173 (1992).
5. Philip Alston, *Labour Rights Provisions in US Trade Law: "Aggressive Unilateralism"*, HUM. RTS. Q. 1,6 (1993).
6. 19 U.S.C. §2642(a)(4).
7. See for example the Social Accountability 8000 -(SA 8000) and the Ethical Trading Initiative (ETI) Base Code which specifically cover several 'core' ILO Conventions.



and discrimination.[8] It must be noted that the ILO Declaration does not deal with rights concerning conditions of work, wages, safety and health or social security. It deals only with those rights that the ILO had traditionally classified as 'basic human rights' with the sole addition of a new right, namely, the elimination of child labour. The ILO compilation of Conventions and Recommendation that were earlier classified as 'basic human rights' are today often referred to as 'core' rights, with the inclusion of the elimination of child labour. These rights correspond by and large with the notion of civil and political rights as opposed to economic, social and cultural rights in the context of the human rights debate in the Cold War era.[9] While evaluating the effectiveness of such international initiatives to identify and enforce labour standards, the limited scope of rights covered by the ILO Declaration must be kept in mind. (This has led some to observe that the 'core' rights contained in the ILO Declaration alone merit being called 'labor rights' while those relating to wages or conditions of work which are specific to the degree of development of each country should be referred to as 'labour standards').[10]

The coverage of these various initiatives are not uniform in terms of countries or establishments covered. Some are directed solely at the export sector, such as various codes of conduct that deal with goods that are sub-contracted to other countries and eventually reach markets where retail outlets are located. Others, such as the ILO Declaration, have a broader scope dealing with all kinds of domestic production processes irrespective of where the goods or services are consumed or sold. The logic underlying the broader scope of ILO standards and the ILO Declaration is to ensure decent conditions of work and not merely to provide for a level playing field in international trade. With the creation of the World Trade Organisation (WTO), and the international debate over the talk of minimum or fair labour standards (the so-called social clauses) the exclusive jurisdiction of the ILO to deal with labour matters had been severely threatened. The fears of the developing countries had led to the insertion

8. These are the areas covered by Convention Nos. 29, 87, 98, 105, 111, 138 and 182 viz. CONVENTION No. 87 dealing with freedom of association and protection of the right to organize, CONVENTION No. 97 dealing with right to organize and collective bargaining, CONVENTION No. 100 dealing with equal remuneration, CONVENTION No. 111 dealing with discrimination in occupation, CONVENTION Nos. 138 and 182 dealing with child labour and worst forms of child labour repsectively, CONVENTION Nos. 29 and 105 dealing with forced labour.
9. See Kamala Sankaran, *Human Rights and the World of Work*, JILI 284, 287 (1998).
10. See Christopher McCrudden and Anne Davies, *A Perspective on Trade and Labor Rights*, J. OF INT. ECON. LAW 43, 50 (2000).

of a clause in the ILO Declaration that " labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for this purpose; in addition any comparative advantage of any country should in no way be called into question by this Declaration or its follow-up."[11] Despite the assertion repeatedly made that the forum for dealing with labour standards is properly the ILO and not the WTO, scholars have argued that the WTO too has a role to play with respect to workers' rights.[12] The debate regarding the linking of labour standards with international trade has been sharply divided in recent years[13] and the ILO Declaration steers clear of the controversy.

Multilateral labour standards, such as ILO standards, have their own methods of supervision[14], whereas bilateral or unilateral labour standards depend on individual governments to assess compliance by trading partner with specified standards.[15] Upon ratification by a member State, the ILO supervisory bodies can monitor the observance of the Convention within the country. This is done by the ILO supervisory bodies such as the Committee of Experts (COE) assessing periodic reports submitted by Governments and also trade unions and employer organisations in the country. There is a need to report even in the case of unratified Conventions. The advantage of the ILO system of monitoring labour standards in different countries is that it is based on a complaints system, with governments and trade unions having the opportunity to complain to the ILO about violations of ratified Conventions or Recommendations. In the case of voluntary initiatives, the codes are enforced through a system of monitoring. The codes of conduct are monitored by independent agencies

11. *Supra* n. 2.
12. See for instance Robert Howse, The World Trade Organization and the Protection of Workers' Rights, J. SMALL & EMERGING BUS. L 131(1999).
13. See generally, S. Charnowitz, *The Influence of International Labor Standards on the World Trading Regime: A Historical Overview* 126 INT'L LABOR REVIEW (1987); L.A. Compa and S.F. Diamond (eds), HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE (1996); T.N. Srinivasan, *International Trade and Labor Standards from an Economic Perspective* in P. van Dijck and G. Faber (eds), CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION (1996); Ozay Mehmet, Errol Mendes, and Robert Sinding, TOWARDS A FAIR GLOBAL LABOR MARKET: AVOIDING A NEW SLAVE TRADE (1999).
14. For an overview of the ILO system of supervision, see generally, H. Barolomei de la Cruz, G von Potobsky, and L. Swepson, THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS (1996).
15. Thus in the case of the US GSP, the United States Trade Representative examines petitions relating to violation of workers' rights.



or accredited individuals.[16] This parallel system of monitoring violations of voluntary codes of conduct often marginalises or tends to ignore national inspection systems and established systems of international supervision, such as the regular reporting and complaint system of the ILO. This system of monitoring also often ignores and provides no opportunity to trade unions within each country to participate in the enforcement of codes of conduct. The remedy for any violation is the rescinding or rewriting of the contract between the user enterprise and the sub-contractor, and provides no avenue for aggrieved workers.

## II LABOUR LAWS, ILO STANDARDS AND THE INFORMAL ECONOMY.

The ILO had, in its initial years, focused its attention on employment conditions in the industrial sector in developed countries. The relevance of the ILO's activities to developing countries was debated in the 1950s and 1960s, when newly independent countries joined the ILO.

It is a moot point whether labour laws in general and ILO standards in particular, are relevant to the informal economy in countries such as those in South Asia. The diverse character of labour markets of South Asia, where the majority of those working are self employed and are in the informal sector, has been well documented.[17] Work conditions are uncertain and often outside legislative protection. The majority of those who work in the informal economy or are those who are not engaged in waged employment are excluded from the scope of protective labour legislation in these countries. The question of whether all those who work or, at the very least, all those who are employed, should be brought within the purview of the labour laws and ILO standards has been an area of concern.

Labour laws that have developed in several countries have been premised on the existence of an employer-employee relationship.[18] The

16. See Tsogas, *supra* n. 4. The independent monitors could be large auditing firms or non-governmental organisations having the requisite expertise. On the weaknesses of enforcement of codes of conduct see generally, Lauro Ho, Catherine Powell and Leti Volpp, *(Dis)assembling Rights of Women Workers Along the Global Assembly line: Human Rights and the Garment Industry* 31 HARV. C.R.-C.L. L. REV. 383 (1996).
17. Jeemol Unni, *Gender and Informality in Labour Market in South Asia*, ECON. & POL. WEEKLY 2360 (2001), T.S. Papola and A.N. Sharma (eds.) GENDER AND EMPLOYMENT IN INDIA (1999).
18. The expression 'labour law' used here is used to cover laws that deal with the employment relations, conditions of work, safety and health and wages. The distinction between employment law and labour law used in some countries is not followed.

crucial test of eligibility for being covered under such laws is that a person be 'employed'. (Not every person who is employed is necessarily covered by protective labour legislation. Persons may be excluded because of the managerial or administrative functions they perform, because they are employed in the police or armed forces or because they are employed in domestic service.[19] Persons who are unable to clearly establish that they are employed are likely to fall outside the scope of labour laws in these countries. Such 'atypical' cases could arise due to the temporary, casual, or part-time nature of their employment or because they are employed as contract labour in a contract negotiated by intermediaries/contractors. The growing informalisation of even the formal sector due to the growth of such 'atypical' forms of employment has implications for the workforce thus excluded from protection.

The employer-centric nature of labour laws also creates difficulties for workers who move from work-site to work-site and/or for whom the employer frequently changes, such as those in the construction industry or in domestic service in South Asia. In India, the benefits under several labour laws are available only after a person has worked for a minimum period of service under one employer. Social security systems in India impose liability either solely on the employer (Maternity Benefit Act 1961) or on employers and employees together (Employees Provident Fund and Miscellaneous Provisions Act 1952) or on an insurance scheme where employer, employees and the State contribute to the insurance fund (Employees State Insurance Act 1948). Frequent changes in the employer poses challenges and requires protection and "portability of benefits to facilitate worker mobility across jobs"[20] that the law or its administration may not have not envisaged.

A related aspect is the almost complete exclusion of self employed persons from the protection of labour laws in these countries. The 'informal economy' includes such own-account or self employed workers, employees in enterprises in the informal sector as well as informal employment in the formal sector.[21]

Trade union initiatives in the 1990s in India have sought to provide legal protection to some categories of workers in the informal economy.

19. See for examples the exclusions in the coverage of terms 'industry' and 'workman' in the INDUSTRIAL DISPUTES ACT 1947.
20. See Virginia L. duRivage, Francoise J. Carre and Chris Tilly, *Making Labour Law Work for Part-Time and Contingent Workers* in Kathleen Barker and Kathleen Christensen, CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 277 (1998).
21. See Jeemol Unni *supra* n. 17 at 2362.



A successful campaign by the National Campaign Committee for Construction Workers resulted in the enactment of a central law for construction workers in 1996 in India. This law mediates the delivery of benefits through a tripartite board, de-linking the delivery of benefits to a construction worker from his/her individual employer. Another campaign, spearheaded by the Self Employed Women's Association, is presently lobbying for the enactment of a law for home workers. Possible models of legislation replacing an employer-employee relation with one mediated by a tripartite board are those covering headload workers in Kerala, India, or the central law dealing with construction labour in India, among others.

The ILO, too, has been grappling with the existence of 'atypical' work and the need to develop labour standards for those who are self employed or outside the traditional master-servant/subordination relationship. In order to increase its reach beyond Europe and the Americas, the ILO began adopting standards relating to rural workers, share croppers and workers in co-operatives. The 1990s saw the ILO address the need to regulate new forms of employment relationships brought into existence by the changing nature of work.[22] The ILO has developed labour standards that deal with self employed or 'atypical' workers such as rural workers, sharecroppers, rural tenants, members of co-operatives.[23] Despite strong opposition, the ILO successfully adopted the Convention relating to home work in 1996.[24] The opposition claimed that home workers were unsupervised workers who were outside the ambit of legal subordination to their employers. However, the ILO was unable to adopt a Convention in 1997 covering contract workers employed through intermediaries/contractors. There was strong opposition to conferring employment status, and consequent benefits, to such contract workers vis-à-vis the principal employer/user enterprise.

The legal regulation of contract workers has profound implications for those enterprises that have a global supply chain spread over several countries, such as in the Textiles, Footwear and Clothing (TFC) sector. If the principal employer/user enterprise were deemed to be liable for

22. The ILO adopted Convention No. 175 dealing with part time work in 1994, and in 1996 adopted Convention No. 177 dealing with home work.
23. See for instance ILO RECOMMENDATION No. 132 relating to tenants and sharecroppers, CONVENTION No. 141 and RECOMMENDATION No. 149 relating to rural workers' organisations.
24. ILO CONVENTION No. 177. For an analysis of the debates in the ILO at the time of the adoption of this Convention see Kamala Sankaran, *The ILO, Women and Work: Evolving Labour Standards to Advance Women's Status in the Informal Economy*, III GEORGETOWN J. OF GENDER AND THE LAW 851(2002).

contract workers employed in such global supply chains, it could bring all such remote employees under the protective legislation of the 'host' country in which the principal employer/user enterprise is based. The issue of imparting extraterritoriality to the law would also arise. It is in this context that one must view the myriad private initiatives in the form of voluntary codes of conduct adopted by principal employer/user enterprise and consumers (and employees in some instances). Such voluntary codes of conduct frequently stipulate working conditions for those working in global supply chains. Yet the 'right', if any, conferred by these voluntary initiatives is available to the principal employer/user enterprise against the sub-contractor found violating the codes of conduct, without providing a 'right' to those working in such supply chains. Such voluntary codes of conduct do not envisage a central role for workers nor do they confer an employer-employee relationship between the principal employer/user enterprise and the worker. In addition, these codes of conduct frequently do not cover all those who work in the sub-contracting chain; home workers and casual workers are often excluded.[25]

## III Addressing the Concerns of the Informal Economy

A rights-centered approach would accord centrality and 'voice' to workers and those representing their interests. ILO labour standards and other initiatives should define 'work', 'worker' and their representatives in the broadest manner so as to include all sections of workers in the informal economy.

The ILO supervisory mechanism has permitted trade unions to draw the attention of monitoring bodies to gaps in the enforcement of ratified Conventions. However, workers in the informal economy, who are not organised into trade unions, are outside the scope of the ILO supervisory mechanism. Despite this constraint, trade unions have used the forum of the ILO to draw attention to the problems of the informal economy. For example, the Centre for Indian Trade Unions reported to the ILO that Convention No. 100 dealing with equal remuneration for men and women was violated in India as women's work (in the formal and informal economy) was consistently under-valued. The Hind Mazdoor Sabha repeatedly reported to the ILO that rural workers, engaged by the government in various famine-related Employment Guarantee Schemes or by irrigation departments, were being deprived of their rights under ILO

25. See for instance see Navsharan Singh, Situating Home-based Work in the Webs of Macroscape. http://www.wiego.org/papers/navsharan.pdf.



standards. In Sri Lanka the IUF has drawn the attention of the ILO to the denial of rights to workers following the state of emergency imposed in 2000.[26] However, it must be noted that countries in South Asia have only partly ratified these Conventions, thereby limiting the opportunities available to trade unions to approach the ILO.

Several monitoring agencies, such as non-governmental organisations and consumer organisations, collect information on working conditions in the course of monitoring codes of conduct. However, since they do not have a standing in the ILO, they cannot report the violation of labour standards by employers in member States. Further, since codes of conduct usually do not empower workers or trade unions to act when there is any violation, there is a need to expand the scope of these codes to confer such rights on workers.

At present ILO's core labour standards only partially cover those working in the informal economy.[27] However, the adoption of ILO Convention No. 177 dealing with home work has opened up the possibility of including within the scope of labour standards those who work outside the control and supervision of the employer and outside the traditional notion of subordination. This could pave the way for greater visibility at the national and international level for those working in the informal economy.

26. See ILO, Reports of the Committee of Experts on the Application of Conventions and Recommendations, Part III, International Labour Conference, 89th Session (2001).
27. *Supra* n. 8.

# THE CONTRIBUTION OF ENVIRONMENTAL MANAGEMENT SYSTEMS TO SUSTAINABLE DEVELOPMENT: RELEVANCE OF THE ENVIRONMENTAL MANAGEMENT AND AUDIT SCHEME

*Michael von Hauff**

## I. Introduction

It is remarkable that India was the first country in the world to enshrine environmental protection as a state goal in its Constitution. It is also worth noting that India has relatively detailed and well developed environmental protection legislation, some of which takes its lead from German environmental laws and directives. Moreover, in connection with the Brundtland Report of 1987 and the 1992 UNCED Conference in Rio de Janeiro, India was also the scene of a widespread, sophisticated debate about the new guiding principle of "sustainable development". However, there is here a wide gap between the level of scientific knowledge and the practical realization of that knowledge.

In 1996, for example, the Supreme Court ordered the closure of 9,038 industrial enterprises in New Delhi that were not complying with the required environmental standards. One further action in this context was to ban companies with polluting production methods from the large cities such as Delhi. The type of voluntary company-based environmental protection practiced successfully in the European Union as part of environmental management systems is still largely unheard of in India, even though it is being increasingly called for by some experts and by the Confederation of Indian Industry.

India is in an environmental crisis, which will become worse in the future. While certain industrialized nations have managed to de-couple economic growth and environmental pollution, the same cannot yet be said for India. As the above graph shows, emissions of $CO_2$ have up to now been increasing faster than GDP.

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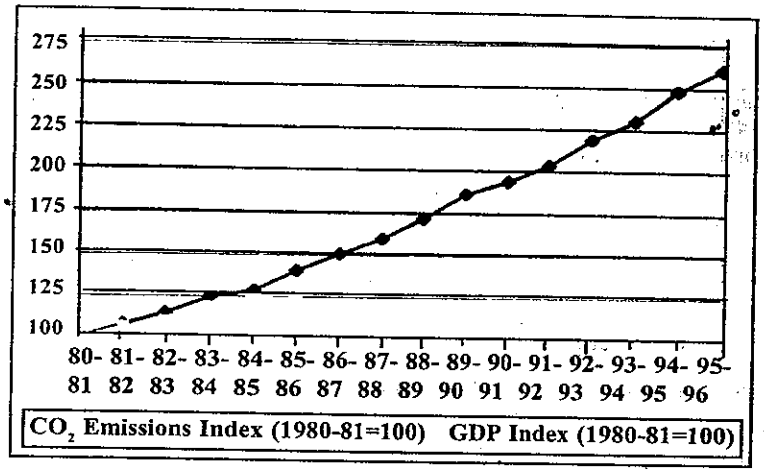



Fig. 1: $CO_2$ Emissions and Economic Development in India

In India, a share of the blame for the environmental crisis has to be laid at the door of the industrial sector. In spite of some highly developed areas, there are many industries with aging capital stock, low productivity and desolate production methods. Even though labour productivity has been growing overall, capital productivity has been negative. Consequently, industrial development has resulted in severe environmental degradation and the problems are expected to worsen in the near future.

For the management of many enterprises and companies in highly developed countries, the development of environmental legislation and the growing environmental awareness amongst the general population present a great challenge, urging them to pay greater attention to the environment. Increasingly, this challenge is also becoming significant as a result of the changed environmental awareness of the groups with which they deal, i.e. their customers, suppliers, backers and employees. More and more, the company's environmental protection is playing a role in their identification with the company. But many companies in India have not solved their environment problems sufficiently. Therefore the Court has ordered some companies out of the cities like in Delhi. The question is: is this the only way to solve the problem or are there other solutions? Some experiences of Germany may be helpful.

### *A. The German Experience*

National environmental legislation in the EU member states has been supplemented by a new instrument for dealing with industrial environmental protection - the "Environmental Management and Audit Scheme - EMAS". EMAS was passed by the EC Council on 1 February 1993. What is special about EMAS is that participation and implementation are voluntary; in other words, its aim is for companies to take responsibility themselves. Unlike national laws and ordinances, this instrument of environmental policy requires commercial industry's own initiative and controls in the area of environmental protection.

There is a broad consensus that greater environmental orientation is required not only for industrial, but also for other private enterprises and non-profit organizations. For this reason, EMAS was opened up for "additional sectors" (such as power and water supplies, sewage treatment, wholesale and retail sales, transport companies, the financial and insurance sector, public administration, educational institutions and hospitals) as early as February 1998. In its provisional version of EMAS II, dated 30 October 1998, the Commission stated: "For this reason, all organizations having a significant effect on the environment should be able to participate in EMAS, in order in this way to have at their disposal an instrument for dealing with these effects and improving in-plant environmental protection'.

The aim of EMAS is to integrate environmental protection concerns in all areas of corporate or organizational policy, and thus to progress from reactive to pro-active environmental management. EMAS offers companies and organizations many positive incentives for continuously improving their environmental protection schemes beyond existing legal regulations. In this way

- environmental risks can be reduced,
- cost-saving potential, for example via a reduction in energy consumption, can be tapped, and
- a company's environmental awareness can be demonstrated to the outside world.

Up to now, however, many German small and medium-sized enterprises fear that the introduction of EMAS will involve high personnel and other costs. For this reason, many grants are available in Germany for small and medium-sized enterprises wishing to introduce this environmental management system.



### *B. Distinction between EMAS and DIN ISO 14001*

Parallel to the elaboration of EMAS, the International Standard Organisation (ISO) convened a Strategic Advisory Group on Environment (SAGE) on 16 August 1991. The brief given to SAGE is aimed at transposing the concept of sustainable industrial development into a concrete, action-based concept. At the beginning of 1995, the ISO Technical Committee presented its document "Environmental Management". Since the German translation was presented in October 1996, it has had the status of a German standard: DIN EN ISO 14001.

From the point of view of internationally operating companies, one crucial difference is that the EC regulation (EAMS) "only" applies Europe-wide, while DIN ISO 14001 is valid throughout the world.

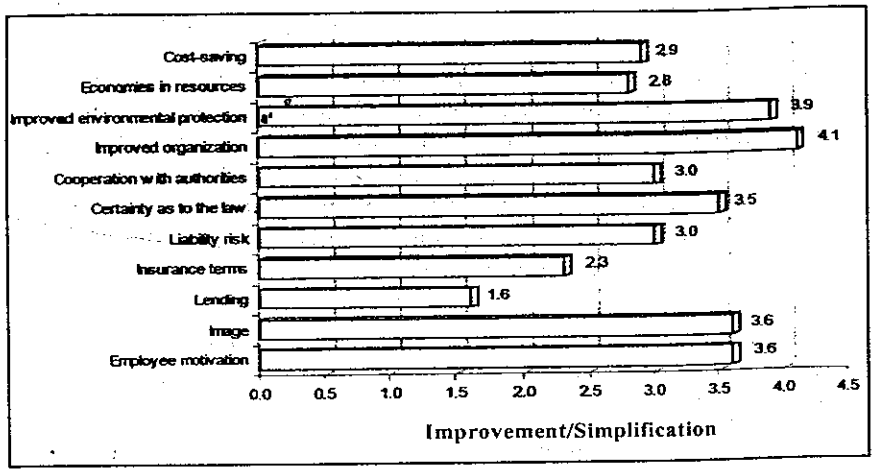
In a few years, it is anticipated that firms throughout the world which account for more than 25% of total global product will work according to the DIN ISO 14001 environmental management system. The goals of the ISO 14001 norm are structured hierarchically.

The prime aim of this international standard is to promote environmental protection and avoid pollution in harmony with socio-economic demands. This is to be brought about by providing a structured management system which has a pervasive influence on all the management activities of an organization. The secondary aim of ISO 14001 is to provide measures or modules on which the environmental management system is based. In so doing, both ecological and economic aims are to be achieved, and the requirements made of modern management met. Concrete instructions for action provide support for the establishment of this environmental management system. Any company, regardless of size and sector, can introduce the DIN ISO 14001 environmental management system. A review by senior management both closes the cycle and provides regular impulses for new developments.[1]

Empirical studies have shown that the most important improvements are to be found in the area of firmly establishing environmental protection in the company and in in-plant environmental protection. Mention should also be made of other improvements such as an improved image, increased employee motivation and greater certainty as to the law.

The following comments will point out the major similarities and differences between the two environmental management systems. Both systems are based on the fundamental idea that companies, via the

1. T. Dylick, VON DER DEBATTE EMAS vs. ISO 14001 ZUR INTEGRATION VON MANAGEMENT SYSTEMEN, IN: UMWELT WIRTSCHAFTSCHAFTS FORUM, No. 1, 4 (1997).




Source : Doktoranden-Netzwerk Okoaudit, 1998

Fig 2. Improvement or simplification as a result of certification pursuant to ISO 14001

implementation of an effective environmental management system, will arrive at self-regulated action in the area of in-plant environmental protection.

The two environmental standards are similar in that they are, aimed at

- compliance with national legal regulations,
- the continuous improvement of in-plant environmental policy,
- clearly formulation quantifiable environmental aims,
- the establishment and corresponding documentation of an environmental management system.

The two environmental management systems EMAS and DIN ISO 14001 differ mainly in that DIN ISO 14001 does not contain any obligation to prepare an environmental statement and is not tied to a particular site. On the other hand, EMAS, unlike DIN ISO 14001, has so far only offered manufacturing companies the opportunity of participating in the EC regulation. However, this was changed as a result of the impending amendment.



One disadvantage of DIN ISO 14001 is that it does not call for any binding environmental statement. The desired interaction between company and the general public does not materialize, but this is extremely important, particularly in the area of environmental concerns, and contributes to companies' credibility.

In Germany, many companies have decided first to introduce EMAS. Once this has been done, DIN ISO 14001 certification does not represent any great effort as its requirements are on the whole lower. Here a value hierarchy of the two environmental concepts is becoming quite clearly apparent.

- DIN ISO 14001 is often praised as a valuable instrument for countries without comprehensive environmental legislation.
- When devising DIN ISO 14001, many experts were in favour of not fully considering the higher requirements of EMAS.
- For example, US and Canadian companies strictly rejected any public environmental statement for DIN ISO 14001. They feared consequence in the area of product liability, which is very extensive in their countries.
- Furthermore, validation, i.e. an audit performed by an independent verifier, is mandatory under EMAS but voluntary for DIN ISO 14001.

In future, however, it can be expected that the two environmental management systems will converge more strongly. For this reason, this section will conclude with some recommendations resulting from the evaluation as it has been performed in Germany. The issue is:

> "ISO versus EMAS — competing or complementary standards?"

The experts assume that EMAS is the more demanding management system. However, as it is also less user-friendly, it can scarcely be classified as competitive in its present form. For this reason, the following strategy is recommended as a way of differentiating between the two systems: ISO 14001 is regarded as a foundation stone which demonstrates "environmental literacy", and focuses EMAS on verified ecological "star performance". This would mean that DIN 14001 was classified as a building block on the way to EMAS. For the expert group, the resulting recommendation is as follows: "If ISO 14001 and EMAS develop in complementary" fashion, as recommended, there will clearly be a demand in other parts of the world for an environmental management system with a verified ecological "star performance" component".

## II. Assessment of EMAS

EMAS is a new instrument of European environmental policy, and has been fully applicable in all EU member states since 13 April 1995. The instrument is an attempt to enlist the initiative and self-regulation of industry and, in future, other organizations such as service companies and non-profit organizations for the requirements of progress in environmental policy. The system creates market economic system of incentives within the system of national environment policy laws and regulations. Companies should be encouraged, considering the expectations placed in them, to introduce schemes and activities to protect the environment which go beyond currently prevailing environmental regulations.

In Germany, many companies have shown great interest in participating in EMAS. More than 70% of companies are in principle interested in participating. It is striking that even the majority of companies from highly polluting industries want to participate in EMAS. For example, of 72 companies in the German chemicals industry, 78% affirmed their intention to introduce EMAS in the foreseeable future.

There is no doubt that EMAS is an important environmental management system for reinforcing sustainable development. In the now famous "Brundtland Report", the United Nations Development Programme (UNEP) first called for "sustainable development" as a global aim. At the 1992 Earth Summit in Rio and the Climate Conference in May 1995, many countries declared their belief in this aim and undertook to play their part in achieving this aim.

Today, there is no question that a purposeful, sustained reduction in pollution must be aimed for both at the local government level and by individual companies. It should be emphasized here that EMAS accords companies an important role within sustainable, non-polluting development. However, a critical analysis of EMAS also shows that it allows companies to evolve at different speeds and different degrees of effectiveness. This is clearly shown both by the principle of voluntariness and the freedom for environment policy manoeuvre which EMAS allows.

What is at issue here is not just a reduction in energy consumption, but also in materials flows, the inclusion of the entire product line from the point of view of upstream manufacturing processes and downstream applications (e.g. disposal concepts and non-polluting transport concepts). Furthermore, such an interpretation is concerned with an environmentally utilization or consumption of land and a systematic withdrawal from environmental risks. Finally, it is concerned with environmentally



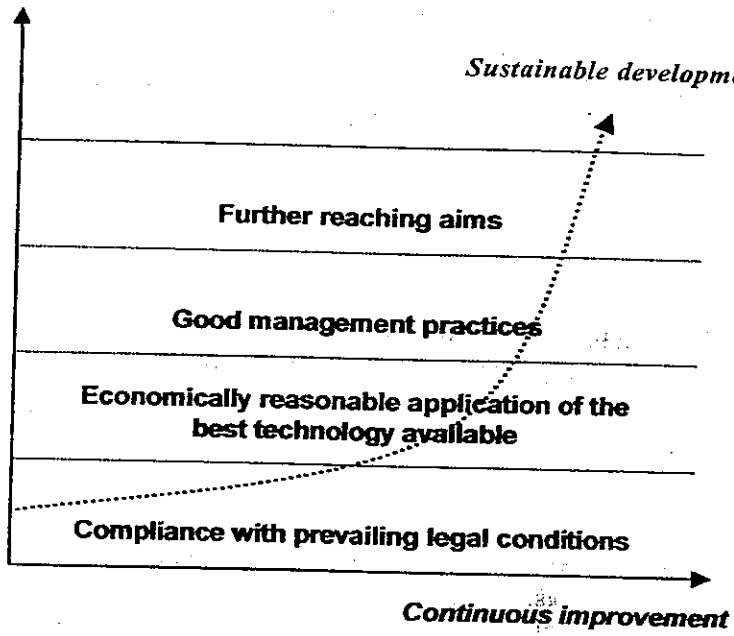



Fig 3. Requirement placed in EMAS by sustainable development

friendly distribution and transport system. This broad interpretation is completely compatible with EMAS.

The above diagram shows clearly how companies can rigorously follow, or be shown to follow, the path of sustainable development. The degree of achievement of aims can be quantified by means of a system of indicators.

EMAS thus contains important stimuli for sustainable, non-polluting development. However, it has to be remembered that the introduction of EMAS in companies in advanced industrialized countries coupled with the relocation of polluting production to Third World countries makes no sense and harms the credibility of the companies concerned.

At company level the introduction of EMAS gives rise to costs, as the following list clearly shows.

**Cost involved when introducing an eco-audit**

- Information procurement costs
- Consulting fees
- Costs of personnel and physical resources for internal eco-auditors
- Down times
- Public relations costs
- Fees for external eco-auditors
- Fees for accredited independent verifies
- Fees for participation in EMAS

These costs can be divided into internal and external costs. Depending on the size of the company and the amount of work involved, they come to between 10.000 € and 150.000 € per audit This includes consulting costs, the inclusion of employees, employee training, etc. External costs depend on the size of the site and come to between 8.000 € and 30.000 €.

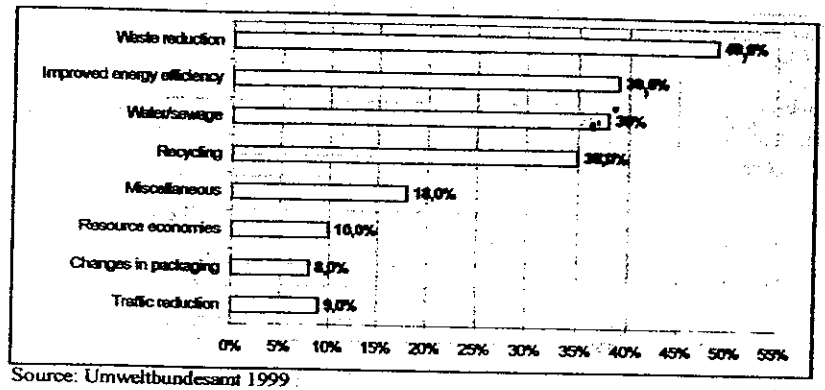
These costs have their corresponding benefits for the company. For example, one could mention a reduction in consumption of raw materials, consumables and supplies, as well as of energy, a reduction of pollution and waste as a result of greater efficiency, and integrated materials management and control.

In addition, a credible introduction of EMAS also increases employee motivation and employee identification with the company. An empirical study by the Bonn-based Unternehmerinstitut (business institute) in 1997 comes to the following conclusion. For the first time, a study is presented in which management, environment officers and works council members (800 persons in all) were involved. Most of those concerned had formed a positive impression of their environmental management system. Major findings:

- There was obvious success in the area of ecological efficiency: e.g. through reductions in waste (46%), reductions in the area of water/sewage (31.6%), and reductions in energy use (25%).
- When judged under economic criteria, environmental management has proved to be extremely economical: while the approximate average cost of setting up an environmental management system is 80.000 €, just under half of respondents reported annual savings of more than 50.000 C. The attractive cost-benefit ratio might induce many companies to introduce systematic environmental management in future.

In a further survey, cost savings as a result of environmental protection are shown as follows.






Source: Umweltbundesamt 1999

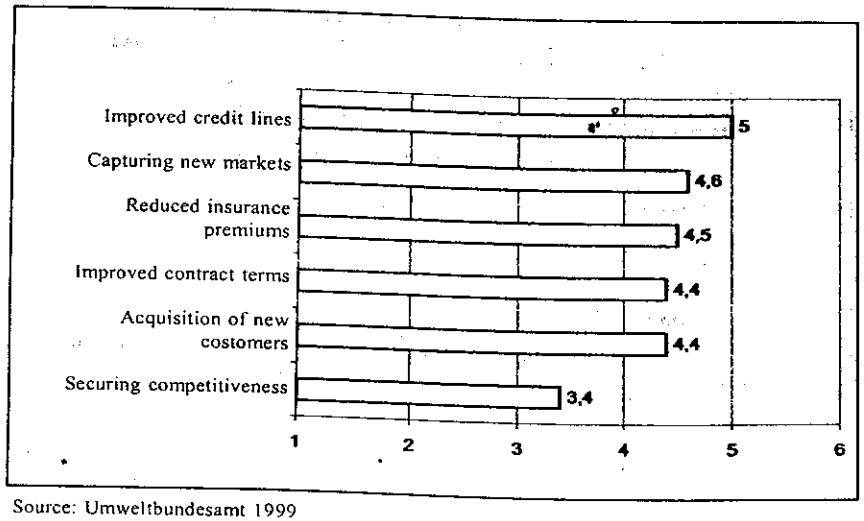
Fig 4. Cost savings through environmental protection

Apart from positive internal effects, there are also positive external effects. Any company reducing emssions, waste and resource use plays a role in improving the quality of the environment. As this is increasingly expected, or indeed demanded, by the general public, and particularly by customers and suppliers, the result is that the company's market position is strengthened. In Germany, many banks are currently drafting special environmental credit guidelines. Authorities will react positively in dealings with verified companies by expediting licensing procedures. They can assume that the provisions of environmental law will be complied with.

EMAS must be improved significantly as concerns external benefits on the one hand and market-related aspects on the other. Without intensive support from the government there is a danger that EMAS will decline in significance, particular vis-à-vis ISO 14001. In particular, this also applies to the authorities involved.

## III. More Recent Trends

In the Federal Republic of Germany, industrial enterprises are greatly interested in participating in EMAS. Since the accreditation of environmental verifiers in October 1995, some 3.000 sites have so far been validated and entered in the site register. In terms of the total number of sites in Germany, however, this is only a very small number. This means that many companies are, currently introducing EMAS or will only begin




Source: Umweltbundesamt 1999

Fig 5. Market effects following introduction of the environmental management system

to do so in the future. The revision of EMAS (EMAS II) has set the following new accents that will make the system even more attractive:

- **The area of application will be opened up:** As was pointed out in my introduction, the area of application, which itself was wider than that of the original version, will be extended still further. Agribusinesses will also be able to introduce EMAS, for example.
- **Organization instead of site**: "All land at a distinct geographic location under the management control of an organization covering activities, products and services". This means that only organizations will be registered (or parts of organization if agreed with the verifier), but not sites.
- **Management system pursuant to ISO 14001:** "Organization having a certified environmental management system, recognized according to requirements of Article 9, do not need to conduct a formal initial environmental review when moving on to EMAS implementation, if the necessary information for the identification and evaluation of the environmental aspects of Annex VI is provided by the certified environmental management system". In the area of "environmental management", therefore, there is alignment between EMAS II and ISO 14001.
- **Inclusion of indirect environmental aspects (e.g. product, transport):** Environmental impact is of particular importance here, which is defined as follows: "any change to the environment, whether adverse or beneficial, wholly or partially resulting from an organization's activities, products or services".
- **Annual "updates" of the environmental statement:** "appropriate mechanisms shall be in place and in operation to ensure that the audit results are followed up." (Annex II, 2.8 Audit follow-up).
- **Logo instead of statement of participation:** "Organizations participating in EMAS may use the logo outlined in Annex IV only if they have a current EMAS registration. Further specifications of the logo in compliance with the minimum requirements set out in Annex IV shall be adopted in accordance with the procedure laid down in Article 14". To date, however, Annex IV has not been finalized, i.e. a logo is not yet available.



It is also planned to include associations and local authorities.

Case study: Application of the eco-audit to the local authority level

On 13 January 1998, the Federal Government passed an ordiance to extend to scope of the eco-audit law. This also included local authorities. Local authorities have a far wider and more complex area of impact than industrial enterprises.

A series of pilot projects has shown that EMAS can easily be transferred to the local authority level.

In future, a crucial condition for the ecological efficiency of EMAS will be whether and to what extent the companies and organizations involved interpret environmental protection as a preventive policy, i.e. how sweeping their environmental aims me. It is also significant how suitably their environmental management is structured and how well it works. Incentives in the form of government deregulation (simplified licensing procedures, less government interference, better rates for business liability insurance, etc.) are an important condition for promoting willingness to adopt sweeping and pro-active in-plant environmental protection.

## IV. Conclusion

EMAS is a European environment policy tool and differs fundamentally from the member states' national environment policies. EMAS is based on the principle of voluntary participation. In addition, it is a market-based instrument of environment policy. By contrast, for example, German and Indian environment policy has so far mainly been based in administrative law.

On the basis of the concept of "sustainable industrial development," the ISO has developed and implemented its enviromrnental instrument ISO 14001. Two kindred instruments of voluntay in-plant environmental protection had thus come into being, yet they differed in certain crucial points. While, from an international point of view, EMAS is only valid for organizations in EU member states, ISO 14001 is recognized and valid worldwide.

Initial experiences of companies' participation in EMAS have shown that its requirements are high for small and medium-sized enterprises. This was realized when the regulation was being drawn up, and support for small and medium-sized enterprises is explicitly set out in the regulation. In Germany, there are many grant schemes, most of them at soft level. In addition, cooperation between small and medium-sized enterprises to allow them to cope better with the eco-audit has proved very useful. So far, some 3,000 companies have participated in EMAS and been successfully audited. There is no doubt that the implementation of EMAS makes a significant contribution to sustainable development.

However, its ecological efficiency depends to a great extent on whether the companies involved treat EMAS in a very narrow, administrative way, or whether late the regulation into a very comprehensive and innovative basic understanding. Cost-benefit analyses have shown that, m the medium term at least, positive economic benefits predominate at most of the companies involved.

# IMPLEMENTATION OF COURT ORDERS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: AN OVERVIEW OF THE EXPERIENCE OF THE INDIAN JUDICIARY+

*S. Muralidhar**

## I. Introduction

The Constitution of India recognises as fundamental rights many of the individual rights that comprise the International Covenant on Civil and Political Rights (ICCPR). These include the right to life,[1] to equality,[2] to the freedom of speech and expression[3] and the right to seek judicial redress before the Supreme Court of India[4] for enforcement and protection of these rights which are contained in Part III of the Constitution. Part IV of the Constitution contains the Directive Principles of State Policy (DPSPs) many of which correspond to the individual rights enshrined in the International Covenant on Economic Social and Cultural Rights (ICESCR). For instance, minimum living wages,[5] free and compulsory education for all children up to age of fourteen,[6] minimum standards of living, nutrition and public health,[7] protection and improvement of environment, forests and wild life[8] and the right to free legal aid.[9] Article 37 of the Constitution declares the Part IV provisions (DPSPs) as being

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+ Revised version of a paper prepared for the First South Asian Judicial Colloquium held in New Delhi in November 2002.

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1. Art. 21.
2. Art. 14.
3. Art. 19(1) (a), which is available to all citizens and is subject to reasonable restrictions specified under Art. 19 (2).
4. Art. 32. Writ petitions can be filed directly in the Supreme Court of India where there is a violation of an fundamental rights specified in Part III of the Constitution. For violation of these and other constitutional rights writ petitions can also be filed in the High Courts under Article 226 of the Constitution.
5. Art. 43.
6. Art. 45.
7. Art. 47.
8. Art. 48-A.
9. Art. 39-A.

non-justiciable and states they "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."

The Indian judiciary has a unique position under the Constitution as an independent organ of state designed to provide a countervailing check on the functioning of the other two organs in their respective spheres. Armed with the power to strike down executive, quasi-judicial and legislative actions as unconstitutional, the judiciary has, as the ultimate interpreter of constitutional provisions,[10] expounded the basic features of the Constitution of which the power of judicial review has been recognised as forming an integral part.[11] Every attempt at diluting or dispensing the power of judicial review through statute or constitutional amendments has been rebuffed with certainty.[12] Secondly, the Supreme Court's declaration of the law is mandatorily binding "on all courts within the territory of India"[13] and "all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court of India."[14] This coupled with the power to punish for contempt of the court,[15] reinforces the position of the judiciary as a constitutional authority that enforces accountability and answerability of the other organs of the state.

The role of the Court has, over the fifty-two years of its working, undergone a transformation that has witnessed its emergence as a dynamic institution playing an active role in expanding the scope and content of individual and collective rights of citizens, in the civil and political spheres as well as in the economic, social and cultural (ESC) spheres. A series of developments brought this about:

- The declaration of the indivisibility of the fundamental rights on the one hand and the DPSPs on the other. It was said that "In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to the directive

10. *State of Rajasthan* v. *Union of India* (1977) 3 SCC 592 at 662.
11. *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225.
12. For instance, in *Kihoto Hollohan* v. *Zachillhu* 1992 Supp (2) SCC 651, the Supreme Court stuck down a portion of the 52nd amendment to the Constitution, which sought to immunize from judicial review the decision of a Speaker of the legislature in the context of the anti-defection law.
13. Art. 141.
14. Art. 144.
15. Art. 129 in the case of the Supreme Court and Art. 215 for the High Court. This power is in addition to be found under the CONTEMPT OF COURTS ACT 1971.



principles"[16] and that both were complementary, "neither part being superior to the other."[17]

- The assertion of the doctrine of substantive due process as permeating the entire Part III of the Constitution comprising the fundamental rights. Thus, in order to pass judicial scrutiny an executive, quasi-judicial or legislative action would have to satisfy the 'just, fair and reasonable' test.[18]
- The expansion of the scope and content of the fundamental right to life as encompassing "the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms."[19]
- The innovation of public interest litigation (PIL) as a tool to achieve social objectives by enabling easy access to courts for those disadvantaged socially and economically. A conscious attempt was made to relax the rules of standing and procedure and free litigants from the stranglehold of formal law and lawyering.[20]
- The expanded notion of the right to life enabled the court, in its PIL jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of ESC rights. The early PIL cases witnessed attempts by the court to rescue bonded labour from dehumanizing conditions of work,[21] ensuring availability of free legal aid to destitute undertrial prisoners[22] and protecting the right of pavement dwellers to processual due process while facing forced eviction.[23]
- More recently, the court has been able to evolve binding guidelines to deal with the problems of sexual harassment of women at the workplace,[24] and the availability of the bare minimum

16. *Kesavananda Bharati* v. *State of Kerala supra* n. 11 at 879.
17. *State of Kerala* v. *N.M.Thomas* (1976) 2 SCC 310 at 367.
18. *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248.
19. *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi* (1981) 1 SCC 608.
20. The objective of PIL has been explained in *S.P.Gupta* v. *Union of India* 1981 Supp SCC 87.
21. *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 SCC 161.
22. *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81. Art. 39-A, a DPSP in Part IV, which provides for the right to free legal aid, was held to explain the content and scope of the right to life under Art. 21 and hence enforceable as such.
23. *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545.
24. *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241.

rations through the public distribution system for those below the poverty line.[25]

This piece proposes to examine the nature and enforcement of orders of the Indian courts in the context of economic, social and cultural rights. It attempts to examine the positive features of the court's interventions as well as the possible criticisms that such an exercise inevitably draws from those who envision a restricted role for courts.

## II. Nature of Court Orders

Judicial orders in the ESC sphere has by and large been in PIL cases and this analysis confines itself, for the sake of convenience, to those handed down by the Supreme Court of India. The enforcement of the orders of the court depends to a large extent on the nature of the order. There are invariably two facets of an order – the *declaratory* part and the *mandatory* part. Declaratory orders and judgments, without consequential directions to the state authorities, have to await the acceptance of their binding nature under Articles 141 and 144 by the state and their consequent implementation. In *Unnikrishnan J.P.* v. *State of Andhra Pradesh*,[26] the court declared that "right to education is implicit in and flows from the right to life guaranteed under Article 21"[27] and that "a child (citizen) has a fundamental right to *free education* up to the age of fourteen years."[28] The state responded to this declaration nine years later by inserting, through the Ninety-third amendment to Constitution, Article 21-A which provides for the fundamental right to education for children between the ages of six and fourteen.[29]

25. *People's Union for Civil Liberties (PUCL)* v. *Union of India* (2001) 7 SCALE 484.
26. (1993) 1 SCC 645. The case concerned the challenge to the validity of certain state legislations regulating the charging of fees by private educational institutions and prohibiting the charging of 'capitation' fees from students seeking admission.
27. *Id.* at 730.
28. *Id.* at 735. The court added: "We cannot believe that any state would say it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the state." Further, the court clarified: "The right to education further means that a citizen has the right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development, By saying so we are not transferring Article 41 from Part IV to Part III – we are merely relying upon Article 41 to illustrate the content of the right of the right to education flowing from Article 21."
29. Another example of a declaratory judgment would be *Vishaka* v. *State of Rajasthan*, *supra* n. 24.



Mandatory orders, on the other hand, are premised on the general apathy displayed by the executive to move to action and spell out a plan of action as well as a time schedule within which compliance with court orders is expected. In *Bandhua Mukti Morcha*,[30] the court declared that the non-enforcement of welfare legislation like the Minimum Wages Act 1948 and the Bonded Labour (Abolition) Act 1976 would tantamount to "denial of the right to live with human dignity enshrined under Article 21 of the Constitution."[31] However, the court did not stop with the declaration of the law but issued a series of directions for compliance by state authorities. The court then proceeded to monitor the implementation of these directions, an exercise that is continuing till the present date.[32]

## III. Techniques and Facets of Enforcement of Orders

The PIL jurisdiction of the court has enabled innovation in relation to the manner of dealing with issues, undaunted by the possible incapacity to comprehend complex issues that may prima facie seem not amenable to 'judicially manageable standards'. A brief overview of the techniques adopted by the court would help appreciate this:

- The issue brought before the court is far more important than the person bringing it. Thus, it is not open to a petitioner in a PIL to withdraw the case, and in that event, the court may dispense with the petitioner while continuing to engage with the cause.[33]
- Very often, as has been happening with fair regularity in the recent past, the court appoints a senior counsel as amicus curiae to assist it in the proceedings.[34] The amicus curiae assists the court in addressing the issue in legal terms, sifting out the relevant facts from the documents and pleadings and in helping sharpen the focus of discussion, conscious of the contingencies

30. *Supra* n. 21.
31. *Id.* at 183.
32. For a recent order, see *Bandhua Mukti Morcha* v. *Union of India* (2000) 10 SCC 104. One recent instance is the PIL seeking strict implementation of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 aimed at preventing the malaise of female foeticide: *CEHAT* v. *Union of India* (2001) 7 SCALE 477 and (2001) 8 SCALE 325.
33. *Sheela Barse* v. *Union of India* (1988) 4 SCC 226. See also, *S.P.Anand* v. *H.D.Deve Gowda* (1996) 6 SCC 734.
34. For instance, Mr.F.S.Nariman, Senior Advocate assisted the Supreme Court as *amicus curiae* in the case relating to sexual harassment of women at the workplace (*Vishaka*, *supra* n. 24).

of judicial functioning.[35] This also ensures that an element of continuity is maintained at the stage of implementation of the orders and not made dependent on the continued enthusiasm of the PIL petitioner.

- The court takes the help of commissioners or expert bodies for ascertaining facts or for an independent verification of the facts presented by the petitioner or the state.[36] The same device can be adopted at the stage of implementation of the court's orders.[37]
- Unlike the regular run of cases, PIL cases are not disposed of by a single judgment at one point of time. A series of short orders are passed and their implementation ensured, before the court proceeds to a final judgment. The court has described this device as a 'continuing mandamus'.[38]
- The court usually builds into its directions a forewarning of the consequences of disobedience or non-implementation. Thus while laying down a detailed schedule for conversion of the mode of motor vehicles plying on Delhi roads to clean fuels, the court warned that violation of the order would invite action for contempt of court.[39] In the PIL relating to the protection of the forest cover, the court has often had to wield its contempt power to pull up recalcitrant and adamant state officers who were seen thwarting the implementation of its orders.[40]
- In the post-judgment phase too, the court has often retained the case on board for monitoring the implementation of its directions.

35. An instance of such an involvement is that of Mr. Harish Salve, Senior Advocate, in the PIL concerning the protection of forest cover: *T.N.Godavarman Tirmulapad* v. *Union of India* (1997) 2 SCC 267.
36. Senior lawyers were appointed as commissioners in the PIL concerning child labour in Tamil Nadu: *M.C.Mehta* v. *State of Tamil Nadu* (1996) 6 SCC 756 and a bureaucrat in the bonded labour case: *Bandhua Mukti Morcha*, *supra* n. 21.
37. In *Sheela Barse* v. *Union of India* (1994) 4 SCALE 493, a senior advocate was given the mandate of ensuring the implementation of the judgment of the court in *Sheela Barse* v. *Union of India* (1993) 4 SCC 204 which had declared the jailing of the mentally ill in jails to be unconstitutional. In the PIL concerning the protection of forest cover, a High Powered Committee appointed by the court has been charged with overseeing the implementation of the court's directions.
38. *Vineet Narain* v. *Union of India* (1998) 1 SCC 226 at 243.
39. *M.C.Mehta* v. *Union of India* (1998) 6 SCC63.
40. *T.N.Godavaraman Tirumulapad* v. *Union of India* (1998) 3 SCALE 669 and (1998) 9 SCC 672.



Thus the PIL in which detailed guidelines concerning arrests were laid down has been listed with fair regularity and the directions monitored till the present, six years after the main judgment.[41]

- Aware of the need to remain within the limits of justiciability, the court has been careful to explain the legal basis for its intervention in the different areas concerning ESC rights. Thus the right to education was explained as forming an integral part of the right to life,[42] as was the right to environment[43] and to health.[44]
- The court has also stressed that its intervention is warranted only where it finds that there has been a failure by those charged with performing their statutory and constitutional functions to address the problem.[45] It is this context that the court intervened to direct the governments at the centre and the states to make available foodgrains, overflowing in state godowns, to be made available on a priority basis to those living below the poverty line.[46]
- In an area where the court is of the view that the issue is in the realm of executive or legislative policy, it is usually reluctant to intervene although such policy may have implications for ESC rights. Thus the court declined, recently, to interfere in the decision of the government to disinvest its shares in a public sector undertaking on the ground that this was in the realm of economic policy of the government and that the court was plainly not equipped to evaluate its appropriateness.[47]

The court thus attempts to strike a balance between remaining within its sphere of influence while continuing to ensure answerability and accountability of the other organs of state.

## IV. The Debate on Judicial Intervention

The intervention by the court in a wide range of issues, including those involving ESC rights, has generated a debate about the competence and

41. *D.K.Basu* v. *State of West Bengal* (1997) 1 SCC 416 (main judgment). For a sampling of subsequent orders see those reported in (1999) 7 SCALE 222, (2000) 5 SCALE 353 and (2001) 7 SCALE 487.
42. *Unnikrishnan*, *supra* n. 26.
43. *M.C.Mehta* v. *Union of India* (1998) 9 SCC 589.
44. *Paschim Banga Khet Majoor Samity* v. *State of West Bengal* (1996) 4 SCC 37.
45. *Vineet Narain* v. *Union of India* (1996) 2 SCC 199 at 200-01.
46. *PUCL* v. *Union of India*, *supra* n. 25.
47. *BALCO Employees' Union* v. *Union of India* (2002) 2 SCC 333.

legitimacy of the judiciary in entering areas which have for long been perceived as belonging properly within the domain of the other organs of state.[48] But that by itself may not explain the necessity for the court's intervention in the larger perspective of the development of the law and of healthy democratic practices that reinforce public accountability. To place the debate in its perspective, it may be necessary to briefly recapitulate the implications of judicial intervention through PIL in the area of ESC rights.

The positive implications may be stated as:

- finding a space for an issue that would otherwise not have merited sufficient attention. The decision in *Vishaka*,[49] for instance, has brought into public discourse the issue of sexual harassment of women in the workplace which had otherwise been completely ignored by the executive and the legislature. It becomes immediately useful, as a law declared by the Supreme Court, to demand recognition and enforcement of the right to access judicial redress against the injury caused to women at the workplace.
- catalysing changes in law and policy in the area of ESC rights. Many of the recent changes in law and policy relating to education in general, and primary education in particular, are owed to the decision in *Unnikrishnan*[50].
- devising benchmarks and indicators in several key areas concerning ESC rights. For instance, the decision in *Paschim Banga*[51] delineates the right to emergency medical care for accident victims as forming a core minimum of the right to health and the orders in *PUCL*[52] underscore the right of access for those below the poverty line to food supplies as forming the bare non-derogable minimum that is essential to preserve human dignity.
- development of a jurisprudence of human rights that comports with the development of the international law. PILs concerning environmental issues have enabled the court to develop and

48. See generally, Ashok Desai and S.Muralidhar, *Public Interest Litigation: Potential and Problems* B.N.Kirpal *et al* (eds.), SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159 (2000).
49. *Supra* n. 24.
50. *Supra* n. 26.
51. *Supra* n. 44.
52. *Supra* n. 25.



apply the 'polluter pays principle',[53] the precautionary principle,[54] and the principle of restitution.[55]

Other issues that have arisen in this context are:

- *Conflict of rights*: Some of the PILs concerning ESC rights throw up issues concerning conflicting rights of different sets of individuals. Thus the decision to order closure of a polluting abattoir in Delhi was seen as also affecting livelihoods of butchers,[56] and the decision to construct a dam across the Narmada to provide water for the citizens of one state as conflicting with the right to shelter of those that belonged to another.[57]
- *Challenges to Legitimacy:* The continued non-implementation, for instance, of a declaratory judgment, may be seen as undermining the court's authority.[58] It is a moot question whether the use of the contempt power, in the context of practical problems posed by lack of resources, is indeed the best way of ensuring implementation of the court's orders.
- *Not accounting for competing public interests*: It is possible that in dealing with an issue from the point of view of those bringing it, the court may not be mindful or able to anticipate the impact its orders may have for others not present before it. Thus it may happen that while ordering the closure of a polluting industry, the workmen and their families who may be adversely affected, may not be heard.[59] It is not always possible for the court to satisfactorily redress their grievances at a later point in time.

53. *S.Jagannath* v. *Union of India* (1997) 2 SCC 87.
54. *Vellore Citizens' Welfare Forum* v. *Union of India* (1996) 5 SCC 647.
55. *In Re: Bhavani River- Shakti Sugars Ltd.* (1998) 6 SCC 335.
56. *Buffalo Traders Welfare Association* v. *Maneka Gandhi* 1994 Supp (3) SCC 448.
57. *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664 and 7644.
58. Chief Justice Bharucha, in a speech delivered at a seminar organised by the Bar Council of India in December 2001 pointed out that: "It is in the overweening public interest that the courts should not pass orders that they cannot enforce. Orders that cannot be enforced bring the judiciary into disrepute for the citizen jeers: 'here is an order that a Court has made, and what has happened? Nothing.": *Speech by Hon'ble Mr. S.P. Bharucha, Chief Justice of India* in Jagga Kapur (ed.) VII SUPREME COURT ON PUBLIC INTEREST LITIGATION V at VIII (2001).
59. See generally the orders in *M.C.Mehta* v. *Union of India* (1997) 11 SCC 227, 312 and 327.

- *Continuity in the treatment of the issue*: Since by their very nature PIL cases, including those concerning ESC rights, require monitoring by courts of the implementation of their directions over a long period of time, it is imperative that there is a degree of both continuity and consistency in their approach to the issue. If this is not able to be ensured, and some times it is not, the gains of judicial intervention may not be able to be sustained.

## V. Conclusion

The above discussion serves to highlight the need for continued judicial intervention in the area of ESC rights even while the issues that such intervention throws up are addressed. In a country where large sections of the population continue to be denied access to survival rights and entitlements, the judiciary is very often called upon to intervene in exercise of its primary role as a protector and enforcer of basic rights. The experience of the Indian judiciary bolsters the vision of the Constitution as a dynamic and evolving document and not merely an expression of desired objectives in an open-ended time frame. By taking on board the citizen's concerns about an inactive or indifferent legislature or executive, the court provides the platform for the state and civil society to engage as active participants in the scheme for realization of ESC rights.

# *NOTES & COMMENTS*

# PROTECTING THE LIFELINE YAMUNA FROM POLLUTION AT DELHI

*Usha Tandon**

## I. Introduction

River Yamuna is the main source of water supply in National Capital Territory (NCT) Delhi (hereinafter referred to as Delhi). There is a heavy pressure on the water supply and sanitation on river Yamuna at Delhi leading to severe impact on water quality of the river. A recent study conducted by the Centre for Science and Environment has revealed that the tap water in Delhi is crawling with bacteria and bottled water is poison.[1] Delhi contributes greatly to the pollution of the Yamuna river. Pollution of Yamuna begins the moment it enters Delhi at Wazirabad in the north. Delhi generates about 2083 mld (million litres per day) of sewage against 1473 mld of sewage treatment. The entire existing capacity of sewage treatment is not up to the desired secondary treatment level. Thus nearly, 565 mld of untreated sewage and significant quantity of partially treated sewage is discharged into the Yamuna river through various drains.[2]

Though Delhi covers only two percent of the length and basin area of the river, it contributes 71 percent of the waste water discharged into the river everyday. And since most of the Yamuna water that flow into the city are used to cater to Delhi's extravagant requirements, what remains of the river after Delhi has finished with it, is undiluted sewage. Even an optimum flow of water is not maintained. The situation is worse during summer. The average annual flow in Yamuna is estimated to be about 100 billion kilolitres, of which 80 percent is during the three monsoon months. With very little water flowing through it through the other months, the assimilation capacity of the river is considerably reduced as sewage is neither diluted nor dispersed.[3]

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1. Hindustan Times, February 6, 2003; see also Times of India, February, 10, 2003.
2. CPCB, Water Quality Status of Yamuna River 57 (2000).
3. Sharma, *When River Weeps*, Down to Earth 27 (April 1996).

## II. Causes of Pollution to River Yamuna From Delhi

The main causes of pollution to Yamuna from Delhi are the population growth and industrialization of Delhi.

### *Population Growth*

The ever- increasing population of the country manifests itself by way of the metropolitan cities becoming increasingly congested. Delhi has experienced phenomenal population growth immediately after its declaration as the capital of India during the year 1912. The population growth of Delhi since 1901-2001 is presented in the following table:[4]

| Decadal Year | Total Population-Delhi |
|---|---|
| 1901 | 405809 |
| 1911 | 413851 |
| 1921 | 488452 |
| 1931 | 636246 |
| 1941 | 917939 |
| 1951 | 1744072 |
| 1961 | 2658612 |
| 1971 | 4065698 |
| 1981 | 6220406 |
| 1991 | 9420644 |
| 2001 | 13782976 |

*Source*: Directorate of Census Operations, Delhi.

Delhi has followed an upward trend in population growth all through the last century. However, the biggest increase was in the decade 1941-51, when the number doubled following the influx of refugees. The density of population for Delhi in 1981 was 4194 persons per sq.km., which was increased to 6354 persons per sq.km. in 1991 and 9294 persons per sq.km. in 2001.[5] The density of population of Delhi is the highest in the country. The immigration of population from other states has been a major cause

4. See Directorate of Census Operations, Delhi, District Census Handbooks.
5. See GOI, Census of India 2001, Series 1, Paper 1 of 2001.



of Delhi's population growth. The neighboring states of Uttar Pradesh, Haryana and Rajasthan account for over 70% migration of population to Delhi. Besides this a floating population of about 3 to 4 lakh persons visit the capital city daily and is a recurring feature. The floating population further increases extraordinarily during the periods of mass congregation, exhibition, trade fairs, rallies etc.[6]

In spite of intensive developmental activities in Delhi 70% population of Delhi still lives in sub-standard habitat with a break-up of 1.0 million in *Jhugi-Jhonpadi* clusters, 1.2 million in unauthorized colonies and unauthorized regularized colonies, 1.4 million in slum designated areas, 0.5 million in urban villages, 0.5 million in rural villages and about 1.2 million in resettlement colonies.[7]

The urban area of Delhi has been growing continuously since 1911. There was a considerable rise of population mainly as a result of developments coming up after the transfer of the Imperial Capital from Calcutta to Delhi. After the establishment of New Delhi in 1931, the expansion became almost stagnant. Thereafter significant change in the urban area was experienced only in the post-colonial period. After independence, Delhi has been growing steadily with the urban area expanding to 685.3 sq.km. (according to 1991 census), which is 46.21% of the total geographical area of Delhi.[8]

Delhi discharges more than 2,000 million litres per day mld of waste water into Yamuna . Of this, only 300 is contributed by the industrial sector. The bulk of the pollutants come from untreated sewage, dumped into the river because the city administration lacks sufficient sewage treatment facilities. Even the existing treatment facilities are underutilized. A mere 31.8 mld of sewage is treated sufficiently for disposal into the river. The existing sewage plants are capital-and power-intensive. Sewage goes untreated into the river during machinery and power breakdowns; in other cases badly situated sewage treatment plants (STPs) get flooded during the rains.

### *Industrialisation in Delhi*

The growth of industries in Delhi after independence has closely followed the rise in the population. The total number of industries in Delhi was around 18,500 in the year 1961 which steeply increased to about

6. CPCB, Water Quality Status of Lakes and Reservoirs in Delhi 3 (July 2001).
7. *Supra* n. 2 at 21.
8. See GOI, Census of India 1991, Series 1, Paper 1 of 1991.

93,000 by 1993. A rapid growth in the number of industries was encouraged due to the availability of facilities and various incentives. After 1993 the growth of industries in Delhi was almost constant due to high cost of land, strict compliance of environment protection/pollution control laws, development of suitable industrial area in the adjoining cities e.g. NOIDA, Ghaziabad and Faridabad. The fast industrialization resulted in a mixed and unplanned land-use causing deterioration in living conditions and the quality of the environment in the city.[9]

Industries generate water pollution load, which is toxic and varied in nature. Some are refractory and very difficult to either destroy or remove once they have entered a stream. There are several large, medium and small-scale industries which are located within the 16 major industrial areas in Delhi. Industrial waste from Delhi's 20 large, 25 medium and about 93,000 small industrial units flow into the river through the drains. By the time Yamuna leaves south Delhi at Ohkla and for 490 km. thereafter the Yamuna is a dead river. The water which the Central Pollution Control Board categorises as fit for drinking at Wazirabad is deemed unfit for even bathing at Okhla. The dissolved oxygen (DO) and biological oxygen demand (BOD) levels at Wazirabad and Okhla differ dramatically.[10]

## III. Legal Efforts

### *The Water (Prevention and Control of Pollution) Act 1974 (Water Act)*

The Water Act establishes a Central and State Pollution Control Boards[11] for the prevention and control of water pollution. The Central Board may advise the Central Government on water pollution issues, coordinate the activities of State Pollution Control Boards, sponsor investigation and research relating to water pollution and develop a comprehensive plan for the control and prevention of water pollution.[12] The Central Board also performs the functions of a State Board for the union territories.[13] The Act generally prohibits disposal of polluting matter in streams, wells and sewers or on land in excess of the standards established by the

9. *Supra* n. 2 at 22.
10. *Supra* n. 3.
11. Hereinafter referred as Central Board.
12. S. 16, Water Act.
13. *Id.* S. 4 (4).



State Boards.[14] The 1988 amendment introduced a new Section 33A in the Water Act which empowers State Boards to issue directions to any person, officer or authority including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service. The 1988 amendment also modified S. 49 to allow persons to bring actions under the Water Act. The Act provides for a consent procedure to prevent and control water pollution. A person must obtain consent from the State board before taking steps to establish any industry, operation or process, any treatment and disposal system or any extension or addition to such a system which might result in the discharge of sewage or trade effluent into a stream, well or sewer or onto land.[15]

### *The Environment (Protection) Act 1986 (EPA)*

The EPA extends to the control of water pollution. The EPA defines the environment to include water and the inter-relationship which exists among and between water and human beings, other living creatures, plants, micro-organisms and property.[16] The Act authorizes the Central Government to establish standards for the quality of the environment and for discharge of environmental pollutants from any source.[17] The Ministry of Environment and Forest has published Environment (Protection Rules) 1986 establishing general standards and industry – based industry standards for certain types of effluent discharge.[18]

### *The Code of Criminal Procedure 1973 (CrPC)*

Remedies are provided against public nuisance under Sections 133 to 144 of the CrPC. Under Section 133 of the CrPC specified Magistrates[19] may pass order for the removal of public nuisance within a fixed period of time. Public nuisance is not defined in Section 133, rather as many as six instances of public nuisance are provided in clauses (a-f) of Section 133 sub-section (1). Out of these six clauses two clauses (a and b) are relevant here. According to Section 133 (1) (a) if such Magistrate thinks

14. *Id.* S. 24.
15. *Id.* S. 26. The State Board may condition its consent by orders that specify the location, construction and use of the outlet as well as the nature and composition of new discharges.
16. S. 2 (a), EPA
17. *Id.* S. 3 (2).
18. The Environment (Protection Rules) 1986, Sch. I and VI.
19. District Magistrate, SDM or any other Executive Magistrate specially empowered in this behalf.

that any lawful obstruction or nuisance should be removed from any river or channel which is lawfully used by the public, then he may make conditional order to remove such obstruction or nuisance. According to Section 133 (1) (b) if the Magistrate considers that the conduct of any trade or occupation is injurious to the health of the community, then he may make conditional order requiring such person to desist from carrying on such trade or occupation or to regulate in such manner as may be directed. The Magistrate may act on information received from a police report or any other source including a complaint made by a citizen. The person directed to remove the nuisance must either comply with the order and show cause against it. Where he opposes the order, the Court must initiate an inquiry and call on the parties to adduce evidence. When a person fails to appear and show cause or when the court is satisfied on the evidence adduced that the initial order was proper, the order is made final. This section provides an independent, speedy and summary remedy against environmental nuisance.[20]

### *Constitution of India*

Article 48A of the Constitution enjoins that "the State shall endeavour to protect and improve the environment". Article 51A imposes a fundamental duty on the citizen of India to protect and improve the natural environment including lakes and rivers. The expression "right to life" occurring in Article 21 of the Constitution includes the right to clean environment including clean water.[21]

Articles 32 and 226 of the Constitution of India empower the Supreme Court and the High Courts respectively to issue directions, orders or writs for the enforcement of fundamental rights. As the Supreme Court has interpreted Article 21 to include the right to clean environment, a litigant may assert his or her right to a healthy environment against the State in a writ petition to either the Supreme Court or a High Court. Further the

20. Though there is a controversy among High Courts regarding the jurisdiction of Magistrate to deal with environmental nuisance under S. 133 after passing of the WATER ACT and the AIR ACT, more and more High Courts recently are of the view that the later Acts do not override the former provision. See *Nagarjuna Paper Mills* v *SDM*, 1987 (93) Cr.L.J. 2071 (AP), *Lakshmi Cement* v *State*, 1994 (100) Cr.L.J. 3649 (Raj.), *Gurudev Ice Factory* v *State*, 1996 (102) Cr.L.J. 2833 (P&H), *Ganesh Prasad* v *State*, 1997 (103) Cr.L.J. 928 (Pat.), *Harihar Polybre* v *SDM* 1997 (103) Cr.L.J. 27311111 (Kant.), *Anita Tyre Retreading Works* v *The City Magistrate*, 1999 (105) Cr. L.J. 1187 (All.).

21. See *Subhash Kumar* v. *State of Bihar* AIR 1991 SC 420 and *Virendra Gaur* v. *State of Haryana* 1995 (2) SCC 577.



traditional concept of *locus standi* is no longer a bar for the community oriented public interest litigation. Though not an aggrieved party, environmentally conscious individuals, groups or NGOs may have access to the Supreme Court or High Court by way of public interest litigation (PIL).[22]

## IV. ADMINISTRATIVE EFFORTS

The river Yamuna has been monitored by the Central Pollution Control Board for the last twenty years. It has conducted various studies on water quality monitoring and management including assessment of assimilation capacity, bio-monitoring and evaluation of death-rate of microbial pollution.[23] Considering the importance and sentimental relations of public with rivers, especially the Ganga and the Yamuna, the Government of India had launched a programme the "Ganga Action Plan" for cleaning of the river in 1985 based on the survey and monitoring studies conducted by Central Pollution Control Board

In the first phase of Ganga Action Plan, diversion and interception of all the waste water drains along the Ganga river were taken up. It had been felt at later stages that the result of the Ganga Action Plan cannot be fully realized, until simultaneous action be taken for abatement of pollution in important tributaries like Gomti and Yamuna, as these rivers are contributing significant amount of pollution to river Ganga. Therefore, the Government of India had launched cleaning of Yamuna river (Yamuna Action Plan) and Gomti river (Gomti Action Plan) in the second phase of Ganga Action Plan.[24] Under the Yamuna Action Plan, it has been considered necessary to undertake continuous water quality monitoring of the river to assess the present status of water quality in various stretches of the rivers and to evaluate the outcome of various pollution control activities in existence or being implemented. The Central Ganga Authority, presently National River Conservation Directorate (NRCD), had taken up monitoring of these rives. The salient features of Yamuna Action Plan are presented below:

### *Yamuna Action Plan*

The schemes of pollution abatement under the Yamuna Action Plan had been planned to be implemented in 15 districts viz. Yamuna Nagar,

22. See Diwan and Rosencranz, ENVIRONMENTAL LAW AND POLICY IN INDIA 133-153 (2001).

23. See for example, THE YAMUNA SUB-BASIN (ADSORBS/2/80-81), QUALITY AND TREND OF RIVER YAMUNA (A/10/1982-83), ASSIMILATION CAPACITY OF POINT POLLUTION LOAD- THE RIVER YAMUNA IN UT- DELHI (CUPS/12/1982-83).

24. See *supra* n. 2, chapter 5.

Jagadhari, Karnal, Panipat, Sonepat, Gurgaon and Faridabad in Haryana, Saharanpur, Muzafarnagar, Gaziabad, NOIDA, Mathura, Vrindavan, Agra and Etawah in Uttar Pradesh and NCT-Delhi. Later some more towns were added in the Action Plan on the recommendations of respective State Governments.[25] The schemes under the Yamuna Action Plan are being implemented by the State Governments through identified nodal agencies with due emphasis on public participation and institutional development. The Ministry of Environment and Forest, Government of India is coordinating the overall implementation of the programme.

It has been proposed to set up sewage treatment plants with a total capacity of about 900 mld under the Yamuna Action Plan, some of which already installed and become operative. The following type of pollution abatement work is proposed to be taken up under the programme: (i) interception and diversion of municipal waste water, (ii) sewage treatment, (iii) low cost sanitation, (iv) improved crematoria, (v) improvements of ghats, (vi) afforestation along the river banks and (vii) community participation. Under the Yamuna Action Plan emphasis would be laid on (i) the minimization of the cost of conveyance of sewage and the energy needs for pumping through decentralization of sewage and sewage treatment facilities wherever feasible, (ii) low cost technology options for sewage treatment would be encouraged through agro-forestry, oxidation ponds, aqua-culture, up-flow anaerobic sludge blanket (UFASB) digester etc., (iii) the Action Plan will address the problem of siltation, bank erosion, and iv) pollution from agricultural run-off containing pesticides and fertilizers, through active cooperation of the concerned administrative Ministers.[26]

### *Yamuna Action Plan for Delhi*

Yamuna river enters Delhi at Wazirabad and after traversing about 22 km. from north to south leaves Delhi at Okhla dividing it into eastern and western parts. Considering the pollution load in Yamuna at Delhi and its

25. *Ibid.* The estimated expenditure planned in the programme for 15 districts was Rs. 357 crore. Government of Japan had extended soft loan of Rs. 17.77 billion for the Yamuna Action Plan. The capital cost of the schemes planned and launched are to be equally shared between Government of India and State Governments. The cost of operation and maintenance of the assets created under the programme are proposed to be borne fully by the State Governments. Emphasis has been laid on appropriate treatment technologies and resource recovery from sewage by proposed utilization of treated sewage for irrigation and aqua-culture, sludge as manure and bio-gas for power generation.
26. *Ibid.*



self-cleaning capacity, it was felt that unless the pollution abatement action is taken at Delhi, the objectives of the Yamuna Action Plan cannot be achieved. Under the Delhi package of Yamuna Action Plan, two sewage treatment plants, each of 10 mld capacity, are proposed to trap and treat the waste water from Sen Nursing Home and Delhi Gate (civil mill) drains. In addition, it is proposed to augment the sewage treatment capacity from the existing 1473 mld to about 2713 mld after Ninth Five Year Plan. The other components of Yamuna Action Plan in Delhi comprise i) setting up low cost toilets and improved crematoria in selected areas, ii) providing river front facilities at few places, and iii) increasing plantation along the river banks.[27]

The Yamuna Action Plan for Delhi is coordinated by Department of Environment, NCT-Delhi. Some projects have been finalized by the Ministry of Environment and Forest, for the NCT-Delhi in association with Delhi Jal Board ( DJB), and Municipal Corporation of Delhi (MCD).[28] The Delhi Government, Department of Environment is conducting "Clean Yamuna Compaign" under its *bhagidari* scheme every year (since 2001) during May/June with the help of Government functionaries, NGOs, RWAs, NCC, schools and hospitals etc. During the drive huge quantity of plastic bags, garbage, water, hycacinths, and general litter from river embarkment are lifted and sent to the sanitary landfill sites.[29]

## V. Judicial Efforts

### *Yamuna Pollution Cases*

A news item titled "...and Quite Flow *Maily* Yamuna..." was published in a daily newspaper *The Hindustan Times*, New Delhi on August 18, 1994. The Supreme Court took *suo-moto* cognizance of this news item and issued notices on December 2, 1996 to the Central Pollution Control Board to conduct investigations with a view to having an assessment of the status of pollution due to generation of industrial wastes, municipal sewage, household wastes and other types of wastes. On August 27, 1999, the Apex Court angrily observed, that "till now, since the last few years, this court has been trying to see that the river does not get polluted and the quality of water improves. Orders had been passed directing the

27. *Ibid.*
28. Information taken from the unpublished papers of Department of Environment-NCT-Delhi. Department visited on February 10, 2003.
29. *Ibid.* A programme *kinare-kinare* is aired from All India Radio- FM (102.6 MHz) on every Sunday at 11.00 a.m. giving information on river Yamuna with entertainment.

setting up of treatment plants, shutting or shifting of industries, but with no success....There are enough laws at the command of the State to enable it to take appropriate action to see that the river is not polluted. The overwhelming majority of people of this State and those who depend upon the quality of the river water cannot be allowed to be held at ransom by a small percentage polluting the river aided and abetted, in a way, by a governmental inaction."[30] The Court directed Central Board and the Delhi Pollution Control Committee (DPCC) and Haryana State Pollution Control Board (HSPCB) to set up Monitoring Stations at Palla, where the river enters Delhi and at Agra Canal at which point it enters the State of Haryana. The Court further directed the Central Board and the DPCC to set up similar monitoring stations on each of the drains leading to the river.

On January 24, 2000, the Supreme Court directed the Delhi Administration to communicate to every industry in Delhi not to discharge their effluents into any drain leading to Yamuna or into Yamuna itself which has the effect of polluting the said river.[31] In its subsequent order passed on March 10, 2000, the Hon'ble Court regretted that there was not much improvement in the quality of water in Yamuna since the orders were passed by the Court. The Court expressed its dissatisfaction with the endeavours on behalf of the Delhi Administration and other connected authorities in taking adequate and proper measures to redeem the water.[32]

The Apex Court on April 28, 2000, observed that "this court on an occasion, nearly five years ago had directed that in order to treat the domestic waste, sewage treatment plants should be established. In the year 1995, it was contemplated that 14 sewage treatment plants would be set up and they were expected to be operational by the year 1997. We are informed that in the year 1998 two more sewage treatment plants were contemplated with the result that as of today there should have been 16 sewage treatment plants in operation. However the construction of only 8 sewage treatment plants has been undertaken, out of which only 4 are functional today. ... As regards the industrial effluents which is discharged, the situation is no better."[33]

Their Lordships of the Supreme Court on April 4, 2001 observed that the right to life guaranteed under Article 21 of the Constitution includea

30. *AQFM Yamuna* v *CPCB*, 1996 (5) SCALE 418 at 419.
31. 2000 (SC2) GJX 0807, (2000) 9 SCC 44.
32. 2000 (3) SCALE 122.
33. 2000 (SC2) GJX 1005, (2000)10 SCC 587.



a right to clean water.[34] This right to clean water being deprived to 31.8 million citizens of Delhi because of the large scale pollution of the river Yamuna. The entire pollution takes place only in the stretch of the river Yamuna, that passes through Delhi which is about 22 km. The quality of the river Yamuna, when it enters in Delhi, is far superior than when it leaves Delhi and when the Yamuna enters the Agra canal. The Hon'ble Court further directed the Ministry of Urban Development to submit how its Integrated Action Plan could be implemented within the prescribed time frame. Directions were also issued to the Chief Secretary of Delhi to inform the Court regarding steps that could be taken to ensure the required quantity of water in the river Yamuna so that it could no longer be called "*Maily* Yamuna" after March 31, 2003. The Court also directed the Ministry of Environment and Forests to study the problem with regard to the treatment of sewage in Delhi and give their positive and concrete suggestions, so that after March 31, 2003 no untreated sewage should go to the river Yamuna On December 4, 2001 the Court directed that the Government should not allow construction of additional floor or increase FAR without increasing the corresponding civic amenities because any such addition in the construction would increase population and the extinction of the river Yamuna.[35] The Court further directed the Central Government to consider and inform the Court whether any amendment is required of the EPA so that the requirement of Environment Impact Assessment for the purposes of the town planning is incorporated. The matter is still under consideration of the Hon'ble Court.

## VI. Conclusion

About 85% of pollution problem in Yamuna is from the domestic sources.[36] The unabated discharge of treated and untreated sewage generated by burgeoning population is the major cause for deterioration of water quality in river Yamuna. When the population of Delhi was limited Yamuna's boundless supplies seemed endlessly renewable. This, however is no longer possible since the exponential growth of human population in Delhi leading to urbanization and industrialization have already reduced the per capita availability of water and the purity of water. Water has become petroleum in the 21st century in Delhi. The micronial pollution is prevailing in entire Yamuna river mainly due to contribution of human waste. So unlike the developed countries, where the ecological degradation

34. CPCB, Parivesh,16 (December, 2000).
35. *Ibid.*
36. *Supra* n. 2 at 29.

is a result of their industrialization and excessive consumerism, Delhi's decay is attributed to its over-population. It is sad that while experts are showing concern about the ecological management, the authorities do not do anything effective to control the rapid population growth in Delhi. In the face of such an incorrigible growth of Delhi's population, it would require a highly committed, competent and strict administration together with adequate infrastructure if the Yamuna in Delhi is to be saved from imminent crises.

# PROTECTION OF BIO-TECHNOLOGICAL INVENTIONS AND PLANT VARIETIES: NATIONAL AND INTERNATIONAL PERSPECTIVES

*V.K. Ahuja**

## I. INTRODUCTION

Bio-technology has assumed significant importance in the recent past. It plays a crucial role in various sectors particularly in the sector of food, medicine, agriculture, energy, pesticide and fertilizer. With the adoption of Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement) in 1995, it became obligatory for the Member States to protect bio-technological inventions and plant varieties in their respective territories.

Bio-technology is a technology concerned with living organisms, such as plants, animals and micro-organisms as well as non-living biological materials such as seeds enzymes, plasmids etc.[1] Bio-technological inventions, on the other hand are the processes for the creation or modification of micro-organisms and other living organisms as well as biological material. Micro-organisms include all the bacteria, viruses, fungi, mycoplasma, cell lines, and algae.

The TRIPs Agreement excludes plants and animals from patentability, but it does require the patenting of "micro-organisms" and "plant varieties". This in fact has raised a number of technical, legal, moral, social and ethical questions which have not been answered satisfactorily even in the developed countries. In developed countries, patents are generally granted for micro-organisms on the basis of human contribution to the nature. Micro-organism as they are found in nature in their natural state are regarded as "discoveries" and therefore, not patentable. But if human contribution is sufficient and value is added by such contribution, e.g. in the isolation, identification and purification of the micro-organisms, patents

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1. WIPO, BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY 375 (1988).

are granted for such inventions. Sometimes, it becomes very difficult to demarcate between the discovery and invention in the field of bio-technology. This problem is also being faced in the developed countries where it is being resolved by judicial pronouncements. Genetically modified micro-organisms are considered as inventions and are therefore patentable.

In United States, the U.S. Supreme Court delivered the first judgment in this area in *Diamond* v. *Chakravarty* in 1980, where the Court held that the organism, as claimed, "...is not nature's handiwork, but his own; accordingly, it is patentable subject matter under 35 U.S.C. 101". The Court further stated "that in order to give ingenuity a liberal encouragement, Congress has chosen to couch 35 U.S.C. 101 in expansive terms so that statutory subject-matter would include anything under the sun...that is made by man."[2]

Bio-technology plays an important role in the production of fertilizers and pesticides also. Use and production of toxic fertilizers and pesticides have proved dangerous to the soil, water, air and flora and fauna. According to a study in Baroda, Gujarat, which is known as the chemical capital of India, the loss in soil fertility and the subsequent fall in agricultural output has been in the range of 60 to 80 percent.[3] Therefore the demand of bio-fertilizers is growing in order to replace the nitrogen fertilizers. Apart from this, in the field of bio-pesticides, a range of insects and worms are being discovered which fight against pests that attack the crops.

Bio-technology is also being applied to develop genetically modified animals. This area started with the development of cancer-prone mice, the so-called Harvard Onco-Mouse, by introducing in them an oncogene.[4] After a long debate the U.S. Patent office agreed to the grant of patents for new animal varieties with modified characters. Recently, a Singaporean scientist has patented a genetically modified mouse which runs around in circles. The "Chakragati" mouse, which can mimic human disease symptoms is expected to reduce costs and shorten testing times for developing new drugs.[5]

2. *Diamond* v. *Chakravarti*, (1980) Supreme Court 447 US 303, 206 U.S.P.Q.193.
3. Pushpam Kumar, *Intellectual Property Rights and Bio-Diversity : Emergence of Biobattles* in K.R.G.Nair *et. al.* (ed.), INTELLECTUAL PROPERTY RIGHTS 192 ( 1994 ). See also Suman Sahai, *Patenting of Life Forms : What it Implies*, ECON. & POL. WEEKLY, April 25, 1992.
4. Nitya Nand, *Patentable Subject Matter in Biotechnology in India*, paper presented at the WIPO National Seminar on the Role of Patents and Patent Information in Promoting Biotechnological Inventions, New Delhi, India, November 7 - 9, 1994, *reprinted in* 43 INTELLECTUAL PROPERTY IN ASIA AND THE PACIFIC 56(1994).
5. TIMES OF INDIA, August 19, 2002.



In addition to this, surprisingly bio-technology is being applied to female mammals. Baylor College of Medicine and the Grenada Biosciences of Texas in the U.S., have jointly filed a patent application before the European Patent Office seeking patent protection for genetic engineering research that enables female mammals to secrete certain biochemicals from their mammary glands.[6] A similar application has also been made to the U. S. Patent and Trademark office.

It is noteworthy that in spite of ethical, moral and social issues being raised, more and more human biological materials including hair, urine perspiration, semen, blood, heart, kidney are being patented.[7] It is appropriate here to mention the ruling of the California Supreme Court which protects biotechnology companies from sharing the profits from commercial marketing of a human cell line with those to whom it belongs. In this case a surgeon had surreptitiously removed from the body of John Moore a rare cell line (designed as 'Mo') and later patented it in 1984. The Mo cell patent (U.S. Patent No: 4438032) was subsequently sold by the surgeon for a hefty amount of $ 3 million.[8]

In agriculture, biotechnology has great impact on plant-based economic and industrial development. Bio-technology has accelerated the pace of plant breeding and proved useful in improvement of agricultural productivity by providing crops with raised yield ceiling, crops which are high-yielding and disease resistant or are low-moisture or high-salt tolerant.

## II. BIO-TECHNOLOGICAL INVENTIONS AND GENETIC EROSION

The farmers throughout the world particularly in developing countries have put in hard labour for hundreds of years to improve the crops they have grown. Through their careful observation, breeding and selection, they have created a number of varieties within each crop species. This variation provides the main raw material for crop improvement today and for the future.

Unfortunately, this bio-diversity is now being threatened by the acts of mankind. Many of the traditionally grown land races no longer exists in the world as they have been replaced by modern varieties prepared by applying bio-technology. Although it is true that bio-technology is able to improve the traditional varieties but with the advent of hybrid seeds there

6. Devinder Sharma, *Patenting of Female Species*, THE HINDUSTAN TIMES, December 6, 1994.
7. *Ibid.*
8. *Ibid.*

is a possibility that the traditional varieties, which may yield less but are better suited to the local environment may disappear from the market. In this way, modern plant breeding will be held responsible for the loss of traditional genetic diversity.

It is worth noting here an incident which took place in California. A few years ago, when the multimillion dollar musk melon industry of California was on the verge of being wiped out by fungal disease, resistant genes were brought in from India. India was never paid for those genes. Apart from this, it is also noticeable that every Canadian wheat variety today contains genes introduced from as many as 14 different Third World countries. All the rice germplasm is taken from India and Japan to United States of America free of cost.[9] Therefore, if this bio-diversity is eroded, it may have the devastating impact on the entire world.

In order to overcome this problem, many countries have started establishing gene banks to preserve traditional landraces, varieties and wild species in cold storage. Increasingly efforts are also being made to conserve material in the field, either on farm in the case of traditional land races and varieties, or in special habitat reserves in the case of wild species.[10] Though these efforts are appreciable, these are inadequate today as they need a lot of funds. The problem is acute in developing countries because once these traditional crops are lost, it would be very difficult for them to conserve them as they will not be able to spend a lot of money on gene banks.[11]

The United Nations Convention on Biological Diversity 1992 also raises concerns on the erosion of bio-diversity and obliges Member States to conserve biological diversity. The Convention recognizes the sovereign rights of the States over their own biological resources. India, being a party to the Convention has enacted the Biological Diversity Act 2002 with the objective of conserving biological diversity and making sustainable use of bio-resources.

9. *Supra* n.3 at 2.
10. Brian Belcher and Geoffrey Hawtin, *A Patent on Life : Ownership of Plant and Animal Research* in K.R.G.Nair et.al. (ed) *supra* n. 3 at 284..
11. It is worth mentioning the establishment of International Centre for Genetic Engineering and Bio-technology. One half of the Centre has been set up in New Delhi, India and the second half in Trieste, Italy. The Indian Centre is to work on problems of human and animal health, fertility and agriculture, whereas the Italian Centre will concentrate on industrial micro-biology and will work out new and renewable sources of energy. The two Centers may also take up other subjects that have a bearing on problems of the Third World and solutions to which can be found through bio-technology. See Jignesh U. Chhatrapati, *Bio-Engineering : A New Era for Third World*, THE HINDUSTAN TIMES, November 22, 1995.



### *A. UPOV Convention*

With respect to the protection of plant varieties, there is an international convention known as UPOV Convention (Union for the Protection of New Plant Varieties) which was adopted in 1961 and revised in 1972, 1978 and 1991. Under UPOV Convention 1991, plant breeders rights' (hereinafter referred to as PBRs ) certificate are given to those who breed new varieties which are distinct, uniform and stable.[12]

### *B. Breeders' Rights*

Article 14(1) of the UPOV Convention 1991 prescribes the breeders' rights in respect of the propagating material. The Article provides that subject to Articles 15 and 16, the following acts shall require the authorization of the breeder :

(i) production or reproduction (multiplication);

(ii) conditioning for the purpose of propagation;

(iii) offering for sale;

(iv) selling or other marketing;

(v) exporting;

(vi) importing and

(vii) stocking for any of the purposes mentioned in (i) to (vi) above.

The revision of 1991 has considerably expanded and tightened the rights of the plant breeders. The 1991 revision of the UPOV Convention, while leaving the term 'propagating material' to legislatures to define, has increased the number of infringing acts related to it. The term may be extended to whole or part of the plant or a single plant cell from which a whole plant can be produced.

In respect of harvested material, the Convention requires that the authorization of the breeder is required for the product which has been obtained through the unauthorized use of propagating material of the protected variety.[13] Thus, the breeder may allow others to produce the variety but reserve to himself the rights mentioned in Article 14 (1) in

12. Art. 5(1), UPOV CONVENTION 1991.
13. *Id.*Art. 14(2).

respect of end product.

The breeder's authorization is also required in respect of products made directly from harvested material of the protected variety through the unauthorized use.[14] These products may include flour, oil, wine etc. However, this right will be available to the breeder only if he had no reasonable opportunity to exercise his right in relation to the said harvested material. Under Article 14(4), additional acts other than those mentioned in items (i) to (vii) of Article 14 (1) (a) shall also require authorization of the breeder.[15]

### *C. Exceptions to the Breeder's Right*

Article 15 of the UPOV Convention provides exception to the breeder's right. Article 15(1) provides for compulsory exceptions. It states that 'acts done privately and for non-commercial purposes'[16] and 'acts done for experimental purposes'[17] are covered under compulsory exceptions. In addition to this, Article 15(1)(iii) exempts those acts which have been referred to in Article 14(1) to 14(4) if done for the purpose of breeding other varieties, except where the provision of Article 14(5) apply (that is essentially derived variety). Thus, breeding a new variety by making repeated use of protected variety is not an infringement as it is covered by compulsory exceptions but commercialising the new variety without authorization of the owner of protected variety will be an infringement. The 1978 Act does not contain any corresponding provision.

The 1991 Act of UPOV Convention does not take proper care of farmers' interests as it makes it optional for the Contracting Parties to protect the interest of the farmers. Article 15(2) provides that each Contracting Party may, within reasonable limits and subject to safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting on their own holdings, the protected variety or

14. *Id.*Art. 14(3).
15. In addition to above mentioned rights, the breeder has also got rights in relation to (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety, *Id.* Art. 14(5)(a)(i); (ii) varieties which are not clearly distinguishable in accordance with Art. 7 from the protected variety, *Id.* Art. 14(5)(a)(ii), and (iii) varieties whose production requires the repeated use of the protected variety, *Id.* Art. 14(5)(a)(iii).
16. *Id.*Art. 15(1)(i).
17. *Id.* Art. 15(1)(ii).



a variety covered by Article 14(5)(a)(i) or (ii). Thus, it is not mandatory for the Contracting Parties to incorporate farmers' exception in their municipal laws regarding plant varieties. Moreover, if a Contracting Party provides certain rights to the farmers to use for propagating purposes, the product of the harvest which they have obtained by planting the protected variety on their own holding, such a right shall be available subject to the legitimate interest of the breeder only. In addition to this, such a right may not be available against every protected variety but may be restricted to some varieties, as the State may provide in its laws. However, under the 1978 Act, it was not an infringement to save seeds from the harvest out of the protected variety for the purpose of growing next crops.

## III. TRIPs Agreement

The TRIPs Agreement makes it obligatory for Member States to provide patent protection to any inventions, whether product or processes, in all fields of technology. The obligation is, however, subject to the fulfilment of the condition that the inventions are new, involve an inventive step or non-obvious, and are capable of industrial application or useful.[18]

Members are free not to grant patent protection to certain inventions where it is necessary to protect *ordre public* or morality, or to protect human, animal or plant life or health or to avoid serious prejudice to the environment. Members may also exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.[19] It is, therefore obligatory for Members to provide patent protection to micro-organisms, non-biological and micro biological processes. The TRIPs Agreement does not define the terms micro-organisms or microbiological processes. In absence of any definition in the Agreement, two views have been expressed. The first view is that micro-organisms are microscopic or ultramicroscopic organisms, whereas second view considers them limited to uni-cellular organisms such as viruses, algae, bacteria, fungi and protozoa and exclusive of cell lines, genes and genes sequences. Thus, TRIPs Agreement leaves some scope for the Members to define these terms in their own way in their municipal legislations provided the definitions are reasonable.

18. Art. 27(1), TRIPs Agreement.
19. *Id.* Art. 27(2) and (3).

In case of plant varieties, the TRIPs Agreement obliges Members to protect them either by patents or by an effective *sui generis* system or by any combination thereof.[20] The TRIPs Agreement does not make it obligatory for Members to comply with the provisions of UPOV Convention for protecting plant varieties.

Under TRIPs Agreement, patentee has the right of making, using, offering for sale, selling, or importing the patented product for a period of 20 years from the date of filing.[21] Certain limited rights are also available to the public against the patentee's rights under the TRIPs Agreement.

## IV. Existing Legal Regime in India

### *A. Patents Act 1970*

In India, in the context of bio-technology, only inventions relating to methods or processes for the production of drugs, medicines, biocides and food including the processes employing the use of micro-organisms were patentable. No patent was being granted in respect of claims for (i) substances intended for use, or capable of being used as food, medicine or drug; or (ii) substances prepared or produced by chemical processes including biochemical, biotechnological and microbiological processes. But after becoming a party to the TRIPs Agreement, it became obligatory for India to amend its Patents Act 1970 in order to bring it in conformity to the former. Consequently the Patents Act was amended by the Patents (Amendment) Act 1999 which inserted a new sub-section in Section 5 of the Patents Act 1970 which provides that a claim for patent of an invention for a substance itself intended for use or capable of being used, as medicine or drug may be made and shall be dealt in the manner provided in Chapter IV A.[22] The effect of this provision is that in respect of substances as mentioned in Section 5 (2), exclusive marketing rights will be provided to the applicant.[23] The exclusive marketing rights are granted for a period of five years, or till the date of grant of patent or the date of rejection of application for the grant of patent, whichever is earlier.[24] The provisions relating to the exclusive marketing rights are transitory and in conformity with TRIPs Agreement.[25]

20. *Id.* Art. 27(3).
21. *Id.* Arts. 28 and 33.
22. Chapter IV A of the Patents Act 1970 provides for the grant of exclusive marketing rights.
23. *Id.* S. 24 B.
24. *Ibid.*
25. Art. 70(9), TRIPs Agreement.



The impact of amendment in Section 5 may be that modern drugs and medicines may be available in India within a short span of time after their inventions. The prices, however, are likely to go up as the term of patent has been raised to twenty years by the Patents (Amendment) Act 2002.

The Patents Act 1970 excludes from the definition of invention the following and consequently renders them unpatentable:

(i) an invention the primary or intended use or commercial exploitation of which would be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment;

(ii) plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals; or

(iii) an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known components.[26]

The effect of the aforesaid exclusions is that even if there is a bio-technological invention which fulfils the criteria of being 'new', 'involving an inventive step' and is 'capable of industrial application', no patent shall be granted in respect of such invention if it falls under any of the aforesaid exclusion. However, in case of seeds and plant varieties the protection may be available under the Protection of Plant Varieties and Farmers' Rights Act 2001.

The Patents Act confers upon the patentee, in case of a product patent, the exclusive right to prevent third parties, from the act of making, using, offering for sale, selling or importing for those purposes the product in India. In case of a process patent, the Act confers the exclusive right to prevent third parties from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India provided that the product obtained is not a product in respect of which no patent can be granted. The Patents (Amendment) Act 2002, which received Presidential assent on 25th June 2002, brings the Patent Act 1970 in conformity with TRIPs Agreement.

26. S. 3, Patents Act, 1970.
27. S. 14, Plant Varieties Act.

### *B. Plant Varieties and Farmers' Rights Act 2001*

The enactment of the Protection of Plant Varieties and Farmers' Rights Act 2001 (hereinafter the Plant Varieties Act) was an outcome of the India's obligations which arose from Article 27(3)(b) of the TRIPs Agreement which obliges Members to protect plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. India decided to protect plant varieties by a *sui generis* law i.e. the Plant Varieties Act.

The Plant Varieties Act makes the following varieties registrable[27]:

(i) such genera and species as notified by the Central Government;

(ii) extant variety;[28]

(iii) farmers' variety;[29] and

(iv) essentially derived variety of such genera and species as notified by the Central Government.[30]

The aforesaid new varieties shall be registered only if they conform to the criteria of novelty, distinctiveness, uniformity and stability.[31] However, an extant variety may be registered on the criteria of distinctiveness, uniformity and stability only.[32] Registration of a variety is denied in cases

28. According to S. 2(j), *id.*, "extant variety" means a variety available in India which is –
    (i) notified under section 5 of the Seeds Act, 1966 ; or
    (ii) farmers' variety; or
    (iii) a variety about which there is common knowledge; or
    (iv) any other variety which is in public domain.
29. According to S. 2(l) *id*, "farmers' variety" means a variety which-
    (i) has been traditionally cultivated and evolved by the farmers in their fields; or
    (ii) is a wild relative or land race of a variety about which the farmers possess the common kmowldge.
30. *Id.* S. 23 S. 2(i), defines "essentially derived variety" in respect of a variety (the initial variety ) to mean to be essentially derived from such initial variety when it-
    - is predominantly derived from such initial variety, or from a variety that itself is predominantly derived from such initial variety, while retaining the expression of the essential characteristics that results from the genotype or combination of genotypes of such initial variety;
    - is clearly distinguishable from such initial variety; and
    - conforms ( except for the differences which result from the act of derivation ) to such initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of such initial variety.
31. *Id.* S. 15(1).
32. *Id.* S. 15(2).



where prevention of commercial exploitation of such variety is necessary to protect public order or public morality, or human, animal and plant life and health or to avoid serious prejudice to the environment.[33] Further no registration will be made of a variety of any genera or species which involves any technology including genetic use restriction technology and terminator technology and also such technology which is injurious to the life or health of human beings, animals or plants.[34] This provision is of significant importance. The seeds with terminator technology can be used only once as the seeds saved from such crops will not grow and every time farmers have to buy seeds from the market. This causes substantial loss to the farmers. The provision prohibiting the use of terminator technology in any variety, genera or species, thus frustrates the objectives of multinational companies intending to market such varieties in India.

An application for registration of a variety can be made by the breeder or his successor, assignee of the breeder; farmer or group of farmers or community of farmers claiming to be the breeder of variety; any person authorized by any of the aforesaid persons; or any university or publicly funded agricultural institution.[35] During the term of registration, the breeder or his successor, his agent or licensee gets the exclusive right to produce, sell, market, distribute, import or export the variety.[36] The Protection of Plant Varieties and Farmers' Rights Authority (hereinafter "the Authority" ) is empowered to grant compulsory licence to any interested person after the expiry of three years from the registration if the reasonable requirements of the public for seeds or other propagating material of the variety have not been satisfied or the seed or other propagating material of the variety is not available to the public at a reasonable price.[37]

33. *Id.* S. 29(1).
34. *Id.* S. 29(3).
35. *Id.* S. 16(1). The registration is made for nine years in the case of trees and vines and six years in the case of other crops. The registration may be reviewed and renewed on payment of fees. The total period of validity, however shall not exceed eighteen years from the date of registration in case of trees and vines; fifteen years from the date of notification in case of extant variety ; and fifteen years from the date of registration in all other cases. *Id.* S. 24(6).
36. *Id.* S. 28(1).
37. *Id.* S. 47(1). The PLANT VARIETIES ACT also provides for the researchers' rights and farmers' rights. Under S. 30, any person may use registered variety for conducting experiment or research. Further, use of a registered variety is allowed by any person as an initial source of variety for the purpose of creating other varieties. However, the authorization of the breeder of a registered variety is required where the repeated use of such variety as a parental line is necessary for commercial production of such other newly developed variety.

Section 39 provides for farmers' rights. A farmer who has bred or developed a new variety is entitled for registration and other protection in like manner as a breeder of a variety. Further, a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation is entitled for recognition and reward from the Gene Fund, provided that material so selected and preserved has been used as donors of genes in varieties registrable under the Act. Apart from the aforesaid rights, a farmer is deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a protected variety in the same manner as he was entitled before the coming into force of this Act. With the inclusion of this right, the apprehensions of the farmer community are set at rest. However, the farmer is not entitled to sell branded seed[38] of protected variety.[39]

In addition to the breeders' rights, researchers' rights and farmers' rights, the Plant Varieties Act also provides for communities rights. Section 41 provides that any person, group of persons or any governmental or non-governmental organization may on behalf of any village or local community in India, file in any notified centre, any claim attributable to the contribution of the people of that village or local community in the evolution of any variety for the purpose of staking a claim on behalf of such village or local community. The centre may verify the claim, and if satisfied, report its findings to the Authority. The Authority, if satisfied after making enquiry, may issue notice to the breeder of that variety and order him to grant such sum of compensation, as it deems fit, to the claimant. The compensation ordered by Authority shall be deposited in the National Gene Fund by the breeder.[40]

## V. Conclusion

In order to perform her obligations arising out of the TRIPs Agreement, India has amended her Patents Act 1970 by enacting the Patents (Amendment) Act 2002 which provided adequate protection to bio-technological inventions.

Another development in India in the field of intellectual property law took place when the Parliament enacted the Plant Varieties Act. The Act

38 Branded seed means any seed put in a package or any other container and labeled in a manner indicating that such seed is of a variety protected under this Act.

39 *Id.* S. 39(1) proviso.

40 *Id.* S. 41.



is an outcome of prolonged debates and discussion on the subject. The Plant Varieties and Farmers' Rights Bill 1999 which was introduced in the Parliament was referred to the Joint Committee of the Parliament. The Joint Committee presented its report along with a redrafted Bill to Lok Sabha on 25th August, 2000. The Bill was enacted with minor changes. The Act maintains a balance between the rights of breeders and the rights of researchers and farmers. The Act provides conducive environment to the breeders to develop new varieties and at the same time sets at rest the apprehensions of the farmer community by allowing them to retain their harvest for the purpose of sowing and re-sowing. The use of terminator technology in breeding new varieties is disallowed. The Act introduces the concept of benefit sharing and constitutes the National Gene Fund for the benefit of farmers. The Act intends to prevent abuse of breeders rights by providing for grant of compulsory licences.

To sum up, the Patents Act 1970 and the Plant Varieties Act will prove helpful in the promotion of bio-technology and new plant varieties respectively. Adequate measures have been taken to prevent abuse of rights under both the Acts. It is only with the passage of time that we will know the pros and cons of the working of the Plant Varieties Act.

# CONFLICT BETWEEN TRADE MARKS AND DOMAIN NAMES

*Poonam Dass**

Technological changes have made the world very small. Today goods/services/information are available on Internet at the click of a mouse. Many dotcom companies have been established to sell their products or provide services or information through internet. These business organizations host a website for doing business on internet. These websites can be accessed by a consumer through the internet address of the company.[1] Part of the address viz. yahoo.co.in, rediff.com, bisleri.com, expressindia.com is known as the domain name. Sometimes the consumer does not know the internet address of the company and tries to use the trade names or trademarks of various commercial organizations to access their sites. This may lead them to some other site, which is doing business in some other goods or a pornographic site. This affects the goodwill and reputation of the owner of trade mark or trade name. Hence such domain names come in conflict with the legal rights of the owners of the trade mark or trade name.

This article is an attempt to study what is domain name and trade mark, how domain names can conflict with the legal rights of the owners of trademark or trade name and what efforts have been made by legislature, courts and international organizations to resolve such conflicts.

## I. Domain Names

An internet site can be accessed through its Internet Address[2]. Every

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1. For example http://www.yahoo.co.in, http://www.rediff.com, http://www.bisleri.com, http://www.expressindia.com.
2. In *ACLU v Reno* 929 F Supp 824, 830, 845 (EDP 1996) Judge Mokenna has explained internet address system as follows: "Each host computer providing internet service has a unique Internet Address. Users seeking to exchange digital information (e-mail, computer programs, images, music) with a particular Internet host require the host's address in order to establish a connection. Host actually possesses two fungible addresses, a numeric IP Address such as 123.456.123.12 and an alphanumeric 'Domain Name' such as microsoft.com with greater mnemonics."



computer on the internet has a unique address just like a telephone number, which is a complicated string of numbers between 0 to 255, known as Internet Protocol Address (IP Address). This number is divided into sets of 4 by full stops and is also known as Uniform Resource Locator. For example 207.82.250.251 where 207 is the network, 82 and 250 refer to sub-networks and 251 is the computer itself. This address being difficult to remember, a system of Domain Names was developed known as DNS. The DNS makes using the internet easier by allowing a familiar string of letters known as domain name. Instead of typing IP Address the web page can be accessed by typing a domain name[3]. It is a mnemonic device that makes addresses easier to remember.

### *Types of Domain Names*

There is a hierarchy of Domain Names:

(i) Top Level:

(a) Generic Top Level Domain Names (gTLD).[4]

(b) Country Code Top Level Domain Names (ccTLD).[5]

3. For example IP Address of YahooIndia is 203.199.70.100 and its domain name is yahoo.co.in, IP address of IBM is 129.42.17.99 and the domain name is ibm.com. When an internet user enters a domain name into a software application such as a browser program or FTP client, the software sends that name to one of a number of Domain Name Server Computers. The Domain Name Server searches in its database for the IP Address, which matches the domain name, and then returns, the IP Address to the requesting software application. Once the software has received the IP Address it can be used to communicate with the server to which domain name refers. This is the reason why domain names are unique; if they are labeled with more than one IP Address, it would be uncertain which server has to be contacted. See Chris Reed, Internet Law Text and Materials 38-39 (2000).
4. There are seven main gTLDs ending with .com for commercial corporations, .edu for educational institutions, .net for organizations involved in internet operations such as internet service providers & network information centers, .org for miscellaneous organizations-not for profit, .gov for government entities including royal families, .mil for military and defense entities, .int for international organizations. Seven new gTLDs have been announced by Internet Corporation for Assigned Names and Numbers (ICANN) on 16.11.2000. These are .biz , .info , .pro , .name , .museum , .coop , and .aero . The domain names ending with .com , .net , .org are registered through many different companies which are accredited by ICANN known as registrars. Eg. Network Solutions Inc. in USA, Direct Information Pvt Ltd in India (www.directi.com). The list of registrars is available at www.internic.net/origin.html.
5. These indicate the country of registration. For example .in for India, .de for Germany, .jp for Japan. Each of these domain bears a two letter country code derived from Standard 3166 of the International Standardization Organization (ISO 3166).They are 244 in number. A list of ccTLDs is available at www.iana.org/cctld/cctld-whois.htm The rules for registering domain names in the ccTLDs vary significantly and some are

(ii) Second Level Domain Names (SLD)

(a) for gTLDs : The organizations generally like to register their trademarks or trade names as second level domain names.

(b) for ccTLDs : For ccTLDs second level domain name is provided by the registrar registering the domain names.[6]

(iii) Third Level Domain Names(only for ccTLDs): The Third Level Domain Name is chosen by the organization which wants to register it. It may be a real world trademark or trade name. For example tata.co.in where tata is third level domain name.

The total domain names registered worldwide are 31497437 and .com registrations are 21783099 internationally.[7]

## II. Trade Marks

A trade mark is a visual symbol in the form of a word, devise, or a label attached to articles of commerce with a view to indicate to the purchasing public that they are the goods manufactured or otherwise dealt in by a particular person as distinguished from similar goods manufactured or dealt in by other persons. The mark should be distinctive or capable of distinguishing the goods of one person from another A mark which is descriptive or a geographical name in its ordinary significance is incapable of distinguishing goods of one person from another.[8] A person who sells his goods under a particular trade mark acquires a sort of limited exclusive right to the use of mark in relation to those goods.[9]

reserved for use by citizens of the corresponding country. In India it is registered by National Centre for Software Technology(NCST) which is a Government of India organization and is an accredited registrar of ICANN.The requirements of registration are available at http://www.indianregistry.net/coin/req.htm.

6. In India for '.in' ccTLD the second level domain are .co, .firm, .ac, .res, .gov, .mil, .net, .org, .ind, .gen..For example '.co.in' for companies.
7. Statistics from Netnames Ltd. website: http://www.domainstats.com.
8. See S.9, Trade and Merchandise Marks Act 1958.
9. See P. Narayanan, Intellectual Property Law (1997). S.2(v). *id.* defines trade mark as a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person; S.2(zb) of Trade Marks Act 1999 also defines trade mark as ' a mark which is capable of distinguishing the goods or services of one person from those of others and include shape of goods, their packaging and combination of colours, used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person.



The service marks are not covered under the definition of trade marks under Trade and Merchandise Marks Act 1958 but the courts are giving protection to the service marks under common law remedy of passing off.[10] Trade marks with respect to goods are protected through infringement action for the class of goods for which the mark is registered under the Act.[11] The definition of trademark under Trade Marks Act 1999 includes both goods and service. The Act also protects well known trade marks through infringement even though the goods are dissimilar.[12] This Act is yet to be implemented.

A trade mark performs four functions - it identifies the product and its origin, guarantees its unchanged quality, advertises the product and creates an image for the product.

## III. Is Domain Name a Trademark

Domain names were created to serve the technical function of providing addresses for computers that were easier to remember than the underlying IP Addresses. As commercial activities have increased on the internet, domain names have become part of standard communication apparatus used by businesses to identify themselves, their products and their activities. Advertisements appearing in media now routinely include a domain name address, along with other means of identification and communication such as corporate name, trade mark, telephone number and facsimile number. But whereas telephone and facsimile number consists of anonymous string of numbers without any other significance, the domain name, because of its purpose of being easy to remember and to identify, often carries an additional significance which is connected with the name or mark of business or its product or services.[13]

10. Lord Diplock in *Erven Warnink* v. *Townend* (1980) RPC 31 at 93 described passing off as follows:
(1) misrepresentation (2) made by a person in course of trade (3) to prospective customers or ultimate customers of goods or services supplied by him (4) which is calculated to injure the business or goodwill of another trader and (5) which causes actual damage to a business or goodwill of the trader by whom the action is bought or will probably do so.
11. S.29(1), Trade and Merchandise Marks Act 1958 says a registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or a registered user thereof using by way of permitted use, uses in the course of a trade mark which is identical with, or deceptively similar to, the trade mark, in relation to any goods in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.
12. See S.29(4)(c), Trade Marks Act 1999
13. See WIPO, The Management of Internet names and Addresses: Intellectual Property Issues, Interim Report of the WIPO Internet Domain Name Process 3 (23 Dec 1998).

Domain Names are relevant because consumers often perceive them as performing in electronic commerce, much the same role as trade marks and trade names have historically played in more traditional modes of business. The courts in the USA have held that "Domain Names may be a valuable corporate asset as it facilitates communication with a customer base".[14]

The Indian courts in series of decisions viz. *Yahoo Inc.* v. *Akash Arora*[15], *Rediff Communications* v. *Cyberbooth*[16], *Aqua Minerals Ltd* v *Pramod Borse*[17], *Dr. Reddy's Laboratories Ltd* v. *Manu Kosuri*[18], *Info Edge (India) Pvt. Ltd* v. *Shailesh Gupta*[19], *Celador Productions Ltd* v. *Gaurav Mehrotra*[20] have held that a domain name is more than an internet address and is entitled to equal protection as trade mark. The services rendered on internet are also protected under the action of passing off.

## IV. Conflict between Trademarks and Domain Names

A legal right in a trade mark occurs:

(1) if the mark has been registered under Trade and Merchandise Marks Act 1958 as trade mark or

(2) by use of the mark for trading which prevents others from using the mark.

An e-business while starting business on internet makes them more exposed to trade mark infringement or trademark dilution or passing off actions.

Conflicts between the holder of trademarks and domain names generally occur in the following manner:

1) insufficient names to satisfy trademark holders

2) global nature of internet may lead to trademark dilution

14. *ACLU* v. *Reno supra* n. 2. Also see *Card Service International* v. *McGee* 950 F Supp 737 (ED Va 1997) where the court observed "Domain Name serves same function as trade marks and is not a mere address or like finding number on the Internet and therefore is entitled to equal protection as trade mark".
15. 1999 PTC (19) 201.
16. AIR 2000 Bom. 27.
17. 2001 PTC 619(Del).
18. 2001 PTC 859 (Del).
19. 2002 (24) PTC 355 (Del).
20. 2003 (26) PTC 140 (Del).



3) cyber squatting

4) use of trademarks as Meta Tags

5) use of deceptively similar domain names

### *A. Insufficient Names to Satisfy Trade Mark Holders:*

A domain name must be absolutely unique. In other words there can be only one holder of domain name. There may be multiple persons and organization with the legal rights for the same name under the trade marks law. If the use of trade mark would be likely to deceive or cause confusion, the same cannot be used by any other person for their own goods.[21] But if a trade mark is registered subject to territorial limitation, the other person can use the mark in a different territory. Another instance could be where a trade mark has been used by the other person on dissimilar goods and which does not cause confusion, then the same mark can be registered for such goods. The Act also protects the honest and concurrent user of mark for same goods or description of goods subject to conditions or limitations.[22] Hence, there can be number of users of the same mark. These users would like to register their trade marks as domain names to promote their trade on internet. In India if there are 3 trade mark holders whose trade mark is identical say ABC and all of them want to register ABC.co.in., who is entitled to domain name? The general approach which seems likely to be adopted is the first come, first served principle, leaving the remaining 2 dissatisfied. The same problem occurs for gTLDs where the same trademark holders are in different jurisdictions.

This problem of scarce capacity of gTLDs was resolved by the introduction of ccTLDs whereby the right holders could register under the ccTLD in which they hold registered mark. But if the right holders are in different jurisdictions, to resolve the conflict it was suggested that the number of gTLDs be increased to 100. Some have called for specific proposals to have gTLDs for registered trade marks and gTLDs for specific classes of business. One particular proposal from WIPO suggested the creation of gTLDs specifically for registered trade marks with second level domain of randomly assigned number strings to help differ-

21. See S.11(a), Trade and Merchandise Marks Act 1958. Also see S.9(2), of Trade Marks Act 1999.
22. See S.12(3), Trade And Merchandise Marks Act 1958; Also S.12, Trade Marks Act 1999.

entiate between identical trade marks belonging to separate right holders. The more memorable the number string the higher the registration fee. But this would again lead to conflict over who could register the second level domains with squabbles over certain memorable numbers[23].

### *B. Trade Mark Dilution*

Internet can be accessed form anywhere. A trade mark registered in the domain owner's jurisdiction is displayed in other jurisdictions where a different person may hold the same trade mark for dissimilar goods. Even though there is no actual trade mark infringement because the lines are dissimilar, there is nonetheless danger of trade mark dilution i.e. lessening the capacity of a famous mark to identify and distinguish goods or services. For example a domain name maruti.com registered in the USA may conflict with the trade name Maruti in India as use of domain name may be detrimental to distinctive character and repute of the trade name as the site can be opened from India also.[24]

The plaintiff has to prove that

(i) it owns the trade mark

(ii) the mark is distinctive and famous

(iii) the defendant's use is causing dilution

The underlying object of this doctrine is that there is a presumption that the relevant customers start associating the trade mark with a new and different source. It results in smearing or partially affecting the descriptive link between the mark of the prior user and its goods. In other words link between the mark and the goods is blurred.[25] This is known as *dilution by blurring*. For example. if an online clothing company were allowed to use www. fidelity.com as its domain name, blurring would eventually dilute this world famous trademark doing business in mutual

23. See Reed Chris, *supra* n. 3 at 47. Also see Levis-Davies, A MODEL FOR INTERNET REGULATION? CONSTRUCTING A FRAMEWORK FOR REGULATING ELECTRONIC COMMERCE 35, 48 (1999).

24. In the USA, FEDERAL TRADE MARK DILUTION ACT of 1996 amended the LANHAM ACT to protect companies against dilution of famous and distinctive marks. FEDERAL TRADE MARK DILUTION ACT 15 USC § 1125(c) provides: The owner of a famous mark shall be entitled...to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of mark...

25. *Caterpillar Inc* v. *Mehtab Ahmed* 2002 (25) PTC 438 (Del) at para 16.



funds.[26] In India the court has held,

> Another kind of dilution is by way of sullying or impairing distinctive quality of trade mark of a senior user. This in common parlance is known as *dilution by tarnishment* [Emphasis supplied]. The object of such an invasion is to tarnish, degrade or dilute the distinctive quality of a mark. For example if an attempt is made to communicate a message that a particular product of senior use is injurious to health or is inferior in quality some epithet is used in the advertisement. For example to convey the message that Coca Cola is bad for health, advertisement campaign saying Drink Cocaine in the same font and stylised script as used by the senior user, junior user is guilty of dilution.... There is no need to establish likelihood of confusion as to source, affiliation and connection...[27]

As far as the Indian statutory position is concerned Section11(2)(b) of the Trade Mark Act 1999 does not allow registration of marks which are detrimental to the distinctive character and repute of the well known mark already registered.[28] Section 29(4)(c) of the Act says that an infringement action can be taken against such person using the mark

26. See Ferrera *et. al.*, CYBER LAW TEXT AND CASES 51 (2001). Also see *Toys "R" Us* v. *Richard Feinburg* 98 Cir. 2780 (AGS), 1998 US Dist Lexis 17217 (S.D.N.Y.), The US court held that defendant's use of domain name gunsareus.com for e-business selling firearms neither infringed nor diluted the trade mark of plaintiff. However, the decision was reversed on appeal.

27. *Caterpillar Inc* v. *Mehtab Ahmed* *supra* n. 25 at para 17. In the US case of *Hasbro Inc* v. *The Internet Entertainment Group* 1996 WL 84853 (W.D. Wash. 1996)27, the plaintiff used Candyland for a children's game. The defendant used candyland.com as a domain name for a pornographic site. The court held that this caused dilution by tarnishment and would degrade the quality of the Candyland mark.
In *Toys "R"Us* v. *Akkaoui* 1996 US Dist LEXIS 17090 (N.D. Cal Oct 29, 1996). Plaintiff's Toys "R"Us & Geoffrey, Inc are mass market discount retailers of children's toys and games. Defendants were doing business under the domain name Adult "R"Us.com on internet for sexual devices and clothing. Court held that Toys "R"Us is famous and distinctive. Toys "R"Us and Kids "R"Us marks are eligible for protection from dilution. Adult "R"Us tarnishes the mark of plaintiff by associating it with the line of sexual products.

28. S.11(2 ) – A trade mark which-
a) .....
b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor, shall not be registered, if or to the extent, the earlier trade mark is a well-known trade mark in India and the use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark.

having reputation in India and without due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark.[29] The Act does not specifically use the word dilution of trade mark but lessening of capacity to distinguish are covered by the words 'detrimental to the distinctive character'. There is no statutory remedy under the Trade and Merchandise Marks Act 1958.

In *Tata Sons Ltd* v. *Manu Kosuri.*[30] The suit arose on account of misappropriation of the plaintiff's trademark TATA by defendents as a part of series of domain names that have been registered by them incorporating the well known mark TATA. Court held that the defendant's use of the impugned mark name is thus aimed at diverting the business of the plaintiff and would irreparably damage the reputation and good will of the plaintiff by tarnishing of the asset ie trade mark TATA by the aforesaid activities and restrained him from using name TATA in any business and in any manner dealing in any goods or services under any domain names containing the word TATA or any other mark/name which is identical or deceptively similar to trade mark TATA or containing the word TATA on the internet or otherwise, and causing dilution of the trade mark TATA.

### *C. Cyber squatting*

A cyber squatter registers domain names in an attempt to extort money from the trade mark holder for transfer of the domain name. This activity is known as domain name piracy, cyber piracy and cyber squatting.The domain name holder may not have actually used the domain name in respect of the trademark holder's goods or services i.e. he has not committed any direct infringement of trademark, yet the courts have provided remedy to the trade mark holder on the various grounds, including

29. S.29(4) - A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in course of trade, a mark which –
    a)
    b)
    c) the registered mark has reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.
30. 2001 PTC 432 (Del) - The domain names involved were jrdtata.com, ratantata.com, tatahoneywell.com, tatayodogawa.com, tatateleservices .com, tatassl.com, tatapowerco.com, tatahydro.com, tatawestide.com, tatatimken.com.



trade mark dilution[31], passing off[32] and unfair competition.

In 1996, NSI (Network Solutions Inc.) first adopted its Domain Name Dispute Resolution Policy. Under this policy, if a domain name was identical to a federally registered trademark, then the complainant (trademark owner) could give written notice of the conflict to the domain name holder, provide satisfactory evidence of trademark ownership to NSI and thus effect a domain name change transfer. From a trademark owner's perspective, this dispute resolution policy was quite limited. If the disputed domain name was not identical to the registered mark, the trademark owner would have no recourse through NSI and would have to resort to court action.

In *Aqua Minerals* v. *Pramod Barse*[33] The defendants demanded large sum of money for transferring domain name bisleri.com which he was using for a different activity, to the plaintiff who were the owner of registered trademark BISLERI. The court held that it is likely to cause enormous harm and prejudice to the plaintiff resulting in pecuniary and other losses. The fact that he is re-offering the domain name to the plaintiff against huge amounts of money bares the ill designs and bad faith of the defendant in getting this domain name registered. The court restrained the defendant from using the mark on the ground of passing off and held that the plaintiff can approach NSI to get the domain name transferred.

31. See US case *Panavision International LP* v. *Toeppen* Case No 97 – 55467 (9th Cir. April 1998) defendant had registered over 100 trade marks as domain names, and had several times offered to sell them to the trade owners including offering to sell the domain panavision.com to the plaintiff at the substantial price. He did not use these marks in relation to goods or services in respect of which the marks were registered, for example website www.panavision.com contained photographs of the town of Pane, Illinois. The court held defendant guilty of infringing the FEDERAL TRADE MARK DILUTION ACT 15 USC § 1125(c).
32. See UK's case *Marks & Spencer PLC* v. *One in a Million Ltd* [1998] FSR 265 - The defendant was a domain names dealer who had registered many domain names using prominent British business names and trade marks such as burgerking.com, marksandspencer.com, sainsburys.com, virgin.org, bt.org, britishtelecom.co.uk, the court decided in favour of the plaintiff's on the Basis of the defendants passing off because any future use of a domain name which was similar or identical to household names such as those of plaintiff's and also explicit threats to sell the domain name to any other interested party would inevitably amount to passing off.
33. 2001 PTC 619 (Del): Also refer to *Dr. Reddy's Laboratories Ltd* v. *Manu Kosuri* 2001 PTC 859 (Del) where the domain name registered by defendant was drreddyslab.com similar to Dr. Reddy which is a famous mark and *Tata Sons Ltd* v. *Manu Kosuri* 2001 PTC 432 (Del)

In order to solve the problem of cyber squatting, the USA has passed Anti Cyber Squatting Consumer Protection Act 1999 (ACPA) which amends the US Trade Mark Act 1946. It created civil liability for bad faith[34] registration with the intent to profit of domain names that are identical or confusingly similar to distinctive trade marks[35] or which dilute famous trade marks.[36] Personal names (e.g. madonna.com ) are also protected.[37] Remedies under this include injunctive relief, the forfeiture or cancellation of the domain name,[38] actual damages or profits or elective statutory damages of between $1000 & $100000 per domain name.[39] ACPA was used in *Sporty's Farm LLC* v. *Sportsman's Market Inc* to uphold an appeal decided under Federal Trade Mark Dilution Act.[40]

In both Trade and Merchandise Marks Act 1958 and Trade Marks Act 1999 there is no provision for protecting the trade mark holders from the menace of cyber squatting. There is a need to amend Trade Marks Act 1999 to protect those trade mark holders whose mark are distinctive but not famous, from cyber sqatters who intend to gain profit from registering such deceptively similar domain names on the lines of the US legislation of 1999.

34. A non-exhaustive list of factors to be considered in determining whether bad faith exists includes:
    - the prior bonafide use of the name in the offering of goods or services;
    - the provision of material and false contact information when applying for domain registration;
    - the person's offer to sell or otherwise assign the domain name to the mark offering of goods and services; and the registration of multiple domain names which the person knows are identical or confusingly similar to distinctive marks or dilute famous marks: See Reed Chris *supra* n.3 at 55.
35. 15 USC § 1125(a)(d)(1)(A)(I).
36. 15 USC § 1125(a)(d)(1)(A)(II).
37. 15 USC § 1129(b).
38. 15 USC § 1116.
39. 15 USC § 1117.
40. In this the plaintiff was a mail order company which sells products to pilots and aviation enthusiasts, and which had used and registered as trade mark the logo 'sporty's'. A competitor, Omega , entered into aviation product business under the name of Pilot's Depot and registered the domain name 'sportys.com' with NSI. Following complaints by plaintiff , the Omega sold the domain name to its newly formed wholly owned subsidiary Sporty's Farm, which sold Christmas trees, and which began advertising on 'sportys.com' web page. The Court of Appeals for Second Circuit affirmed the lower court's injunction requiring Sporty's Farm to relinquish the domain name to plaintiff , applying the new cyber squatting law. The court found that the mark 'Sporty's' was distinctive as defined in ACPA and thus it did not need to find whether sporty's mark was famous and there was a clear evidence that the purpose of domain name registration was to compete the plaintiff in its aviation product market. 53 USPQ 1570, WL 124389 (2nd Cir. 2000).



### *D. ICANN's Uniform Dispute Resolution Policy (UDRP)*

Due to rise in domain name disputes relating to infringement, dilution, or cyber squatting, on the recommendations of WIPO a report on the Internet Domain Names was released in 1999. On the basis of the report ICANN adopted a Uniform Dispute Resolution Policy (UDRP) which went into effect for all registrars on Jan 1, 2000. The policy enables ICANN to cancel, change or transfer domain name registration on the written or electronic instruction from a registrant and the receipt of a decision from a dispute resolution service provider appointed under the policy. There are four dispute resolution service :

(i) WIPO Arbitration and Mediation Center based at Geneva (www.arbiter.wipo.int.centre)

(ii) National Arbitration Forum based at Minnenpolis, Minnesota, USA (www.arbforum.com/domains/domainintro.html).

(iii) DeC based at Montreal, Quebec, Canada (www.eresolution.ca/services/dnd/arb.htm)

(iv) CPR based at New York (www.cpardr.org/home/.htm).

The UDRP is limited to cybersquatters and uses a mandatory procedure to resolve issues. The mandatory procedure is enforced through contracts imposed by all ICANN registrars on all domain name registrants. Under Para 4(a) of policy all registrants in following situations are required to submit to the mandatory administrative process in the form of Arbitration:

(i) The registered domain name is identical or confusingly similar to a trade mark or service mark in which the complainant has rights.

(ii) The domain name registrant has no rights to or legitimate interest in the domain name

(iii) The domain name has been registered and is being used in bad faith

What constitutes bad faith is specified in Para 4(b) of policy. It includes:

(i) use of domain name for renting or selling it to trade mark owner.

(ii) registration of domain name to prevent a trade mark owner from using their name as domain name

(iii) or registration of a domain name primarily to disrupt the business of the competitor

(iv) to attract commercial gain by causing confusion about source or sponsorship.[41]

The first case decided by the WIPO was *Worldwrestlingfederation.com*[42] which commenced in 1999 where respondent offered to sell the domain name to complainant for valuable consideration in excess of any out of pocket costs directly related to domain name. It was held that name is confusingly similar to World Wrestling Federation and respondent has no rights or legitimate interests in respect of domain name and since the respondent offered to sell it to the complainant 3 days later, the Panel believes that the name was registered in bad faith.

Some of the Indian cases decided by WIPO where domain name registered by respondent in bad faith were transferred to the complainant are *Maruti Udyog Ltd* v. *Suzuki Motors Corp(marutisuzuki.com)*[43], *Tata Sons Ltd* v. *The Advanced Information Technology(tata.org)*[44], *Cox & Kings India Ltd* v. *Rakesh Sud* (duniyadekho.com)[45], *SAP Systems /SAP India System* v. *Davinder Pal Singh Bhatia (sapmaster.com, sapwizard.com)*[46], *Zee Telefilms Ltd & Wimpole Holdings Ltd* v. *Rahul Dholakia & Oznic.com(zeetv.com)*[47], *AB SKF and SKF Bearings India Ltd* v. *Vikas Pagaria(skfindia.com)*[48].

Recently cybersquatting of internet domain name indianexpress.com by a USA based entity came to an end by transfer of domain name to

41. The process commences with the online filing of complaint to one of the dispute resolution service providers. The service provider then forwards the complaint to the respondent within 3 days of the receipt of the payment of fees from the complainant, and notifies the ICANN and the registering body concerned that the proceedings have commenced. The respondent than submits their response to the provider within 20 days from the commencement day. The provider selects a panel of experts from the list maintained by the provider and panel members have 14 days from the notification of appointment to forward the decision to the provider. These decisions must contain the written reasons on which the decision is based. The process finishes in 45 days. All the decisions are published on the internet and the remedies are limited to cancellation of registration of a domain name or transfer of the domain name to the complainant.
42. Case No. WIPO D99-0001.
43. 2000 PTC 636 (WIPO).
44. 2001 PTC 129 (WIPO).
45. 2001 PTC 113 (WIPO).
46. 2001 PTC 530(WIPO).
47. 2001 PTC 660 (WIPO).
48. 2002 (25) PTC (WIPO).



Indian Express Online Media Ltd by an order of WIPO Arbitration and Mediation Centre on September 20, 2002. The proceedings were initiated on August 22, 2002.[49]

Apart from the gTLD's cases, WIPO also provides domain name dispute administration services for the certain country code top level domains (ccTLDs).[50]

### *E. Dispute Resolution Policy of National Centre for Software Technology(NCST)*[51]

In India the disputes with respect to domain names assigned under ccTLD '.in' are resolved according to the policy laid down by NCST. It lays the scope of the Disputes and the mandatory procedure to be followed.

#### *Scope of Disputes*

A dispute over the Domain Name assigned may arise under following conditions:

a. Assigned Domain Name is identical or confusingly similar to a trade mark or service mark in which the complainant has rightful claim.
b. Assignee has no rights or legitimate interests in respect of the Domain Name.
c. Assignee has sold/auctioned/transferred the Domain Name to a third party without taking approval of Domain Registrar.
d. Domain Name has not been used by the assignee for over one year.
e. A complaint of cyber squatting has been received.
f. Any other dispute, accepted by the Domain Registrar in his own discretion.

All other disputes between assignees and third party regarding Domain Name can be taken up through any court, arbitration or other proceedings that may be available

49. See *US based Cybersquatter Evicted from Express Site*, THE SUNDAY EXPRESS (Vadodara), September 29, 2002.
50. The list of ccTLDs is for which dispute are resolved is available at website http://arbiter.wipo.int/domains/cctld/index.html
51. See http://www.indianregistry.net.

*Procedure for resolution*

The Domain Registrar shall intimate to the assignee that a third party complaint has been filed. He has to represent the case within 15 days of notice. Oral hearing is granted to both parties and then the decision in writing is communicated to the concerned. The appeal lies to Internet Management Group (IMG) and further appeal to appropriate court in Mumbai within six weeks of communication of decision in writing or by e-mail.

The remedy is given in the form of cancellation or transfer of domain name.[52]

## V. Use of Trade Marks as Metatags

Metatags are the Hyper Text Markup Language (HTML) codes, invisible to the user that the computer search engines use to determine which sites correspond to a keyword search by a web user, whereby there is likelihood of confusion as they reach a site which are unrelated to their request.[53]

In India the Trade and Merchandise Marks Act 1958 Section2(2)(a) and Trade Marks Act 1999. Section 2(2)(b) say that use of mark shall be construed as reference to the use of printed or other visual representation of marks.[54] For the purpose of passing off or infringement of mark there has to be use of trademark.[55]

52. For detailed procedure see www.indianregistry.net/coin/pro.htm.
53. In *Brookfield Communications Inc* v. *West Coast entertainment Corp* [1999] 50 USPQ 2d 1545, Brookfield claimed that West Coast's inclusion of the term "MOVIEBUFF" as a metatag for the site infringed S.32 & S.43(a) of the Lanham Act. The Court found that such a use of the plaintiff's trademark in the defendant's website as a metatag would result in "initial interest confusion". The court explained that search engine users looking for Brookfield's "MOVIEBUFF" products may be taken to one of the defendants as a result of a search performed using that term. The court recognized that there is no source confusion in the traditional sense, as consumers would know they are patronizing West Coast rather than Brookfield. Nevertheless, the court held that by using "MOVIEBUFF" as a metatag for their websites, West Coast sought to divert people looking for Brookfield's "MOVIEBUFF" product and, as a result of such initial interest confusion improperly benefited from the goodwill that Brookfield had developed in its mark.
54. Also see S.2(2)(c) of Trade Marks Act, 1999.
55. See S.29(1) Trade and Merchandise Marks Act 1958. Also see S.29(6) of Trade Marks Act which says:
For the purposes of this section, a person uses a registered trade mark, if in particular he –
(a) affixes it to goods or the packaging thereof;



But the use of marks as metatags is not visible as used in the computer programme which cannot be seen at the front end. To cover such a situation an amendment is required in Trade Marks Act 1999.

*Deceptively Similar Domain names*

The domain name registered by the subsequent e-business may be phonetically similar to the earlier domain name registered by another e-business which may lead to the confusion or deception in minds of consumers that services provided are from the same person which is in their mind or there is some trade connection between the two e-business. The courts have provided the remedy in the form of passing off action.

In *Rediff Communications* v. *Cyberbooth*[56] The plaintiff rendered services under domain name "rediff.com" which was widely published. The defendants had common field of activity and they were using the domain name "rediff.com". The court restrained the defendant from using the domain name "rediff.com" as it was confusingly similar and object was to trade upon the reputation of plaintiff's domain name. Similarly in *Info Edge (India) Pvt Ltd* v. *Shailesh Gupta*[57] where the plaintiff's domain name "naukri.com" had acquired reputation and was providing advertisements relating to jobs. The defendants started using the domain name "naukari.com" which provided hyperlink to their site "jobsourceindia.com" providing the services similar to defendants. The court held that the defendant's choice of slightly mis-spelt version of the plaintiff's domain name was deliberate in order to suit the business activities of defendant and for the purpose of diverting the traffic of the internet users to website unrelated to the plaintiff by confusing the internet users as to sponsorship or affiliation with a website that defendant operates for commercial gain.

These kinds of services provided can be protected under the Trade marks Act 1999 as the definition of trade marks under the Act include 'services' and infringement action can lie if the mark has become famous. However this statutory remedy can be availed if the Act is implemented. Till that time one can approach courts for passing off action only.

(b) offers or exposes goods for sale, put them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;
(c) imports or exports goods under the mark; or
(d) uses the registered trade mark on business papers or in advertising.
56. AIR 2000 Bom. 27.
57. 2002 (24) PTC 355 (Del).

## VI. Conclusion

The Indian courts have laid down that internet domain names are entitled to equal protection as trade marks and are allowing passing off action for use of deceptively similar domain names. The Trade Marks Act 1999 need to be implemented fast in order to give better protection e-businesses for services offered on internet .

As regards the conflict of right of honest and concurrent user to register its trade mark and uniqueness of domain name, the conflict is irreconcilable at the moment due to insufficient gTLD's/names to satisfy trade marks holders. For cyber squatting the courts and international organizations provide a remedy. The ICANN dispute resolution policy has helped expeditious resolution of disputes. But a statutory provision on the lines of the USA legislation is required to prevent this menace. With respect to trade mark dilution caused by domain names, courts are allowing passing off action. The Trade Marks Act 1999 provides for infringement action in certain cases. The use of trade marks as Metatags which are not visible requires that the Trade Marks Act 1999 should be amended to include such a situation.

# MEDICAL NEGLIGENCE UNDER CONSUMER PROTECTION ACT: JUDICIAL ENDEAVOUR

*Neeru Nakra*[*]

## I. Introduction

Medical profession in its work orientation is supposed to serve the suffering humanity. A patient reposes complete trust in the doctor while seeking medical help. Quite often than not, in the public eye, the doctor is next only to God, someone who can save lives, who can snatch a person from the jaws of death. A betrayal of this trust – that's what medical negligence is all about.

The stories of recovery of scissors or bandages in a patient's abdomen post-operation, operating the left side instead of infected right, interchange of babies in children's ward, brain damage due to poor anaesthesia, hospitals turning away accident patients ... and many more are the stark realities of the modern medical profession in India. All this has raised certain fundamental moral and legal questions about the medical profession, the liability of the doctors, hospitals and the rights of hapless victims to claim compensation from doctors and hospitals . The trend towards accountability of the medical profession has gathered momentum as there was no specific law relating to the liability of doctors for medical negligence. Such cases had to be prosecuted under the general penal and tort law. However, unlike the West, the instances of courts ordering payment of compensation to the victims, much less the conviction of errant doctors, were rare. Consequently, in view of the lack of accountability of doctors, there has been an alarming increase in cases of medical negligence. The Consumer Protection Act 1986 (CPA), has filled the void with the object of providing quick and efficacious remedy to consumers in case of defect in goods / deficiency in services.[1]

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1. J.L.Kaul, Book Review, *Medical Negligence and Compensation* XXII Delhi Law Review 227-228(2000)..

## II. Consumer Law and Medical Negligence

The CPA is one of the benevolent social legislations intended to protect the large body of consumers all over the country from exploitation. It enables the consumers to secure speedy and inexpensive redressal of their grievances with the establishment of a quasi-judicial machinery. Under the CPA, Consumer Forums (i.e. Consumer Dispute Redressal Agencies (CDRA)) at district, state and national levels are established to provide simple, inexpensive, time bound justice to consumer complaints against any defect in goods / or deficiency in services. With globalization of economy and enhancement of consumerism, the importance of the CPA has multiplied manifold. Since the inception of CPA, large number of cases against the medical personnel and hospitals have been filed and huge compensation awarded.

### *A. Professional Duty*

Law imposes a duty on everyone to conform to a certain standard of conduct for protection to others. The doctors owe a duty of care to their patients. Failure to show due care or skill in medical treatment resulting in death, injury or pain of the patient gives rise to a cause of action of negligence. It is the duty of the redressal agencies to safeguard the interest of the patients against malpractices by medical professionals if there is deficiency in medical services.[2]

The judiciary has played a vital role in bringing the medical services within the definition of 'services'.[3] And treating patients as 'consumer'[4] within the ambit of the CPA.

2. S. 2(1) (g), CPA: Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.
3. S. 2(1) (o), CPA defines 'service' as service of any description which is made available to potential users includes transport, insurance, banking, processing, supply of electricity, board or lodging, housing construction, entertainment, amusement or purveying of news or other information but does not include the rendering of any service free of charge, or under a contract of personal service.
4. S. 2(1)(d), CPA, defines consumer as any person who buys any goods for a consideration includes any such user of such goods but does not include a person who obtains such goods for resale or for commercial purpose; or any person who hires or avails of any services for a consideration, includes beneficiary of such services.



### *B. Judicial Exegesis*

The flow of consumer cases into CDRA created under the CPA has continued unabated. The hopes of bringing about speedy resolution of consumer disputes through CDRA have steadily been dampened with slow but unmistakable judicialisation of the process of CDRA. The apex commission, i.e. National Commission has drawn attention to the intention of the framers of CPA that the proceedings under the Act be simple and free of technicalities, yet, it has been the chief instrumentality in drawing on the provisions of Code of Civil Procedure 1908 and Indian Evidence Act 1872. The most important reason for the trend towards judicialisation is the fact that business houses engage lawyers of eminence for looking after their interest before these agencies.[5] Nevertheless, the consumer fora have awarded compensation in many cases. In one of the recent examples, the consumer court has awarded compensation of Rs. 91,860 to a patient who sought it for the medical negligence because of which a gauge wire was left inside his body during surgery.[6]

The liability under the consumer law arises when there is defect in goods /deficiency in service. The service defined in Section 2(1)(o)[7] of CPA brings within its sweep service of any description available to potential users. It is true that the professional services of doctors, engineers, lawyers are not specifically mentioned in the definition. The facilities of services mentioned in the definition are merely illustrative of the definition of service, but not exhaustive. Naturally, the professional services of doctors, lawyers, engineers, architects and technical service fall within the ambit of Section. 2(1)(o) of CPA, because these services are available to potential users on payment of consideration.[8] The inclusion of medical services within the ambit of CPA has remained a controversy. The consistent view of the State Commissions of Andhra Pradesh[9], Bombay[10], Gujarat[11], Kerala[12] and Madras[13] is that the activity of pro-

5. D.N. Saraf, *Consumer Protection Law*, XXXI, Annual Survey Of Indian Law 113 (1995).
6. Navneet Mendiratta, *Court Tells Doctors to pay for Leaving Guage Wire in Body*, The Times Of India, April 19, 2003.
7. *Supra* n. 3.
8. R.K.Bag, Law Of Medical Negligence And Compensation 329 (2001).
9. *Gulam Abdul Hussain* v. *Dr. Katta Pullaiah Chowdhury* 1991 (1) CPR 499 (Hyderabad).
10. *B.S. Hegde* v. *Dr. Sudhanshu Bhattacharya* II (1992) CPJ 449 (Bombay).
11. *Yasmin Sultana* v. *Dr. Rupaben D. Patel* 1994 (1) CPR 407 (Gujarat).
12. *Smt. Vasantha P. Nair* v. *M/s Cosmopolitan Hospital* 1991 (2) CPR 155 (Kerala).
13. *Navaneethan* v. *Dr. Rathinasamy* 1992 (1) CPR 41 (Madras).

viding medical assistance for payment carried on by the hospitals and members of medical profession falls within the scope of 'service' under CPA and in the event of any deficiency in the performance of such service, the members of the profession and the hospital authorities are liable to pay compensation. Moreover, the State Commission, Madras in *Navaneethan's* case held that the relationship between a medical practitioner and his patient is not a contract of personal service, but a contract of professional service falling within the ambit of CPA. The above view is echoed by State Commissions of Andhra Pradesh, Bombay, Kerala and West Bengal.[14] However, the contrary view expressed by the State Commissions, Gujarat[15] and Karnataka[16] is that the professional service rendered by the doctor for consideration is a contract of personal service which is excluded from the term 'service' under CPA. The conflict of judicial opinion among the State Commissions has been set at rest by the National Commission[17] which has laid down that the professional service rendered by the doctor on receiving consideration paid by the patient cannot be a contract of personal service and therefore such medical services fall within the ambit ofSection 2(1)(o)[18] of the CPA.

However, the law was well settled by the Supreme Court of India in *Indian Medical Association* v. *V. P. Shantha and others*.[19] The much awaited judgment of this case was delivered on 13.11.1995 setting at rest the doubt regarding jurisdiction of the CDRA to entertain complaints against members of the medical profession for deficiency of service and negligence. The court came to the following conclusions:

(1) Service rendered to a patient by a medical practitioner (except where the doctors render service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1)(o)[20] of the CPA.

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India or State Medical Councils constituted under the

14. See for example *Kasturi Bhattacharjee* v. *Sivaji Basu* 1997 (2) CPR 318 (Cal.).
15. *Subhash Chandra N. Pandya* v. *Shailesh J. Shah* 1991 (2) CPR 537 (Guj.).
16. *Y. Meenakshi* v. *Dr. H. Nandeesh* II (1991) CPJ 533 (Bangalore).
17. *Cosmopolitan Hospital* v. *Smt. Vasantha P. Nair* 1992 (1) CPR 820 (NC).
18. *Supra* n. 3.
19. AIR 1996 SC 550.
20. *Supra* n. 3.



provisions of Indian Medical Council Act would not exclude the service rendered by them from the ambit of the Act.

(3) A 'contract of personal service' has to be distinguished from a 'contract for personal service'. In the absence of the relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a 'contract of personal service'. Such service is rendered under a 'contract for personal services' and is not covered by exclusionary clause of the definition of 'service' as per the CPA.

(4) The expression 'contract of personal service' would include the employment of a medical officer for the purpose of rendering medical service to the employer. It would be outside the purview of 'service' under the CPA.

(5) Service rendered free of charge by a medical practitioner attached to a hospital / nursing home or a medical officer employed in a hospital / nursing home where such services are rendered free of charge to everybody, would not be 'service' as defined under the CPA. The payment of a token amount for registration purpose only at the hospital / nursing home would not alter the position.

(6) Service rendered at a non-government hospital / nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service – is outside the purview of the expression 'service'. The token amount paid for registration would not alter the position.

(7) Service rendered at a non-government hospital / nursing home where charges are required to be paid by persons availing such services falls within the ambit of the CPA.

(8) Services rendered at a non-government hospital / nursing home where charges are required to be paid by persons who are in a position to pay and the persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free services would also be 'service' and the recipient is a 'consumer'[21] under the CPA.

21. *Supra* n. 4.

(9) Service rendered at a government hospital / health centre / dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service is outside the purview of the expression 'service'. The token amount paid for registration would not alter the position.

(10) Service rendered at a government hospital / health centre / dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing such services would fall within the ambit of the expression 'service' irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be 'service' and the recipient a 'consumer' under the CPA.

(11) Services rendered by a medical practitioner or hospital / nursing home cannot be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service'.

(12) Similarly, where as a part of the conditions of service, the employer bears the expense of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital / nursing home would not be free of charge and would constitute 'service' under the CPA.

The court made the suggestion that in most cases 'deficiency in service'[22] may be due to obvious faults which can be easily established such as removal of wrong limb, or performance of an operation on a wrong patient or giving injection or a drug to which the patient is allergic. The court concluded that there was no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the agencies under the CPA.[23]

The well-reasoned judgment of the Supreme Court[24] is indeed a landmark in fixing accountability of members of medical profession who

22. *Supra* n. 2.
23. *Supra* n. 5 at p. 134.
24. *Supra* n. 19.



provide service for consideration. Those who can afford to pay charges of private medical facility have at least the satisfaction that their right to receive appropriate standard of care at the hands of the members of the profession would be vindicated through speedy and inexpensive procedures of the consumer fora.[25]

Only a few months after its judgment in *Indian Medical Association*,[26] another landmark judgment was handed down by the Supreme Court defining respective rights and obligations of allopathic and homeopathic systems of medicines.[27] In *Poonam Verma* v. *Ashwini Patel*[28], a person registered as a medical practitioner for homeopathic practice only, without finding the necessity of conducting pathological tests treated Pramod Verma for an ailment by prescribing allopathic medicines. As a result the patient died. The Maharashtra State Commission and the National Commission did not provide relief to the complainant, the wife of the deceased. The Supreme Court held that the respondent, by virtue of his registration, was under a statutory duty not to enter the field of any other system of medicine. By practising allopathy, he had 'trespassed into a prohibited field and was liable to be prosecuted.' The petitioner was granted a compensation of Rs. 31 lakhs and costs of Rs. 30,000/-. Hence, consumers in the country have won major battle against medical malpractice. By holding that a person who studies one system of medicine, but practices another, is a quack and the Supreme Court has upheld the right of the consumer to haul up such quacks before consumer courts. It was also held that where a service provider is guilty of such negligence, no further proof is required to hold him liable for his action. The judgment[29] should certainly send a warning signal to all those who indulge in quackery because it makes it clear that a person who is qualified in Ayurveda, Homeopathy or Allopathy should practice only that system of medicine. Any departure from this, may well mean coughing up hefty sums as compensation to patients or their relatives.[30]

In an important case of *Harjot Ahluwalia* v. *Spring Meadows Hospital*[31], Harjot, a minor, was taken to Spring Meadows Hospital, New

25. *Supra* n. 5 at 134.
26. *Supra*, n. 19.
27. D.N. Saraf, *Consumer Protection Law* XXXII Annual Survey Of Indian Law 159 (1996).
28. AIR 1996 SC 2111.
29. *Ibid.*
30. Modi's, Medical Jurisprudence And Toxicology, Edited by B. V. Subrahmanyam. (2001).
31. II (1997) CPJ 98 (NC).

Delhi, with high fever. Without prior test, he was administered some medicine and intravenous injection resulting in cardiac arrest. Non-availability of oxygen in the hospital resulted in irreparable brain damage and consequently the patient went into a vegetable state for rest of his life. The National Commission held that there was deficiency in service on the part of the hospital and awarded compensation of Rs. 12.5 lakhs to the minor child, Harjot Ahluwalia and Rs. 5 lakhs to his parents.

On appeal, in a landmark judgment,[32] the Supreme Court upheld the decision of National Commission and dismissed the appeal preferred by Spring Meadows Hospital who were held guilty of negligence of their staff and were ordered to pay huge compensation. A significant part of the decision is that it was held that the parents of the child were consumers having hired the services and child was a consumer as the beneficiary of such services.

### *C. Value of Expert Evidence*

Medical negligence is easy to allege, but extremely difficult to prove. The fact cannot be ignored that there may be ignorance on the part of the patient also who goes to a quack for his medical treatment. It is the duty of the redressal agencies to safeguard the interest of the patients against malpractices by medical professionals but at the same time, the inexpensive nature of consumer jurisdiction should not be allowed to become a vicious weapon in the hands of unscrupulous patients to harass the medical professionals without good and adequate cause.[33] The consumer courts have taken into account the fears of the medical professionals without ignoring the legitimate claims of the patients.[34]

The role of the expert medical witness is to inform the judge so as to guide him to the correct conclusions. The expert evidence must be adduced to prove the allegation of negligence by the doctor.[35] In the absence of expert evidence on behalf of the complainant, the National Commission declined to hold that the treatment given by the doctor was not proper or there was over transfusion of blood resulting in cardiac decompensation.[36] There is plethora of cases where the compensation was not awarded by the State Commissions as the allegations of negligence

32. *Spring Meadows Hospital* v. *Harjot Ahluwalia* AIR 1998 SC 1801.
33. *Sachin Aggarwal* v. *Dr.Ashok Arora* I (1993) CPJ 113 (Haryana).
34. *Supra*, n. 8 at 11.
35. *Dr. C. V. Mathew* v. *P. Babu* I (2000) CPJ 134 (Ker.).
36. *Dr. T. N. Subrahmanyam* v. *Dr. B. Krishna Rao* 1996 (2) CPR 247 (NC).



were not substantiated by the expert evidence. The outcome of the cases of medical malfeasance has not been satisfactory. The members of the fraternity hesitate to appear as expert witness on behalf of the complainant.[37] To succeed in medical malfeasance case, the heavy onus of establishing negligence of the doctor is extremely difficult due to inability of complainants to lead expert evidence. But, in certain cases, the maxim *res ipsa loquitor* i.e. thing speaks for itself can be invoked. The Supreme Court applied this doctrine in *Achutrao Haribhau Khodwa* v. *State of Maharashtra*[38], where the patient had to undergo second operation in critical condition for removal of a mop (towel) left inside the peritoneal cavity of the patient during sterilization operation in a Government hospital. A gauge wire left in the stomach of the patients post operation; baby gets two inch cut on the left side of the face during caesarian delivery[39] can be cited as an example where the conduct of the doctors speaks volumes for their performance of duties without reasonable care.

Therefore, it becomes imperative to resort to expert opinion in cases where medical negligence has to be proved and not apparent. An expert opinion does carry lot of weight because it is not always negligence on the part of the doctors. Thus, it is for the judge to look into the facts and circumstances of each case and the expert opinion substantiating the complainant's case. Since the medical services have been brought within the ambit of CPA, it becomes necessary to have a member from medical field in the composition of the consumer fora.

### *D. Adequacy of CDRA*

The CPA provides a hierarchy of consumer courts i.e. District Forum, State Commission and the National Commission. The position of the State Commissions and the National Commission in their hierarchy (working in consumer sphere) are analogous to that of the High Courts and the Supreme Court (established under the Constitution of India).[40] From the structure and working of District forum, State Commissions and National Commission the pyramidal hierarchy of consumer court can be seen, yet

37. D.N. Saraf, *Consumer Protection Law* XXX ANNUAL SURVEY OF INDIAN LAW 175 (1994).
38. (1996) 2 SCC 634.
39. *Baby Gets Two-Inch Cut Durign Delivery*, THE TIMES OF INDIA, April 14, 2003.
40. Goyal, Anupam, *Consumer Protection Act, 1986 : Structural Loopholes in the Constitution of Consumer Courts* IV NATIONAL CAPITAL LAW JOURNAL 119 (1999).

merely the administrative control[41] and appellate jurisdiction[42] do not give State Commission and National Commission, the 'Higher Court' status of having 'precedent' creating power in absence of expressly laid down provisions to that effect. Although section 24B was inserted in the CPA which gave the National Commission and State Commissions administrative control on their subordinate courts, yet it is not sufficient in terms of 'precedent' creating power on the basis of jurisprudence.[43]

The CPA in its composition provisions[44] of the consumer forum at all levels provides that except the President (legal expert), all other members of any single forum shall consist of persons of ability and integrity having adequate knowledge or experience of problems relating to economics, law, commerce, industry, accountancy, public affairs or administration. Thus the majority of judges in a consumer forum at any level is of non-legal experts. When sometimes the legal experts may be subject to incorrect approach in interpreting the law due to the inscrutable nature of task of interpretation, it is difficult to expect sound judgment from non-legal experts.[45]

In the present scenario, all technicalities of law have entered the consumer protection litigation which was thought at the time of the CPA enactment to be purely factual, simple consumer disputes with little element of law. Hence it is incumbent upon the legislature to bring an amendment to the effect of keeping the majority of legal experts and invest consumer forums with precedent creating power.[46]

However, to make the CPA more functional and purposeful, a comprehensive amendment was carried out recently by the Government and brought into force from 15th March, 2003. The Amendment Act is expected to greatly strengthen the consumer movement in the country.[47] Important amendments include: Revision of pecuniary jurisdiction in respect of redressal agencies at different levels[48] and provision for issue of interim order by redressal agencies.

41. S. 24B, inserted by CONSUMER PROTECTION (AMENDMENT) ACT 1993 (w.e.f. 18th June, 1993).
42. Ss. 15 and 19, CPA.
43. *Supra* n. 40.
44. S. 10, CPA.
45. *Supra* n. 40 at 122.
46. *Id.* at p. 126.
47. THE TIMES OF INDIA, April 30, 2003.
48. W.e.f. 15 March, 2003, District Forum – upto Rs. 20 lakh; State Commission – above Rs. 20 lakhs upto Rs. One Crore; National Commission – Above Rs. One Crore.



## III. CONCLUSION

The judiciary has shown empathy towards the victims of medical negligence and endeavoured to bring the medical services within the ambit of the CPA. Because of this endeavour, the victims of medical negligence now will not be allowed to wait for years to secure justice. The Supreme Court has given landmark judgments clearly laying down that the patient is a consumer and hospitals / medical practitioners are service providers within the scope of the CPA. But why has the court allowed the hospitals providing free of charge service to all the patients to remain outside the scope of CPA? If the patients who pay hefty sums face the negligence of the doctors, then one can only imagine what is going on in the hospitals / government hospitals where all kinds of patients including non-paying poor patients are being given medical treatment! The indifference and callousness meted out to them by medical personnel is often worse because of poor hygienic conditions, lack of medicines, absence of doctors and lack of acceptance of responsibilities on the part of the medical institutions. The CPA envisages the services being provided on the payment of consideration. It seems that because of this provision, the hospitals / medical practitioners providing free of charge services are kept outside the purview of the Act! But what can be more valuable consideration than one's own life? Moreover, the doctors take the oath to serve the humanity with conscience and dignity. One of the ten commandments of the Code of Medical Ethics, is "*the health of my patient will be my first consideration*". If it is followed, then even monetary consideration would be secondary. Thus, even if hospitals / medical practitioners provide free of charge services to all, they should not be kept outside the purview of the CPA because, it relates directly to someone's life.

Protection of legal umbrella can take colour of liability of contract, tort, consumer law; Medical Council Regulations, judicial pronouncements and judicial recognition to right to health making it a part of right to life guaranteed by the Constitution of India. But the fact cannot be ignored that in the era of environmental degradation with high levels of all kinds of pollution, malnutrition and changing values of the society, the public is more prone to serious health problems e.g. cancer, AIDS, recent panic SARS etc. Hence, the survival is dependent upon the fact how good are the medical services provided to the patient to cure him. In this way, doctors become indispensable. Therefore, the adage that the doctors are next to God, is not an exaggeration in modern times, but they are not God. They are expected not to give life but try and try till end to save the life. Since to err is human, liability of medical practitioners arises only when

they do not take due care in treating the patient. Therefore, the balance between the doctors' interest and consumer's welfare can be achieved not by resorting to stringent legal measures but by a balanced legal paradigm.

Negligence by a doctor should not be pardonable because it can put an end to a life. Therefore, it becomes imperative for a medical person to take extra care for the patients because of the fiduciary relationship between the doctor and the patient. *Even wee bit of medical negligence can be fatal and remember life does not have action replay.*

# THE CAUVERY DISPUTE: EVOLUTION OF A CRISIS

*Nitish Verghese and Anju Rani**

The dialectic of political compulsions and successive dispute settlement processes has been the hallmark of the dispute regarding the sharing of the waters of Cauvery between Karnataka and Tamil Nadu. Similar in many aspects to several other inter-state water disputes in India, a number of which have been successfully resolved, the Cauvery dispute has assumed serious proportions because of developments that bode ill for the federal structure of the country and the constitutional health of Karnataka. In this article we will examine the evolution of the Cauvery dispute when it started with questions regarding agreements and differences over the utilization of river waters and development of river valley projects to the stage where it has become a 'water basin under stress' '90% of whose water has been exploited unlike most other river basins in the country'[1] turning it into a highly politicised flashpoint for crisis in times of poor rainfall.

## I. Legal doctrines regarding Inter-State Waters

An Inter-state Water Dispute by definition entails a conflict of interests: with two or more states claiming competing rights over use, distribution or control of the waters of, or in, any inter-State river or river valley.[2] The legal doctrines related to rights over inter-State Waters are:

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1. Sunita Narain, *Rivers of Discord*, Down to Earth October 31, 2002, available at http://www.downtoearth.org.in.
2. The Inter-State Water Dispute Act 1956 (ISWDA) states
"2. Definitions- In this Act, unless the context otherwise requires,-
a) ...
b) ...
c) "water dispute means any dispute or difference between two or more State Governments with respect to-
i) the use, distribution or control of the waters of, or in, any inter-State river or river valley; or

*(i) Doctrine of Territorial Sovereignty (Harmon doctrine)*

Proposed by the United States of America's Attorney General Harmon in 1896 in the controversy between the U.S. and Mexico regarding the use of the waters of the river Rio Grande, it advocates exclusive and sovereign rights of the riparian state over waters flowing through its territory disclaiming any obligation to the other riparian State(s). This doctrine takes an extreme position that favours the upper riparian state allowing it to appropriate waters at the cost of the lower riparian state.[3]

*(ii) Doctrine of Prior Apportionment or Prescriptive Rights*

According to this doctrine priority of usage or appropriation gives seniority of rights to a riparian state. This would therefore accord greater rights to a lower riparian that has a longer history of development and use of the water resources.[4]

*(iii) Equitable Utilization and Community of Interest Theories*[5]

Equitable utilization means the sharing of waters of an international river by the states on an equitable basis. The community of interest theory envisions that a river passing through different states as one unit should be treated as such for its maximum utilization. It therefore emphasizes a joint approach to development as well as sharing of water resources. The Kosi project (India and Nepal) exemplifies this approach.[6]

ii) the interpretation of the terms of any agreement relating to the use, distribution or control of such waters or the implementation of such agreement; or
iii) the levy of any water-rate in contravention of the prohibition contained in section 7."

3. This doctrine has not enjoyed wide support. In fact, although asserting this doctrine the U.S. itself conceded some rights to other riparian states on grounds of good neighbourly policy. Further, the HELSINKI RULES ON THE USES OF THE WATERS OF INTERNATIONAL RIVERS 1966 rejects the Harmon doctrine in the commentary to Art.IV. *Available at* http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm. See S.N. Jain, Alice Jacob and Subhash C Jain, INTERSTATE WATER DISPUTES IN INDIA 94-95 (1971).
4. "The doctrine of prior apportionment has been applied in some decisions of the U.S. Supreme Court [*Wyoming Vs Colorado* (1922) 259 US 419]...As against this there is the doctrine of equality- also applied in some cases in the U.S. Supreme Court [*Connecticut Vs. Massachusetts*, (1931) 282 US 670]" P.M.Bakshi, A BACKGROUND PAPER ON ARTICLE 262 AND INTERSTATE DISPUTES RELATING TO WATER, prepared for the National Commission To Review the Working of the Constitution, *available at* http://lawmin.nic.in/ncrwc/finalreport/v2b3-6.htm.
5. S.N. Jain , *et al*, *supra* n. 3 at 97.
6. P.M. Bakshi, *supra* n. 4.



*(iv) Doctrine of Equitable Apportionment*

The doctrine of equitable apportionment seems to have found wide support in that this principle has been applied in numerous inter state water disputes in the U.S.[7], as also in India[8]. Further, the Helsinki Rules state, "Each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."[9] The term 'beneficial' was explained as 'economically or socially valuable'. Simultaneously, it is agreed that the doctrine of equitable apportionment, although the most acclaimed principle, cannot be articulated in fixed simple rules but only in broad guidelines that can be applied according to the facts and circumstances of each particular case.[10]

## II. POSITIONS ADOPTED BY KARNATAKA AND TAMIL NADU

"The river [Cauvery] flows for a distance of about 300 kms. within the State of Karnataka and almost an equal span within the State of Tamil Nadu before it ultimately joins the Bay of Bengal."[11] Kartnataka, in this case, is the upper riparian State. At the outset (at the time of the agreements in 1892 and 1924 between the princely State of Mysore (Karnataka) and the Madras Presidency (Tamil Nadu) in British India) Tamil Nadu was far ahead in terms of utilization and development of the Cauvery waters. Eventually, Karnataka too developed and increased its utilization and development. Karnataka now "tends to assume a primacy of rights as an upper riparian over Cauvery waters, with only the residuary flows going to Tamil Nadu, thus virtually if not explicitly invoking the Harmon Doctrine...Karnataka asserts an unqualified right to use Cauvery waters for the benefit of its farmers..."[12] Tamil Nadu on the other hand has had to face diminishing flows over the years and consequently in years of poor rainfall finds itself at the mercy of Karnataka so "it would prefer

7. *Id.* at Chp. 4 (7). See for instance *Connecticut* v. *Massachusetts* (1931) 282 U.S. 670; *New Jersey v New York* (1931) 283 U.S. 336; *Nebraska v Wyoming* (1945) 332 U.S. 54.
8. *Id.*at Chp. 4(9) and 4(10). THE NARMADA TRIBUNAL REPORT VOL. I, 109-113 (1978) contains an elaborate discussion of the doctrine and its application. THE KRISHNA WATER DISPUTES TRIBUNAL REPORT 52 and 93 (1976) and THE GODAVARI WATER DISPUTES TRIBUNAL REPORT VOL. I 19 (1979) took note of this position)
9. Cited in S.N. Jain *et al*, *supra* n. 3 at 98.
10. *Ibid.*
11. *Tamil Nadu C.N.V.V.N.U.P. Sangam v. Union of India* A.I.R. 1990 SC 1316 at page
12. Ramaswamy R. Iyer, *The Cauvery Tangle- What's the Way Out?* FRONTLINE, September 27, 2002.

to obtain a clear recognition of a legal *right* to a share in the Cauvery waters. It therefore tends to take a legalistic stand on past agreements and on the principle of prescriptive rights arising from prior appropriation."[13]

According to Iyer, neither of the stands is tenable. He advocates the application of the principle of equitable apportionment for beneficial uses. Further, what he recommends is not only mutual compromise but also the adoption of the spirit of conciliation and compromise. The Cauvery Water Dispute Tribunal[14], after examining the case for twelve years, is close to giving its award and "the best course now would be to await and accept the results of the adjudication process." To pave the way for such acceptance Iyer says "Tamil Nadu must realize that historic flows cannot be restored; that it must learn to live with reduced flows; and that it can do so through a combination of better water management, avoidance of waste, local conservation of rain water, conjunctive use of surface water and ground water, changes in cropping pattern...Karnataka must recognize that Tamil Nadu is a co-riparian with a right to share in the waters of the common river and not a poor relative asking for charity...that the abstraction of water by the upstream state should not be done in such a manner as to cause serious difficulties ('substantial harm' in the language of the old Helsinki Rules[15] or 'significant' adverse effects in the language of the 1997 U.N. Convention relating to International Watercourses[16]) to

13. *Ibid.* Also, Nirvikar Singh and Alan Richards state "Tamil Nadu asserts that the entitlements of the 1924 Agreement are permanent. Only those clauses that deal with utilization of surplus water for further extension of irrigation in Karnataka and Tamil Nadu, beyond what was contemplated in the 1924 Agreement can be changed. In contrast, Karnataka questions the validity of the 1924 Agreement. According to the Karnataka government, the Cauvery water issue must be viewed from an angle that emphasizes equity and regional balance in future sharing arrangements." Nirvikar Singh and Alan Richards, *Inter State Water Disputes in India: Institutions and Policies, available at* http://econ.ucsc.edu/faculty/boxjenk/indiawater.pdf.
14. In July 1986 Tamil Nadu formally requested the Central Government to establish a tribunal under the ISWDA to resolve the dispute. The Central Government deferred it in favour of negotiations which did not make much progress. In 1990 the Supreme Court in considering a writ petition filed in 1983 by a society of Tamil farmers, to which the states of Tamil Nadu, Karnataka and the Union Territory of Pondicherry were added as respondents, directed the Central Government to constitute a tribunal to adjudicate the dispute. See *supra* n. 11.
15. *Supra* n. 3.
16. United Nations Convention on the Law of the Non Navigational Uses of International Watercourses 1997. *Available at* http://www.internationalwaterlaw.org/IntlDocs/Watercourse_Conv.htm



the downstream State."[17]

## III. Change in the Nature of the Cauvery Dispute

That there seems to exist a perceived need to 'prepare' Karnataka and Tamil Nadu and make them amenable to the acceptance[18] of the pending award of the Tribunal can be justified by the changed character of the dispute over the past decades. The nature of the dispute has changed since the 1950s from the question of allegations of bringing more land under irrigation than was agreed upon; undertaking irrigation projects that were said to exceed limits of, and sometimes run counter to, the provisions of the 1924 agreement; lack of communication in respect of information regarding projects of common interest and refusal to exchange relevant information in the 1950s and 1960s; during which both Mysore and Madras increased their respective utilization of the Cauvery waters and undertook the construction of various storage reservoirs and canals. For instance, it was provided that "should Madras construct any new storage reservoir on the Bhavani, Amravati or Noyil rivers in Madras, Mysore was at liberty to construct storage reservoir on a tributary as an off-set with a capacity not exceeding 60% of the new reservoir in Madras."[19] Some of these projects were given clearance by the Planning

17. See *supra* n. 12. Similar measures are urged by Sunita Narain: "There is much more at stake here than the formulae for the apportionment of the river's water. This is a region, which over the past years has seen dramatic growth in water guzzling crops...the *kurvai* crop of rice- *kharif* or summer season rice- of the Tamil farmers [Karnataka farmers also grow a water intensive crop- sugarcane] introduced in the late 1960s with the building of the Mettur dam on the Cauvery...[earlier] [in Karnataka] irrigated agriculture expanded in the seventies and eighties to rival its Tamil neighbours in terms of acreage...in the early 1940s it used 20-25% of the Cauvery water, by the 1990s the state utilized over 40%...The only solution for this region is to seriously implement water conservation and augmentation measures..., water policy planners had estimated that if the rice growing area of the states was reduced by just 2%, it would make available enough water to meet the growing needs of Tamil cities. Scientists had also worked on early maturing crops and water minimizing rice crops. Most importantly, there was said to be a need to diversify the crops in the lower reaches of the river to less water-consuming, but equally profitable crops". In this context, pointing out the erroneous govt. policy she says, "...over the 1990s, the government's public distribution system (PDS) has given rice a higher minimum support price than other grains and cereals." Sunita Narain, *supra* n. 1.
18. "...states have sometimes refused to accept the decisions of tribunals. Therefore, arbitration is not binding. Significantly, the courts have also been ignored on occasion. Finally, the center has sometimes intervened directly as well, but in the most intractable cases, such as the sharing of the Ravi-Beas waters among Haryana, Jammu and Kashmir, Rajasthan, and Punjab, central intervention, too, has been unsuccessful." See, Nirvikar Singh and Alan Richards, *supra* n. 13.
19. S.N. Jain *et al, supra* n. 3 at 45-47

Commission; for certain others no specific approval was obtained. The basis of *quid pro quo* and understanding to overcome mutual differences at this stage seems to have been concerns about the question of division of surplus waters which was to be taken up in 1974. The Madras Government therefore gave assurances that it would not claim prescriptive rights on the basis of these schemes and that "these would only utilize the surplus waters on the Cauvery without prejudicing the ultimate distribution of such waters between Mysore and Madras."[20]

When Kerala also became a claimant to the Cauvery waters in 1956 after the reorganization of States, it was suggested by the Deputy-Chairman of the Planning Commission that all such problems could be better addressed by setting up a river board by the states concerned. Kerala was in favour but both Mysore and Madras were opposed to the idea.[21] According to many authors, the River Boards Act 1956 has "remained a dead letter to this day"[22] Around the 1970s there seemed to be an urgency to resolve the Cauvery dispute by the Central as well as the State Governments.[23] A 1972 report by a Fact Finding Committee and studies by an Expert Committee led to an agreement in August 1976 which comprised existing utilization, redistribution of savings and the setting up of an inter-state Cauvery Valley Authority. Tamil Nadu being under Central rule at the time, it was decided to defer matters till the induction of a duly elected state government. The newly inducted state government eventually refused to ratify the agreement and rejected it as unacceptable. Consequently, negotiations were resumed and they went on for 'over two decades but produced no results.'[24] The process of negotiations continued, albeit unsuccessfully, till 1990 when on the direction of the Supreme Court a Cauvery Water Dispute Tribunal was set up by a Central Government notification.[25]

In 1990, during the pendency of the reference, Tamil Nadu approached the Tribunal seeking interim relief and praying "that the state of Karnataka be directed not to impound or utilize waters of the Cauvery river beyond the extent impounded or utilized by them as on 31.5.1972...that an order be passed restraining the State of Karnataka from undertaking any new projects, dams, reservoirs, canals etc., and/or from proceeding

20. *Ibid.*
21. *Id.* at. 48
22. *Id.* at 125. See also Ramaswamy R. Iyer, *A Cauvery Debate: On the Points Raised at a Debate in Bangalore* FRONTLINE, November 23-December 6, 2002.
23. P.M. Bakshi, *supra* n. 4 at Chp. 6(7).
24. Ramaswamy R. Iyer, *supra* n. 12 at 17.
25. see *supra* n. 11



further with the construction of projects, dams, reservoirs, canals etc. in the Cauvery Basin."[26] It also sought release of 20 T.M.C. (thousand million cubic feet) as a first instalment "pending final orders...on the ground that the *samba* crop cannot be maintained without additional supplies at Mettur reservoir."[27]

The Tribunal took the stand that it had no jurisdiction to grant interim relief unless a reference for the same was made by the centre. The matter went before the Supreme Court which ruled that the terms of the reference made by the Central Government indeed contained that request[28]. The opportunity to address the larger question whether the Tribunal has any jurisdiction or not under the ISWDA to entertain any interim application till it finally decides the dispute, was lost when the states of Karnataka and Kerala expressed readiness for the applications for the interim directions to be determined on merits. Accordingly, the Tribunal gave an Interim Order (IO)[29] requiring Karnataka to release 205 t.m.c. ft. of Cauvery waters to Tamil Nadu annually. A detailed monthly schedule for the release of water was also laid down.

Upon this followed violent demonstrations in Karnataka expressing strong resistance to compliance with it. This marked a new turn in the course of events, with both states adopting hard-line positions and the issue taking a particularly volatile and fractious tone.

## IV. DEVELOPMENTS IN THE LAST DECADE

Karnataka promulgated an Ordinance[30] which sought to nullify the IO. On a reference[31] by the Central Government the Supreme Court held that the Ordinance was *ultra vires* the Constitution and the Karnataka Government allowed it to lapse.

Recourse to the Supreme Court and Tribunal has been sought several times since 1990 whenever political mechanisms have not yielded desired results. However, at the same time even with matters before the courts, political understanding would sometimes be reached in individual instances and compromise solutions achieved. On the one hand, these would be considered as part of the negotiation procedure running concurrently with adjudication, on the other hand however, these seem to be merely stopgap

26. *State of Tamil Nadu* v *State of Karnataka* (1991) 2 SCR 501
27. *Ibid.*
29. Interim Order passed by Cauvery Water Disputes Tribunal dt.25.7.91.
30. The Karnataka Cauvery Basin Irrigation Protection Ordinance (1991).
31. *In the matter of: Cauvery Water Disputes Tribunal* A.I.R. 1992 SC 522.

arrangements meant to tide over an emergent situation but without yielding any lasting understanding that would facilitate a final resolution of disputes.

For instance, in 1998, hearings on Tamil Nadu's petition in the Supreme Court for the implementation of the IO were suspended on a request by the Attorney General citing the formulation of a scheme for the implementation of the I.O. The Cauvery River Authority (CRA) which was eventually formed under this scheme (comprising the four Chief ministers and the Prime minister as chairman) was far removed from the Cauvery River Authority (an official-level professional cum bureaucratic body) initially sought to be established under Section 6A of the ISWDA, chiefly due to the objections raised by Karnataka over the latter[32]. Nonetheless, Tamil Nadu withdrew its petition. As pointed out by Iyer, this essentially political body has the limited role of consensus-promotion in the event of a dispute over the implementation of the I.O. and has been unable to perform even this role effectively.

In another instance, the delay by the CRA to decide on requests by Tamil Nadu for implementation of interim relief has been noted by the Supreme Court in that it ordered the release of 1.25 t.m.c. ft. of water per day till the CRA should arrive at a final decision. The Supreme Court did not agree to delay its order until the CRA had taken into consideration, in the course of reaching such final decision, the distress sharing formula to be evolved by the Cauvery Monitoring Committee.[33]

The crux of the matter is that the dispute is really faced in years when there is a distress situation due to delayed or poor monsoons. At other times there is enough water for all concerned parties viz. Karnataka, Tamil Nadu, Kerala and Pondicherry. The dispute is fundamentally regarding allocation of reduced supplies of water and sharing of distress. Protracted delays in considering matters at the CRA as well as in the political, executive mechanisms take place not only because of unyielding adversarial attitudes of respective Governments whose hands seem to appear forced by 'the will of the people'. They also take place because by reason of these delays, matters are left unaddressed or simply allowed to be procrastinated till the North Easterly monsoons arrive in Tamil Nadu on which agriculturists also depend. Thus the situation is temporarily saved.

32. See Ramaswamy R Iyer, *supra* n. 12 at 18.
33. V. Venkatesan, *Distress over a Formula* FRONTLINE, September 27, 2002.



Events, unfortunately, have fallen into a pattern where in a bad monsoon year Karnataka does not release the allocated quantity on grounds of 'not having enough water for even its own people', Tamil Nadu seeks relief either from the Supreme Court or the Prime Minister. The farmers in Karnataka start disruptive agitations threatening public order and peace. In November 2002, Karnataka tendered an unconditional apology on a contempt petition in the Supreme Court for not complying with its orders to release water. It pleaded 'ground realities' as an explanation meaning thereby the massive agitation launched by the farmers. Iyer questions the implications for the 'rule of law, the sanctity of constitutionally mandated conflict resolution mechanisms and the inviolability of the Supreme Court's decision' in the prevailing situation.[34] Consequently, relations between Kannadigas and Tamilians have come under strain.

## V. CONCLUSION

Apart from inordinate delays in the adjudication process itself, it is the problem of implementing the awards which have dogged the inter-state water disputes so far. Consequent to the amendments to the ISWDA carried out in 2002[35] based on the Report of the Sarkaria Commission[36] many of these issues seem to have been addressed. A few issues, such as no time frame being envisaged on the decision of the post award reference, among others, seem to raise some doubts.[37]

Referring to the Cauvery water dispute Iyer states that, "Purely as a water sharing dispute this is not a particularly difficult one (the difficulty in this case lies not in water but in politics)".[38] Expressing deep concern

34. Ramaswamy R. Iyer, *Cauvery: Disturbing Developments*, THE HINDU, September 22, 2002.
35. THE INTER-STATE WATER DISPUTES (AMENDMENT) BILL 2002 (as passed by the Houses of Parliament). *Available at* http://wrmin.nic.in/constitution/iswact.htm.
36. Government of India. COMMISSION ON CENTRE-STATE RELATIONS REPORT I 483-493 (1988). See also the Consultation Paper prepared by the National Commission to Review the Working of the Constitution, SARKARIA COMMISSION RECOMMENDATIONS IN RESPECT OF INTER STATE WATER DISPUTES AND ON THE PROPOSED AMENDMENTS IN THE INTER STATE WATER DISPUTES ACT, 1956. *Available at* http://wrmin.nic.in/cooperation/sarkaria.htm
37. See Ramaswamy R Iyer, *Inter State Water Disputes Act, 1956: Difficulties and solutions* ECON. & POL. WEEKLY 2907-2910 (2002).
38. See Ramaswamy R Iyer, *supra* n. 22. Also, as a comparable illustration of the part played by political considerations in influencing perceptions by a state of its legitimate interests in an inter-State Water dispute, the Sutlej-Yamuna Link canal (SYL) issue offers interesting similarities. There, negotiations and agreements brokered between

over the role played by farmers he advises steps to change their attitude: "Karnataka farmers have been profoundly misguided. It is the responsibility of the Karnataka Government and politicians of all parties to educate them on the right approach. Instead, they are being guided by the sentiments of the farmers. This is very unfortunate and fraught with serious consequences."[39] Touching on a very pertinent issue, one regarding the role the intelligentsia has played in Karnataka so far, he says: "It is also unfortunate that the intelligentsia has been silent."[40]

Thus Iyer recommends a grass-root level initiative with the intelligentsia and opinion makers playing an active and constructive role to educate the farmers on the wrongs and rights of the case; that Tamil Nadu also has a legitimate right on the waters; that farmers in both states should begin to adjust and begin making a change in their farming, water consumption and water management habits to effect a long term change conducive with reduced water supplies.

Most relevantly, he urges a civil initiative to build bridges between the people of Karnataka and the people of Tamil Nadu. The adoption of a pragmatic and cooperative attitude is the key to finding a lasting solution[41]

states (Punjab & Haryana) by the Centre when the same party was in power in the state (Punjab) and at the Centre subsequently ran into a deadlock when different parties came to power in the state and at the Centre thus resulting in lengthy adjudication processes and political negotiations that are still ongoing.
Among other issues, the allocation of waters to Rajasthan (a non-riparian state) is also questioned by Punjab on the basis of existing riparian laws. See P.P.S. Gill, *SYL canal issue: who is to blame?*, THE TRIBUNE, January 24, 2002. (online edition).
Another study points to the existence of structural defects in the dispute settlement mechanism for Inter-State Water disputes in India and the dominant part played by states till date in allocation of river waters despite the scope provided by Art.262 of the Constitution and Entry 56 of the Union List for the Centre to play a more active role, and offers solutions to *inter alia* free the subject from political influence. See, Nivikar Singh and Alan Richards, *supra* n. 13.

39. See Ramaswamy R. Iyer, *supra* n. 22.
40. *Ibid.*
41. In the context of a 'lasting solution', it may be mentioned that the Supreme Court, gave a direction (See, *In Re: News Item Published in Hindustan Times titled And Quiet Flows the Maily Yamuna* 2002(8) SCALE 194 and also, *In Re: Networking of Rivers* 2002(8) SCALE 195 and *In Re: Networking of Rivers* 2003(1) SCALE 2) to the Central Government to undertake a national river-interlinking project (with a time frame of 10 years and a roughly estimated cost of Rs.5, 60, 000 crores). The concept of such a project is neither new nor recent, having been considered *inter alia* by the National Commission for Integrated Water Resources Development Plan and found to be 'not so promising'. On the one hand, there is dismay at this direction of the Supreme Court on the part of some experts - who find it ill-considered and question the legitimacy of this exercise of judicial activism. On the other hand, they raise grave doubts about the feasibility and advisability of the national river-interlinking plan on, among others, grounds of sociological, environmental, financial, geological, economic and geographical concerns.
More pertinently, in the context of this paper, Iyer specifically questions the presumption that consensus among states on water transfers from their river basins to other river basins will not pose a particularly serious problem: "We have not so far been ableto persuade states within a basin to shareriver waters (e g, the Cauvery dispute); insteadof resolving such intra-basin disputes through the better, more economical and more cooperative management of the resources of the basin, should we try to bring water from another and more distant basin? Further, despite some talk of integrated, holistic planning for a basin, the idea has made no headway because of strong resistance from the states. Should we not reach the stage of basin-planning first before talking about inter-basin transfers?" See Ramaswamy R Iyer, *Linking of Rivers* ECON. & POL. WEEKLY, March 1, 2003 (online edition). Also see Ramaswamy R Iyer, *Linking of Rivers: Judicial Activism or Error?* ECON. & POL. WEEKLY, November 16, 2002 (online edition). For a pro river-interlinking view (of a senior bureaucrat in the Water Resources Ministry at the Centre, which is also a rejoinder to Iyer's article of November 16, 2002), see Radha Singh, *Letter to the editor: Linking Rivers* ECON. & POL. WEEKLY, February 1, 2003 (online edition). Also see, Bharat Singh, *A big dream of little logic*, SUNDAY HINDUSTAN TIMES, March 9, 2003.
42. S. Guhan, quoted in Parvati Menon and T.S. Subramanian, *The Cauvery Tussle*, FRONTLINE, September 27, 2002.



to the dispute. In the words of S. Guhan, "Only an equitable solution will be politically acceptable and unless the solution is politically acceptable it cannot be implemented, however sound it might be legally and technically."[42]

# CLONING: SOME LEGAL ISSUES

*Sumathi Chandrashekaran*[*]

## I. Introduction

The religious and ethical aspects of cloning have been subjects of numerous articles and books, variously speculating upon the necessity or the morality of the act of cloning. Cloning, as we understand it today, began with the "replication" of frogs some four decades ago, and has developed so rapidly since then, to suggest that the fiction of *A Brave New World* might actually become a reality. The more circumspect among us might be tempted to question these dramatic transformations that are taking place, in the fashion Jacques Monod, the Nobel prize winning biochemist did, when he wrote: "Neither [man's] destiny nor his duty have been written down. The kingdom above or the darkness below: it is for him to choose."[1] However, this paper does not attempt to promote or ratify, or even dispute, a single, or several, stance(s), religious or moral, pertaining to cloning. It does, instead, try to look at some existing, and anticipated, *legal* aspects of cloning - vital considerations that have to be dealt with in view of contemporary scientific developments.

## II. What is Cloning?

A crude yet basic definition of "cloning" would be that it is the production of identical daughter cells from a parental cell. The process of cloning can be used to derive either multiple cell types or an entire individual being. This process can start from either an egg cell or from stem cells. Stem cells are cells derived from 1-14 day old embryos.

Since we are (naturally) immediately concerned with the cloning of human beings, it is necessary to understand what "human cloning" is. The US Human Cloning Prohibition Act of February 2003 defines human cloning as: "...human asexual reproduction, accomplished by introducing nuclear material from one or more human somatic cells into a fertilized or

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1. Jacques Monod, Chande and Necessity 167 (1974).



unfertilized oocyte [an egg] whose nuclear material has been removed or inactivated so as to produce a living organism (at any stage of development) that is genetically virtually identical to an existing or previously existing human organism."[2]

## III. The Present Legal Scene

No unanimous international stance on cloning or stem cell research exists. The drafting of a United Nations treaty, which would have banned human cloning worldwide, was postponed, after objections were raised regarding its limitations.[3] However, various countries have evolved their own legislations concerning stem cell research and cloning.[4] No human embryo research is permitted in Germany, France, Norway, Ireland, Austria, Poland and Brazil. Human cloning was recently banned by the Australian Senate, although debate on whether research on spare IVF embryos should be allowed continues.[5] In January 2001, the United Kingdom legalised creation of cloned embryos for therapeutic stem cell research purposes only.[6] A *de facto* policy in China allows scientists similar rights.

On August 1, 2001, the US House of Representatives voted to ban any sort of cloning, whether reproductive or therapeutic. But on August 9, barely a few days later, following an outcry from the scientific community, President Bush decided to allow federal funding for human embryonic stem cell research, as long as the donor embryos had been destroyed by August 8, 2001.[7] Privately funded researchers in the US are freely permitted to derive, and use, stem cells from embryos created for research. The Human Cloning Prohibition Act, passed by the House on 27

2. H.R. 534, Human Cloning Prohibition Act of 2003, 27 February 2003, http://thomas.loc.gov/cgi-bin/query/D?c108:1:./temp/~c108PAnrFR::, Visited: 01 April 2003.
3. "Limited U.N. Treaty on Cloning Ban is Put Off for Now", 06 November 2002, http://www.zenit.org/english/ visualizza.phtml?sid=27361, Visited: 21 November 2002
4. *Stem Cell Policies Around the World*," 293 Science 1242 (2001).
5. Darren Gray, *Cloning of Humans Banned* The Age, November 15, 2002. *http://www.theage.com.au/articles/2002/11/14/1037080848786.html*, Visited: 21 November 2002
6. Early in March 2003, the House of Lords upheld the cloning law, while dismissing a "pro-life" charity's appeal challenging the existing legislation. The judgement "backed Parliament's ability to authorise therapeutic cloning, under strict licensing conditions, for research into the production of compatible cell tissue with which to fight disease." Reported in *LordsUphold Cloning Law*, http://news.bbc.co.uk/2/hi/health/2846265.stm, March 13, 2003, Visited: 01 April 2003.
7. Gretchen Vogel, *Bush Squeezes Between the Lines on Stem Cells*, 293 Science 1242-5 (2001).

February 2003, makes it unlawful for any person to perform, attempt to perform, or to participate in an attempt to perform human cloning.[8]

Both the derivation and use of stem cells from spare embryos are permitted in Japan, Canada, Spain, Italy, Finland, Sweden, Israel, Switzerland, Singapore and Australia, with restrictions in some countries.

In India, there is no regulation on cloning, and the use of 14-day old embryos for research is not banned. The National Centre for Biological Sciences (NCBS) in Bangalore, and Reliance Life Sciences in Mumbai have 10 of the 64 stem cell lines allowed by the United States government for research.[9] These two organisations have been named as eligible for US funding.

The Indian Council for Medical Research (ICMR) is currently in the process of framing guidelines on transfer of embryonic stem cell lines for foreign collaborations.[10] Especially noting the "rights of human embryo[s] and subjects who are not competent to give informed consent", ICMR's *Ethical Guidelines for Biomedical Research on Human Subjects*,[11] recommends that embryo-research should be restricted to 14-day old embryos. The ICMR has also stated as part of its Tenth Plan that "separate and updated guidelines specific for any research or therapy with cord blood stem cell need to be prepared during the 10th Plan period as an addendum to the *Ethical Guidelines*."[12] The National Bioethics Committee, formed under the aegis of the Department of Biotechnology (DBT), has brought out a report *Ethical Policies on the Human Genome, Genetic Research & Services*,[13] drawing on internationally accepted ethical principles, and keeping in mind ICMR's *Ethical Guidelines*. The report states that "research on embryonic stem cell biology may be undertaken with adequate safety measures", but "[a]s a principle, human cloning shall not be permitted."

8. *Supra* n. 2
9. B. Krishnakumar, *Human Spare Parts*, THE WEEK, September 16, 2001, Online edition, *http://www.the-week.com/21sep16/cover.htm*.
10. Lola Nayar, *India Framing Strict Laws for Stem Cell Research*, INDO-ASIAN NEWS SERVICE, September 29, 2001. *http://in.news.yahoo.com/010929/43/15pfr.html*, Visited: 21 November 2002.
11. *Statement of Specific Principles for Human Genetic Research* in Indian Council of Medical Research, ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH ON HUMAN SUBJECTS 39-50 (2000), *available on* http://icmr.nic.in/ethical.pdf. Visted: 01 April 2003
12. See Indian Council of Medical Research, TENTH PLAN DOCUMENT 2002-2007 25 (2002). http://icmr.nic.in/10thplan.pdf.
13. *Gene Therapy & Human Cloning*, in National Bioethics Committee, Department of Biotechnology, ETHICAL POLICIES ON THE HUMAN GENOME, GENETIC RESEARCH & SERVICE. http://dbtindia.nic.in/ethical.html.



It is to be noted that the existing framework within which research is to be conducted in India is merely defined in the form of guidelines/ policies. No legal authority is vested in these policies/guidelines. Also, it may be noted that there are at present no recommendations have been made on stem cell research by the Ministry of Law.[14]

## IV. THE LEGAL ISSUES

### *A. Reproductive and Therapeutic Cloning*

Some of the fog surrounding the legal issues about cloning can be dealt with by considering the *motives* behind cloning.

When the targeted result of cloning is the creation of a new human being, it is called reproductive cloning. Human reproductive cloning is banned in most countries. If and when reproductive cloning comes about, we are faced with more pressing complexities. Does cloning violate a child's right to a future? A cloned child is born, *ipso facto*, with genetic fates mapped out, circumscribed by the environment. But there may come a time when technology can ensure that people with "desirable" qualities are produced. We already have such methodology available in the cultivation of plants: hybrid varieties of "consumable" plants are optimally designed to be high yielding and pest-resistant at the same time. Humans justify such agricultural technology as being necessary to meet the growing needs of an increasing population deprived of vital food resources. When it comes to humans themselves, who is to decide these "desirable" qualities? Who has the right to control cloning operations? Human rights legislation, therefore, must be involved when considering cloning technology.

When the purpose of cloning is to induce embryonic stem cells to acquire specific characteristics, for replacing damaged cells or tissues, it is called therapeutic cloning. Therapeutic cloning is medically advantageous but involves the destruction of the stem cell donor embryo. As mentioned earlier, stem cells are derived from 1-14 day old embryos. These embryos, theoretically, have the *potential* to develop into human beings. The argument, therefore, *against* therapeutic cloning is that the process actually kills one life to save another.

Carrying the argument that opposes therapeutic cloning a little further, on the basis that *all* cells are totipotent (that is, they can develop into

14. Personal communication from T.K.Vishwanathan, Secretary, Ministry of Law, Government of India.

complete organisms), there is no difference between a human embryo and *any* living cell.[15] As a corollary, the destruction of *any* living cell for *any* purpose is equivalent to destroying a potential embryo. Such an interpretation effectively diminishes the justification of therapeutic cloning. Additionally, it imposes, although only theoretically, moral objections on, for instance, a seemingly harmless, and often inadvertent, act of scraping off one's cheek cells.

It is, however, important to consider providing legal protection to embryonic research that uses genetic techniques for the cure and prevention of diseases.

### *B. Cloning and Consent*

The primary question that arises when considering cloning and embryonic stem cell research is under what circumstances can human material be used for these purposes. The DBT in India categorically states that embryos cannot be created exclusively for the purposes of research.[16] But then the question arises as to how research in this field is to proceed in India. What can be done with embryos that might otherwise have been lost? This is where the question of consent comes in. It would be instructive in this regard to examine the positions taken by other countries. The "...right to physical integrity requires the informed consent of the person from whom material is taken (including the mother/parents in the case of gametes or embryos)."[17] Obviously, this consent should govern not only the taking of such material, but should also specify the conditions for its use. Both ICMR and DBT are agreed that the informed consent of persons who are to participate in stem cell research is to be necessarily obtained.[18] The consent process should not only state what is normally done with foetal tissues, spare embryos or gametes; but should also disclose possible risks of the study, and provide the right to withdrawal from the study even after initial consent has been provided.

15. Geoffrey Winn, *The Stem Cell Debate*, September 2001, *available at* http://www.law4u.com.au/lil/ls_stem.html, Visited: 21 November 2002.
16. Department of Biotechnology, ETHICAL ISSUES AND CONSENT PROCESS PERTAINING TO STEM CELL RESEARCH, *available at* http://dbtindia.nic.in/consent.html. Visited: 02 April 2003
17. M.H.M. Schellekens and J.E.J. Prins, *Regulatory Aspects of Genomics, Genetics and Biotechnology: An Orientation on the Positions of Germany, the United Kingdom and the United States*, 7.1 ELECTRONIC J. OF COMPARATIVE LAW (March 2003) *available at* http://www.ejcl.org/ejcl/71/art71-2.html. Visited: 02 April 2003
18. *Supra* n. 11 and n. 16



But while consent may be obtained from the parents, the question still remains: how is the consent of an embryo – granting that consciousness is inherent even at that stage of life - to be obtained? This is an extraordinarily complex issue, and perhaps even one that can never be satisfactorily resolved.

### *C. Cloning and Technology*

Announcements of successful attempts of cloning a human being were made recently by Clonaid and members of the Raelian sect, and continuing attempts to clone humans have been made for the past few years by two scientists, in particular, P. Zavos and S. Antinori. The foremost apprehension regarding human cloning is that the existing technology is not sophisticated enough to ensure that human clones are created without any basic biological malfunctioning.[19] Zavos, when questioned about this, however, defended arguments against the possibility of defective births by stating that genetic screening tests would be conducted before actually creating a clone.[20]

When one considers the increasingly frequent use, and acceptance, of techniques such as *in vitro* fertilization, why should another method that offers the same result (in this case, cloning) be banned? If one is legally allowed to create human beings, *artificially*, through certain techniques, why should one not be allowed to do so through others?

The primary objection is purely scientific: as technology stands today, it is regarded by some scientists that the attempt to clone human beings could result in the birth of stillborn, unhealthy or severely disabled children.[21] But this argument against cloning fails if, and when, technology sufficiently advances to ensure safe cloning. So, if the argument against human cloning focuses exclusively on this issue, then once the technology is deemed safe, human cloning will appear permissible.

### *D. Cloning and Civil Liabilities*

Article 8 of the Universal Declaration on the Human Genome and Human Rights states that "Every individual shall have the right, according to international and national law, to just reparation for any damage sus-

19. The recent death of Dolly, the first cloned mammal, attributed to premature ageing, demonstrates the need to achieve a *foolproof* cloning method, before embarking on a full-scale human cloning project.
20. A. Stern, BOSTON GLOBE A7, January 27, 2001, as cited in Rudolf Jaenisch and Ian Wilmut, *Don't Clone Humans* 291 SCIENCE 2552 (2001).
21. Rudolf Jaenisch and Ian Wilmut, *supra* n. 20.

tained as a direct and determining result of an intervention affecting his or her genome."[22] In the event of human cloning being made allowable *before* acquiring sound technology to carry out such procedures and/or in the event of a child *surviving* such an unsuccessful cloning attempt, it could lead to a situation where civil liabilities could arise.[23] An action for negligence can, in the circumstances, be brought, based on:

(a) negligence while cloning, such as selection of the wrong embryo.

(b) negligence in giving, or failing to give advice, regarding possible risks in a process.

(c) negligence in allowing a child to be born with a particular genetic inheritance.

The Congenital Disabilities (Civil Liabilities) Act 1976 of the United Kingdom, provides that a child who is born alive but is disabled as a result of an occurrence before its birth may have an action in negligence against the person responsible for that occurrence. This Act deals with situations where a duty of care was owed to a parent of the child.

In cloning, however, there is the difficulty of deciding *who* that parent is: the nuclear donor of the clone is *not* a parent, in the accepted sense of the word. The gametic parents of the *donor* are, in the biological sense, the parents of the clone.

The US law envisages a similar problem. A Congressional bill opposing human cloning, which was introduced in the US House in April 2001, says: "...cloning confounds the meaning of 'father' and 'mother' and confuses the identity and kinship relations of any cloned child, and thus threatens to weaken existing notions regarding who bears which parental duties and responsibilities for children."[24]

### *E. Cloning and Inheritance*

An interesting implication of cloning arises on the question of inheritance of property[25]: suppose X, a male, makes a will leaving his property

22. UNIVERSAL DECLARATION ON THE HUMAN GENOME AND HUMAN RIGHTS 1997, *http://www.unesco.org/ibc/en/genome/projet/index.htm.*
23. John Duddington, *The Legal Aspects of Human Cloning*, CATHOLIC MEDICAL QUARTERLY (2000), *available at* http://www.catholicdoctors.org.uk/CMQ/Aug2000/cloning_legal_aspects.htm, Visited: 21 November 2002.
24. H. R. 1644 IH, 26 April 2001, "Human Cloning Prohibition Bill of 2001", http://thomas.loc.gov/cgi-bin/query/C?c107:./temp/~c107qGwFwh. Visited: 21 November 2002.
25. *Supra* n. 23



to 'the children' and then a child (Y) is cloned from X. Is Y the child of X? Probably yes, but then Y will also be the child of X's own parents, who may have made a similar will, and whose estate may by now have been distributed.

Alternatively, suppose X and his wife Z, enter into mutual wills and agree to leave everything to 'our children'. But Y is not the child of Z. And it would be incorrect for legislation to provide that Y should be deemed to be Z's child because this may not be what X would intend. Such situations must be provided for if reproductive cloning is legalised.

### *F. Cloning and Patents*

In January 2001, Roslin Institute applied for world patents for the process used to clone Dolly, the sheep.[26] The patents, if granted, will give exclusive monopoly over the cloning of all animals - *not* excluding humans - until 2017.

The Institute has already obtained UK patents for the same "Dolly technology". It has, in turn, granted licenses to two private companies - PPL Therapeutics and Geron Corporation.[27] These companies, which fund research in nuclear transfer techniques, have exclusive worldwide process licenses. Uses in human *reproductive* cloning, however, are specifically excluded.

WiCell Research Institute, a subsidiary of the Wisconsin Alumni Research Foundation (WARF) holds patents on five human embryonic stem cell lines. In 1999 Geron obtained exclusive commercialization rights from WARF for therapeutic and diagnostic products based on six cell types: liver, muscle, nerve, pancreas, blood and bone.[28]

These patents, *ipso facto*, are biased in favour of those who can financially afford to use such processes. But patents generally encourage innovation, forcing scientists, in the present situation, to develop new and possible cheaper cloning processes.

26. Patent Nos: WO 9707668 and WO 9707669, World Intellectual Property Organisation, 06 March 2000, http://www.grain.org/publications/pirates-en.cfm. Visited: 21 November 2002.
27. *UK Patents Granted on Dolly Technology*, *Press Release*, Roslin Institute, 19 January 2001, *available at* http://www.ri.bbsrc.ac.uk/library/press/pn00-01.html. Visited: 21 November 2002.
28. "Geron Files Motion in Lawsuit", *Press Release*, Geron Corporation, 03 October 2001, *http://www.geron.com/pr_20011003.html.* Visited: 21 November 2002.

### *G. Cloning and Human Diversity*

The 64 cell lines that have been allowed US federal funding represent only persons of European ancestry, and some Asians. If research is conducted exclusively on these cell lines, therapeutic cloning will be of limited use. The quantitative limits on cell lines also restrict experimental results towards the available lines.[29] Ideally, therapeutic cloning should eventually be made available to every human being in need. This will be a difficult target to achieve if such restrictions remain.

Additionally, it is a commonly held fear that eugenicists can perhaps misuse these cell lines to preferentially grow embryos of a certain kind. ICMR's *Ethical Guidelines* makes note of this stating that "Eugenic Genetic Engineering for selection against personality, character, formation of body organs, fertility, intelligence and physical, mental and emotional characteristics is prohibited."[30] To avoid related problems, some authorities suggest that one's own genome be patented. The Human Genome Declaration, while recognizing that the human genome is, in a sense, "the heritage of humanity", also states that a person's right to respect for dignity "makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity."[31]

### *H. Cloning and Human Rights*

As human rights legislation stands today, the issues dealt with are typically restricted to the *violation* of the rights of humans such as torture and/or deaths in custody, the imposition of the death penalty and the abuse of fundamental rights of human beings. A *living* human being has the right to question the abuse of, and demand the protection of, her or his rights as a living being. This is a fundamental right available in any reasonable legislative system.

In view of the fundamental revolution taking place in the biological sciences, it would perhaps be prudent to extend the scope of human rights legislation to cover *embryo-fates*. The legislation pertaining to *embryo-fates*, as is available today, refers primarily to abortion and related issues,

29. Jon Entine and Sally Satel, *The Science of Diversity: Race Belongs in the Stem Cell Debate*, WASHINGTON POST, September 9, 2001, available at http://www.washingtonpost.com/ac2/wp-dyn/A60970-2001Sep8?language=printer. Visited: 21 November 2002.
30. *Supra* n. 11
31. *Supra* n. 22 Art 2(b)



i.e. the legislation covers situations where an embryo has *already been created*.

Having reached a turning point, in the scientific sense, where we are now in a position to *create* an embryo from nothing except a few cells, *and* manipulate its development through its entire creation-process, perhaps, the next crucial step in legislation would be to accord protection to such entities. While some might see this as a curbing of scientific freedom, it is a necessary and logical step when one considers the potential misuse that unfettered freedom grants to persons who pursue such research. In the absence of legislation, a researcher is free to destroy an embryo, create only specific organs that are financially viable (kidneys, for instance, already have a well-established commercial value) and trade them in the black market, all in the guise of "therapeutic cloning". We are already living in a system where human flesh has become a commodity. In India, despite existing legislation in the form of the Transplantation of Human Organs Act 1994 (THO), several loopholes exist that allow and promote unethical organ trade, especially kidneys from live donors.[32] We have to reconsider what it means to be "human". At the very least, we must ensure that human *life* does not become a commodity. And this is possible only through such protective legislation.

## V. NEW LEGISLATIVE PARADIGMS

It is assumed that the State, through its democratic process, creates the right to legislate for its population, on the basis of a predetermined moral structure. This legislation, for instance, rules against socially reprehensible acts like alcoholism and drug-abuse. But recent technological

32. S. 9(3) of THO says that removal of any organ from a live donor for transplantation into a recipient who is not a "near relative" may be permitted by the Authorisation Committee, if the donor has affection or attachment towards the recipient, or any other special reason. There were about 1,000 such unrelated transplants in Karnataka from 1995 to 2002. This large number suggests that there were commercial transactions involved, and that persons were selling their kidneys for financial compensation. See *Call for Amendment of Organ Transplant Act*, THE HINDU, April 28, 2002, *available at* http://www.hinduonnet.com/2002/04/28/stories/2002042801810400.htm, and *Against the Organ Trade*, FRONTLINE, May 11-24, 2002, *available at* http://www.frontlineonnet.com/fl1910/19100840.htm. Visited: 01 April 2003
Additionally, recent testimony to the US Congress reveals that the Chinese government is involved in this trade by selling the organs of prisoners. See Daniel McConchie, *Using Stem Cells from Embryos Will Make Human Flesh Profitable*, The Centre for Bioethics and Human Dignity, available at http://www.cbhd.org/resources/aps/dsm-stemcell.html. Visited: 02 January 2003

developments suggest that there may be a genetic basis for problems like alcoholism.[33] The logical question that follows is: within this legislative structure, is it fair to condemn, or reprieve, an individual merely on account of this genetic make-up?

Let us suppose there is a cloned being of a mass-murderer. On growing up, if he indulges in similar mayhem, is he responsible for his actions? The absence of individual responsibility for actions through the transference of moral culpability to one's genetic make-up strikes at the very root of legislative processes. If everything can be traced to the genetic code, if every action can be shown to have a genetic basis, what role can legislation play?

New paradigms have to be established to provide the basis for legislation in the context of technological transformations that are rapidly changing the world. Immense demands are going to be made on the skills of the legal fraternity: they will be called upon to cope with technology of a complexity hitherto unimagined *and* deal with societal pressures that impinge upon the lives of every human being. To paraphrase Thomas Kuhn[34], old paradigms are rapidly vanishing, and new ones are but slowly emerging from the mists that shroud the very origins of life itself.

33. See *Excel Treatment Program: Alcoholism and Genes, available at* http://www.exceltreatment.com/rds_pages/ rds_page3.html. Visited: 02 January 2003
34. Thomas Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

# EVIDENTIARY VALUE OF DNA TESTS: ITS ADMISSIBILITY AND RELEVANCE

*Mukul Kumar and Mrinmayee Sahu**

## I. INTRODUCTION

**The Enderby Murders*[1]*: On the 21st of November, in 1983, 15 year-old Lynda Eastwood was raped and strangled in the village of Enderby, near Leicester, England. Despite hundreds of tips and a massive police investigation, no suspects were apprehended. One night a little more than three years later, Dawn Ashworth didn't come home. The next day, she was found dead, having suffered the same fate as Lynda Eastwood - she also was 15 years old.*

These crimes were eventually solved, and involved the first use of DNA[2] fingerprinting in a homicide. Alex Jeffreys first reported this technique in 1985, and this was his first real test.

The investigation entailed:

The first use of DNA fingerprinting to exonerate a suspect.

Collecting blood for DNA typing from 4,583 young men during the hunt for the murderer.

**Putting the security forces in the dock, the DNA test by the Central Forensic Laboratory, Kolkata, established that the five persons killed by security forces in an "encounter" in Panchalthan (J&K) following the massacre of 35 Sikhs in Chattisinghpora on March 20, 2000 were civilians and not foreign militants as claimed by the forces. The Jammu and Kashmir Government recommended an investigation by the Central Bureau of Investigation (CBI) into the incident. The then Chief Minister of J&K, Dr. Farooq Abdullah, tabled the forensic report in the Assembly.*[3]

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1. See http://www.nddb-bndg.org/cases/collin_e.htm.
2. Deoxyribonucleic Acid.
3. Full report available on http://www.hinduonnet.com/thehindu/2002/07/17/stories.

**A body was exhumed in Columbus, Ohio from the ground after 27 years. The purpose of the exhumation was to acquire the DNA profile as a standard and compare it with evidentiary standards in a criminal case. Samples of femur bone, tooth and a fingernail were collected and successfully subjected to DNA extraction. Thus, samples as old as these, or even older, could be typed reliably.*[4]

The focus of most criminal investigations is on linking evidence from the crime scene to suspects, and for more than a century, science has played an increasingly important role in this process. Forensic Science is the application of science to matters of law. As our knowledge and technical expertise in science increases so does the complexity and importance of the science presented to the courts in the legal system. Forensic science is a broad, interdisciplinary field in which biological and physical science methods are used to analyze and evaluate physical evidence related to matters of criminal and civil law. Its contribution to crime investigation is indispensable in this era of rising crime. The 1980's ushered in the age of DNA[5] testing, which permits investigators to perform almost unbelievable feats of identification.[6] With current techniques, it is possible for a single person to be differentiated from all the people that have ever lived using DNA from a single hair root. The principles and techniques used for forensic DNA typing[7] are also quite

4. Mohammad A. Tahir, Elizabeth Balraj, Linda Luke, Terry Gilbert, James E. Hamby, and Muhammad Amjad, *DNA Typing of Samples for Polymarker, DQA1, and Nine STR Loci from a Human Body Exhumed after 27 Years* 47 THE INDIAN POLICE JOURNAL 106-112 (2000)
5. DNA is the material that governs inheritance of eye color, hair color, stature, bone density and many other human and animal traits. DNA is a long but narrow string-like object. A one foot long string or strand of DNA is normally packed into a space roughly equal to a cube 1/millionth of an inch on a side. This is possible only because DNA is a very thin string. Our body's cells each contain a complete sample of our DNA. A strand of DNA is made up of tiny building blocks. There are only four, different basic building blocks. Scientists usually refer to these using four letters for the four different building blocks. The letters are: A, T, G, and C. These four letters are short forms for more complicated chemical names, but actually the letters (A,T, G and C) are used more commonly than the chemical names. Another way of referring to the building blocks or letters is to call them bases. For more on DNA refer to Gardner, Simmons and Snustad, PRINCIPLES OF GENETICS (1991).
6. Sir Alex J.Jeffreys discovered the use of DNA for forensic analysis on September 15, 1984.
   See http:// library.thinkquest.org/17049/gather/
7. DNA typing is performed by demonstrating differences in length of specific DNA sequences. This can be done by digestion of DNA with restriction enzyme(s), followed by Southern blot hybridization using a probe specific for the polymorphic site. Polymerase chain reaction (PCR) techniques are becoming widely applied to the same task, and have several advantages over Southern blotting. The general term "DNA fingerprinting" is used to describe all these procedures for characterizing VNTRs, RFLPs and other sequence polymorphisms. Two conceptually different types of fingerprinting are commonly performed for either VNTR or RFLP analyses: Single-locus DNA fingerprinting, and Multi-locus DNA fingerprinting. Each of these methods has advantages over the other in specific situations. For example, single-locus but not multi-locus methods are useful when the DNA is degraded and for mixed (i.e. victim and perpetrator) samples. On the other hand, multi-locus fingerprinting typically provides more information per sample than single-locus fingerprints. See Suminder K., D.S.Paliwal, and V.K.Goyal, *DNA Methodologies and their Uses in Forensic Analysis* 48 THE INDIAN POLICE JOURNAL 83-89 (2001)
8. See Kirtiman Singh, *Blood group Evidence in Legal Trials of Disputed Paternity* 21 DELHI LAW REVIEW 247-256 (1999)
9. Seth F. Kreimer, and David Rudovsky, *Double Helix Double Bind; Factual Innocence & Postconviction DNA Testing* 151 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 547 - 617 (2002).
10. See *Shri. Jagannath v. State of UP* AIR 1995 SC 712.
11. Court Of Appeal (Criminal Division) October19.2000. Present: Kay LJ, Silber J, Judge Mellor Judgment by: Kay LJ Source: www.forensic-evidence.com/site/EVID/DNA_Watters.html.



useful for other purposes. DNA profiles are widely used in resolving issues of parentage in man and animals, and are rapidly replacing serologic analysis (i.e. blood typing) for that purpose.[8] The basis of this branch of science is the premise '*man may lie but material objects will not lie.*'

The purpose of DNA typing in forensic medicine is to match a sample from the crime site with a suspect. Technically, applications of the techniques do not actually determine whether the sample came from the suspect. Rather, statistical analysis of the test results yield a probability that the sample did not come from the suspect, and with DNA typing, that probability can be so miniscule as to be certain. Importantly, DNA testing has proven to be as powerful for exonerating suspects as it has for convicting them. "*There can be no exaggerating the unique and unprecedented power of DNA forensic science to determine guilt or innocence in serious criminal cases.*"[9]

This paper provides an insight into the admissibility and sufficiency of DNA Tests in the light of the rule of thumb that the guilt of the accused must be proved beyond all reasonable doubt[10].

In most criminal prosecutions where DNA evidence is utilized, the evidence serves to corroborate, in a powerful manner, other circumstances pointing to the guilt of the accused. A recent U.K. decision [*R. v. Watters*[11]] held that DNA evidence, without corroborating evidence, was not sufficient evidence to convict under the particular circumstances of the case. The Court observed, "It was necessary to look to see

whether, firstly, the rest of the evidence in some way supported the DNA evidence so that, taken together, a proper inference of guilt could be drawn..... But in every case one has to put the DNA evidence in the context of the rest of the evidence and decide whether taken as a whole it does amount to a prima facie case." The evidence by a forensic expert also confirmed that DNA evidence should not be used in isolation and without other supporting evidence, however tenuous. DNA evidence in itself was not proof.

The decision of the Kerala High Court in the case of *Sajeera* v. *V.P.K.Salim*[12] also point in the same direction. In this case it was held that, "Now the DNA finger-printing test has been much advanced and resorted to by the Courts of law to resolve the dispute regarding paternity of the child." It was observed that the DNA test would certainly be *corroborative evidence* in support of the contention of PW 1 that she had no access to her husband at about the time the child would have been conceived. (Emphasis added).

It was observed in *Anil Kumar v Turaka*[13], "....DNA encodes the person's unique genetic make up. Compared to blood tests the odds of DNA fingerprinting going wrong are one in 30,000 million." Thus DNA Tests, though hitherto considered as purely corroborative evidence should be held sufficient to sustain convictions. It is then a question of degree and some risk of convicting the innocent must run. Although scientifically speaking, as observed above by the Andhra High Court, the probability of DNA fingerprinting going wrong approximates to impossibility.

As per Section 45[14] of the Indian Evidence Act 1872, opinion of experts are relevant upon a point of *science* and certain other fields enumerated in the section itself. Almost a decade back the Chief Judicial Magistrate in Case NO. M.C. 17 of 1988, observed: "The Evidence of expert is admissible under Section 45 of the Indian Evidence Act. So also, the grounds on which the opinion is arrived at are also relevant u/s 51[15] of the Act."[16]

12. 2000 Cr LJ 1208 (Ker.) at 1210.
13. 1998 Cr LJ 4279 (A.P.).
14. Sec 45: When the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in question as to identity of handwriting or finger impressions are relevant facts.
15. Sec 51: Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.
16. Quoted in Dr. M.W.Pandit and Dr. Lalji Singh, *DNA Testing, Evidence Act and Expert Witness* 47 THE INDIAN POLICE JOURNAL 99-105 (2000).



Although DNA tests have been accepted by many courts and High Courts in India, it is yet to be incorporated formally in the Evidence Act. Its admissibility and application under the Act is haunted by confusion in the legal arena. As a result it is open to the Courts to accept such test under Section 45 of the Act. As rightly pointed out in 1995 by the then Chief Justice of the Kerala High Court Rao J., DNA testing is as yet not considered a conclusive proof under Section 112[17] of the Evidence Act.[18]

## II. DNA TESTING AND THE RIGHTS OF THE ACCUSED

Having brought out the relevance and importance of DNA testing in tightening the noose around the suspect in the crime, the fundamental principles of liberty in the context of compelling evidence may be analysed now. A curious and interesting aspect would be the appreciation of the maxim *Nemo tenetur se ipsum accusare* – No man, not even the accused himself, can be compelled to answer any question the answer to which may tend to prove him guilty of a crime. He may confess, if he so pleases, and his confession will be received against him; but if tainted by any form of physical or moral compulsion, it will be rejected. It confers upon a criminal trial an aspect of dignity, humanity and impartiality. But it can be vehemently argued that the rule is devoid of any rational foundation. The rule favours the guilty extremely, and in a proceeding the aim of which is to convict the guilty, this would seem to be sufficient condemnation. "The innocent have nothing to fear from compulsory examination, and everything to gain; the guilty have nothing to gain, and everything to fear."[19] A matter deserving notice in connection with this part of the law is the inherent right to be assumed innocent until proven guilty. The Burden of Proof on the accuser to prove the guilt of the accused beyond all reasonable doubt is crippled by the protection against self-incrimination available to the accused.

Extending these principles to the issue of DNA testing, the principles may be stated as:

(a) Accused need not take a DNA test to prove that he is not the source of any particular blood, hair, sperm, etc. It must be assumed that the Accused is not the source.(The Right to be Assumed Innocent )

17. Sec 112 relates to birth during marriage being conclusive proof of legitimacy.
18. See *supra* n. 16.
19. Salmond, JURISPRUDENCE 472-473 (1966).

(b) Accused need not take a DNA test that might prove that he is the source of any particular blood, hair, sperm, etc.( The Freedom from Self Incrimination )

(c) If someone believes that the accused is the source of any particular blood, hair, sperm, etc., then the accuser must prove it without the help of the Accused.( Burden of Proof ).

Turning now to the law in India with respect to the abovementioned principles of liberty we can note that Article 20(3)[20] of the Constitution gives protection against 'Testimonial compulsion'. In *Sharma,M.P.* v. *Satish Chandra*[21] the Supreme Court pointed out that the immunity given by the clause extends to immunity against being compelled to furnish *any kind of evidence* which is reasonably likely to support a prosecution against him. But in the later case of *State of Bombay* v. *Kathi Kalu*[22] the Apex court has narrowed down the above proposition by laying down that the protection does not extend to *any kind of evidence* but only to self incriminating *statements* made by the accused (including oral or written *testimony*) relating to the charge brought against him. Consequently it follows that medical examination of the person of the accused or the taking of blood from his person for the purpose *without his consent*, would also be justifiable for the same reason.

However, it is quite evident from a few recent decisions of various Indian Courts including the Supreme Court of India that a person cannot be compelled to give blood samples under the existing laws in India. A vital ruling in this regard is the case of *Goutam Kundu v State of West Bengal*[23]. This case dealt with the issue of ascertainment of disputed paternity. The following guidelines were laid down by the Court through Hon'ble Justice A.M.Ahmadi and S.Mohan JJ. :

(A) Courts in India cannot order blood test as a matter of course.

(B) No one can be compelled to give sample blood for analysis.

Some High Court judgements are also to the same effect. The Hon'ble Kerala High Court in the case of *Sajeera v P.K. Salim*[24] observed, "Now the DNA finger-printing test has been much advanced and resorted to by

20. Art 20(3) No person accused of any offence shall be compelled to be a witness against himself.
21. AIR 1954 SC 300.
22. AIR 1961 SC 1808.
23. AIR 1993 SC 2295.
24. 2000 Cr LJ 1208.



the Courts of law to resolve the dispute regarding paternity of the child, it is true that without the consent of the person blood test cannot be conducted and there is no law in India enabling the court to compel any person to undergo blood test as available in England."

The Hon'ble Andhra Pradesh High Court in the case of *Syed Mohd. Ghouse v Noorunnisa Begum*[25] held that Court could not compel the father to submit himself to DNA test.

Interestingly the Law Commission of India in its 180th report on "*Article 20 (3) of the Constitution of India and the Right to Silence*" of a person accused, seems to have reopened the issue of compulsory testing of blood sample, for DNA or other tests. It is expressly stated in the report that, "The right to silence has various facets. One is that the burden is on the State or rather the prosecution to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he is proved to be guilty. A third is the right of the accused against self-incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. There are also *exceptions* to the rule. An accused can be *compelled* to submit to investigation by allowing his photographs taken, voice recorded, his blood sample tested, his hair or other bodily material used for *DNA testing* etc.[26] (Emphasis added).

## III. Conclusion

It is not only the relevancy of fact that is in issue, it is the credibility of evidence also that is of importance in the determination of truth. DNA Tests satisfy this dual requirement as it would not be wrong to say that DNA Tests provide a credible piece of evidence. "The road to judicial

25. 2001 Cri LJ 2028
26. The Report concluded as: "A survey of the current law in various countries reveals that in USA, Canada and India in view of the constitutional provisions against self incrimination the Courts have required the prosecution to prove guilt beyond reasonable doubt and there has been no encroachment whether at the stage of interrogation or trial, into the right to silence vested in the suspect or accused.... We have reviewed the law in other countries as well as in India for the purpose of examining whether any amendments are necessary in the Code of Criminal Procedure, 1973. On a review, we find that no changes in the law relating to silence of the accused are necessary and if made, they will be ultra vires of Art. 20(3) and Art. 21 of the Constitution of India. We recommend accordingly."
The complete 180th Report of the Law Commission of India on "*Article 20 (3) of the Constitution of India and the Right to Silence*" submitted in May 2002 is available on http://lawcommissionofindia.nic.in/reports/180rpt.pdf .

acceptance of DNA identification evidence has been rocky."[27] But it is refreshing to notice that the technology of DNA typing has been making major strides. The authorities in India are now recognizing the strength of DNA evidence. Recently on December 24, 2002, following a Delhi court order doctors at Safdarjung Hospital, Delhi took for DNA examination the blood sample of Rahul, the prime accused in Maulana Azad Medical College students gang rape case.[28]

It must be remembered that in the Indian context as things stand today, there is no specific DNA legislation authorizing an investigating officer to collect a specified amount of blood, hair, sperm, etc. for the purpose of investigation on the lines of statutes operational in other countries. As for example, The Criminal Justice and Public Order Act in U.K. provides for forcible testing of body samples.[29] In The United States of America, The National Commission on the Future of DNA Evidence was established to maximize the value of forensic DNA evidence in the criminal justice system, to provide recommendations on the use of current and future DNA methods, applications and technologies in the operation of the criminal justice system, from the crime scene to the courtroom.[30] Reference may also be made to DNA Identification Act 1998, c. 37[31] in force in Canada. The purpose of this Act is to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of the Act.

Having regard to the conclusiveness of DNA tests, it is imperative to incorporate it formally in the Indian Evidence Act 1872 besides making provisions for standardization of testing, training of experts and quality

27. David H. Kaye, *DNA Identification in Criminal Cases: some Lingering and Emerging Evidentiary Issues*, available on http://www.promega.com/geneticidproc/ussymp7proc/0702.html.
28. See http://www.tribuneindia.com/2002/20021225/nation.htm
29. Also The Family Reforms Act 1969 confers powers on the Courts to direct taking of blood tests in civil proceedings in paternity cases.
30. http://www.ojp.usdoj.gov/nij/dna/. Virginia became one of the first states in the U.S. to pass a DNA database law. Passed in 1989, the law at first stipulated that state authorities must collect DNA samples only from people convicted of violent felonies such as homicide. In 1990, the law was expanded to include those convicted of non-violent felonies such as manslaughter. From 1989 to the end of September 2000, the Virginia DNA databank helped police solve 107 rape cases, 28 homicides, 10 rape homicides, 90 burglaries and breaking and entering cases and 14 other crimes including auto theft, drive-by shooting and arson. See http://www.cnn.com/2000/LAW/10/24/states.dna.virginia.cr/.
31. http://www.nddb-bndg.org/legis_e.htm.



controls. Section 53 of the Code of Criminal Procedure 1973 proves to be inadequate with regard to DNA testing. The section provides for the examination of accused by medical practitioner at the request of the police if reasonably necessary for the ascertainment of facts which may afford such evidence and to use such force as is reasonably necessary for that purpose. Unfortunately with regard to DNA testing the Section suffers from the following infirmities:

(A) It does not state specifically whether it can be invoked in relation to DNA test.

(B) It does not entitle the police officer to collect semen, blood, saliva, etc. personally for the purpose of investigation.

C) The section applies to criminal cases instituted by the police only and not to complaint cases.

Obviously, suitable amendments must be made to make the Section more comprehensive. Besides, to introduce transparency and given the history of the Indian Police and prosecutors for fabricating evidence;[32] the process of collection and testing of samples must be left to an independent body.

The need to revamp the criminal justice system has been felt for quite sometime as it has come under severe stress and strain due to the changing aspirations of the citizens and the resulting social transformation, the process of criminal investigation, the prosecution and adjudication. There is a need to rewrite the Code of Criminal Procedure 1973, the Indian Penal Code 1872 and the Indian Evidence Act 1872 to bring them in tune with the demand of the times and in harmony with the aspirations of the people of India. No technology is devoid of criticism and controversy. DNA Testing is no exception. Nevertheless such criticism should not be allowed to mitigate the importance of the same. In essence, the objective of both law and science is the same, viz. 'Quest for the Truth'.

32. The Jammu and Kashmir government was accused of fudging DNA samples from five alleged militants, shot dead by security forces in March 2000. Officials apparently had tampered with the DNA samples to ensure the joint police and army operation on Kashmir could not be accused of killing innocent people.

# THE RIGHT TO ESTABLISH AND ADMINISTER MINORITY EDUCATIONAL INSTITUTIONS: RETHINKING ARTICLE 30 (1) OF THE INDIAN CONSTITUTION

*Arunav Patnaik**

## I. INTRODUCTION

Article 30 (1)[1] of the Indian Constitution gives rights to "establish and administer educational institutions" only to religious and linguistic minorities, not to every community in the country. But, it is not an exception to the principle of equality embodied in Article 14[2]. Article 30 (1) is a provision of positive discrimination[3] based on the thinking that mere principles of non-discrimination would not result in real equality.[4] Minorities need special rights and protection to preserve their identity, characteristics and traditions to be able to enjoy the same status as that of the majority.[5] So, Article 30 (1), in a way, is a facet of the equality principle.

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1. Art. 30 (1) states that, "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."
2. Art. 14 states that, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
3. K.Jagannatha Shetty, J. (majority judgment) in *St.Stephen's College* v. *University of Delhi* AIR 1992 SC 1630.
4. FACT SHEET NO.18 (REV.1), MINORITY RIGHTS, UNITED NATIONS OFFICE OF THE COMMISSIONER FOR HUMAN RIGHTS (1998).
5. UNITED NATIONS DOCUMENT E/CN.4/52, SECTION V (1947) states that, "Special rights are not privileges but they are granted to make it possible for minorities to preserve their identity, characteristics and traditions. Special rights are just as important in achieving equality of treatment as non-discrimination. Only when minorities are able to use their own languages, benefit from services they have themselves organized, as well as take part in the political and economic life of States can they begin to achieve the status that majorities take for granted. A difference in the treatment of such groups, or individuals belonging to them, *is justified if it is exercised to promote effective equality* and the welfare of the community as a whole." Also see Art.27 of the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.



This paper argues that the interpretation put on Article 30 (1) by the courts needs some fine-tuning to bring it in alignment with the principle of equality. The courts have taken a 'literal approach' to interpret Article 30 (1) and have presumed that the article grants autonomy to minority educational institutions. This has resulted in granting excessive rights under Article 30 (1) in violation of Article 14. To ensure that Article 30 (1) is in harmony with Article 14, the rights to establish and administer educational institutions that do not deserve the special protection of Article 30 (1) need to be sifted out; these rights should be given the same treatment as that given to similar rights exercised by non-minority educational institutions.

This paper suggests a 'correlation test' to identify rights that are in the interest of the minority community – *special rights* to establish and administer educational institutions that rightfully belong to Article 30 (1). Conversely, this test will also help identify *general rights* to establish and administer educational institutions that do not belong to the inviolable space of Article 30 (1).

## II. COURTS HAVE PRESUMED THAT ARTICLE 30 (1) GRANTS AUTONOMY TO MINORITY EDUCATIONAL INSTITUTIONS

Ordinarily, the cases that come before courts under Article 30 (1) are disputes between minority educational institutions (MEIs) and the state, where MEIs challenge a legislative provision or an executive order as encroaching upon their right under Article 30 (1). Courts' enquiry generally has been whether the legislative provision or executive order impairs the "right to establish" or "right to administer" the educational institution, with the understanding of the two phrases in their most ordinary and generic sense.

Taking the literal approach, courts have interpreted the word "administration" in Article 30 (1) as meaning "management of the affairs of the minority institution."[6] Even while approving some types of regulations, and that too in a very confused manner,[7] courts have been very careful to ensure that they do not whittle down the "power of administration" in

6. Hidayatullah, C.J. in *State of Kerala* v. *Rev. Mother Provincial* AIR 1970 SC 2079.
7. P.N. Singh, *Administration of Minority Institutions: Constitution Does Not Sanction Oppression* in Tahir Mahomood (ed.), MINORITIES AND THE STATE OF THE INDIAN LAW (1991). Pratap Bhanu Mehta, *Minority Institutions and the State* THE HINDU, August 10, 2002.

general,[8] as they think it is this power that Article 30 (1) endeavours to protect. Courts have understood the article as granting "autonomy" in administration[9] and, in one decision the court has even gone on to observe, "*no part of the management* could be taken away by the government and vested in another body without an encroachment on the guaranteed right."[10] The core right of management has been left untouched, as if it is an inviolable space, while regulations on some grounds have been allowed.[11]

On the question of whether an educational institution is a 'minority educational institution (MEI),' the test has been only to see whether the minority community has set up the educational institution,[12] and not whether it has also been established largely in the interest of the minority community. Once the court is satisfied that an educational institution is a MEI, it presumes that a whole "bundle of rights to administer" follow by virtue of Article 30 (1).

## III. General Rights versus Special Rights

Every educational institution set up by the minority community may not be a 'minority educational institution' and every right to administer exercised by a MEI may not qualify for protection under Article 30 (1). It is important to understand that even a minority community can set up a *general educational institution* and there can be some *general rights to administer* even in a minority educational institution.

But only those *rights that are in the interest of the minority community* deserve the protection of Article 30 (1); it is these *special rights* (to establish and administer) that belong to the inviolable space envisaged by the article. Article 30 (1) being an aspect of equality, every exercise of right under this article should in one way or other address the

8. Shah, J. in *Sidhrajbhai Sabbai* v. *State of Gujarat*, AIR 1963 SC 540, observed that, "If every order which while maintaining the formal character of a minority institution destroys the 'power of administration' is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Art.30(1) will be but a "teasing illusion", a promise of unreality," implying thereby that Art. 30(1) promised 'powers of administration' without any qualification.
9. *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, AIR 1974 SC 1389.
10. Fazal Ali, J. in *All Saints High School* v. *Govt. of A.P.*, AIR 1980 SC 1042.
11. Krishna Iyer, J. in *Gandhi Faiz-e-am College* v. *Agra University*, AIR 1975 SC 1821, drew a distinction between regulations and restrictions and said that a 'restriction' which "bit into the autonomy" of a MEI is bad while a 'regulation' to "obviate maladministration" is good.
12. *S. Azeez Basha* v. *Union of India*, AIR 1968 SC 662.



peculiar minority position; its use should help in bringing about an equilibrium between the minority and the majority community.

Rights to establish and administer that have no correlation with the 'minority character' of the educational institution are *general rights* that do not belong to Article 30 (1) and, therefore, need not be shielded by it.[13] The source of these *general rights* to administer (or establish) lie outside Article 30 (1) – they spring either from Article 19(1)(g) or Article 26 (a).[14] The non-minority communities exercise these *general rights* to establish and administer educational institutions guaranteed under these articles. There is no reason as to why the *general rights* exercised by the minority communities should not be treated at par with those of non-minority communities.

The rights that fall within Article 30 (1) and the rights that fall outside are entitled to different treatment. If the source of a right to establish or administer is identified to be Article 19 (1)(g) or Article 26 (a), then it can be subject to particular types of regulation specified under those articles. The rights under Article 19 (1)(g) are subject to reasonable restrictions imposed by law made under clause (6) of the article; the rights under Article 26 (a) are subject to regulations in the interest of "public order, morality and health." If the general rights exercised by MEIs are not subjected to the same regulations that the rights of non-minority communities are subject to –i.e. the regulations under Article 19 (6) or Article 26 (a) –, the principle of equality will be violated.[15]

13. For instance in *St. Stephen's College* v. *University of Delhi*, AIR 1992 SC 1630, the Court held that Delhi University cannot take away the right of the management of St. Stephen's College to conduct interview to select students into the college as it had the protection of Art.30 (1). The only question that the Court looked into was whether there was any arbitrariness in the manner in which the interview was conducted, and finding no vice in the process, approved it. But, the author submits that interview, as a method of selecting general candidates is not a *special right* under Art. 30 (1) – a right that serves the minority interest in any way – and should not be given special protection; it is a *general right* of administration.
14. B.N.Kirpal, J. (majority judgment), in *T.M.A. Pai Foundation & Ors.* v. *State of Karnataka* AIR 2003 SC 355, answering the question, "Is there a Fundamental Right to set up Educational Institutions and if so , under which provision ?", held that apart from Article 30(1) educational institutions could be set up under : [1] Article 19 (1)(g) as education would fall under the expression "occupation", and [2] Article 26(a) as it gives the right to "maintain institutions for. ...charitable purposes".
15. See *supra* n. 13: If the right to conduct interview has been denied to other non-minority Delhi University colleges on some grounds of policy then allowing St. Stephen's College to conduct interviews is contrary to Art. 14. The right to conduct interview being a *general right* to administer should be given the same treatment irrespective of the character of the institution that exercises it.

## IV. Article 30 (1) should be read harmoniously with Article 14

Courts, therefore, should not see the rights of a minority educational institution to administer as one 'bundle of rights' all deserving the special protection of Article 30 (1). But as has been pointed out above, courts have taken a 'literal approach' to interpretation of Article 30 (1) which has resulted in a wide interpretation of the constitutional provision. They have not sifted out the *general rights* to administer any educational institution from the *special rights* to administer a MEI. To embark upon an enquiry that would clearly delineate the space that is rightfully within the ambit of the article, courts have to fundamentally change the manner in which they approach Article 30 (1).

Although the primary rule of interpretation is that words in a statutory provision should be read in their ordinary, natural and grammatical meaning, such a literal approach has only a prima facie preference. [16] It is subject to the qualification that if such a construction produces an inconsistency or absurdity, then the intention could not have been to use the words in their ordinary meaning.[17] There is a real conflict between Article 30 (1), the way it has come to be interpreted by giving full force to its plain words, and Article 14. It is, therefore, not a good idea to stick to the literal approach.

When there are two provisions in an enactment that cannot be reconciled with each other, they should be so interpreted that effect can be given to both.[18] This method of reconciliation in statutory interpretation is what has come to be known as 'the principle of harmonious construction.' Instead of reading Article 30(1) widely, a more 'rational' reading of the article would bring it in harmony with the principle of equality of Article 14. Such a rational reading should sift out the *general rights* to administer from Article 30(1), as giving these rights the special protection of the article would give an unjustified privilege to MEIs not given to the non-minority educational institutions.

## V. A 'Correlation Test' to identify rights that are in the interest of the minority community

While deciding cases on Article 30 (1), courts should not start with the presumption that the ambit of the right under the article is very wide.

16. P. St. J. Langan, Maxwell On The Interpretation Of Statutes 6 (1969).
17. *River Water Commrs.* v. *Adamson*, (1877) 2 App. Cas. 743.
18. Venkatarama Iyer, J. *Sri Venkataramana Devaru* v. *Mysore*, AIR 1958 SC 225.



Courts need to go one step further in their analysis. When a MEI asserts a right under Article 30 (1), the court should try to ascertain whether the right satisfies, what may be called, a "correlation test".

According to this test, at the outset of the enquiry the MEI should satisfy the court that the action, of "establish(ing)" or "administer(ing)" sought to be protected, is in the interest of the minority community and they need it by virtue of their peculiar minority position. Until this correlation of the action to the peculiar 'minority interest' is established, a "right" to the action cannot be claimed. Actions which have no connection with 'minority interest' fall outside the inviolable space of Article 30 (1); they might get protection under the *general rights* of Article 19 (1) (g) or Article 26(a). Such an approach will bring more rationality to the interpretation of Article 30 (1) and make it compatible with the principle of equality.

This test need not be a narrow test. Courts can take a liberal approach in deciding whether the action sought to be protected is in the minority community's interest or not. Even when it may not be clearly apparent, courts can give an opportunity to MEIs to explain how their action is in the interest of their community. Many actions that have got the protection of Article 30 (1) taking the 'literal approach' will probably pass this new test. But, the test and the reasoning have to be correct for the article to be consistent with the principle of equality.

## VI. Conclusion

Over a period of time, courts could develop a body of thought by applying this test of correlation in different cases. The Indian courts have in the past formulated similar tests while interpreting constitutional provisions where the plain words of the text do not explicitly provide for any such test. The test of "intelligible differentia" devised to approve legislative classification under Article 14 is an instance of such judicial ingenuity.[19] The Supreme Court's separation of the "creamy layer" (using the 'means' test) from the "other backward classes" as not being entitled to

19. This test was first laid down by the Supreme Court in *Chiranjit Lal* v. *Union of India*, AIR 1951 SC 41. In *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1951 SC 75, S.R. Das, J. observed that "a legislative classification to pass the test, two conditions must be fulfilled, namely (1) that the classification must be found on an intelligible differential which distinguishes those that are grouped together from others and (2) that the differentia must have a rational relation to the object sought to be achieved by the Act."

reservation under Article 16 (4) is another case in point.[20]

It is not the author's intention to seek more regulation of minority educational institutions. This paper calls for a more rational reading of Article 30 (1) using a 'correlation test.' Such a reading will clearly bring out the justification of every exercise of this *special right*. In due course this will strengthen the right and help silence the extreme critics (from some quarters of society) who demand that the right should be scrapped from our Constitution altogether.

20. B.P.Jeevan Reddy, J. (majority judgment) in *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477, observed that, "...we feel that exclusion of socially advanced members will make the 'class' as truly backward class and would more appropriately serve the purpose and object of clause (4)."

# WITHDRAWAL OF PROSECUTION AGAINST DETAINEES TO FULFIL A RANSOM DEMAND

*Vandana Sehgal**

## I. INTRODUCTION

This paper seeks to examine the present legal position regarding the options available to the State when dealing with a situation in which innocent persons are abducted and a demand is made to the State for releasing detained criminals to secure the safety of the said hostages.

An accused comes into the custody of State under three basic situations: -

(i) any person suspected of committing cognizable crime can be arrested by police/security forces but has to be produced before the nearest Magistrate within 24 hours excluding the time taken for journey.[1]

(ii) if the accused is held guilty by a competent court of jurisdiction after trial and is sentenced for imprisonment then he is in custody of the State as a convict.

(iii) the State also has right to arrest and keep in custody, individuals under preventive detention laws.

The release of a detainee from custody is possible in the following ways (apart from being acquitted/discharged of the charges in the criminal case): -

- withdrawal of the criminal cases altogether pending against him;
- release on bail by a court of competent jurisdiction;[2]

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1. S. 57 and 167, CRIMINAL PROCEDURE CODE 1973 (CrPC), Art. 22 (2) of the Constitution of India.
2. An individual imprisoned under preventive detention laws also has right to obtain freedom through the appellate procedure prescribed under the relevant act or by filing a writ petition for quashing the detention order in the High Court/Supreme Court.

- revocation of the order of preventive detention by the State[2]; or
- grant of pardon, retrieve or remission.

## II. Duty to prosecute offenders, Compounding of offences & Withdrawal of Prosecution for Release from custody

Police authorities are statutorily bound to register a First Information Report (FIR) when any information relating to the commission of a cognizable offence is received. They are also required to investigate if there is reason to suspect the commission of such cognizable crime.[3] Further, the duty of the police authorities is coupled with the public duty of an individual. Every person aware of the commission of or of the intention of any other person to commit, any offence mentioned in Section 39 CrPC is required to forthwith give information of the same to the nearest magistrate or police officer. Intentional omission to give information renders the person liable to punishment.[4] In addition to the duty created by Section 39, there is a further duty on village officers and village residents to report certain matters to the police or magistrate.[5]

The power to compromise a criminal matter (compounding) is limited by Section 320 CrPC. Indian law permits compounding of only minor offences. Even these minor offences are divided into two parts, those offences which can be compounded even without the permission of the court[6] and other offences which can only be compounded with the permission of the court.[7] Serious and heinous crimes cannot be compounded between the offender and the victim, even if both the parties are willing to do so. In *State of Uttar Pradesh* v. *Chandrika*[8], the Supreme Court has also held that the concept of "plea bargaining" is not recognized and is against public policy under our criminal justice system.

While there are limitations on the type of offences that can be compounded, the prosecutor who is in charge of a case may withdraw from the prosecution of any person for any offence with the consent of the court under Section 321 CrPC.

3. S 154, 156-57, 159, CrPC; *State of Haryana* v. *Bhajan Lal* 1990 SCR 259.
4. *Id.* S. 39 CrPC read with Ss. 176 and 202, Indian Penal Code 1860 (IPC).
5. S. 40 CrPC.
6. *Id.* S. 320 (1).
7. *Id.* S. 320 (2). Further restrictions are imposed on compounding by S. 320 (7), when the offence is liable for enhanced punishment due to previous conviction etc.
8. AIR 2000 SC 164; also see *id.* S. 320 (9).



In *Rajendra Kumar Jain* v. *State*[9], Justice O. Chinnappa Reddy summarized and laid down the broad propositions regarding interpretation of Section 321 CrPC and exercise of the powers thereunder by the prosecutor as follows:-

(i) Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the executive;

(ii) The withdrawal from the prosecution is an executive function of the Public Prosecutor;

(iii) The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else;

(iv) The government may suggest to the Public Prosecutor that he withdraw from the prosecution but none can compel him to do so;

(v) The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but also on other relevant grounds as well as to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammary Hall enterprises;

(vi) The Public Prosecutor is an officer of the court and responsible to the court;

(vii) The court performs a supervisory function in granting its consent to the withdrawal;

(viii) The court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

It was also held that it is a duty of the Court to appraise itself of the reasons, which prompt the prosecutor to withdraw from the prosecution.

In *Sheonandan Paswan* v. *State of Bihar*[10] which was a decision of a five Judge bench, the Supreme Court held that the trial court does not

9. 1980 (3) SCR 982.
10. 1987 (1) SCR 702.

require to assess the evidence and find out whether the case would end in acquittal or conviction while giving consent to withdraw the case under Section 321 CrPC to the prosecutor. All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. When the prosecutor makes the application for withdrawal after taking into consideration all the materials before him, the court exercises its judicial discretion by considering such materials and on such consideration either gives consent or declines consent.

However, none of the cases that came up before the Supreme Court[11] specifically dealt with the issue of withdrawal of a criminal prosecution of an accused in order to fulfil a demand for his release as a swap for abducted hostages. This issue came up for consideration before the Supreme Court in *Abdul Karim* v. *State of Karnataka*[12] wherein the Court was given the opportunity to clarify the status of law in this regard.

## III. Forest Brigand Veerappan and Panic in the Government

There is a forest area of around 16,000 acres on the border between the States of Karnataka and Tamil Nadu wherein a man named Veerappan was alleged to have carried out heinous crimes and criminal activities for more than ten years. On the night of 30.7.2000, Veerappan abducted a very popular film star named Rajkumar[13]

Veerappan raised various demands to the State of Karnataka and Tamil Nadu. Among these demands, he asked for the release of certain persons languishing in the jail of Karnataka and Tamil Nadu.[14] The Special Public Prosecutor (SPP) filed applications under Section 321 CrPC for withdrawing cases registered under TADA against 51 accused. No reference to the demand of Veerappan was made in the application.

Mr. Abdul Karim, the father of Shakeel Ahamed, who was allegedly killed by Veerappan and his gang opposed the application filed by the SPP. The statement of opposition alleged that the Government of the State of

11. The aforesaid cases and other reported cases.
12. 2000 (8) SCC 710.
13. The facts have been taken from the judgment of the Supreme Court in *Abdul Karim* v. *State of Karnataka*, *ibid*.
14. These persons lodged in Karnataka jails had been charged under Ss. 3-5, Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) together with Ss. 143, 147, 148, 341, 342, 120-B, 326, 307, 302, 396 read with S. 149 IPC, Ss. 3-5, Indian Explosives Act 1884 and Ss. 3 and 25, Arms Act 1959.



Karnataka had yielded to the demands of Veerappan and no cogent reasons had been given for the decision to drop the TADA cases. The SPP denied these averments (regarding yielding to the blackmail by Veerappan) in the statement of opposition. The SPP further in his rejoinder stated that "all cases" against these persons were not being withdrawn and that they would be prosecuted for the offences under IPC and Explosives Act 1884.

The TADA Court permitted the withdrawal of cases under TADA. The trial court rejected the right of Abdul Karim to be permitted to raise objections. The TADA Court noted in its order that it would have to take notice of the fact that the objections statement mentioned that Rajkumar had been kidnapped by the prime accused (Veerappan). But thereafter the court did not deal with this aspect of the matter and stated that "the grant of permission to withdraw subserves the administration of justice and the permission had not been sought covertly with an ulterior purpose unconnected with the vindication of law, which the executive organs are duty-bound to further and maintain."

Immediately, thereafter the said accused filed for bail in offences under IPC and Explosives Act before the same learned Judge who was presiding over the TADA Court and was now sitting as Principal District & Sessions Judge. The learned Judge granted bail to the accused thereby in effect permitting them to be set at liberty if they fulfilled the conditions of bail by execution of a personal bond and surety. These orders by the learned Judge were challenged in the Supreme Court.

On 14.8.2000 the Government of the State of Tamil Nadu issued a Government Order directing that charges against one R, another associate of Veerappan, in respect of two cases registered against him under TADA be withdrawn "in the public interest". The Inspector General of Police Intelligence, Chennai was directed to take necessary action accordingly. On 16.8.2000 the SPP at Chennai made two applications to the TADA Court under Section 321 CrPC stating that R was charged before the Designated Court in cases arising under TADA, the Explosives Substances Act, IPC and the Arms Act and the cases were pending for framing charges and that he was satisfied that under the new change of circumstances and also in the public interest the charges under TADA be withdrawn. The designated court held: "As this application has been filed by the learned Special Public Prosecutor on the basis of the Government Order referred above, permissions is granted to withdraw the TADA case against the accused".

In respect of the four detenus under National Security Act 1980 (NSA), the State of Tamil Nadu passed orders dated 14.8.2000 revoking the detention orders. The aforesaid order of the Government of the State of Tamil Nadu was also challenged in a public interest petition before the Supreme Court.

The matter was brought up before the Supreme Court by an appeal filed by Mr. Abdul Karim against the aforesaid decisions. The Supreme Court stayed the operation of the impugned orders by its interim directions dated 29.8.2000.[15]

The Supreme Court reiterated the principles for exercise of powers and jurisdiction under Section 321 CrPC as laid down in *Sheonandan Paswan* v. *State of Bihar*.[16] The Supreme Court quashed the order whereby the cases under TADA were permitted to be withdrawn. The order of giving consent to withdrawal of prosecution was quashed on the grounds that no material was placed before the Trial Court upon the basis of which the learned. Judge could have been satisfied that the prosecutor has applied his mind for applying for withdrawal of cases and reached a conclusion in good faith that the withdrawal was necessary. The Court was of the opinion that the prosecutor should have considered the following relevant issues that before seeking permission to withdraw a prosecution:[17]

1. Was there material to show that the police and intelligence authorities and the State Government had a reasonable apprehension of such civil disturbances as would justify the dropping of charges against Veerappan and others accused of TADA offences and the release on bail of those in custody in respect of the other offences they were charged with?
2. What was the assessment of the police and intelligence authorities and of the State Government of the risk of leaving Veerappan free to commit crimes in future, and how did it weigh against the risk to Rajkumar's life and the likely consequent civil disturbances?

15. *Supra* n. 12. The matter was heard by a Bench comprising of S.P. Bharucha, D.P. Mohapatra and Y.K. Sabharwal JJ. The majority judgment was given by S.P. Bharucha J. speaking on behalf of himself and Mohapatra J. Y.K. Sabharwal J. concurred with the majority judgment while giving additional reasons.
16. *Supra* n. 10.
17. *Supra* n. 12 at para 25.



3. What was the likely effect on the morale of the law-enforcement agencies?
4. What was the likelihood of reprisals against the many witnesses who had already deposed against the respondents-accused?
5. Was there any material to suggest that Veerappan would release Rajkumar when some of Veerappan's demands were not to be met at all?
6. When the demand was to release innocent persons languishing in the Karnataka Jails, was there any material to suggest that Veerappan would be satisfied with the release of only the respondents-accused?
7. In any event, was there any material to suggest that after the respondents-accused had secured their discharge from TADA charges and bail on the other charges Veerappan would release Rajkumar?
8. Given that the Government of the States of Karnataka and Tamil Nadu had not for ten years apprehended Veerappan and brought him to justice, was this a ploy adopted by them to keep Veerappan out of the clutches of the law?

The Supreme Court also deprecated the conduct of the Karnataka Government in trying to mislead the trial court in complicity with the accused to enable them to obtain bail.[18] The Supreme Court found that the State of Karnataka was acting in panic and haste without thinking things through.[19]

18. *Id.* at para 28.
19. *Id.* at para 30. Y.K. Sabharwal J, who delivered a concurring opinion observed thus:- "The application and order under Section 321 is a result of panic reaction by overzealous persons without proper understanding of the problem and consideration of the relevant material, though they may not have any personal motive. It does not appear that anybody considered that if democratically-elected governments give an impression to the citizens of this country of being lawbreakers, would it not breed contempt for law; would it not invite citizens to become a law onto themselves. It may lead to anarchy. The Governments have to consider and balance the choice between maintenance of law and order and anarchy. It does not appear that anyone considered this aspect. It yielded to the pressure tactics of those who according to the Government are out to terrorise the police force and to overawe the elected Governments. It does not appear that anyone considered that with their action people may lose faith in the democratic process, when they see public authority flouted and the helplessness of the Government. The aspect of paralysing and discrediting the democratic authority had to be taken into consideration. It is the executive function to decide in the public interest to withdraw from prosecution as claimed, but it is also

## IV. Orders under Preventive Detention

As aforesaid the State of Tamil Nadu had also revoked the orders for preventive detention passed under NSA narrating in the order that it was doing so as Veerappan has demanded the release of these detenus as ransom demand after the kidnapping of Mr. Rajkumar.[20] The Supreme Court quashed this order as well and observed :

> Having set aside the order under Section 321 passed by the Designated Court at Chennai in the matter of Radio Venkatesan, the Government of the State of Tamil Nadu cannot comply with Veerappan's demand to release the five prisoners from its jails. It is appropriate in the circumstances to set aside the orders of the Government of the State of Tamil Nadu under the National Security Act releasing the other four persons from detention.[21]

For strict legal purposes the Supreme Court has not laid down any authoritative enunciation of law for quashing this executive order.

NSA is one of the numerous Central Acts dealing with preventive detention. NSA permits the Government to issue orders for preventive detention with a view to preventing the accused from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers or the security of India.[22] But there is no mandatory requirement on the government to exercise powers of preventive detention. It is but obvious from the scheme of the law relating to preventive detention that it is an enabling provision only. The executive cannot be mandated to exercise this power, as the court cannot quantify suspicion for exercise of these powers.

While the Courts under writ jurisdiction have had occasions to quash the orders issued for preventive detention but *Abdul Karim* is the first instance in which the Supreme Court has actually prevented the Government from revoking such an order. One cannot construe it as an order to continue with the preventive detention as the Court itself has not specified any grounds on which the detention order should be continued or is valid.

for the Government to maintain its existence. The self-preservation is the most pervasive aspect of sovereignty. To preserve its independence and territories is the highest duty of every nation and to attain these ends nearly all other considerations are to be subordinated." *Id.* at para 45.

20. *Id.* at para 14.
21. *Id.* at para 29.
22. S. 3, NSA.



The only logical conclusion one can draw is that any executive order that has been coerced out of the State by hostage taking is necessarily vitiated and must be quashed. The executive must continue to perform its duties with fearlessness in accordance with law and cannot be guided by considerations like demands of ransom for release of detainees in exchange of hostages.

Even from the practical point of view, it does not make sense that order of preventive detention should be revoked against the very same persons for the benefit/at the behest of whom serious crime of abduction, with the threat of killing the hostage, has been done.

## V. Release on Bail

As discussed above, the Supreme Court had criticized the conduct of the Government in trying to mislead the trial court in order to enable the accused to obtain bail.[23] The Supreme Court observed that there was little doubt that after their release the accused were not expected to attend the court and in the circumstances the order granting the bail to the accused was also set aside. This order of the Supreme Court is well in keeping with the law in this regard even though it was for the first time it was enunciated in a situation of hostage crisis.

Suffice it to say for the purposes of the present paper that bail in serious (non-bailable) offences is covered under Section 437 CrPC. The letter and spirit of Section 437 clearly dictates that the discretion of granting bail to an accused in order to release him (or her) from custody has to be exercised by the Court and the Court has to take proper precautions that the accused will continue to be available to face trial and if convicted to undergo punishment.[24]

The Supreme Court in numerous decisions has reiterated the consideration that the accused should be available to undergo trial and must not be able to flee from justice. The decisions that can be used as illustrative examples are *State* v. *Capt. Jagjit Singh*[25], *State of Rajasthan* v. *Balchand (Baliay)*[26], *State* v. *S. Gill*[27], *State* v. *Jasjeet Singh*[28], *Prahlad Singh Bhati* v. *NCT Delhi*.[29]

23. *Supra* n. 12 at para 28.
24. With specific reference to S. 437 (2), 437 (3) (a), CrPC.
25. 1962 (3) SCR 622.
26. 1978 (1) SCR 535.
27. 1984 (3) SCR 993.
28. AIR 1984 SCC 1503.
29. 2001 (4) SCC 280.

On the basis of the statutory provisions and judicial enunciations, it can be safely concluded that the State cannot be permitted to persuade or request the Court to grant bail in order to actually permit the person in custody to flee from justice.

## VI. Power to grant Pardon for release of Prisoners

In *Abdul Karim* the Supreme Court was not required to consider the exercise of power for grant of pardon, suspension or remission of sentence in order to release detainees in exchange for hostages. It is important to examine in brief the scope of judicial review of these powers in case the Government of the day decides to call upon the President or Governor to grant pardon to prisoners or to commute/suspend their sentences in order to release them from custody. The President has constitutional powers to grant pardon under Article 72 of the Constitution of India. The corresponding power for grant of pardon by the Governor is in Article 161 of the Constitution of India. The Government also has powers under Section 432 and 433 read with 434 and 435 CrPC for suspension and remission of sentences.[30]

In *Maru Ram* v. *Union of India*[31] the Supreme Court observed that the exercise of such powers by the President or the Governor fall within the ambit of judicial review. The principle of judicial review was also recognized in *Kehar Singh* v. *Union of India*.[32]

In subsequent decisions, the Supreme Court actually had to exercise its powers of judicial review to strike down the grant of remission of sentence – pardon granted under Article 161. In *Swaran Singh* v. *State of U.P.*[33], the Court was constrained to strike down the exercise of powers by the Governor under Article 161 to grant remission to a convict. The Court directed that the Governor should reconsider the issue in the light of the material that was not placed before him.

In *Satpal* v. *State of Haryana*[34], the Supreme Court again quashed the order passed by the Governor for remission – pardon of the accused under Article 161. On the facts of the matter the Supreme Court held that the order was vitiated and the Governor had not been advised properly.

30. This power is limited by S. 433-A, CrPC in case of offences that carry the prescribed penalty of death sentence as it prescribes a minimum sentence of 14 years imprisonment.
31. 1981 (1) SCR 1196.
32. AIR 1989 SC 653.
33. 1998 (4) SCC 75.
34. 2000 (5) SCC 170.



As the Supreme Court has extended the ambit of judicial review to the powers under Articles 72 and 161, it is but evident that any executive orders under Section 432 and 433 CrPC will also be subject to judicial supervision. There have been a number of decisions by the Supreme Court and the High Courts which have firmly established the right of judicial overview over the exercise of these powers by the executive and in some instances even reversed state orders allowing pre-mature release of prisoners.[35] For instance, even in *Satpal* v. *State of Haryana*[36] that has been discussed above, the executive order that was quashed by the Court was issued under Article 161 read with Section 432 CrPC.

On the basis of the aforesaid discussion, it can be concluded that the spirit and tenor of the judgment in *Abdul Karim* will be applied in case there is attempt by the State to rely on powers under Articles 72 and 161 of the Constitution of India or for that matter on any other similar provision like Sections 432-33 read with 433A, 434 and 435 of CrPC in order to release terrorists against a ransom demand.

## VII. Conclusion

While technically the judgment in the *Abdul Karim* was based on the interpretation of Section 321 CrPC, as the three Judge bench had to follow the principles laid down by five-judge bench in *Sheo Nandan Paswan* v. *State of Bihar*[37], but for all practical purposes the Court was laying down the law in an area of security doctrine which is not adequately covered by legislation. The tests laid down by Bharucha J. and the observations of Sabharwal J. clearly indicate that the Court has embedded the policy that prisoners will not be released in swap for hostages into the law of the land.

While on one hand it has become fashionable to criticize the courts for judicial activism, on other hand it also has to be considered that the executive has been in clear abdication of its own responsibilities. Over a period of time we have seen numerous such crises in India. We even had the public spectacle of our Foreign Minister personally taking terrorists to set them free in Afghanistan. In these circumstances there can be no

35. *State of M.P.* v. *Mohan Singh* 1996 Cr LJ 2878 (SC), *Thirumalareddy Thomasamma* v. *Govt. of A.P.* 1992 CrLJ 3016 (AP), *Hukam Singh* v. *State of Punjab* 1975 Cr LJ 902 (FB), *Veeramachaneni* Raghavendra *Rao* v. *Govt. of A.P.* 1985 Cr LJ 1009 (AP), *Sudesthamma* v. *State of A.P.* 1985 CrLJ 1890 (AP) and *Jayant Veerappa Shetty* v. *State of Maharashtra* 1986 CrLJ 1298 (Bom.).
36. *Supra* n. 34.
37. *Supra* n. 10.

quarrel with the proposition that the decision by the Supreme Court in *Abdul Karim* was correct and timely.

But one cannot also lose sight of the fact that the judiciary is not an appropriate body for drafting legislation. It does not have the time, resources or infrastructure to legislate on matters, especially ones that have important internal and external security implications. The courts can deal with immediate issues when specific cases are before them but are not equipped for laying down long-term vision, policy or guidelines. Be that as it may, the Supreme Court has already taken the initiative to bite the bullet[38] in this regard and laid down the contours for the proper security doctrine to be adopted by the Government. It is high time the executive and legislature lay down an appropriate legislation and clearly enunciate an executive policy to deal with future situations of this nature.

38. The Supreme Court *de facto* took the moral responsibility for the possible death of the hostage Mr. Rajkumar in *Abdul Karim* when it prevented the Government from releasing criminals. Mr. Rajkumar was subsequently released unharmed.

# NEED FOR NATIONAL LEGISLATION ON REFUGEES: SOME ISSUES+

*Harjyot Singh Bhalla and Sumedha Shiva**

## I. INTRODUCTION

The major forms of human rights violations are killings, beatings, torture, sexual assault, separation and disappearance, shootings, looting and destruction of property. These abuses are being experienced on the individual level by a substantial number of humans, and are a major cause of increase in the number of refugees over the years. "Concern with the refugee crisis that faces the modern world is not new of course. Previous studies have almost, without exception, focused from their outset on the continually worsening nature of the world's refugees problem, citing increasing number of refugees in official statistics and the deadly combination of conflict, economic collapse, and the loss of basic human rights as underpinning an unprecedented situation of crisis proportions"[1].

It is estimated that number of refugees has grown up from 2,116,200 in 1951 to 11,697,800 in 1999.[2] In Asia their number has gone up from a mere 41,500 in 1951 to 4,781,800 in 1999.[3] Arrival of asylum seekers in any country has dual implications For the refugees, it relates to the apprehension of treatment on arrival, the economic, social, political rights that will be conferred upon them and the problem of assimilation with the local residents; for the states it means burden of creating socio-economic conditions for the settlement of the refugees besides providing them with the more immediate asylum by allowing them entry.

Most of the states are signatory / parties to various conventions dealing with refugee laws. These instruments along with other human rights instruments have become the source for the treatment of refugees world over. In observing the principles behind these international instru-

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1. Richard Black And Vaughan Robinson, GEOGRAPHY AND REFUGEES 3 (1993).
2. UNHCR, THE STATE OF THE WORLD REFUGEES (2000).
3. UNHCR, THE STATE OF THE WORLD REFUGEES (2000).

ments there has been no uniformity of behaviour at all. The behaviour of the states can be broadly classified as [4]: -

(a) States that are parties to either or both instruments relating to the status of refugees and following the principles enunciated in those instruments.

(b) States that are parties to either or both the instruments but not adhering to the principles in a uniform manner.

(c) States that are not parties to either or both the instruments and not respecting the international principles enunciated in the instruments.

(d) States that are not parties to either or both the instruments, but that fully recognize and implement the principles within their economic capability.

India - due to its geographical location, comparatively stronger economy, diverse social fabric and in addition a history of accepting migrants - attracts the maximum number of refugees from neighbouring countries. At the end of 2001, some 345,000 refugees were living in India, including as many as 144,000 from Sri Lanka, 110,000 from China (Tibet), 52,000 from Burma, 15,000 from Bhutan, 12,000 from Afghanistan, an estimated 5,000 to 20,000 from Bangladesh, and nearly 300 from other countries [5].

Although India has permitted refugees to remain in the country, formal legal protection has been accorded to some groups of refugees only, whereas other groups and individual refugees completely lack protection. Moreover, the mode of treatment as between certain groups may differ, which on the face of it may pose problems.

In the absence of *de jure* principles the government has extended *de facto* protection to refugees in the territory of India.

Refugees in India may be categorised as: -

(a) Those assisted by Government of India (some mass influxes) – from neighbouring countries.

(b) Those recognized by UNHCR (individual refugees) – Afghans, Iranians and Burmese.

4. Dr. V. Vijayakumar, *Should India Ratify the Refugee Convention and Protocol*, BULLETIN ON IHL & REFUGEE LAW 325 [Vol.2, No. 2(A)].
5. *Statistics 2001 available at* http://www.refugees.org. (visited on 20 July, 2002).



Thus, India is a refugee prone area in a world that is increasingly generating more refugees in each succeeding year. Unfortunately, despite all efforts, refugees continue to be treated inequitably, and their number is expected to grow along with the growth in global economy.

### *The International Framework and India's Human Rights*

Some of the important legal documents and international instruments are the Convention Relating to the Status of Refugees 1951[6], Protocol Relating to the Status of Refugees 1967[7], Universal Declaration of Human Rights 1948[8], International Covenant On Civil and Political Rights 1966[9], Optional Protocol to the International Covenant on Civil and Political Rights 1976[10], International Covenant on Economic, Social and Cultural Rights 1966[11] and the OAU Convention, 1969[12].

Out of the above listed international instruments India has acceded in 1979 to the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and was a party to the Universal Declaration of Human Rights, 1948.

In 1992, India acceded to the Convention on the Rights of the Child (1989); the Convention on the Elimination of All Forms of Racial Discrimination (1963) was ratified in 1969; the Convention on the Elimination of all Forms of Discrimination Against Women (1979) was ratified in 1993

6. It deals with issues such as defining the term "refugees", lays down standards of treatment of refugees by the contracting states, general obligations/duties of refugees towards country of asylum and other rights relating to refugees.
7. The Protocol aims to extend enjoyment of equal status for all refugees covered by the definition in the 1951 Convention irrespective of the dateline 1st January, 1951.
8. It recognizes certain basic human rights to be enjoyed by all human beings irrespective of caste, race, nationality, religion, etc.
9. Keeping in mind the provisions of the UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948 (UDHR), this Covenant recognizes the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights.
10. In order to further the purposes of INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1966 and for the implementation of its provisions the Human Rights Committee set up in part 4 of the 1966 Covenant receives and considers communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.
11. Recognizes that in accordance with the UDHR, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.
12. Keeping in mind the specific refugee problems in Africa, the Convention enlarged the definition of the term 'refugee'.

and in 1997 India signed the Convention Against Torture.

In the Indian context, application of the above international human rights instruments are not enforceable by Indian courts unless the specific provisions are incorporated into municipal law by the legislature, though the courts have nonetheless 'read in' certain international human rights principles in a growing number of decisions[13].

Thus the position therefore is that even if a treaty or convention or resolution is not ratified or agreed to by India, courts are still at liberty, provided there exists no Indian law to the contrary, to incorporate these conventions, treaties and resolutions into Indian law and thereby enforce them.

## II. Refugees – Issues Involved

"The definition of a 'refugee' in international law is of critical importance for it can mean the difference between life and death for an individual seeking asylum."[14] The purpose of an indisputable definition or description of the refugee status is to provide justification and compliance with the criterion which in turn will indicate the kind of aid and rights one is entitled to receive as a refugee.

India not being a party to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol has generally followed the international principles relating to refugee laws as there is no domestic law or guidelines which can be acted upon for the protection and resettlement of refugees. This has created problems in defining the term 'refugees' in India because unless there is a settled procedure for determining the

13. *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241, this was a case involving rights of working women against sexual harassment in work places. In the absence of suitable legislation in this field, the Supreme Court held that, "Any international convention not inconsistent with fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of Constitutional guarantee. This is implicit from Article 51 (c) of the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in the Seventh Schedule of the Constitution." *Id.* at 249. In *Gramophone Company of India Limited v. Birendra Pandey* AIR 1984 SC 677, the court held: "There can be no question that nations must march with the international community and the municipal law must respect rules of international law just as nations respect international conventions. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with acts of Parliament." *Id.* at 671.

14. B. S. Chimni, International Refugee Law 1 (2000).



status of people who may be termed as 'refugees' there are bound to be digressions.

In 1951, a major attempt was made by the United Nations to define a refugee in the Convention Relating to the Status of Refugees and Stateless Persons. However, the definition contained within 1951 Convention clearly does not cover everyone outside his or her country, in a situation of distress, and unable to return home.

## III. Providing Immediate Protection from Persecution

### *A. Persecution*

"Persecution is not defined in the 1951 Convention or in any other international instrument".[15] Articles 31 and 33 of the Convention refer to those whose life or freedom 'was' or ' would be' threatened[16] and the UN Convention Against Torture 1984 defines that term as covering, "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...it does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

"From Article 33 of the 1951 Convention, it may be inferred that a threat to the life or freedom on account of race, religion, nationality, political opinion or membership of particular social group is always persecution. Other serious violations of human rights – for the same reason – would also constitute persecution"[17].

States are more or less free in interpreting this term, and practice reveals no coherent or consistent jurisdiction. Since, fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee.

It will be a fruitless exercise trying to list all known measures or forms of persecution. Assessment must be made while taking into account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured.

15. Guy S. Goodwin-Gill, The Refugee In International Law 66 (1996).
16. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979), para 51.
17. *Ibid.*

### *B. Source or agent of persecution*

Another important issue is that of agent of persecution or the source. Distinction is drawn between persecution by state or attributable to the state or its agents on the one hand, and persecution by non-state actors on the other. In practice, to whom a state 'may' or 'may not' give protection often depends upon who the agent of persecution really is. For example: - Germany considers persecution by state as relevant for granting refugee status in Germany, however, persecution by non-State entities is not taken into account.[18] Similar principle is followed in Sweden also.

However, looking at article 1A of the 1951 Convention the decisive criterion for refugee status is that an individual having a well founded fear of persecution is "unable or, owing to such fear, is unwilling to avail himself of the protection" of his country of origin. The essential element here is the absence of national protection against persecution, and whether the act is or is not attributable to the state is the not at all the issue. The general principle of interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties, requires a treaty to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's objects and purpose. The word persecution, therefore takes into it's ambit, all persecutory acts irrespective of whether the source of threat can be attributable to state or not.

### *C. Non-Refoulement*

Asylum or refuge from persecution is an essential component of refugee protection and the principle of Non-Refoulement is inseparable from the concept of refuge from persecution.[19]

Refoulement relates to any state action whereby a refugee is directly or indirectly forced to return or is sent to a country where he or she has reason to fear persecution including threats to life and freedom. Thus, Non-Refoulement is a safeguard against forcible returns to persecution or other damages.

In absence of a formal procedure / 'Due Process' for determining whether the principle of Non-Refoulement is applicable or not in the given

18. UNHCR, *An overview of Protection Issues in Western Europe* in LEGISLATIVE TRENDS AND POSITION TAKEN BY UNHCR (UNDATED)
19. Article 33(1) of the 1951 Convention stipulates that *" No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion."*



circumstances, the risk of Refoulement of asylum seekers has further increased.

### *D. Foreigners entitled to Human Rights Protection*

Though India is not a party to the 1951 Convention nor to the 1967 Protocol, the general principles of international law relating to foreigners which also includes refugees must be taken as incorporated directly into the Indian Constitutional Law via Article 21, particularly in view of the fact that India has acceded to the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social, and Cultural Rights 1966, the Convention on Rights of the Child 1989, and the Convention on the Elimination of All Forms of Discrimination Against Women 1979.

Our Constitution guarantees certain fundamental human rights to citizens as well as non-citizens. The preamble of the Constitution, which declares the general purpose for which the several provisions of the Constitution have been made to assure the dignity of the individual, is also the basic objective of the international humanitarian law. The Article 21 of the Constitution of India guarantees the right of life and the personal liberty. A person cannot be deprived of life and liberty, except according to the procedure established by law[20].

## IV. NEED TO DIFFERENTIATE BETWEEN CLASSES OF FOREIGNERS

A *foreigner* according to the Foreigners Act 1946 is a person who is not a citizen of India. Logically, this would mean the following classes of

20. The court in the case of *National Human Rights Commission* v. *State of Arunachal Pradesh*, (1996) 1 SCC 742, held that, the Indian Constitution confers certain rights on every human being, may be a citizen of this country or not, which includes right of "life". The then Chief Justice said, thus, "We are a country governed by the Rule of Law. .... So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus, the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise..."*Id.* at 751. In *Ktaer Abbas Habib Al Qutafi* v. *Union of India* (CA 3433 of 1998), the High Court of Gujarat in Ahmedabad summarized the principles that have emerged from Indian judicial precedents. This included conformity with international conventions and treaties. Although not enforceable, the government is obliged to respect them, but the power of the government to expel a foreigner is still absolute. Meanwhile, Article 21 guarantees the right to life for non-citizens. International covenants and treaties, which effectuate these fundamental rights, can be enforced. The principal of non-refoulement is encompassed in Article 21 so long as it is not prejudicial to national security. In view of directives under Articles 51(c) and 253; international law and treaty obligations are to be respected as long as they are consistent with domestic law.

foreigners, which need be differentiated from each other i.e., foreigners (tourists or visitors), refugees and migrants are all covered under the Act as foreigners.

*Refugees*, who belong to a distinct class within the broad category of foreigners are, thus, subjected to the provisions of the Foreigners Act 1946, the Registration of Foreigners Act 1939 and other related statutes as any of the other classes. Another class is that of *migrants*. A migrant may be referred to as an economic migrant, who generally leaves a country to seek better living conditions or for reasons of better employment, etc. His leaving a country as a mater of choice is completely voluntary, unlike, the refugees who flee from a country due to the fear of being persecuted and under a compulsion to receive protection in another country. Thus, a refugee enters the territory of another state involuntarily while an economic migrant does so as a matter of choice. *Tourists* or *visitors* as a distinct class also fall with in the category of foreigners, who move to a country with proper documentation (i.e., a valid passport, visa, etc.) and their purpose for so coming to a country is altogether different form that of refugees or migrants.

Thus, there is a need to differentiate between various classes of foreigners. Refugees should be duly recognized as a distinct class, so as to enable states to understand their requirements, make appropriate provisions for them accordingly and eventually provide the kind of assistance they deserve.

### *A. Indian judiciary has given due recognition to the rights of refugees*

In India, the judiciary has played a very important role for the protection of refugees. In many cases it has provided a humanitarian solution to the problems of refugees[21]. The courts have also interpreted provisions of the Indian Constitution, existing laws and, in the absence of municipal law, provisions of international law to offer protection to refugees and asylum seekers[22].

21. In the case of *Luis de Readt* v. *Union of India* (1991) 3 SCC 554, and *Khudiram Chakma* v. *Union of India* (1994), Supp (1) SCC 614 and AIR 1994 SC 1461, the Supreme Court reiterated the principle that protection of life and liberty are guaranteed rights of even aliens in the Indian territory. The Court did not hesitate to extend the right to a large number of refugees who were threatened of forcible eviction by organized local population with the support of the local government.
22. *People's Union for Civil Liberties* v. *Union of India* (1997) 3 SCC 433; also see *NHRC* v. *State of Arunachal Pradesh supra* n. 20.



The courts have located the rights of refugees in Article 21 of the Constitution of India which gives protection to all those who are being deprived of their life or personal liberty except by due procedure established by law and placed their protection within the broad consortium of the power of judicial review of the High Courts and the Supreme Court.

The principle of 'non-refoulement', which broadly states that no refugee should be deported to a country where he or she will face persecution or death, is encompassed by the protection offered by Article 21[23].

### *B. Due Process*

"'Due process of law' has never been a term of fixed and invariable content and doesn't have an exact and comprehensive definition, which could be applied to all possible cases and circumstances. In the course of developing it's meaning, the courts have gone beyond its literal meaning of 'due procedure', and have brought within it substantive as well as procedural rights. When applied to substantive rights, it is interpreted to mean that the Government is without right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power or without the observance of those general rules established in the system of jurisprudence for the security of private rights"[24].

In the absence of a formal refugee legislation, the procedure which need to be followed for determination of refugee status and granting assistance to the asylum seekers has lost all consistency - thanks to the capricious administrative decisions – and has developed unimaginable complexities. Yet, the government seems to be taking no interest whatsoever, in getting rid of this unreasonable *ad-hocism*.

In order to ensure the protection of those who require it, clear procedures and criteria need to be established. These should include, but not to be limited to, the following basic principles[25]: -

23. Supreme Court in *Dr. Malavika Karlekar* v. *Union of India*, Writ Petition (Criminal) 583 of 1992, 25.9.1992; Guwahati High Court in *Zothansangpuri* v. *State of Manipur* (Civil Rule No. 981 of 1989).
24. H.K. Saharay, THE CONSTITUTION OF INDIA 195 (1997).
25. Annotated Agenda, Theme II: Global Consultations On International Protection, Regional Meeting for Asia and the Pacific, Macau Sar, People's Republic of China, 28-29 May, 2001

Respect for the principle of non-refoulement (i.e., prohibition against return of asylum seekers to a country where their life or freedom would be at risk).

Clearly defined criteria based on human rights/humanitarian principles.

Careful examination of the claim (or profile of a group) by a clearly identified, qualified, knowledgeable and impartial decision- making body. The possibility for an independent review of a negative decision (during which time the asylum seeker or group is permitted to remain in the host country).

### C. *Foreigners Act and Refugees*

The Foreigners Act 1946 applies to persons who are not citizens of India. However, the Act itself does not lay down any machinery for determining whether a person is a foreigner or not, or, who is a citizen of India. "The purpose of the enactment was to confer power to the government to regulate the entry, presence and departure of foreigners into, in and from India"[26]. However, by uniformly subjecting all classes of foreigners without any distinction between immigrants, foreigners, forced immigrants (refugees, asylum seekers), the legislature, it appears, failed to visualize and consider other eventualities, thereby, leaving the whole matter of regulating the presence of foreigners in India to the executive discretion. Nothing in this Act, excludes the application of its provisions to refugees, as a result, a person who escapes his country of origin due to fear of persecution and enters India may be punished for contravention of this Act under Section 14.

On an analysis of the various provisions of the Foreigners Act, it can be noticed that the Act confers on Central Government the right to: Expel a foreigner; Enforce an order of expulsion; and Prevent any breach of it[27] and confers the right to use such force, as may be necessary "for the effective exercise of such power"[28]. This is clearly against the principle of non-refoulement, which is an inseparable aspect of the asylum from

26. V K Dewan, LAW OF CITIZENSHIP FOREIGNERS AND PASSPORTS 239 (1996-97).
27. S. 3(2)(c), FOREIGNERS ACT 1946.
28. *Id.* S. 11(1).



persecution.[29] The legislature has, thus, committed a folly by delegating unbridled power to the central government. Further, provisions dealing with deportation of foreigners have no reference whatsoever to the principle of non-refoulement.

The government has also been granted the power to control places frequented by foreigners[30] and to close such premises either entirely or during specified periods[31] and to refuse admission to such premises either to all foreigners[32]. Sub Clause (a) is arbitrary, and gives authorization to unreasonable measures, as Sub Clause (c) should more than suffice in controlling activities of foreigners in such places.

The words " ...in addition to" in Section 11(1)[33] confer a wide array of powers, which may be subject to abuse and may even, expose an asylum seeker to refoulement. Section 11(2) – gives extensive powers to the police, which, on the one hand, may be necessary in dealing with smugglers, terrorists or other foreign nationals who may be perceived as a threat to national security, yet on the other hand such provisions may conflict with the principles governing refugee protection. And above all, the Act does not provide for safeguards or remedy or action to be taken against a person who acts unreasonably and misuses the powers conferred on him under various provisions of this Act.

Foreigners Act vests the Central Government with absolute and unfettered discretion; thus, an unrestricted right to expel remains. No provision in the Act deals with the problem of refugees/asylum seekers who have committed crimes against peace, humanity or other serious non-political crimes. There is no provision for subsequent revocation of refugee status once granted and there is no provision linking the extradition statute with refugee problem.

29. In the case of *Mir Abdul Qadir* v. *State of Andhra Pradesh* AIR (1967) A.P. 105 a notice under Section – 3 (2)(c) of Foreigners Act was served upon the petitioner requiring him to leave the country at once and with a view to deport him the police took him into custody. After consideration of such fact their lordships held that - the petitioner cannot claim to be released by High Court under Section 491(Cr. P. C.). In case of an asylum seeker this would not just be arbitrary but also amount to denial of justice.
30. S. 7A , FOREIGNERS ACT 1946..
31. *Id.* S. 7A(a).
32. *Id.* S. 7A(c).
33. *Id.* S 11- "...any authority empowered...to give any direction or to exercise any other power, may in addition to any other action expressly provided for in this act, take, or cause to be taken such steps and use, or caused to be used, such force as may in it's opinion, be reasonably necessary for securing compliance with such direction..."

### *D. Need for Amendment*

Numerous cases[34] throw ample light on the vulnerable situation in which refugees ("people who fled their country under fear of persecution and entered India to take refuge") generally find themselves in India, where in the absence of any legislation specifically dealing with refugees and laying down "due process" to be followed when dealing with asylum seekers, they are treated as any other class of foreigners.

There exists a clear technical lacuna in the provisions of the Foreigners Act, which fails to distinguish between different classes of foreigners resulting in rampant *ad-hocism* in administrative decisions. Contemporary international law unambiguously promises to confer various rights and privileges to refugees when compared to economic migrants. States are also expected to distinguish between refugees and other classes of foreigners within their jurisdiction / territory and treat them in accordance with international principles on human rights. A refugee is an individual who deserves to be dealt with in a humanitarian manner and treating him as any other class of foreigner is gross injustice.

The Act gives wide arbitrary powers in the hands of the government to pass orders restricting, controlling and regulating the entry, presence and departure of foreigners into, in and from India. State has been granted wide powers of expulsion, which is not only against the interest of the refugee residing within territorial limits of India at any given time[35], but also, against the principle of Non-Refoulement.

34. In the case of *Maung Maung Myo Nyunt* v. *Union of India & C.W.P.* No. 5120 of 1994, petitioner along with four others, all five being Burmese refugees, who had escaped from Burma following political unrest after the military government came to power in 1988. They were arrested and taken in judicial custody, and, charge sheet was filed against all five for illegal entry and stay under S. 14 of the FOREIGNERS ACT. Bail was granted by the Guwahati High Court and UNHCR granted refugee certificate to them. Thereafter petitioner was given a visa to study in a school in Norway, along with travel document by the Norwegian government. However, in view of criminal complaint against them under S. 14 of the FOREIGNERS ACT pending in the court of CJM, Churachand Pur, he was not granted an Exit Visa by the ministry of home affairs, hence he filed a writ petition in the high court of Delhi. Finally the case was withdrawn and petitioner was granted permission to leave India by an order dated 30/12/1994; In *Smt. Zothansngpuii* v. *State of Manipur* C.R. No. 981 of 1989, petitioner a Burmese citizen had entered India along with many others as a result of terror let loose by Military authority in Burma. She was prosecuted in India and convicted to a simple imprisonment under S. 14 of the FOREIGNERS ACT and Rule 6 of the PASSPORT RULES 1950.

35. S. 3 (2)(c).



Thus, not only does the Foreigners Act need immediate amendment, but there is also a need for immediate Rules on refugee to fill in the legal lacuna.

## V. CONCLUSION

There is an urgent need to frame legislation that can address the nature of the problem concerning refugees and provide the manner of relief required. The problem of refugee cannot be viewed in isolation and, therefore, the legal framework, which has got to be built, must not only take care and provide for the protection, rehabilitation and repatriation of the refugees but also reconcile the conflicting interests of the receiving countries. Unless there is a solution within the legal framework, for all the problems, which arise as a result of refugee movement, the law would not be comprehensive.

# BRINGING LAW TO THE SERVICE OF DARIDRA NARAYAN

*Shweta Paul and Priyanka Kalra**

## I. INTRODUCTION

The homeless pavement dwellers, the bonded labourers and suppressed gender constitute the fourth world within the third world. The socio-economic neglect of the population below the poverty line is by and large the destiny of the bulk of the people of India. Beggars around places of worship and other tourist spots are seen as scars in the otherwise well laid out urban landscape. The U.S. Supreme Court highlighted this reasoning in *New York v. Miln*[1] in these words: " It is as competent and as necessary for a state to provide precautionary measures against moral pestilence of paupers, vagabonds and possibly convicts, as it is to guard against physical pestilence...."

In India the phenomenon of beggary assumes variety of forms that have been variously described as types or kinds of vagrancy or beggary. The first group are the physically handicapped, mentally handicapped and diseased vagrants or beggars. The class of physically handicapped are most successful in arousing sympathy and compassion in the heart of the alms giver; that is why physically handicapped and bodily deformed are in great demand for organized beggary. Another category constitutes the casual vagrants or beggars. Such a population is generally drawn from amongst the unskilled rural labour force who are able to secure only casual or part time work in the urban labour market. Thus once they are out of employment or their part time work ceases to bring adequate earning they find it difficult to maintain themselves, which compels them to fall back upon the only way of surviving, that is through charity. A survey of the beggars in Delhi conducted by the Delhi School of Social Work[2] revealed that there are two kinds of part time or casual beggars.

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1. 36 U.S. (11 Pet.)102,142 (1837), cited in C.Foote, *Vagrancy-type Law and its Administration* in William J. Chamberliss (ed.), CRIME AND LEGAL PROCESS 309 (1969).



the non-religious and religious part time beggars. The non-religious part time type consists of those who are normally self employed in various small scale manual trades and the return from these are neither regular nor stable. The work is often of a casual nature subject to many seasonal and other variations. Whether the frequent repetition of this practice becomes a process that ultimately makes a professional beggar of the part time beggar is difficult to say. Generally, the beggars found around *Gurudwaras* and temples on appointed days belong to the class of religious part time beggars for whom beggary is a temporary and casual means for survival.[3]

## II. LEGAL VIEW

The homeless of Delhi have the same human rights as any other Delhi citizen. These rights are recognized under the Constitution of India. Article 23 stipulates that traffic in human beings, beggary and other similar forms of forced labour is prohibited and that any contravention of these provisions shall be an offence punishable in accordance with the law. The United Nations also recognize these rights under various International Conventions.

Beggar's Court is a specialized court to deal with the trial and sentencing of beggars, constituted in terms of Section 3 of the Bombay Prevention of Begging Act 1959 (BPA) as extended to the Union Territory of Delhi.[4] Under the BPA, begging is illegal in Delhi. "Begging" is defined in the BPA as "soliciting or receiving alms in a public place" and includes anyone "having no visible means of subsistence and, wandering about or remaining in any public place in such condition or manner, as makes it likely that the person doing so exists by soliciting or receiving alms".

This broad definition allows the Delhi police to arrest anyone who looks poor and unfairly targets those who are homeless and live in public places such as pavements or parks. The BPA is one of the main legal instruments used by the police to clear the homeless off the streets in so-

2. Delhi School of Social Work, THE BEGGAR PROBLEM IN METROPOLITAN DELHI 31 (1959).
3. See B.B.Pande, *Vagrants, Beggars and Status Offenders and Beggary Prevention Law In India* in U. Baxi (ed.), LAW AND POVERTY 248-276 (1978).
4. S. 3 states that the power conferred on courts by this Act shall be exercised only by the High Court, Court of Session, a Magistrate of the First class, a Court constituted under the Children Act, or any other court exercising criminal jurisdiction in the area, and may be exercised by such court whether the case comes before them originally or on appeal or revision.

called 'clean-up' drives to beautify Delhi.

Any person arrested for begging has to appear before the court. If the court is satisfied that the person is not likely to beg again, it may release him/her on a bond for abstaining from begging. A convicted beggar can be detained in a certified institution for a period of up to three years and no less than one year. When a person is convicted for begging for a second or subsequent time, he/she can be detained for a period of up to 10 years. A "certified institution" is defined as "any institution, which the Chief Commissioner provides and maintains for the detention, training, and employment of beggars and their dependants".

The penalty for employing or causing persons to beg or using them for purposes of begging is imprisonment for up to three years. However, these exploiter beggars are rarely arrested as they have enough money to bribe the police. In view of the seriousness of this type of beggary the law has designed special provisions which subject the 'exploiter beggars'[5] to serious penal consequences which include stringent action against exploiter beggar and imprisonment up to ten years under the Indian Penal Code.[6]

The BPA is supported by the Delhi Prevention of Begging Rules 1960 which states that any person without a permit to solicit or receive, money or food or gifts can be arrested. The begging offence is established on the basis of a summary trial in the Beggars Court usually manned by a Judicial Magistrate or a Special Magistrate appointed for that purpose.

The wide ambit of the offence may be justified on the basis of the need to make the law more effective for dealing with the problem but it does give unduly wide discretion to the police and the raiding parties members to interfere with the lives of the innocent citizens. The discretion of the arresting authorities is also widened by the clause (a) of Section 2(1) of the BPA which empowers them to treat singing, dancing, fortune-telling performing or offering any article for sale as pretence for soliciting or receiving alms. Large numbers of people who earn their livelihood by indulging in traditional trades or in self employed vocations are under constant fear on account of the over wide power attributed under this provision.

5. Habitual and professional beggars.
6. S. 363A, INDIAN PENAL CODE 1860.



## III. FUNCTIONING AND PROCEDURE OF SEWA KUTIR

The institutions created in terms of the BPA are significant since they fulfil two-fold objects namely, to punish and to rehabilitate. The sentence of detention in the certified institution for a period of one year or more involves substantial deprivation of the liberty of the "beggar" whose freedom and liberty to earn is the only source of livelihood for the dependants. That is why for a large percentage of the pauperised and the marginalised population the beggary prevention law's control function is significant. In 1960 when the BPA was extended to Delhi there was only one institution that is Sewa Kutir at Kingsway camp.[7] However, with the passage of time various other institutions apart from the well known institution have come up.[8]

Any police officer or a superintendent of an institution is authorized to arrest a beggar in terms of the provisions of the BPA. Beggars are routinely brought in a rickety van to Sewa Kutir. The court is presided over by the Metropolitan Magistrate who entertains bail applications and conducts a summary enquiry. The trial starts soon after the magistrate has disposed administrative matters. Beggars are assembled in a queue and taken towards the room where their *jamatalashi* is done - a procedure whereby each beggar is inspected to ascertain their belongings. Once their belongings are inspected, the probation officer prepares a social investigation report based on an interview with each beggar. The probation officer is also required to visit the local area to which the beggar offender belongs as part of the social investigation report. This report is of great assistance to the Metropolitan Magistrate to ascertain the facts and to crosscheck the statements made by the alleged beggar offender.

The alleged beggars who are made to assemble outside the court room are ushered in one by one and presented before the Magistrate. Usually there is no one to represent the beggars. The presentation before the Magistrate is generally brief and the proceedings to the point. Usually the uncontested cases are disposed of in one summary enquiry and lasts just less than two minutes. All those who fail to give a satisfactory account

7. The institution was established in 1940 by the Delhi Association for the care of the destitute. See DELHI MUNCIPAL CORPORATION ACT 1957.
8. These are the poor house (Sewa Kutir) at Kingsway Camp, home for diseased male beggars also at Kingsway camp, home for beggars Sewa Sadan at Tikri Kalan, home for old and infirm beggars at Narela, home for able and disabled beggars Sewa Kendra at Narela, home for able and disabled female beggars at Mehrauli, home for able disabled and diseased female beggars at Hari Nagar and home for leprosy and T.B.Beggars at Shahdara. These are run by the Delhi Administration and are financed by the Government grants, donations and sale proceeds of the products produced in the institution.

concerning their employment, their presence in the town and others who seem forlorn are taken to be beggars. The common trend that is followed for sentencing persons found to be a beggar is either to release him/her on condition that he/she will leave the town or release them on personal bail surety bond for Rupees 1000/- or so. In case the beggar fails to produce the requisite amount as surety, s/he is committed to the certified institution.

## IV. Our Role

The students of Campus Law Centre have been successfully running a project to provide free legal aid services to the beggar offenders under the BPA at Poor House Court, Sewa Kutir, in the cases being heard by the Metropolitan Magistrate.This project was started in 1976 by the Legal Aid Clinic of the Campus Law Center, under the able guidance of the Professor-in-Charge of the project. The main aim of the project is to provide free legal aid to the needy and to make them aware of their legal rights. In the first year of the project the student volunteers were able to get 3,992 beggars released. The project has been continuing since then with the same zeal and motivation amongst the students and has achieved its goal by helping innumerable beggars.

In the year 2001-2002 the student volunteers have provided legal aid to about 400 beggars in Sewa Kutir. In addition, street plays have been staged and a documentary film shown in order to bring awareness and the public in general. Under the supervision of our teacher Convenor of the Faculty legal services programme students assist the beggars to defend themselves in the Court. In the trial proceedings, the role of students is to provide legal service to the people who were erroneously thought to be beggar offenders and were brought to the beggar home. However students are cautioned that all the beggars may not be innocent and that some are professionals in this field.

Our experience of working in the project was varied. We often had to interview those who were caught and provided free legal aid to those who were innocent. Initially we took everyone by their face value but then we also started to differentiate between the artificiality and the reality of the cases brought before us. Often, behind a painful and excruciating story was the case of a professional beggar and an expert in this field. We were advised by one of the probation officer who was a lady of grit and determination and was well versed with the state of affairs at the beggar's home. She guided us to the manner in which questions were to be asked since interviewing is an art which require tact to reach the



truth of the matter. We were required for writing bail applications, trial stage representation with the permission of the Magistrate and filing bail bond and surety bond papers. By and large our presence in the poor house complex was welcome. Our ability to render meaningful legal service crucially depended upon the co-operation and support we received from the reception and classification centre staff, court staff and the probation department staff.

Some of the cases we handled related to people who were not beggars but were caught from the railway stations of Delhi. Once we interviewed them we came to know that a lot of people in the Reception Cum Certifying Centre shared their plight since in that particular week the police raid van had raided the railway station and had caught a lot of men and women who were innocent. The beggar offender are held either by police van or the Reception Cum Certified Van.

We present below our interviews with some of the victims.

**Ram Krishan**

*What do you do?*

*I am a mazdoor working in Ajmeri Gate.*

*Where were you caught?*

*I was caught at the railway station*

*Were you begging?*

*No, I am a resident at Ajmeri Gate and am the sole earning member for my family of four.*

(The Magistrate relied on curious method of arriving at a material conclusion by inspecting the hand and feet of the alleged beggar. Rough, coarse and blistered hands and cracked feet meant living through hard work and not beggary. The method was simple but effective.)

**Madhu Raja Ram and Deepak**

*Where were you caught from?*

*MR - I am not a resident of Delhi and was caught from Old Delhi railway station.*

*Deepak - I have been caught from Ajmeri Gate where I sleep.*

*What was your purpose of visit to Delhi?*

*MR - I came to visit my relatives.*

*Deepak - I have been residing in Delhi for last ten years and work as a labourer.*

(He showed us his daily earning and told about his rental accommodation).

*Why were you caught and if released where will you go?*

*MR - I was caught as I had very little money and had lost my way.*

*Deepak - I am a labourer and residing in Delhi for last ten years and I have been caught while working. When I resisted I was beaten up by the police personnel.*

After we cross examined them we found them to be innocent. On the next date of hearing when we represented them we managed to get them released. They were overjoyed and obliged for our service.

### V. Preventive measures

It is shocking that institutions meant to assist the poor often victimise them. The reason why we are writing about a Beggars' Home instead of other burning topics is because we realised that many of the inmates were not beggars but were innocent persons who were poor and wore shabby and tattered cloths and required justice and fairness from fellow beings.

The state has very wide powers to incarcerate a person charged with beggary merely because the person was seen loitering about or seemed to be a beggar in a public place. Though under the law begging is considered a crime, yet beggars are not criminals in ordinary sense of the term. Begging is an outcome of economic injustice. Beating and torture cannot be a punishment for being poor.

Our participation in the project led us to view this problem from a socio-economic stand point. Poverty encompasses the majority of the population of India. However, with a positive approach and mindset we can lay down certain guidelines and steps to eradicate beggary and initiate efforts in this direction. Efforts to provide livelihood in rural areas would go a long way in preventing urban migration and the poverty. There is a lack of social security and protective measures for older persons who are not taken care of by their children - there should be old-age homes for these poor people and also orphanages for the children. For schemes such as these, adequate financial provision should be made and the Government should give some assistance to the States.

# *BOOK REVIEWS*

THE STATE OF CHILDREN IN INDIA - PROMISES TO KEEP. By A. B. Bose. New Delhi: Manohar Publishers, 2003. Pp. 341, Rs. 700/-

The adoption by both the Houses of the Indian Parliament the National Policy for Children in 1974 was a landmark event. It not only brought children to sharp national focus leading to declaring them as supremely important asset, but also led to enumeration of fifteen point action programme relating to a wide spectrum of measures and services devoted to them before and after birth and through the period of growth. As a sequel to the thrust of the National Policy, backed-up by the constitutional commitment to the child citizen and growing International recognition to the rights and interests of children, several child-centred initiatives in the areas of health care, nutrition, custodial care, skills development, education etc were undertaken in the last three decades in India. More significant and better known have been certain legislative initiatives such as the Juvenile Justice Act 1986, the Child Labour (Prohibition and Regulation) Act 1986, The Juvenile Justice (Care and Protection of Children) Act 2000[1] and the proposed the National Commission for Children Bills 1994 and 2001. But most of these initiatives, whether involving the ratification of the U.N. Convention on the Rights of the Child 1989 or handing down new and progressive laws or judicial pronouncements relating to children, have only helped in enriching the normative aspect debate and, in a way, added to the child friendly normative rhetoric. This provides a sharp contrast between the normative rhetoric and realities at the ground level, which are marked by 'faulty' or even non-implementation of the norms. This leads to perception of children at two distinct levels: First, that is primarily concerned with the normative framework and its philosophical justification, and second, that focuses on the implementational realities, including the forces that inhibit the implementation of the norms.

The book under review is primarily based on the second level of perception. As indicated in the prefatory note, "... The present study, by contrast, focuses on the outcomes as reflected by various key indicators of child development... Most studies on child development pick up specific areas. The need, for an effort which brings together different sectors

1. The latest in the list is the Goa Children's Act 2003 that provides a comprehensive legal framework to protect, promote and preserve the best interest of children in Goa and to create a society that is proud to be child friendly".

of child development has been voiced at many forums. The present study is an attempt to fill this gap, and is of the nature of an overview of the current state of India's children". (pp. 17-18) After adverting to the major concerns taken up in the book the author also refers to the target population that is in his mind thus: "The text is meant for the general reader interested in social developments and aims at communicating with a wide audience so as to share with persons of diverse educational backgrounds the key child development issues". (p.18) Thus, the book promises to be helpful in proper identification of the core problems of Indian children and generate better understanding of measures and programmes undertaken for the amelioration of their plight in diverse sectors.

The main theme is spread-over in five chapters, thirty figures, one hundred and fourteen tables, six boxes, bibliography, index that together run into 341 pages. The first chapter titled as "The Setting" envisages to discuss certain key social and economic factors like the population, sex ratio, rural and urban distribution, expectation of life at birth, age composition, work participation, poverty, literacy, housing and amenities etc. The chapter serves as a useful backdrop to the problems taken up in the subsequent chapters, namely "Struggle for Survival", "In School, Out of School", "Little Toiling Hands" and "Other Disadvantaged Children in Need of Care and Protection". Chapter 2 that is devoted to Right to Survival is rightly given the most exhaustive treatment running into 100 pages. The scientific discussion on Infant Mortality Rate, Child Mortality Rate, Female Foeticide, Female Infanticide, Childhood Diseases, Immunization and other Health and Nutritional Care Measures is most exhaustive, with statistical data presented in tables and figures. The conclusion shows slight decline in infant mortality and child mortality rate, but the outcome is much better in urban areas as compared to rural areas. Furthermore, the state of children's health is shown to have a direct relationship with the state of mother's health. Similarly, Chapter 3, running into 75 pages is devoted to Right to Education. The chapter begins with a brief mention of the normative mandate enshrined in the Constitution and the Supreme Court rulings on the point. The chapter provides, a useful discussion relating to realities of primary and secondary education in urban and rural regions. The statistics relating to enrolment in primary and secondary classes and rise in the number of primary and secondary schools appears to be impressive at the first sight, but examining the reality closely leads to disappointment in the words of the author himself thus: "There has unfortunately come into existence a big class divide and a rural - urban divide in education in terms of facilities and quality which has serious



social consequences... Schools in backward rural and tribal areas are the most neglected and the standard of teaching very poor. Even in other areas, schools to which the children of underprivileged have access are run by the State or local authorities and have a poor record of performance". (p. 216)

Chapter 4 relating to Child Labour has explored all possible dimensions of the social problem. Responding to the often resorted distinction between child labour and child work the author has proposed a child-friendly conceptualisation thus: "When the child is denied his childhood, deprived of opportunities to develop, cannot go to school, and has to work in conditions which endanger his physical and mental health, it becomes a clear case of where the child's future is being abused by adults to fulfil their needs at the cost of the child's needs". (p. 221). The discussion that follows the aforesaid sensitive conceptualisation relates to major issues such as magnitude, age distribution, sex distribution, regional and state variations, causal factors, and element of exploitation, legislative action and role of International and Non-governmental agencies. In the context of legislative action, the author appears to have overlooked the magnificent contribution made by the Supreme Court through its ruling in *M.C. Mehta v. State of Tamil Nadu.*[2] In the legal circles the decision is known more for the Order of December 10, 1996 in which the Court passed series of directions that significantly affected the implementational reality, but equally significant is the relatively less known Order of December 18, 1996[3] that has rationalized the child labour ruling further. Summing up the debate the author makes these pithy observations: "... the State has tacitly recognised employment of children, whatever the age, as a current socio-economic reality... In fact the first four decades after independence could be characterised as a prolonged period of dormancy, as the problem of child labour received little funding, support for tackling the problem in a developmental perspective as recommended by various Committees/Commissions and the laws are hardly enforced." (pp. 263-64)

The last chapter is like an omnibus clause that lumps together a wide range of diverse categories of children like children in conflict with law, street children, sexually abused children, child-beggars, destitute or sick children and drug addict children. The coverage given to such a vast category in bare 50 pages appears to be inadequate. Juveniles in conflict with law itself has so many issues that to do justice to it would require

2. A.I.R. 1997 S.C. 699.
3. Writ Petition (C) No. 46770/1985.

more exhaustive treatment, particularly because this category is covered by an elaborate legislative framework and judicial pronouncements.

Going through this densely written and excellently brought-out book, which is supported by scientifically obtained statistics and very well presented figures, table and boxes, is a sheer delight and an enlightening experience. But at times one is left feeling that perhaps the value and criticality of the content could have been further enhanced had primary and secondary data from informal and individual and NGO research sources been brought in. Finally, a book on a theme relating to children, particularly when it claims to "keep promises", cannot avoid taking clear sides. On the issues of child labour, child education and child abuse the author appears to maintain fair degree of neutrality that come from his long service background in the social welfare bureaucracy, but some of us who have the privilege of knowing the author would have liked the academician in him to 'rise up' once again.

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MOGHA'S LAW OF PLEADINGS IN INDIA WITH PRECEDENTS. By S.A. Kader and G.C. Mogha. Sixteenth Edition. Calcutta: Eastern Law House 2002, Pp. xxxiii+1091, Rs.670/-

The object of pleadings in litigation, more so in civil litigation, is to ascertain the dispute between the parties, to narrow down the areas of conflict and to determine where the parties differ. To achieve this objective, it is incumbent on the parties to present their case in the pleadings with precision and clarity to enable the court to decide the *lis* between the parties and render quality justice. It is a well settled rule that no evidence can be led on a plea not raised in the pleadings, and no amount of evidence can cure the basic defect in the pleadings.[1] Courts have always frowned upon vague pleadings.

It is the responsibility of the lawyer to draft the pleading meticulously and for this he has to have a thorough knowledge of the law of pleadings and be familiar with the various forms. Although it may not be possible for every lawyer to become an expert in the art of drafting, it is possible for one and all to strive to give his best. It is equally important that propriety ought to be maintained when drafting pleadings.[2] Recently, the Supreme Court has strongly deprecated false averments made on behalf of the government by an officer of the rank of secretary in the objections raised by the state in a case before the court.[3]

The first edition of the book under review appeared in 1926 when, in the words of Grimwood Mears J., of Allahabad High Court, who wrote introduction to this book, 'abusive, irrelevant and reckless statements in pleadings were common' and this state of affairs was naturally a matter of serious concern for the courts. 'Pleading and Conveyancing' was not then taught as part of the legal curriculum in law colleges. There were no books worth the name on pleadings. Today, law on 'Pleadings and Conveyancing' is a core subject and compulsory course in LL.B. syllabi taught invariably by legal practitioners. Even then, pleadings by and large lack precision and clarity all over the country, although efforts are being made in law schools to improve this state of affairs by attracting talented lawyers to impart practical training to the law students including imparting

1. *Ravinder Singh* v. *Janmeja Singh* (2000) 8 SCC 191 at 194.
2. *Captain Virender Kumar* v. *Union of India* AIR 1994 SC 1711.
3. *Praga Tools Corporation Ltd.* v. *Mahboobunnissa Begum* (2001) 6 SCC 238 at 244.

training in the art of drafting. Indulgence shown by the courts to the bar and the attitude of the courts in refraining from taking too serious a view of shortcomings in pleadings except in rare cases has contributed to this state of affairs. Significant improvement in having quality pleadings is possible only if the law schools, the bar and the judiciary collaborate and make a real, earnest and concerted endeavour in this direction.

The present book has undergone 15 editions which fact amply demonstrates its intrinsic merit as regards contents and quality. The book has over the period of time become a classic and is still unrivalled in that respect. However, since law is growing constantly by legislation as well as by judicial decisions, while revising even a standard treatise it becomes necessary to incorporate new problems and solutions thereto. Subsequent editions of any work have to keep pace with developments of the law but the difficulty of keeping abreast of it becomes more pronounced in cases where the author who took pains on the writing of his book is no more.

The editors of the present edition, S.A. Kader J., a former judge of the Madras High Court, and Mr. G.C. Mogha, son of the author and a former District & Sessions Judge, have painstakingly revised the present 16th edition and have incorporated recent case law at appropriate places which has added to the utility of the book.

The book has been divided into four parts. Part-I contains the principles of pleading;[4] Part-II deals with precedents (forms of petitions, applications and also contains forms of pleadings in a large variety of suits);[5] Part-III incorporates forms of various writ petitions which can be filed before the Supreme Court and the High courts under Articles 32 and 226 of the Constitution respectively for enforcing fundamental and other legal rights; and Part-IV comprises some forms of election petitions.[7] The book also contains an index to Part-I of the book to facilitate easy reference to the index of precedents and table of contents.[8] In Chapter XVIII of Part-I the editors have added salient features of the Conciliation and Arbitration Act 1996 and have also highlighted the material changes in the law of arbitration introduced by the said Act.[9]

4 S.A. Kader & G.C. Mogha *Mogha's Law of pleadings* in India *with Precedents* (Eastern Law house, (2002) at 3-413.
5. *Id* at 417-1002.
6. *Id.* at 1005-1045.
7. *Id.* at 1049-1055.
8. *Id.* at 1059-1091.
9. *Id.* at 379-381.



Although in the preface to this edition, the editors have stated that they have included model forms under the Administrative Tribunals Act 1985, The Recovery of Debts to Financial Institutions Act 1993, and the Consumer Protection Act 1986, but one finds only a brief introduction in Chapter XVIII to these legislations.[10] There are no model forms under any of these legislations given in Part-II, of the book which ought to have been included as common people approach the forums constituted under these legislations even without assistance of a lawyer. Inclusion of standard formats under the Administrative Tribunals Act and the Consumer Protection Act, in particular, would have added to the utility of this book and made this book more useful for the common man as well. The discussion on the writs in the same chapter is lively and upto date but the discussion on public interest litigation is rather sketchy.[11]

There is no reference to the Companies Act 1956 - a legislation which in its own right has assumed great importance and legal practice in this area has become a speciality in itself The forms of petitions under the said Act are conspicuous by their absence.

But for the shortcomings referred to above, the present editors have done a commendable job in revising the book. It is hoped that in the future editions these deficiencies will be looked into and this classic work would be further revised and kept upto date by these editors who are knowledgeable and experienced persons.

This new edition of the book will serve as a good guide for legal practitioners and prove particularly valuable to those new comers in the profession who join it with zeal to master the art of drafting.

*Bushan Tilak Kaul**

10. *Id.* at 405-409.
11. *Id.* at 397-405.

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A.N. SAHA MARRIAGE AND Divorce. By M.N. Das. Sixth Edition. Calcutta: Eastern Law House, 2002. Pp 95+1151, Rs 850/-

Importance of marriages in Indian society is undisputed despite the courts decriminalising live in relationships[1] though not recognizing it as conferring any legal status on the parties. For a majority of Indians therefore only marriages accord legal, social and sometimes even religious recognition to the spousal relationship; and become occasions to be celebrated with gaiety, pomp and show amidst friends and supporters. People also spend lavishly on ostentatious weddings as these are still perceived with hope to be a one time affair by the bridal couple and their immediate family members. Its breakup either by the loss of life of the partner or by divorce is unthinkable at the time of its solemnization. Thus marriages are celebrated with joviality and their break up is full of gloom; a rude shock accompanied with a feeling of despondency. This is despite the fact that the social pattern of western culture is gradually percolating the roots of Indian society. Divorce in India is still feared; is not even remotely contemplated at the time of solemnization of marriage, but is no longer a stigma or a taboo in the sense it used to be. In addition dowry is branded as illegal; its return to the bridal family in the event of a break up and lack of hesitation on the part of the young women to use Section 498A of the Indian Penal Code against the in laws (at least in the metropolitan areas) with increased parental support has given a huge business to lawyers dealing with matrimonial matters . With strained relations and a vehement desire to teach the other spouse as bitter a lesson as possible, the parties who earlier took the vows, to remain with each other till death do them apart, now enter into a nasty match of mudslinging in the court while trying to get out of this relationship. Trapped in the web of multiplicity of laws applicable to their relationship from various angles, civil and criminal, they become pawns in the hands of lawyers having only a monetary interest in their clients. The religious based application of laws relating to marriage and matrimonial remedies only adds to their bewilderment. In this scenario any literature on family laws becomes of vast importance to not only the practitioners but also to the parties and their near relations in trying to find out which religious

1. *Payal Sharma* v. *Superintendent Nari Niketan Kalindi Vihar, Agra* AIR 2001 All 254.



based or secular marriage law will come to their rescue. The book[2] under review therefore is of vital significance in this area.

Another factor that assumes immense importance is the status of women as far as the interpretation of certain aspects of matrimonial jurisprudence is concerned. Should the traditional expectations of differential behaviour, assignment of duties, their adequate or inadequate performance, classification and imposition of concepts of wage earner and home makers and the breakup being a direct result of a non compliance or inadequate compliance with these cherished ideals be of substantive relevance? With gradual emancipation in the overall status of women should the shackles of stereotyping of roles, continue to bind with justifications a married women even amidst the Constitutional guarantees of gender parity? These are questions that need to be explored in any literature covering the discussion on the matrimonial legislations.

The book is divided into 28 chapters and 27 appendices and discusses the laws of marriage, marriage between heterosexuals and homosexuals[3]; matrimonial remedies of restitution of conjugal rights, nullity, divorce, maintenance, and dowry as is applicable to the various disparate religious communities in India. Strangely enough though the book is titled "Marriage and Divorce" and not "Family Law" the author also deals with the law relating to adoption and cross-country adoption in around forty seven pages. The emphasis is more on cross country adoption as the domestic law has been briefly summarized. One wonders at the significance of titles like "Revised central government guidelines to regulate matters relating to adoption of Indian children"; "Role of Central Adoption Resource Agencies" and who are its members; its functions; structure; renewal; recognition and withdrawal of recognition procedure; and finances of voluntary coordinating agencies in this book. The discussion though material in itself, cannot be regarded as an important part of a book on laws of marriage and divorce. The appendices running into 400 pages contain twenty different legislations relating to the laws of marriage and divorce, Rules of the different High Courts, Rules with respect to the registration of marriages, Parsi Marriage and Divorce Rules, Muslim Women's (Protection of Rights on Divorce) Rules, Family Court Rules

2. A N Saha, MARRIAGE AND DIVORCE 6th Edition by M N. Das, (2002).
3. *Supra* n. 2 at 46.
4. *Supra* n. 2 at 712, heading 16 "Adoption by Christian Couple". See also pp. 708-709 topics 3-8; and foreign marriages between Hindus and Muslims. Under the title "Foreign Marriages at p. 704 the author discusses just one case without any further discussion.
5. *Supra* n. 2 at 92.

and model forms of petitions; plaints and defences. The coverage appears to be extensive from the detailed synopsis that precedes every chapter sometimes running into more than one page. It is beneficial to the reader as the desired topic can be easily accessed without turning page after page. However though the synopsis on each topic shows a wide range of sub headings relating to the chapter, not all sub topics have been given the same treatment. In fact some of the sub headings though worthy of elaborate discussions have been dismissed in just three or four lines. In many cases the sub heading seems to be influenced by the ratio of a single case given in two to three lines without any related statutory provisions or any further discussion. Notable among many others are sub-headings dealing with constitutional validity of Section 9 of the Hindu Marriage Act 1955 i.e Restitution of Conjugal Rights and validity of marriages solemnized after the conversion of a Hindu married man to Muslim faith to a Muslim woman[6].

Right in the preface while making some preliminary observations with respect to importance of marriage and the need of every individual to have the security that only a family can provide, the author quotes with approval the following passage from (Man the Unknown):

> The laws relating to education and specially to that of girls, to marriage and divorce should above all take into account the interests of children. Women should receive higher education, not in order to become doctors, lawyers or professors, but to rear their offsprings to be valuable human beings.[7]

Her very existence in this world therefore is to upbring the children and whatever is her education should be centered around these factors. To give effect to the above mentioned opinion right from childhood a girl should be taught the art of homemaking and pleasing her would be in-laws and her textbooks should be confined to cookery lessons and attaining perfections in the job of child bearing and rearing with the primary and ultimate aim in her life being marriage. Her utility for a purpose undermines her personal ambitions and even her consent. Such observations do come as a surprise as strangely enough the author does not have any word of advice in matrimonial behaviour to Indian men or for their attitudinal change nor has, any quotes for the same. The breakup of marriage is projected as a direct result of a behavioural or educational level change in women rather than the perpetuation of stereotyping of roles for men and

6. *Supra* n. 2 at 46.
7. *Supra* n. 2 at 5.



women which he seeks to legitimize by quoting such orthodox opinions. Extremely unfortunate as the author displays a lack of gender sensitivity and seems to espouse the typical patriarchal ideologies that Indian women are trying to liberate themselves from.

As application of family laws varies depending upon the religion of the parties, their domicile and sometimes even with the form of marriage they might have undergone a discussion on which family law amidst the multiplicity of family laws will govern whom is of immense importance. The author errs here as while discussing the application of family laws to Hindus. He observes.

> [e]very Hindu domiciled in India is governed by Hindu Marriage Act[8]

The statement is incorrect as all Hindus domiciled in India are not subject to the application of Hindu Marriage Act 1955. Hindus in the state of Goa and the Union Territories of Daman; Diu and Pondicherry are subject to different laws as far as marriage and matrimonial relations are concerned. The entire chapter on application of Marriage Acts is silent on this aspect.

Similarly while discussing the application of laws of marriage for the Christian community the author confines his discussion to only the Indian Christian Marriage Act 1872 and the Divorce Act 1869 but is silent on the laws applicable to the Christian community in Goa, Daman and Diu that are at variance with the above mentioned laws. Further with respect to acquisition of marital status the author observes:

> Marriage being a personal right, the spouses after a valid marriage are entitled to live openly to the knowledge of all members of the community or locality in which they live and by such living they acquire married status.[9]

The statement appears to be strange. Does that mean that married status cannot be acquired if they do not live openly? Or does it mean that no one except spouses are entitled to live openly even in light of the fact that the courts have recently upheld the right of parties to be partners 'in a live in relationship? Acquisition of married status is by getting married to each other validly and not merely by living together openly within the knowledge of the members of the community or the society. A marriage between two persons even though performed without the knowledge of

8. *Supra* n. 2 at 21.
9. *Supra* n. 2 at 39.

their parents or society if is otherwise valid will confer on the parties married status irrespective of the fact that they might not be living together. The author himself contradicts his earlier statement as in the next line he says "Recognition by family or community is not a precondition for married status".

One of the highlights of the book is the discussion relating to marriage and conflict of laws[10] where the author states the position of marriages under different municipal laws, marriage on high seas and recognition of overseas divorce.

One of the major problems that a married woman confronts in the event of a matrimonial breakup is where to live? Commenting on the right of a spouse to have a matrimonial home[11] the author gives in detail the law in England providing an insight into the relevant provisions of Matrimonial Home Act 1983 but fails to state the relevant Indian situation. Similarly while dealing with the concept of matrimonial property the author is totally silent about distribution of matrimonial assets in the event of divorce of the spouses where during the subsistence of marriage the property was acquired by the joint efforts of both the husband and the wife but the efforts were not monetary in nature, for example, where the wife is a home maker and enables the husband to take a gainful employment after assuming the domestic responsibilities. Mention can be made here of the concept of the matrimonial property under the laws prevalent for the inhabitants of Goa, Daman and Diu where pursuant to an ante-nuptial contract the separate acquisitions of the husband and the wife during the subsistence of the marriage belong to both of them. Though the administration of the property is in the hands of the husband generally, he cannot alienate it nor transfer it in any manner without the consent of the wife. In the event of the death of either of them the property is first divided into two halves and one half is given to the surviving spouse without prejudice to the rights of the spouse to inherit the property from the other half[12].

There are certain topics whose relevance cannot be explained e.g. a topic like Registration of Portuguese Marriages[13] under the chapter Solemnisation and Registration of Marriages. Amongst the matrimonial legislations applicable in India this special emphasis only to Portuguese

10. Under chapter 27.
11. *Supra* n. 2 at 103 -105.
12. For details see Poonam Pradhan Saxena, *Concept of Matrimonial Property* in Kusum (ed.) WOMEN-MARCH TOWARDS DIGNITY (1991).
13. *Supra* n. 2 at 89



marriages and not marriage under any other law appears perplexing.

As far as the law relating to Indian Muslims is concerned the position stated in the book is deficient in several respects. The only area given an adequate treatment is the permission of limited polygamy given to Muslim men by discussing Constitutional Challenges to it and including the relevant position of Pakistan and Bangla Desh laws[14].

Firstly, the law of marriage has deviations depending upon the sect to which the community belongs. However the author does not bring out nor makes clear the distinctive features of Sunni and Shia law of marriage for its solemnization and validity except where he deals with the title "Divorce by Husband: Shia law"[15].

Secondly, while discussing the validity of Muslim marriages the author notes the controversy and conflict of juristic opinion with respect to the validity of marriages of a Muslim man with a Hindu woman and follows the judgment of Kerala High Court[16] declaring that a marriage between a Muslim man and an idolatress as void and not merely irregular[17] . However the correct position is that some schools of Islamic law do permit the marriage between a Muslim man and a non-Muslim woman. These marriages are irregular and though the wife of an irregular marriage does not inherit the property of her deceased husband, the children born out of this irregular wedlock inherit the property of the father[18].

Further the arrangement of the topics in general is not according to any section appearing in any of the matrimonial legislations nor is in accordance with the sequence of the grounds of a particular matrimonial remedy. The discussion is spread over seven independent chapters titled Mental Capacity, Cruelty, Desertion, Adultery, 'Pregnancy by a person other than husband,' Impotency and some other grounds for reliefs, i.e. grounds for different matrimonial remedies. It makes the reader go through pages after pages to get a clear picture of which law will be applicable to his case, which ground can be availed of by him and what would be its requisites.

Though the book appears to be voluminous the relevant portions containing substantive theoretical law on marriage and divorce is spread

14. *Supra* n. 2 at 670.
15. *Supra* n. 2 at 681.
16. *Chellamma* v. *Hamza* (1986) 2 Cur Civ Cas 807.
17. *Supra* n. 2 at 672.
18. See Mulla's Principles of Mahomedan Law 19th Edition by M Hidayatullah and Arshad Hidayatullah 227 (2002).

over 400-500 pages. It can be confusing for a beginner as it does not clarify certain basic principles of family laws, such as what is the basis for application of family laws, what are the different remedies available in what situations and on what grounds.

The book is average and can be used only by family law practitioners and those familiar with specific fundamentals of family law.

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THE ARBITRATION AND CONCILIATION ACT 1996. By Prafulla C. Pant. Sixth Edition. New Delhi: Butterworths India, 2001. Pp. LIX + 865, Rs. 795/-, ISBN 81-87162-33-6.

Arbitration and conciliation are different modes of alternative dispute resolution. Following the globalization of the Indian economy, it became indispensable to amend the Arbitration Act 1940 and to bring it in conformity with UNCITRAL Model Law on Commercial Arbitration 1985. Today, parties to the business contract prefer arbitration clause to traditional litigation which is unreasonably long, expensive and cumbersome. Thus, in order to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, the Parliament enacted Arbitration and Conciliation Act 1996 (hereinafter referred to as the Act).

The book under review is a good treatise on the Act and is mainly divided into four parts. The first part contains, inter alia, supplement to the sixth edition (Present edition). The second part is an introduction of the subject, whereas the third part contains the text of the Arbitration and Conciliation Act 1996. The fourth part consists of appendices.

The present edition is the sixth edition of the book. It is quite surprising that it also carries a supplement to the sixth edition in the first part in which gist of cases decided in the year 2000 has been given. Though the book has been published in 2001, yet the aforesaid cases do not find a place at relevant places in the commentary.

In introduction, the editor gives a historical background of the law of arbitration in India. A bird eye view of the Arbitration Act 1940 and the Arbitration and Conciliation Act 1996 is also given in the introduction.

In the third part, the editor reproduces the sections of the Arbitration and Conciliation Act 1996. Each section is followed by synopsis and commentary. As the Act is based on UNCITRAL Model Law on International Commercial Arbitration, 1985 to a great extent, the editor reproduces it after preamble and section I of the Act. The commentaries on various sections of the Act contain corresponding provision of the Arbitration Act 1940 and case law.

The last part of the book contains XXIV appendices on the subject. These are statement of objects and reasons of the Arbitration and Conciliation Bill; notes on clauses of the Bill; memorandum regarding delegated legislation; Arbitration Act 1940; Arbitration (Protocol and Convention) Act 1937; Foreign Award (Recognition and Enforcement) Act 1961; Arbitration Act 1950 of England; Arbitration (International Investment Disputes) Act 1966 of England; Arbitration Acts of 1975 and 1979 of England. "Rules of Arbitration of the Indian Council of Arbitration 1993; English Arbitration (Commodity Contracts) Order 1979; English Chartered Institute of Arbitrators Arbitration Rules 1988; London Court of International Arbitration Rules 1985-, ICC Court of Arbitration Rules 1988; UNCITRAL Arbitration Rules 1976, UNCITRAL Conciliation Rules 1976; European Convention 1961 on International Commercial Arbitration; the Settlement of Investment Disputes between States and Nationals of other States. The Chartered Institute of Arbitrators Short Form Arbitration Rules 1990-1 model forms, Understanding on Rules and Procedures Governing the Settlement of Disputes; schemes of appointment of arbitrators under the new Act by the Supreme Court and High Court, and the Interest Act 1978.

Though some of the appendices have been repealed, nevertheless they are useful for the purpose of research and study. However, inclusion of Interest Act in the appendices is not required. Further, the UNCITRAL Model Law on International Commercial Arbitration 1985 should have been given in the appendices. The editor has failed to provide the text of UNCITRAL Conciliation Rules 1980.

Barring the aforesaid shortcomings, the book no doubt is a good treatise on the subject as it provides adequate material on the subject. The book is very useful for practitioners, researchers, academicians, judges and students. It is worth keeping in all the libraries. The cases however should be updated and included at the relevant places in the commentary.

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THE INDIAN ADMINISTRATIVE LAW. By M.C. Jain Kagzi. Delhi: Universal Law Publishing Co. Pvt. Ltd., 2002. Pp. lviii + 542, Rs. 225/-.

Administrative law has been characterised as the most outstanding legal development of the twentieth century and it has witnessed remarkable advances in recent times. It is a branch of law, which is being increasingly developed to control abuse or misuse of governmental power and keep the executive and its various instrumentalities and agencies within the limits of their power. The rule of law which runs like a golden thread through every provision of the Constitution and indisputably constitutes one of its basic features requires that every organ of the State must act within the confines of the powers conferred upon it by the Constitution and the law, and administrative law is that branch of the law which seeks to ensure observance of the rule of law.

The book under review is a critical, indepth study with live insights of the administrative law in India. Kagzi's book first published in 1962, has been thoroughly revised and updated in the present sixth edition in 2002. The book is one of the best treatises on the subject and this edition has further taken it towards the goal of excellence. There are considerable improvements and additions in this edition besides updating the book with case law and relevant legislation.

The kaleidoscopic changes in administrative law have revolutionised whole perspectives and caused shifts in doctrines and thoughts in respect of essential principles. The present book is the author's feeble effort to articulate some of these changes within the limits of understanding and intellect. He makes an attempt to treat the subject as an instrument of State activism, and implementation tool for fundamental principles of State policy. To an extent, review and revision of the book stresses the law in action which is the basis of administrative law.

The book is divided into twelve chapters. Each chapter contains thought provoking discussion making the book an excellent, outstanding, brilliantly enjoyable and original piece of research work on the text of administrative law.

In Chapter 1, Introduction, the author attempts to delineate the nature, scope and definition of administrative law, growth of administrative law in UK, USA and India, difference between constitutional law and administrative law, doctrine of separation of powers and rule of law. The author describes the sociological aspect of administrative law. Administrative

law deals with the social well-being by helping as a remedy in the hand of weaker sections against the abuse or misuse of law by the public authorities. The administrative law through its various facets serves the principles of legal and political equity to every individual in the society.

The author seeks an entirely new functional interpretation of the doctrine of separation of powers. The doctrine on the basis of State action has functionally witnessed a power mix, and expansion of executive administrative power so as to include even quasi-legislative and quasi-judicial power. The emphasis is laid more on balance of powers and a system of checks and balances; and emphatically on minimisation of control of, for instance, the executive on the judicial officers. The Constitution expressly provides this in Article 50 by requiring the separation of the executive and the judiciary. The growth of administrative processes necessitates a reiteration of the rule of law. It ensures proper and orderly exercise of the administrative powers, and softens the rigours of the administrative processes. Its aim is a welfare State based on socialist patterns of society, and guards against establishment of a totalitarian, authoritarian State. The rule of law must be the first casualty to the growth of authoritarianism and establishment of extra-constitutional centres of power. Rule of law is very articulately brought out with reference to the provisions of the Constitution and judgments of the Supreme Court of India.

In Chapter 2, the author discusses the constitution, membership, powers, jurisdiction of the government, administrative bodies and authorities and the statutory corporations with the help of relevant constitutional provisions, statutory provisions and case law.

Chapter 3 deals with the administrative action and process. Administrative action is the core concept of administrative process, because the administrative process alone can cleanse or discipline the administrative action if it goes astray. It is an important factor, which cannot be ignored, that a modern welfare State entails the conferment of discretionary powers on the administration to effectuate wide socio-economic goals. Discretion is a tool of individualization of justice but it involves the possibilities of being misused and exercised in an arbitrary manner. Discussion on administrative discretion unfolds many more deceptions as well as mystiques of the administrative authorities and presents a bitter truth that "absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions." It therefore becomes necessary to confine, structure and check discretion in order to uphold the principle of rule of law in administration. The judiciary has over the years evolved rules for controlling and structuring the exercise of discretionary



power which, having regard to the complexities of modern economy, has necessarily to be vested in different instrumentalities and agencies of the State, so that the discretionary power does not degenerate into arbitrary power. Judicial review can be exercised if the administrative action suffers from the vice of illegality, irrationality, procedural impropriety, arbitrariness or unreasonableness. All the principles of judicial review of discretionary powers fall into three major categories. One, abuse or misuse of power by the authority; two, non application of mind by the authority and three, violation of principles of natural justice. The author discusses the third ground of judicial review of administrative action *i.e.* principles of natural justice. He could have included other two grounds of judicial review in this chapter to make his discussion more complete and informative on the topic.

To enable the administration to discharge effectively the multifarious functions entrusted to it, the administration needs to exercise broad powers of conducting inquiries and investigations into various matters. Chapter 4 deals with such inquiries and investigations. Inquiries into rail, air, factory, accidents, riots and police firing are frequently demanded and instituted by government authorities. These days it is common that allegations of ministerial corruption are publicly made without being contradicted. The author explains ministerial corruption as receipt of bribes, pay-offs, pick-backs, commissions, favouritism, abuse of power and connivance at corruption. *The Pondy Firms License Scandal, The Moily Tapes and The Bofors Gun Deal* are discussed. The author emphasises the desirability of the establishment of ombudsman-type institutions in India, although the Central and State Governments have not been receptive of the idea of their adoption.

In Chapter 5, the nature and scope of administrative remedies and court reviews are quite appropriately discussed in an exhaustive manner. A person who is wronged by an improper administrative act, or an act improperly done must be afforded a redress, and the concerned administrative authority should be asked to refrain from causing an *injuria* or if possible any improper act should be rendered ineffective. The demand for redress must necessitate a review of the administrative act, the nullification of an improper order, repair of the damage caused thereby and lastly, the person concerned should be prevented from being harmed. This must necessitate that the administrative action should be subjected to a review by the higher administrative agency, the normal parliamentary and judicial control.

With the growth of administrative process in the twentieth century, administrative rule-making or delegated legislation has assumed tremen-

dous proportions and importance. In Chapter 6, a comprehensive discussion relating to delegated legislation has been made. Today the question is not whether delegated legislation is desirable or not, but what controls and safeguards can be introduced so that the power conferred is not misused or misapplied. In the control mechanism, the first place is occupied by judicial control. Since delegated legislation suffers from the lacunae of comprehensive publication as well as consultation, what is imperative in this perspective is a legislation providing for mandatory publication and consultation in order to have effective people's participation for better, effective and efficient administration in a country like India with a flourishing democracy having vigorous regard for the spirit of liberty.

Chapter 7 deals with the scope and extent of sub-delegation of legislative power and conditional legislation.

A number of tribunals as attractive forums of adjudication have came up. The tribunals are supposed to be quicker, economical, less formal and possessed of expertise in a subject compared to the courts. Chapter 8 deals with the study of the tribunals at work. Their powers, procedures, provisions for appointment of members etc. are discussed. The topic is discussed incisively and completely.

Under our Constitution the High Courts and the Supreme Court have a wide supervisory jurisdiction over the State agencies, administrative bodies and tribunals. Chapter 9 deals with the writ jurisdiction of the High Courts under Article 226 and the limitations on writ jurisdiction. Chapter 10 deals with the appellate jurisdiction of the Supreme Court under Article 136. Public interest litigation, in brief is also dealt with in the chapter. It needs more elaboration. Many important judgments of the court have been left out. One of the distinctive features of public interest litigation movement has been that from its very inception it became a hypersensitive area and generated a lot of controversies and apprehensions. Discussion on public interest litigation could have been enlarged by discussing its complexities and problems and thereby provoking thinking to make it an effective technique of reaching justice to the deprived sections of the society.

In Chapter 11 the discussion revolves around the concept of liability of the administration in contract and tort. The privileges and immunities of the administration in suits on the ground of sovereign acts are explained with the aid of updated judicial decisions.

Chapter 12 deals with suits against the State and tile public authorities. The constitutional and statutory provisions dealing with nomenclature of the parties, notice and relief to the aggrieved person are discussed.



The author concludes that today we have an established system of the Indian Administrative Law. The fundamentals of the constitutional limitations and the principles of the rule of law, *equality before the law* and the established jurisdictions of the Supreme Court and the various High Courts, and the prescribed procedures are deemed inalienable values of governance, conduct of business of the government and the functioning of the administration at all levels. These have shaped the essential principles of administrative law. The changing political objectives evolving socio-economic order, the attributes of democratic socialism, the policies of social control and public regulation consistent with the norms of socio-economic justice and equality provide the necessary motivations, impulses and articulations of the system. The obligation of the State not to abridge fundamental rights is simply challenging. And, the administrative law provides the modes of redressal to individual persons for grievances against the administrative authorities in circumstances wherein any relief is not given by conventional means and methods. It establishes an equation between a single individual citizen and the machinery of the government. It enables him to stand up to an administrative authority armed with discretion and privileges from compulsory jurisdiction of the law courts. In his interest it prescribes and enforces procedures and limitations of administrative process impels the administrative authority to act in accordance with the accepted standards of fairness and finality.

Kagzi has produced and arranged remarkably his wealth of learning with great industry as well as zeal and the readers will be benefited by the keen study of the vast range of the topics covered by the author of the text book under review. Written a clear and lucid manner, the book is a storehouse of knowledge on the subject and will be cherished by the law students, legal practitioners, researchers, law professors, judges, administrators and tribunal members.

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MITRA'S CIVIL REFERENCE. By M.R. Mallick. Fourth Edition. Calcutta: Eastern Law House, 2002, Pp 1784 + 53, Rs. 1290/-.

The book under review holds itself out to be a "virtual encyclopaedia on civil laws". It contains fifty one chapters, out of which forty three deal with statutes ranging from Advocates Act 1961 to the Designs Act 2000 to the Special Marriage Act 1954. The remaining eight chapters are on important subjects, namely, Accident Claims, Administrative Law, Adverse Possession, Banker and Customer, Environment Protection, Interpretation of Statutes and Deeds, Partition and Torts. The commentary on Arbitration and Conciliation Act 1996, Accident Claims, law of civil contempt, Consumer Protection Act 1986, Easement Act 1882, Indian Trust Act 1882 and Wakf Act 1995 are the new additions to this fourth edition of the book. The chapters relating to Banker and Customer, the Code of Civil Procedure 1908, the Interpretation of Statutes and Deeds, and the Indian Divorce Act 1869 have been revised. The chapters have been painstakingly updated with the latest case law, of both the Supreme Court and the various High Courts.

As regards the diversity of the Subjects covered, a commentary on the Constitution of India in a Civil Reference does appear a bit incongruous, more so, in light of the discussion on Article 20 guaranteeing the rights of the accused in criminal cases. Again, the inclusion of the Bengal, Agra and Assam Civil Courts Act 1887 in a Reference of national civil laws seems inexplicable.

Further, the author, having declared that the book is a "comprehensive study of entire gamut of civil laws in its variegated perspective" runs the risk of having missed out on other fields of civil law (such as those pertaining to court fee and suit valuation). On the other hand, given the sheer number of the statutes and subjects covered, the author also runs the risk of giving a cursory and incomplete treatment to the chapters. The chapters disclose that the author has compiled the case law in respect of select statutory sections and identified subjects. The Index, which is chapter-wise, too, indicates the limited scope of the commentary of the particular chapter. As a consequence, the chapters do not contain a comprehensive nor exhaustive commentary on the statute or the subject under discussion. Given the breadth of topics covered by the book, such a result is perhaps inevitable. Indeed, the value of the book lies in its bringing together in one place the latest case law on a wide, though select,



range of civil laws. The author is to be complemented for his remarkable and imaginative effort in this regard.

The book will be of immense use to the reader seeking to find recent precedents relating to the statutory section or subject that the author has chosen to deal with. The legal propositions and the ratio of the judgements have been formulated concisely and in simple language. The book is extremely well presented, richly bound and moderately priced. It will undoubtedly attract a wide readership from both the Bar and the Bench.

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GOYLE'S LAW OF INJUNCTIONS. By Ajit K. Sengupta. New Delhi : Eastern Law House, 2002. Pp. 62+425, Rs. 390/-.

Injunction is the most used and the least understood term in the law. Therefore any book on this subject in a lean size and at a modest price has to be looked with glasses fitted with lenses of suspicion. The present book under review has to go through this test.

There is no denying the fact that the law of injunction is the most important branch of legal relief available to a litigant. It is equivalent to "First Aid" to the victims of a road accident and if administered at proper time it saves many a precious lives. If the remedy of injunction is exercised in a judicious manner at appropriate time it puts an end to a lot of undesirable and avoidable litigation. It has the potency of nipping the evil in the bud. But at the same time it is not an infallible branch of law. When the relief of injunction is misapplied or abused then the remedy proves to be worse than the disease itself. It is common knowledge that many a public utility projects had been stalled only due to injunctions granted by the courts and then the plaintiff goes on merry-making at the expense of public at large.

Injunction is thus a double-edged sword. It protects and it kills too. The powers of the courts to grant injunction are not only very wide but they are discretionary also. These powers have to be exercised commensurate with sound judicial principles with a view to advance the cause of justice and not to mar it.

In the course of time the principles for the issue of injunctions have become crystallized yet they are the least understood. The moment a persons is confronted with a problem relating to injunction a tug-of-war starts in his mind. He has to weigh the various pros and cons by a mental process and them come to a decision whether the remedy lies or not. It is in these hours of trial the role of a good and dependable compendium becomes indispensable.

It is in this backdrop that the book in question is to be reviewed and to find out whether it is worth its salt or not.

The book is divided into five main chapters as under:

Chapter 1: An overview

Chapter 2: Bar to Injunctive Relief



Chapter 3: Temporary Injunctions

Chapter 4: Perpetual Injunctions

Chapter 5: Injunctions in Particular Situations.

The first chapter gives a general glimpse into the subject. The author has dealt with the subject in a summary manner by taking a bird's eye view. The author has discussed the concept of Mareva Injunction *(pari-materia* to the Order 38 of the Code of Civil Procedure) and Anton Pillar Order. While discussing the principles governing Mareva Injunction reference has been made to two recent cases decided by the Apex Court of India viz. *Mahadev Savlaram Shelke* v, *Pune Municipal Corporation* (1995) 3 SCC 33 and *Sundaram Finance Limited* v. *NEPC India Limited* (1999) 2 SCC 479.

The don'ts of the law of injunction have been propounded and expounded in the second chapter of the book. It is a study of Section 41 of the Specific Relief Act 1963, which lists ten conditions under which the injunction can be refused. The author, in a figurative sense, has appropriately termed them as "Ten Commandments". It speaks of the literary inclinations of the author who has off and on given glimpses of his rich literary style while at the same time keeping his language lucid, clear and laconic.

In the second chapter the author has given a fair treatment to the various prohibitions to the grant of injunction. In the case of breach of contract the principles of 'negative covenant' and the 'contract of personal services' have been fairly discussed. Contracts in restraint of trade vis-à-vis the public policy doctrine has been given adequate coverage. Reference has been made to the celebrated case of *Mogul Steamship Co.* v. *Mcgregor Gow & Co.* (1892) AC 25. A fair treatment has been given to the law governing acquiescence, alternative remedy and conduct of the plaintiff However in discussing the 'personal interest' the author while observing that "he (plaintiff) must have a *locus standi* and not be a busybody", has confined himself to the adversarial kind of litigation only. He has been entirely oblivious of one very important and contemporary branch of litigation viz. the representative litigation commonly known as PIL (Public Interest Litigation). It is hoped that this will be taken cognizance of in the next edition of the book.

While discussing Temporary Injunctions in the third chapter of the book the author has adequately dealt with the "Trinity" principles that govern the grant of temporary injunctions viz. prima-facie case, irreparable injury and balance of convenience. Under as many as forty sub-heads the

author has dealt with various issues such as res-judicata, caveat and restitution etc. The author while dealing with appellate and revisional remedies has also made a passing reference to the remedies available under the Articles 227 and 136 of the Constitution of India.

The provision relating to the consequences of breach of injunction has been very dealt with and all the dimensions of law in this regard have been covered and duly substantiated with judicial precedents of the Apex Court and the High Courts. The remedy under Order 39 Rule 2A of the Code of Civil Procedure has been explored in conjunction as well as in contrast with the remedy under the, Contempt of Courts Act 1971. While relying upon the case reported in AIR 2000 AP 214 (*P. Shanker Rao* v. *Smt. B. Susheela*) the author has rightly pin-pointed, "The court need not wait till the injunction is breached. In a fit case the court can undoubtedly direct police aid as a preventive measure. This power not expressly conferred, is a power incidental or ancillary to the exercise of the power to grant injunction."

Chapter four confines itself to the Perpetual Injunctions. The concepts of breach of obligation, torts and damages have been given adequate representation. The right to property on the basis of ownership and possession has also been discussed. The last (but not the least!) chapter deals with injunctions in particular situations running from Arbitration to Writs and other miscellaneous matters. This chapter has taken a lion's share in the book.

One heartening feature of the fifth chapter is that the author has devoted around fifty pages in discussing the relief of injunction regarding the. IPRs (Intellectual Property Rights). This is a recognition of the fact that the author has been visionary to perceive what an important role the field of IPRs is going to occupy in the near future. The concept like transborder reputation of a trademark, which is a subject of relatively recent origin, has also found its place in the book.

The author has fairly dealt with other matters pertaining to easements, mortgages and trespass etc. Virtually no topic of relevance has been left out.

In the Appendix the important and relevant provisions of the Specific Relief Act, the Code of Civil Procedure and the Limitation Act have been listed for ready reference.

To write a book on a subject as old as the law itself is an onerous task. To sum up the law which is ages old and is constantly evolving in a small book running into 425 pages is a big challenge. To do this requires



extraordinary skills and the author of the book is not found wanting.

There is no dearth of books on subjects like injunction. But Goyle's Law of Injunctions has the potential of creating a niche for itself. The author is at home with the subject and has been able to clinch the issues without mincing words. The author has condensed such an important branch of law in a useful and reader-friendly manner.

The book has been published by the Eastern Law House and the quality work that has gone into editing, proof-reading and printing of the book speaks for itself. The book is nicely bound and clothed in an attractive jacket. No compliments are necessary because quality is its own reward. The book is reasonably priced.

The book can be used as a text-book as well as a referencer. The book is a masterpiece and will prove itself to be of immense use to Judges, Advocates and students of law alike.

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## FORM IV

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

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I, Parmanand Singh, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
Parmanand Singh