DELHI LAW REVIEW

VOLUME XXV : 2003

ISSN 0973-00IX

Mode of Citation : XXV DLR (2003)

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Website : www.du.ac.in/dlr

Annual subscription : Rs 150 (Domestic)
US $ 20 (Overseas)

Back Volumes of Delhi Law Review from Vol. I (1972) to Vol. XXIV (2002) are available @ Rs. 150 (Domestic) US $ 20 (overseas) each (subject to availability).

Published by the Faculty of Law, University of Delhi, Delhi-110007 and printed at Shivam Offset Press, A-12/1, Naraina Industrial Area, Phase-I, New Delhi-110028. Phone : 25796770, 2579019, 25793991.

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Editorial

It gives me pleasure to present before the reader the Silver Jubilee edition of the *Delhi Law Review*. The *Review* started publication in 1972, and in the years since then has been one of the premier law journals published in the country. The *Review* has seen contributions from academics, both within and outside the country, researchers, lawyers and law students. It has been our endeavour to maintain high standards of scholarship and I am sure the *Review* will reach new heights in the years to come.

Legal education in India is presently undergoing a period of rapid change. Changes in the law and legal institutions, both within India and internationally, have demanded that legal education keep pace with these developments. The Faculty of Law, at the University of Delhi has been an early pioneer in legal innovation and continues to be in the front ranks of legal education in India. The *Review* serves as a platform to critically analyse and comment on changes taking place in the legal environment and legal education. Indeed, the emphasis on critical analysis and legal writing, which are emerging as important areas in legal education, only get strengthened by colleagues and students alike contributing to the *Review*. I am hopeful that in the years to come, the *Review* will attract contributions from the best and the brightest in the legal field.

I am thankful to all the contributors of this issue of the *Review*. I am indeed grateful to the Editor, Dr. Kamala Sankaran, and the other members of the Editorial Committee, Mr. B.T. Kaul and Dr. B.K. Raina, for their effort in producing this issue of the *Delhi Law Review*. I am also happy to note that from this year the *Review* would also be available on the Internet making for easier access and wider readership. I thank the Editors and the students who have made this possible. I also thank the printers, Ms. Shivam Offset Press for the fine job of printing this issue. We welcome suggestions for the improvement of the *Review*.

21 June, 2004

Surendra Prasad
Dean and Head
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Constructing A Platform of Memory: Towards A Sociology of Indian Law Reviews

Upendra Baxi[*]

I. Some Disquieting Questions

The Silver Jubilee of the *Delhi Law Review* is a landmark event in the history of contemporary legal education and research in India. The editors of the *Review*, especially Dr. Kamla Sankaran, have done me great honour by their gracious invitation to contribute. Their request has placed a somewhat onerous burden as well because I felt that it was not quite right to yield to the temptation of offering as contribution a slice of my writing in progress. On the other hand, a wholly new offering for such an occasion did not compellingly emerge! I have resolved the tension by addressing here *faute de mieux* the tradition of law school based journals/ law reviews in India.

The task is made already difficult by the word 'tradition'. In fact, it may equally be said that one is rather speaking of its 'lack.' Speaking either way – tradition or lack of it- does not make much sense outside the wider literary traditions of law, by which I mean the well-established ways of writing academic textbooks and professional law books, digests, and commentaries. All this raises many questions. *First*, of course, is the very problem of nomenclature: what is an apt expression here - 'law reviews', law journals, or campus based academic traditions of legal writing? *Second*, how may we characterise the overall Indian literary traditions of law during the long colonial history and the short but tumultuous postcolonial times? *Third*, what may be said to constitute, within this tradition, the relation between law school-based reviews/ journals and the proliferation of lawyerly materials? *Fourth*, in terms of character and content, what does after all, the 'law review' corpus contribute to Indian legal development? Put starkly, is their existence worthwhile and if so, for whom? *Fifth*, how may we relate the situation of Indian 'law reviews' to South / postcolonial knowledge production? Unfortunately, for the present purpose, this listing remains

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illustrative, not exhaustive; and I may here address only some of these complex issues.

In any event, friendly interrogations are necessary both as enabling us to revisit the recent past of Indian legal education and scholarship and as providing signposts for the future. But the undertaking is fraught with difficulties as well. My nearly quarter century long association with renovating Indian legal education and research further complicates tasks of judgement, and with it the management of one's inevitable predilections and biases. Further, no empirical studies yet exist against which one may readily expose oneself to a kind of reality check.

I write this as an act of hope. My hope is to provoke a quotient of self-reflexive Indian legal education and research in first two decades of the 21st century C.E. The first five decades of the last century sustained remarkable articulation of series of anxieties concerning the role of legal education and research; the best and the brightest of Indian academics in the previous half century knew that a lot needed to be done to redeem legal education but remained insecure, and differed a great deal, concerning the best way ahead. There was a robust resistance to any recipe reform. In comparison the pioneers of the new wave legal education working through a profusion of national law schools and new multiplex campus systems managed by a combination of indigenous and expatriate capitalists display remarkable self-confidence. They know *what* is to be done, *why* so, and in which precise *modes*; and further they know that their vision is unerringly *right*. Understandably, of late there has been no anxious discourse concerning nature and future of Indian legal education and research that so thoroughly agonised their precursors.

Already, unfortunately, the writing on the wall remains frightful; the uncritical embrace of the unconstitutional political economy of a globalising political India makes past concerns objects in a Jurassic Park! I hope what I have to say here is received in more constructive affection by the emergent community of Indian legal academics than warranted by the amused, and at times frightened, courtesy extended to half extinct Dinosaurs!

II. The Politics of Naming

The politics of naming presents a story yet awaiting its full raconteur. My primary focus here is with the distinct practices of naming some periodic publications as *reviews* and others as *journals*. But a wider aspect needs acknowledgement at the threshold: the politics of naming University postgraduate law departments, informally or otherwise, as *law schools*. Only careful historical research can determine the origins, spread, and the

politics underlying this change. In the interim, however, some preliminary understanding remains necessary.

We all know, *first*, that not just Indian legal education but the entire system of University education institutionalises separation between imparting undergraduate and postgraduate education, symbolised by the distinction between respectively 'colleges' and 'departments'. *Second*, the extant, even primordial, legal structures allow a differentiation of management between colleges and university departments; the statutory establishment of a Law Faculty, and within it a Department of Law, have eventually signified different pathways for the reform of Indian legal education. Universities having a large number of affiliated law colleges and rather meagrely staffed Departments understandably nurture the preponderant voice of college Principals in matters such as enrolment, curricular planning, pedagogy, and evaluation. *Third*, we also know that such reform proceeded apace in the single Law Faculty departments vested with responsibility for both undergraduate and postgraduate studies; national universities such as Aligarh, Benaras, and Delhi, and state universities such as Chandigrah and Jammu, remained in the forefront of innovation. *Fourth*, at least in one instance - namely Benaras, a law college was transformed into a single department Faculty. *Fifth*, however, we do not precisely know the histories of this separation/amalgamation. *Sixth*, the notion that Universities may have a cluster of departments named as 'school' probably first emerged with the Delhi School of Economics, inspired by the London School of Economics and the novel emergence of Jawaharlal Nehru University structure entailed the invention of a wholly postgraduate university comprising only 'schools' and 'centres'. Neither model seems to have contributed much to the emergence of the idea of a 'law school'. *Seventh*, since 1980s with the inception of the National Law School of India University at Bangalore, and eventual proliferation of kindred brand equity ventures, we enter a signal, if not unique era, of single Faculty University, an idea that has since proliferated in diverse fateful ways.

Even though we lack archival research plotting the graph of this transformation, Americanisation of Indian legal education since 1960s leads to collective self-presentation of University departments imparting both graduate and postgraduate legal education as 'law schools'. However, we ought to note that this transformation begins as a circumstance of voluntary reception of a progressive trend of benefiting from Anglo-American legal education with the heroic efforts of Dean R. U. Singh at Lucknow Law School (the unsung hero of modern Indian legal education) who fostered such future leaders as Professor G. S. Sharma, Anandjee, P.K. Tripathi, A. T Markose, R. U. Tiwari, S.K. Agarwal, and Shiv Dayal.

His impact on his peers (notably Hafiz-ur-Rahman at Aligarh, Dean Ramaswamy at Delhi, and younger faculty elsewhere) was considerable. But for Professor R. U. Singh's imaginative and indefatigable labours (he even sequestered his lifetime earnings to enable some of these eminent colleagues to study overseas, especially in the United States), the eventual Ford Foundation philanthropy that revitalised Indian legal education would never have arrived at any meaningful 'take-off ' stage!

This inaugural debt remains yet to be fully acknowledged and now it is unlikely to ever occur, given the stalling of any creative response by his protégées (some now deceased) of my insistent request that they at least assemble a belated biographical memoir for the lamented R.U. Singh. I may here only say this much in passing: any history of Indian legal education reform that fails to honour the memory of its indigenous founders (and this history includes Professor G.N. Joshi at Benaras, Principal Pandit of the Indian Law Society Institute Law College at Pune and at one moment Dr. B. R. Ambedkar as the Principal of Government Law College, Bombay) remains insolently inaccurate indeed! I hope that this Essay will finally stir some of the younger academics at Delhi, and elsewhere, to redress the manifold and nefarious default of their precursors.

Reverting to the politics of naming, an important contrast is furnished by the fact that Law Colleges have *magazines* whereas Law Schools may paradigmatically only produce journals/ reviews. The *lowly* college magazine is not considered a scholarly production; yet, it historically furnishes a significant outlet for local literary energies. As far as I know, there exists no study of the tradition of college magazines. It is unlikely also that any law library in India holds the entire collection of law magazines. Unlike journal and reviews, law college magazines are thought to furnish a genre of perishable writing.

The label 'law review' has distinctive Anglo-American origins, while the term, 'law journal' is an appellation with many countries of origin. A random title sample reveals an equal distribution of both the appellations. Delhi, Cochin, Chandigrah, Jammu, Nagpur, among others, present themselves as law reviews; Jaipur, Jodhpur, Kerala, among others, name their faculty publications as journals. The two national level academic publications also interestingly use the same appellation: *The Journal of the Indian Law Institute* and *The Journal of the Indian Society of International Law*. The only interesting variation was provided by *The Indian Yearbook of International Law*, inaugurated by Professor Charles Alexandrowicz, and nurtured by Professor T.S. Rama Rao; interestingly the Indian Law Institute based its annual publication not as yearbook but as the 'survey' of

Indian law. Obviously, the model of the *British Yearbook of International Law* influenced Alexandrowicz whereas the Indian Law Institute title was derived, I suspect, from the American genre of 'surveys'. Does this naming choice exert any gravitational weight in scholarship thus nurtured?

Is all this a mere linguistic accident or indicative of diverse institutional histories? Contingency does play a role. Professor Gyan Swaroop Sharma may have been as a Yale scholar influenced by his *alma mater* in terming the Jaipur, and later in a foundational moment the Indian Law Institute publication, as a *Journal*. So may have been Dean Tripathi (Delhi) loyal to his Columbia Law School tradition. This does not quite explain why Dean Anandjee (Benaras) betrayed his Yale association in naming his school publication as a '*Review*.' This, of course, needs to be fully grasped as an aspect of competition, once upon a time, for leadership of Indian legal education between these two stalwarts. Not to be left behind in this was Dean Markose (Cochin) who owed loyalties similar to Dean Tripathi, although his scholarship was stamped more with English rather than American tradition. Dean Paras Diwan at Chandigrah and Professor S.S. Saraf at Jammu were not as was fiercely loyal to their overseas lineages in naming.

Beyond the contingency of scholarly association perhaps remain other histories signifying practices of the politics of naming. I do not know, for example, how distinguished American academics serving as Ford Foundation consultants influenced the practices of naming. It is also puzzling that the design of most law journals/reviews came to be American law school oriented when we recall the Anglophile legal aesthetic of many senior law teachers for whom *The Modern Law Review* signified the epitome of legal scholarship. And *place names*, American style, substituted the thematic motifs, the most poignant indicator of this being the transformation of Delhi University's annual publication entitled *Vyavhar Nirnya* into starkly *Delhi Law Review*. Was this choice an aspect of rush for modernisation of Indian legal education and research that forbade even titular invocations of metaphors of classical Hindu jurisprudence?

III. Features

The history of naming practices, yet to be written, also constructs narratives of juristic transplants. It is clear that while names of literary traditions can be mimed, their histories may not be transplanted. Not being a student of historiography of American Law Reviews is a handicap; but I still suggest an appropriate measure of comparison of Indian Law Reviews should invite attention to the formative era of American Law Reviews.

Prescinding this it is clear that the aspiration levels of the pioneers of modern legal education were high indeed; their aim was nothing short of social reproduction of the paradigm of American legal scholarship on the Indian soil encapsulated in the formula: '*No law review, no law school!*' The British model dispensed with the requirement of a law school journal as a *sine qua non* for providing legal education; this seems to have been summarily rejected by the pioneers of Indian 'modern' legal education.

The distinctive pedagogic extension of 'case method' of teaching law in leading Indian Law Schools entailed the necessary component of faculty and student writing. However, the captains of modern legal education also realised the virtue of hurrying slowly. The practices of this virtue meant that university based departments, which offered undergraduate as well as postgraduate degrees in law, were thought capable of ushering revolutionary curricular and pedagogic transformation within historically given institutional hierarchical governance. The dislocation between innovation and structure is a vast problem in itself, one that needs to be addressed in any serious future work on the 'modernisation' of Indian legal education and research. I here concern myself with this overall problematic primarily in relation to distinctive features of institutional literary productions, to which I now briefly turn.

A. Personnel

Academic institutions everywhere stand infected/ inflected by differentials in the quantity and quality of teaching staff and relations of hierarchy that constitute power and authority. The Indian law reviews/ journals understandably carry their distinctive milieux birthmarks.

A stark fact concerning the historic moment of 'modernisation' of Indian legal education in the last half of the 20th century C.E. is that fully fledged law faculties with tenured staff emerged slowly and unevenly. 'Tenure' is a term of art in American legal education where the privilege of full time teaching positions (or as we say in India, 'confirmed'—as against probationary appointments) is based on peer group evaluation of actual literary contributions and pedagogic excellence as well as determinations concerning potential. Professional politics intrudes but almost never to a point of rendering irrelevant considerations of academic / research contribution and potential. The situation in India is different where statutory selection committees of the University allow only a marginal peer group elevation through outside experts. In any event, very few Indian law schools can match the faculty size of even a modest American law school.

Most University law departments (outside national universities and the fortunate few state university law schools), including the self-styled national law school universities, remain meagrely staffed, especially at senior levels. And across all situational variables, the distribution of tenured chairs in law remains scarce. Most prestigious law schools enjoyed only one and unusually two tenured chairs. Neither Benaras nor Delhi, the engines of 'modernisation' of Indian legal education, had at the foundational moment more than two professors! As late as seventies, I happened to be the fourth professor appointed to Delhi University and that point of time perhaps the only non-Delhi based academic thus invited to a Chair! In this context, duties of memory require us to recall the promising figure of Professor Khawja Ali Darja, whose premature demise deprived the Delhi Law School of inestimable prospect of future leadership. At Delhi, the situation has since quantitatively changed; on a rough count, we have now about 25 professors! This result has been assured by the operation of merit promotion scheme that rewards primarily long years of teaching over demonstrable archive of quality publication; few will contest, upon wise introspection, the fact this quantitative expansion relates inversely to qualitative contribution to Indian legal literary production.

The Delhi Law School has also suffered a great deal of *casualisation of academic labour*, which adversely affects law reviews/ journals as well the overall academic milieu. I refer here to the phenomenon of *ad hoc* recruitment. The Delhi Law Faculty enjoys an unenviable reputation in this regard from its inception until today, where at any given time, the *ad hoc* faculty remains disproportionately far too numerous, with such appointments renewed from semester to semester and year-to-year. The reasons for these are many; in particular, a rather generous study leave provision for tenured teachers necessitates *ad hoc* recruitment of uncertain duration; so do the delays in convening statutory selection committees for full time positions. Further, the process of obtaining the concurrence by the University as well the University Grants Commission for creation of new faculty positions remains cumbersome. I wrestled with this intransigent problem myself, perhaps with modest success, in my own tenure as the Dean of the School and the Vice Chancellor of the University. This is a different story, which I may not pursue here. But this peculiar formation administers amniocentesis to motivational structures for research and writing. Worse still, it creates and sustains a milieu of rather pernicious, often vicious, forms of intra-Faculty politics of dependency and patronage. This warrants further analysis; in this Essay I take all this as furnishing an inarticulate major premise for the state of art.

B. Hierarchy

The ways in which institutional hierarchies are structured remain important, though not decisive, for campus based literary traditions. With notable exceptions, senior law teachers and heads/ deans/ principals do not always favour *primus inter pares* academic cultures, where leadership roles tend to be defined not in terms of *power* but *influence.* When academic hierarchy stands constructed further on the lines of status, somewhat disassociated from active incumbent investment in literary production, growth of literary traditions also suffers.

Outside some state universities where Headship of law departments continues until the superannuation of the incumbent, most central (national) universities adopt the patterns of renewable three years tenure of Headship, which also coincides with Deanship. So over whelning are the institutional commitments of these offices that these beings may aspire to make literary contributions by a heroic struggle to find the twenty- fifth hour of the day! The notable exceptions only serve to prove the rule. It must be acknowledged that participatory decision making process where committees decide routine but important matters such as teaching allocation, examination responsibilities, library management encourages, at least in terms of time management, more senior level participation in legal writing.

However, the overall ethos of administrative cultures remains decisive. Quite often, the institutional Head/Dean/ Principal imagine themselves in the figure signifying an almost Austinian sovereign! More often a 'he,' rather than 'she', he determines the composition of the editorial committee, and the choice of the working editor. This composition remains the ineluctable privilege of the Dean or the Head of the department (as the case may be.) The Dean / Head also stands designated as the editor-in-chief, perhaps for good enough administrative reasons. This signifies 'good' times when the institutional leader is academically proactive and lean and mean time when he/she remains rather lazy! Since regular publication of review/ journal is not a prize item for practices of intra-faculty politics, most literary publications blossom only in good times. For this reason alone, the silver jubilee of the *Delhi Law Review* remains worthy of celebration!

Hierarchy also determines the role of student editorship; as far as I know, no Indian law review/ journal stands edited wholly by students, a major departure from American law school 'vision'. By the indicator of wholly student edited and managed law reviews in India, none may be said to exist in India.

The lack of wholly student managed and run law reviews is understandable because we, overall, lack a full time student body not distracted by other more compellingly relevant (including the scheduled rewards in Indian urban middle class male dowry markets) career pursuits. But this does not explain why quality full time undergraduate students and full time postgraduate students, including doctoral scholars, have yet not been fully involved in the editorial enterprise. I am not saying that student editorship presents an 'unqualified human good' (to borrow a description that E.P. Thompson evoked to describe the 'Rule of Law'), having witnessed personally Hans Kelsen's anguish at the *rejection* of his article critiquing in turn Julius Stone's critique of the Basic Norm, by the student editors of the *California Law Review*, eventually published by their peer group in the *Stanford Law Journal.* Of course, the editorial decision here was simply outrageous! Having said this, I must still add that throughout my literary career in India I have missed the push and the prod of young editorial minds asking me to do even better!

C. Authorship Variables

Other features of campus based literary productions direct attention to authorship and content variables, which in turn are at least partly related to the ways in which frequency of literary publication constitutes the basis of career advancement. For weal or woe, Indian law schools have, overall, rejected the 'publish or perish syndrome'. The habits of regular writing/ publication remain conspicuous by their absence. Only a small percentage of Indian legal academics may claim, in a lifetime of active teaching career, more than three page summation of books and papers; some senior academics, even Professors, in leading Indian law schools even as of now, present woefully slender publication record. This state of affairs, lamentable in itself and presenting a wider problematic, is relevant here as a causal factor partly explaining the retarded development of law journals/ reviews in India.

Concerning the dimensions of authorship, many issues await analysis. Yet, the following features are, I believe, likely to be validated by further research. *First*, compared with the formative years, the contribution by American scholars has dwindled, almost to point zero. The early phase of Ford Foundation funding (especially Delhi and Benaras) brought itinerant law professors, some of them of great distinction, to the Indian Law Schools; the Ford Foundation retreat also signified the end of such creative peregrination. The Fulbright program, still in operation, does not bring such visitors too often. The sites of visitation seem to have now shifted to

National Law Schools. Overall, the lack of American collegial interest in publishing in Indian journals is thus understandable if only as symptomatic of Foundation unaided low intensity concern with Indian legal development.

Second, contributions by law professors remain minuscule, compared with contributions made by teachers at middle levels and young scholars. This seems to hold true also in relation women authorship. *Third*, and related, it is my impression that, overall, male colleagues dominate in terms of literary contribution, despite the otherwise happy social fact, certainly for Delhi Law School but also otherwise widespread, of gender parity in recruitment and forms of further career advancement.

Fourth, student authorship remains puzzlingly slender, given the thriving enrolments for Master's and doctoral programs. The system of shorter articles and student notes still remains rather uncommon. One reason for this of course is that the only form of legal writing, if it may be so-called, that the undergraduate law students practice occurs by way of answers to law examinations! Despite insistent urgings, most notably in the massive Report of the University Grants Commission Curriculum Development Centre (which I was privileged to lead), undergraduate tradition of student writing has yet to emerge, the only happy but still transient exception now provided by some national law schools.

Fifth, the more active faculty authors find the law school reviews too episodic to meet their literary production urges and aspirations. They routinely contribute more to the Journals of the Indian Law Institute, and the Indian Society of International Law. They also adorn mastheads of editorial boards of many Indian scholarly journals, possessed of editorial advisory powers of rejection, or stylistic/ content reformulations, which they would rarely invoke for their own literary contributions! My observation here is based on my experience of editing, even if for a short while, *The Journal of the Indian Law Institute*. Even so, the episodic refereed publication, a *rara avis* for Indian scholarly writing, seems to have had some benign consequences for literary production of Indian law reviews.

Sixth, in terms of social origins and communities of fate and belonging, it remains sadly true that the Indian law reviews have failed even aspirationally to catalyse literary contributions from the scheduled castes and tribes students and teachers, despite the fact affirmative action programmes and policies entail their substantial presence in Indian law schools. In particular, the voices of *dalit* women protesting violence of Indian law and order are *not* at all reflected in Indian law reviews/ journals. Does this symbolise forms of institutionalised racism and patriarchy in Indian law schools, despite some notable reform and innovation?

D. Content Variables

The dimension of content obviously warrants careful analysis. It is my impression that the *Delhi Law Review*, and kindred publications, remains heavily engaged with the following areas: public law, international law, commercial law, and family law. This while reflexive of dominant Faculty pursuits leaves out major areas from engagement such as criminal law, labour law, and legal theory/ history/ jurisprudence. I suggest future explorations based on refined pursuits of techniques of content analysis, as these alone may help unravel area biases in faculty writing and raise pertinent issues concerning this not-so-benign institutionally fostered neglect. However, I complicate this picture somewhat further in Section IV.

Aside from patterns of concentration and neglect, we ought to note changes in content quality. It is my overall impression, as a connoisseur of Indian law reviews/ journals that these have made, as well as registered, some important contributions. The law reviews have excelled at innovating doctrinal analysis of judicial decisions. Critical, if not extended book reviews, constitute another noteworthy instance. Cosmopolitan citation styles have also further developed. Equally, perhaps *more* importantly, these productions have remained hospitable to the pleas for non-doctrinal research and encouraged empirically informed research contributions. I suspect that future content analysis will more than amply validate these observations.

E. Resources

The questions of organisation and resources also need to be empirically fully grasped. Most campus based law reviews remain annual publications; not always published on time; combined issues for two or more years also occur. The frequency and irregularity of publication stand easily explained; the available funds from the University Budget for departmental publications are meagre and remain steady over time despite the rising costs of publication. Because of the high costs that the heavily subsidised University presses entail, the law journals/ reviews hunt for the least expensive commercial publisher. The print run is small; institutional subscription by other law school libraries is insignificant; the legal professionals do not subscribe; the market for subscriptions and back issues remains poorly organised; so do listings, if any, for complimentary distribution in ways that promote further circulation at least among the vast and ever growing alumni. At best, and from year to year, some income is derived from commercial advertisements. No reputed law publisher is inclined to take over the responsibilities of publication and marketing law school reviews because of the foregoing

features: the situation is happily different for other Indian social science disciplines.

Given all this, it is unsurprising that the journals/ reviews remain wholly non-viable and that perhaps no more than a dozen annual University law reviews exist. Worse still, very few law school libraries (let alone the libraries of the Supreme Court of India, and those of the High Courts) possess a full set of these publications. I know from my own experience what an uphill task it is for an individual scholar to have in one's personal collection a full set of these publications; as late as 2004 I find myself a begging even my own Delhi Law Faculty colleagues to keep me up-to-date! There is no reason why some aspects of the resource situation may not be ameliorated by collective institutional effort. Given the current phase of digitalisation of Indian campuses, and the law schools, the way ahead seems to lie in faculty E-journal format.

IV. Originality versus Mimesis

We remain deprived, even orphaned, of narratives of evolution of Indian legal education and research after more than five decades of the Indian Independence, and the Golden Jubilee of Indian constitutionalism, within which the nascent tradition of law reviews may well be understood. This unfortunate circumstance deprives us of any historic base of understanding of continuity and change in legal education and research. One important question arises at the threshold: what marks the difference between colonial and postcolonial Indian legal education and research? This is too large a question to be handled here but I may at least say that traditions of literary production, including of course the law reviews, provide a mirror.

The wider tradition of legal writing continues to flourish in the colonial mode. The unending revisions and re-editions of professional books and treatises remain based on a peculiar conception that suggests that legal professionals need legal *information*, not *knowledge*. Accordingly, professional treatises provide a prolix tour guide to statutory changes and leading judicial decisions, the latter ossified into forms of quick, always ready at hand, summaries of what the judges may be said to have decided. This genre dreads more nuanced and complex academic commentation on judicial (and legislative) developments and blithely ignores any reference to national and campus based law reviews. The eminent corpus of professional law books (Mulla on contracts, Ratanlal and Dhirjalal on penal code, Munir on evidence, Shah on company law, Mulla on Hindu law, and others on an ever growing listing) provides an astounding example of the colonial imagery

of law in which doctrinal scholarship remains summative rather than critical.

The gifted corpus of Durga Das Basu that fostered approaches to knowledges of comparative constitutional law, and the eminent treatise of H. M. Seervai on Indian constitutional law, of course signal some extraordinary departures from this model. These are truly learned works. They also refer to scholarly writings emanating from the United States, United Kingdom, Canada, and Australia, which at one time, before the Internet explosion, were not available to many students and teachers. However, they completely exclude any reference to Indian scholars and law journals. The only scholarship they recognise and cite remains deeply Anglophile. Even Indian legal academics that participate in the tradition of revising/ re-editing 'canonical' works meekly obey deeply entrenched commercial traditions. Professor N.R.M. Menon, otherwise singularly dedicated to innovation of Indian legal education, brought very little scholarly writing to professional notice in an otherwise important reworking of editions of professional treatise on the penal code (co-authored with Justice D.A. Desai). The Butterworths rendition of Indian *Halsbury* necessarily continues the mode of colonial professional publication, despite the fact that some eminent Indian scholars have contributed to its composition. One hopes that the globalising legal tradition represented by the Butterworths Lexis-Nexis does not perpetuate cannibalistic inadvertence to literary formation of even innovative Indian legal scholarship.

We may not, however, ignore signs of hope. Academic treatises in some fields remain exemplary in referring to Indian writing; I refer here to treatises on constitutional and administrative law and jurisprudence produced notably by Professors A. T. Markose, M. P. Jain, S. P. Sathe, M. C. J. Kagzi, S. N. Jain, M.P. Singh, and I. P. Massey. In other domains, for example, the texts produced by Professors Paras Diwan, Tahir Mohammad, and B. Sivaramayya also significantly break the colonial mould.

This having been fully acknowledged, it needs stating that most Indian textbooks, and Indian scholarship generally, remain insufficiently (to put this rather mildly) South comparative. Try a search for references to South Asian, African, and Latin American literature in these scholarly productions (as well as Indian law reviews) and you would draw a total blank! In a sharp contrast, other forms of South Scholarship (especially Malaysian and Singapore and southern African legal literary traditions) remain suffused with Indian literary referential components. Only a few Indian scholars have produced textbooks or treatises in foreign law (I can only recall Dean Ramawsami's great work on the American Constitution's commerce clause,

Professor M. P. Jain's work on Malaysian administrative law and if I may expand the reference to Indo–German comparative studies to Professor M. P. Singh's work on German administrative law). Even pending further content analysis as concerns the wider literary tradition, one may safely say that it remains distinctly colonial, tethered to the imperial metropolis, and mimetic at its very core.

At the same time, we may ignore at considerable historiograhpic peril, elements of originality defining some emerging aspects of postcolonial scholarship emergent in Indian law reviews, within and outside Indian campuses. Academic writing in the *Journal of the Indian Law Institute*, the *Indian Journal of International Law*, the *Annual Survey of Indian Law*, and the sundry Indian law school journals/ reviews have actually contributed to several paths of de-colonising Indian legal development. I may not review here in any rich detail this complex contribution; at best I may randomly silhouette some important profiles.

First, the attempts at judicial archaeology constitute/construct markers of a new Indian juristic literary tradition. Critical celebration of judicial biographies remains a distinctive feature of campus based and off-campus Indian law reviews. The latter, in the pages of *The Journal of the Indian Law Institute*, has celebrated the judicial and juridical lifetimes of some eminent Indian Justices such as Justice Gajendragadkar and Subba Rao, which in some ways influenced my labours in producing, as my very first contribution at Delhi Law School, a book of writings and judgements of Justice K.K. Mathew entitled *Justice Mathew on Equality, Democracy and Liberty*. Equally important is the Special Issue of *The Aligarh University Law Review* on Justice Mahmood, recalling his contributions to the making of the Indian law. This is probably the only law review based celebration of Indian justices under the colonial circumstance.

Second, the profoundly pertinent mediations by Professor Gyan Swaroop Sharma in the pages of the *Jaipur Law Journal* created ferment for contemplation of a distinctive Indian jurisprudence. Gyan also sought to institutionalise this imagery by a plea for a National Law School for India; this inaugural contribution deserves to be at least cherished by the new wave national law schools entrepreneurs.

Third, the *Jaipur Law Journal*, more than any of its counterparts, contributed to the further development of a distinctive Indian jurisprudence through the contributions of Professor G. S. Dhyani and the unsurpassable comparative contract law scholarship of Professor I.C. Saxena.

Fourth, the rather remarkable contributions in the *Benaras Law Review* concerning labour law and jurisprudence (by Dean Anandjee and his

specialist colleagues), preventive detention jurisprudence (notably by Professor Jariwala), judicial process (R. K. Mishra), mark a sociologically oriented legal analysis. Further, this *Review* hosted an inaugural jurimetric exploration of the Indian Supreme Court by George Godbois, Jr., which inspired a doctoral dissertation by Professor Vijay Kumar Gupta (which I was privileged to 'supervise'), since monographically published.

Fifth, the Indian law reviews have offered remarkable nourishment, by way of critical, often insightful, of public law scholarship: this stands signified by contents of several leading law journals/ reviews (notably by Professors P. K. Tripathi, M.P Jain, S. P. Sathe, D.N. Saraf, D.K. Singh, M. C.J Kagzi, M.P. Singh, P. N. Singh, B. Errabi, among others).

Sixth, no less remarkable remain the equally remarkable contributions to the development of 'family law' scholarship by stalwarts such as Paras Diwan, B. Sivaramayya, and Tahir Mahmood, and younger scholars like Dr. Poonam Pradhan Saxena and to explorations of juvenile justice (notably through the active scholarly pen of Professor Ved Kumari).

Seventh, the ongoing dialogue, in the pages of the *Delhi Law Review* concerning social action litigation and the place of human rights in Indian state and societal development stands marked, if I may say so in all modesty, by my much internationally cited contribution to Delhi Law Review entitled '*Taking Suffering Seriously: Social Acton Litigation Before the Supreme Court of India*' and subsequent contributions by Professors P.N. Singh, M.P. Singh, and B.B. Pande.

Eighth, (and without being exhaustive) one needs to acknowledge diverse valued contributions: to public international law (notably by Professor J. N. Saxena), international trade law (Professor A.K. Koul), and intellectual property rights (Professors S.K. Verma and Ashwini Kumar Bansal).

Future content analysis of law review/ journal contributions to the life of law in India will need refinement across many lines. We need to develop impact indicators in several ways that at the threshold raise several simple-looking questions. How often do Indian scholars contributing to legal literature in India, and overseas, cite contributions from campus based law reviews/ journals? What is the citational index of such references in professional treatises and academic texts produced by campus-based scholars and researchers? How often, and in which decisive contexts, do appellate justices invoke contributions made through these productions in comparison with their contributions to the wider tradition of legal writing? How may we assess the impact of campus based, and related traditions of writing on both the development of adjudicatory and legislative policy-making in

India'? What kinds of relation (of hegemony or reciprocity) mark contributions by scholars of Indian origin (now fortunately an expanding genre) and the Euroamerican 'natives'? Many similar questions may be raised.

The impact of campus-based (and wider literary tradition) on adjudicatory policymaking is best accessed by a juridical/ judicial citation index, providing a full measure of its utility and value. Indian academics may take some pride in episodic judicial acknowledgement, though far less profusely available when compared with American Supreme Court footnote references to law review literature. However, if we were to measure deference by later Indian scholars to their predecessors a more despairing situation emerges. No Indian scholar has yet produced a range of references to Indian literary production even remotely comparable to the recent exemplary work by Werner F. Menski's recent *Hindu Law and Tradition* (2003). This work constitutes a monumental reproach to cannibalising tendencies of much contemporary Indian legal traditions of writing.

In this context, the contributions by expatriate scholars (I use this term as signifying non-resident Indians as well as to persons of Indian origin) needs also to be situated in relation to the Indian literary tradition. Expatriate scholarly contributions devoted to Indian legal tradition and development have grown steadily, in the American law reviews, in the past two decades. I may here mention by way of example contributions by Professor Ved Nanda among the senior scholars and among the younger colleagues: Archana Parashar (though located in Australia), Prabha Kottisweran, Vijayshri Sripathi, Jayanth R. Krishnan, Anita Ramsastry, Vikram Raghavan, and Iqbal Ishar. Fortunately, this remains an illustrative listing be cause any further listing must also include some brilliant doctoral / postdoctoral scholars working in American Law Schools. Further, at least one expatriate scholar served time in a leadership position at the National Law School of India University, Banglore; and one Indian scholar has led, for now more than a quarter century, the International Center for Law in Development, New York. All this signifies indeed a promising development. While most of expatriate writings remain wholly advertent, even deferential, to Indian legal literature, contemporary Indian law review writing rarely cognises their literary contributions.

Even as the expatriate contributions have increased, the overall interest in Indian legal development and corresponding literary contribution by Euroamerican 'native' scholars has steadily declined. India-oriented legal scholarship has suffered a serious decline owing to a number of factors, which need to be fully explored, a task that I cannot address here. But an

initial checklist of factors will at least include the following: the already referred-to decline in Ford Foundation auspices for legal education reform, the low rate of scholarly and institutional return for legal academics pursuing 'exotic' comparative law research, the diversion of resources to studying institutionalisation of the 'rule of law' in People's Republic of China and the so-called 'post-socialist' and 'transitional' societies, the fluctuating profile of legal education and reform in overseas development aid North allocations, the complexity of Indian legal development since the Independence, and the rise of Indian legal scholarship, both doctrinal and empirical.

One needs also recall the ways in contemporary globalisation has provided some new diversions: some American law scholars known for their contribution to Indian legal studies have begun acting as 'consultants' (even as 'lobbyists') to transnational corporations, not so much for their erstwhile specialisation in Indian law but for the network of Indian scholarly, and other, contacts they usefully bring to the service of global capital. Thus, for example, both the Union Carbide Corporation and Enron retained as consultants some noted American law professors with India background (their identities must remain undisclosed for reasons of collegial courtesy and reasons of privileged communication.)

Further, given the spurt of globalisation related policy research concerning 'good governance', 'diversity, and 'access to justice' programmes, many American colleagues (among others) with extensive India background lead or take part in missions under the auspices of the World Bank, the Asian Development Bank, the UNDP, the USAID and like agencies. One may then witness, in the near future, some still 'New Law and Development' type policy analysis emerging as contribution to the campus and off-campus based Indian, and overseas, law reviews.

One must remain wary though of ignoring individual biographies. The emergence and development of concern with the law-ways of the non-European Other invites labours of cultural anthropology studying transformations in the dominant/ hegemonic Euroamerican juristic cultures, a theme for another day! In the present context, it may indeed be worthwhile to seek such understanding in relation to a Duncan Derrett or a Marc Galanter.

As concerns the latter, the question surely arises: How may we understand Galanter's past and ongoing luminous contributions to Indian law and jurisprudence? How may we essay an understanding and explanation of his more abiding interest, compared with the episodic excitement of his peers? Specialisation in South development brought rewards primarily

within the Cold War formations of knowledges designated as 'area studies', outside which the system of academic honour and rewards remains competitively insular. What, after all, enabled Marc Galanter to successfully break (and with what future benign impact) through this American institutional mould? Further, how may we understand the social fact (in the Durkheimian sense) that he has been so remarkably able to nurture, with eminent success, a whole new generation of expatriate scholarship and also to furnish sites of comparative learning for generations of Indian students, and scholars, in their itinerant United States locations? He has encouraged serious minded empirical engagement with both state and non-state forms of Indian law in the United States against some heavy odds. He remains the only American scholar to continue to contribute, for now over four decades to critical understanding of Indian legal development — his first publications on India were in 1960 and 1961, and his initial exposure to Indian law was as a (Fulbright) student at Delhi Law School, then under the deanship of L.R. Sivasubramaniam. I suggest that a future volume of the *Delhi Law Review* addresses the full range of his contributions, and their impact on teaching and research in India, and that in doing so raise the further crucial question: In what ways may this engagement with India can be said to have cross-fertilised the American intercultural understanding of transformative role of law in society?

The wider question above also invites parallel labours as well in relation to the extraordinary contribution of Duncan Derrett, further enriched by Werner Menski and the insightful contributions of Dieter Conrad. Apart from furnishing 'symbolic capital' (to evoke Pierre Bourdieu's fecund phrase) respectively to the School of Oriental and African Studies at London and South Asia Institute at the University of Heidelberg, what impact did their work may be said to have on the United Kingdom and German scholarly landscape?

Comparative legal studies, in their various traditions, have primarily traced the impact of dominant Euroamerican law and jurisprudence on the colonial and still *de-colonising* societies; they have not yet even formed the question of *refracted impact*. Is it conceivable that domination traditions may remain entirely unaffected by the culture of the dominated peoples? Does no learning/ unlearning occur among epistemic communities of the North by 'contact' with the global South? Aside from notable exceptions of Charles Alexandrowicz who traced the constitutive impact in the making of modern international law the 'gains of learning' (I here use this Hindu law metaphor with a benign intent!) arising from South (here both Asian and African) traditions and knowledge-ways, and of American comparative law oriented scholarship (enlivened by contributions of anthropology and political

science exemplified by Professors Bernard Cohn and Lloyd and Susanne Rudolph), one notes ruefully that the figure of 'contact' remains itself excessively Euroamerican-centric. 'Post contact' societies seem to be endowed with a permanent essence; they signify overwhelmingly only those affected by past imperial and now post-imperial globalising hegemonies. An authentic postcolonial law review scholarship may only emerge in the future by the posing of the issue of reverse impact. One hopes against hope that the 'new wave' patterns of the Indian legal education and research may address this task adequately.

V. Relationship with Wider Literary Tradition

I have already highlighted in the foregoing the rather difficult relation between professional treatises and episodic law review offerings. Clearly, the aspiration of the founders of Indian law reviews stands fully betrayed, were we to read this as signifying a more creative traffic of ideas between practitioners and professors. On yet another register of cross-cultural learning, there emerges a dire disparity. Leading South law journals, and judicial opinions, especially in Southern African jurisdictions, testify to a rich recourse to Indian law journal materials. The same observation holds true for some interesting developments in Latin American scholarship, which take seriously aspects of social action litigation and public law theory. In contrast, within-India legal literary production remains, overall, insolently insular.

More than five decades of the growth of insularity of campus-based legal scholarship remains refracted as well on other literary production sites, most notably the enviably viable (from the standpoint at least of the long suffering editorial communities of law school reviews) *Journal of the Indian Law Institute* and *The Annual Survey of Indian Law*. During my association with the Indian Law Institute, as its Honorary Research Director (1985-1988), in the course of a project concerning content analysis of the *Journal* (unfortunately unpublished), I was astounded by the relative referential paucity to campus based law review production. The same, more or less, remains true of scholarly contributors to the Journal Section of the *All India Reporter*, *Supreme Court Cases*, and allied law report journal contents. The situation is unfortunately *no* better in the new wave 'leadership' now allegedly offered by national law schools type literary productions.

All this is indeed deeply troublesome. The wealth of citations to Anglo-American law reviews and journals aggravated by voluminous silence to South legal literary production suggests a profound failure on our part to

de-colonise Indian legal education and research. And insofar as this furnishes a 'model' for the contemporary Commonwealth legal education and research, the insufficient pace and rate of de-colonised Indian scenario poses a moment of contemporary danger.

VI. A Conclusionary Word

This elegiac, still far from a funerary, note should serve also as the conclusion of this admittedly curious contribution.

On a more upbeat note, I hope that these scattered observations may contribute to the much needed critical self-reflexivity even on the part of the already heavily globalisation satiated and sedated legal academia, constituted by the newly flourishing entrepreneurial communities of arch-'globalisers' of Indian legal education.

May I also express a larger hope that students of contemporary historiography of South literary productions may find this nascent exploration somewhat worthwhile?

Affirmative Action in Selected Countries+

*Harish C. Jain**

Globalisation and increasing competition pose important challenges to policy makers and organisations. One such challenge is the extent to which equality of opportunity is afforded to all members of the increasingly diverse labour force in the global economy.

This article examines: (a) the experiences of countries where equal employment and employment equity/affirmative action policies have been designed to assist the majority population such as in South Africa and Malaysia; (b) selected country experiences with quotas/reservations, legislated goals and timetables and positive action policies and programmes. For example, India and Malaysia have affirmative action (AA) programmes that are constitutionally sanctioned; the United States has Presidential Executive Orders requiring AA for federal contractors and sub-contractors with mandated goals and timetables; Canada and South Africa have legislated equal opportunity and employment equity/affirmative action (EE/AA) policies with goals and timetables; Britain has a policy of voluntary AA programmes and Northern Ireland in U.K. has legislated goals and timetables and AA programmes for Catholic minorities; and (c) lessons to be drawn from the success/failure of these policies in the six countries, and a analysis of whether or not such policies can be a source of competitive advantage in the global economy.

I. Affirmative Action, Employment Equity and Workforce Diversity[1]

The terms AA, EE, and *workforce diversity* are often used interchangeably. However, they are conceptually different. In the North American context, AA originated in the United States as a response to segregation

+ This article has been partially supported by the Social Sciences and Humanities Research Council of Canada (SSHRC).

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1. This section is adapted in part from Harish C. Jain, Peter J. Sloane and Frank M. Horowitz, Employment Equity And Affirmative Action: An International Comparison (2003).

and the disadvantage of Blacks in employment, education and other areas of life. Some have described AA as "hiring by numbers" due to its focus on increasing the representation of designated groups through targeted hiring, and to some extent training and promotion. AA compliance does not emphasise changing organisational policies, practices, and climate so that designated groups could become equal partners with other workers and share with other employees promotion and rewards for their performance.[2] The term EE was coined by Judge Rosalie Silberman Abella, appointed chair of a Royal Commission on Equality in Employment in 1984 by the Canadian federal government. Judge Abella set a course different from AA and sought to avoid the controversy and stigma attached to it. EE is designed not only to improve numerical representation of designated groups through hiring, but also to provide the supportive organisational culture for the retention, promotion, and training of the designated groups.

Thus, EE is a much more comprehensive strategy that stresses both quantitative and qualitative measures. Accordingly, the emphasis is not only on improving numerical representation but also on providing equality of opportunity through fair staffing procedures and a supportive organisational climate.[3]

In this article, I examine EE/AA with the perspective described above. Both refer to selective proactive policies and programs by government and non-governmental institutions to redress work-related inequalities that exist within countries along racial, ethnic, gender, caste, disability, and other lines. Diversity management, on the other hand, is a voluntary corporate response and an extension, not substitution, of proactive policies to ensure fair treatment of all employees.

AA/EE programs are legislatively driven, whereas diversity management is strictly voluntary and is a strategic corporate response to the growth of diversity in the workforce and is motivated by business objectives. Diversity management can complement, but not replace, EE/AA.[4]

2. Carol Agocs and Catherine Burr, *Employment Equity, Affirmative Action and Managing Diversity: Assessing the Differences* need volume number INTERNATIONAL JOURNAL OF MANPOWER 30 (1996).
3. Harish C. Jain, *Foreword* in Adele Thomas and David Robertshaw, ACHIEVING EMPLOYMENT EQUITY: A GUIDE TO EFFECTIVE STRATEGIES, DEVELOPING THE FABRIC OF ORGANIZATIONS (1999).
4. Harish C. Jain and Anil Verma, *Introduction: Workforce Diversity and Competitive Strategies: Human Resource Policies and Practices in the 1990s* INTERNATIONAL JOURNAL OF MANPOWER 5-13 (1996).

II. SELECTED COUNTRY POLICY RESPONSES TO EMPLOYMENT EQUITY/ AFFIRMATIVE ACTION PROGRAMMES

I have selected several countries to illustrate policy responses to discrimination in employment in the public and private sectors at the macro and micro levels respectively. These are: India, Malaysia, Canada, United States, South Africa, and Britain including Northern Ireland. Employment Equity/Affirmative Action (EE/AA) policies of these countries will be examined in some detail.

In Malaysia and South Africa, AA policies deal with the majority communities. In Malaysia, such policies deal with the *Bumiputras* ("sons of the soil") who comprise approximately 66 percent of the estimated 23.3 million population, Chinese 25.3 percent and Indians 7.4 percent of the population.[5] In South Africa, EE policies in the form of constitutional guarantees of equality of opportunity and employment equity legislation and other policies deal with women (both White and Black) who are 52 percent of the total population and with Blacks who are more than 88 percent of the country's population including men and women who comprise Blacks (76.7 percent), coloureds (8.9 percent), Asians (2.6 percent), and others.[6] In India, the government's task is one of addressing inequalities for women consisting of 48 percent of the population and a significant number of minorities such as scheduled castes (SCs), scheduled tribes (STs).[7] Both groups constitute 21 percent or more than 200 million of the 864 million population as of 1991.[8] In Canada and the United States, EE target groups include racial minorities, women, aboriginal people and persons with disabilities. In both countries, close to 45 percent of the workforce consists of women; racial minorities constitute about 25 percent in the

5. Treasury, ECONOMIC REPORT 2000.
6. STATISTICS SOUTH AFRICA 2001
7. SCs comprise 135 million persons and STs consist of 66 million persons, as of 1991. STs are made up of some 400 communities varying greatly in size, physical characteristics, linguistic and religious usages, as well as traditional modes of livelihood. They do not however, have a distinctive racial, religious or even linguistic identity that marks them off from the non-tribal communities. They remain relatively backward and live in isolation in remote communities. Unlike the tribals (STs), SCs are found in every part of the country and have been closely involved in the life of their respective communities. They speak the language of the region they inhabit. In the past, they occupied the lowest position in the economic hierarchy and have been engaged in manual and menial occupations. The Constitution of India has abolished the practice of untouchability, but they continue to suffer from many disadvantages (Beteille 1993).
8. Harish C. Jain and C.S.V. Ratnam, *Affirmative Action in Employment for the Scheduled Castes and the Scheduled Tribes in India* 15 INTERNATIONAL JOURNAL OF MANPOWER 6-25 (1994).

United States and 10.3 percent of the labour force in Canada. In Britain, racial minorities form 6.5 percent of the population but their visibility is increased by their concentration in large metropolitan areas.[9] Women make up 43 percent of those at work. In Northern Ireland, ethnicity and religion are closely inter-twined. For instance, a person's community of origin greatly affects their marriage partner, residential area, school to be attended by their children, choice of employers, etc.[10] The Catholic minority is sizeable and growing relative to the Protestant majority, (58 percent Protestants versus 42 percent Catholics). AA is the key mechanism, according to the former Fair Employment Commission (FEC) and now the Equality Commission, to affect the working environments inside companies.

A. The Indian Experience

When India became independent in 1947, the nationalist leadership was committed to removing job and other barriers faced by the two groups. They wrote into the Constitution provisions prohibiting discrimination on grounds of religion, race, caste, sex, descent, place of birth or residence: the Constitution came into effect in 1950. The purpose was to eliminate discrimination against the untouchables - Scheduled Castes (SCs) and to facilitate spatial and social mobility for tribal people - Scheduled Tribes (STs).[11]

Members of the SCs and STs are predominantly in the unorganised, informal sector, and thus largely unprotected by employment standards and other labour legislation. A substantial majority is dependent on agriculture but do not own land, which leads to very low wages and bonded labour.[12]

Both SCs and STs were given seats in the parliament and in the state legislative assemblies in proportion to their population. Quotas or reservations provisions were also made for employment in government and public sector jobs (i.e., public enterprises), in the national and state governments, as well as for admissions into schools, colleges, medical and engineering schools.[13] Thus, the Indian experience is one in which AA is defined quite rigidly in terms of reservations and quotas. The rationale for Constitutional safeguards and AA programmes for women and the socially and economically depressed classes - both men and women - lies in the obnoxious practice of untouchability in respect of SCs and exploitative slavery in respect of both the SCs and STs.

Due to repeated criticisms[14] of government policies by the Commission for Scheduled Castes and Scheduled Tribes (set up in 1978 in the Ministry of Home Affairs) the Constitution was amended in 1992.[15] This provided statutory powers to the Commission to investigate and monitor all matters relating to AA measures provided for the SCs and STs. It became mandatory for the federal and state governments to consult the Commission on AA measures. The Commission was also vested with powers of a civil court examining a suit.[16]

In 1990, the Indian Government announced that there would be additional quotas or reservations for "other backward classes" (OBCs).[17] The OBCs are socially and educationally backward classes of citizens and the government adopted a quota of 27 percent for the OBCs on top of the 22 percent provided for the scheduled castes (SCs) and the tribals (STs). Thus, in all, 49 percent of government jobs and admissions into colleges, medical and engineering schools were put aside for approximately three-

9. B. Parekh, Report On The Future Of Multi-Ethnic Britain (2000).
10. R.J. Cormack and R.D. Osborne, Discrimination And Public Policy In Northern Ireland (1991).
11. According to Sowell, "India is not only the world's largest multi-ethnic society but also one of the most socially fragmented, with powerful religious, caste, regional and ethnic differences cross-cutting the society. There are an estimated 180 languages in India and more than 500 dialects." T. Sowell, Preferential Policies: An International Perspective (1990). In India, preferential policies for majorities are state or local, while preferential policies for less fortunate minorities such as untouchables and tribal groups are national, supplemented by local programs.
12. A. Kaur, *India* in Jane Hodges-Aberhard and Carl Raskin (eds.) Affirmative Action In The Employment Of Ethnic Minorities And Persons With Disabilities (1997).
13. Constitution of India, Arts. 15, 16, 46 and 335.
14. The representation for SCs and STs was well below the quotas: 5 percent in Class I jobs against a quota of 15 percent for SCs and 1.04 percent versus a quota of 7.5 percent for STs.
15. The Commission for Scheduled Castes and Scheduled Tribes is now a constitutional authority.
16. A. Kaur, *supra* n. 12. As a result, several measures were adopted, such as: (1) the establishment of the National Scheduled Castes and Scheduled Tribes Finance and Development Corporation—a non-profit company—to assist in employment generation for SCs and STs; (2) aid to voluntary organizations for SCs such as technical training; (3) national overseas scholarships and transportation grants for higher studies abroad; (4) post-secondary school scholarships for SC and ST students including payment of all tuition and compulsory fees as well as maintenance allowance; (5) book banks for SC and ST students; and (6) hostels for girls and boys from SCs; as well as (7) coaching schemes offered through pre-examination recruitment training centres to improve SC representation in various services in the federal and state government and in public sector enterprises.
17. Mandatory Constitutional provisions of reservation of seats in the Parliament and the State Legislatures apply only to the SCs and STs, and not to the OBCs.

quarters of the population.[18] In its decision of November 16, 1992, the Supreme Court upheld the government's order (by a majority of 6 to 3) to provide job quotas for the OBCs. The Court decided that reservations for all three groups (SCs, STs and OBCs) should not ordinarily exceed 50 percent. As well, candidates selected for reserved positions must meet certain conditions of eligibility to satisfy the requirement of efficiency in administration. The judgement exempted from reservations appointments to certain positions, for example, defence personnel, research scientists, medical scientists, university professors, etc.[19]

The achievements of AA in India are significant, particularly with regard to securing proportionate representation in professional and managerial positions (yet this is confined to the public sector).[20] There is a small and growing middle class of untouchables and tribals.[21] Although AA programs were originally intended to last for ten years from 1950, they have been extended repeatedly over the years. Only a small proportion of the SC and ST population are qualified for better jobs in government and public enterprises. As per the 1981 census, only 2 percent of SCs and STs graduated from high school and 0.25 percent were university graduates. Thus, providing access to human resource endowments and entitlements like education, training, relevant skills, etc. should precede or proceed in parallel with the quota system.[22]

AA in India has survived and strengthened because of popular and political support; more than one out of every five seats in the parliament are represented and filled by SC and ST candidates as guaranteed by the Constitution. Similar reservations exist with respect to state legislatures,

18. Harish C. Jain and C.S.V. Ratnam, *supra* n. 8.
19. Indra Sawhney v. Union of India AIR 1992 SC 477.
20. Harish C. Jain and C.S.V. Ratnam, *supra* n. 8.
21. Currently, of the 365 districts in India, 60 to 70 are headed up by district officers who are members of SCs and STs; some of them are also vice-chancellors at universities, doctors, airline pilots, and lawyers. In addition, there are SC teachers in a fairly large number of village schools and they play an important role in changing attitudes towards SC's. See A. Beteille, *India: Equal Opportunities for All and Special Opportunities for Some*, in Weiner (ed.) DEVELOPMENT AND DEMOCRACY (1993). AA has been successful in large part in altering the image that other people have of SCs and STs.
22. In the past, it has often been pointed out that jobs reserved for the STs and SCs could not be filled for want of qualified candidates. This is partly a direct result of governments not giving effect to the Constitutional directive for universal elementary education. Hence, job reservations, according to Beteille has been an easy way out for governments; it is a cheap mechanism, implemented at low cost. All that it requires is that places are set aside in the public service See Beteille *supra* n. 21. Beteille goes on to point out that an effective job reservations program would have required much more active intervention by both the government and other agencies in society.

(and even in local government bodies). Continued political pressure from the elected representative belonging to these communities, who account for 22.5 percent of Parliamentarians and legislators, helps keep governments and public enterprise managers on their toes.[23] Despite these provisions, the progress has been slow on account of a low economic growth rate in the 1950–1990 period. Resources available for the expansion in education and other social services have remained scarce.

It has become increasingly apparent that the beneficiaries from the disadvantaged communities are likely to be the better-off and not the worst-off members of the communities to which they belong and in whose name quotas are made. The Supreme Court of India, in its 1992 decision noted earlier, was concerned about the flow of benefits to what is called "creamy layers" among the disadvantaged and that no really effective way has been found for diverting the benefits of reservation from the better-off to the worst-off members of backward communities.[24]

Reservations policies have also exacerbated inefficiency to some extent and the attitude that government employment is a right. There is no incentive for better performance. The entire initiative has been left to the government. The private sector has had no obligations to offer job opportunities to SCs and STs.[25]

B. Experience in Malaysia

The post-independent government in Malaysia was formed by a coalition of three ethnic groups: the Chinese, the Indians, and the Malays. Following independence in 1957, an accord was forged among the three ethnic groups: Citizenship for the Chinese and Indians in return for the Malays receiving preferential treatment under the constitution.[26] However, following the riots after the 1969 elections it was felt that the ethnic Malay community was economically disadvantaged and that this situation was not conducive to national stability and unity.[27] A new economic policy (NEP)

23. Harish C. Jain and C.S.V. Ratnam, *supra* n. 8.
24. A. Beteille, *supra* n. 21. In India, a vast majority of the population is concentrated in villages. Job reservations divert attention from the masses who are so poor even to be seeking jobs in their names. Hence job reservations can only attend to the problems of middle class SCs and STs.
25. *Ibid.*
26. M. Puthucheary, *Malaysia: Safeguarding the Malays and the Interests of Other Communities* in Weiner (ed.) *supra* n. 21.
27. According to Sowell *supra* n. 11, "an escalation of preferential policies of Malays occurred after the race riots of May 1969, in which Malays unleashed mob violence against the Chinese. The Malay government promulgated its 'New Economic Policy,' designed to achieve what it called 'racial balance.'"

resulted in a fundamental restructuring of the Malaysian economy in order to correct economic imbalances. Several strategies were employed to increase the employment and earned income of *Bumiputras* (native Malay). Quotas were introduced in various areas such as admission to university and equity ownership. Quotas, however, were used extensively in the public sector where *Bumiputras*, especially those with educational qualifications, found ready employment. Appointments in the Civil Service were made at a ratio of four Malays to one non-Malay.[28] While there was some resentment on the part of non-Malays, the Chinese leadership within the governing alliance was willing to go along. In fact, there was a political bargain struck between the Malays and the Chinese elite. The deal was that the Chinese could make money while the Malays could run an administration that pursued pro-growth policies.[29]

Substantial changes were made to the Constitution. The special position of Malays was guaranteed; these provisions could not be removed even by normal two-thirds majority required for other constitutional amendments. Thus, future governments could not amend this section of the Constitution even if they had a two-thirds majority. In addition, amendments to the sedition laws were passed to make it illegal to question these rights in Parliament or outside.

In the post-NEP period, the government decided to continue the quota program.[30] According to Puthucheary,[31] the combination of economic

28. According to Puthucheary *supra* n. 26, the NEP aimed at assisting Malays and other *Bumiputras* to move from agricultural occupations to the more lucrative urban occupations where opportunities for socio-economic advancement were much greater. Affirmative action programs were introduced to education, employment and in the corporate sector where wealth was measured in terms of equity ownership. In education, ethnic quotas were introduced for admission to local universities. In the private sector, statistical targets were set for "economic restructuring." It was envisaged that within a twenty year period, the proportion of Malay ownership of share capital would increase from less than 2 percent in 1969 to about 30 percent by 1990. In addition, laws were passed making it compulsory for firms over a certain size to employ a certain number of Malays at all levels of the hierarchy. Companies wishing to expand their operations were also required to set aside a proportion of their new capital for Malay ownership. The price of shares offered to Malays was lower than the market value, thus giving opportunity to those who were allocated these shares to make quick returns. The emphasis of the NEP was on equality of results, that is, in ensuring that the distribution of income, wealth and occupations is in proportion to the population of each group. Emphasis was placed on getting the right ethnic "mix" in employment at all levels and in both public and private sectors.

29. I. Emsley, *Malaysia, Affirmative Action: The Malaysian Experience* OPTIMA (1992).

30. M. Mahathir, *Speech at Parliament* NEW STRAITS TIMES, June 18, 1991.

31. Puthenchary, *supra* n. 26.

growth and special benefits produced a Malay middle class. The NEP came to be increasingly identified with restructuring of society in order to reduce inter-ethnic disparities, especially between ethnic Malay and ethnic Chinese Malaysians.[32]

The NEP has been associated with the economic development policy in three Outline Perspective Plans- OPP-1 for 1971 to 1990; OPP-2 for 1991–2000 and OPP-3 for 2001–2010 and the new National Vision Policy[33] is linked to OPP-3. As Jomo suggests, development policy associated with the Second OPP and then by National Vision Policy (NVP) linked to OPP-3 is still thought to be primarily influenced by the NEP's restructuring of society.[34] The NVP supports the objective of previous plans in 1970s and 1980s to place 30 percent of the country's wealth in the hands of Malays - the *bumiputras*. In March 2001, following clashes between Indians and Malays, the government for the first time set a 3 percent target of Indian equity ownership. The government is predicting an average economic growth rate of 7.5 percent per annum so that affirmative action policies for the *Bumiputra* and Indian population will not be at the expense of Chinese interests.

Results of the Policies

In 1969, Malays had only 2 percent of equity in firms, and few Malays were in management. Arrangements were made to expand Malay equity capital, so that by 1990 it reached about 18 percent and 20 percent in 2000.[35] Private individual ownership rather than trust agencies ownership has risen from less than a third to over 90 percent, though much of this NEP achievement has been subject to dispute. Until the early 1990s, the economy of Malaysia grew at between 6 and 7 percent per year. In private sector employment, the Malays exceeded the fifty percent target set in the first Outline Prospective Plan (OPP-1) reaching 61.8 percent by 1990 in the professional and technical categories. The Malays also improved their representation from 22.4 percent in 1970 to 31.3 percent in 1990 in the administrative and managerial occupational groups, even though their tar-

32. K. Sundaram Jomo, *Malaysia's New Economic Policy and 'National Unity Paper* prepared for the United Nations Research Institute for Social Development Conference on Racism and Public Policy, September, Durban, South Africa (2001). See also Heibert, Murray, and S. Jayasankaran, *Affirmative Action Polices Enacted After Riots 30 Years Ago Still Play a Vital Role in Forecasting Racial Harmony* FAR EASTERN ECONOMIC REVIEW May 20, 1999.

33. Announced by Prime Minister Mahathir in April 2001.

34. K. Sundaram Jomo, *supra* n. 32

35. *Ibid.*

geted representation level was 49.3 percent. This lower representation attainment level reflects low Malay representation at the managerial and supervisory levels in the manufacturing and service sectors.[36]

The most significant change over the years has been the reduction in the incidence of poverty from 74 percent of Malays in 1970 to an overall figure of 6 percent in 1994 and the Malay share of national wealth went up from 1.5 percent in 1969 to 19.4 percent in 1998. The national economy had an economic growth rate of 7 percent a year for most of that period and hence the Malay's advance did not come at the expense of other races.[37] Thus, the distribution of income, wealth and occupations among individuals has achieved a more balanced ethnic mix. In particular, the affirmative action programs have contributed to the establishment of a Malay business community. Through various strategies including the setting up of public enterprises to employ and train Malays and the use of administrative regulations to encourage Malay employment in private sector companies, a more ethnically balanced urban community has come about. Malays now occupy positions that were monopolized by non-Malays in the past. Enrolment in institutions of higher learning increased to such an extent that by 1980, 75 percent of the students in local institutions of higher learning were Malay.[38]

The high rates of economic growth, as indicated above, resulted in a general increase in the level of income for all ethnic groups and this has been the most important factor contributing to the success of the affirmative action programs.

Some negative consequences of AA have been that a) it has been difficult for the civil service to maintain its image as impartial and politically neutral when it is constantly making political decisions based on ethnic considerations rather than on the objective criteria of need and merit, according to Puthucheary[39]; b) AA can result in the perpetuation and even strengthening of ethnic cleavages; c) AA programs also tend to result in conflicts within the preferential groups themselves since the benefits of AA programs accrue disproportionately to better off than to poorer sections of the groups; this is especially the case between the dominant Malay group and the other indigenous sub-groups that together make up the *Bumiputra* category such as Sarawak and Sabah groups; and

36. J. Hodges-Aberhard and C. Raskin, AFFIRMATIVE ACTION IN THE EMPLOYMENT OF ETHNIC MINORITIES AND PERSONS WITH DISABILITIES (1997).
37. Murray Heibert and S. Jayasankaran, *supra* n. 32.
38. M. Puthucheary, *supra* n. 26.
39. *Ibid.*

d) some critics have argued that once AA is introduced, it becomes permanently entrenched in the political system, serving the interests of a small minority.

C. Experience in the United States

In the United States, initially the country had to address the problem of a disadvantaged minority rather than a majority or large plurality. According to Farley,[40] the United States was essentially a Black-White country until 1960. Today, USA is becoming a multi-cultural country having people from numerous nationalities and racial and ethnic backgrounds. This is because of slowing birth rates of Blacks (and Whites) and increasing immigration from Asian and Latin American countries; there were almost 13 million landed immigrants during the 1980s and early 1990s.[41] Farley suggests that the Spanish-origin population will numerically pass the Black population within 10 years, due to their rapidly growing population relative to Blacks.[42] In fact, Farley's prediction has already come true. According to the 2000 Census figures, Hispanics have already overtaken Blacks: there were 35,305,818 Hispanics (or 12.5 percent Hispanics out of the total population of 281,421,906), relative to 34, 658, 190 Blacks or 12.3 percent Blacks in the same year. This demographic diversity is to be found throughout the United States[43], and not just in big cities, and has been confirmed by the 2000 Census.[44]

According to Farley[45], 90 percent of Blacks lived in poverty at the beginning of World War II and while relative gains have occurred in the median income of Blacks in the 1990s, the Black-White earnings gap is likely to continue.

The Civil Rights Act 1964, Title VII, applies specifically to employment; other sections or titles of the Act apply to voting rights, education and accommodations etc. Title VII prohibits discrimination on the basis of race, colour, religion, sex or national origin in every aspect of employment,

40. R. Farley, *Demographic, Economic and Social Trends in a Multicultural* America in James S. Jackson (ed.) NEW DIRECTIONS: AFRICAN AMERICANS IN A DIVERSIFYING NATION (2000).
41. *Ibid.* See also James S. Jackson, *Introduction and Overview* in NEW DIRECTIONS: AFRICAN AMERICANS IN A DIVERSIFYING NATION (2000).
42. R. Farley, *supra* n. 40.
43. *Ibid.*
44. See www.census.usatoday.com . See also Haya El Nasser and Paul Overberg, *Index Charts Growth in Diversity: Despite 23 percent Jump, Segregation is Still Going On, Researchers Say* USA TODAY 3A, 10A, March 15, 2001.
45. R. Farley, *supra* n. 40.

The Equal Opportunity Employment Commission (EEOC) was established to administer the Act. The Act applies to employers, employment agencies, and labour organisations. The Act was amended in 1972 and its coverage extended to include public and private employers with 15 or more employees.

The term affirmative action first appeared in American law, in the Civil Rights Act 1964, Title VII. All employers of 100 or more employees are required to submit employment statistics reporting employment by race and other protected categories in broad job classifications each year. Although not specifically required under Title VII, affirmative action may be required as part of a conciliated or court settlement among employers and the federal enforcement agencies. According to Leonard,[46] more than 1,700 class action suits were filed under this legislation. These suits have been among the most powerful prods to increasing minority and female employment because they affected the most people, resulted in large awards, and generated most publicity.

The Civil Rights Act 1991 covers more prohibited grounds such as age, disability and extends the coverage of the Act to the United States Senate and political appointees of the President and staff members of the elected officials at the sate level. The House of Representatives employees are covered by a House Resolution adopted in 1988.[47] In 1965, the then President Lyndon Johnson issued an executive order requiring affirmative action in employment and promotion of all federal contractors, even if they had never discriminated.

D. Experience in Canada

Canada's population and workforce are becoming increasingly pluralistic. Forty-two per cent of Canadians reported origins other than French or British, while 16 per cent of Canadians were foreign born.[48] The 1996 Census information regarding racial minorities or visible minorities (VMs), as they are called in official statistics in Canada, indicated that VMs made up 11.2 percent of the Canadian population. The VMs are a growing proportion of the population in Canada's principal cities. For instance, they made up 32 percent of the population of Toronto, 31 percent in Vancouver,

46. J. Leonard, *What Promises are Worth: The Impact of Affirmative Action Goals*, Journal Of Human Resources 20 (1985).
47. Wayne F. Cascio, Managing Human Resources: Productivity, Quality Of Work Life, Profits (1998)
48. Heritage Canada, Annual Report 1994–1995 on the Operation of the Canadian Multi-Culturalism Act (1996).

as well as 16 percent in Calgary, 14 percent in Edmonton, 12 percent in Ottawa/Hull, and 11 percent in Winnipeg.[49] Table 1 shows the representation of racial minorities in the Canadian workforce from 1981 to 1996. Their proportion had more than doubled from 4.9 percent to 10.3 percent.

Table 1

Percentage of Workforce Representation of Women and Racial Minorities in Canada: 1981-1996

	1981	1986	1991	1996
Females	42.1	44.0	45.9	46.4
Visible minorities	4.9	6.3	9.1	10.3

Source: Census Statistics Canada

a. Policy Responses in Canada

In the early 1980s, governments in Canada began to investigate the need for policy initiatives in the area of improving the economic status of minorities who faced discrimination in the labour market. The best known of these investigations, commissioned by the federal government known as the Abella Commission Report,[50] found that significant obstacles confronted the four designated groups and recommended early action to head-off potential social conflict that may result from inaction. In the same year, the all-party Parliamentary Committee Report known as the Daudlin Commission Report, *Equality Now!*,[51] reported similar findings on the status of visible minorities. The Edmonds Task Force[52] examined barriers to advancement of women in the federal public service.

The Canadian responses to improving the status of designated groups such as women and ethnic minorities can be divided into four groups. One category of response is in the form of prohibiting discrimination on enumerated grounds. All the provinces and territories including the federal government, for instance, have human rights legislation prohibiting dis-

49. Harish C. Jain, Parbudyal Singh, and Carol Agocs, *Recruitment, Selection and Promotion of Visible Minority and Aboriginal Officers in Selected Canadian Police Services* 43 Canadian Public Administration 46 (2000).
50. R. S. Abella, Equality in Employment, A Royal Commission Report (1984).
51. R. Daudlin, Equality Now! Report of the Special Committee on Visible Minorities In Canada Society (1984).
52. J. Edmonds, Beneath the Veneer Volumes 1–4 (1990).

criminatory treatment on several grounds including gender, race, ethnic, origin, religion, and age. Courts have been willing to read in certain grounds of discrimination, even when the legislatures in certain jurisdictions had chosen not to include these grounds into their respective laws. For instance, sexual orientation in the case of the Alberta and the federal human rights statutes was read into the two statutes by the Supreme Court of Canada. The Constitution Act 1982, contains the Canadian Charter of Rights and Freedoms. Section 15(2) of the Charter guarantees certain rights and freedoms without precluding employment equity programs. This section applies to all government agencies across Canada (e.g. federal, provincial, territorial and municipal).

The second category of responses has been to enact specific legislation aimed at implementing employment equity programs. This has taken the form of federal Employment Equity Act (EEA) 1986, revised and amended in October 1995 and strengthened to include federal government agencies for the first time. The 1986 EEA covered employers in mainly three industrial sectors: banking, transportation, and communications. It covered about 343 private sector employers and federal crown corporations with a total of 576,965 employees.[53]

The third category has been to use administrative policy (as opposed to legislation) to require implementation of employment equity programs. The best example here is the Federal Contractors Program (1986) which requires organisations with 100 or more employees bidding on federal government contracts of $200,000 or more to undertake employment equity programs. This program covers 845 contractors with a workforce of 1.1 million.[54] Contractors are required to remove barriers faced by the four designated groups in selection, hiring, promoting and training; mount proactive positive measures; and come up with specific goals and timetables

The fourth category of response has been the collective agreement provisions under the industrial relations legislation. Approximately half the collective agreements in Canada included anti-discrimination clauses that prohibit discrimination on the basis of the several prohibited grounds or merely incorporate the human rights legislation of the relevant government. These prohibited grounds cover hiring, promotion, job assignment, compensation and other areas where discrimination may occur.[55] About one-third of collective agreements also contained specific clauses for the protection of older and disabled workers and prohibit sexual harassment. Some agreements also contain clauses on relatively new grounds such as AIDS, drug use, electronic surveillance of workers etc.[56]

53. H.C. Jain, *Employment Equity in Canada* HUMAN RESOURCE MANAGEMENT IN CANADA 45-50 (1995).

54. Judi Longfield, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act* REPORT OF THE STANDING COMMITTEE ON HUMAN RESOURCES DEVELOPMENT AND THE STATUS OF PERSONS WITH DISABILITIES (2002).

b. Employment Equity

EE is permitted by the Constitution Act 1982 as well as the federal EEA enacted first in 1986 and revised extensively in 1995.

The Canadian Charter of Rights and Freedoms is a part of the Constitution Act 1982. The Charter's provisions apply to all government agencies across Canada including federal, provincial and municipal. In addition, the Charter provisions have a direct impact on human rights legislation through the equality provision,[57] Section 15, as noted above.

Section 15 (1) states: Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex or mental or physical disability.

(2) Subsection (1) does not preclude any law, program, or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

In addition, the federal government has had the Contractors Program since 1986 which applies to large and medium sized provincially regulated employers who supply goods and services to federal government departments and agencies. Both the EE Act and the Contractors Program cover four groups: women, aboriginals, persons with disability and visible (racial) minorities.

The EEA applies to employers in the private sector, as noted above and to federal government departments with 100 or more employees. The legislation requires these employers to file an annual report with Human

55. Anthony Giles and Akivah Starkman, *The Collective Agreement* in Morley Gunderson, Allen Ponak and Daphne Taras (eds.) UNION-MANAGEMENT RELATIONS IN CANADA 306 (2001).

56. A. Giles and A. Starkman, *supra* n. 55 at 307.

57. D. McPhillips, *Employment Legislation in Canada* in Morely Gunderson *et al* (eds.) *supra* n. 55 at 227.

Resources Development Canada (HRDC). Employers are required to provide annual information on the representation of the four designated groups by occupational groups and salary range, as well as hires, promotions and terminations. The public sector employers were required to provide similar information to the Treasury Board of Canada beginning 1996.[58]

Under the 1995 Act, in addition to this statistical information, employers are also required (as of October 1997) to include in their annual reports: 1) a description of the measures taken to implement EE and the results achieved; 2) and the consultations between the employer and its employee representatives concerning EE implementation.

Failure to comply with the filing requirements can result in an administrative penalty for three specific reporting violations (for private sector employers only): (a) failure to file an annual report; (b) failure to include the required information; and (c) knowingly filing a report containing false or misleading information. The amount of monetary penalty is $10,000 for a single violation and $50,000 for repeated and continued violations. All records used in the compilation of the annual reports must be retained by the employer for two years following the submission of the report. The annual reports are made publicly available and also given to the Canadian Human Rights Commission (CHRC).[59]

The CHRC was given the authority to conduct on-site compliance reviews (i.e. audits) to verify and ensure employer compliance as of October 24, 1997. The Act also provided for the final enforcement, where necessary by an EE Tribunal. The Tribunal was empowered to hear disputes and issue orders enforceable by courts.

The 1995 Act prescribed four factors to be taken into account in setting goals by an employer.[60]

These were:

(1) the degree of under-representation of each designated group in each occupational category;

(2) availability of qualified persons in designated groups within the employer's workplace and the Canadian workforce;

(3) the anticipated growth or reduction of the employer's workforce during the period of numerical goals; and

58. H. C. Jain, *supra* n. 53.
59. *Ibid.*
60. *Ibid.*

(4) the anticipated turnover within the employer's workforce in respect of which the numerical goals apply.

c. Evaluation of the Results

In the private sector firms covered by the EEA since 1986, overall, the representation of members of VM groups went up almost 2.5 times in the fifteen years, 1987 to 2001, from 4.9percent to 11.7percent. However, their representation remained below the forecasted 14 percent labour market availability rate expected in the 2001 Census.[61] VMs remained concentrated in some occupational groups and under-represented in others, including senior management.[62]

The CHRC reported that while there had been progress for some designated groups, "movement towards an equitable federal workplace continues at a snail's pace,"[63]. Visible minorities in the public sector "are simply not making acceptable gains."

As noted earlier, the EEA did not apply to the public service (that is, federal government departments and agencies) until 1996. Hence the data is available since 1997. As of March 31, 2002, the representation of VMs in the federal public service was 6.8percent, way below the labour market availability even in 1996 let alone 2001.

E. Experience in Britain and Northern Ireland

Ethnic minority population has been growing continuously since the late 1940s, reaching 1 million in the late 1960s, 3 million by 1991 and more than 3.8 million of the population of Great Britain in 1999.[64] In the spring of 2000, 2.4 million people of working age belonged to ethnic minorities in Great Britain.[65]

Women are concentrated in lower skilled and lower paid jobs with less access to vocational training and education. In addition, large numbers of them work part-time and this is closely associated with their family responsibilities.[66]

61. Canadian Human Rights Commission, ANNUAL REPORT 41 (2002).
62. Employment Equity Act, ANNUAL REPORT 65-66 (2002).
63. Canadian Human Rights Commission, ANNUAL REPORT 86 (1999 - 2000).
64. D. Owen, B. Reza, A. Green, M. Maguire and J. Pitcher, *Patterns of Labour Market Participation in Ethnic Minority Groups* LABOUR MARKET TRENDS 505-510 (2000).
65. B. Twomey, *Labour Market Participation of Ethnic Groups* LABOUR MARKET TRENDS 29-42 (2000).
66. EOC website, p. 1, *available* at www.eoc.org.uk .

In Britain, equal employment opportunity legislation was initially introduced during the 1970s and has been gradually expanded to include more groups and to cover more aspects of employment. There is separate legislation covering sex, race, and disability[67] and separate geographical arrangements with separate enforcement agencies in Britain and in Northern Ireland. In Northern Ireland,[68] religion has been the main reason for the Fair Employment legislation.

In Britain, the Equal Opportunities Commission (EOC) and the Commission for Racial Equality (CRE) are the enforcement agencies for the Sex Discrimination Act and the Race Relations Act respectively. They have the power to request information from employers and other organisations, to undertake 'formal investigations' and to issue 'non-discrimination notices.' Both agencies have the authority to issue 'Codes of Practice.' While adherence to such codes is voluntary on the part of employers, such non-compliance may be taken into account in legal proceedings. The government, however, plans to merge the EOC and the CRE and have one single all embracing equality commission, as in Northern Ireland, with a wider range of coverage including religion and age.

Although there is no general provision for affirmative action (AA) in the above mentioned legislation, AA is permissible in recruitment and training where there have been fewer or no members of one race or sex in particular work in the previous twelve months.

67. THE RACE RELATIONS ACT 1976 makes it unlawful to discriminate on grounds of colour, race, nationality including citizenship or ethnic or national origin in employment, training and related matters. THE SEX DISCRIMINATION ACT 1975, as amended makes it unlawful to discriminate on grounds of sex and marriage when recruiting, training, promoting, dismissing or retiring staff. See H.C. Jain and A. Bowmaker-Falconer, EMPLOYMENT EQUITY/ AFFIRMATIVE ACTION CODES OF PRACTICE AND BEST PRACTICES IN USA, BRITAIN, CANADA AND OTHER SELECTED COUNTRIES (1998).

68. In Northern Ireland, legislation bans discrimination in employment on grounds of religious belief or political opinion. All public authorities and private sector employers with more than ten employees are required to register with the Fair Employment Commission -now the Equality Commission-and submit annual reports to the Commission on the religious composition of their workforces. Failure to do so is a criminal offence that is punishable by a fine and in some cases by economic sanctions, such as loss of government grants and contracts. The Commission has power to direct an employer to take Affirmative Action, such as the encouragement of job applicants from an underrepresented group. It can also set goals and timetables in cases where fair participation by both Protestant and Catholic communities in employment is not being secured. The Fair Employment Tribunal adjudicates on individual complaints of discrimination. It can award unlimited compensation to victims of discrimination and may order remedial action by an employer. It also has powers to fine an employer and provide details of the Commission's directions to the employer to high court in order for an employer to obey its orders. See HMSO, NORTHERN IRELAND (1995).

In Northern Ireland the legislation covering racial discrimination was enacted recently (1997) to be administered by the Commission for Racial Equality. Religion, not covered by legislation in Britain, has the most extensive legislative coverage in Northern Ireland with provisions for both AA and contract compliance. Although legislation prohibiting discrimination on the basis of religion has existed in Northern Ireland since the partition of Ireland in 1920, it was not until the enactment of Fair Employment Act 1976 that employment discrimination on the basis of religion and political opinion in both public and private employment was outlawed.

For racial and ethnic minorities there was no legislative protection until 1997, as noted above, when the (NI) Race Relations Order (RRO) was enacted. Unlike Britain, it was perfectly lawful to deny someone a job in Northern Ireland because of his or her colour and ethnic background.

In Northern Ireland, the census has never included a question on ethnicity and therefore no definite figures are available. The best estimates, according the Multi-Cultural Resource Centre, is that between 1.5 to 2 percent of Northern Ireland's population is made up of Blacks and minority ethnic communities.[69]

The enactment of the RRO was mostly due to the impetus from the non-governmental voluntary and community sectors and the criticism of the British Government by the United Nations Committee on the Elimination of All Forms of Racial Discrimination 1993 for not providing protection from racial discrimination in Northern Ireland. As Rogers[70] observes, there were Black and minority ethnic communities in Northern Ireland, some second and even third generation. Some of their members undoubtedly suffered racial discrimination and harassment. It took more than 21 years before this legislation was extended from Britain to Northern Ireland.

Racial grounds in the RRO are defined as colour, race, nationality, or ethnic or national origins. The legislation covers employment, the provision of goods, facilities and services, housing and education. It outlaws direct and indirect discrimination and victimisation. In relation to employment, it covers recruitment, promotion, training, harassment and access to benefits.

In April 1998 the Belfast Agreement was signed by the Irish and British Governments and ratified by a majority of people in Northern Ireland. Political power was devolved from the British Parliament to Northern

69. S. Rogers, EMPLOYMENT EQUITY: THE VIEW FROM NORTHERN IRELAND (2000) (unpublished manuscript at the Fifth International Metropolis Conference, Vancouver).

70. *Ibid.*

Ireland. The equality dimension of this Agreement was translated into legislation in the form of Northern Ireland Act 1998. The Act provided for the establishment of a new Commission called the Equality Commission. The Commission assumed the functions of the existing equality agencies in Northern Ireland: the Commission for Racial Equality, the Equal Opportunities Commission and the Fair Employment Commission as well as the Northern Ireland Disability Council.[71] The new Equality Commission opened its doors to the public in October 1999. As of now, the various agencies are operating independently within the new Commission and the Equality Commission is faced with the challenge of coming up with a structure to deliver services to a diverse range of constituencies within its mandate.

The RRO empowers the Equality Commission to assist, financially or otherwise, individual complainants. This is unique since legal aid is not available for cases before the Northern Ireland industrial tribunals relating to employment. No provision is provided for class actions.[72] The legislation does provide the power to conduct a formal investigation into practices within sectors or specific industries. However, judicial decisions in Britain have limited the effectiveness of this tool thus far. Both the CRE and Equality Commission have recommended that the government must make legislative amendments to ensure that formal investigations are more effective. Apart from enforcement, the Equality Commission has decided to focus on capacity building within the Black and minority ethnic sector itself.

In Northern Ireland, the public sector continues to be a major employer providing work for 34 percent of those in employment. The workforce at present (2000) is around 420,000.[73] The female participation in the workforce has gone up from 45 to 47percent in the last decade. (There is no detailed data of the breakdown of workforce on grounds of ethnicity as yet).

a. Fair Employment and Treatment Order

Due to its ineffectiveness the first FEA was strengthened in 1989 and 1998 under the Fair Employment and Treatment Order. The Fair Employment Act 1989 was replaced by the Fair Employment and Treatment (Northern Ireland) Order 1998 (enacted in December 1998). However, the

71. *Ibid.*
72. *Ibid.*
73. WOMEN AND MEN IN BRITAIN *available* at http://www.eoc.org.uk.

terms of the Order are essentially the same as those of the earlier Act, with minor realigning to transfer the role of the FEC to the Fair Employment Directorate within the new Equality Commission, as noted earlier.

All private sector employers in Northern Ireland with more than ten employees are required to register with the FEC, while public sector employers are automatically registered with the Commission. In 1999, there were almost 3,994 private sector employers and 132 public sector employers registered with the new Equality Commission[74] representing more than 70 percent of the total Northern Ireland workforce.

Fair employment legislation placed obligations on employers such as the requirement to review employment practices and mandatory monitoring of their workforces. These features have been absent from any other anti-discrimination legislation in Britain. The FEA 1989 provided for : (a) a compulsory registration of employers of more than ten workers with the Fair Employment Commission (FEC); (b) annual monitoring of workforces and of applicants for employment; and (c) review every three years of recruitment, training and promotion practices to determine whether an affirmative action program needs to be set up to reach the goal of fair participation of both Catholics and Protestants in accordance with FEC's Code of Practice. Penalties under the Act include criminal penalties, economic sanctions and exclusion from tendering for government contracts and denial of any government grants.[75]

The FEC and now the Equality Commission (EC) has the power to conduct investigations to determine whether individual employers have complied with the requirements of the legislation. The Commission can also obtain a written undertaking from the employer to commit itself to undertaking affirmative actions including goals and timetables to correct under-representation of a religious group. It may apply to a tribunal to enforce the undertakings. According to the latest report of the EC, only 4 of the 4100 employers required to make a return were prosecuted for failure to submit within the specified time period.[76] According to the EC, the Catholic share of the monitored workforce in 1999 was 39.9 percent compared to a Catholic share of those 42 percent of those available to work. The Catholic share of the male monitored workforce, according to EC has increased from 32 percent in 1990 to 36.9 percent in 1999. Among

74. Canadian Human Rights Commission, ANNUAL REPORT 32 (1999 - 2000).
75. P.J Sloane and D. Mackay, *A Employment Equity and Minority Legislation in the UK after Two Decades: A Review* INTERNATIONAL JOURNAL OF MANPOWER 18 (1997).
76. Canadian Human Rights Commission, ANNUAL REPORT 32 (1999 - 2000).

the female workforce, Catholics increased from 38.5 percent in 1990 to 42.5 percent in 1999. Since 1990, the Catholic proportion had increased in every occupational group.[77] Even though the monitoring by the EC revealed a continuation of the improvement in the Catholic participation in the labour market, the gap in employment contributed significantly to the continuing differentials in the experience of unemployment between Catholics and Protestants. Among the long-term unemployed, two-thirds were Catholic.[78] There is, however, clear evidence that the FEA has had a significant impact on reducing inequalities in the workplace in Northern Ireland.[79]

b. Conclusions and Implications

Thus, the Northern Ireland Orders relating to race relations are passive, weak law thus far since there is no provision of monitoring and without goals and timetables as in the case of the FEA in NI. The British RRA will include a positive duty on public employers to promote equality of opportunity and monitoring by the CRE. However, unlike the FEA, there are no such requirements in the case RRO in Northern Ireland. The positive action provisions in both the RRA and of the RROs are weak, as noted earlier; in addition, there is no contract compliance under these laws.

Northern Ireland has its own Sex Discrimination Order 1976, and Equal Opportunities Commission, but legislation covering racial discrimination was enacted recently. Religion, not covered by legislation in Britain, has the most extensive legislative coverage in Northern Ireland with provisions for both AA and contract compliance. Although legislation prohibiting discrimination on the basis of religion has existed in Northern Ireland since the partition of Ireland in 1920, it was not until the enactment of the Fair Employment Act 1976 that employment discrimination on the basis of religion and political opinion in both public and private employment was outlawed.

The FEC's enforcement powers are substantially greater than those of the EOC and CRE in Britain. However, according to CRE, there has been increasing acceptance of ethnic monitoring in the 1990s. Hence, the CRE (in 1993) made several proposals to the government. These included compulsory monitoring of ethnic origins of those in employment, contract compliance, powers for local authorities, and class action suits in industrial tribunals.

77. Canadian Human Rights Commission, *supra* n. 76 at 28.
78. *Ibid.*
79. S. Rogers, *supra*. n. 69.

An important development since 1973 has been the role of European community legislation that takes precedence over United Kingdom law and has brought about changes in the Britain legislation, especially relating to women. Britain became a member of the European Economic Community (EEC) in 1973 and thus subject to the EEC law.

The amended RRA was enacted in November 2000. The amended legislation extends the outlawing of discrimination to all public authorities and central government as well as it places a statutory duty on these bodies to promote racial equality and eliminate institutional racism.[80] Auditing and inspection of public bodies is also mandated under the new Act. CRE expects to make a real, measurable impact on racial equality across Great Britain.[81] For instance, the duty will apply to the way a public authority carries out its various functions, including employment of staff. The duty on public authorities include: a) the monitoring of staff by ethnicity; b) the assessment of the impact on racial equality of proposed policies and consultation on them; c) the monitoring of the impact on racial equality of policies and practices.

The CRE has the authority, under the new Act, to issue codes of practice containing practical examples of how different types of public authorities can comply with their general and specific duties. Hence, there will be codes for central (federal) government departments, local authorities. educational bodies, police authorities and the NHS, as well as a general code for all other authorities.

c. An Assesment of the Race Relations Act in Britain

The RRA in Britain has had a positive effect, "has helped to curb the worst kinds of discrimination in employment" and "also had invaluable impact on the general climate of opinion".[82]

The weaknesses of the RRA include a) failure to deal with institutional racism and organizational culture; b) the concern with colour racism rather than cultural racism; c) more concerned with ensuring equality of treatment rather than dealing with difference and diversity; d) does not prohibit religious discrimination; e) concerned with negative duties, that is avoidance of discrimination rather than promoting diversity.[83] According to the report, *The Future of Multi-Ethnic Britain*, sponsored by the Runnymede

80. Commission for Racial Equality, ANNUAL REPORT 5-9 (2000).
81. *Id.* at 6.
82. B. Parekh, REPORT ON THE FUTURE OF MULTI-ETHNIC BRITAIN 264 (2000).
83. *Id.* at 265.

Trust, the positive duty, noted earlier, in the amendments to the RRA. do not extend to private employers.[84] A recent survey of the ethnic minorities in the one hundred largest corporations in Europe found that, except in Britain, few minorities reach the top; none of the responding companies had an ethnic minority as a Chief Executive Officer (CEO) and almost all had a dismal representation of racial minorities in the board rooms within European countries.[85] The report cites a survey conducted by the Runnymede Trust in Britain in 2000 and found that ethnic minorities constituted only 1 percent of senior managers.[86]

F. Experience in South Africa

The Employment Equity Act (EEA) was enacted by the Parliament in 1998. It aims to redress the ghettoization of the Blacks(including coloureds and Indian),women and persons with disabilities (called the designated groups) in the workplace. The objective of the EEA is to achieve equality in the workplaces by elimination of unfair discrimination and promotion of equal opportunity[87] through the implementation of positive and pro-active measures (termed as affirmative action measures) to advance the designated groups. The EEA requires employers with either 50 or more employees or certain specified turnover (in monetary terms) to undertake affirmative action measures with a view to ensure that the designated groups have equitable representation in all occupational categories and levels in an employer's workforce consistent with their availability in the external labour market.

a. Rationale for EEA

Historically, the labour market was a distorted one, with inequality in access to education, skills, managerial and professional work, based on race and ethnicity. Racial discrimination was created in labour legislation, for example in job reservation clauses that restricted access to skilled jobs (preserving them for White employees), in the Mines and Works Act 1904 and Industrial Conciliation Act 1956. These provisions were repealed in 1980 and significant labour law reforms have occurred in the last five

84. *Ibid.*

85. Rana Foroohar, Stefan Theil, Samia Marais, Tara Pepper, Heike Weidekind, Barbie Nadeau, and Emma Daly, *Race in the Boardroom: A Newsweek Survey of Corporate Europe Finds Plenty of Confusion about the Continent's Changing Identity Just as New Laws are about to Require More Clarity,* NEWSWEEK 28-32 February 18, 2002.

86. Rana Foroohar *et al, supra* n. 85.

years. However, the apartheid labour market has left most employees inadequately trained and economically dis-empowered. South Africa's peaceful transition through its 1994 national election and constitutional measures has given hope that the Constitutional democracy will provide equal protection and opportunity to all citizens regardless of colour, gender, religion, political opinion or sexual orientation.

The legacy of workplace discrimination against Blacks, the majority population, is systematically being eroded, albeit slowly. According to one survey of 161 large firms in South Africa (employing 560, 000 workers), in the year 2000,[88] 10percent of managers were Black, 5percent each were coloured and Indian; thus, 80percent of all managers were White. Of these managers, 79percent were male and 21percent female. In 1998, the percentages of Blacks, coloureds, and Indian were 6, 4 and 4 respectively

87. The legislative armoury against unfair discrimination is now quite formidable. For example, Chapter 2 of the new EEAprohibits unfair discrimination against designated employees. These include bBlack people, women and employees with disabilities. Legislative prohibitions against unfair discrimination are also intrinsic to South Africa's CONSTITUTION (1996). Chapter 2 (the Bill of Rights) contains an equality clause, and like the EEA specifies a number of grounds which constitute unfair discrimination. Additionally, Sch. 7 of the LABOUR RELATIONS ACT 1995 considers unfair discrimination either directly or indirectly as a residual unfair labour practice. Grounds include race, gender, ethnic origin, sexual orientation, religion, disability, conscience, belief, language and culture. Labour laws have been at the forefront of the post-apartheid government's determination to remove unfair discrimination. A new law, THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 1999, seeks to prohibit discrimination in both civil society and in employment practices.
The draft CONSTITUTION adopted by the Constitutional Assembly on May 8, 1996 was approved by the Constitutional Court in November of 1996 . Section 9(2) of the Bill of Rights in the Constitution states in part:
"To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."
Similarly, S. 2(2) of Sch. 7 of the LABOUR RELATIONS ACT 1995 stipulates that "an employer is not prevented from adopting or implementing employment policies and practices that are designated to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."
More explicitly, section of the EEA sets out the purpose of the Act to achieve equity in the workplace.
(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels of the workforce.

88. BREAKWATER MONITOR REPORT (2000) *available* at http://www.labourgov.za

with 86percent White managers, and 84percent male and 16percent female.[89]

According to the Commission on Gender Equality (CGE) women constituted the major segment of the SA population but accounted for only a third of the labour force. They were mainly concentrated in service, retail and manufacturing sectors. Across all sectors, women were mainly to be found occupying jobs associated with stereotyped domestic roles; thus gender equality within the workplace, according to the CGE was underpinned by job segregation and perceived roles associated with gender group.[90]

The Department of Labour (1999) states that Whites had a 104 per cent wage premium over Africans; men earned approximately 43 per cent higher wages than similarly qualified women in similar industrial sectors and occupations.[91]

Another indication is the representation of women and Africans in the senior public sector positions. According to the 1995 Household Survey, men accounted for 78 percent and women for only 22 percent of all legislative, senior officials and management positions in the workforce. Of the 78 percent that were men, 46 percent were White, 23 percent Black, 6 percent Asian, and 3 percent Coloured. Of the 22 percent that were women, 12 percent were White, 8 percent were Black, 1 percent Asian and 1 percent coloured.[92]

Eighty seven per cent of management in the Public Service (Director and above) in 1998 were men, and only 13 percent women.[93] Over half

89. *Ibid.*

90. Commission for Gender Equality, SURVEY OF EMPLOYERS REGARDING AA POLICIES AND PRACTICES. GENDER IN THE PRIVATE SECTOR (1999). More than a quarter of African males and 60 percent of African females in the formal sector were in the elementary occupations such as cleaning, garbage collection and agricultural labour. Similarly 41 percent of coloured women were in these elementary occupations while 40 percent of Indian women were in clerical occupations. About 18 percent of African women and 19 percent of coloured women were in managerial or professional jobs while 11 percent of African men, 14 percent of Coloured men and 37 percent of Indian men were in managerial professional jobs. See B.J. Erasmus and E. Sadler, *Issues Affecting Women in the South African Workplace: A Comparative Analysis of Findings* SOUTH AFRICAN JOURNAL OF LABOUR RELATIONS 4-19 (1999).

91. Adele Thomas, A PIANO OF DISCORD: REASONS FOR JOB MOBILITY AMONG BLACK MANAGERS (2000) (unpublished paper, on file with the University Of Witwatersrand, Johannesburg).

92. Lize Booysen, *Towards More Feminine Business Leadership for the 21st Century: A Literature Review and a Study of the Potential Implication for South Africa* SOUTH AFRICAN JOURNAL OF LABOUR RELATIONS 39 (1999).

93. STATISTICS SOUTH AFRICA 41 (1998).

the men who were public sector managers were White.[94]

Women comprised only 1.3 percent (49) of the 3773 directors of the 657 companies listed on the Johannesburg Stock Exchange.[95] Only 14 women were listed as either executive directors, chairwomen or managing directors, and less than 1percent board members were women.[96]

b. Employer Obligations Under the EEA

The EEA requires employers in consultation with unions and employees to:

> conduct a review of employment policies and practices to identify the specific job barriers faced by the designated group members and attempt to remove them;
>
> conduct a workforce survey and analysis to identify the underrepresentation of members of the designated groups relative to their availability in the external workforce;
>
> develop an employment equity plan with numerical goals and timetables, monitoring and evaluation procedures; report on remuneration and benefits in each occupational category and level;[97] and

94. Lize Booysen, *supra* n. 92.

95. There is also a concentration of managerial control through a system of interlocking directories where the same person(s) serve on the boards of several corporations. This social closure has limited the upward mobility of Black managers and women. However, South Africa's re-entry into the international business community has forced an awareness about its relative competitiveness in the manufacturing and service sectors. Recently, statutory and governmental tender requirements have been towards employment equity and diversity at all levels. Several Black directors have been appointed to boards of directors. Although less than 15 percent of South Africa's company directors are Black or women, this is likely to change significantly by the year 2005.

96. G. Naidoo *Empowerment of Women in the Corporate World* 15 PEOPLE DYNAMICS (1997).

97. The EEA does not set quotas, but rather enables individual employers to develop their own plans. Criteria regarding enhanced representativity include national and regional demographic information and special skills supply/availability. S. 27(1) of the EEA requires designated employers to submit a statement of remuneration and benefits received in each occupational category and level to the Employment Conditions Commission established by S.59 of the BASIC CONDITIONS OF EMPLOYMENT ACT 1998. S.27(2) requires that where disproportionate income differentials are reflected in the statement, a designated employer must take measures to progressively reduce such differentials. S. 27(3) indicates that these measures may include: (a) collective bargaining; (b) compliance with sectoral pay determinations made by the Minister of Labour in terms of S. 51 of the BASIC CONDITIONS OF EMPLOYMENT ACT; (c) applying norms and benchmarks set by the Employment Conditions Commission; and (d) relevant measures

develop measures an employer will undertake to progressively reduce any disproportional differentials in pay as well as an employment equity plan.

Whenever unfair discrimination is alleged in terms of the EEA, a reverse onus of proof is on the employer to establish that the practice is fair. As part of a required employment equity plan, all employers with 50 or more employees are required to review all their employment and human resources practices to remove any provisions or practices which may have a discriminatory effect. This includes recruitment and selection, and remuneration. It is in these two areas, as well as in the provision of substantive benefits and conditions of employment, where discrimination is most likely.

The EEA requires that employers give due consideration to 'suitably qualified person' in their recruitment of designated groups. Such a person may have either formal qualifications, prior learning, relevant experience, or capacity to acquire-within a reasonable time-the ability to do the job.

Capacity to acquire the ability to do the job will require training and support. Currently few Black men and women are qualified to fill semi-skilled, skilled and professional jobs, due to apartheid practiced by the previous White regime. The EEA along with the Skills Development Act 1998 requires employers to provide training to designated groups.

The EEA encourages employers to provide improved internal grievance procedures against discriminatory behaviour and harassment. Labour inspectors have the enforcement powers. Those disputes that cannot be resolved through internal procedures will be referred to the Commission for Conciliation, Meditation and Arbitration (CCMA) and ultimately the Labour court.[98]

c. State of Compliance with the Employment Equity Act by Employers

The Commission for Employment Equity (CEE) recently released its first annual report covering the period 1999–2001.[99] The Commission's

in the SKILLS DEVELOPMENT ACT 1998. The Employment Conditions Commission is required to research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials. The Commission is not allowed to disclose information pertaining to individual employees or employers.

98. Bob Hepple, *Equality Laws and Economic Efficiency* INDUSTRIAL LAW JOURNAL 18 (1997).

99. Department of Labour, COMMISSION FOR EMPLOYMENT EQUITY REPORT, 1999–2001 (2001).

report for 2001 is based on 8250 employers with 3.336.784 employees and shows mixed results:

On the plus side, it indicates that employers, in general, are taking their responsibility seriously for eroding the effects of the apartheid labour market which had left most Black workers inadequately trained and disempowered. For instance, the EEC report indicates that Black (African, coloureds, and Indians) workers improved their labour market position from the 1998 baseline survey[100] to 2001 as Professionals, Technicians and Associate Professionals from 25 to 38 percent in 1998 to 55 and 48 percent in 2001 respectively. The Professionals' position also compares favorably to Statistics South Africa's Household Survey data for 1999.

Blacks lost ground from 1998 as legislators, senior officials and managers when their representation in these occupational categories was 28 percent to 26 percent in 2001; this is even more pronounced compared to their representation of 45 percent in the Household Survey of 1999. They are primarily concentrated in elementary occupations (98percent in 2001), plant and machine operators (94percent in 2001), skilled agricultural and fishery workers (86percent in 2001) and service and sales workers (72percent in 2001).[101]

Women (Black and White) hold a minority of positions, that is 22 percent, as legislators, senior officials and managers; of the 22 percent, White women hold 15 percent, Indian women 1 percent, African women 3 percent, and Coloured women 2 percent in this category.[102] Women (both White and Black) currently hold only 13percent of all top management and 21percent of all senior management positions in SA. However, (not shown in the table) African women hold only 1.2percent of all top management positions.[103] Women represent 38 percent of total employment, and are clearly under-represented in all management occupational levels.[104]

Black employees consisted of 31 percent of all levels of management. Therefore, an overwhelming majority of managers across all levels of management were White. Employees with disabilities represented only 1percent of all management level. The CCGE Survey (1999) found that employers cited the several problems in integrating women in their workforce: (a) resistance by male employees (across the organisational

100. Conducted by Jain and Bowmaker-Falconer in 1998 for the SA Department of Labour.

101. *Supra* n. 99 at 30.

102. *Ibid.*

103. *Id* at 19.

104. *Id.* at 19 and 24.

spectrum): (b) stereotyped perceptions, and (c) poor skills among female employees.[105]

However, employers adopted the following criteria for recruitment and promotion

(a) psychometric testing including subjective and culturally biased testing; and

(b) emphasis on skills, formal qualifications and experience.[106].

A paradox thus seems to exist, as noted by the CGE[107]: one the one hand companies are citing poor skills level amount females to be the main barrier. On the other hand, they continue to include it as a criterion for recruitment and promotion. Thus, this means that male employees would be the most likely job incumbents relative to women.

An evaluation of the compliance with the EEA must take into consideration: a) the economic and financial factors relevant to the sector in which the employer operates; b) present and anticipated economic and financial circumstances of the employer; (c) progress in implementing EE by other employers; and d) reasonable efforts made by the employer to implement EE.[108] In fact, some of these factors regarding employer's economic and financial circumstances and plans are outlined in the Canadian (federal) EEA.

d. Conclusion

Although progress has been made in enhancing racial and gender representation in the workplace, this is an incremental process which has to be supported by coherent human resource development priorities through the implementation of the Skills Development legislation and changes in the organisational culture. This is vital at both public policy and organisational levels. An increasing earnings gap has an adverse impact on mainly Black people. This situation continues, despite the increasing diversity and multiracial character of a growing middle class. The biggest priority must be human resource development and education in skills and competencies needed in a society in transition.

105. Commission for Gender Equality, SURVEY OF EMPLOYERS REGARDING AA POLICIES AND PRACTICES. GENDER IN THE PRIVATE SECTOR (1999)
106. *Ibid.*
107. *Ibid.*
108. M. Samson, *Training for Transformation* AGENDA 6-17 (1999).

This reality has been recognized by the government and the Black Economic Empowerment Commission. The Commission has made important recommendations to the government to 'kick-start' the economy and enhance economic growth through state-driven measures to ensure Black participation in the mainstream economy. Proposed measures include a national integrated human resource development strategy, legislated deracialisation of business ownership in the private sector, setting of national targets that include land distribution and ownership, and equity participation in economic sectors. The Commission further recommends targets for senior and executive management in private sector firms of more then 50 employees to be Black. The Commission's proposals, which have been accepted by the government in principle, are a significant policy basis for improving access to capital and skills and economic empowerment for the majority of South Africans. These overall measures, along with the progress in implementing employment equity, will greatly improve the chances of majority Blacks to have their just share in the South African economy.

III. OVERALL CONCLUSIONS AND IMPLICATIONS

It is obvious that countries with mandatory AA programs such as India, Malaysia, and the Northern Ireland part of UK, as well as those with Contract Compliance programs such as the United States, have made significant progress in improving the employment and earnings of the designated groups, although they still have a long way to go.

EE/AA policy measures stimulate positive changes in the workforces of affected employers. In particular, such public policy measures:

- help broaden the focus of the affected employers to designated groups in the selected countries;
- require employers to collect both stock and flow data on the designated groups in several countries such as Canada, USA, and South Africa;
- encourage many employers to devise new and innovative measures to attract, retain and motivate designated group workers by adopting pro-active hiring, training, promotion and compensation policies;
- persuade many employers to relate their human resource management plans to corporate plans by revamping the human resource function, and in many cases, developing human resource information systems to benefit both designated and other workers; and

sensitise employers to the changing demographics in their respective societies, thereby helping mangers develop policies to cope with these developments.

There are powerful forces at work to reduce disparities in the labour market opportunities of ethnic minorities and women. We have deliberately chosen six countries which are diverse both in terms of culture and economic development to show that responses to this challenge vary according to the circumstances of each country but usually involve a degree of legal intervention. While there may be widespread agreement in the need for reform, the precise mechanisms for achieving this are the subject of much debate and controversy. Nowhere is this more clearly seen than in the case of affirmative action and to some extent employment equity programs that may be perceived to have detrimental effects on individual members of non-discriminated against groups.

Malaysia and South Africa are distinctive in so far as protection is offered to the ethnic and racial majority as opposed to minority groups. In India the problem arises from the caste system. In the UK a distinction is made between Northern Ireland and Britain. In the former religion which is aligned with political leanings is a major issue, while this is largely absent in the rest of the UK. In England the problem of racial discrimination is influenced by the fact that racial minorities are largely concentrated in large urban areas. In each of the developing countries there may be problems of illiteracy and in the UK and elsewhere of language which reduce the productivity potential in employment of certain members of these groups and make it more difficult to detect whether differences in employability and pay are caused by discrimination. In the USA racial minorities include a diverse array of groups including Blacks, Hispanics and Mexicans, with non-Whites making up 25 percent of the population. What is clear from USA, Canada as well as the UK experience is that the outcomes differ not only between the minorities and majority groups, but also across minority groups with some achieving better labour market performance than others. In the USA and Canada there are a wide range of measures including affirmative action and employment equity plans respectively for federal contractors and protection against age and other prohibited grounds of discrimination. Much of this legislation has been influential elsewhere as in the case of affirmative action in Northern Ireland.

Spotlight on Criminal Justice Administration in India+

*B.B. Pande**

Criminal Justice Administration (CJA) has always been a fascinating theme. Even during our childhood days we spent innumerable hours playing criminal-police, lockin-lockout and punishing the culprit games, which caught our imagination because they evoked infantile anxieties, fears and joys. But then, there was much greater unanimity in our desire to enact the policeman and our zeal to impart punishment to the wrongdoer. One more thing that was distinct about those 'games' was that, though they were games but we all took them seriously. In the six decades of my journey from childhood to adulthood and beyond, the CJA is still with us, perhaps even more, but the lines of demarcation between police and criminal have become distinctly blurred and the unanimity about punishment to the culprit has more or less disappeared. Now, for most of us the CJA is a real thing (not a game), but more and more of us seem to have mastered the art of 'playing' with it and in the process the real has turned into a 'grand farce'. Presently, I propose to turn the spotlight on certain key areas of CJA, which are described by some to be in a 'state of crisis'. This is with a view to better understanding the nature and extent of the 'crisis' and forging possible measures for its resolution.

1. The Eroding Normative *Raison D'etre* of Criminal Law and Deviance

Criminal law can be defined 'normatively' as something good or desirable, because it functions to prevent or resolve social conflicts between the law-abiders and the law-breakers. It is such conceptualisation of criminal law that is taught in law classes and academies and also believed as a gospel truth by a large bulk of the consumers of criminal law, who unequivocally accept the consensus based criminalisation myth. In contrast to this much better known view, criminal law can also be perceived

+ Kumarappa-Reckless Award Lecture delivered at the 27th All India Criminology Conference, of the Indian Society of Criminology organised by the Lucknow University, Lucknow, October 10-12, 2003.

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'neutrally', as a set of 'power resource', which is neither good nor bad.

Such a neutral criminal law can be deployed for tilting the power balance more for enhancing conflicts rather than reducing them. The 'normative' or "neutral" conceptualisation can be equally applied to deviance as well. Thus, deviance may be bad or worth shunning to many, but there are others who perceive it merely as a form of behaviour that can have both negative as well as positive connotations. From a sociologist's point of view there is nothing unusual for the different sections of society to perceive law and deviance diversely. Such diversity as a matter of fact is well analysed by the sociologists in terms of the four distinct combinations of relationship between law and deviance which are described in social science parlance as follows (i) *functionalism*, where both criminal law and deviance are normatively defined, (ii) *instrumentalism*, where criminal law is neutrally defined but deviance is normatively defined, (iii) *interactionism*, where criminal law is normatively defined and deviance is neutrally defined, and (iv) *structuralism*, where both criminal law and deviance are neutrally defined.

In the domain of politics normativity may not always be a virtue, because norms are often used for maintaining domination and conjuring hegemony. But for a Mohandas Karamchand Gandhi, a true *satyagrahi* must learn to respect the norm and be ready to face punishment if he breaks it. But today many politicians would prefer to avoid the Gandhian tenet of fidelity to the norms; for them the norm is not more important than the cause. Norms can be respected so long they yields political benefits. The main reason for the growing disrespect for the norm amongst politicians is that it shuts-out almost completely the possibilities of an alternative and a politically convenient action. Also norm by its very nature is rigid and more or less inflexible that eliminates the possibilities of politics of propagating new causes. The *Babri Masjid Demolition case*[1] is a classical example of growing tension between the norm that criminalises the act of defiling any place worship (Section 295, Indian Penal Code 1860, enacted over 140 years ago) and the cause of building another place of worship. The case also marks the growing tension between the unchangability of the norm and the mutability of the cause.

But unlike the sociological and political view points, the norm is the very heart and soul of law. Norm in the legal domain not only declares in advance the kinds of behaviour that are proscribed but also keeps under check whimsical and arbitrary views that have a tendency of gaining

1. *M. Ismail Faruqui* v. *Union of India* AIR 1995 SC 605.

'credibility because of political influence, mostly of the extra-legal kind. A recent Prakash Jha film: *Gangajal*, is an excellent example of this tendency and its increasing appeal. The film based on the Bhagalpur blindings episode in the late seventies shows how in the face of all-round failure of the CJA and the growing menace of crime, the people express a strong support for arbitrary and illegal actions on the part of the police. For the community the cause of fighting criminals becomes more important than the norms of fair trial, human dignity etc. The more worrying aspect of *Gangajal* jurisprudence is its likely impact on the normativity. This is particularly important at this juncture when the print as well as visual media is evoking much greater interest in crime themes. The recent introduction, in the TV channels of programmes such as "*Jurm*", "F.I.R." and "Most-Wanted" have succeeded in turning the crime theme into an item of entertainment, but without caring for the normative boundaries. These programmes can either lead to undue glorification of crime or of the repressive control apparatus. Both of which are equally detrimental to the normative cause.

It is nobody's argument that the out-dated and irrational norms can never be questioned or subjected to reform or change. But for achieving that objective one need not go to the extent of eroding the very sanctity of the norm itself. Because that extreme step should be resorted to only under revolutionary situations, which ought to come in the lives of a nation only rarely.

II. Silent and Open Subversion of the Rule of Law

Just as subversion of the norm primarily relates to the consumers or the subjects of the CJA, the issues relating to subversion of Rule of law primarly relates to the agencies of the CJA such as the police, the prosecution, the courts, the prisons, the correctional services and the criminal lawyers. Since these agencies are creations of the law, their power and functions are strictly subject to the relevant laws alone. It is assumed that the various agencies function in accordance with the rule of law, either singly or in combination.

But the reality of CJA is hardly in confirmity with the theoretical assumptions that the agencies of criminal justice ought to and do function in strict compliance with rule of law. The non-compliance can range between mere violations to inadvertent or advertant subversions. The term subversion of rule of law relates to those violations that have the tendency of turning the CJA into a farce. Furthermore, depending upon the motive of the subverter, a subversion may be described as a silent subversion or

open subversion. Silent subversions are a part of the routine and may occur mainly on account of paucity of resources or lack of manpower and inadequate training and skills. The instances of subversion of procedural and evidentiary rules is more rampant and better known, but the instances of silent subversion of substantive law is not unknown either. The infamous *Best Bakery* Case judgement (Sessions Case No. 248 of 2002 titled as *State* v. *Rajubhai Dhamirbhai Baria and others*) of the Sessions Judge of the Fast Track Court No. 1, Vadodara Shri H.U. Mahida could not have done better in exposing the of the CJA in a more telling manner thus:

> [W]henever communal riot takes place, the police investigation in the riot related offences turns out to be lame as compared to other investigations. The real culprits escape from the scene of the offence on arrival of the police. The innocent passerby and others watching the sight curiously remain under impression that they would not be harmed since they are innocent. However, from amongst such people and from the surrounding population the police selectively picks certain persons of their choice. During the course of investigation if anybody turns out to be oversmart or raises his voice, such persons are definitely slammed inside as accused. (para 49 Sessions Case No. 248/02).

In the same vein the judgement goes on to read:

> [J]ust as bogus accused are roped in the offence, bogus witnesses are also roped and involved and similarly bogus panchas are created. Since the accused are bogus, the depositions made by the true witnesses also turn out to be meaningless against the bogus accused. (Para 50).

The Judge has rendered great service by letting out the inner realities of investigation and testimonial processes, but he little realised that he himself was becoming a party to subversion of rule of law when he decided to conveniently keep out of the mess. As later pointed out by the National Human Rights Commission in its petition before the Supreme Court in these words. "That the failure of the trial court, after making the observations referred to above, to order further investigations before concluding the trial has put the credibility of the justice delivery system under serious challenge. In this context, the petitioner submits that *a criminal trial is not a mere formality. When an offence is committed and the court is seized of the case either through complaint or police report, it becomes the duty of the court to ascertain the truth and render justice. Failure to do so results in miscarriage of justice*" (Ground I of the Petition: emphasis supplied). It is hoped that the Supreme Court's intervention may set right the miscarriage in the Best Bakery Case or the other post Godhra riot cases, but the sad fact of subversion of Rule of Law in many other cases before the various criminal justice agencies still remains unaddressed.

We all know how the consumers of the CJA, particularly those who are poor and resourceless are made to run from pillar to post for getting their F.I.R.'s registered, securing a fair and impartial investigation, ensuring that witnesses are permitted to make a true and fearless deposition and the courts make acquittals, convictions and sentencing strictly in terms of the laws. Take for instance the problem of hostile witness that constituted the basis for the 21 acquittals in *Best Bakery case*. The practice of witnesses turning hostile is not something unknown to the CJA in India. The fact that witness will turn hostile, is often well-known to the investigating agencies and welcomed by the prosecution and even the judiciary. Many lawyers are known and sought after for their special abilities to break the witnesses. Therefore, the malaise of witnesses turning hostile is largely a creation of the system itself, that uses this as a technique for diverting the resourceful accused out of the system. In the *Best Bakery case* itself, did the functionaries of the CJA not know that undue pressures were being exerted for quite some time on the key witnesses? Yet why no one cared to exercise the rule of law power before the actual event of "Miscarriage of justice"? As a matter of fact the State of Gujarat and its functionaries never displayed any interest in enforcing the rule of law at all: F.I.R.s were designedly not registered, in a large member of cases, as indicated in the *Best Bakery* judgement also, for over a month no investigatory steps were initiated, even the Fast Track Court judge enacted a farcical trial by acquitting all the 21 accused after a bare 4 months and 7 days trial (the trial commenced on February 20, 2003 and the judgement was delivered on June 27, 2003 - as per NHRC Petition). From all this it appeared that the State of Gujarat was in no mood to enforce the rule of law and did not mind its open subversion in the name of the will of the majority. This is clearly borne out by the defiant attitude of the Chief Minister who by following a unusual course preferred a Petition before the President of India, seeking an enquiry into all the earlier riot cases. Meaning in a way: We admit the subversion of Rule of Law in Gujarat, but that had been happening for a long time in many other states as well. Even the institutions meant to protect the interest of minorities and women merrily fell in line with the State's views. It goes to the credit of the NHRC that it responded to the open subversion by preferring a well argued Petition before the Supreme Court under Article 136 of the law. Now after the admission of the Petition and the Supreme Court's tough talking with the CJA function-

aries of the State the message has gone home that subversion of rule of law shall not be tolerated any more this time.

Even after the sad experience in Gujarat it may still be legitimate for the defenders of the CJA and many such other rule respecting functionaries to argue that there is no real crisis, but only certain digression on account of a few deviant officials. It may be further argued that such limited instances of subversion can be effectively checked by the powers of judicial and administrative review. After all the large number of cases before the Supreme Court and High Courts that keep on giving mild or strong directions to the officials to comply with the rules are indication that the system is working fairly well. But the growing incidents of State lawlessness, increasing nexus between criminal-politicians and officials and the spreading tentacles of corruption at high places does not let us believe that everything would be all right in the very near future. We do get an uneasy feeling of damage to the institutions may have gone beyond repair.

The stakes involved in the intentional and even inadvertent subversion of Rule of Law are too high to be ignored and too pressing to be postponed any longer. Thus, unless some concrete steps are taken to ensure better compliance with the Rule of Law at all the levels; we shall continue to be haunted by the ghost of the rule-respecting police officers who are already locked-up in a life and death battle in more than just a few sectors. The poignancy of the situation is best exemplified in the character of an upright and young police officer in the recently released Bollywood film *Shool* (The Thorn), whose cries for upholding the rule of law were neither heeded by his fellow officers nor by the top brass of the police. Ultimately the law-abiding and rule-oriented officer takes to the path of lawlessness for the sake of elimination of the political don and in the end destroys the very principle for which he stood and suffered throughout

III. Denial of Justice by Delay

Delay in CJA has already become too well known to shock us any more. Perhaps that is why the Supreme Court in *Ramchandra Rao* v. *State of Karnataka*[2] declined to lay a strict limit to the period for a criminal trial. But delay from the perspective of the parties caught in the criminal justice drama such as the accused (his family members, relatives and friends), the victim (his family members, relatives and friends) and the community (whose day to day anxieties and fears are closely linked to the incident) is different and a vital element for upholding the credibility of the CJA in their

2. (2002) 4 SSC 578.

eyes. The following two incidents unfolded a new meaning of delay for me.[3]

Father who could not afford even a few days' delay

The Lok Adalat in Tihar Prison in the month of December, 2000 had a difficult undertrial prisoner who was alleged to have committed theft of a cycle. He told the Magistrate that he had not committed the offence but was willing to confess to the crime because it will earn him early release from the prison. The Magistrate advised him that confession and conviction would entail a criminal record, therefore in his own interest he should wait for his trial in a regular court, with fair chances of acquittal. The undertrial persisted and said a regular trial takes few months and even more: "I cannot afford to wait because my ailing son may die by then".

Complainant more interested in bringing an end to the case

In the course of Compounding of Cases Project at Tis Hazari Courts our legal service volunteers came across a case in which the complainant was more keen to bring the case to an end than the accused. This was because the ten year old case had already had several hearings and each time the complainant had to appear in the court along with the case property, a scooter. He would not only loose one day wages, but would also be required to carry the junk scooter in a cycle rickshaw. After counselling and persuasion the accused agreed to oblige the complainant by confessing to the crime, and the case came to an end after conviction and set-off for the period already undergone.

The dynamics of delay in criminal cases is complex and thoroughly under researched. A recent study has analysed delay in the trial of minor offences at the District Court level in Delhi.[4] The study had identified delay in terms of six stages, namely, from filing of chargesheet to framing of charges, prosecution evidence, statement of the accused, defence evidence, arguments and judgement. The study made an offence-wise analysis of delay as follows:

- For Accident cases the average time taken in disposal of cases resulting in conviction was 1893 days and for cases resulting in

3. These are based on the Tihar Jail Project conducted by the Legal Aid Clinic, Faculty Law, University of Delhi.
4. Amita Punj, *Delay in Trial of Minor I.P.C. Offences at the Tis Hazari Courts*, Unpublished LL.M. Thesis 2002.

acquittals the average disposal time was 3150 days. In these cases the maximum average delay of 1828.8 days was caused at the Prosecution evidence stage, followed by 418.2 days in the filing of chargesheet to framing of the charge stage.

- For Hurt, Assault and Intimidation cases the average time taken for conviction cases was 1849 days, while for acquittal cases it was 2380 days. In such cases, the average time taken for prosecution evidence was 1485.95 days, followed by average time taken for framing of charges as 801.5 days.
- For Theft cases the average time taken for disposal of cases leading to conviction was 1962.2 days and for cases leading to acquittal it was 2561.2 days. In such cases the average time taken for prosecution evidence was 1516 days, while average time taken for framing charges after chargesheeting was 763.63 days. The average time taken for defence evidence in these cases was 4.45 days (for Accident) zero days (for Hurt etc.) and 22.5 days (for Theft). Thus, the greatest contributor to delay in trials were witnesses, followed by the presiding officers who delay the framing of charges.

Why did the framers of the Constitution and the drafters of the Code of Criminal Procedure not consider it worthwhile to recognise the right of the accused, the victim and the community to get speedy justice, particularly when the movers of the Criminal Procedure Bill in 1970 had underscored speedy disposal as one of the three basic considerations, is difficult to understand much less appreciate.

Even if delay to a certain extent is treated to be an inherent aspect of the formal system of justice, how does the system stand to gain from it? A closer study of the dynamics of delay reveals that it provides a *carte blanche* to inefficient investigators, manipulating lawyers and vacillating judges, whose only interest is to keep the cause lingering. Why and for how long the CJA would keep on sympathising with the inefficient, manipulator and the vacillating? Why should we not take a cue from the USA that confers right to speedy trial under the Constitution or the UK where such a right is well recognised statutorily?

IV. The Convenient Criminals and Inconvenient Criminals

Though the CJA refuses to acknowledge any class distinction between criminals, but in reality the system operates diversely for the criminals of different socio-economic strata. In the words of Alan Norrie:

> This social dividing up of the potential criminal population takes as to Foucault's (1979) account of the prison in modern society, and the dual role that it plays there. Those who are located at the 'bottom end' of the social structure, with least to gain from 'playing the game', are precisely those whom the prison system ends up containing. They cannot be deterred but they can be removed from circulation for a period of time. The prison thereby acts as a cordon sanitaire, between the relatively law abiding and the rest. While containing the one group, it acts as a symbol to the other of the dangers of crossing the line between criminality and respectability.[5]

The aforesaid criminal can be termed as 'convenient-criminals', who constitute the large bulk of criminal population involved in petty crimes. Richard Quinney described their crimes as 'crimes of resistance',[6] while Marxist criminologists describe them as *lumpenproletariat* criminals. Our CJA too is mainly pre-occupied in dealing with such criminals, whether at the stage of arrest, bail, remand, pre-trial prisonisation, trials, sentencing and post-conviction prisonisation.

In contrast to the above described 'convenient criminals', we have a small yet distinguished class of 'inconvenient criminals' who have been described as 'Privileged Class Deviants'[7] 'Crimes of the Powerful'[8] 'Offences Beyond the Reach of Law'[9]. To this category of 'inconvenient criminals', the addition of terrorists of all hues has been a significant recent development. A feature that outrightly distinguishes this category from the earlier category is their unnatural and unwanted presence within the CJA, not only because they wield disproportionate political and social power but because the system is hardly in a position to deal with them. The discomfiture faced by the judicial authorities in handling the cases of terrorists in Punjab and in the J&K is a case on the point. In the same vein one can explain the continued elusion of the forest Mafia Veerappan (who may as well be described as Saint Veerappan because of his abilities to remain beyond the reach of law on account of his *Maya*), who can be titled as inconvenient criminal *par excellence*.

The underlying idea in emphasising these two categories is not to suggest the obvious, but to draw attention towards the need for rationalisation

5. Alan Norrie, *Crime, Reason and History* 202 (1993).
6. Richard Quinney, *Class, State and Crime: On Theory and Practice of Criminal Justice* (1977).
7. B.B. Pande, *The Nature and Dimensions of Privileged Class Deviance* in K.S. Shukla (ed.) The Other Side of Development (1987).
8. Lee and Visano, *Official Deviance in the Legal System* in H. Laurence Ross (ed.) Law and Deviance (1981).
9. Sixth U.N. Congress (1980)

of the criminalisation process, that appears to have outlived its utility. Those involved in CJA planning know it better that criminal justice cannot be divorced from the socio-economic context. It is well known that our CJA lacks infra-structural resources and skilled manpower. Therefore, if we decided to deploy the CJA resources to effectively deal with the inconvenient criminals, about which apparently most of us are in agreement, than the CJA has to shift away from the convenient criminals. The need to set these priorities is all the more incumbent for us. Even the developed societies of the West have kept on altering their priorities, that is the reason for their undertaking the decriminalisation and re-criminalisation exercise periodically.[10]

I am aware that quite a few of us are trained in not making a distinction between 'petty crimes' and 'serious crimes'. To many petty criminality is the nursery for serious crimes. But it is time that we understand that for taking inconvenient criminals seriously we have to shed our stereotypes and think differently.

V. Criminal Justice Reform Without Hope

In the first phase of comprehensive CJA reforms in the country in the early 70's the basic approach was: *first*, to update the criminal law and procedure and bring it in line with the modern systems; *second*, to evolve a more humane model of CJA by infusing the due process elements; *third*, to make CJA responsive to the needs of specified weaker section such as children, women and lower caste groups, and *fourth*, to suggest new and alternative forms of punishments. The new Code of Criminal Procedure 1973 did have specific provisions for incorporating some of these objectives like right to pre-sentence hearing under Sections 235 (2) and 248(2), speedy disposal by fixing a period of investigation of 60 days and 90 days under Section 167, emphasis on reformative and non-traditional sentences under Sections 360, 361 etc. In the same vein the Indian Penal Code (Amendment) Bill 1972 and the Bill of 1978 were introduced to re-write the substantive Criminal Law Code. One thing distinct about the reform process of 70's was they were backed-up by thorough researches by the Law Commission of India, which brought out the exhaustive 41st and 42nd Reports. Furthermore, these reports and proposed amendments in the Bill were elaborately discussed at the level of the society and in the Parliamentary Committees. It is unfortunate that the IPC Bills lapsed and the events in the 80's and 90's made the law reform itself crisis ridden. By the end of the 90's crime and criminal justice reform no more remained to be an issue

10. The European Decriminalization Committee Report (1981).

of intellectual enquiry, it had passed into the domains of politics. Crime was increasingly seen not only as a threat to law and order but to the national integrity and ideal of nationality itself. No doubt terrorism and transnational economic criminality posed a grave challenge and some serious steps were urgently needed; but seeing all crimes in the same frame and cutting off crime inquiries from intellectual roots led to serious distortions in the understanding of the crime phenomenon and the official policies in respect to it. The constitution of the Justice Malimath Committee on Reforms of (the) Criminal Justice System in November 2000 and its overwide six point terms of reference epitomises this classic distortion. Points 1 and 2 in the terms of reference are more like an admission of the fact that either there existed no CJA in India before 2000 or it had totally lost its utility for the society, that is why there is a need "To examine the fundamental principles of criminal jurisprudence ... to re-write the Code of Criminal Procedure, the Indian Penal Code and the Indian Evidence Act".

The Malimath Committee submitted its Report (MCR) in April 2003. Perhaps more on the expected lines than the earlier constituted CRWC that only succeeded in making certain recommendation that did not carry, forward the dream of building a "totally new social order". The two volume, six parts and twenty three chapter Report has made 158 recommendations touching upon almost all the aspects of the CJA. More important than the specific recommendations are the basic premise of the reform process itself which according to the MCR are as follows:

(i) *violence and organised crimes have become the order of the day. As chances of conviction are remote crime has become a profitable business. Life has become unsafe and people live in constant fear* (para 1.3; emphasis supplied).

(ii) The system is heavily loaded in favour of the accused and is insensitive to victim's plight and rights (para 2.2).

(iii) The Adversarial system lacks dynamism because it has no lofty ideal to inspire. It has *not been entrusted with a positive duty to discover the truth as in the Inquisitorial system....* the system appears, to be skewed in favour of the accused. It is therefore necessary to strengthen the Adversarial system (para 2.15; emphasis supplied).

(iv) Peace and law and order situation depend to a large extent on the efficacy of Criminal Justice System. There is therefore an imperative need to provide a fair *procedure that does not allow easy escape for the guilty* (para 5.16; emphasis supplied).

(v) There are three standards of proof: "A preponderance", "clear and convincing" and "beyond reasonable doubt" ... "The middle course,

in our opinion" makes a proper balance between the rights of the accused on one hand and public interest and rights of the victim on the other (paras 5.30 and 31).

The afore-quoted five paragraphs may be a very narrow sample of the Committee's broad-based recommendations, but it may suffice to give a fair indication of their perception of the social context and the guiding philosophy. Two scholarly comments, one from a former Judge of the Supreme Court Justice K.T. Thomas that "the recommendations have some silver coins" and the other from Professor Upendra Baxi that the MCR has performed a "classic exercise in seduction",[11] underscore the "some appeal for everyone" quality of the MCR. It is proposed here to critically analyse only five key concerns of the MCR as follows:

A. Reforms under the Shadow of International and National Terrorism and Organised Crimes

The whole nation should share the Committee's concern about the harmful consequences of acts of terrorism that strike at the very roots of civilised social existence. No honest citizen would disagree with the Committee's views that strong and firm measures should be adopted for dealing with such crimes and other equally harmful variety described as Federal Crimes. But the real problem is that the Committee appears to have carried the serious crime scare too far by identifying violent and organised crime as the common crime or by suggesting "crime has become a profitable business". The fact is that bulk of crimes are still of the traditional nature, which need to be understood and clearly differentiated from terrorism and organised crimes. In any case for dealing with crimes of terrorists and organised nature more significant would be swift and scientific measures of detection, prevention and investigation rather than lowering the standard of proof, shifting the burden and stringent punishment.

B. Underexplored Reclassification Initiative

The Committee did touch the vital theme of "Reclassification of Offences" in chapter 15. As proposed, the Committee feels "As done in some countries crimes may be classified into four codes, namely (1) The Social Welfare Offence Code, (2) The Correctional Offence Code, (3) The Criminal Offences Code and (4) The Economic and Other Offences Code" (MCR para 15.6.11). Furthermore in Recommendations 108 to 113 there is a proposal to increase summary procedure offences, petty offences,

11. Upendra Baxi, THE (MALIMATH) COMMITTEE AN REFORMS OF CRIMINAL JUSTICE SYSTEM: PROMISES, POLITICS AND IMPLICATIONS FOR HUMAN RIGHTS (2003).

non-arrestable offences, reducing the number of non-bailable offences, increasing the category of compoundable offences etc. But it is unfortunate that the Committee nowhere spells out the rationale for the various reclassification strategies. It is not clear why the Committee proposed to undertake this massive exercise. For example the suggestion that the classification of offences as cognisable and non-cognisable categories ought to be done away with (MCR para 15.3.1), is likely to bring more offences within the CJA fold, thereby, in a way, negating the proposal of four fold classification of offences. Similar recommendation for making all offences cognisable was made by the Padmanabiah Committee on Police Reform (2000), for conferring more powers on the Police. But at the same the Law Commission Paper on *Powers of Arrest* (2002), have suggested increasing the number of non-cognisable offences to give more powers to the judiciary.

While agreeing with the MCR plea of reclassification one had expected that reclassification should have constituted the core of the reform work. But unfortunately this happens to be the least worked-out and elaborated part of the MCR. The reason for such a treatment are not difficult to imagine.

C. Little Scope for Disagreement with Committee's Proposals for the Victims

Perhaps the least controversial aspect of the MCR is its concern for the victims. Victims have traditionally remained the most ignored sections of the CJA. Therefore, the proposal to ensure victims right to more effectively participate in the trial and the right to be compensated adequately are more than justified. But in the context of a society like ours can our thinking about the victim be complete without talking about the victims of abuse of power? This is because most vital and gross victimisation often takes place at the hands of the law enforcement officials such as the Police, the Courts and the correctional institutions. The Supreme Court's initiatives in the area of compensatory justice to victims mainly related to victimisation at the hands of correctional officials *(Rudul Shah* v. *State of Bihar*),[12] investigatory officials *(Nilabati Behara* v. *State of Orissa*[13] and *D.K. Basu* v. *State of West Bengal)*.[14] The Committee seems to have overemphasised the non-State victimisation, which certainly shifts the focus away from the accused, but no attention is paid to the acountability of the power abusing officials.

12. AIR 1983 SC 1086.
13. (1993) 2 SCC 746.
14. AIR 1997 SC 610.

D. Half-hearted Search for Punishment Alternatives

The Committee gives ample evidence that it is alive to the needs of reform in the area of punishment alternatives and sentencing strategies. Chapter 14 of the MCR is devoted to: Offences, Sentences, Sentencing and Compounding. In respect of new forms of punishment the Committee has not gone beyond the IPC Bill 1972. Neither the possibilities of new punishments such as 'curfew order', 'community rehabilitation order' 'attendance centre order' has been explored in the Indian Society context, nor reference has been made to *Restorative Justice* alternative. In many European systems *restorative justice* has already replaced traditional punishment for many non-serious categories of offences.

The most controversial view of the Committee is in respect of Capital Punishment. Para 14.7 is titled as: 'Alternative to Death Penalty', gives an impression that the Committee is taking an abolitionist stand and a reformist line. But its suggestion of imprisonment for life without commutation or remission, can hardly be justified on reformist grounds. The Committee seems to be aware about the need for sentencing guidelines (Para 14.4), but its recommendations fall short of seeking a comprehensive sentencing legislation. Sentencing disparities and formlessness have become too notorious and judicial discretion needs to be guided by Rule of Law, on the lines of the US Sentencing Act 1984 and the UK Sentencing Act 2000.

E. Who cares for "Truth"?

The Committee seems to be over-obsessed by the "truth" seeking quality of the Inquisitorial System (particularly the French system about which the members of the Committee have a few days first hand experience). None can contest the Committee's noble aspiration of making the CJA "truth based". But the Committee has not adequately spelled out the ways and means of going about this mission. Ordinarily our courts find it very difficult to arrive at a conclusion about 'proof' on the basis of relevant and admissible evidence, how is search of truth going to be any easier? Apart from inherent difficulties in search for truth, it is likely to be very time consuming too. It is almost ten years now that the Justice Liberhan Commission is trying to unearth the truth about Masjid demolition, but still they seem to be nowhere near. Furthermore, a judge as a human being is likely to suffer from all possible human weaknesses too, like the *Best Bakery* case judge. It is not clear as to how the proposed mandatory obligation to search the truth is likely to transform the human beings?

WTO Dispute Settlement Mechanisms: A Fresh Look

*A.K. Koul**

I. Introduction

For global peace and prosperity, an open, rule based trading system, based on principles of non-discrimination, progressive liberalisation of tariffs, and rule of law could help support such peace and prosperity. Obviously once the international obligations and rights and duties of member states have been defined, the question of how those obligations, rights and duties are to be enforced especially in the arena of international trade, multilateral conventions and treaties remains. In the Havana Charter/ITO, the concept of balancing the rights and duties was incorporated by providing for compensatory adjustment in case a member has not obligated itself to the rights and duties which it had agreed upon while acceding to ITO. Once the ITO failed to come into existence, almost similar provisions were incorporated in Articles XXII and XXIII of GATT 1947. The management of disputes in the WTO is structured on the basis of the abovesaid Articles of GATT, and the rules and procedures as further elaborated and modified therein. Therefore, a brief survey of the jurisprudence of settlement of disputes as developed in GATT, upto the incorporation of an elaborate treaty of twenty seven articles and four appendices known as Understanding on Rules and Procedures Governing the Settlement of Disputes as part of the Governing the Settlement of Disputes that are a part of the WTO dispensation that has come into force on 1 January, 1995 is attempted.

II. Dispute Settlement in GATT 1947

The GATT 1947 in the legal technical sense did not conceive of a specific procedure or provision for the settlement of disputes nor did it provide legal norms as to when a breach or breaches would amount to violation of a rule so as to give rise to a dispute. The GATT even was silent about the establishment of a tribunal for resolving actual disputes or to promulgate authoritative interpretations on questions of interpretation.[1] Yet

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1. See Kenneth W. Dam, The GATT and International Economic Organisation 352 (1977).

over the years the disputes with regard to breaches of substantive norms of GATT and its articles as well as the question of interpretations have been a recurring phenomena. Surprisingly enough, GATT has resolved many more disputes and evolved umpteen interpretations and interpretative techniques to make the GATT functional. To some extent, the Contracting Parties acting jointly under Articles XXXV.1 or under more specific provisions of GATT exercised the functions of a tribunal. As GATT 1947 is drafted on conventional terms, including a liberal use of prohibitory language, the remedy provisions are not drawn in terms of sanctions. The organising principle as a whole is a system of reciprocal rights and obligations to be maintained in balance. Professor John H. Jackson, however notes that there are nineteen clauses in the GATT which GATT Contracting Parties are obliged to consult in specific instances including the instances of customs valuation, and invocation of escape clause.[2] GATT Articles and Paragraphs are as follows:

11:5; VI:l; VII:1; VIII:2; IX: 6; XII:4; XIII:4; XVIII:12; XVIII:16; XVIII: 21; XVIII:22; XIX:2; XXII; XXIII; XXV:1; XXVII; XXVIII:1; XXVIII:4; XXXVII:2.

Also there are seven different provisions for compensatory withdrawal or suspension of concessions. 3 Article II:5; XII:4; XVIII:7; XVIII:21; XIX:3; XXIII; XXVII, XXVIII:3; XXVIII:4.

The GATT in Article X, to some extent provided a mechanism with due regard to the obligations of contracting parties *inter se* themselves by requiring the publication of laws, regulations, periodical decisions and administrative rulings of general application pertaining to the treatment of products for customs duties. Such instruments are to be published promptly in a manner so that the governments and traders are conversant with them. Similarly, agreements 'affecting the publication of trade policy' in force between the government or a governmental agency of one contracting party and another contracting party, were also to be published.[3]

By 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance further set out the commitments of contracting parties to notify such measures to the maximum extent possible notwithstanding whether those measures are consistent with the rights and obligations of the contracting parties under the GATT.

2. See John H. Jackson, WORLD TRADE AND THE LAW OF GATT 164 (1969).
3. See generally A.K. Koul, *Settlement of Disputes in International Trade*, IN.C.L.J 46-68 (1996).

III. ARTICLE XXIII AND THE ROLE OF PANELS

Article XXII: 1, requires each contracting party to afford other contracting parties adequate opportunity for consultation with respect to any matter affecting the operation of GATT. Article XXII: 2 authorises the contracting parties acting jointly, at the request of a contracting party, to consult with other parties on matters which were not resolved through Article XXII: 1 consultations. Eventually the consultations became a basis for the generation of GATT's settlement procedures which was grounded in Article XXIII.

Under Article XXIII:I a complainant must show that either (i) benefits accruing to him under the GATT are being nullified or impaired; or (ii) attainment of any objective of the GATT is being impeded. In addition, the complainant must further show that such nullification and impairment is a result of (a) breach of obligation by respondent contracting party; (b) the application of any measure by the respondent contracting party, whether it conflicts with the GATT or not; or (c) the existence of any other situation.

If no satisfactory adjustment is made between the complainant and the respondent contracting parties within a reasonable period of time or if the difficulties pertain to clause (c) of Article XXIII, then the complaining party is authorised to refer the matter to the Contracting Parties under Article XXIII:2 who are required to investigate the matter and make appropriate recommendations. In an appropriate case, Article XXIII:2 permitted the Contracting Parties to authorise the complaining party to suspend the application of tariff concessions or other GATT obligations to the party found to be acting inconsistent with its obligations under the GATT.

Over the years, especially in absence of specific procedures and formal settlement of disputes mechanism, the contracting parties laboured very hard and some semblance of formal dispute mechanism system was developed by evolving a system of panels for redressing grievances of the complaining contracting parties.[4] Some semblance of formality was added to the settlement of disputes process in 1979 when the Tokyo Round adopted an Understanding on Notification, Consultation, Dispute Settlement

4. For an overview on the developments in the he dispute settlement mechanisms in GATT, see John H. Jackson, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT, 3rd ed. 327-371 (1995); Robert Hudec, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1990), ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); Pierre Pescartore, *The GATT Disputes Settlement Mechanism*, 27 J. OF WORLD TRADE 6-20 (1993).

and Surveillance which included an annex setting out an Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement. This Description noted, in part, that:

> Panels set up their own working procedure. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute, Panels have also heard the views of any contracting party having a substantial interest in the matter which is not directly party to the dispute, but which has expressed in the Council a desire to present his views. Written memoranda submitted to the panels have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the GATT, especially on historical or procedural aspects. The secretariat provides the secretarial and technical services for panels.[5]

The abovesaid provisions were further reaffirmed and elaborated by adding more detail including a requirement that, 'The Contracting Party to which such a recommendation i.e. to bring a challenged measure into conformity with GATT has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendations or ruling by the Contracting Parties.'[6] Some minor steps were also taken in a Decision on Dispute Settlement Procedures on Nov. 30, 1964.[7]

The panel system of settlement of disputes has played a very vital role and by 1990, more than 140 cases were resolved by the use of panels under Article XXIII. The panel as already referred is an independent body of experts with 'three main tasks viz (a) to inquire into the facts of the case; (b) to assess all the relevant elements for a decision on the measures;

5. Agreed Description of the Customary practice of the GATT in the Field of Dispute Settlement (Article XXIII:2); BISD 263/215, 217.
6. BISD 295/13, 15.
7. BISD 315/9.

and (c) to submit a proposal for such a decision.[8] The reports of the panels do not have legal force. The panel reports go to the GATT 'Contracting Parties' where mediating and political aspects are reconsidered and the panel report if gets adopted, achieves legal force.

The Complaints under Article XXIII I (b) termed as non-violation complaints have raised questions of interpretation and non-violation complaints have been successful only if the infringement of tariff benefits have been proved.

A survey of cases of violation of Article XVIII reveals that the panels adopted different and varying interpretations to the phrase 'nullification and impairment of benefits'. In early violation cases,[9] some sort of injury to the contracting party was considered necessary before involving Article XXIII, however, in subsequent cases, the concepts such as prima facie or nullification and impairment was introduced.[10] Nullification and impairment concepts have further been concretised in the form of 'adverse effect' and 'frustration of reasonable expectation' and these two concepts have not necessarily been applied in a cumulative way but are applied separately.[11]

IV. Dispute Settlement in GATT 1947 and Its Refinements

Having referred to the differing and varying interpretations of the phrase 'nullification of benefits', the dispute settlement in GATT 1947 was suffering from the inbuilt mechanism of not contemplating a formal dispute settlement body. Article XXIII, at best was formally 'Constituting Contracting Parties' as a dispute settlement authority but keeping in view the legal nature of GATT, any decision to modify, amend or interpret the GATT, required the consent of all the parties which *albeit,* was in conformity with Article 40 of the Vienna Convention on the Law of Treaties. This meant that in practice a losing party in a dispute not only could refuse to agree and 'block' the adoption of an adverse panel, it could even refuse to agree to the very establishment of a panel, thereby avoiding the embarrassment of an adopted report altogether.

8. See GATT, Analytical Index prepared by E-U Petermann (1989) of Article XXIII. Also see, Armin Von Bogdandy. *The Non-Violation Procedure of Article XXIII:2, GATT: Its Operation and Rationale*, 29 Journal of World Trade (1995) at 95-111.
9. See cases referred in John H. Jackson, *supra* n. 2 at 181-187.
10. See the case of *U.S. Taxes on Petroleum and Certain Imported Substances*, 34th Suppl. BISD 136 (1998). Panel Report Adopted on June 17, 1987.
11. See Arim Von Bogdandy, *supra* n. 8 at 101.

Panel Reports which were adverse to the contracting parties were indeed blocked, however, in course of evolution of settlement of dispute mechanism from 1947 to 1992, the losing party eventually accepted the results of an adverse panel report in approximately 90 per cent of cases.[12] Still blocking was a problem and seemed in the 1980s to be occurring with increasing frequency.

This 'blocking' of the panel decisions to some extent was overcome by 'Montreal Rules' adopted by the Contracting Parties in April, 1989, Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April, 1989.[13] The 'Montreal Rules' became the basis of negotiating the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes.

The 'Montreal Rules' were applied although on a trial basis from May 1, 1989 till the conclusion of Uruguay Round for the complaints brought under Article XXII or XXIII. The importance of the 'Montreal Rules' was in the fact that it placed time limits on consultations and provided for the automatic establishment of a panel. Once a process of consultation has started, the defending party was required to reply within 10 days and to agree to consultation in good faith in no less than 30 days. In case the agreement for consultation fails, the complaining party could directly request the 'Contracting Parties' for the establishment of a panel. If consultations failed to settle the dispute within 60 days of the request, the complaining party then could request for the establishment of a panel.[14]

'Montreal Rules' provided further that 'If the complaining party so requests, a decision to establish a panel or a working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an Item on the Council's regular agenda, unless at that meeting the Council decides otherwise. This indirectly meant that a Panel would be established without fail, at the second meeting of the GATT Council after the request was put on the agenda, unless the Council decides otherwise. For the Council to decide 'otherwise' under GATT's process of decision by consensus, however, all parties including the complaining party, would have to decide otherwise. This is being termed as a 'negative consensus' system, a system that required consensus not to establish a panel as against the system which required positive consensus to establish a panel.

These and some other principles were adopted on a permanent basis in WTO. The other principles of 'Montreal Rules' which found place in the

12. Hudec, ENFORCING INTERNATIONAL TRADE LAW, *supra* n. 4 at 27.
13. BISD 365/61 hereafter referred as 'MONTREAL RULES'.
14. *Id.* at c 1 and c. 2.

WTO settlement of disputes mechanism deal with the terms of reference of panels, the composition of panels, procedures for multiple complaints and third party participation, and time limits. Rules on sensitive topics of adoption of panels reports were also included.[15]

V. WTO, GATT 1994 AND THE SETTLEMENT OF DISPUTES

A. General

The settlement of disputes in any international organisations should be 'rule oriented' rather than 'power oriented' as the 'rule oriented system' brings stability and predictability and international trading system necessarily requires 'rule base' system that has been in introduced in a big way in the WTO Dispute Settlement Understanding or DSU.[16]

The DSU contains 27 Articles totalling 143 paragraphs plus four appendices, and is perhaps the most significant achievement of the Uruguay Round negotiations, often being referred as a jewel in the crown of WTO. Unique in public international law, the DSU confers compulsory jurisdiction on the Dispute Settlement Body (DSB) for purposes of resolving disputes. The interpretative role of the WTO dispute settlement system is made explicit in Article 3(2) of the DSU which provides that the system serves to 'clarify the provisions of the WTO Agreements in accordance with the customary rules of interpretation of public international law'.

The DSB has been busy with cases since its inception as in the first two years of its existence more than 80 cases were filed and upto the end of year 2003, more than 300 cases were filed which implies that the international community has reposed trust and confidence in the DSB of the WTO. The profile of cases decided and filed shows how varying and conflicting political, economic and social factors of member countries are involved for settling the disputes which essentially may be trade oriented.

As provided in Article 3(2) of the DSU, the Appellate Body of the DSB in its various decisions has depended on the Vienna Convention on Law of Treaties especially its Article 31 as a rule of interpreting the DSU. Article 31 of the Vienna Convention on the Law of Treaties provides that, 'A treaty shall be interpreted in good faith in accordance with the ordinary

15. *Ibid.*
16. John H. Jackson, *The Crumbling Institutions of the Liberal Trading System*, 12 Journal of World Trade L. 93 at 98-101 (1978); *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. of World Trade L. 1 at 3-4 (1979); THE WORLD TRADING SYSTEM 111 (1998) Robert H. Hudec, *supra* n. 2.

meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.' This approach presumably 'is based on the view that the text of a treaty must be presumed to be the authentic expression of the intention of the parties'[17] which represents a break from the GATT 1947 panel practices where negotiating history played a prominent role in ascertaining intention.[18] Under the Vienna Convention Rules, recourse to negotiating history, or preparatory work, can only be a supplementary means of interpretation to confirm a meaning already arrived at by the Article 31 (1) rules, or where an interpretation is in accordance with the rules leaves the meaning ambiguous or obscure or leads to a result that is manifestedly absurd or unreasonable.[19]

The Appellate Body has interpreted the WTO Agreements by reference to ordinary meaning of the words viewed in their context in the light of object and purpose of the treaty. Although it has identified objects and purposes as part of the interpretative process,[20] it has also said that if the terms of the treaty are given their ordinary meaning, in context, this should 'effectuate its objects and purposes.' Appellate Body notwithstanding the fundamental rule of Article 31 (1) of the Vienna Convention has drawn on other interpretative mechanism more specifically on 'effectiveness' which has been endorsed by the Appellate Body as 'fundamental tenet of treaty obligation.' Moreover, the Appellate Body in interpreting the language of a provision of one of the WTO Agreements can seek additional interpretative guidance as appropriate from the general principles of international law. In some cases, the Appellate Body has interpreted on case to case basis, implying that the meaning may change according to circumstances of the case. The practice of the Appellate Body shows that although, Vienna Convention rules on treaty obligations are the starting and guiding principles, yet the Vienna Convention does not provide single and self contained answers to all questions of interpretation of WTO Agreements.

B. DSU and its Applicability

The central provision pervading the settlement of disputes under the WTO is GATT Article XX and XXIII of 1947 incorporated *mutatis*

17. Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES 115 (1984).
18. D.J. Kuvper, *The Law of GATT as a Special Field of International Law: Ignonance, Further Refinement or Self-Contained System of International Law,* 25 Neth YIL 227 (1994).
19. Art. 32, VIENNA CONVENTION ON THE LAW OF TREATIES.
20. See for example, EC Measures Concerning Meat and Meat Products (Harmolics), AB-1997 (Jan 16, 1998) at para 165.

mutandis in GATT 1994. The jurisprudence evolved around Articles XX and XXIII of GATT 1947 has been described earlier. Suffice it to say that Article XIII of 1947 did not provide specific procedures for settling disputes concerning matters arising out of GATT, therefore, the DSU came into being only after the WTO Agreements came into force.[21]

Article I of the DSU sets out the coverage and applicability pursuant to its consultation and dispute settlement provisions concerning the 'covered Agreements' which are listed in Appendix 1: the Agreement Establishing the World Trade Organisation; the 13 individual multilateral agreements on trade in goods; GATS; TRIPS and the four plurilateral agreements. It encompasses measures affecting the operation of any covered agreement taken within its territory of a member, including measures taken by regional or local governments. It does not extend to other matters not falling within the four corners of GATT.[22]

The rules of DSU with special modification have been applicable to other Agreements as listed in Appendix 2 to DSU such as:

Agreement	*Rules and Procedures*
Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex 2
Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
Agreement on Implementation of Article VII of GATT 1994	19.3 through 19.5, Annex 11.2(f), 3, 9, 21
Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V
General Agreement on Trade in Services	XXII:3, XXIII:
Annex on Financial Services	4
Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

The above list of rules and procedures includes provisions where only a part of the provision may be relevant in this context.

21. GATT Focus No 107, May 1994 at 12.
22. See Canada—Agreement of the FOREIGN INVESTMENT REVIEW ACT, BISD 305/140 adopted on 7th Feb. 1984.

If there are disputes involving two or more covered agreements other than the DSU and in the event of a conflict in the special or additional rules and procedures contained in those agreements, Article 1.2 obligates the parties themselves to attempt to agree on the rules and procedures to apply. If they are unable to do so, within 20 days of the establishment of the panels, the Chairman of the DSB, in consultation with the parties, shall determine the rules of procedures to be followed within 10 days of a request to do so by either party. The DSB Chairman should be guided by the principle that special or additional rules and procedures should be used where possible, with the DSU rules and procedures being used where necessary to avoid conflict.

In case there is no difference between the rules and procedures of the DSU and covered agreements, the rules of procedures of DSU apply together with the special or additional provisions of the covered agreements. However a special or additional provision should only be found to prevail over a provision of DSU in a situation where adherence to one provision will lead to a violation of other provisions in the case of a conflict. An interpreter must therefore, identify an inconsistency or a difference between a provision of the DSU and a special or additional provision of a covered agreement before concluding that latter prevails and that the provisions of DSU does not apply.[23]

C. Dispute Settlement Mechanism

a. Dispute Settlement Body (DSB)

The DSU created three institutions to administer WTO dispute settlement mechanism. The first is the Dispute Settlement Body established under Article 2 of the DSU for the purpose of administering rules and procedures set out in the DSU subject to the exceptions as provided in the covered agreements. The DSB has power to establish panels, adopt panel reports and Appellate Body Reports, supervise the implementation of recommendations and rulings, and authorises sanctions for failure to comply with dispute settlement decisions. The General Council of the WTO serves as the DSB but the DSB has its own chairman and follows separate procedures for those of the General Council.

The DSU has the power to establish Appellate Body to review panel rulings.[24] The Appellate Body is a standing institution composed of seven

23. *Guatemala-Cement I*, Gautemala-Antidumping Investigation Regarding Portland Cement from Mexico, Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, para 64.
24. Art. IV:3, WTO Agreement.

persons appointed by the DSB for four year terms.[25] The members of the Appellate Body must be persons with demonstrated expertise in law and international trade who are not affiliated with any government. The Appellate Body membership must be 'broadly representative of membership in WTO.'[26]

The Appellate Body hears cases in divisions of three, but each member is required to stay abreast of the dispute settlement activities of the WTO. The WTO system continues the panel system of GATT 1947. Panels are composed of three (exceptionally five) persons, well qualified governmental and/or nongovernmental individuals, selected from a roster of persons suggested by the WTO members. Panel members serve in their individual capacity and not as representatives of WTO members.[27]

b. Dispute Settlement Procedures

General Provisions

Article 3 of the DSU set out the general provisions which provides mainly the objectives of the dispute settlement mechanism as enshrined in the DSU, which have been summarised as under:

1. adherence to the management principles applied under Articles XXII and XXIII of 1947 GATT as modified by the DSU;
2. DSU is meant for security and predictability of the multilateral trading system, to serve and preserve the rights and obligations of Members under the covered Agreements—recommendations of DSB should not add or diminish the rights and obligations of members of WTO;
3. promptness of settling situations where a Member considers that his benefits have been infringed, and to maintain proper balance between rights and obligations of the Members;
4. DSB's aim should be achieving a satisfactory settlement of the disputes keeping in mind the rights and obligations of members;
5. consultations and dispute settlement should be such which is consistent with the covered agreements and not to nullify or impair benefits of members nor the objectives of the agreements;

25. DSU, Art. 17.
26. DSU, Art. 17.
27. DSU, Art. 8.

6. matters formally raised under consultation and dispute settlement shall be notified to DSB and the relevant Councils and Committees where any member may raise any point relating thereto:

7. solutions mutually agreed to a dispute is preferred—in absence of mutually agreed solutions, the first objective of dispute settlement mechanism is to secure withdrawal of the measures concerned if found to be inconsistent with the provisions of the covered Agreements. Compensation should be resorted to only if the immediate withdrawal of the measure is impractable. The last resort is the possibility of suspending the application of concessions or obligations under the covered Agreements on a discriminatory basis *vis-à-vis* other member subject to authorisation by the DSB.

8. in cases where there is an infringement of the obligations assumed under a covered Agreement, it constitutes a case of nullification or impairment *prima facie* i.e. presumption that rules have an adverse effect on the other Member in the covered Agreement and it is the responsibility of the other Member to rebut the charge.

9. DSU provisions are without prejudice to Members and any Member can have recourse to the authoritative interpretation of the covered Agreement through decision making under the WTO Agreement or a covered Agreement which is plurilateral Trade Agreement.

10. the dispute settlement mechanisms is not contentious and Members are supposed to act in good faith in resolving disputes. Complaints and counter complaints should not be linked.

The jurisprudence of the above 'General Provisions' as developed by the DSB of the DSU is discussed as below.

The concept of 'security and predictability' in Article 3.2 is the central object of the dispute settlement system of DSU to protect the security and predicability of the multilateral trading system and DSU provisions must be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it.[28] The WTO rules are reliable, comprehensible and enforceable, and are not so rigid or inflexible as to leave room for reasoned judgements in conformity with endless and ever changing ebb, of real facts in real cases in the real world.[29]

28. US 301-310 of the Trade Act of 1974, Panel Report, WT/DS/52/R, adopted 27 January 2000, para 7-7.5.

29. *Japan Alcoholic Beverages case*: Appellate Body Report, WT/DS8 AB/R, para 31.

With regard to nullification and impairment of benefits under Article 3.8, the Appellate Body on the contention that United States has never exported a single banana to EEC and therefore could not suffer any trade damage, was rejected and held that the two issues of nullification and impairment and the standing of United States are closely related. The United States is a producer of bananas and a potential export interest by the United States cannot be excluded; the other is that the internal market of United States could be affected by the EEC banana regime, and by its effects on world supplies and prices of banana.... They are relevant to the question whether the European Communities has rebutted the presumption of nullification and impairments.[30] In the case of Turkey-Textiles, the quantitative restrictions on imports of textiles and clothing from India were in violation of WTO law, India had not suffered any nullification or impairment of benefits within the meaning of Article 3.8 as imports from India had increased since Turkey imposed quantitative restrictions. The Panel rejected these arguments and Turkey had failed to rebut the presumption of nullification and impairment.[31]

c. Consultations

Normally, an international trade dispute settlement commences with consultation between the member nations of WTO under Article XXII of GATT 1947 and as already noted, the consultation mechanism was further strengthened and reaffirmed in the Tokyo Round. The DSU affirms the effectiveness of the consultation and provides that each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultations regarding any representation made by another Member concerning measures affecting the operation of the covered Multilateral Trade Agreements taken within the territory of the former. Such consultations occur regularly at the official level and can be raised at the Ministerial level as appropriate.[32]

The request for consultations are to be notified to DSB and to the relevant Councils and Committees. The Council as already noted are Councils for Trade in Goods, for Trade in Services, and for TRIPS. The Committees are those which are concerned with different substantive areas of WTO Agreements, such as Committees on Antidumping, Technical Barriers to Trade, Subsidies and Countervailing Measures.

30. EC—Banana III, EC-Regime for the Importation, Sale and Distribution of Bananas, Appellate Body report WF/DS 27/AB/R; DSR 1997:II, para. 5.1.9.

31. Turkey-Textiles, Turkey Restrictions on Imports of Textiles and Clothing Products, Panel Report WT/DS34/R, adopted 19 Nov. 1999.

32. Art. 4.

The request for consultations should specify the articles of the relevant WTO agreements under which consultations are sought. These normally would include Article 4 of the DSU, the corresponding provisions of other covered agreements which are listed in footnote 4 of the DSU, and Articles XXI or XXIII of GATT. Under footnote 4, the corresponding consultations are listed as under :

Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosaniary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT, 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade Related Aspects of Intellectual Property Rights, Article 64.1 and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

The complaining party should give reasons for the request including identification of measures at issue and the identification of legal basis for the complaint. It is necessary that the request for consultations should be broad in scope as far as possible, both in identifying the measure and in indicating the legal basis for such complaint, as these will limit the scope of any eventual panel request and that in turn, will limit the scope of the terms of reference of the panel.[33] A measure that is not subject of consultations cannot be referred to a panel.[34] Panels, in turn, may evaluate a measure only under the provisions of the covered agreements specified in the terms of reference, which incorporated the request for a panel.[35]

Besides that a Member has to satisfy himself that the action after consultation would be fruitful. The DSU in Article 4:3 sets dead lines for consulation procedures. A Member receiving the request for consultation must respond to the request within 10 days of its receipt, and must agree

33. United States-Denial of Most-favoured nation Treatment as to Non-rubber footwear from Brazil, BISD 395/128 (adopted June, 1992) at 147-148.
34. United States—Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon. BISD 415/ 229 (30 Nov. 1992) (Adopted on 27 April, 1994).
35. Japan-Taxes on Alcoholic Beverages, WT/D58/R, WT/DS/10/R; Adopted on 1 Nov. 1996.

to enter with consultation within 30 days after receiving the receipt or within a time frame mutually agreed. If the receiving Member does not reply within 10 days, or if it fails to consult within 30 days or within a period otherwise agreed, the Member requesting consultation may proceed immediately to request the DSB to establish a panel. The complaining party may also request for the establishment of a panel during sixty days period provided both the parties jointly consider that the consultations has failed.

It is pertinent to mention that the request for consultations and its field of reference that may be referred to a panel is crucial as any failure to raise an issue or to advance a particular objection to the impuged measure has resulted in the respondent's successful objections to its consideration by the Panel. A scrutiny of cases decided by GATT 1947 Panel reveals that the nonidentification of measures as well as field of reference may prove fatal. In EEC-Quantitative Restrictions Against Imports of Certain Products from Hong Kong;[36] Canada-Administration of Foreign Investment Review Act;[37] and the United States—Denial of Most Favoured Nations Treatment as to non-Rubber Footwear From Brazil;[38] the ill conceived references proved fatal.

Whenever, a Member of WTO other than the consulting Member thinks that the Member has substantial trade interests in consultations being held pursuant to Article XXII:I, Article XXII:I of the GATS, or the corresponding provisions in other covered Multilateral Trade Agreements, such interested Member may notify the consulting Member.

Consultations essentially are bilateral, confidential and without the involvement of the DSB, the panel or the secretariate of the WTO. As the consultations are confidential and no official records of kept, a panel which may be constituted in the event that consultations have failed, does not know what was discussed during consultations. Therefore, there is nothing in the DSU that requires that a complainant cannot request a panel unless its case has been adequately explained in consultations. As a corollary to this, the Panel request will itself set out the scope of the requested consultations and the Panel must assume that all the points contained in the request were subject of consultations.

All parties in the dispute settlement must be 'fully forthcoming' and in the consultation process facts must be freely disclosed, as the demands of

36. GATT, BISD. 305/129 (1983).
37. GATT, BIDS 305/140 (1983).
38. GATT, BISD 395/128 (1991).

due process implicit in the DSU make full disclosure of facts during consultations important. For the claims that are made and that the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent acts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact finding.[39]

d. Good Offices, Conciliation and Mediation

If the consultation fails, the Members of WTO may avail themselves of DSU's good offices, conciliation or mediation services. Article 5 of the DSU provides for the above services to be taken voluntarily by the Members if the Members to the dispute so agree and request for such services to any item of the dispute which can be terminated at any time: whenever good offices, conciliation or mediation are entered into within sixty days from the date of the request for consultation before requesting for a panel. Also, the complaining party may request a panel during the sixty days if the parties to the dispute jointly consider that good offices, conciliation and mediation has failed to settle the dispute. Further, the Director General of GATT may provide such services in an effort to assist members to resolve a dispute.

e. The Establishment of Panels

To resolve the dispute within sixty days if the consultation fails (if a Member to which a request for consultations is made agrees within 10 days to consult within 30 days, and does so, the complaining party may not ask for a panel until 60 days have elapsed from the date of original request, unless the parties agree that further consultations would not be productive) at the request of the complaining party, a meeting of the DSB shall be convened within 15 days provided at least 10 days advance notice of the meeting is given, a panel may be established by the DSB to hear the dispute. In cases of urgency including those which concern perishable goods, Members shall enter into consultations within 10 days of the request for consultations, and the complaining Member may request a panel 20 days after the request, if consultations have failed. The DSB is the sole Judge of urgency of the matter.

The DSB may by consensus also decide not to establish a panel. The request for the establishment of a panel has to be made in writing and such

39. India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, AB-1997, WT/DS550/AB/R (19th Dec. 1997, Adopted 16 Jan. 1998, para 94).

request shall indicate whether consultations preceded the request for panel: identify the specific measures at issue; and also provide a brief summary of the legal nature of the complaint and the problems clearly. Special terms of reference are also possible as alternatives to the above method of reference provided the written request includes the special terms of reference.[40] The establishment of panel appears to be a matter of right with the complaining party.

The Jurisprudence as evolved by the DSB on the interpretation of Article 6 is as follows:

(i) It is important that a panel request is sufficiently precise for two reasons: first it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and second, it informs the defending party and the third parties of the legal basis of the complaint.[41]

(ii) In *EC-Bananas*, the Appellate Body stated that the need for a 'legal interest could not be implied in the DSU or in any other provisions of the WTO Agreement and that Members were expected to be largely self-regulating in deciding whether any DSU procedure would be 'fruitful'. We cannot read in DSU any requirement for an economic interest.'[42]

(iii) The term 'measure' in Article XXIII:I of GATT 1994 and Article 26.1 of the DSU as elsewhere in the WTO Agreement, refers only to policies and actions of governments, not those of private parties. But while the truth may not be open to question, there have been number of trade disputes in relation to which panels have been faced with making sometimes difficult judgements as to the extent to which what appears on their face to be private action may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.[43] The post GATT cases demonstrate the fact that an action taken by private parties does not rule out the possibility that it may be deemed to be a governmental if there is sufficient government involvement in it.

40. Article 6 of the DSU.
41. EC-Bananas III_AB-Report, WT/DS27/AB/R, DSR 1997: II, para 142.
42. Korea-Diary, AB-Report, WT/DS98/AB/R, para 7.13.
43. Panel Report on Japan-Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R adopted 22 April, 1998, para 10.52.

It is difficult to establish bright line rules in this regard, however, it needs to be examined on a case to case basis.[44]

(iv) To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified specified measure. The requirement of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified, that the respondent party can reasonably be found to have received adequate notice of the scope of the clause of the complaining party. The two key elements, close relationship and notice are inter-related and only if a 'measure' is, subsidiary or closely related to a specifically 'identified measure' will notice be adequate.

(v) 'measures' within the meaning of Article 6.2 of the DSU are not only measures of general application i.e., normative rules, but also can be the application of tariffs by customs authorities.[46]

VI. Terms of Reference of Panels

In order to avoid delays and also to clear the functioning of panels, the standard terms of reference are to be furnished within twenty days from its establishment and are, to examine, in the light of the relevant provisions in (name of the covered Agreement(s) (5) cited by the parties to the dispute), the matter referred to the DSB by (name of the party) in document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement/s. The DSB may authorise the chairman of in establishing a panel to draw up the terms of reference of the panel in consultation with the parties to the dispute and such terms shall be circulated to all members.[47]

The terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the

44. *Ibid.* paras 10.55-10.56.
45. Japan-Film Supra, para 10. 8.
46. EC-Custom classification of Certain Customs Equipment, Ab-Report DSR 1998:V para 65.
47. Art. 7. DSU.

precise claims at issue in the dispute.[48] The ellipses in Article 7 indicates two things. One, that document number given to the complainant's request for the establishment of a panel will appear in the term of reference. Second, as in the request of the complaining party will have referred to the particular agreements at issue and also, the relevant provisions of those agreements, the panel's jurisdiction will be limited by these references. The panel, therefore, may not go beyond them to consider whether the measures or actions complained of are inconsistent with other agreements or other provisions of the agreements cited.[49]

The relationship between terms of reference and submissions, there is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be submitted in a complaining party's first written submission. It is the panel's terms of reference governed by Article 7 of the DSU, which sets out the claims of the complaining parties relating to the matter referred to DSB.[50] Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the working procedures in Appendix 3 unless the panels decides otherwise after consulting the parties to the dispute.' Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have.[51]

VII. Composition of Panels

Article 8 of the DSU provides that panels normally are composed of three panelists or five provided the parties to the dispute agree for the same within ten days after the establishment of the panel by the DSB. Panelists generally are present or former members of non-party delegation to the

48. Appellate Body Report on Brazil-Dessicated Coconut case; WT/DS22/AB/R, DSR 1997:1 p. 21.
49. Japan—Takes on Alcoholic Beverages, WF/DS8/R, WT/DS10/R, and WTDS11/R (11 July 1996) Adopted as Modified by the Appellate Body 1 Nov., 1996, para 65.
50. EC—Bananas III, Panel Report as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997: II para 7.57.7.58.
51. India—Patents (US)—India-Patent Protection for Pharmaceutical and Agricultural Chemical Products-complaint by United States, Panel Report as Modified by Appellate Body Report, WT/DS50/AB/R, DSR 1998:1 paras 92-93.

WTO, or academics. They serve in their individual capacities, not as government representatives or organisations. Members are generally required to permit their officials to serve as panelists and are prohibited from giving them instructions or seeking to influence them with regard to matters before them. If a dispute involves a developing country, at least one panelist shall be from a developing country if the developing country so requests.

It is the secretariate which proposes nominations for the panels to the parties to dispute and the parties to the dispute are not expected to oppose nominations except for compelling reasons. If the parties do not agree within twenty days from the establishment of a panel, at the request of either party, the Director General of the WTO in consultation with the Chairman of DSB, and the Chairman of the relevant council or committee may form the panel by appointing the panelists whom he or she considers most appropriate in accordance with any relevant special or additional procedure of the covered multilateral agreement, after consulting with the parties to the dispute. Accordingly, the chairman of the DSB may inform the members of the composition of the panel thus formed not later than 10 days from the date the chairman receives such a request.

The secretariate has to maintain a roster of panelists both governmental and nongovernmental individuals possessing the qualifications of either having served on or presented a case to a panel, served as a representative of a WTO member, or of a contracting party to the GATT 1947 or as representative to a council or committee of any covered Multilateral Agreement or its predecessor Agreement, or in the secretariate taught or published on international trade law or policy, or served as a senior trade policy official of a Member. These panels members are to be selected with a view to ensuring the independence of the Members, a sufficiently diverse background and a wide spectrum of experience.

In cases of multiple complaints, where more than one Member requests the establishment of a panel related to the same matter, a single panel is established, taking into account the rights of all members concerned. Further, the single panel has to organise itself in such a manner as if separate panels would have examined the matter in dispute. Written submissions by each of the complainants in a multiple complaint has to be made available to other complainants.

The interests of third parties in a dispute has been recognised (Article 10 of the DSU) and any Member having a substantial interest in a dispute (referred to in DSU as a third party) and having notified the DSB of that interest, may be heard by a panel and may make written submissions to the

panel. Third parties receive the first written submissions of the parties to the first meeting of the panel, but no provision is made for them to receive the second or subsequent submissions. A panel's decision whether to grant 'enhanced' participatory rights to third parties is a matter that falls within the discretionary authority of the panel. Such discretionary authority is not unlimited and is circumscribed, for example, by the requirements of due process.[52]

VIII. Functions, Procedures and Responsibility of Panels

The function of the panel is to assist the DSB in discharging its responsibilities under DSU and the WTO agreements (Article 11 of the DSU). A panel has to make an objective assessment of the matter, including the facts of the case and its conformity with the relevant covered agreements. It has also to make findings assisting the DSB in recommending or giving rulings. For that purpose the panels have to consult the parties to the dispute regularly and give them an adequate opportunity for achieving satisfactory solutions.

The duty to make an objective assessment of the facts is, *inter alia*, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with the objective assessment of the facts. 'Disregard' and 'distortion' and' misrepresentation' of the evidence, in the signification in judicial and quasi-judicial processes, imply not simply an error of judgement in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or due process of law or natural justice.[53]

The burden of proof normally falls on the party whether complaining or defending, who asserts the affirmative of a particular claim or defence. If a party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to other party, who will find unless it adduces sufficient evidence to rebut the presumption.[54]

52. Appellate Body Report on US-1916 Act, WTIDS/36/AB[R, para 138-150.
53. EC—Harmones, *supra* n. 20, Appellate Body Report, 132-133, 135 and 138.
54. US-Wool Shirts and Blouses, AB-Report, WT/DS3 3/AB/R.

Panels control the settlement of dispute process within the confines of the rules set out in DSB, establishing deadlines for written submissions establishing the schedule; (Article 12 read with Annex. 3 of the DSU). Normally all the information is submitted by the parties, panels are not confined to parties for the source of information they need. They can seek information and technical advice from any sources they deem appropriate. Panels have the right to consult experts to obtain their opinions and, with respect to scientific and technical matters, may request an advisory report from an expert review group.[55]

The DSU rules provide time schedule for implementation of various stages in the panel process once it is established. Within one week the panel will consult with the parties and establish a time table for the proceedings.[56]

(a) Reciept of first written submissions of the parties: 1. Complaining Party (plaintiff), 3-6 weeks; .... Party complained (defendant), 2-3 weeks; (b) Date, time and place of first substantive meeting with the parties: third party session, 1-2 weeks; (c) Receipt of written rebuttals of the parties, 2-3 weeks; (d) Date, time and place of second substantive meeting with the parties, 1-2 weeks; (f) Receipt of comments by the parties on the descriptive part of the report, 2 weeks; (g) Submission of the interim report, including the findings and conclusions to the parties, 2-4 weeks; (h) Details for party to request review of parts of report, 1 week; (i) Period of review by panel, including possible additional meeting with parties; (j) Sumission of final report of parties to the dispute, 2 weeks; (k) Circulation of the final report to the members, 3 weeks.[57]

The other provisions of panel procedures stress transparency and a legitimate approach for concluding the panel deliberations as well as expeditious disposal of the disputes brought before the panel. Specific provisions have been made to extend the more favourable and diffenrential treatment to the LDCs which have been accorded to them by the lowered Multilateral Agreements in course of settling the disputes.[58]

IX. Adoption of Panel Reports

The adoption of panel reports is quite different from the practice of adoption of panel reports as practised under GATT 1947. The adoption of

55. Art. 13.2.
56. Art. 12.3.
57. Art. 12 read with Appendix 3 of DSU.
58. Art. 12:11.

panel reports under GATT 1947 was faulty as the report had to be adopted by consensus and as such the panel reports were never accepted in their spirit and character and there were all possibilities of blocking the panel reports. On the other hand, the DSU has changed the procedure of adopting the panel reports significantly, first by providing for interim review of *pros* and *cons* of the dispute after the parties have submitted their submissions to the panel and second, the parties to the dispute may ask for review to the interim report or its parts.[59] This procedure ensures against erroneous findings of fact and law as well as opportunity for the losing party to get the last opportunity of rectifying the mistake before the panel arrives at its final decisions.

Once the report has been finalised by the panel, it is submitted to DSB, the Member are given twenty days before DSB adopts the report. The Members can raise objections within ten days to panel reports and the party to the dispute shall have full right to participate in the consideration and deliberation of the report by DSB. The DSB after the issuance of the panel report and within sixty days shall adopt the panel report at a meeting; if a meeting is not scheduled a meeting of the DSB should be held unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB by consensus decides not to adopt the report. If a party has notified its intentions to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.[60]

X. Appellate Review and Standing Appellate Body

Under Article 17 of the DSU, the DSB has been empowered to establish standing Appellate Body with seven members, three of whom shall serve any one case and shall hear appeals from panel cases. The standing Appellate Body is composed of persons of recognised authority, who have demonstrated expertise in law, international trade and the subject matter of the covered Multilateral Agreements. These members are not to be affiliated with any governments. The tenure of the persons appointed to serve on the standing Appellate Body is four years with the possibility of re-appointment.

The standing Appellate Body is limited to considering issues of law covered in the panel report and legal interpretations developed by the panel. The Appellate Body proceedings are normally to be concluded

59. Art. 15.
60. Art. 16.

within sixty days and in any event not to exceed ninety days and the Appellate Body has to inform the DSB in writing of the reasons for extension of time. The report of the Appellate Body is subject to the same automatic adoption rule as regular panel reports by the DSB unless the DSB decides otherwise by consensus within thirty days of this circulation to the DSB.

The DSB provides strict rule of confidentiality and there is a prohibition of *ex parte* communications with the panel or the appellate Body with regard to matters for their consideration. Also any written submissions to the panel or Appellate Authority is treated most confidential, however, the members to the dispute have a right of access to the same. The Appellate Body may uphold, modify, or reverse the legal proceedings and conclusions of the panel.[61]

The Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within thirty days following its circulation to the Members. The decision of the Appellate Body or a panel that a measure is inconsistent with a covered Multilateral Trade Agreement, shall obligate the members to bring the measure into conformity with that Multilateral Agreement. The Appellate Body or panel can also recommend measures for bringing the measure in conformity with the rule or the Multilateral Trade Agreement.[62]

Finally, the time frame for DSB decisions from the date of establishment of a panel by the DSB until the date the DSB considers the panel or the Appellate Body report, shall not exceed nine months where the panels report has not been appealed or twelve months where the report is appealed.

XI. Surveillance of Implementation of Recommendations and Rulings

Article 21 of the DSU provides an elaborate mechanism of surveillance of implementation of recommendations and rulings of panels and Appellate Body reports.

Once a panel finds a complaint is justified, its report categorically recommends that the offending Member should cease and desist from the violations of GATT rules by either withdrawing the offending measures or

61. Art. 18.
62. Art. 19.

suitably amend the measures to bring it in conformity to the GATT rules or covered Multilateral Agreements.

Accordingly, once the report is accepted, the DSB is empowered to monitor whether or not its recommendations have been implemented. The DSB is further empowered to keep vigil in respect of measures which a losing party has to take to remedy a violation of GATT or the covered Multilateral Agreement in pursuance of the recommendations of the panel within thirty days of the adoption of the panel or Appellate Body report. If a Member is not in a position to comply with the panel's recommendations immediately, a reasonable time may be granted to such Member by the DSB or a mutually agreed time frame within forty five days of the adoption of the recommendations and rulings by the DSB between the disputants. In such arbitration, arbitrators are supposed to implement the panel recommendations and rulings within a period of fifteen months.

In case of disagreement between the disputants of the existence or consistency with a covered Multilateral Agreement of the measures taken to comply with the recommendations and rulings, such disputes are to be resolved by referring them to the settlement dispute mechanisms of the covered Agreements.

The DSB is further empowered to keep under surveillance the implementation of the adopted recommendations or rulings. Any member has a right to raise the issue of implementation of the panel recommendations at the DSB. DSB shall keep on its agenda the implementation of the panel recommendations and rulings for a period of six months.

XII. Compensation and the Suspension of Concessions

If the recommendations are not implemented, the winning party may be entitled to seek compensation or the authority to seek to suspend concessions previously made to that member. However, neither compensation nor the suspension of compensation or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered Multilateral Agreements.[63] Article 21.1 of the DSU provides that prompt compliance with recommendations or rulings of the DSB is essential in order to assure the effective resolution of disputes to the benefit of all members.

It is noteworthy that Article 22.3 of the DSU, catalogues the principles for suspending concessions and obligations after invoking the dispute

63. Art. 22.1.

settlement procedures as conceived in the DSU and briefly are as under:

(a) suspension with respect to same sector in which the nullification or impairment or violation has occurred;

(b) suspension with same sector is neither practicable nor effective, suspension in other sectors under the same agreement;

(c) suspension with other sectors is not effective or practicable and the circumstances are serious enough, suspend concession or other obligations under another covered Multilateral Agreement;

(d) for applying the above principles, sectoral trade and how far it can compensate, as well as broader economic elements related to the nullification or impairment and broader economic consequences of the suspension or other obligations. If the party requests authorisation to suspend concessions or other obligations pursuant to (a) and (b) set above, it shall state the reasons for the request which is sent to DSB. Such a request shall also be forwarded to the relevant council of the covered Multilateral Agreements. The level of suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment.[64]

It is important to note that the DSB shall not authorise suspension of concession or obligations if a covered Agreement prohibits such suspension.[65]

Although as noted earlier, the level of the suspension of concessions or other obligations authorised by DSB has to be equivalent to the level of nullification or impairment, yet the DSB can under certain circumstances and by way of a protest by a complaining party, refer the matter to arbitration. Such arbitration has to be carried out by the original panel, if members are available or by an arbitrator appointed by the Director General of WTO. Such arbitration has to be carried out by the original panel, if members are available or by an arbitrator appointed by the Director General of WTO, Such arbitration has to be completed within sixty days and concessions or other obligations negotiated earlier cannot be suspended during the course of the above arbitration.[66]

The role of the arbitrator is limited as he cannot examine the nature of the concessions or other obligations to be suspended but is concerned only

64. Art. 22.
65. Art. 22.4.
66. Art. 22.6.

to examine whether the level of nullification and impairment is equivalent to the level of injury incurred by the member. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered Multilateral Agreement. The arbitrator may further examine whether the principles required to suspend concession or other obligations (Article 22.3) have not been compiled with and the decision of the arbitrator in this connection is final. All these decisions by the arbitrator shall be communicated to the DSB promptly and the DSB upon request by a party may grant authorisation to suspend concession or other obligations.[67]

Finally DSU provides that the suspension of concessions or other obligations are by way of a temporary relief and are applicable till such time as the measure has been found to be inconsistent with a covered Multilateral Agreement has been removed, or the member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits or a mutually satisfactory solution is reached. It is incumbent on the DSB to continuously monitor the compliance of implementation of the adopted recommendations or rulings, including cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring the measure into conformity with the covered Agreements have not been implemented.[68]

Further, the dispute settlement provisions of the covered Multilateral Agreements can be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a member. Whenever the DSB rules that a member does not observe the provisions of a covered Multilateral Agreement, it is incumbent on the member to observe the provisions by taking reasonable measures necessary for such observance.[69]

XIII. Non-Violation

As already explained in the beginning of this article complaints under Article XXIII: 1(b) termed as non-violation complaints have raised questions of interpretation and non-violation complaints have been successful only if the infringement of tariffs were proved. The DSU have incorporated the abovesaid non-violation principles and have provided that whenever the provisions of Article XXIII: 1(b) of GATT 1947 are applicable to

67. Art. 22:6 and 22.7.
68. Art. 22:87.
69. Art. 22:9.

a covered Multilateral Agreement, a panel or Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the covered Multilateral Agreement is being nullified or impaired or any objective of that Multialteral Agreement is impeded as a result of the application by a member of any measure, whether or not it conflicts with the provisions of that Agreement.[70]

DSU rules further provide for a panel or Appellate Body to arrive at a decision whether a case concern a measure that does not conflict with the provision of a covered Multilateral Agreement to which the provisions of Article XXIII:I(b) of GATT 1994 are applicable, the DSU procedures of 1994 are applicable provided:

(a) the complaining party presents a detailed justification in support of her complaint relating to measures which does not conflict with the covered Multilateral Agreement;

(b) where the measure has been found to nullify or impair benefits under or impede the attainment of objectives of the relevant covered Multialteral Agreement without its violation thereof, there is no obligation to withdraw the measure. However, in such cases the panel or the Appellate Body shall recommend that the member concerned make a mutually satisfactory adjustment;

(c) the arbitration provided in the rules and as discussed above, may upon request of either party determine the level of benefits which have been nullified or impaired and the arbitration may also suggest ways and means of reaching a mutually satisfactory adjustment; and

(d) compensation may be part of a mutually satisfactory adjustment as final settlement of dispute.

Where the provisions of Article XXIII: 1 (c) of the GATT 1994 are applicable to a covered Multilateral Agreement, a panel may not only make rulings and recommendations where a party considers that any benefits accruing to it directly or indirectly under the relevant covered Multilateral Agreement has been nullified or impaired or the attainment of any objective of that Multialteral Agreement is being impeded as a result of the existence of any situation other than those to which the Provisions of Article XXIII: 1(a) and (b) of GATT 1994 are applicable where and to what extent such party considers and a panel determines that the matter is

70. Art. 26.1.

covered by the above paragraph, the procedure of DSU applies only upto and including the point in the proceedings where the panel report has been issued to the members. For the consideration of adoption, and surveillance and implementation of recommendations and rulings the procedure and rules contained in the decision of the GATT Council of Representatives of 12 April 1989 (BISD 365/6 1) applies. For such an application the following principles may be kept in mind i.e. the complaining party should present a detailed justification in support of any argument made with respect to issues covered; and in cases involving abovesaid matters, if a panel finds that cases also involve dispute settlement matters other than those covered under Article XVIII: 1 (c) the panel should issue a separate report detailing with such matters.[71]

XIV. Jurisprudence of Litigating Process and its Future

As already stated the DSU of the WTO is generally considered to be a jewel in the crown of the WTO trading system and the support for the DSU has been acknowledged almost universally transcending the developed and developing countries with euphoria and exuberance which is reflected and demonstrated by almost hundred cases settled by the DSB until 30 July, 2003, a record of sorts as compared to any international adjudicator institution including the International Court of Justice (ICJ). However, from the very beginning, there have been proposals submitted to the WTO for reform.[72]

Admitting the fact that dispute settlement mechanism of WTO has become detailed, integrated and transparent, particularly its time table and clear structures set forth in the DSU are of immense value in settling complex international trade dispute in an age of globalisation and liberalisation, yet there appears flaws in the DSU, *inter-alia*;

(a) contradiction that exists between transparency, participation and the prompt settlement of disputes,

(b) non-existence of integrated mechanisms for the application of Panel and Appellate Body decisions,

71. Art. 26:2.

72. In fact, the WTO and its Members never regarded the DSU as an unchallangeable discipline, and in early 1994, WTO members in Marrakesh Ministerial Conference had requested the review to be closed by 1 Jan. 1997. In the Doha Ministerial Conference negotiations 20 Nov. 2001, the sentiments of DSU reform were affirmed and negotiations for reform had to be settled by May 2003 which was further discussed in Cancun Ministerial Conference of 31 August, 2003 extending the deadline for reforms to May 2004.

(c) provisions for LDCs in the DSU are too general to promote effective enforcement; and

(d) due to its strict rule based system the performance of DSB functions have been limited.

A. On Implementation of Recommendations and Rulings and Suspension of Concessions

A large number of WTO members have suggested in a joint proposal that Article 21.2 of the DSU be reformed to address the sequencing problem.[73] The proposal foresees the creation of Article 21 bis, entitled 'Determination of Compliance,' that would establish the following procedure. A complaining party may re the establishment of a compliance panel:

(a) any time after the member concerned states that it does not need further time for compliance;

(b) any time after the member concerned has submitted a notification that it has complied with the recommendations or rulings of the DSB;

(c) 10 days before the date of expiration for the reasonable period of time to comply. While consultations between the member concerned and the complaining party are desirable, they are not required prior to a request for a compliance panel.

The compliance panel would comprise the Members of the original panel, if its reports have not been appealed, or the Members of the Appellate Body that considered the appeal if the report of the original panel has been appealed. The compliance panel would be required to circulate its report within ninety days of the date of its establishment after which any party to the compliance panel proceeding would be permitted to request a meeting of the DSB to adopt the panel within a period of ten days. The report would be subjected to negative consensus rule: it would be automatically adopted unless the DSB decided by consensus not to adopt.

Compliance panel reports would not be subject to appeal. if the compliance panel found that the Member concerned has failed to bring its measures into compliance within the reasonable period of time determined by the original panel, the complaining party could request authorisation from the DSB to suspend the application of concessions to the Member concerned or to suspend other obligations under the covered Agreements.

73. See, Proposed Amendment of the DSU, WT/Min (99)8. submitted by the Government of Japan on behalf of cosponsors Canada, Costa Rica, and others.

The joint proposal also modifies Article 22.2 to entitle the complaining party to request authorisation to suspend concessions if a compliance panel report pursuant to Article 21 finds that the Member concerned has failed to bring its measures into compliance with the ruling of DSB. If the Member concerned objects to the level of suspension proposed, the proposal states that "the matter shall be referred to arbitration". The arbitrations shall be completed and the decision of the arbitrator shall be circulated to Members within forty five days after the referral of the matter. The complaining party shall not suspend concessions or other obligations during the course of arbitration.

In regard to final compensation, it would be useful to clarify that term compensation used in Article 22 includes grant of financial compensation to the complaining party which have been found to be in violation of rules. Panels should be authorised to impose financial compensation in disputes between developed and developing countries where the panel finds that as a result of WTO inconsistent measures taken by the developed countries, the developing country has lost its trade in the affected product.[74]

With the advent of WTO, its legal refinements, DSU, and its involvement in new fields that affect sovereign governments as well as individuals, it is time to move away from the idea of the GATT/WTO only as package of bilateral balance between governments as to take WTO as a universal trade treaty with a multilateral effect having settlement of disputes mechanism of universal application.

B. Suggestions on Appellate Body

There has been a lot of concern shown by the Members on the role of Appellate Body of the DSU, in particular the extent to which it has gone beyond its mandate and undertaken the role to make rules through interpretations of WTO Agreements. The opposition to such an interpretation is that essentially it is WTO Members who should have the primary power to interpret, modify or change the WTO provisions including the DSU. The Appellate Body is usurping these functions under the garb of interpreting law on the basis of contemporary developments. Therefore, there is no scope for the Appellate Body to take into account unsolicited information including *Amicus Curiae* briefs from the private parties.[75]

Developing countries are insisting that Appellate Body interpretation powers are limited and a decision to allow briefs from non-governmental

74. WT/GC/W/162.
75. WT/GE/W/162.

organisations (NGO's) including, *Amicus Curiae* brief being susbstantive one is beyond the purview of Appellate Body procedural powers. Non-governmental organisations are not accountable to sovereign Members and therefore, have no contractual rights and obligations under WTO. In certain ways the Appellate Body has accorded more privileges to NGO's than to WTO Members which is unfair.[76]

C. Need for Transparency

The procedural deficiency with the DSU is its lack of transparency. The Doha Ministerial Declaration commits Ministers to promote a public understanding of the WTO and 'to making the WTO operations more transparent, including through more effective and prompt dissemination of information.' Yet, proposals for real transparency in the dispute settlement system are continuously being opposed by many of the Members. Numerous proposals in this area have already been made including the proposals in the Text of the Chairman.[77]

The Chairman's proposals includes that Article 3(6) of DSU which sets out rules for solutions mutually accepted to parties is not perfect as it fails to lay down a concrete time within which the parties should be notified and the information that should be contained in the notification. Therefore, the arguments under the covered Agreements and particular dispute settlement terms should be definitely included in the notification submitted.[78]

The Chairman's Text further suggests that the third party interests as conceived in Article 10 of DSU should include his/their presence at the substantive meetings of panels, receiving copies of the submissions made to panels, including interim report by the Appellate Body of its fundings and conclusions.

In the final analysis, if the other international tribunals such as ICJ, International Tribunal for the Law of Sea, European Court of Human Rights and municipal courts of Member countries are open to public, why, WTO dispute settlement system should not follow the same as its outcome impacts the civil society.

XV. On Time Lines

The Chairman's Text tends to strengthen the surveillance of the implementation of recommendations and rulings of the DSB through definitely

76. World Trade Agenda, no. 00/22. Dec. 4, 2000, p. I.
77. See Annex to TN/DS/9 Chairman's text. 28 May 2003.
78. *Ibid.*

and acceptably stipulating, besides adding to Article 21(6) such a subparagraph as "...the Director-General will issue every six months/ once a year a public report on the status of implementation & and rulings that:

"(c) (i) when the Member concerned considers that it has complied with the recommendations and rulings of the DSB, it shall submit to the DSB a written notification of the measures it has taken to comply.

(ii) If the Member concerned has not submitted a notification under sub-paragraph (1) by the date of expiry of the reasonable period of time for implementation, the Member concerned shall submit, at that date, a written notification of any measures it has taken to comply.

(iii) If the Member concerned has not submitted a notification under sub-paragraph e(i) or a final status report under sub-paragraph by the date that is forty five days before the date of expiry of the reasonable period of time, it shall, at the latest fifteen days after that date, notify any measures that the Member concerned has taken to comply and any measures that it expects to have taken by the expiry of the reasonable period of time."[79]

XVI. On Flexibility

Flexibility in the DSU is very important especially in terms of Article-6(i) of DSU which provides that, 'a Panel should be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda....." In order to make it flexible the Chairman's Text provides that the establishment of a Panel may be postponed to the second DSB meeting following that at which the request first appears as an item on the DSB's agenda in order, to accommodate the good offices, conciliation and mediation which may proceed the next DSB's meeting.

Should the Panel process be terminated, once the Panel has been established? DSU is silent. The Chairman's Text accordingly provides two options:

> "After the establishment of the Panel, and until the issuance of the interim report to the parties, the complaining party may notify the termination of the Panel process to the DSB and where the Panel has been composed, to the Panel. If the Panel

79. *Ibid.*

process is terminated in application of this paragraph after the panel has been composed, the complaining party may not make a new request for the establishment of a Panel in respect of the same matter without first requesting consultations under Article 4, unless parties agree otherwise.

or,

"The parties may notify the termination of the Panel process at any time before the circulation of the final Panel Report to the Members. If the Panel has been composed at the time of such termination, the Panel's report shall be confined to a brief description of the case and to reporting that the Panel process has been terminated."

XVII. Protection of the Interests of Developing Country Members

In the Chairman Text, one subparagraph is added to DSU Article 4(10) as under:

"During consultations, Members should give special attentions the particular problems and interests of developing country Members. When the party complained against is a least developed country Member the possibility of holding consultations in the capital of that Member shall always be considered."[80]

The Chairmans Text accords differential and more favourable treatment to developing country Members in Panel Reports:

"(a) a developing country Member wishing to avail itself of any provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements should raise arguments on these provisions as early as possible in the course of the procedure;

(b) the submissions of any other party to the dispute, that is not a developing country Member should address any such arguments which have been raised by a developing county Member party to the dispute;

(c) the Panel report shall explicitly take into account and reflect the consideration given to any provisions on differential and more favourable treatment for developing country Member that form

80. *Ibid.*

part of the covered Agreements which have been raised by a developing country Member party to the disputed."[81]

The other steps designed to improve the negotiating power and skills of developing countries in the dispute settlement mechanism are availability of qualified legal experts to developing countries for which either WTO Secretariate may be involved or a trust fund may be created to finance the hiring of legal experts. The step establishing the Advisory Centre on WTO Law (ACWL) has come into existence from July 2001 and has assisted number of LDCs in settling trade disputes)[82] is very welcome.

XVIII. Impartiality of Panels

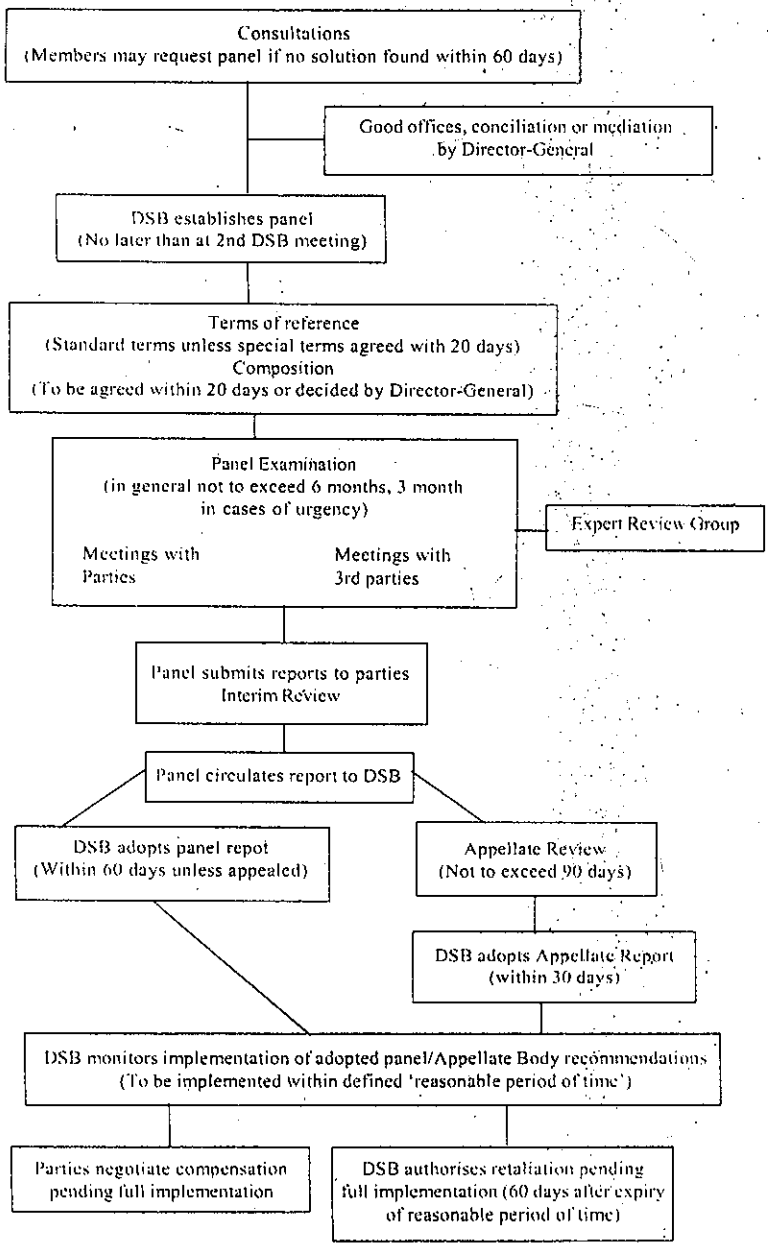
The impartiality of panels and their independence has been on the agenda of DSU reform both in terms of stripping WTO Secretariate officials of their current dispute settlement functions as well as paying the panelists due compensation commensurable to their qualifications and work assigned to them. One way of improving the independence of panelist is to create a class of law clerks who should assist the Judicial panels that are not regular WTO bureaucracy Further, dissenting opinions should be published as it gives a view point which may throw new light on the issues. It is imperative that Panel and Appellate Body Reports should be brief and comprehensible which is not the case at the present moment.[83]

81. *Ibid.*

82. The International Treaty establishing the Advisory Centre on WTO Law (ACWL) was signed in 1999 at WTO Ministerial Meeting in Seattle.

83. For a detailed analysis of the DSU Reform, See, Raj Bhalla, et al, *Austin's Ghost and DSU Reform*, 37 International Lawyer 651-676 (2003); John Ragosta, et al: *WTO Dispute Settlement the System is Flawed and Must be Fixed* 137 International Lawyer 697-752 (2003); Xinjie Luan, *Dispute Settlement Mechanism Reforms and Chinas Proposal* 37 J. of World Trade 1097-1117 (2003) and Bernanrd Hoekman *et al* (ed), Development, Trade, and the WTO - A Handbook (2002).

THE WTO DISPUTES PROCEDURE



NOTES & COMMENTS

Fertility Revolution and Changing Concept of Family and Identity

Ved Kumari[*]

I. INTRODUCTION

The fertility revolution has impacted lives of women in many significant ways. Contraception has given a lot of sexual freedom to woman as well as control over their own bodies. It empowers women by maximizing their choices and enaoling them to control their fertility, their sexuality, their health, and thus their lives. 'Fertility by choice, not by chance, is a basic requirement of women's health, well-being, and quality of life.... A woman who does not have the means or the power to regulate and control her fertility cannot be considered in a "state of complete physical, mental and social well-being".... She cannot have the joy of a pregnancy that is wanted, avoid the distress of a pregnancy that is unwanted, plan her life, pursue her education, undertake a productive career, or plan her births to take place at optimal times for childbearing, ensuring greater safety for herself and better chances for her child's healthy development.'[1]

It is equally important to recognise that women have more stakes in fertility control and are responsible for approximately 3/4 of contraceptive use, in comparison with men's 1/4. They have had to assume responsibility for the inconveniences and risks involved. In the past couples had to choose between methods that had fairly low levels of effectiveness or sterilization, that is effective but permanent. Now women have a wide choice of methods that are highly effective as well as reversible. They have more reliable methods of birth control than ever before, but they have paid a price. As with any drug, an increase in the effectiveness of contraceptives is often accompanied by a decrease in the margin of safety. Many of the methods that women have available for use are associated with potential health hazards like menstruation disturbances, headache, or weight gain.

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1. Mahmoud F. Fathalla, FERTILITY CONTROL TECHNOLOGY: A WOMEN-CENTERED APPROACH TO RESEARCH, *available* at http://www.hsph.harvard.edu/rt21/procreative/FATHALLA.html

These may not threaten life, but may be of extreme concern and often significantly affect a woman's quality of life. The consequences of bearing a child too impact them much more than men, emotionally as well as physically. Not only do women have the prime responsibility of being the carer for babies but also many pay a high price indicated by the high rate of maternal mortality. The rate of maternal mortality in rural areas in India is highest in the world.[2] The facilities for safe abortion or pre-natal, neo-natal and post-natal medical care remain a distant reality.[3]

Fertility control has been promoted in India as in many developing countries, as a measure of population control. The primary aim of government policy regarding fertility control is achieving demographic targets though the health and welfare of clients is not completely lost sight of. The declaration made at the end of the two day Colloquium on Population Policy – Development and Human Rights jointly organised by the Department of Family Welfare, Ministry of Health and Family Welfare, the National Human Rights Commission and the United Nations Population Fund (UNFPA) recognised[4] that have family planning measures have been coercive and impacted the life of women negatively specially due to the son-preference practice. It affirmed that giving priority to health, education and livelihood of women for empowerment of women as also for reduction in fertility rates and stabilization of population.

The fertility revolution has impacted the life of human beings generally in two ways. One, it has enabled prevention of conception and birth of children despite heterosexual sexual intercourse among couples of reproductive age and second, it has allowed for birth of children in ways not thought of before. Throughout most of human history, children have been borne through ordinary heterosexual intercourse and laws regulating relationships between children and their parents have been based on that assumption. Development of new technologies in the last few decades, however, have opened up innumerable possibilities and has created dilemmas that invite reconsideration of the rules that govern the establishment of legal parentage. The current legal rules recognise family by marriage and parentage through birth or adoption but the unprecedented discoveries and developments in procreative medical technologies are creating parenting possibilities, and increasing parenting realities, that defy

2. Carol S. Coonrod, CHRONIC HUNGER AND THE STATUS OF WOMEN IN INDIA, June 1998 available at http://www.thp.org/reports/indiawom.htm.
3. In 1995-2001 contraceptives prevalence was 47%, antenatal care coverage 60%, skilled attendant at delivery 43%, and reported maternal mortality ratio was 540. UNICEF STATE OF THE WORLD CHILDREN 2003 Table 7 Women (2003)
4. 11th January 2003, New Delhi, available at http://www.unfpa.org.in/reports.asp.

the assumptions of the traditional parentage rules. "It is now not only possible to have sex without pregnancy but to have pregnancy without sexual intercourse, pregnancy without parentage, and parentage by procreation without sex or pregnancy."[5]

This paper focuses on the nature and role of law in India in relation to conception, abortion and birth of children with the use of new technologies with special focus on contraception, abortion, sex selection and surrogacy. It must be clarified that it is not highlighting the gender dimensions of the direction of research and development, usage, and promotion of various contraceptive methods. Its primary centre of attention is the legal regime regulating contraception, abortion and birth and their implications for women.

II. FERTILITY REVOLUTION: RANGE OF ISSUES

The range of issues relating to the fertility revolution is primarily two-fold. One, relating to the fertility control measures for ensuring that a child is not born and second, the fertility promotion measure to ensure that a child may be borne by a desirous parent or couple unhindered by their incapability to give birth to a baby for various reasons. In the former categories of measures relating to preventing birth may further be divided further into two sub-categories, (a) successfully preventing conception and (b) preventing birth after conception by abortion. In the latter category of measures relating to giving birth to a baby, the issues may be divided in three further sub-categories, (a) when a baby is conceived and borne by a woman using sperm of her partner through assisted reproductive technologies (ART); (b) when a couple seeks conception and birth of their baby through a surrogate mother; and (c) use of technology by fertile as well as infertile couples for sex and genes selection of their babies. (See, Chart)

A. Preventing Birth

a. Preventing Conception

Widespread contraceptive use is comparatively new in human history with the revolution in contraceptive technology providing methods to women that they can use even independent of the cooperation of their male partners, to regulate their fertility and to enjoy sexual life without fear of unwanted, ill-timed pregnancy. Before 1960, men and women had very

5. NEW REPRODUCTIVE TECHNIQUES AND NEW PARENTAGE ISSUES, available at http://www.etax.byu.edu/wardle/fundprinsfaml/11newpro.htm

limited choices in contraception: coitus-related methods (condom and withdrawal for the male; the diaphragm, cervical Cap, and vaginal spermicides for the female; periodic abstinence for the couple), and permanent methods (male and female sterilization). The contraceptive revolution of the 1960s and 1970s led to significant improvements in existing methods, including the simplification of methods of female sterilization and took contraception out of the bedroom and genital area with the development of systemic hormonal methods administered daily as well as those offering protection for long periods.[6] The analysis of method-specific problems revealed that 75 percent of sterilised women and 87 percent of women whose husbands were sterilised reported having no problem with their method. The most common problems experienced by sterilised women were headache, body ache, or backache (13 percent), abdominal pain (8 percent), weakness or tiredness (7 percent), and white discharge (4 percent). These results pointed to a continuing need to strengthen post-operative care and counselling for sterilization acceptors.[7] Although the government is involved in the manufacture, distribution, and provision of contraception, the key central statute applicable is the Drugs and Cosmetics Act 1940 and is relevant primarily for the approval of contraceptives as drugs.

Sterilisation has been and continues to be the principal form of contraception in India.[8] The National Health Survey of 1998-99 also showed that of the 48 percent of married couples who used some method of contraception, male sterilisation, pill and IUDs accounted for 2 percent each, condoms for another 3 percent and other/ traditional methods for 5 percent. Female sterilisation was the highest at 34 percent. Of 30,167 sterilizations reported, 95 percent are female sterilizations.[9]

Sterilisation thus plays an overwhelmingly significant role in family planning services. Yet, no national statutes regulate the provision of sterilisation services. The following guidelines of the Ministry of Health and Family Welfare regulate sterilisation[10]:

6. *Supra* n. 1.
7. Key Indicators of National Family Health Survey Ph I (1992-93) and Ph II (1998-99) – A Comparative Statement, *available* at http://health.nic.in/fsnfhs.htm.
8. *Ibid* .
9. National Family Health Survey -2 INDIA: MAIN REPORT, 'Chapter V: Family Planning', available at http://www.nfhsindia.org/india2.html
10. Excerpt from Women of the World: Formal Laws and Policies, Center for Reproductive Rights, http://www.crlp.org/pub_bo_wowlaw_india.html.

- A client should be married with a living spouse.
- A male client must be below the age of 50 and his wife below the age of 45.
- A female patient, on the other hand, must be between the ages of 22 and 45.
- The number of children is not a relevant factor.
- The client or spouse cannot have undergone previous sterilization.
- The written consent of all patients undergoing sterilization procedures is necessary.

It is apparent that contraception is seen and promoted as a family planning and population control measure and is not focused on ensuring or encouraging choice and sexual freedom to women. Even though the presence of children or their numbers is an irrelevant factor if a married man or woman seeks sterilisation, single persons as well as couples living together without marriage are not entitled to get sterilised. It is possible to justify this prohibition as a measure against coercive sterilisation of single persons, but the exclusion of couples living together without marriage is indicative of the State's unacceptability of sexual activities beyond marriage. It is paradoxical that while the state is not willing to allow sterilisation of single men and women or even couples living together without marriage, it allows unmarried women to seek abortion legally. While prohibition against sterilisation of single persons may inhibit their sexual freedom, permitting an unmarried woman to seek abortion legally allows her to hide the fact of sexual promiscuity on her part. The message is simple and clear. Marriage continues to be considered as the source of family and the legitimate sphere of sexual activity by the state. Sexual freedom and choice brought about by the fertility revolution remain outside the official cognisance in India.

b. Preventing Birth: Abortion

Abortion is the termination of pregnancy by any method (spontaneous or induced) before the foetus is sufficiently developed to survive independently (foetus less than 20 weeks of pregnancy). Induced abortion is legal in India when performed in accordance with the provisions of the Medical Termination of Pregnancy Act 1971 (MTPA) It permits termination of pregnancy if it involves risk to mother's life or grave injury to her physical or mental heath or if the child to be born will suffer from such physical or mental abnormalities as to be seriously handicapped. Pregnancy due to

rape or due to the failure of contraceptive is presumed to cause grave mental injury to the woman. Failure of contraceptive device is a ground available irrespective of the method used (natural methods/barrier methods/hormonal methods). In fact all pregnancies can be terminated using this criterion. Pregnancy may be terminated on the advise of one registered medical practitioner during the first twelve weeks, and on the advise of two medical practitioners up to twenty weeks. The consent of the woman, married or unmarried or legal guardian if she be a minor or a person of unsound mind is necessary for termination of pregnancy.

Officially there are no precise estimates of the annual incidence of induced abortion. Government statistics pertain only to the reported MTP cases conducted in government's recognised clinics. However, there are several unofficial estimates of induced abortions in India, which vary a lot.[11] Abortion in India is frequently performed under unsafe or undesirable conditions.[12] Some estimates suggest that some 5 million abortions are performed annually in India, with the large majority being illegal. As a result, abortion-related mortality is high.[13]

The fertility revolution has not meant safer pregnancy and childbirth for Indian woman. "The maternal mortality rate in India - 460 per 100,000 live births - is one of the highest in the world. Every year approximately 75,000 to 100,000 women die due to pregnancy and childbirth related reasons."[14]

Performing an abortion in violation of the conditions mentioned in the MTPA is a criminal offence under the Indian Penal Code 1860 (IPC) and is punishable with imprisonment. The severity of the criminal sanction is increased if a woman is "quick with child." Section 312 provides that the woman who causes herself to miscarry is included among the persons who may be liable for abortion. This provision suggests that pregnant women are responsible adults capable of taking independent decisions. However, a woman consenting to adultery is not liable to be prosecuted for the offence on the assumption that the man must have seduced her. In addition, a wife cannot prosecute her husband or his paramour for adultery, while a man

11. M.E. Khan, Sandhya Barge and George Philip, *Abortion in India: An Overview*, SOCIAL CHANGE (Sept-Dec 1996) *available* at http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/suchana/0510/khan_etc.html
12. Kurus Coyaji, *Early Medical Abortion in India: Three Studies and Their Implications for Abortion Services*, JOURNAL OF AMERICAN MEDICAL WOMEN'S ASSOCIATION *available* at http://www.jamwa.org/vol55/55_3_19.htm
13. *Supra* n. 2. In 1991-92, of the approximately 6.7 million induced abortions, only 600,000 were legally performed. See supra n. 10.
14. *Supra* n. 10.

having sexual intercourse with a married woman can be prosecuted by her husband. Apparently the IPC constructs a woman as a responsible adult at par with men in case of abortion but in case of matters relating to her sexuality, she is construed as the property of her husband who enjoys exclusive sexual proprietory rights over her.[15]

The provisions of IPC and MTPA apply equally whether the foetus aborted or to be aborted is male or female. Abortion of male foetuses, however, is exceptional in India. The problem is of female foeticide and infanticide and is a reflection of the secondary status of women within family and society. The problem has been further exacerbated by newer Assisted Reproductive Techniques (ARTs) that have enabled sex determination of a foetus as well as selection of sex of the foetus for conception. The gender-neutral terms used in the MTPA and IPC hide the gendered issues relating to forced pregnancies in order to have a son and forced abortions of female foetuses and the voicelessness of women in the family in these matters. The problem was found to be too severe to be tackled by these statutes. Hence, the state enacted a new statute, namely, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994. In view of even newer technology allowing for sex-predetermination, it was amended and is now know as the Pre-Conception and Pre-Natal Sex Selection/Determination (Prohibition and Regulation) Act 2001. Its effectiveness and impact are yet to be determined.

B. Giving Birth with Assisted Reproductive Techniques (ART)

ART refers primarily to artificial insemination (AI) and in vitro fertilisation (IVF). AI in its simplest form requires the donation of sperm from a man (usually obtained by his masturbation into a container) and the mechanical injection of it into the vagina of the woman. It may be performed with or without the medical professional's assistance.[16] "IVF involves the removal of an egg or eggs from a woman, the donation of sperm from a man, and the combination of them ex utero (usually in a petri dish or similar container) producing one or (usually) more multi-cell human zygotes or embryos which may be frozen for later implantation, or immediately implanted into the uterus of the woman who wants to bear a child or children."[17] IVF procedures are becoming increasingly precise and

15. See, Ved Kumari, *Gender Analyses of Indian Penal Code* in A. Dhanda and A. Parashar (eds), ENGENDERING LAW: ESSAYS IN HONOUR OF PROF. LOTIKA SARKAR 139-160 (1999).
16. *Supra* n. 5.
17. *Supra* n. 5.

sophisticated thereby enabling not only sex selection and sex predetermination but also genes selection giving rise to the term designer babies. This part of the paper discusses how these techniques and the possible scenario of their use have challenged the existing notions of family and identity of its members.

a. Natural Parents and ART

Conception and birth of a child to natural parents through ART is largely unregulated and ordinarily does not raise new issues of parenthood. However, there are a number of scenarios in which new legal and ethical issues have arisen or may arise that need regulation. A few examples[18] from the US highlight the point. A widow asked for removal of sperm from her dead husband 30 hours after his death to be used later. She gave birth to a baby after four years using those sperm. It raises the question of relationship between the dead man and the child born. The current laws recognise fatherhood in case of a child born posthumously if he/she was conceived during the lifetime of the father. In this case, the child was conceived after the death of the father. Is he the child of both his parents or of only his mother? It also raises the ethical issue of consent of the dead man. Can a spouse be allowed to treat the body of her dead husband as her property to be used and disposed of in the manner she likes? In another instance, a man donated a vial of his frozen sperm to his girlfriend before committing suicide. His sons from his marriage objected. The California court decided in favour of the girlfriend as the vial was not part of his property that was subject matter of division among his sons and widow.[19] In yet another case, the mother of the frozen embryos was forty years old at the time of divorce and regarded the frozen embryos as her best hope of having children, but her estranged husband did not want to become the father of her children.[20] She claimed to have the constitutional right to procreative privacy and bodily integrity and that the frozen embryos were persons and the husband was not entitled to interfere. The court however decided the matter according to the term of the contract the couple had with the IVF clinic enabling it to donate the embryos for research if they did not both agree to their disposition. Marriage to father and brother are prohibited but does law or ethics or both prohibit use of their sperm? The present law does not contain clear answers. These and other similar

18. *Supra* n. 5.
19. *Hecht* v. *Superior Court*, 20 Cal.Rptr.2d 275 (Cal. App. 1993) quoted in *supra* note 5.
20. *Kass* v. *Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (1998).

instances raise the issues of status and rights of the child born vis-à-vis the father. Due to many high-profile litigations that have raised newer issues with regard to the consequence of using new reproductive technologies in the developed world, countries like the USA, Australia and UK have enacted newer legislations to address some of the matters. However, there is no uniformity of norms among them. Four 'Model Legislations' have been proposed in the USA itself and they too do not follow the same norms. Surrogacy raises even more complex issues about the identity and family of persons involved in surrogacy arrangements

b. Surrogacy

Surrogacy involves a woman conceiving using an egg from another woman or using the surrogate's own donated egg and the sperm of a donor bearing the child for another person or couple. Typically the surrogate is acting for a married couple but is not limited to them and may include gay and lesbian couples or single men or women.[21]

In the Indian context, one can recall the mythological story from *Vishnu Puran*. Indrani took away Devaki's embryo and gave birth to Balram, Lord Krishna's elder brother. Was that an instance of surrogacy in those times? Even if one were to distance oneself from mythology, it is part of reality today in India with the news of a Gujarati grandmother giving birth to her daughter's twins in January 2004 and the emergence of fertility centres and sperm, eggs and embryo banks opening offices.[22] As per the current position of law, the grandmother will be treated as the mother of her grandchildren though the DNA testing will show that they are not her children. The genetic mother will have to adopt these children before she can legally call them her own. There are reports that this is not the only incidence of surrogacy in India[23] and there certainly have been many more babies around the world borne by surrogate mothers.[24] Most such cases remain hidden and anonymous in India for reasons of social repercussions due to its unacceptability. Most women who accepted surrogacy contracts said that they did it for the money that they needed. India is emerging among the favourites on the list of countries to be searched by intending parents requiringsurrogate mothers, given the high costs of surrogate mothers in the developed countries.[25]

21. *Supra* n. 5.
22. http://www.intendedparents.com/News/Surrogacy_news_from_India.html .
23. http://www.intendedparents.com/News Childless_couple_opt_for_surrogacy_but_choose_to_keep_mum.html
24. http://www.creatingfamilies.com/
25. http://www.intendedparents.com/News/Surfing_for_Surrogates.html

Surrogacy gives rise to a number of legal issues, apart from the ethical issues raised by an instance like the grandmother becoming mother to her grandchildren. The range of such questions is large.[26] This paper is confined to only those aspects that impact notions of identity and family. These issues challenge various assumptions and presumptions of existing laws and principles relating to identity and family and require fresh thinking and new answers. Who is the 'real' mother of the child - the biological or genetic mother? Undoubtedly, on the basis of genetics and DNA fingerprinting, the mother is the woman whose ovum has been fertilised. But biologically, in terms of the intimate relationship between a baby developing in a womb and the woman carrying it, the surrogate mother is the real one. Disputes over possession of the baby have already arisen in this regard. These issues can become highly personal e.g. when a woman becomes a surrogate mother in the case of an embryo resulting from the fertilisation of an ovum from her daughter! Issues will crop up in regard to other familial relationships e.g. between siblings, property rights, inheritance etc.[27] What is the status of the child born to a surrogate mother – legitimate or illegitimate? What is the relationship between a surrogate child and other children of the surrogate mother? Is surrogacy contract enforceable? What are the rights and obligations of the intended parents? What should be given preference in determining relationship – genes or natural bonding resulting from physical contact? Whose interests are to determine the identity and relationship issues – those of the parents or child?

The first set of questions in surrogacy relate to the legal relationship of the child with surrogate mother and her family. The law in India recognises relationships by blood (adoption is included in this category by the legal presumption of the adopted child being at par with a natural born child) or marriage. Children are said to be related to each other by full, half and uterine blood.[28] The status of children in a family is established by reference to the marital status of their parents. They are classified as legitimate when either conceived or born during the subsistence of marriage. Children born outside the wedlock are illegitimate.[29] Surrogacy challenges both these principles.

A child may be borne by a surrogate mother for an intended person or couple (1) using her own egg and sperm of the intended father or (2) an embryo fertilised by the egg and sperm of the intended parents or (3) an embryo fertilised by (i) sperm of intended parent with donor egg from third party or (ii) egg of intended parent and donor sperm from third party or (iii) donor sperm and egg from third parties. Applying the existing legal principles, a child so begotten in the (1) instance can be said to be related to her other children by uterine blood and hence will be subject to the prohibited degree restrictions in case of marriage. The latter case, however, poses the real question. Whether 'blood' refers to the egg and sperm or does it refer to the blood in mother's body too? Whether the child borne by the surrogate mother in the latter situation related by blood with her other children? Will a child borne by a woman using the egg of her daughter and her son-in-law succeed to her property as her child or grandchild?

Further complications are added by the presumption of legitimacy regarding children born during wedlock making the father the natural guardian of the offspring. Will such a child be the legitimate or illegitimate child of the husband of the surrogate mother? If the child was borne for the intended couple by the surrogate mother using her own egg, will the child be the legitimate or illegitimate child of the intended parents? What will be the relationship of the intended mother and the child so born?

The answers to these and other similar questions become most difficult and complicated if the religion of the intended parents and the surrogate mother were also taken note of. The personal laws of the parties govern family relationships and they differ for persons belonging to different religions. For example, in the Hindu Law context, will a male child so born become a member of the coparcenary by birth with an equal share with other coparceners in the joint Hindu family property? Will he be the member of the joint Hindu family of the surrogate mother, the donor or the intended parents? Whose personal laws will apply if the religion of the surrogate mother and the intended parents differed?

Surrogacy is usually based on contracts. Ordinarily a surrogacy contract contains an agreement between the intended parents and the surrogate mother to conceive through ART and carry the pregnancy to term, give

26. Insurance, health, medical, legality of fees, contract, conflict of laws in different territories and so on. *See*, http://www.surrogacy.com/boards/lawarch1.html for a wide range of legal questions relating to surrogacy raised by people involved in surrogacy, egg or sperm donation as well as surrogacy research.

27. MGK Menon, Shri Mahaveer Chand Bhandari Memorial Lecture, The Advance of Science and the Need to Evolve Compatible Legal Systems, (1995) 5 SCC (Jour) 18, *available* at http://www.ebc-india.com/lawyer/articles/96v5a4.htm

28. Full blood when they have the same parents, half blood when they have the same father but different mother and uterine blood when they have the same mother but different fathers.

29. The rules relating to guardianship and inheritance differ for the two categories.

birth to the child, and hand over the baby after birth to the intended parents. The surrogate mother is usually offered an amount for the services rendered and the medical expenses during pregnancy, pre-natal and neo-natal expenses. Is such a surrogacy contract legal and enforceable or contrary to the existing laws and public policy? In the context of identity and family, a surrogacy contract raises some important legal questions. Can parties decide parenthood by contract contrary to the assumptions and presumptions of law? Can parties be allowed to enter into an irrevocable contract of adoption in relation to a child who is yet to be born?

The Indian law has yet to evolve answers to these questions that have been litigated in cases in the western countries. The extent of difficulty in finding answers that may be acceptable to all may be gathered from the fact that at least four separate "uniform laws" dealing with parentage have been proposed in the USA that could apply to artificial procreation by the National Conference of Commissioners of Uniform State Laws, a group of state-appointed legal experts as model laws but have not found uniform acceptance. *In the matter of BABY M, a pseudonym for an actual person*[30] a woman agreed to be artificially inseminated with the semen of another woman's husband, carry the resulting pregnancy to term, give birth and surrender it to the natural father and his wife for US$10,000. Her husband will do everything necessary to rebut the presumption of paternity and she will do everything necessary to terminate her maternal rights over the child. Thereafter his wife would adopt the child and they will be treated as parents for all purposes. In case of the natural father's death, the sole custody of the baby would be with his widow. While his wife was not a party to this contract, surrogate mother's husband was. This was the first surrogacy case before the New Jersey Supreme Court. It said that there was no problem if a woman voluntarily and without payment agreed to act as a "surrogate" mother, provided that she was not subject to a binding agreement to surrender her child and held the contract in question as invalid and termination of the surrogate mother's parental rights and the adoption of the child by the wife/step parent as void by reference to the then existing law in force. It placed the custody of the baby with the natural father applying the best interest of the child principle, declaring the 'surrogate mother' as the mother and referred the question of her visitation rights to the lower court for decision. Holding that the contract in fact was an arrangement of private adoption, it declared it as being against law on the following grounds:

30. 109 N.J. 396, 537 A.2d 1227 (1988), http://biotech.law.lsu.edu/cases/cloning/baby_m.htm

- The payment of money to the "surrogate" mother in fact was offered to obtain an adoption and not for services offered by her as alleged. The law prohibited use of money in private adoptions.
- The natural mother's irrevocable agreement, prior to birth, even prior to conception, to surrender the child to the adoptive couple was illegal and coercive. The law made surrender and consent revocable in private placement adoptions.
- The law required proof of parental unfitness or abandonment before termination of parental rights or adoption could be ordered. The agreement of the natural mother to co-operate with proceedings to terminate her parental rights and to establish that the child's best interests would be served by awarding custody to the natural father and his wife before conception and without the slightest idea of what the natural father and adoptive mother are like, is apparently against the law.

The court further reinforced the invalidity of the contract by reference to established principles of public policy and said:

- The contract's basic premise, that the natural parents could decide in advance of birth as to who would have custody of the child, bore no relationship to the accepted principle that the child's best interests should determine custody.
- The surrogacy contract guarantee of permanent separation of the child from one of its natural parents was contrary to the long established policy that children should remain with and be brought up by both of the natural parents.
- Worst of all, however, was the contract's total disregard of the best interests of the child. There is not the slightest suggestion of any inquiry to be made to determine the fitness of the intended parents for adoption, their superiority to the natural mother or the effect on the child of not living with her natural mother.

In conclusion the court said,

> The surrogacy contract is based on, principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.

Contrary opinion is found in the judgement of the California Supreme Court[31] in a dispute on motherhood when the baby was borne by implanting an embryo from the couple's egg and sperm in the womb of the surrogate mother. The majority judges in this case held the contract to be enforceable as the payment of money was found to be for the services of the surrogate. It applied the intention test (who was intended to be the mother) and held the genetic mother to be the real mother. It could not allow two mothers as the law prohibited it. It also held that the surrogate mother, being a nurse was sufficiently educated, experienced, and financially sound and could be said to understand the consequences of her decision. The minority judge, however, refused to apply the intention test. In his opinion the intention test was applied in tort, property and commercial disputes and this case was not one of those instances. He reasoned that it was a family matter and the test of the best interest of the child applied in family law should be applied.

In both these cases some interesting arguments were raised based on gender discrimination. *In the matter of Baby M,* the wife argued that she should be considered to be at par with an infertile husband in a marriage. The argument was that the law presumed the infertile husband to be the father of the child born during marriage even if the wife became pregnant using the sperm from another man with or without the use of ART. The infertile wife should be similarly treated and presumed to be the mother of the child who was borne using her husband's sperm for her. The court rejected this argument distinguishing the brief role of the sperm donor from that of the nine month long biological and psychological commitment of the surrogate mother. In *Anna Johnson's case* the court pointed out that the law ordinarily determined the paternity through DNA testing and the maternity through the fact of giving birth but maternity could be determined by blood test too. This led to the difficult situation of choosing between the biological mother who stakes her claim to motherhood by the proof of giving birth and the genetic mother by the DNA testing.

It is apparent from the above discussion that surrogacy has raised with many new questions that need to be grappled with and solved by law and state policy. The law will need to make clear provisions regarding surrogacy contracts that impact on family relationships in a big way. Clear tests need to be established to determine the real mother in case the surrogate mother changes her mind. Should the matter be decided by the traditional test of who gave birth, or should it determined by the test similar to that

31. *Anna Johnson*, v. *Mark Calvert* et al. 851 P.2d 776, 19 Cal.Rptr.2d 494 (1993)

applied for determining paternity, i.e., DNA through blood test, or should it be the test of who was intended to be the mother, or should it be decided by the principle of the best interest of the child? The inherent dangers of dehumanisation and exploitation of poor women as well treatment of children as mere property cannot be overlooked. It also raises a broad range of ethical problems. Should the desire of parents to have their own children be allowed to undermine the current "web of social, affective and moral meanings associated with human reproduction.... Surrogate parenting allows the genetic, gestational and social components of parenthood to be fragmented, creating unprecedented relationships among people bound together by contractual obligation rather than by the bonds of kinship and caring."[32]

A thorough study is needed to evolve the best practices suitable to India and the provisions in the statutes in the USA,[33] UK[34] and Australia[35] along with analyses of surrogacy in religious laws[36] may be helpful in deciding some of these aspects. In the year 2000, the National Conference of Commissioners on Uniform State Laws in the US drafted the Uniform Status of Children of Assisted Conception Act.[37] Under that Act, "the granting of parental rights to a couple that initiates a gestational surrogacy arrangement would be conditioned upon compliance with the legislation's other provisions. They include court oversight of the gestational surrogacy arrangement before conception, legal counsel for the woman who agrees to gestate the child, a showing of need for the surrogacy, medical and mental health evaluations, and a requirement that all parties meet the standards of fitness of adoptive parents."[38]

C. Sex Selection and Sex Predetermination

The fertility revolution is not only about preventing and ensuring the birth of children. The research in this field is also aimed to ensure that

32. The policy statement of the New York State Task Force on Life and the Law quoted in *supra* n. 5.
33. http://library.adoption.com/Surrogacy/Surrogacy-Law-Introduction/article/3845/1.html.
34. http://www.lfc.org.uk/donation/Surrogacy.htm.
35. http://www.aph.gov.au/library/pubs/bd/2000-01/01BD024.htm.
36. Shlomit Joy Oz, GENETIC MOTHER VS. SURROGATE MOTHER: WHICH MOTHER DOES THE LAW RECOGNIZE? A COMPARISON OF JEWISH LAW, AMERICAN LAW, AND ENGLAND'S LAW, http://law.touro.edu/Publications/internationallawrev/vol6/part8.html, 28th April 2004; M. Afifi al-Akiti, SURROGATE PARENTING, http://www.iol.ie/~afifi/Articles/surrogate.htm.
37. http://www.aaml.org/Articles/2000-11/UPA%20FINAL%20TEXT%20WITH%20COMMENTS%20.htm
38. *Supra* n. 5.

children do not suffer from congenital diseases and defects. "There are clearly advantages in carrying out gene therapy, where possible, long before the manifestations of a specific disease are apparent, and have already done a great deal of damage. For this, and other reasons, recourse is now made to genetic screening to look for defective genes that can be identified with a specific disease."[39] The disability rights movement though has shown a concern that the society is increasingly becoming intolerant of diversity in any form, more and more utilitarian in approach, and is using medical technology to eliminate any persons who do not fit in with a notion of 'normality'.[40]

Prenatal diagnosis also enables the sex of the child to be known before birth. Introduced in the social milieu of 'son preference' it became the tool of elimination of female foetuses. Special penal statute against female infanticides, namely, the Female Infanticide Act was enacted as far ago as 1864. Not much has changed more than a century later; female children continue to be unwanted. Abortions of female foetuses after sex determination tests are a well-established fact across the country. Renowned demographer Prof. Ashish Bose remarked that 2001 did not show freak figures[41], but the sharpest decline had been in the past decade. In Punjab, the child sex ratio declined from 875 to 793 (a decrease of 82 points), in Haryana from 879 to 820 (59 points) in Himachal Pradesh from 951 to 897 (54 points), in Gujarat from 928 to 878 (50 points), in Chandigarh from 899 to 845 (54 points) and in Delhi from 915 to 865 (50 points).[42] Census 2001 showed an alarmingly low sex ratio among boys and girls below six years of age across the nation. "In Andhra Pradesh, Chattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Karnataka, Kerala, Maharashtra, Manipur, Orissa, Pondicherry, Punjab, Rajasthan, Tamilnadu, Uttaranchal and West Bengal; the juvenile sex ratio is lower than the overall sex ratio of the respective states. As a result of sex-determination and sex-pre-selection tests leading to selective abortions of female foetuses, sex ratio of the child population has declined to 927 girls for 1000 boys. Sixty lakh female infants and girls are "missing" due to abuse of amniocentesis, chorion villi Biopsy, sonography, ultrasound and imaging techniques."[43]

39. *Supra* n. 27.
40. Laxmi Murthy, SEX SELECTION: GETTING DOWN TO BUSINESS, http://www.infochangeindia.org/features77.jsp
41. In 1961, the 0-6 sex ratio was 976, it declined to 964 in 1971, 962 in 1981 and 945 in 1991.
42. ARE WE HEADING TOWARDS A DAUGHTERLESS NATION? Times India.com, Sunday, June 17, 2001 http://www.expressindia.com/news/june17/nation4.shtml.
43. Vibhuti Patel, *Locating the Context of the Declining Sex Ratio And New Reproductive Technologies – II*, THE QUARTERLY JOURNAL OF OPINION (July 2003).

After a study in Mumbai showed that only one male foetus was aborted out of the total eight thousand under scrutiny, first the Maharashtra state and later the central government enacted laws to address this menace, namely, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 (PNDTA).[44] The PNDTA did not take in to cognisance that parents would go a step further in eliminating birth of girl children and use ARTs to ensure that only male babies were conceived. PNDTA had to be amended to prevent sex pre-selection of the foetus. It is now known as the Pre-Conception and Pre-Natal Sex Selection/Determination (Prohibition and Regulation) Act, 2001. The amendments are geared to broadened its scope and strengthen the regulatory mechanisms and implementation.[45] It has been applauded by women's group and received with hostility from medical profession. In 2002, the Medical Council of India recognised tests for sex-determination 'with the intent to terminate the life of a female foetus' as professional misconduct. However, the medical profession finds it easy to undermine these prohibitions and parents continue to use the tests for knowing the sex of their foetus.[46] "An estimated 20 million females in this country have been eliminated following sex-determination tests. But not a single doctor has been convicted. It is the providers of this technology who have to be held ethically as well as legally accountable."[47] It is an open question if the recent amendment to the PNDTA will change anything.

There is no arguing that this form of violence against women has its roots in basic gender inequalities. Until material conditions change, the

44. The Act prohibited all genetic counselling facilities, genetic clinics, and laboratories from divulging information regarding the sex of the foetus except under specified conditions. It limited the use of prenatal diagnostic techniques to the specified disorders, and listed the categories of pregnant women who could legally access pre-natal diagnostic techniques. It further required that all genetic testing facilities should be registered with prescribed authorities and prohibited any medical professional from carrying out such diagnostic procedures in a facility other than one registered pursuant to the statute.
45. The Act has brought within its ambit the emerging techniques for pre-conception sex-selection, such as sperm separation and pre-implantation genetic diagnosis, increasing the fine and additional provisions for the suspension and cancellation of the registration of violators. Manufacturers of ultrasound equipment are now required to sell their products only to registered clinics, and all ultrasonographers now have to maintain records of all tests conducted by them. It also provides for the setting up of state-level supervisory bodies to monitor the Act's implementation, in addition to the supervisory agency that is already in operation at the central level.
46. According to Laxmi Murthy, *supra* n. 40, the medical practice is to prescribe ultrasound for reasons like less amniotic fluid, abnormal foetus etc., to indicate a female foetus and the declaration: 'Everything is fine! In case of a male foetus.
47. *Supra* n. 40.

status of women is unlikely to improve, in spite of consciousness-raising exercises. Many complex issues are involved in legislating in this area. The right of the foetus to live competes with the right of the woman / couple to abort. In addition there is the demand and supply principle. The community seems to demand fewer females while the public policy demands an end to abortion on the basis of sex. Further eugenics is increasingly taking hold in the field of ART and couples are being given the option of tailor-made babies, conforming to specifications. Laxmi Murthy sums up the complexity of the issues in pre-natal sex-determination in the following words:[48]

> Feminists are loath to confer the right to life on the foetus, and the women's movement the world over has fought for a woman's right to control her own body. Unconditional access to safe, legal abortion is a non-negotiable demand to ensure some measure of reproductive autonomy in a situation where women are not in a position to refuse sex, especially in the marital context, where men do not shoulder the responsibility of contraception, where sexual abuse is rampant and safe contraceptives are neither freely accessible nor fool-proof. Yet, feminists also fight against patriarchal notions, which lay down that a female has no place in this society, and the campaign against sex-determination and sex pre-selection is but one aspect of this battle. Pre-selection is even more complicated — a sanitised and less messy way of eliminating the female. There is no 'life' to contend with, no 'murder', no blood and gore. Yet, the violence is in no way diminished. If anything, this is an extreme form of misogyny unimagined until a couple of decades ago.

III. Conclusion

While fertility control technology has changed the lives of women world over, the state policy in India for its usage is geared towards population control. The debate relating to use of fertility control measures is not focused on the right to life of the foetus or a woman's right to control her own body. On the other hand, availability of new technology has resulted in increasing the gap between the number of female and male children born. Existing law does not provide answers to many questions that are arising due to the use of new technology. In any case, law alone cannot prevent the misuse of technologies and other measures for improving

48. *Supra* n. 40.

the status of women per se are equally required. Proliferation of medical technology and its indiscriminate use in obstetrics and gynaecology has led to change in the long accepted norms of an individual's identity as a human being as well as their relationship with others. The new technology seems to be developing in the direction of more commercialisation of human egg, sperm, embryo and children. It is time to take stock of the direction of further research and development in this field. In a country where there are millions of homeless, orphan, and hapless children needing families, should funds be spent on developing eugenics leading to dehumanising of human beings, expanding the child bearing span for women or co-modification of human parts? It is humbly submitted that the state's priority should lie in running campaigns for adoption of children. There is no denying the fact, however, that the fertility revolution has already led to changes in the construction of identity and family. Smaller family has meant more possibility for mothers to take up work outside the household responsibility. The second generation of single children needs to relate and rely on friends more than the family unlike the previous generations where the extended family took care of one's joys and sorrows. The changes have come to stay. It is time that law took note of these changes and created provisions to meet those situations after carefully defining the policies in this regard.

Intellectual Property Protection for Plant Innovation: A Journey from UPOV to TRIPs

Suman Gupta[*]

The biotechnology sector is expanding considerably and making revolutionary production both in the areas of industrial biotechnology as well as agricultural biotechnology. Biotechnology has answers to some of the world's most intractable problems concerning agriculture production, health, nutrition and the environment. Biotechnology has already made significant contribution in pharmaceuticals and agriculture. It is true that biotechnology has so far dominated by MNC's based in developed countries, and has tackled mostly the problems pertaining to these countries. But it cannot be denied that biotechnology has the potential to solve the problems of developing countries, especially those that have the capabilities for plant breeding, as it can provide new tools.

Developing countries, so far, have fear that biotechnology may have adverse effects on health and the environment; furthermore, Intellectual Property Rights (IPR) protected new biotechnological products and processes raise additional concerns of ethics, morality and access to these technologies. IPRs for biotechnological inventions also raise an issue that corporations of developed countries are pirating and patenting biological material and traditional knowledge from the gene-rich developing countries without fair and equitable sharing of profits and benefits and without appropriate transfer of new technologies. These issues have already been raised in Convention on Biological Diversity (CBD). There are some recent examples of patenting of land races, which have been the focus of attack by developing countries.[1]

The international community as well as the governments of developing countries, so far, have paid little policy attention to improving the access of scientists, technologists, entrepreneurs and consumers to these new technologies and products which have capabilities to change their ways of

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1. Well-known examples are *Chickpea plant varieties* case, *Basmati rice patent* case and *Turmeric* case.

living. Developing countries that have a relatively strong research base and industrial capacity will be more successful in this effort. Korea, Taiwan, and Singapore have done best to encourage R&D in biotechnology through the revision of their IPR policies. China, Cuba, Brazil, Mexico and India have also made progress in this sector, while many others are at various stages in this area.[2]

This paper aims to elucidate on the historical evolution of intellectual property rights on plants in developed and developing countries and the link between the UPOV and TRIPs. The paper also discuss the obligations undertaken by developing countries under TRIPs and the Indian legislation on the Protection of Plant Varieties and Farmers' Rights Act 2001 and concludes with recommendations for developing countries on this issue.

I. TRIPs and Patenting of Biotechnological Inventions

The EU and USA differed in their approaches to the patenting of biotechnological inventions during TRIPs negotiations in the Uruguay Round. USA believed that 'anything under the sun made by man', except human beings, was patentable; while the EU strongly resisted patents on living organisms. The WTO members thus agreed to a minimal agreement incorporated in Article 27.3(b), though with a commitment to revisit this provision within four years from the entry into force of TRIPs i.e. by 1999.

Article 27 of TRIPs requires that patents be made available, for both processes and products, in all fields of technology. Under Article 27.3(b), WTO member countries may 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 processes and microbiological processes*," so long as members provide for the protection of plant varieties, "*either by patent or by an effective sui generis system or by any combination thereof.*" However, microorganisms and microbiological or non-biological processes must be protected. The three universally recognised criteria of patentability, namely, novelty, non-obviousness and industrial application or utility has been incorporated into Article 27.1 of TRIPs and apply to all inventions including biotechnological inventions.

However, the application of these standards to biotechnological inventions has given rise to a set of problems. The concept of invention itself in

2. World Bank, Agricultural Biotechnology And Rural Development (1999).

relation to biotechnological inventions is controversial. Almost all patent laws provide that discoveries of substances found in nature do not constitute an invention and are thus excludable from patent grant. However, the distinction between the 'discovery' of something that exists in nature and the 'invention' or the creation of something new involving a pre-determined degree of human effort or intervention, is difficult to make in the field of biotechnology for the purpose of patentability. TRIPs gives no guidance on this; thus it gives a certain degree of flexibility to developing countries in formulating their laws to avoid the patenting of products of nature.

Article 27.3(b) of TRIPs excludes plants from patent protection, so there has been a pressing need about what sort of intellectual property protection should be given to plant innovation and why. This matter takes on urgency in the light of the obligation imposed by Article 27.3 of the TRIPs Agreement on all WTO member countries to provide for the protection of plant varieties either by patents or by an "effective *sui generis* system" or by any combination of the two.

II. Protection for Plant Innovation by Patent and Plant Variety Protection

Plants are a product of nature and the traditional breeding techniques to generate new plant varieties have been used for hundreds of years. It was only recently that newer ways of inducing desirable features in plants have been rewarded through IPRs. The IPR protection for plants may take two forms: Patents and Plant Variety Protection or Plant Breeders' Rights (PBRs). The development of IP protection of plants have been plagued not only by various moral, ethical and biosafety issues but also by many technical problems, such as:

1. It is difficult to set standards of novelty and non-obviousness for living organisms. Most developed countries now recognise that novelty is met if the claimed biotechnological product or process does not exist in the prior art. Inventive step or non-obviousness is represented by a certain level of technical intervention by man over the prior art not obvious to a person of ordinary skill in the subject matter. But questions still remain on all these issues. Under plant variety protection a lower standard is used. Protectable plants must be distinct i.e. must possess a combination of characteristics distinct from earlier plant varieties but should not have been commercialised before. Thus, mere 'discoveries' of plants growing in the wild is protectable provided other criteria are met.

2. It may be difficult to 'technically' replicate biotechnological inventions in the same way as chemical or mechanical inventions. Thus, while repeatability is a criterion for patent grant of biotechnological invention, uniformity and stability are requirements under laws governing plant variety protection.

3. Fulfilment of disclosure requirements of patent law is difficult in case of biological materials. In addition to a detailed written description, this is usually satisfied by deposit requirements of a sample of the protected material, particularly where this is necessary to replicate the process or product claimed.[3]

All these issues are still debated and elaborated by patent offices and the courts in developed countries.

III. History of Plant Variety Protection

The USA was the first country to institute IPR protection for plant varieties. In 1930, the USA introduced the Plant Patent Act and protected new plant varieties that were asexually reproduced and non-tuber propagated. This law is primarily used for the protection of ornamental and fruit plant varieties which are mainly produced by *asexual methods such as budding, grafting, layering* and so on. USA amended this law in 1998 to extend plant patent coverage to plant parts in addition to plant itself.

The European countries, however, instituted separate plant variety protection laws as they considered patent law unsuitable for this purpose. Netherlands in 1941, and Germany in 1953 granted limited protection to breeders to exclusively market the seed of protected varieties.[4] This *sui generis* protection was specially designed to give weaker protection than that given by the patent. Two important exceptions to breeders' rights were included: (1) the freedom of other breeders to use the protected variety as starting material for breeding further varieties without any requirement of an authorisation or any payment of royalty (known as the breeders' exemption) and (2) the freedom of farmers to re-use saved seed of the protected variety (known as farmers' privilege).

3. R.S. Crespi, *European Union* in Erbisch and Maredia (eds.) Intellectual Property Rights in Agricultural Biotechnology (1998).
4. See New Plant Varieties and the Protection of the Rights of the Breeders: A Historical Note, *available at* www.upov.int.

A. Plant Protection under UPOV Agreement

It was only in 1968 that a new thrust was given to the recognition of plant breeders' rights when an International Agreement UPOV[5] was entered into for administering the rules on plant variety protection. Denmark, Germany, Netherlands and UK became UPOV's first members. Many other countries of western and central Europe became members by the early 1980s. The main advantage of the UPOV Convention as revised in 1978 and 1991, is reciprocal national treatment or the same treatment to foreign right holders as accorded to nationals for the protection of new plant varieties from member countries.

In 1970, USA passed its Plant Variety Protection Act and became a member of UPOV in 1981.The Plant Variety Protection Act 1970, as amended in 1994, provides protection to the breeder of any sexually reproduced or tuberpropagated plant variety (other than fungi or bacteria) who has so reproduced the variety, if the variety is 'new', i.e. never sold prior to the date of application or priority date; 'distinct', i.e. clearly distinguishable from previously known varieties; 'uniform', i.e. where the variations in the variety can be described and predicted and are commercially acceptable; and finally 'stable' i.e. the variety must be capable of being reproduced with the same essential and distinctive characteristics with a reasonable degree of certainty. The disclosure requirements were to be met by deposit of the new seed and the provision of a description of the variety. When these and other requirements are met the new plant variety receives protection for 20 years (25 years if it is a tree or vine) against, primarily, production of propagating material for commercial exploitation by third parties without the authorisation of the right holder. This regime parallels the Plant Patent Act 1930 but applies to sexually reproduced plants and to tubers[6] and also has no requirement of non-obviousness.

Many other countries followed and joined UPOV. Japan joined the UPOV in 1982 and now follows the revised version of 1991. New Zealand instituted its first PVP law in 1975 and amended it in 1981 to cover all plant species.[7] Australia passed a Plant Variety Rights Act 1987 and acceded to UPOV in 1989. Now, The Plant Breeders Right Act has

5. *Union Internationale pour la Protection des Obtentions Vegetales* or the International Union for the Protection of New Varieties of Plants.
6. The US ratified UPOV 1991 in February 1999. See *www.upov.int.*
7. UPOV-WIPO-WTO (1999); 'Experience of UPOV Member States in Implementing Sui Generis Systems: Japan, New Zealand' in UPOV-WIPO-WTO Joint Regional Workshop, Bangkok, 18-19 March 1999.

replaced this law and brings Australia in conformity with UPOV 1991.However Australia retained the farmers' privilege to save seed.[8] Korea enacted a Seed Industry Law 1995 that closely followed the UPOV 1978. This law was amended in 1999 to bring it in line with UPOV 1991.[9]

B. Plant Protection under the TRIPs Agreement

The next major thrust in international law on protection of plant varieties came with the conclusion of the TRIPs Agreement in December 1993. Under Article 27.3(b) breeders' right are obligatory despite the possibility of excluding the patenting of plants. Further TRIPs mention no adherence to the pre-existing international convention, UPOV. The reason was that UPOV 1991 had not yet entered into force and many developed countries considered UPOV 1978 inadequate. There was no agreement among industrialised countries as to the details of an effective *sui generis* system of protection for plant varieties. The end result is that countries are free to construct their own individual regime for such protection, provided it meets the undefined standard of 'effectiveness'.

The developing country members of WTO were not required to model their *sui generis* legislation on UPOV. However, UPOV is the only international model available so far on PBR, which gives a reasonable degree of flexibility to farmers and breeders to use the protected variety. Thus, following UPOV 1978 or 1991 could be considered an option for developing countries to frame their legislation, provided that it is otherwise TRIPs-compatible.

Austria, Finland, Norway and Portugal also became members of UPOV in the period since 1993. Mexico adopted the Federal Plant Variety Law 1996, corresponding to UPOV 1978 and joined UPOV in 1997. Bolivia, Columbia, Ecuador and Peru have PBR laws conforming substantially to UPOV 1991, as do other developing countries such as Morocco, Costa Rica, and Venezuela. Many other developing countries like Kenya and Chile that are exporters of cut flowers and ornamental plants also view effective PBR protection to be in their long-term interest as it facilitates access to new and better plant varieties.[10] Brazil a recent member of UPOV passed a law for the Protection of Plant Varieties that is in compliance with UPOV 1978.

8. See Press Release, December 1999 at www.upov.int.
9. UPOV-WIPO-WTO, National Experience and plan to Implement *Sui Generis* Systems: China and the Republic of Korea presented at the UPOV-WIPO-WTO Joint Regional Workshop at Bangkok, 18-19 March, 1999.
10. UPOV Model in IP/C/W/175 dated 11 May, 2000, *available* at www.wto.org .

India also opted for the 1978 version of the UPOV as a basis for its legislation The Protection of Plant Varieties and Farmers' Rights Act 2001 for plant variety protection, although the concept of "essentially derived variety" is taken from UPOV 1991.

IV. Utility Patents for Plants

Despite the strengthening of protection for PBRs under UPOV 1991, developed countries hold that protection to new plant varieties can be offered only under regular patent systems. Utility patents on living organisms were not permitted even under the US Patent Law. The patent system was considered appropriate only for industrial products and processes and not for living organisms. However, the advent of microbiology and the commercial exploitation of genetic engineering changed the perception on the patenting of living organisms. The US Supreme Court in *Diamond, Commissioner of Patents and Trademarks* v. *Chakrabarty*[11] while reviewing a rejection by the USPTO of a patent application for a bacterium that was capable of breaking down crude oil spills, held that there was no objection to the patenting of living material, provided it met all the criteria of patentability. Utility patents for plants were also recognized by the US Patent Office Board of Appeals in *Ex parte Hibberd*[12] where it overturned the decision of a patent examiner who refused to allow a patent on maize mutants on the ground that the invention was 'product of nature' and that another law, the US Plant Variety Rights Law, pre-empted the ability to grant such patents. Again, in 2001, the US Supreme Court in *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred International,* Inc[13] confirmed that plants and seeds are eligible subject matter for utility patent protection, notwithstanding the availability of concurrent protection under the Plant Patent Act 1930 or the Plant Variety Protection Act 1970. Thus, three distinct forms of legal protection for plant innovation are now available in USA. This Tripartite System for the protection of plant innovation is as follows:

The Plant Patent Act 1930, as amended in 1954 and 1998, provides protection for anyone who invents or discovers and asexually reproduces any distinct and new variety of plant, other than a tuberpropagated plant or a plant found in uncultivated state, that meets a standard of non-obviousness.

The Plant Variety Protection Act 1970, as amended in1994, provides protection to the breeder of any sexually reproduced or tuberpropagated

11. US 303,206 USPQ.193.
12. 227 USPQ 443 (Bd. Pat. App. & Int., 1985).
13. 534 US.124 (2001).

plant variety (other than fungi and bacteria) who has so reproduced the variety... if the variety is "new", "distinct', "uniform", and "stable", within the meaning of PVPA. It contains no non-obviousness requirement.

Under Utility Patent Protection, as a result of series of cases culminating with the US Supreme Court decision in *JEM Ag Supply*, plant innovators may obtain utility patent protection for plant genomes, coding for non-plant proteins, plant tissue, cells and cell cultures, seeds, or whole plants, provided that the substantive utility patent requirements of utility, novelty and non-obviousness and the procedural requirements of an enabling written disclosure or in some cases an "enabling deposit" of plant material is met.

V. Some Recommendations for Developing Countries

Both UPOV 1991 and TRIPs allow member-countries to let the breeder opt for either plant variety protection or patent protection, or both. With the spread of modern biotechnological methods, plant breeders may need both forms of protection to fully cover plant innovations. Developed countries are establishing a comprehensive system of IP protection for plants, in which *Plant Variety Protection* cover varieties arising from breeding methods, including the use of genetic engineering; and has *Patent Protection* for agricultural biotechnology inventions such as genes, or both if appropriate, at the option of the right holder.[14] It is necessary because process technologies that are applicable to a wider range of plant materials, or germplasm cannot be protected under PVP system.

The current scenario is that developed countries are demanding the developing countries to make efforts to combat intellectual piracy. The developing countries have also raised concerns over gene piracy, problems relating to access to technologies, unfair exploitation of genetic resources, fair and equitable sharing of the financial benefits and preserving of existing biodiversity.[15] However, these issues relate to the protection of traditional knowledge, innovations and creativity referred to *WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*,[16] as well as the *Doha Declaration*, specifically instructing the TRIPs Council to examine the relationship

14. See decision in *Novartis* case of December 1999 *available* at www.european.patent.office.org .
15. Charles R. McManis, *The Interface between International Intellectual Property and Environmental protection: Biodiversity and Biotechnology*, 76 Wash. U. L. Q. 255 (1998).
16. See WIPO/GRTKF/IC/1/3, March 16, 2001.

between the TRIPs Agreement and the CBD, giving particular attention to the protection of traditional knowledge and folklore.[17]

The proposals to modify patent standards so as to require disclosure of genetic resources and evidence of prior informed consent reflect an effort that will hopefully ensure that traditional innovators receive an equitable share of the benefits emanating from the patent system. This would require an amendment to the language of Article 27.

The existing technological gap between developed and developing countries and the capital-intensive nature of product development provides that the best way for developing countries is collaboration and not confrontation. It is not possible for developing countries to forgo the potential benefits of biotechnology to solve their most pressing problems of poverty, disease and malnutrition on account of these exaggerated fears. It is important for them to develop competitive skills in research in biotechnology, and for this firms in both public and private sectors must be encouraged through the grant of adequate and effective IPR protection, at least up to the level obligatory under TRIPs. Safeguards against the adverse effects of restricting competition can be made through the liberal use of the flexibility available under TRIPs, to grant compulsory licenses in cases of egregious anti-competitive behaviour by right holders or for gaining access to essential blocking patents.

So, rather than watering down the scope of available patent protection for plant innovation, a better way is to protect traditional plant innovators and encourage plant innovation by reducing the administrative obstacles in acquiring plant variety protection and broaden its scope. Any system for achieving a balanced co-existence between patents and plant breeders' rights must ensure that the cost of protection is commensurate with its scope.

Multilateral developmental institution should be encouraged to help developing countries to make capabilities in biotechnology through both financial and technical assistance for R&D projects, including obtaining and defending IPRs at home and abroad. They can also help by purchasing privately developed IPR covered biotechnological invention in the core area of food crops or medicine, in order to ensure their widest dissemination at reasonable cost to poorer countries. This would also help in resolving the conflict of rewarding private innovations through IPRs.

17. Doha WTO Ministerial 2001, MINISTERIAL DECLARATION, WT/MIN (01) DEC/1, November 20, 2001, *available* at http.www.wto.org.

Proposals on the biodiversity issues can be raised in concrete terms to counter developed countries demands for further protection of biotechnological inventions under TRIPs. At present the TRIPs text is sufficiently flexible to accommodate solutions to problems raised so far by developing countries. So, the developing countries that already have capabilities in plant biotechnology must encourage this research, whether in private or in the public sector. They must seriously consider institution of stronger protection through the UPOV 1991 model and perhaps, additionally through patent protection. Given the fact that much of the technology in this area is in the hands of the private sector of developed countries, their stronger IPR protection over domestic innovations would help in creating 'bargaining chips' that could be used to gain access to desired technologies.

VI. THE PROTECTION OF PLANT VARIETIES AND FARMERS RIGHTS ACT 2001

A. Coverage of Plant Varieties and Scope of Protection

This legislation was necessitated by the commitment that India made in TRIPs Agreement and it opted for *sui generis* system, which aims to balance farmers and breeders' rights. The Act provides for the establishment of an effective system for the protection of plant varieties, the right of farmers and breeders and to encourage the development of new plant varieties. It is necessary to recognise and protect the rights of farmers in respect of their contribution made in conserving, improving and making available plant genetic resources for the development of new plant varieties. It is also necessary to protect plant breeders' rights to stimulate investments for R&D of new plant varieties both in public and private sector for the accelerated agricultural development. Such protection will also facilitate the growth of seed industry to ensure high quality seeds and planting material to farmers.[18]

The most important issue relates to the scope and coverage of the Act that provides for registration for any variety, which may be specified, or extant variety or farmer's variety or *"essentially derived variety"*.[19] It needs serious considerations. First, TRIPs provides for protection of plant varieties, which means new plant varieties, and not the derived variety or the extant variety. Second, if we judge from the '*novelty*' angle both derived and extant varieties would not qualify for any exclusive rights which are supposed to be provided to the breeders on the new plant

18. Preamble, THE PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT 2001.
19. THE PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT 2001, S.14.

varieties on registration under Section 28(1). Exclusive rights should be allowed only when the criteria of *novelty, distinctiveness, uniformity and stability* as specified in section 15(3) are satisfied.[20] Thus, this Act provides protection for whole range of plants, including extant and derived varieties. This coverage is not in keeping with the other developing countries and goes beyond the requirements that India would have to meet under TRIPs. The inclusion of '*essentially derived variety (EDV)*' was the single most important amendment made by UPOV 1991. By including this variety, the research exemption available under UPOV 1978 to freely use protected varieties for research purposes and for breeding new varieties will be excluded. The inclusion of EDVs will strengthen breeders' rights in conflict with farmers' rights. Even the definition of EDV has been adopted in the same way as in UPOV 1991.[21] This will ensure that no new variety can be produced by use of the protected variety by any means. The EDVs are more or less the same as the parent variety except for limited specific changes. They are developed in such a way that they retain virtually the whole genetic structure of the earlier variety.

The Act also goes beyond the requirement relating to coverage of number of plant genera or species. UPOV permits new members to start with protection of a limited number (5-15) of plant genera or species and in ten years to include all genera and species. An appropriate strategy would have been to provide a limited coverage in order to understand the impact not only on the genetic diversity and ecology but also on the farmers who are users of the protected plant material. Furthermore, all plant varieties related to food security viz. food grains, vegetables and fruits should have been placed in the exempt category for the time being and protection should be limited to flowers, ornamental plants, spices, tea, coffee, rubber etc. Another reason for asking for limited coverage is that codified data of all existing plant varieties is not ready and in the absence of it one can falter in conferring exclusive rights. Thus, only new plant varieties should have been covered and there should have been no exclusive rights for essentially derived and extant varieties. The government as well as the Parliament must have exercised the freedom of *sui generis* to limit the scope of coverage.

B. Farmers' Rights

The Act recognises the farmer not merely as a cultivator but also as a conservator of all the agricultural gene pool and a breeder who has bred

20. *Id.*, S.15.
21. *Id.*, S 2(1)(i).

several successful varieties.[22] The Act makes provision that such farmers' varieties may be registered with the help of NGOs, so that they are protected against being scavenged by corporations. The rights of rural communities are also protected.[23] The formulation of Section 39 allows the farmers to sell seed in the way he has always done, however, with the restriction that these seeds cannot be branded with the breeders' registered name. This protects both, the farmers' and the breeders' rights.[24] The breeder is rewarded for his innovation by having control over the commercial market place and farmer is able to independently engage in his livelihood. The Act even did not provide even for sale of surplus seed of protected variety and this will remain a serious problem for the farmers.

C. Other Rights

Other than the right to sell (unbranded) seed of protected varieties, the rights of farmers and local communities are protected in other ways:

Authorization of farmers and rural communities for creating essentially derived varieties: The Act has the provisions to acknowledge the role of rural communities as contributor of land races and farmers' varieties in the breeding of new plant varieties. Breeders cannot use such varieties for creating EDVs without the express permission of farmers.[25]

Benefit sharing and the right to be represented for benefit sharing: The Act provides for provisions for deposit and determination of benefit sharing. A gene fund has been created. An important provision Section 41 under which any person, government or NGO is entitled to register a community claim and get it. This enables the registration of new varieties or farmers' varieties or claims on behalf of the community if the people of a village or local community cannot do so either because of illiteracy, lack of awareness or otherwise.[26]

Protection against bad seeds: Section 39 (2) provides liability clause to protect farmers against the supply of spurious or bad quality seeds, which causes crop failure. However, this section gives too much discretion to the authority provided in the Act.

Exemption from disclosure and fee: Farmers are exempted from the detail disclosure requirement under Sections18 and 40 which has to be submitted

22. *Id.*, S.2 (k) for definition and S.39.
23. *Id.*, S.16 (persons who can make application), S.18 (Form of application) and S.41.
24. *Id.*, S. 39(1), proviso and explanation.
25. *Id.*, Ss. 15, 18, 23, 40, and 41.
26. *Id.*; Ss.26, 41 and 45.

at time of applying breeder' certificates. They are also exempted from paying certain fee as per Section 44.

Protection against innocent infringement: Section 42 protects the innocent farmers from prosecution against infringement offences. This was necessary because the new system of PBRs will initiate infringement litigation.

Protection of public interest: The Act restricts the registration of certain varieties to protect public order, morality, life of human, animal or plant, harm to environment produced by terminator technology.[27]

Provisions for compulsory licensing: Sections 47 to 53 of the Act make provisions for compulsory license if the authority feels that the reasonable requirements of the seeds or other propagating material is not available to public.

Provisions for researchers' right: Section 30 provides that registered varieties may be used for research purposes, though the authorisation will be necessary.

Authorities under the Act: Chapter II provides for the establishment of Authority consisting of a Chairperson and 15 members, its functions and powers, the Registry and National Register of Plant Varieties. Chapter VIII provides for the Appellate Tribunal its powers and functions etc.[28]

27. *Id.*, S.29.
28. *Id.*, Ss. 3 –13 and Ss. 54-59.

Right of Reproduction of Composers of Music and Producers of Sound Recordings: Infringement by Home Tapers

*Alka Chawla**

I. Origin and Growth of Recording Technology

In 1877 Thomas Edison in USA invented the gramophone, and later invented the first record of sound vibrations that could be played back for aural perception. Then came magnetic tapes and recorders, direct metal mastering, compact digital discs, digital audiotapes and small digital audio-cassettes and increasingly personal computers.[1]

Varieties of recording equipment made unauthorised copying of sound recordings rampant. The principal areas of concern in this field are: (1) commercial piracy (2) home taping and (3) renting or hiring of copyright material.

Home taping is an expression commonly used to mean reproduction of audio-visual works and sound recording for private use by tapers in their homes for personal use. Home taping normally involves taping from radio, television, pre-recorded audio and video cassettes, making copies of compact discs, downloading from internet, etc.

The technology of home taping in a number of situations leads to infringement of the right of reproduction of composers of music and producers of sound recordings, as copying for private use from pre-

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1. J. Glusman Lawrence, *It's my copyright, right ? Music Industry Power to Control Growing Resale Markets in Use Digital Audio Recordings* 70 Wis. L. Rev. 20 (1995). Digital technologies allow unauthorised distributors to reach mass audiences at little or no cost. A file can be placed on the Internet for free, and entire books/ music CDs/ movies can be scanned into files at negligible expense. The simple and quick distribution of information is unfettered by traditional limitations of cost, time, and accessibility. A major feature of digital technologies is that they are capable of producing copies of near perfect quality that are often indistinguishable from the original work. The low cost involved in making these copies and the ease with which they can be produced threaten the economic interests copyright holders have in their property.

recorded cassettes and downloading from internet is not covered by the exception of "fair dealing" in the Indian Copyright Act 1952. Thus unauthorised home taping makes every home taper an infringer who presumably causes economic losses to copyright owners.

II. The Fact Of Home Taping: An Infringement Leading To Economic Losses

Lord Templeman in *C.B.S Songs Ltd.* v. *Amstrad Consumer Electronics Plc.*[2] observed, "From the point of view of society, the present position is lamentable. Millions of breaches of law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break law because they estimate that the chances of detection are non-existent. Some home copiers may consider that the entertainment and recording industries already exhibit all the characteristics of undesirable monopoly – lavish expenses, extravagant earnings and exorbitant profits – and that the blank tape is the only restraint on further increases in the prices of records."

There are two views with regard to home taping.[3] One view is of those adversely affected by private copying namely, the record industry, owners of copyright in films, composers and performers. They argue that private copying has a very serious effect on the reproduction rights of all those who own rights in the original recordings. They assert that the fundamental purpose of copyright law is to promote cultural activity by bestowing upon authors the exclusive rights to exert control over the uses of their works. By receiving this exclusive control, authors have an economic incentive to invest time in the creation of new intellectual works.[4]

According to Nimmer, "in the years past, home taping of long playing albums undoubtedly decreased overall record sales to some extent".[5] Roper Organisation in United States of America concluded in a 1979 study

2. (1998) 2 All E.R. 484; (1998) A.C. 1013.
3. Cornish feels that some of the home taping of sound undoubtedly deprives recording manufacturers of sales that they would have otherwise made, but it is very difficult to determine how much; the claims of the manufacturers show stark differences of opinion: W.R. Cornish., Intellectual Property: Patents, Copyright, Trade Marks And Allied Rights 348 (1993).
4. Davies Gillian and Michele E. Hung, Music And Video Private Copying: An International Survey Of The Problem 280 (1993).
5. B. Melville Nimmer and David Nimmer, Nimmer On Copyright 8B. 01[B] note 12 (2001).

"there is no doubt that substantial records and pre recorded tape sales are lost through taping".[6] The *Hamilton Study*, prepared for the Copyright Royalty Tribunal, concluded that "consumers taping music does have an impact on their purchases of prerecorded music."[7] The CBS Records Market Research Study found that "audio home taping costs the prerecorded music industry up to 100 million units annually, a loss that, at list prices, amounts to 700-800 million dollars".[8] The study concluded that sales of pre-recorded music would be 20 percent greater without blank taping.[9] A study of home taping released by Warner Communications, Inc. found that, "during the 1980 survey year, over $600 million worth a blank tape was used by some 39 million people to bring over $ 2.85 billion worth of music (and other professional entertainment) into their homes" and concluded, "were home taping not possible, tapers would be spending hundreds of millions of additional dollars on records and prerecorded tapes."[10]

In India no statistical survey of damages suffered by copyright owners on account of home taping is available. However, according to a report from International Federation of Phonogram and Videogram Producers, India had 32 million cassette recorder-owning households in the year 1993-94.[11] Another report indicates the market for audio systems in the country to be increasing at an average of 3 million sets per annum.[12] Taking this into account the total number of cassette recorder owning households in India was estimated to be 41 million by 1996-77 and the market size of cassette at 423.12 million.[13] The National Productivity Council team found that market of compact discs in India is confined only to major urban centres, especially metro cities.[14] Their survey revealed that only 27 households out of 128 were using CDs as against cassettes as CDs were very expensive as compared to cassettes.

6. The Roper Organisation, Inc., A Study On Tape Recording Practices Among The General Public 3 (1979). For a sound critique of the methodology of such surveys, see Kurplantzick and Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy* 45 J. Copyright Society 497 (1998).
7. Copyright Royalty Tribunal, Report Of The Committee On Home Taping U.S. 3 (1979).
8. CBS Records Market Research, Blank Tape Buyers: Their Attitudes And Impact On Recorded Music Sales 15 (1980).
9. *Id.* at 16.
10. Warner Communications, Inc., Home Taping: A Consumer Survey 2 (1982).
11. International Federation of Phonogram and Videogram Producers, India Market Report (1996).
12. Economic Times, January 15, 1997.
13. These statistics is taken from National Productivity Council, Copyright Piracy in India (1999). *Available* at http://www.education.nic.in/htm/ web/e_piracy_study/cpr.htm.
14. *Ibid.*

The other view is of consumers, tape industry, video and audiocassette manufactures. They maintain that it cannot be said with conviction that decline in sales of records is because of home taping.[15] The Office of Technology Assessment and the Copyright Office of US observed that although home copying does displace sales in both analogue and digital formats, "the magnitude and economic impact of the displacement is difficult to assess at this time."[16]

III. Tackling Home Taping: Efforts by International Conventions and Organisations

At the international level the Berne Convention was not concerned initially with the rights of the record makers.[17] In 1960 a Committee of Experts convened jointly by BIRPI (now WIPO), UNESCO and ILO drew up a draft Convention which served as a basis for the deliberations in Rome, where a Diplomatic Conference agreed upon the final text of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization. (Rome Convention) on 26th October 1961.

The producers of phonograms were given the right to authorise or prohibit the direct or indirect reproduction of their phonograms.[18] 'Direct' reproduction means reproduction from a matrix whereas 'indirect' includes recording of a phonogram "off the air". The reproduction right is not qualified in any way but states:

> Any contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this convention as regards: private use.[19]

The rights of the producers of the phonograms have, constantly been strengthened by international efforts like Phonograms Convention 1971, TRIPs Agreement 1994 and WIPO Performances and Phonogram Treaty 1996 (WPPT),[20] but the matter of private use or home taping has always been deliberately left to the contracting parties.

15. Gerald Dworkin and Richard Taylor, Blackstone's Guide To CDPA 160 (1988).
16. State Representative, (Audio Home Recording Act, 1992, USA) 34, 38 ; Also see, Home Taping Rights Campaign Office, The case for Home Taping (1987).
17. S.M. Stewart, International Copyright and Neighboring Rights 224 (1989).
18. Rome Convention, Art.10.
19. *Id.*, Art. 15.
20. See Berne Convention (1971 Act), Art. 9 (2); TRIPs 1994, Art.13; WPPT 1996, Art.16.

Before the advent of digital recording and reproduction technique in the form of digital audio tape (DAT) machines, there was a growing agreement among nations that, although home taping may be considered as not conflicting with the normal exploitation of the works concerned, it does unreasonably prejudice the "legitimate interests of authors"[21] and therefore, it would not be allowed without eliminating such a prejudice or at least, reducing it to a reasonable level.[22]

With the advent of DAT, the situation changed, as the quality of the reproduction became much higher. If analogue sound recordings are reproduced by analogue equipment there is always a loss in quality when a copy is made. But where digital recordings are produced by DAT machines even the hundredth generations of copies are of exactly the same quality as the original recording. Such serial reproduction of perfect copies, even for private purposes, if allowed without restrictions, will not only unreasonably prejudice the legitimate interests of authors but also conflict with the normal exploitation of the works concerned.[23]

The WIPO Committee for drafting a possible Protocol to the Berne Convention with respect to "Right of Reproduction: Private Reproduction for Personal Use by Devices" proposed that the possible Protocol to the Berne Convention should provide as follows: [24]

> (a) The private reproduction of programmes, electronic data basis or sheet music by mechanical or electronic devices, and the private serial digital reproduction of any works or sound recordings, shall not be permitted without the authorization of the author of the work or the producer of the sound recording concerned even if such reproduction is for personal purposes.
>
> (b) The private reproduction, other than serial digital reproduction, for personal use of audio visual works, works embodied in sound recordings and sound recordings themselves, shall be permitted without the permission of the author, provided that the prejudice caused by such reproduction to the legitimate interests of the authors and producers of sound recordings

21. Berne Convention Paris Text, (1971) Art. 9(2); TRIPs 1994, Art. 13; and WIPO Copyright Treaty (WCT) 1996, Art. 10.
22. WIPO, Normative Activities Of Wipo In The Field Of Copyright, Committee Of Experts On A Possible Protocol To The Berne Convention, Geneva (2nd Session, 10-17 Feb, 1992).
23. *Ibid.*
24. *Ibid.*

concerned is eliminated, or at least reduced to a reasonable level by means of a payment on reproduction equipment normally used for such reproduction, or both.

(c) The payment mentioned in point (b) shall be paid by those who manufacture such equipment or material (except for those which are exported) or who import such equipment or material into the country (except where the importation is by a private person for his personal use).

The matter of home taping, however, did not find any mention in the WIPO Copyright Treaty 1996 (WCT) and WPPT that are special agreements within the meaning of Article 20 of the Berne Convention.[25]

On the technological front, a variety of technical measures like copy control flags, serial copy management system, macro vision, encryption, identification and watermarking were being developed to prevent unauthorised copying. These measures required appropriate legislative and legal support to ensure that these were respected and also to deter their defeat. The WCT[26] and WPPT[27] recognised the need to provide protection for such copy-protection devices. The two WIPO Treaties made it *obligatory* for the contracting parties to provide for adequate legal protection and effective legal measures against circumvention of technological protection measures. For the first time, international norms were drawn up to modify the copyright regime, before any national law was revised. A lot of debate has ensued over how this principle should be implemented in national laws.[28]

IV. Tackling Home Taping: Some National Experiences

A. United States of America

The Copyright Code 1976 of USA lists a number of exceptions to the set of protected rights.[29] The most notable exception to a copyright owner's exclusive rights is the fair use exception.[30] What constitutes a fair

25. WCT 1996, Art. 1.
26. WCT 1996, Art. 11.
27. WPPT 1996, Art.18.
28. India has still not adopted WCT and WPPT.
29. United States Code 1976, Ss. 107 to 120. For example, S. 107 deals with fair use, S. 108 provides for Limitations on exclusive rights: Reproduction by libraries and archives; S. 109 for Limitation on exclusive right: Effect of transfer of particular copy or phonorecord.
30. Copyright Code 1976, S. 107.

use is to be determined by the equities of the particular situation.[31]

In 1979, in *Universal City Studies, Inc.* v. *Sony Corporation of America*[32], the Federal Court for the Central District of California held that an off-the-air non-commercial recording of an audiovisual works,[33] made in home was not a copyright infringement. The court discussed both audio-visual works, the sound recordings and relied heavily on its conclusion that the Copyright Act 1976 was not intended to protect sound recordings from home copying for home listening purposes.

Prior to this decision and in fact even prior to the Act of 1976 the *House Report on the Sound Recording Amendment of 1971* stated:

> It is not the intention of the committee to restrain the home recording, from broadcasts or from tapes or records of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it.[34]

Thereafter, the Supreme Court of USA in *Sony Corp. of America* v. *Universal City Studios Ltd.*[35] legitimised the Video Cassette Recorder (VCR) industry by upholding the right of Sony to sell a Betamax recorder to home users for taping television programmes, containing both audio and visual components. The court observed that Betamax simply facilitated time shifting, i.e. watching a television programme at a later hour than its original broadcast.

The songwriters, music publishers, record companies and other copyright proprietors did not agree with this decision. They delegated veteran songwriter Sammy Cahn to target Sony as the defendant.[36] Both the competing claims were once again in litigation. During the pendency of this litigation, various interest groups worked out an accord that became the framework for a Bill to be presented to Congress. The lawsuit was dismissed by mutual consent of the parties in contemplation of enactment

31. Lee B. Burgunder, Legal Aspects of Managing Technology 252 (2001); S.M. Stewart, *supra* n. 17 at 82; Resolution of the Sub Committee of the Intergovernmental Committee on Reprographic Reproduction, Washington 159 (1975).
32. 480 F. Supp. 429 (C.D. Cal. 1979).
33. An audiovisual work consists of series of related images, together with accompanying sounds, which are intended to be shown by a device or a machine.
34. H.R. Rep. No. 487, 92 d. Cong. 1st Sess. 7, reprinted in 1971 US Code Cong. And Ad. News 1566 cited in Nimmer on Copyright, *supra* n. 5 at 8B-9.
35. 464 US 417 (1984).
36. *Cahn* v. *Sony Corp.*, 90 Civ. 4537 (S.D.N.Y.), (July 9, 1990) quoted in Nimmer on Copyright. See *supra* n.5 at 8B-7.

of Audio Home Recording Act 1992 (AHRA).

AHRA achieves following goals: First, it allows manufacturer to sell digital audio records and audiophiles, subject to regulated boundaries. The law allows original work to be copied without limit, but prevents copying of such copies i.e. all digital recording devices must incorporate SCMS i.e. Serial Copy Management System.[37]

Second. AHRA defines two separate funds,[38] namely, Sound Recordings Fund and Musical Works Fund, which get contributions from manufacturers and importers of Digital Audio Recorders and tapes. Exactly two-thirds of all royalty payments under the AHRA are allocated to Sound Recordings Fund. The statute regulates in exhaustive detail internal divisions of this Fund into non-featured musicians, vocalists, featured recording artists and copyright owner of sound recordings. One third of royalties is allocated to Musical Works Fund, which is subdivided into copyright owner of music, music publishers and writers. Third, Section 1008 of AHRA for the first time provides for home use exception. It affords immunity to home tapers who make copies without direct or indirect commercial motivation. This immunity applies to both the digital and analog recordings.[39]

AHRA creates *sui generis* entitlements and responsibilities in the copyright sphere. It steers an intermediate course between artists and owners on one hand and home audio enthusiasts on the other. It allows purchasers of digital recordings to take advantage of the record function of their equipment and produce copies but requires certain copying controls to be observed.

In 1998 the music industry was faced with another problem when Diamond Multimedia Systems began to market a new digital device, Rio. It is a small device with headphones that allow users to download MP3 audio files from a computer and to listen to them elsewhere. The question

37. A specific method of using copy control flags that allows digital copies to be made from a master, but not from a copy of that master. Thus, second generation copies or reproductions and beyond are precluded. This is accomplished by having a set of control flags on the master that are changed by the copying device during the copying process. If the copy is used for an attempted copy, the control flags are incorrect and the copy device will reject it as a master for copying. SCMS is used primarily on music CDs.
38. See NIMMER ON COPYRIGHT, *supra* n. 5; Edward Samuels. WHY CAN'T I MAKE COPIES FROM COPIES OF MY CDs, *http://www.gigalaw-com/articles/2001-all/samuels-2001-04-all.html* visited on 10.09.02.
39. Digital Audio Recording Device is defined as a consumer device with a digital recording function, the primary purpose of which is to make digital copies of a digital music recording.

that was posed *in Recording Industry Association of America* v. *Diamond Multimedia system Inc.*[40] was whether a device such as Rio falls within the scope of AHRA. The court held that the material objects from which Rio made copies did not qualify as digital music recordings, therefore, the hard drive of a computer could not qualify as digital music recorder and there was no need for them to comply with SCMS. AHRA therefore, could not keep pace with the fast moving technology. The result of the Rio decision was that Diamond was free to manufacture and distribute the machine without having to make any technical changes or even pay royalty to the Sound Recordings Fund or Musical Works Fund.

In 2000, *A & M Records* v. *Napster*[41] made minds all over the globe to work and gauge the effect which software like Napster have on the entertainment industry.[42] Napster[43] facilitated a free music file trading system, open to the public over the internet. On December 6, 1999, seventeen record companies and A & M Records filed a suit against Napster, Inc alleging vicarious copyright infringement.[44] In January 2000 Music Corporation filed a motion for preliminary injunction against Napster "for engaging in or assisting others in copying, downloading, uploading, transmitting, or distributing copyrighted music without the express permission of the rights owner".[45] There was evidence to show that Napster knew or had reason to know of its users' infringements of their copyrights. The argument of Napster , *inter alia*, was that its users were protected by the home taping immunity conferred by Section 1008 of AHRA, therefore, Napster's service constitutes a fair use. The court held this argument to be without merit. It was held that "repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute commercial use."[46] The copies were made to save the cost of

40. 80 F. 3d 1072 (9th Cir. 1999).
41. For the discussion on the Napster see http://www.eff.org/IP/P2P/Napster/20010227_P2P_ Copyright_White_Paper.html, *A & M Records, Inc.* v. *Napster*, Inc., 239 F. 3d 1004 (9th Cir., 2001)
42. See http://www.lseis.ucla.edu/ie/p/napster.htm; "The Indian Entertainment Industry acquired full industry status in 2001. Valued currently at Rs. 15,400/- crores, the industry is expected to grow to approximately 60,000-70,000 crores in the next 5-7 years". See R.S. Lodha , *Message* in Amarchand Mangaldas, THE ENTERTAINMENT LAW BOOK – FRAMES 2000 (2002).
43. Horne Natasha, Brook Voelzke and Lisa Kabula, THEFT OR INNOCENT TRADE ON THE INFORMATION SUPER HIGHWAY, available at *http://westlaw.com*, visited on 26 September, 2002.
44. See Wendy M. Pollack, *Tuning In:The Future of Copyright Protection for On-line Music*, 90 FORDHAM L. REV. 2445 (2000).
45. *Ibid*.
46. 239 F. 3d at 1015.

purchase. This practice is cited particularly by the recording industries as a factor in the 15 percent drop experienced in music sales.[47] In addition to finding Napster users liable for direct infringement, the Court found that Napster itself had engaged in contributory infringement, with actual and constructive knowledge of the infringing activities, and vicarious copyright infringement, because it had a direct financial interest in drawing users to its service as customers.[48]

Napster also relied on the doctrine of 'staple article of commerce' framed by the Supreme Court of USA in the decision of *Sony* v. *Universal City Studio*[49], as Napster's peer-peer file sharing system is an important technology and capable of substantial non-infringing use. The principle laid down in *Sony* case was that one should not outlaw new technology before all the implications and potential uses of the technology could be ascertained.

Napster had to pay $ 26 million for infringement of copyright to compensate songwriters and music publishers, in respect of the copyright vesting in song lyrics and melodies (but not in respect of sound recording copyright). This means that Napster must still reach a settlement with the Recording Industry of America (RIAA).[50]

The current copyright principles have thus adequately dealt with the challenges posed by Napster-like technology but they seem to be ill equipped to counter technologies based on Gnutella protocol (such as Bearshare and Lime water programme), where there are no servers in the traditional sense. No central point links together and serves as an index to all of their files and searches. This has significant implications for the policing and prosecuting of copyright infringements.

In the USA, the Digital Millennium Copyright Act of 1998 (DMCA) has not only enacted the WIPO Treaty but also gone beyond it. In particular it gave a strong boost to the use of technological protection by making it illegal to circumvent technological protection used by publishers, or to develop or distribute the devices that do so. Such acts are illegal even

47. International Federation of the Phonographic Industry (IFPI), May 2002; See also Forrester Research, REPORT ON HOME TAPING (2002), USA.
48. For a full text of the Napster judgement see http://caselaw.lp.findlaw.com/data2/circs/9th/0115998p.pdf.
49. See *supra* n. 35
50. RIAA also calls itself the "Coalition to Save America's Music". It is constituted of various music trade unions, music licensing companies, record labels and music publishers among its members. See generally Robert Long, *Opinion and Comment on the Changing Audio Scene* 29 HIGH FIDELITY 5 (October 1982).

for uses that would not have infringed on copyright (which is not the case with WIPO Treaty).

B. European Union

In July 1995 the European Commission published a Green paper entitled *"Copyright and Related Rights in the Information Society."* that required harmonisation of laws including intellectual property in Europe to ensure that right holders would make material available while balancing the interests of the users. After a lot of consultations the Commission published a draft "Directive on the Harmonisation of Certain Aspect of Copyright and Related Rights in the Information Society" in November 1997, which was adopted on May 22, 2001.[51]

The European Directive in its Article 5(2)(b) allows copying on any medium for private and non-commercial use. This is subject to a requirement that the right holders should receive fair compensation, and also take account of the application of technological copy protection measures. Thus 'home taping' comes within fair use provided fair compensation is given to copyright owners. It appears that it is on the lines of AHRA 1992 and DMCA 1998 of USA. The European Community has also signed the two WIPO Treaties

C. United Kingdom

The UK Copyright Act 1956 did not create home taping as an exception to the right of reproduction. However, Section 70 was introduced in the Copyright, Designs and Patents Act 1998 (CDPA) which provides, "The making for private and domestic use of a recording of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or cable programme or any work included in it."[52]

Therefore, as far as material is copied from a broadcast or cablecast, the new Act has introduced an exception for time shifting.

Section 296 of the CDPA gives a new right to a person who issues copies of copyright works to the public with built-in "copy protection". He is entitled to proceed against anyone who "knowingly" makes imports or

51. J.H. Graham Smith, INTERNET LAW AND REGULATION 17 (2002). Also see http://www.europa.cn.int.
52. This section was introduced after the decision in *Sony Corporation of America* v. *Universal City Studies Inc.* [1984] 104 sct.774.

markets equipment designed to circumvent the copy protection.[53] This is a civil right of action which may lead to an injunction, monetary relief, delivery up and direct seizure as with copyright piracy

D. India

India is a poor country where the source of entertainment in millions of houses, in rural as well as urban, is listening to radio. People also tape songs and programmes from the radio and pre-recorded cassettes of friends and relatives for personal use. Such a source of entertainment should be freely available to the people without any financial burden. As the law stands today, right of reproduction of composers of musical works, and right of the producer of sound recording to make another sound recording is infringed by millions of home tapers around the country. Enforcement of such a right by individuals themselves is impossibility, but that does not mean that the fact of infringement is falsified by non-enforcement. We have to look for certain possible solutions in order to compensate the individual owners of rights, without treating the home tapers as infringers or thieves and strike a correct balance between access to works and incentives to creators.

There is no exception in Section 52 of the Indian Copyright Act 1952 which allows any person either to 'reproduce' or do the 'act of fair dealing' in case of sound recording and films either for "private use" or "private study" or "for educational purpose". The only exception in case of sound recording and films without the authorisation of the author is in the case of performance in the course of the activities of educational institutions[54], which by no stretch of imagination can include "home taping". Section 52 should, therefore, be amended to include "making copies of cinematograph films or sound recordings for the purposes of private use" in order to include "home taping" of sound recordings and cinematograph films from audio and audio visual cassettes specifically under the provision of fair dealing.

If home copying were to be treated as an infringement of copyright then the cost of enforcement of rights of copyright owners would far exceed the benefit that may accrue to the copyright owner. The best possible solution therefore is efficient working of musical collecting societies like Indian Performing Rights Society (IPRS) and Producers of Phonograms

53. WCT and WPPT also lay a lot of emphasis on this technique. It has been adopted by DMCA 1988
54. The Indian Copyright Act, S. 52 (1) (i).

Limited (PPL), which should in detail work out a scheme for distribution of revenue to the composers of the musical work and producers of sound recordings. Musicians and composers are the ones who truly create the music for our entertainment and record companies provide a useful service as they distribute pre-recorded copies of music usually of a high quality.

To meet with the problem of compensating copyright owners for losses caused to them because of unauthorised copying, Copyright Amendment Bill 1992 and Copyright Cess Bill 1992 were introduced in the Lok Sabha. Copyright Amendment Bill 1992 sought to create collecting societies whereas Copyright Cess Bill 1992 proposed to levy[55] and collect by way of cess for the purposes of Copyright Act a duty of excise on copying equipment in addition to excise duty liable on equipment under the Central Excises and Salt Act 1944. Similarly, the Bill proposed to levy and collect customs duty on imported copyright equipment in addition to custom's duty leviable under Customs Act 1962.[56] The proceeds of excise and customs duty collected were to be credited to the Consolidated Fund of India. The Central Government would then pay to the copyright society which would frame a scheme for determining the quantum of remuneration payable to individual copyright owners having regard to the number of copies of work in circulation. The Government can think of reviving the Cess Bill which has lapsed.

Section 37 gives a special right called "broadcast reproduction right" to every broadcasting organisation. Broadcast means communication to public by any means of wireless diffusion or by wire.[57] According to Section 39 no broadcast reproduction right shall be deemed to be infringed by making of any sound recording or visual recording for the private use of the person making such recording. Home taping in such cases is, therefore, permissible as it comes under permitted use. According to this Section a home copier may keep the recording in his personal library permanently for repeated viewing or listening unlike in UK where such recording can be made only for the purpose of time shifting.[58] However enforcing this limitation even in UK is practically impossible.

The Indian Copyright Act gives the author of a musical work, sound recording and cinematograph film the right to communicate the work to the public.[59] 'Communicate to public' includes making any work available on the Internet. If making available on Internet amounts to broadcast then one

55. See Copyright Cess Bill 1992, Cl. 3.
56. *Id.*, Cl. 4.
57. The Indian Copyright Act, S. 2(dd).
58. See S. 70, CDPA 1988.
59. S. 14 (1)(a)(d) and (e).

can download songs, music and films without violation of right of reproduction of authors and producers. It is humbly submitted that communication to public by Internet does not amount to broadcast as broadcast takes place by some determinate Broadcasting Organisation to a passive audience, whereas Internet is not under control of any organisation as such. Downloading of music and films from the Internet i.e. 'reproduction' from Internet even for private use would thus amount to infringement unless specifically included in fair dealing, as suggested above.

For protection of producers of sound recordings and also to keep pace with the world, emphasis, no doubt, should be made on development of technological measures; but one should also not be oblivious of the threats to access and diffusion of knowledge and technology from these technological changes in an obligatory environment created by the two WIPO Treaties. The technological protection measures would create a hindrance to the traditional right to browse or make copies of copyrighted work for personal use. In a country like India, the Internet-connectivity is still at a minimal level and access to Internet resources unaffordable. Moreover, the issues concerning access to information and knowledge are still emerging around the world. India has already complied with TRIPS and it will be premature for a developing country like India to go beyond TRIPS and endorse the obligations imposed by the WIPO Treaties.

DNA Technology and Legal Issues in India

*Mahavir Singh Kalon**

I. Introduction

The importance of the fast developing DNA technology and its impact on the rights of an individual and its societal effect have created an urgent need for all those who are concerned with justice delivery system to understand the basics of modern genetic science in order to play an effective role. In any informed discussion about the ethical legal and social implications of the "New genetics", a basic scientific background is an essential pre-requisite which need not wait till an expert witness enters the witness-box to enlighten the surroundings. The Constitution of India, by Article 51A(h) and (j), declares that, it shall be the duty of every citizen of India "to develop the humanism and the spirit of inquiry and reform"; and "to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement." The Parliament is legislatively competent to make laws with respect to the Union agencies and institutions for professional, vocational or technical training, promotion of special studies or research, or scientific or technical assistance in the investigation or detection of crime and with respect to coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. (Entries 65 and 66 of the Union List).

II. The Basics of Modern Genetic Science

Every cell in the human body contains a nucleus, with the exception of red blood cells, which lose this structure as they mature. Within the nucleus are tightly coiled threadlike structures known as chromosomes. Humans normally have 23 pairs of chromosomes, one member of each pair derived from the mother and one from the father. One of those pairs consists of the sex chromosomes - with two X chromosomes determining femaleness, and one X and one Y determining maleness. The other 22 chromosomes are known as autosomes. Each chromosome has within it,

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arranged end-to-end, hundreds or thousands of genes, each with a specific location, consisting of the inherited genetic material known as deoxyribonucleic acid (DNA). Scientists have numbered these autosomes from 1-22 in size order, with chromosome 1 being the largest (containing nearly 3,000 genes). DNA contains a code that directs the 'expression' or production of proteins, which form much of the structure of the cell and control the chemical reactions within them. The DNA of each gene is characterized by a unique sequence of bases that from the 'genetic code'. These bases are arranged in groups of three, known as codons or phrases. The base sequence is the crucial feature of the gene. It is this sequence that carries the genetic information essential for the synthesis of an RNA molecule that may subsequently direct the synthesis of a protein molecule or may itself be functional in the cell. This process is called gene expression; it has two stages. The first stage in gene expression is transcription (the process by which RNA directs the synthesis of a protein). Proteins are composed of amino audis and are the molecules that carry out the work of the cell.[1] There are four basic building blocks (referred to as bases or nucleotides) for DNA: adenine (A) and guanine (G), which are known as purines; and thymine (T) and cytosine (C), which are known as pyrimidines. These nucleotides link together to form long polynucleotide chains, having a defined sequence of nucleotides. A DNA molecule consists of two of these chains, linked together by hydrogen bonds, running in opposite directions. The two chains link together in a ladder-like together in a ladder-like shape, twisted into the now famous double helix first described by James Watson and Francis Crick in 1953, who were awarded the Noble; Prize for their work. Linkage of the chains follows a strict rule, known as complementary base pairing, so that the base A can only pair with the base T, and vice versa; and the base G can only pair with the base C, and vice versa. The human genome is comprised of about 3.2 billion of these base pairs.

It will be in the goodness of our topic, if we pinpoint some more details regarding DNA technology as follows[2]:

DNA is contained in blood, semen, skin cells, tissue, organs, muscle, brain cells, teeth, hair, saliva, mucus, perspiration, fingernails, urine, faeces, etc. DNA evidence can be collected from virtually anywhere. DNA has

1. THE ETHICS OF PATENTING DNA, a Discussion Paper published by Nuffield Council on Bioethics (2002).
2. See Supinder Kaur, DNA AND CRIMINAL JUSTICE SYSTEM : ROLE OF LAW ENFORCEMENT AGENCIES, National Seminar on DNA Test and the Law: New Dimensions, 27-28 March, 2004, School of Legal Studies, Guru Nanak Dev University Regional Campus, Ladhewali, Jalandhar (Punjab).

helped solve many cases when imaginative investigators collected evidence from nontraditional sources (see "Identifying DNA Evidence"). One murder was solved when a suspect's DNA, taken from saliva in a dental impression mold, matched the DNA swabbed from a bite mark on the victim. A masked rapist was convicted of forced oral copulation when the victim's DNA matched DNA swabbed from the suspect's penis 6 hours after the offence. Numerous cases have been solved by DNA analysis of saliva on cigarette butts, postage stamps, and the area around the mouth opening on ski masks. DNA analysis of a single hair (without the root) and found deep in the victim's throat provided a critical piece of evidence used in a capital murder conviction.

III. IDENTIFYING DNA EVIDENCE

Since only a few cells can be sufficient to obtain useful DNA information to help solve a case, the list below identifies some common items of evidence that one may need to collect, the possible location of the DNA on the evidence, and the biological source containing the cells. It needs to be remembered that merely because one cannot see a stain it does not mean there are not enough cells for DNA typing. Further, DNA does more than just identify the source of the sample it can place a known individual at a crime scene, in a time, or in a room where the suspect claimed not to have been. It can refute a claim of self-defence and put a weapon in the suspect's hand. It can change a story from an alibi to one of consent. The more officers know how to use DNA, the more powerful a tool it becomes.

Any type of organism can be identified by examination of DNA sequences unique to that species. Identifying individuals within a species is less precise at this time, although when DNA sequencing technologies progress further, direct comparison of very large DNA segments, and possibly even whole genomes, will become feasible and practical and will allow precise individual identification.

To identify individuals, forensic scientists scan 13 DNA regions that vary from person to person and use the data to create a DNA profile of that individual (sometimes called a DNA fingerprint). There is an extremely small chance that another person has the same DNA profile for a particular set of regions.

Some examples of DNA Uses for Forensic Identification

- Identify potential aspects whose DNA may match evidence left at crime scenes
- Exonerate persons wrongly accused of crimes

- Identify crime and catastrophe victims
- Establish paternity and other family relationships
- Identify endangered and protected species as an aid to wildlife officials (could be used for prosecuting poachers).
- Detect bacteria and other organisms that may pollute air, water, soil, and food.
- Match organ donors with recipients in transplant programs
- Determine pedigree for seed or livestock breeds
- Authenticate consumables such as caviar and wine

DNA identification can be quite effective if used intelligently. Portions of the DNA sequence that vary the most among humans must be used; also, portions must be large enough to overcome the fact that human mating is not absolutely random.

IV. DNA and Legal Issues

It goes without saying that a blood/DNA test can only be conducted if blood or DNA samples are taken.[3] In case, blood/DNA samples are 'otherwise available'. It has to be further proved that these truly belong to the 'donor' or the person in question and further that these match with the "specimen samples". Unless samples are taken for matching - comparison, a report cannot be obtained from an expert and the chances of comparison would not arise.

What would be the position when any sample is not available and the person, whose blood/DNA test is to be undertaken, does not consent to give it? Whether a sample of blood for DNA test can be taken by force? What is the legal scene in developed countries? Is there any law in India regarding the taking of blood/DNA sample? Can such a sample be taken under 'compulsion' or use of force? What are the shortcomings in this behalf? In the absence of a specific legislation, how can a sample of blood of a minor/child or chronically ill patient can be taken? All and such similar questions are being considered by legal regime all around the world.

Article 21 of the Constitution of India provides "A person shall be deprived of his life and personal liberty except according to the procedure established by law."

3. Nirvikar Gupta, Blood is Thicker in Law CrLJ (2004).

It is submitted that any effort to compel any person to take DNA test against his consent will be in direct contravention of Article 21 which provides for the protection of personal liberty of the persons. Such an attempt will amount to deprivation of the personal liberty of the person concerned, the protection of which is expressly guaranteed under Article 21 of the Constitution.

Again, Article 20(3) of the Constitution states "No person accused of an offence shall be compelled to be a witness against himself."

When it is question of disputed paternity and the accused is the alleged father any attempt to subject him to a blood test against his wishes will again be in direct contravention of Article 20(3) since such an attempt will in effect be that of compelling the accused to give evidence against himself.

The law in India with respect to the above-mentioned principles of liberty provides that Article 20(3) of the Constitution gives protection against 'testimonial compulsion'. In *Sharma, M.P.* v. *Satish Chandra*[4] 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*[5] 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 person.

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.*[6] This case dealt with the issue of ascertainment of disputed paternity. The following guidelines were laid down by the Court through Hon'ble 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.

4. AIR 1953 SC 300.
5. AIR 1961 SC 1808.
6. AIR 1993 SC 2295.

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[7] observed, "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 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*[8] held that Court could not compel the father to submit himself to DNA test.

Interestingly the Law Commission in 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 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.*[9]

A. Indian Constitution and Right of Privacy

In India, the right of privacy has been culled out of the provisions of Article 21 of the Constitution and other provisions relating to the Fundamental Rights read with the Directive Principles of State Policy. India is a signatory to the International Covenant of Civil and Political Rights 1966. Referring to Article 17 of that Covenant and Article 12 of the Universal Declaration of the Human Rights 1948, the Supreme Court in *People's Union for Civil Liberties* v. *Union of India*[10], held that, the, right to privacy is a part of right to life and personal liberty enshrined under Article 21 of the Constitution, and it cannot be curtailed except according to the

7. 2000 Cr LJ 1208.
8. 2001 C6 LJ 2028.
9. Law Commission of India, 80th REPORT at 204-205.
10. AIR 1997 SC 568.

procedure established by law. In *M.P. Sharma* v. *Satish Chandra*[11], it was observed that a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. The Court observed that when the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, "we have no justification to import it into a totally different fundamental right, by some process of strained construction." Nor is it legitimate to assume that the constitutional protection under Article 20(3) (right against self-incrimination) would be defeated by the statutory provisions for searches. However, the right to privacy was more specifically in issue in the context of disclosure of the outcome of the blood test in *Mr. 'X'* v. *"Z"*[12], in which the appellant's blood sample was tested and he was found to be HIV positive which resulted in the appellant's proposed marriage being called off. The Supreme Court held that the right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution. However, the right was not absolute and may be lawfully restricted for prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. It was held that, having regard to the fact that the appellant was likely to marry, was saved in time by the disclosure, otherwise, she too would have been infected with the dreadful disease if the marriage had taken place and was consummated. Once the law provides "venereal disease" as a ground for divorce to either husband or wife, such a person who was suffering from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease.

B. The Code of Criminal Procedure 1973

It is again interesting to observe that the criminal law is also, significantly silent on such a power of a "Court to direct the taking of blood samples for blood/DNA analysis.

A Single Judge of Gujarat High Court in *Najabhai* v. *State of Gujarat*[13] has held that the bar of Article 20(3) of the Constitution would extend with regarding to compelling the accused to submit himself to medical examination also. However, this proposition runs contradictory to a decision by

11. AIR 1954 SC, 300.
12. (1998) 8 SSC 296.
13. 1972, Cr. LJ 1605.

Apex Court in *State of Bombay* v. *Kathi Kalu*[14] wherein, such examinations were held not included within the meaning of becoming a witness. Referring to the powers conferred under Section 53, Code of Criminal Procedure 1973 (Cr PC) the Andhra Pradesh High Court[15] has held that although there is no clear provision in Cr PC for taking such blood samples yet there is no prohibition for taking such blood samples of an accused by exercising powers under Section 53 Cr PC. The Court observed that taking samples of blood and semen would come within the scope of examination of the person of the arrested person and therefore, examination of a person by a medical practitioner must logically take in examination by testing his blood, sputum, semen, urine etc. The Court further held that Section 53 provides the use of such force as is reasonably necessary for making such an examination. Therefore, it held that whatever discomfort might be caused, when samples of blood or semen are taken from an arrested person, would be justified under the provision of Sections 53 and 54 of Cr PC.

On the other hand, a Division Bench of Allahabad High Court[16] dealing with a criminal case, was of the view that though there was no specific provision in Indian Law permitting taking of blood yet in a criminal case, an examination of person can be made under Section 3 (1) of the Cr PC which shall include the taking of blood samples, including an examination of an organ inside the body. The Court drew the aforesaid conclusion as per the provisions of Section 367 (1) and Section 482 of the Cr PC. It also held that there is nothing repulsive or shaking to conscience in taking the blood of an accused person in order to establish his guilt and so far as the question of causing hurt is concerned, even causing some pain may be permissible under Section 53 Cr PC.

Quite recently Delhi High Court considered the question of privacy (in relation to foetus) and DNA test and held that such directions cannot be issued which forces the woman to produce evidence against herself.[17]

C. DNA Test and its Implications in Family Laws

a. DNA Technology and Maintenance

Section 125 of the Cr PC gives effect to the natural and fundamental duty of a man to maintain his legally wedded wife, legitimate or illegitimate

14. 1961 (2) Cr LJ 856 SC : AIR 1961 SC 1809
15. *Ananth Kumar* v. *State of Andhra Pradesh*, 1977 Cr LJ 1797.
16. *Jamshed* v. *State of Uttar Pradesh*, 1976 Cr LJ 1680.
17. *X.* v. *Z.* AIR 2002 Del. 217.

children and parents so long as they are unable to maintain themselves. It provides a speedy remedy against starvation for a deserted wife, children and parents. In such cases, generally, defence taken by the respondent to avoid the payment of maintenance, particularly to the deserted children is that she/he is not born to him, but born of the spouse's paramour. Thus, in such cases the paternity and the maternity of the child is disputed. Therefore, to establish paternity/maternity apart from adducing the oral and documentary evidence, the most warranted evidence is of medical proof in the form of DNA test. At present in our country the DNA test is only voluntary and not mandatory. Unless the necessary law is enacted or amended on par with the laws of the developed nations, the DNA test would not be helpful in solving the disputed matters in our country. Therefore, our Apex Court in the absence of such enactment or amendment of the existing law, has rightly observed that the DNA test shall not be compulsory and it shall be a voluntarily one only. It is, therefore, the parties in such cases very seldom come forward for DNA test voluntarily.[18]

The findings of our Courts in some of the landmark cases clearly establishes that the state has to enact law to the parties for making DNA test mandatory. Some of the decided cases are :

(a) "valid marriage is a condition for the claim of maintenance". *Sumitradevi v. Bhikan*[19]

(b) "where a woman at the time of marriage was pregnant by some other person, she was held not entitled for maintenance". *Ameena* v. *Hassan Koya*.[20]

(c) "illegitimate children born of an adulterous intercourse by a married woman can recover maintenance from the putative father." *Rozario* v. *Ingles*.[21]

(d) "evidence of the prosecution that the couple was living as husband and wife was enough to substantiate the claim for maintenance even in the absence of the proof of the performance of *Saptapadi*." *Sadhu* v. *Sarita Bala*.[22]

18. Mohamed Usmon, DNA AND FAMILY LAW PATERNITY, MATERNITY, ADULTERY, INHERITANCE AND MAINTENANCE, National Seminar on DNA Test and the Law : New Dimensions, 27-28 March, 2004, School of Legal Studies, Guru Nanak Dev University Regional Campus, Ladhewali, Jalandhar (Punjab).
19. 1984 Cr LJ 528.
20. 1985 Cri LJ 1996.
21. AIR 1893 Bom. 468.
22. 1985 Cri LJ 979.

In case only oral evidence is available to prove the cohabitation of the spouses this type of evidence is always prone to concoction and building of false stories. Even if the cohabitation is found to be true, there is every possibility of getting such oral evidence tampered with and suppressed for many obvious reasons. Therefore, in such cases if the DNA test is conducted then the claim of the petitioner/respondent in maintenance matters could be proved.

b. DNA Technology - Paternity and Maternity.

Women constitute half of the population of the world. Inhuman treatment is being meted out to them on suspicion of their fidelity which amount to gross violation of human rights. The courts in the absence of any legislation or executive guidelines are helpless to compel the parties to undergo a DNA test. In cases of maintenance the respondent (father) usually files the written statement denying the relationship was the petitioner's daughter as his legitimate daughter born to him through the petitioner (mother). The respondent further claims that he did not cohabit with the petitioner and that he had left her long back, and on this basis itself, he denies his liability to maintain his deserted child. The fundamental and landmark judgement on this point is *Smt. Ningamma* v. *Chikkaiah*.[23] In this case, the trial court after framing the issues had passed the orders on the I.A. under Section 151 of the Code of Civil Procedure 1908 filed by the respondent, directing the petitioner and her minor daughter to subject themselves to medical examination of their blood group test in order to determine the paternity of a minor child or otherwise. The petitioner thereupon challenging the impugned orders of trial court filed revision petition before the appellate court challenging the said impugned orders. The appellate court gave the findings that "Compelling a person to submit himself to blood test, not authorized by any law, it will amount to interference with man's personal fundamental right to life. Legitimacy of child and paternity of child cannot be established by conducting the DNA test."

c. DNA Technology and Adultery

The Law Commission has given mature consideration to the subject of the offence of adultery in the Indian Penal Code 1860 (IPC) Today, we have the provision of Section 497 IPC which says that adultery is an offence committed by a third person against the husband in respect of his wife without his consent or connivance. In such cases, if the married

23. AIR 2000 Kant 50.

woman conceives and suppresses this fact of pregnancy from her husband, the husband can, easily confirm such pregnancy of his wife through her paramour. Further, in order to establish the chastity of the wife and the sacredness of the nuptial contract, DNA test is very necessary to ascertain the truth or otherwise of such suspected pregnancy as otherwise suspecting the infidelity of the wife, the husband may take the very extreme step of killing her. The existing provision of adultery punishes only the adulterer and not the women and as such the woman gets protection from legal punishment. Therefore, to avoid such offences the law is needed to direct such women to undergo DNA test so that it could create fear and horror in the mind and heart of such woman who conceives and becomes pregnant through her paramour. Furthermore, we know it is a male dominated society. Human beings are social animals, Husbands on trivial grounds suspect the chastity and fidelity of their wives and they deny the pregnancy and not only that, but they go to the extent of killing them. Hence, to avoid such unfortunate incidents, if the DNA tests are compulsorily ordered in such cases the truth will come out and the spouses will not have suspicion. The legitimacy or otherwise of the foetus in the womb of the mother or even on the delivery, the child's legitimacy, could be established to the best satisfaction of such couples. In addition an immediate amendment of Section 497 IPC is also needed, so that the married woman should also realise their respective responsibility towards legally wedded husbands. The married woman who participates in the offence of adultery should be made punishable on par with the adulterer. The Malimath Committee has right recommended for the amendment of Section 497 of IPC forthwith.

D. DNA Technology - Inheritance

Under the Hindu Marriage Act 1955, an illegitimate child (legitimised by virtue of Section 16) inherits only his parents' property in which the father is the coparcener.[24] Under Muslim Personal Law, an illegitimate child inherits only his mother's property and of her relations.[25]

Thus, under such circumstances to establish the legitimacy or illegitimacy of such children and to inherit the property, the DNA test is the only perfect medical evidence for inheritance or non-inheritance of the properties. In our country foeticide, infanticide, marital cruelty, dowry deaths and child abuse are very much common. The violence against women is also rampant. Women face violence in the form of sexual harassment, eve-

24. *Perumal Goundar* v. *Pachappan* AIR 1990 Mad. 110.
25. *Rahamatulla* v. *Maqsood Ahmed* AIR 1952 All. 640.

teasing, trafficking, and sexual discrimination, which are some of the types of gender violence. Medical community uses the process of Artificial Insemination as the best treatment of infertility. Artificial Insemination is of three types - (a) Artificial Insemination Homologous, where the semen injected into female's body is of her husband's (AIH). In such cases naturally there is no misunderstanding between husband the wife; (b) Artificial Insemination Heterogeneous or Donor, where the semen injected is of third party donor (AIT). In such cases, the itself wife suppresses the fact of this type of Artificial Insemination and if she gets to conceive and deliver a child thereafter, her husband for proving the illegitimacy of such child not born to him, can take the aid of DNA test; (c) Artificial Insemination with the mixture of the semen of the husband and the stranger (CAI). Here if the consent of the husband for such insemination is taken, no dispute arises and if on the other hand, insemination is kept secret and on knowing the same on later on, naturally dispute arises between the wife and the husband. And in such circumstances the husband to prove the illegitimacy of such child may subject his wife, the child and himself for DNA test. But due to the non enactment of the law on DNA test in our country such disputes remains as disputes ending in either divorce or judicial separation or even going to extent of causing homicides.

E. The Indian Evidence Act 1872

The problem with the adversarial system is that it gives too much importance to burden of proof, which is inclined in favour of the accused in criminal cases. The proof need not be beyond reasonable doubt. When DNA results are conclusive enough in establishing in material particulars against the accused, the burden of proof must be on the accused. The court also has the power to draw presumptions. A new section on presumption can also be added. No question of leniency should come as an obstacle which generally happens in adversarial system.

The concept of proof while appreciating DNA evidence should not be beyond all possible doubt. DNA testing is to be done under the supervision of judiciary which will be a right step in this direction.

Section 56 provides certain facts as conclusive. These acts can not be challenged as there is no need to adduce any thing for proving or disproving them. DNA results can be inserted in this provision.

F. Identification of Prisoners Act 1920

The Justice Malimath Committee has recommended the amendment if Section 4 of Identification of Prisoners Act 1920 on the lines of Section 27

of the Prevention of Terrorism Act 2002 (POTA). Section 27 POTA provides that the police officer while investigating any case can request the Court of Chief Judicial Magistrate or the Court of Chief Metropolitan Magistrate as the case may be, in writing for obtaining samples of handwriting, fingerprints, blood, saliva etc. from any accused person. And only under the direction of courts, the samples may be taken. Thus, adequate safeguards are provided in this regard. The section also provides that in case the accused refuses to give samples, the Court can draw adverse inference against him. If these recommendations are implemented it will be possible for the investigating agencies to go for DNA testing in identifying the culprit.

V. Conclusion

To cope with the present criminal justice system, no adequate legislation has been enacted by any government. DNA test is emerging as a recognisable evidence to prove the crime being committed in a large number of cases. Recently in the case of Rahul, the prime accused in Maulana Azad Medical College student's gang rape case,[26] on 24th December, 2002 following a Delhi Court order doctors at Safdarjung Hospital, Delhi took the blood sample of Rahul for DNA examination. In the sensational murder case of the poetess Madhumita, the accused Amarmani Tripathi was also ordered to undergo DNA test.

It must be remembered that in the Indian context as things stand today, there is no specific DNA legislation authorising 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. For example, The Criminal Justice and Public Order Act in U.K. provides for forcible testing of body samples.[27] Reference may also be made to DNA Identification Act 1998, c. 37[28] 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

26. See www.tribuneindia.com/2002/20021225/nation.htm.
27. Also the Family Reforms Act 1969 confers powers on the Courts to direct taking of blood tests in civil proceedings in paternity cases. For the USA See http://www.ojp.usdoj.gov/nij/dna/. Virginia became one of the fist states in the USA to pass a DNA database law.
28. http://www.nddb-bndg.org/legis._e.htm.

provisions for standardisation of testing, training of experts and quality controls. Section 53 of the Cr PC proves to be inadequate with regard to DNA testing. The section provides for the examination of accused by a 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[29]:

(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.

Suitable amendments must be made by giving adequate teeth to its relevant Sections. Besides, to introduce transparency and given the history of the Indian Police and prosecutors in fabricating evidence,[30] the process of collection and testing of samples must be left to an independent body.

The need to renovate the criminal justice system has been felt for quite some time as it has come under severe stress and strain due to the changing aspirations of the citizens and resulting social transformation, the process of criminal investigation, the prosecution and adjudication. There is a need to rewrite the Cr PC, the IPC 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 same i.e. 'Quest for the Truth'.

The DNA technology has conclusively created a special place in the legal system but there are many impediments like establishment of laboratories, quality control, collection of samples, finances and public awareness which need to be tackled by the Government especially in the field of creation of more DNA test laboratories equipped with latest infrastructural facilities and qualified scientists. It is shocking that India has only seven

29. Mukul Kumar and Mrinmayee Sahu, *Evidentiary Value of DNA Tests: Its Admissibility and Relevance*, XXIV DLR 206-207 (2002).

30. The Jammu and Kashmir government was accused of fudging DNA samples from five alleged militants.

DNA Testing Laboratories with fifteen scientists[31]; even if these scientists conduct DNA test day and night, they could only be able to test 700-800 samples in a year whereas these laboratories are getting 25000 to 30000 samples per year for the DNA test. It proves that our investigating agencies are handicapped because of the scarcity of DNA Testing Laboratories and scientists. There should be training programme for Prosecutors, Defence Attorneys, Judges, for Forensic Scientists and for Victim Service Providers. Some rays of hope can be expected as the Parliament has already established an Advisory Committee to look into some of these aspects. One hopes this is sorted out at the earliest so that we can proceed with full swiftness on this path in the furtherance of truth.

Our democratic polity is governed by the rule of law. A conscious balance has to be struck between individual liberties and collective interest of the society. If the rule of law has to prevail and the questionable practices are to be discontinued, it is necessary that the police officers and forensic scientists should be vested with adequate legal powers for collection of evidence against the accused leading to their successful prosecution in the court. Our adjudicatory system is also required to be focused for quick disposal of cases. It would be expedient to incorporate some of the provisions of the British Law referred above to our statutes. It is hoped that if the above suggestions were implemented, our legal system would improve substantially, thereby restoring people's faith in the State and creating favourable conditions for the rule of law in the country.

31. *Only Seven Laboratory with 15 Scientists for DNA Testing in our country*, HARI BHOOMI, January 24, 2004.

The Biosafety Protocol: International Transfer of Living Modified Organisms

*Piyush K. Sharma**

The most significant progress for the Convention on Biological Diversity (CBD)[1] during the last one decade has been the adoption of the Biosafety Protocol.[2] The Biosafety Protocol is an agreement which is designed to regulate international trade, handling and uses of any Living Modified Organisms (LMOs) 'that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health'.[3] It also aims to build human resources and institutional capacities in developing countries, facilitate transfer of technology and financial resources and set up a biosafety clearing house for exchange of scientific and technical information on LMOs. While developed countries that are at the centre of the global biotechnology industry have established domestic biosafety regimes, many developing countries like India are now starting to establish their own national systems.

I. Meaning of Biosafety and LMOs

Biosafety is a term used to describe efforts to reduce and eliminate the potential risks resulting from biotechnology and its products. For the purposes of the Biosafety Protocol, this is based on the precautionary approach[4], whereby the lack of full scientific certainty should not be used as an excuse to postpone action when there is a threat of serious or irreversible damage.

LMO is defined in the Cartagena Protocol on Biosafety as any 'living organism' that possesses a novel combination of genetic material obtained through the use of 'modern biotechnology'.[5] 'Living organism' means any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids.[6] 'Modern biotechnology' means the application of (a) *in vitro* nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of nucleic acid into cells or organelles, or (b) fusion of cells beyond the taxonomic family, that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection.[7] In everyday usage LMOs are usually considered to be the same as GMOs (Genetically Modified Organisms), but definitions and interpretations of the term GMO vary widely. LMOs form the basis of a range of products and agricultural commodities. Common LMOs include agricultural crops that have been genetically modified for greater productivity or for resistance to pests or diseases. Processed products containing dead modified organisms or non-living modified organisms components include certain vaccines, drugs, food additives and many processed, canned, and preserved foods. They can also include corn and soybean derivatives used in many foods and nonfoods, cornstarch used for cardboard and adhesives, fuel ethanol for gasoline, vitamins, and yeast-based foods such as beer and bread.

II. The Need for a Biosafety Protocol

Genetic engineering promises remarkable advances in medicine, agriculture, and other fields. These may include new medical treatments and vaccines, new industrial products, and improved fibres and fuels. Proponents of the technology argue that biotechnology has the potential to lead to increases in food security, decreased pressure on land use, and sustainable yield increase in marginal lands or inhospitable environments and reduced use of water and agrochemicals in agriculture.

But the biotechnology is a very new field, and much about the interaction of LMOs with various ecosystems is not yet known. Genetic scientists are altering life itself. The products of genetic engineering are living organisms that could never have evolved naturally and which do not have

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1. 31 I.L.M. 818 (1992); Entered into force on 29 December 1993. India signed the Convention on 5 June 1992; ratified on 18 February 1994. See also Gurdip Singh, *Legal Aspects of Biodiversity Convention*, XVII Delhi Law Review (1992).
2. The full name of the Biosafety Protocol is "Cartagena Protocol on Biosafety to the Convention on Biological Diversity". Cartagena is the name of the city in Colombia where the Biosafety Protocol was originally scheduled to be concluded and adopted in February 1999. However, due to number of outstanding issues, the Protocol was finalised and adopted a year later on 29 January 2000 in Montreal, Canada.
3. Cartagena Protocol on Biosafety, Art. 1.
4. Principle 15, Rio Declaration contains Precautionary Principal as follows: "In order to protect the environment, the precautionary approach shall be ideally applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measure to prevent environmental degradation."
5. *Id.*, Art. 3(g).
6. *Id.*, Art. 3(h).
7. *Id.*, Art. 3(i).

a natural habitat. LMOs can reproduce and interbreed with natural organisms thereby spreading to new environments and future generations in an unpredictable and uncontrollable way.[8] Inadequate testing and regulatory controls mean that the potentially harmful effects of LMOs will only be discovered when it might be too late.[9] The damage may then be irreversible. For these reasons, LMOs must not be released into the environment. They pose unacceptable risks to ecosystems, and have the potential to threaten biodiversity, wildlife and sustainable forms of agriculture.

In some countries, genetically altered agricultural products have been sold without much debate, while in others there have been vocal protests against their use, particularly when they are sold without being identified as genetically modified. In response to these concerns, nearly all the countries of the 'Third World' called for a strong protocol, based on the precautionary principle, in which their right to say no to imports of LMOs would be protected. Because most Third World countries have tropical environments, which are rich in biological diversity, they are especially vulnerable to genetic pollution. Commenting on the urgent need for a protocol, Tewolde Berhan Gebre Egziabher (the Head of the Ethiopian delegation who was also the spokesperson for the largest negotiating group of over 100 countries, called the 'Like-Minded Group', which included most of the Third World and also China) had this to say "All technologies involve risk. Since genetic engineering manipulates the basis of life, the risks involved are more frightening than any other developed so far. It is therefore essential for those of us who are the poorest of the world, and thus most vulnerable, to require a regime which assigns liability and ensures redress. We feel it is unjust of the richest of the world to expect us to bear the risks of their experimentation".[10] It has now been recognised in international law that LMOs are significantly different from other goods and products and require their own set of rules.

III. Background

In 1992, 175 governments signed up to the CBD at the Earth Summit

8. See http://www.biodiv.org/biosafety/faqs.asp.
9. *Ibid.*
10. Spinney L. *Biotechnology in Crops: Issues for the Developing World*, A Report compiled for Oxfam Great Britain (May 1998). See www.Oxfam.org.uk/policy/papers/gmfoods/gmfoods.htm; See also *International Transfer of GMOs – The Need for a Biosafety Protocol*, Presentation at the 2nd Session of the Intergovernmental Committee on the Convention of Biological Diversity by CEAT Clearinghouse on Biotechnology, European Co-ordination Friends of the Earth & Genetic Resources Action International Grain, Nairobi, 20 June-1July1994.

in Rio, which acknowledged that releases of LMOs may have adverse effects on the conservation and sustainable use of biological diversity. All countries that signed up to the CBD were expected to: (i)"Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts....taking also into account the risks to human health."[11]; (ii)"Consider the need for and modalities of a protocol setting out appropriate procedures....in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity".[12]

To meet this end, the United Nations Environment Programme set up an Expert Panel to consider the terms of reference, scope and elements of a possible 'Biosafety Protocol'. The Panel concluded that a legally binding instrument was needed as no other effective international biosafety agreements were in existence. In 1995, a formal Working Group was established to develop a draft protocol. This Working Group met over the next four years, and then in February 1999, representatives from over 135 countries attended a meeting in Cartagena, Colombia, where it was expected that an agreement on a Biosafety Protocol would finally be reached.[13] However, despite consensus among the vast majority of delegates present at the meeting, the negotiations collapsed because of a small group of grain-exporting countries, led by the USA, and including Canada, Australia, Argentina, Chile and Uruguay. These countries, which formed a powerful negotiating block called the 'Miami Group', feared that a strong protocol would disrupt their export markets. They tried, therefore, to force an agreement in which most LMOs (including all those destined for use as food for humans and livestock) would actually be excluded from the Protocol. They also wanted any protocol to be subordinate to the rulings of the World Trade Organisation (WTO). This move was vigorously opposed, as a treaty specifically designated to protect biodiversity would become meaningless if it were subordinate to the WTO, which has consistently ruled against environmental protection in favour of 'free trade'. The USA and its allies "came to the negotiations without any clear will to move forward" said the then EU Environmental Commissioner Ritt Bjerregaard.[14]

11. CBD, Art. 8 (g)..
12. CBD, Art. 19(3).
13. See http://www.biodiv.org/biosafety/articles.asp.
14. *Biosafety: Economic Concerns Steered Cartagena Talks*, UN Wire (United Nations Foundation News Briefing), 25th February 1999, See also, B. Burrows, *Resurrecting the Ugly American: US Played the Bully at Cartagena*, Food and Water Journal (Spring, 1999).

They wanted an agreement without any genuine environmental credibility. It would have excluded agricultural commodities, resulting in a liberalising of trade without proper protection of developing countries.[15]

Following the collapse of the biosafety negotiations in Colombia, consultations with delegates at a meeting of the Convention on Biological Diversity in July 1999 confirmed that there was still the political will among most countries to reach agreement on a protocol. Informal talks were then held in September, and preparations made for a new round of biosafety negotiations which would take place in Montreal in January 2000. Finally, on 29th January 2000, after four days and nights of intense negotiations in Montreal, 133 countries reached agreement on a Biosafety Protocol. Under this Protocol, all countries are legally bound to ensure that any development, handling, transport, use and release of LMOs is undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.[16] The precautionary principle is at the heart of this agreement. This means that countries have the right to ban or restrict the import and use of LMOs when there is a lack of scientific knowledge or consensus regarding their safety.[17] Considering the power of those countries that had made every effort to weaken the Protocol, it is stronger than many people had expected. Many compromises were made, however, in order for an agreement to be reached. In the words of Rafe Pomerance, the deputy chief of the US delegation: "We were just too important, too big....to be ignored".[18]

The Protocol was opened for signature at the United Nations Office at Nairobi by States and regional economic integration organisations from 15 to 26 May 2000, and remained open for signature at United Nations Headquarters in New York from 5 June 2000 to 4 June 2001.[19] By that date the Protocol had received 103 signatures. The Protocol entered into force on 11 September 2003, ninety days after receipt of the 50th instrument of ratification.[20]

IV. Key Legal Provisions of the Biosafety Protocol

The Protocol promotes biosafety by establishing rules and procedures

15. *Id.*
16. Cartagena Protocol on Biosafety, Art. 2 (2).
17. *Supra* n. 4.
18. Andrew Pollack, *U.S. and Allies Block Treaty on Genetically Altered Goods.* New York Times, February 25, 1999, Web site: www.nytimes.com/library/world/global/022599biotec-treaty.html.
19. Cartagena Protocol on Biosafety, Art. 36.
20. *Id.*, Art. 37.

for the safe transfer, handling, and use of LMOs, with specific focus on transboundary movements of LMOs. Parties to the Protocol must ensure that LMOs are handled, packaged and transported under conditions of safety. The Biosafety Protocol contains 40 Articles and 3 Annexes. Some of the major areas of concern of the Protocol are:

A. Advanced Informed Agreement (AIA)

The "Advance Informed Agreement" (AIA)[21] procedure applies to the first intentional transboundary movement of LMOs for intentional introduction into the environment of the Party of import.[22] It includes four components: notification[23] by the Party of export or the exporter, acknowledgement of receipt of notification[24] by the Party of import, decision procedure[25] and review of decisions.[26] The purpose of this procedure is to ensure that importing countries have both the opportunity and the capacity to assess risks that may be associated with the LMO before agreeing to its import. Specifically, the Party of export or the exporter must notify the Party of import by providing a detailed, written description of the LMO in advance of the first shipment. The Party of import is to acknowledge receipt of this information within 90 days.[27] Then, within 270 days of the date of receipt of notification, the Party of import must communicate its decision.[28] (i) approving the import,[29] (ii) prohibiting the import,[30] (iii) requesting additional relevant information,[31] or (iv) extending the 270 days by a defined period of time.[32] Except in a case in which consent is unconditional, in other cases the Party of import must indicate the reasons on which its decisions are based.[33]

Further, the importing countries are required under the Biosafety Protocol to take all measures based on risk assessment to prevent LMOs from causing any adverse effects on biological diversity, taking also into account risks to human health.[34] To this end, an importing country can

21. *Id.*, Art. 7-10.
22. *Id.*, Art. 7(1).
23. *Id.*, Art. 8.
24. *Id.*, Art. 9.
25. *Id.*, Art. 10.
26. *Id.*, Art. 12.
27. *Id.*, Art. 9(1).
28. *Id.*, Art. 10(3).
29. *Id.*, Art. 10(3) (a).
30. *Id.*, Art. 10(3) (b).
31. *Id.*, Art. 10(3) (c).
32. *Id.*, Art. 10(3) (d).
33. *Id.*, Art. 10(4).
34. *Id.*, Art.16 (2).

demand that the exporter carry out, and bear the cost of any further risk assessments that are needed to help the importing country to make a decision.[35] In order to avoid or minimise any harm to biodiversity or human health, an importing country may place conditions on the import of a LMO, or refuse to allow it, if there is lack of scientific information and knowledge regarding extent of any potential adverse effects.[36] And, if an importing country decides to approve the import of a LMO, it may review and change this decision, at any time in the light of new scientific information.[37]

B. The Biosafety Clearing-House (BCH)

The Protocol established a Biosafety Clearing-House as part of the clearing-house mechanism under Article 18(3) of the CBD,[38] in order to facilitate the exchange of scientific, technical, environmental and legal information on, and experience with, LMOs;[39] and to assist Parties to implement the Protocol.[40] The Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) recommended that the BCH should be established in a phased manner beginning with a pilot phase.

C. Exclusions from AIA Requirements

The 'Like-minded Group' of Third World countries wanted all LMOs to be included under this AIA procedure. However, the 'Miami Group' of exporting countries managed to force a compromise under which the AIA only applies to the first import of any LMO intended for direct release into the environment, and under which the majority of LMOs are actually excluded from the scope of the AIA. This includes:

a. LMOs that are Commodities (i.e. those intended for food, feed and processing)[41]

LMOs intended for direct use as food or feed, or processing (LMOs-FFP) represent a large category of agricultural commodities. The Protocol, instead of using the AIA procedure, establishes a more simplified procedure for the transboundary movement of LMOs-FFP. Under this procedure, a Party must inform other Parties through the Biosafety Clearing-House, within 15 days, of its decision regarding domestic use of LMOs that may be subject to transboundary movement.[42] Decisions by the Party of import on whether or not to accept the import of LMOs-FFP are taken under its domestic regulatory framework that is consistent with the objective of the Protocol.[43] A developing country Party or a Party with an economy in transition may, in the absence of a domestic regulatory framework, declare through the Biosafety Clearing-House that its decisions on the first import of LMOs-FFP will be taken in accordance with risk assessment as set out in the Protocol and the timeframe for decision-making.[44] In case of insufficient relevant scientific information and knowledge, the Party of import may use precaution in making their decisions on the import of LMOs-FFP.[45]

35. *Id.*, Art. 15(2 & 3).
36. *Id.*, Art. 10(6).
37. *Id.*, Art. 12.
38. *Id.*, Art. 20, Art. 18(3) of CBD provides that the Contracting Parties shall, at its first meeting, shall determine how to establish a clearing-house mechanism to promote and facilitate technical and scientific cooperation.
39. *Id.*, Art. 20(1) (a).
40. *Id.*, Art. 20(1) (b).
41. *Id.*, Art. 7(2).

b. LMOs that are destined for 'Contained Use' (e.g. LMOs used in laboratories etc.)[46]

LMOs that are intended for 'contained use' are also excluded from the AIA procedure. This does not, however, exempt countries from their obligations under the Protocol to prevent LMOs intended for 'contained use' from harming biodiversity including human health. Therefore, countries are still required to apply the precautionary principle when making any decisions with regards to any development, handling, trade, transport and use of these LMOs.[47] As defined in the Biosafety Protocol, 'contained use' includes "any operation, undertaken within a facility, installation or other physical structure, which involves LMOs that are controlled by specific measures that effectively limit their contact with, and their impact on, the external environment".[48] This definition is extremely broad, and examples of LMOs which could potentially fall under this definition include genetically engineered fish kept in land-based ponds or in cages in the sea, any LMO grown in a greenhouse or used in a laboratory, genetically engineered livestock kept in barns, or even LMOs that are released in field-trials which have some kind of barrier or fence around them.[49]

42. *Id.*, Art. 11(1).
43. *Id.*, Art. 11(4).
44. *Id.*, Art. 11(6).
45. *Id.*, Art. 11(8).
46. *Id.*, Art. 6(2).
47. *Id.*, Art. 2 (2).
48. *Id.*, Art. 3(b).
49. *Supra* n. 8.

However, the Protocol also states that it is up to each country to decide whether or not a LMO is regarded as being under 'contained use', in accordance with its own standards. As many of the above examples are effectively releases into the environment, countries may decide that such LMOs should actually fall under the rules which apply to the international introduction of LMOs into the environment, and therefore subject to the full AIA procedure.[50]

c. LMOs that are Pharmaceuticals

The Biosafety Protocol does not apply to any LMOs which are pharmaceuticals for humans, if they are 'addressed by other relevant international agreements or organisations'.[51] It is thought that 'international agreements or organisations' is meant to refer to bodies such as the World Health Organisation.[52] However, it remains to be seen whether these organizations will be regarded as 'relevant' to the objectives of the Protocol, as they do not actually address the potential of LMOs which are pharmaceuticals to have adverse effects on biological diversity (e.g. genetic pollution from genetically engineered crops or animals which produce pharmaceuticals and are released into the environment).[53]

d. Exports of LMOs that are 'in transit' (i.e. passing through a territory of a country route to another).

LMOs which are 'in transit' are excluded from the AIA procedure.[54] The Biosafety Protocol does not therefore require exporting countries to obtain the explicit consent of countries that lie on trading routes before transporting LMOs through their territories. However, exporting countries are still required to respect the domestic rules and regulations which apply to LMOs in transit through these countries. As with commodities, countries on trading routes also have the right to monitor new approvals of LMOs in other countries, and may inform the Biosafety Clearing-House if they

50. *Id.*, Art. 6(2).
51. *Id.*, Art. 5.
52. R. Steinbrecher and M. Ho, *Fatal Flaws in Food Safety Assessment: Critique of the joint FAO/WHO Biotechnology and Food Safety Report*, ROME 45 (1996).
53. P.J. Regal, *Scientific Principles for Ecologically based Risk Assessment of Transgenic Organisms*, 3 MOLECULAR ECOLOGY 5-14 (1994), *available* at. http://www.psrat.org/pjrisk.htm. See also Lim Li Lin, *The Core Issues in the Biosafety Protocol: An Analysis*, 114-115 THIRD WORLD RESURGENCE (Feb/Mar 2000) *available* at http://www.twnside.org.sg/title/core.htm.
54. CARTAGENA PROTOCOL ON BIOSAFETY, Art. 6(1).

decide they need to ban or restrict the passage of certain LMOs through their territories.[55]

D. Handling, Transport, Packaging and Identification of LMOs

The Protocol provides for practical requirements that are deemed to contribute to the safe movement of LMOs. Parties are required to take measures for the safe handling, packaging and transportation of LMOs that are subject to transboundary movement.[56] The Protocol specifies requirements on identification by setting out what information must be provided in documentation that should accompany transboundary shipments of LMOs. It also leaves room for possible future development of standards for handling, packaging, transport and identification of LMOs by the meeting of the Parties to the Protocol.[57]

The Protocol requires exporters to ensure that all consignments of LMOs that are intended for direct introduction into the environment are clearly labelled. This label has to include (a) identification of the consignment as 'living modified organisms'; (b) specific identity and relevant traits and /or characteristics; (c) any requirements for safe handling, storage, transport and use; (d) the contact point for further information and, as appropriate, the name and address of the importer and exporter; (e) a declaration that the movement is in conformity with the requirements of the Protocol (i.e. that the importing country has given permission for the consignment to enter its territory).[58]

LMOs that are commodities, however, are not subject to the same labelling requirements. For the moment, all that is required is that commodities be labelled as 'may contain living modified organisms'. This label must also say that the commodities are not intended for introduction into the environment, as well as giving details of a contact point for further information. A final decision about more detailed labelling of LMO commodities will be taken no later than two years after the Protocol comes into force.[59] The labels for LMOs intended for contained use do not have to include the specific identity, relevant traits and/or characteristics of the LMO. They must, however, include: (a) identification of the consignment

55. *Id.*
56. *Id.*, Art. 18(1).
57. *Id.*, Art. 18(3).
58. *Id.*, Art. 18(2) (c).
59. *Id.*, Art. 18(2) (a).

as 'living modified organisms'; (b) any requirements for safe handling, storage, transport and use; (c) a contact point for further information (including the name and address of the individual and institution to whom the LMO is being sent).[60]

E. Unintentional Transboundary Movements of LMOs

When a Party knows of an unintentional transboundary movement of LMOs that is likely to have significant adverse effects on biodiversity and human health, it must notify affected or potentially affected States, the Biosafety Clearing-House and relevant international organisations regarding information on the unintentional release. Parties must initiate immediate consultation with the affected or potentially affected States to enable them to determine response and emergency measures.[61] In case of any illegal transboundary movements the Protocol gives affected countries the right to demand that the country from which the LMOs originated retrieve and/or destroy the GEO, at its own expense.[62]

F. Socio-Economic Concerns

Although socio-economic considerations are not an explicit requirement of the risk assessment procedures in the Protocol, countries are given the right to consider socio-economic impacts, when evaluating potential imports of LMOs. Countries may also take into account socio-economic considerations, such as the value of biological diversity to indigenous and local communities, when implementing domestic regulatory measures for LMOs.[63]

G. Liability and Redress

The Protocol contains an enabling provision by which the Conference of the Parties serving as the meeting of the Parties shall, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs. The Parties shall endeavor to complete this process within four years.[64]

60. *Id.*, Art. 18 (2) (b).
61. *Id.*, Art. 17.
62. *Id.*, Art. 25.
63. *Id.*, Art. 26.
64. *Id.*, Art. 27.

H. Public Consultation

The Protocol requires Parties to promote and facilitate, on their own and in co-operation with other States and international bodies, public awareness, education and participation concerning the subject of the Protocol and to ensure that the public has access to information on LMOs that may be imported. In accordance with the laws and regulations of Parties, the public is to be consulted in the decision-making process regarding LMOs, made aware of the results of such decisions and informed about the means of public access to the Biosafety Clearing-House.[65]

I. Institutional Arrangements at the National Level

Parties are required to designate national institutions to perform functions relating to the Protocol. Each Party needs to designate one national focal point to be responsible on its behalf for liaison with the Secretariat. The functions for liaison may include, for example, receiving notifications of meetings relating to the Protocol issued by the Secretariat and invitations to submit views on matters under discussion, and acting accordingly.[66]

Each Party also needs to designate one or more competent national authorities, which are responsible for performing the administrative functions required by the Protocol and which shall be authorised to act on its behalf with respect to those functions. A Party may designate a single entity to fulfil the functions of both focal point and competent national authority. Each Party must, no later than the date of entry into force of the Protocol for it, notify the Secretariat of the names and addresses of its focal point and its competent national authority or authorities.[67]

V. Biosafety Protocol and the WTO

The relationship between the Protocol and the WTO agreements has yet to be settled. The Protocol is not clear concerning the relationship which is to exist between potentially conflicting environmental risks and trade obligations. The Biosafety Protocol is an agreement concerned with the protection of biodiversity while WTO is concerned with the removal of barriers to trade. The relationship between these two agreements is of critical importance and certain to be controversial. The Biosafety Protocol

65. *Id.*, Art. 23.
66. *Id.*, Art. 19(1).
67. *Id.*, Art. 19(2).

emphasises that its rules should not be interpreted as implying a change in the 'rights and obligations of other international agreements' (such as the WTO), it goes on to say that this does not mean that the Protocol is subordinate to these other international agreements. The Protocol also maintains that trade and environment agreements should be mutually supportive.[68]

The differences between the WTO and the Biosafety Protocol are so significant that a mutually supportive relationship looks extremely difficult. Under the WTO, for example, the onus is on the importing country to provide proof that a LMO is not safe if it wishes to block an import, and the importing country will be subject to punitive sanctions if it cannot provide this proof. Under the Biosafety Protocol, on the other hand, the onus is on exporting countries to provide the evidence that a LMO is safe, and importing countries are required to take all measures necessary to prevent a LMO from causing any adverse effects. In case of disputes, countries can refer to the Vienna Convention on the Law of Treaties,

68. CARTAGENA PROTOCOL ON BIOSAFETY, *Preamble* : The Parties to this Protocol,
Being Parties to the Convention on Biological Diversity, hereinafter referred to as "the Convention",
Recalling Article 19, paragraphs 3 and 4, , and Articles 8 (g) and 17 of the Convention,
Recalling also decision II/5 of 17 November 1995 of the Conference of the Parties to the Convention to develop a Protocol on biosafety, specifically focusing on transboundary movement of any living modified organisms resulting from modern biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity, setting out for consideration, in particular, appropriate procedures for advance informed agreement,
Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development,
Aware of the rapid expansion of modern biotechnology and the growing public concern over its potential adverse effects on biological diversity, taking also into account risks to human health,
Recognizing that modern biotechnology has great potential for human well-being if developed and used with adequate safety measures for the environment and human health,
Recognizing also the crucial importance to humankind of centre of origin and centre of genetic diversity,
Taking into account of the limited capabilities of many countries, particularly developing countries, to cope with the nature and scale of known and potential risks associated with living modified organisms,
Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,
Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,
Understanding *that the above recital is not intended to subordinate this Protocol to other international agreements.*

which governs the interpretation of treaties under international law. The Vienna Convention rules that a later international agreement supersedes an earlier one, and an agreement on a specific subject prevails over a general one.[69] It would be logical to assume, therefore, that the Biosafety Protocol should take precedence over the WTO in any dispute, as the Protocol deals specifically with biosafety issues which are not covered by the WTO, and because the Protocol is also the more recent of the two agreements.

Further, to what extent are the WTO agreements and the Cartagena Protocol different when it comes to the application of the precautionary principle? Both sets of rules require some scientific evidence in order to claim a risk. However, in order to ban a LMO, it is not necessary to prove a causal link between the LMO and specific damage. A favourable interpretation such as this is far from certain, as a lot depends on the forum where any dispute is arbitrated. If disputes are brought before the WTO, where the dispute settlement panel usually rules in favour of the interests of big corporations and powerful countries, countries following their obligations under the Protocol could potentially find themselves in trouble. But if a country were ruled against for taking measures to prevent LMOs from damaging biodiversity and human health, such a ruling could end up further undermining the legitimacy of the WTO. This is something that countries such as the US are keen to avoid at the moment. It is possible therefore, that the continued public scrutiny and criticism of the WTO, together with growing opposition to genetic engineering, makes it less likely that countries will challenge a Protocol-based decision by appealing to the WTO.[70]

Since the Biosafety Protocol regulates trade in LMOs, but employs elements from biological and environmental science and food and health safety, all regulations proposed within the Protocol must be founded on sound scientific principles. The relationship between the rights of Parties under national laws, WTO agreements and the Biosafety Protocol must be clarified to avoid continuous, lengthy, costly and confusing litigation. Assessment of risk to human health from hazards in food are to be distinctly identified and separated from risk to biological diversity arising

69. D. Currie, GREENPEACE SUBMISSION ON INTERNATIONAL LAW TO THE NEW ZEALAND ROYAL COMMISSION ON GENETIC MODIFICATION, 9 March 2001, p.11, see http://www.gmcommission.govt.nz; VIENNA CONVENTION ON THE LAW OF TREATIES, Art. 3.2 & 3.4; McNair, THE LAW OF TREATIES 219 (1961), citing the *Mavrommatis Palestine Concessions (Jurisdiction) case* (PCIJ) Ser. A, No. 2, at pp. 31, 32; see also Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2nd ed.)(1996); Jenks, *The Conflict of Law Making Treaties*, 30 Br Y.I.L. 401-53, 448 (1953).
70. Lim Li Lin, *supra* n. 53.

from hazards engendered to the environment by LMOs. However, all assessments should require relevant scientific evidence, not vague suggested adverse effects which may occur.

VI. India Ratifies the Protocol

The Government of India approved the proposal and India signed the Biosafety Protocol on 23rd January 2001. Subsequent to the Cabinet approval on 5th September, 2002, India has acceded to the Biosafety Protocol on 17th January 2003.[71]

In India the dangers of LMOs receive a lot of public and media attention. The apprehensions about LMOs are linked, amongst others, with concerns for biodiversity preservation. Cross-fertilisation may result in the loss of indigenous species because of competition in the ecological system.[72] The potential dangers include the displacement or destruction of indigenous or endemic species; and exposure of species to new pathogens. India's experience has been limited to small field trials. Doubts are being raised about the country's preparedness to meet the potential risks arising from LMOs.[73] For instance, when transgenic crops are commercialised on a large scale, can biosafety regulations be monitored? As of now, the absence of an effective system to monitor imports of agricultural commodities and plant materials appears to be highly problematic.[74]

Therefore, for India the Protocol is significant in a number of ways: (a) the exporter is required to provide information to the importing country regarding the characteristics of the LMO under consideration, as well as information deriving from a risk assessment of that LMO. It is prudent for India to know which LMOs are entering the country and for there to be an assessment of the risks posed by an LMO prior to its introduction into the environment of the importing country; (b) as India has mega bio-diversities for many plant species, the Protocol will help to prevent adverse effects of LMOs on the conservation and sustainable use of biological diversity considering that LMOs pose potential and varied threats to India's biodiversity; (c) the Protocol recognizes that scientific knowledge about LMOs is incomplete, and that efforts are required to take measures to prevent environmental harm in the absence of scientific certainty about that harm; (d) the Protocol will provide enhanced visibility and credibility

71. See http://envifor.nic in/mef/cpbw.pdf.
72. *Ibid.*
73. *Ibid.*
74. See http://www.greenpeaceindia.org/patents.htm.

of national systems for regulating biosafety; (e) there will be improved access to relevant technologies and data, and benefits from a regular exchange of information and expertise and (f) demonstration of commitment to conservation and sustainable use of biological diversity through the implementation of bio-safety measures.

Under the legal provisions of the Biological Diversity Act 2002 the Central Government is required to undertake activities to regulate, manage or control the risks associated with use and release of LMOs resulting from biotechnology, likely to have adverse impact on conservation and sustainable use of biodiversity and human health.[75] It may also declare some resources to be exempted from the provisions of this Act, including resources normally traded as commodities.[76]

VII. Conclusion

The Biosafety Protocol is not a trade agreement. It aims to protect people and the environment from a technology whose risks and impacts are poorly understood. Subordinating the Protocol to current "free trade" procedures will not only result in a weak agreement, but also could seriously undermine food security and have a potentially devastating effect on biodiversity. The Protocol recognises that LMOs are different from other goods and require their own set of trade rules and acceptance of the precautionary principal as basis for decision making. It is a step towards setting an agenda for international legislation and governance which puts environmental and even social concerns above corporate profits and free trade.

However, there is a need for continued monitoring of the implementation of the agreement, particularly to react to any challenges which may be made. Also there is a need for stricter AIA procedure which will apply to seeds, live fish and other LMOs that are to be intentionally introduced into the environment. There is a need for stricter immediate enactment of special measures to protect centres of genetic diversity/origin and other environmentally sensitive areas from being contaminated by LMOs and there is a need to lobby for action on the liability issue – a timetable for reaching an agreement on liability must be drawn up immediately.

75. The Biological Diversity Act 2002, S. 36(4) (ii).
76. *Id.*, S. 40.

Clipping the Wings of *Talaq*: A Case of Judicial Reform

*Barsha Mishra and S.J. Hussain**

I. Introduction

"Shariah is based on wisdom and is meant for the worldly and spiritual benefit of the people and means completed justice for all and absolute kindness and wisdom. Hence, we cannot consider that code of law a law of Shariah in which there is cruelty instead of justice, hardship in place of leniency, loss instead of advantage and foolishness in place of reason.[1] This spirit of Shariah is reflected in a decision of *Shamim Ara* v. *State of U.P.*[2] decided by Justice R.C. Lahoti. His Lordship ruled in this case that a *talaq* to be effective has to be pronounced and in the absence of any pronouncement or a mere plea taken in the written statement of divorce having been pronounced sometime in the past cannot by itself be treated as effectuating *talaq*.

The Courts in India have on earlier occasions progressively interpreted the Muslim law of *talaq* to relieve the wives from the heavy shackles of traditional law. They have insisted upon the effective communication of the pronouncement of *talaq* to the wife.[3] By doing so the courts have reduced the husband's proclivity to pronounce *talaq*. However, some courts have strictly adhered to the rule of Muslim law and held that a *talaq* pronounced in the absence of a wife is valid even if it is not communicated to her.[4]

In *Muhammad Shainuddin* v. *Noor Jahan*[5] the Court said that there was no authority for the proposition that talaq took effect from the date on which the wife came to know of it. On the other hand in *Abdul Knader* v.

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1. Ibn Qayyin, Bidyat - ul-Mujtahid, Idarat al-Musannifin, Rabwah, (1958) as cited by K.N. Ahmad, Muslim Law of Divorce 13 (1978).
2. *Shamim Ara* v. *State of U.P. and Anr* J.T. 2002/520 See further *Dagdu* v. *Rahimbi Dagdu* (2002) Vol. II 315.
3. *Fulchand* v. *Nawab Ali* (1909) 93 I.L.R. Cal. 184.
4. *Manoli* v. *Moideen* (1968) MLJ (Cr) 660.
5. AIR 1955 Hyd. 144, See also *Amalgiri* v. *Mst. Begha* AIR 1955 J&K 1.

Azeera[6] following Ameer Ali's view the Madras High Court held that the *talaq* given in the absence of wife would be effective only when it became known to her. The Bombay High Court followed suit in *Chandni* v. *Bandesha*[7].

In *Dilshada Masood* v. *Gh. Mustaffa*[8] the Jammu and Kashmir High Court in this case held that the divorce which was not pronounced in Arabic was not valid applying the Shia Law where divorce has to be given in Arabic according to a particular formula and in the presence of two witnesses who must be Aadil. Krishna Iyer J. in a land mark judgment which involves interpretation of Section 2 (ii) of the Dissolution of the Muslim Marriage Act 1939 which provides that if a husband has neglected or failed to provide the wife maintenance for a period of two years held that she can be granted divorce. The case was *Yusuf* v. *Sowramma*[9]. Holding that it was a "popular fallacy" that Muslim husband had unbridled authority on the matter of divorce and recognising the right of a Muslim wife to seek dissolution of the marriage on the ground of husband's failure to provide maintenance for two years, his Lordship observed:

"The Islamic law's serious realism on divorce, when regarded in the correct perspective excludes blameworthy conduct as a factor and reads the failure to provide maintenance for two years as an index of irreconcilable breach, so that the mere fact of non- maintenance for the statutory period entitles the wife to sue for dissolution."[10]

II. Talaq given in Writing

The courts have generally followed the principle of Muslim Law that if *talaq* is given in writing it takes effect from the time of execution of the deed.[11] Muslim Law recognizes two from of writing regarding divorce-customary and non-customary forms.[12] *Talaq* takes effect even if it is not communicated to the wife.[13] The deed is said to be in customary form if it is properly written and addressed giving the name of the writer and the

6. AIR 1944 Mad 224.
7. AIR 1961 Bom 121.
8. AIR 1986 J&K 80.
9. AIR 1971 Ker 261.
10. *Id.* at 266.
11. *Ahmad Kasim* v. *Khatun Bibi* (1932) 59 ILR Cal 833. *Mohd. Shamsuddin* v. *Noor Jahan* AIR 1955 Hyd 144.
12. See for details Fatawa-i-Kazee Khan 94-10, Vol. (Reprint 1994) Ameer Ali, Mohammadan Law Vol II 444-446 (1986) where *talaq* in writing both under the Hanafi law and Shia Law is stated.
13. *Fulchand* v. *Nawab Ali* (1909) 99 I.L.R. Cal. 184.

person addressed. This form is called manifest provided that it can be easily read and comprehended. In such case of customary form intention to divorce is presumed. Otherwise the intention to divorce must be proved.[14] If on the other hand the deed is not in a form of a declaration not addressed to the wife or any other person it is not in customary form and therefore divorce is not effected.[15]

Talaq given in writing may take any form. If *talaq* is given by letter it will take effect on the receipt of the letter by the wife. If the letter reaches her father and he tears it to pieces there will be no *talaq* unless the father transact all her business or acts as agent and resides in the same house with her.[16] If the father should inform the wife of the receipt of the letter and give her the torn pieces the *talaq* takes effect only if the letter can be read and understood. *Talaq* can take effect by deed of divorce.[17]

The Shia law does not recognized *talaq* given in writing nor does the law sanction *talaq* given in language other than Arabic and in the presence of two reliable witnesses.[18] The law further lays down that the witness should be present at the time when *talaq* is given.[19] In *Shamim Ara*,[20] *talaq* was not given in any of the forms referred to above. *Talaq* was given in the statement by the husband in pleadings filed in answer to petition for maintenance by the wife.

III. Shamim Ara's case[21]

In Shamim Ara's case there was a *talaq* pronounced sometime in the past mentioned in the written statement in the proceedings submitted by the husband.

The facts of the case under discussion were as follows:

The wife filed a suit for maintenance under Section 125 of Criminal Procedure Code 1973. The husband in the year 1990 contended that he had divorced her by administering triple *talaq* sometimes in the year 1987. The Family Court decided that the *talaq* was valid according to Muslim

14. Mulla, *Principles of Mohammedan Law* 260 (2003) 9th Ed, See further Ameer Ali. *supra* n. 12 at 444 and 445.
15. Mulla *supra* n. 14 at 260.
16. Ameer Ali, *supra* n. 12 at 445.
17. *Rashid Ahmed* v. *Anisa Khatun* A.I.R. (1932) PC 25.
18. Ameer Ali, *supra* n. 12 at 444-446.
19. *Ibid.*
20. *Supra* n. 2.
21. *Supra* n. 2.

Law. The wife appealed in the High Court. The husband took a plea that he had divorced his wife and that this fact was mentioned in the written statement filed in the High Court. The High Court in turn decided that the *talaq* given in the written statement became effective from the time the written statement was filed in the High Court. Therefore maintenance to the wife was granted from that time from 1990. The wife took an appeal to the Supreme Court against this decision. The Court declared that a plea of previous *talaq* taken in the written statement cannot at all be treated as pronouncement of *talaq* by the husband nor the affidavit filed in some previous case in which the wife was not a party be treated as evidence of any valid marriage. Therefore the court held that the marriage was not dissolved and the husband was liable for payment of maintenance until the obligation to an end in accordance with law.

The Court said that no such text has been brought to its notice which provided that a recital in any document whether a pleading or an affidavit incorporating a statement by the husband that he has already divorced his wife, on an unspecified date even if not communicated to the wife, would become an effective divorce on the date on which the wife happens to learn of such statement. The court took an opportunity to also deal with oral *talaq* and the law related to it. The court referred to various cases relating to the validity of irrevocable *talaq*. Most important among these cases was a case of *Rukia Khatun* v. *Abdul Khalique Lasker*.[22]

Baharul Islam J. declared in this case that the correct law of *talaq* as ordained by the holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and wife. The decision was based on the following verse of Quran.[23]

> If ye fear a breach between them
> Twain, appoint (two) arbiters, one
> From his family, and the other
> From hers. If they wish for
> peace, Allah will cause their
> Reconciliation. For Allah hath
> Full knowledge, and is acquainted
> With all things.

The Supreme Court reiterated this principle of Islamic law of divorce. The above verse it may be pointed out, does not give specified reasons for

22. (1981) 1 GLR 375) (para 13).
23. Al-Quran, 4:35.

obtaining divorce. All that the Quranic verse says is that if there is a breach the parties go through the reconciliatory process with the help of arbiters. The above verse of Quran has been the corner stone upon which the law of divorce has been regulated.

Throughout the history of Islam, both classical and modern, neither in Quran nor in Hadith are the grounds of divorce enumerated. Stating that Quran does not limit the causes (much less reasonable cause) to specified cases Maulana Muhammad Ali observes:[24]

> If the different nations of the Europe and America, who profess the same religion, are at the same level of civilization and same stage of advancement and have an affinity of feeling on most social and moral questions, cannot agree as to the proper causes of religion like Islam, which was meant for all ages and all countries, for people in the lowest grade of civilization as well as those at the top, limit those causes which must vary with changing conditions of humanity and society.

There are cases where wives went to Prophet Mohammad seeking divorce from their husbands. For instance Jamilah the wife of Thabit bin Abbas came to the Prophet and said 'Oh! Allah's Prophet, I do not blame Thabit for defects in his character or his religion." The Prophet asked her whether she was ready to give the garden which her husband gave. When she agreed the Prophet asked Thabit to accept the garden and divorce his wife.[25]

There is another Hadith which concerns the Holy Prophet himself in the matter of divorce. It is narrated by Al Awazi. He asked Al- Zuhri as to which of the wives of Prophet sought refuge with Allah from him. He said, that he was told by Yrwa that Aishah said that when the daughter A-Jaween was brought to Allah's Prophet as his bride and as he went near her she sought relief with Allah. The propht is reported to have said "You have sought refuge with the great, return to your family".[26]

Again, Prophet is reported to have said that "If a woman be prejudiced by the marriage, let it be broken off."[27]

A similar approach to the doctrine of *shiqaq* (i.e. breakdown of marriage) is witnessed during the reign of Khulafa -I Rashidin. A woman

24. Muhammad Ali, THE RELIGION OF ISLAM, 672-673 (1989).
25. See Ameer Ali, *supra* n. 12 at 478.
26. Sahih Al- Bukhari, Vol. VII, 5th Ed. (1987).
27. See Ameer Ali, *supra* n. 12 at 478.

came to Hadrat Omar to seek divorce from her husband. Hadrat Omar, on her refusal to live with her husband, put her in a secluded place for three days. When she was asked how she felt she replied, "I swear by God, I have never passed more peaceful nights."[28]

Hadrat Omar there upon asked the husband to release the wife. It must be pointed out that no inquiry was made as to the grounds or reasons why the wife did not want to live with the husband. It was also found that the husband had committed no fault.

IV. TALAQ IN A WRITTEN STATEMENT AND CLAIM FOR MAINTENANCE

There have been quite a few cases decided by the courts where the husband had made a statement of *talaq* while countering the petition of the wife for maintenance, the question that was raised in such cases was whether such statement will effect a valid *talaq*. In *Syed Jamaluddin* v. *Valian Be*[29] it was held that even if the husband had not proved talaq the fact that he had made a statement submitted to the court will effect a valid talaq from the date of filing of the pleading or affidavit or the communication of the notice. Under such circumstances it was held that the husband would not be liable to maintain the wife longer than the period of iddat.

It may be pointed put that *Immarn Sahib* v. *Hajju Bee*[30] the court decided that a mere mention in a written statement was not simply sufficient to have the effect of divorce unless it is pronounced in the presence of the witnesses or the wife herself.

In *Wahab Ali* v. *Qamro Bi*[31] the court addressed the questions squarely: what is the legal effect of the husband stating in his written statement that he had already divorced his wife, if the court should come to the conclusion that the divorce pleaded was not proved: In other words whether the statement itself could operate as a divorce as and from the date the written statement was filed in the court. Following the early decision of the High Court, in *Mohd. Hussain* v. *Rasul Bi*[32], wherein it was held that a statement of the husband as having given *talaq*, made before the Court operated as divorce.

28. See *Belqis Fatima* v. *Najm-ul-Ikram* PLD 1959 Lah 566 at 579-580.
29. 1975 Cri LJ 1884.
30. (1970) 1 Andh W.R. 138.
31. AIR 1951 Hyd. 117.
32. 14 Deccan L.R. 37.

In *Abdul Aziz* v. *Kabira Bi*.[33] it was held that endorsement by the husband on a notice issued by the court in maintenance proceedings, that he had divorced his wife operated as a declaration of divorce.

In *Wahad Bakshi Sheikh* v. *Hadisa Bibi*.[34] the husband had given *talaq* in the presence of witnesses and it was duly registered by the local Kazi on the very next day of his marriage. The learned magistrate found that the *Talaknama* was kept concealed from the wife. It was only when the matter to grant maintenance came up before the court that she came to know that she had been divorced by her husband. It was held that *talaq* become effective from the date of the proceedings.

The decision of the Supreme Court in *Shamim Ara's* case is momentous. It has shown the way that the judiciary can play an important role in liberalising and modernising the rules of Muslim law of marriage and divorce. Thus, it is seen that whereas in all the earlier decisions by the Courts it was held that *talaq* written in the pleadings or written statements made by the husband was valid. During the colonial administration of justice the courts in India by and large expressed reluctance to depart from the opinion of the traditional Muslim law. The attitude adopted during the British administration of justice was followed in letter and spirit after independence but now the judiciary has taken a progressive measure in order to elevate the hapless Muslim wife. The judgment of Lahoti J. is a historic judgement and it is hoped that this judgment will be followed with approval in India. But a caveat has to be entered here. The courts can interpret Muslim law in a progressive way so long it is in tune or conformity with Shariah. If the interpretation of Muslim law by the courts is not within the confines of Shariah then we have a great controversy. The case of *Shah Bano Begum*,[35] is in point.

33. In *Abdul Aziz* v. *Kabira Bi* 32 Deccen L.R. 192.
34. *Wahad Bakshi Sheikh* v. *Hadisa Bibi* A.I.R. 1951 Hyd. 117.
35. *Mohd. Ahmad Khan* v. *Shah Bano Begum* AIR 1985 SC 925.

The Need For Redefining Competition Law In India

*Neera Bharihoke**

I. Introduction

The period of last thirteen years has brought about a sea change in the economic policies of India notably in the field of trade and industry. The economy is being liberalised to strengthen it through liberalising imports as well as exports. The role of public sector enterprises and of the government is being minimised. The policies emphatically underscore the need for and the importance of foreign investing, foreign collaboration and the nation's readiness to facilitate these.[1]

The impact of liberalisation has further received a boost by India ratifying the World Trade Organisation (WTO) agreements. WTO is a multilateral treaty emphasising on weeding out protectionism, unilateralism and monopolisation and on promoting international trade and market. WTO facilitates opportunities to member States for optimum and rational use of their comparative advantages.[2]

II. Anti Competitive Conduct And the Law

The policies of liberalisation and globalisation have brought with them new types of challenges like dumping of foreign goods in the Indian market, disputes relating to intellectual property rights, restructuring and realignment of corporate bodies and unbridled entry of multinational corporations (MNCs) into the country. Lowering restrictions on imports and foreign direct investment has attracted the interest of MNCs to invest in India. MNCs are being offered red-carpet treatment without giving domestic business sufficient time to prepare themselves to face and compete with MNCs.

MNCs are inherently rich with resources such as finance, technology, products management practices and international business experience. Their

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1. See New Economic Policy 1991 and New Industrial Policy 1991.
2. Hoekman, Bernard and Koteci, The Political Economy of the World Trading System 12 (1995).

large cash reserves and/or ready access to credit empower them to buy their way into markets. MNCs are mostly interested in accessing a potential market and not with producing in a country.[3] The competitive strength of MNCs and a few enterprises that have gained sufficient economic strength empowers them to engage in anti-competitive practices or to create situations of monopoly and to raise artificial entry barriers so as to remove competitors from the market and thus hamper competition.

Indian domestic industry had remained insulated from competition for more than forty years since independence. Until the mid-1980s, India continued to pursue the goal of self-reliance by adopting protective and inward-looking policies. Economic policies, procedural bureaucratic bottlenecks and absence of conducive business environment led to lack of access to global technology which led to lagging behind of domestic industries in technological development.[4] The process of economic liberalisation has exposed domestic industries to face competition from imported goods as well as the goods manufactured or services provided by the MNCs.

Opening the economy to increased international competition has highlighted the need to increase competitive pressures in some areas of the domestic economy, in particular by expanding the coverage of the Monopolistic and Restrictive Trade Practices Act 1969 (MRTP Act). In the scenario of increased competition, both in the domestic and international market, the responsibility of the MRTP Commission, the sole competition law agency to ensure free and fair competition had increased immensely.

III. A Critique Of MRTP Act

MRTP Act, the sole competition law in India, has shifted its focus from prevention of concentration of economic power to curbing monopolistic, restrictive and unfair trade practices, after being amended in 1991. Prior to its amendment, the MRTP Act regulated mergers, amalgamations and take-overs, but this is no longer the case after 1991. The need of prior approval of Central Government for establishment of new industries, expansion, diversification, merger, amalgamation and take-over of the industries has been dispensed with so as to lead to increase in productivity of the nation and generating employment.[5]

3. A.Bhaduri and D. Nayyar, The Intelligent Person's Guide To Liberalization 45 (1996).
4. See M. Singh, Economic Reforms: Crisis and Management, Occasional Papers, Ministry of Finance, Government of India (1995).
5. See Statement of Object and Reasons, Monopolies and Restrictive Trade Practices Amendment Act 1991.

While mergers and acquisitions in some instances may be very healthy and inevitable, they have a great potential for limiting competition as well. With pre-entry restrictions removed, the chances for collusion and emergence of monopolistic trade practices increase. A related concern is that MNCs may engage in dumping and unfair price competition to drive small and weaker players out of the market. Private anti-competitive conduct may replace public conduct. Again, the combined effect of these two strategies may well be the emergence of a few, limited oligopolies. Thus the process of mergers, amalgamations and take-overs may eventually wipe out competitors from the market and thus lead to concentration of economic power in a few hands. The result will inevitably be a dampening effect on growth, employment and development. Thus mergers, amalgamations and take-overs need strict regulation.

Competition cannot be left unfettered in the belief that it will drive out unfair trade practices. Free trade, in the modern and technologically more complex age does not provide all the safeguards. Forces of competition have to be reinforced with a competition law particularly to counter forces of monopoly.[6] MRTP Act is limited in its sweep and hence fails to fulfil the need of a competition law in an age of growing liberalisation and globalisation.

When the MRTP Act was enacted in 1969, the economic policies of that time constituted the premise for its various provisions. The aim of the MRTP Act was curbing the monopolies and prevention of concentration of economic power. But under the liberalised economic policies, the law has to yield to the changed and changing economic policies. The focus of the MRTP Act should be on promoting competition.

Further, a perusal of the MRTP Act shows that there is neither a definition nor even a mention of certain offending trade practices, which are restrictive in nature. Some of the illustrations are: abuse of dominance; or cartels, collusion and price fixing; bid rigging; boycotts and refusal to deal. One particular general provision, Section 2 (o) of the MRTP Act, which defines 'restrictive trade practice', has been used by the MRTP Commission to cover all anti-competitive practices. It is necessary to identify specific anti-competitive practices and define them.

WTO Agreements like Agreement on Trade Related Aspects of Intellectual Property 1994 and the Agreement on Technical Barriers to Trade 1994 are giving rise to anti-competitive practices and are hampering the volume of Indian exports. These agreements have the potential to create

6. D.P. Mittal, Competition Law 4 (2003).

artificial barriers to entry of potential competitors in the market.[7] Further after India's entry into WTO, the need for a new competition law has become more necessary. WTO is a "free trade" institution. It has laid down a system of rules dedicated to open, fair and undistorted competition.

From April 2001, all quantitative restrictions have been completed phased out and with low level tariffs already negotiated during WTO rounds, India faces severe competition from abroad.[8] From toy makers, plastic processors and urea manufactures to giants of industry like automobile makers, steel producers and textile mills, all will have to face competition from the world over. The current trade policies as well as competition law contained in MRTP Act is not adequate to meet these challenges.

Indian entrepreneurs and Indian enterprises need to be provided a level playing field. The provisions of MRTP Act, in its present form, are incapable of providing the same. The present anti-trust legislation, namely MRTP Act, is more like a watchdog without teeth. The challenges thrown by the policy of liberalisation and globalisation make it imperative to amend MRTP Act or replace the MRTP Act with a new competition law, having strong enforcement machinery than the one, which is provided under MRTP Act.[9] The new law should contain sharp teeth to make it more effective in meeting the challenges thrown by policy of opening of economy and also keeping in view the experience gained over period of time.

A High Level Committee on Competition Policy and Law (High Level Committee), under the Chairmanship of S.V.S. Raghavan, was constituted by the Ministry of Law, Justice and Company Affairs on 25th October 1999 to examine the provisions of the MRTP Act, 1969 and to propose a modern Competition Law. The High Level Committee submitted its report to the Government in June 2000.

IV. Recommendations of the High Level Committee

The High Level Committee recommended the enactment of a new Indian Competition Act in preference to amendment of the MRTP Act.[10] The Report discussed in detail both policy and law of competition. The suggestion was that the new Act should cover competition in the provisions

7. I.G. Patel, Economic Reform and Global Change 12 (1998).
8. R. Mehta, *Removal of QRs and Impact on India's Export*, 35 Econ. & Pol. Weekly 1667 (2000).
9. Annual Reports of the High Powered Expert Committee on Companies and MRTP Act, 1997 onwards too emphasize the same.

of services as well as production and supply of goods. The economic reforms of liberalisation, deregulation and privatisation should be so designed that they strengthen the Competition Policy and vice-versa. All trade policies should be open, non-discriminatory and rule-bound. They should fall within the contours of the competition principles. All physical and fiscal controls on the movement of goods throughout the country should be abolished. Government should divest its shares and assets in State monopolies and public enterprises and privatise them in all sectors other than those sub serving defence and security needs and sovereign functions. All state monopolies and public enterprises should be under the surveillance of Competition Policy to prevent monopolistic, restrictive and unfair trade practices on their part. Any form of discrimination in favour of the public sector and Government commercial enterprises except where they relate to security concerns must be removed. However, care should be taken not to create private monopolies out of public monopolies.[11]

The High Level Committee observed that the focus for most Competition Laws today in the world is in three areas, namely agreements among enterprises, abuse of dominance and mergers or, more generally, combinations among enterprises.[12]

As regards agreements among enterprises, the Committee observed that these have the potential of restricting competition. There can be "Horizontal" and "Vertical" agreements between firms. Horizontal agreements refer to agreements among competitors and vertical agreements to an actual or potential relationship of buying or selling to each other.[13] The High Level Committee has recommended that the Competition Law should cover both types of agreements, if it is established that they prejudice competition. Horizontal agreements relating to prices, quantities, bids (collusive tendering) and market sharing are particularly anti-competitive. Vertical agreements like tie-in arrangements, exclusive supply/distribution agreements and refusal to deal are also generally anti-competitive.[14] The High Level Committee has recommended that certain anti-competitive practices should be presumed to be illegal whereas agreements that contribute to the improvement of production and distribution and promote technical and economic progress, while allowing consumers a fair share of

10. See Executive Summary of the Recommendations of High Level Committee on Competition Policy and Law para 1(1999).
11. *Id.*, para 2.
12. *Id.*, para 3.1.
13. *Id.*, para 3.2.
14. *Id.*, para 3.3.

the benefits, should be dealt with leniently. Blatant price, quantity, bid and territory sharing agreements and cartels should be presumed to be illegal.[15]

Dominance, per se, is not objectionable, so much as resort by the dominant individual or entity to practices which frustrate or impair competition. The Committee expressed doubts as to whether dominance can be usefully assessed with reference to share of a party in the market for a product. Dominance needs to be appropriately defined in the Competition Law in terms of "the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its actions". The definition needs to be also in terms of "substantial impact on the market including creating barriers to new entrants".[16]

Abuse of dominance rather than dominance should be the key for Competition Policy/Law. Abuse of dominance will include practices like restriction of quantities, markets and technical development. Abuse of dominance, which prevents, restricts or distorts competition, need to be frowned upon by Competition Law.[17] Relevant market needs to be an important factor in determining abuse of dominance. Abuse of dominance will need to be dealt with by the Adjudicating Authority on the rule of reason basis.[18]

As regards mergers or amalgamations, the Committee observed that mergers need to be discouraged, if they reduce or harm competition.[19] For the purpose of deciding whether a merger/amalgamation of any of the existing entities will be detrimental to competition, a threshold limit based on the asset value of the merged entities was suggested. A merger will require consideration if the asset value of the merged entity is Rs. 500 crore or more, or if the asset value of the 'group' to which the merged entity belongs is Rs. 2000 crore or more. The expression 'group' as defined in the MRTP Act was proposed for adoption. Prior notification of the merger should be a statutory requirement; and a merger should be deemed to have been approved, if no reasoned order is received from the Mergers Commission conveying its disapproval within a time limit, say of ninety days.[20]

15. *Id.*, para 3.4.
16. *Id.*, para 3.5.
17. *Id.*, para 3.6.
18. *Id.*, para 3.8.
19. *Id.*, para 3.9.
20. *Id.*, at para 3.10.

The High Level Committee suggested that Competition Policy/Law needs to have necessary provisions and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO Agreements. In particular, agreements relating to foreign investment, intellectual property rights, subsidies, countervailing duties, anti-dumping measures, sanitary and phytosanitary measures, technical barriers to trade and Government procurement need to be reckoned in the Competition Policy/law with a view to dealing with anti-competition practices.[21]

The High Level Committee recommended the transfer of all cases involving unfair trade practices pending with the MRTP Commission on the date on which the MRTP Act ceases to be in force, to the concerned consumer courts under the Consumer Protection Act 1986, which have had overlapping jurisdiction over such cases. The assumption is evidently that unfair trade practices do not distort competition and that they have an adverse effect on consumers alone.[22]

The High Level Committee also suggested establishment of a Competition Law Authority to be called as 'Competition Commission of India' (CCI) to implement the Indian Competition Act to hear competition cases.[23] The Committee also suggested that the Headquarters of the CCI may be located in a metropolitan city other than Delhi with permanent Benches at Delhi, Calcutta, Mumbai and Chennai with further Benches to be decided by the Government from time to time.[24] Two members of the CCI would constitute the Mergers Commission.[25] CCI would have the power to formulate its own rules and regulations to govern the procedure and conduct of its business and also its administration. It would have powers to impose fines and sentences of imprisonment, to award compensation and to review its own orders. The trial before the CCI should be summary in nature. It would have limited powers of contempt. It would also have powers to review the orders of other regulatory authorities on the touchstone of competition. There would be a provision for advance ruling.[26] The investigative and prosecutorial wings will be separate but headed jointly by the Director General (Investigation & Prosecution). All complaints would be made only to CCI. The Director General (Investigation & Prosecution)

21. *Id.*, para 3.12.
22. *Id.*, para 4.2.
23. *Id.*, para 5.1.
24. *Id.*, para 5.4.
25. *Id.*, para 5.5.
26. *Id.*, para 5.8.

would only take up such cases referred to him by CCI. He would not have *suo moto* powers of investigation.[27]

On recommendations of High Level Committee, a Competition Bill was introduced in the Parliament, which has received the assent of both the Houses of Parliament and thus Competition Act has been passed in 2002. It has not been enforced so far.

V. Competition Act 2002

Competition Act, 2002 (hereinafter referred to as Act), will replace MRTP Act. Amending the MRTP Act would be time consuming as well as it would require drastic amendments. It would be wiser to repeal the MRTP Act as a more tailor made law is needed to allow for market economy to prosper.

The Act has shed the preoccupation of curbing the monopolistic, restrictive and unfair trade practices. Further the Act, unlike MRTP Act, does not owe its genesis to Article 39 (b) and (c) of Constitution of India. The Act has been framed to foster competition and to prevent practices having adverse effect on competition. It does not condemn concentration of economic power unless the same is being abused. The Act has been enacted with a view to provide the players in the economy with a level ground field to compete fairly so that all potential players get their piece of cake according to his or its efforts and potential.[28] The Act will promote the creation of a business environment and enhance the efficiency and productivity of the Indian economy.

The Act seeks to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of the consumers and to ensure freedom of trade carried on by other participants in India. To achieve these objectives the Act prohibits anti-competitive agreements, prohibits abuse of dominant position and regulates combinations.

The Act is divided into nine chapters. Chapter I defines the applicability of the Act and also defines the various expressions used in the Act. Chapter II provides for prohibition of certain agreements, abuse of dominant position and regulation of combinations. Chapter III provides for establishment of Competition Commission of India. Chapter IV defines duties, powers and functions of Commission. Chapter V defines duties of Director General. Chapter VI provides for penalties. Chapter VII provides

27. *Id.*, para 5.9.
28. See the Statement of Objects and Reasons of the Act.

for competition advocacy. Chapter VIII provides for finance, accounts and audit. And Chapter IX contains miscellaneous provisions.

The Act seeks to ensure fair competition in India by prohibiting trade practices, which cause appreciable adverse effect on competition in markets within India. For this purpose, Act provides for establishment of a quasi-judicial body, namely Competition Commission of India (CCI). The Act will not apply to Government Departments and enterprises performing sovereign functions, policy making aspects of Governmental activities preference in procurement from small scale industry units/ public sector undertakings and such similar policies. The Act also provides for exemption of certain classes of enterprises and international agreements from the applicability of the Act by way of specific notifications.[29]

The Act aims at curbing negative aspects of competition through the medium of CCI. CCI will have a Principal Bench and Additional Benches and will also have one or more Mergers Benches.[30] It will look into violations of the Act, a task to be undertaken by the CCI based on its own knowledge or information of complaints received and references made by the Central Government, the State Governments or statutory authorities.[31] The CCI can pass orders for granting interim relief[32] or any other appropriate relief and compensation[33] or an order imposing penalties.[34] An appeal from the orders of the CCI shall lie to the Supreme Court.[35] The Central Government will also have powers to issue directions to the Commission on policy matters after considering its suggestions[36] as well as the power to supersede the CCI if such a condition is warranted.[37]

The Act also provides for investigation by the Director General for the CCI. The Director General would be able to act only if so directed by the CCI but will not have any *suo moto* powers for initiating investigations.[38]

The Act confers power upon the CCI to levy penalty for contravention of its orders,[39] failure to comply with its directions,[40] or making of false

29. S. 54.
30. S. 22.
31. S. 19.
32. S. 33.
33. S. 34.
34. S. 42.
35. S. 40.
36. S. 55.
37. S. 56.
38. S. 41.
39. S. 42.
40. S. 43.

statements or omission to furnish material information.[41] The CCI can levy upon an enterprise a penalty of not less than ten per cent of its average turnover for the last three financial years.[42] It can also order division of dominant enterprises.[43] It will also have power to order demerger in the case of merges and amalgamations that adversely affect competition.[44]

The Act also seeks to create a fund to be called the Competition Fund.[45] The grants given by the Central Government, costs realised by the CCI and application fees charged will be credited into this Fund.[46] The pay and allowances and the other expenses of the CCI will also be borne out of this Fund.[47] The Act provides for empowering the Comptroller and Auditor-General of India to audit the accounts of the CCI.[48] The Central Government will be required to lay the annual accounts of the CCI, as audited by the Comptroller and Auditor-General and also the annual report of the CCI before both the Houses of Parliament.[49]

The Act aims at repealing the MRTP Act and the dissolution of the MRTP Commission.[50] The Act provides that the cases pending before the MRTP Commission will be transferred to CCI except those relating to unfair trade practices, which are proposed to be transferred to the relevant forums established under the Consumer Protection Act 1986.[51] This will do away with the overlapping jurisdiction of consumer forums and Competition Authorities over the matters relating to unfair trade practices.

VI. Competition Law: Dilemmas

Some persons advocate that there is no need for a competition law in market economy[52] since the market itself finds solutions to the problems as they emerge. A concern is also voiced by some that since at present, the domestic industries lack the competitive strength, it is premature to implement a Competition Law. A transition period of say 7-10 years may be provided to the domestic producers and suppliers to enable them to get ready to face competition particularly at the global level.[53]

41. S. 44.
42. S. 27.
43. S. 28.
44. S. 31.
45. S. 51.
46. *Ibid.*
47. *Ibid.*
48. S. 52.
49. S. 52.
50. S. 66.
51. *Ibid.*
52. D. R. Pendse, *No to Competition Law*, The Economic Times, 16 February, 2000., S. N. Chary, *Compete, Don't Ask for Competition Policy*, The Economic Times, 13 January, 2000.

The High Level Committee in its Report, had suggested a list of measures to be adopted by government before adoption of a competition policy/law. The measures to be adopted are scrapping of Industries (Development and Regulation) Act, 1951, removal of all reservations for small-scale sector, economic reforms of liberalization, deregulation and privatization to be further progressed[54], amendments to Industrial Disputes Act 1947 and the connected statutes for an easy exit, structures like Board of Industrial Financial Reconstruction to be eliminated, concerns relating to trade dimensions vis-à-vis WTO agreements and principles to be addressed, Urban Land (Ceiling and Regulation) Act 1976 to be repealed, withl these recommendations to be applied to all industrial and professional enterprises, including those in private as well as public sector.

The government is taking steps in the directions suggested by the High Level Committee. But all these measures are not that easy to be implemented and it may take years to adopt all of these measures. These may be pre-requisites for implementation of Competition Law, in the opinion of the High Level Committee, but further delay in implementation of Competition Law may defeat the very purpose of Competition Law. One of the reason being, barriers to FDI are being dismantled. There is a need to ensure that early entrants among foreign MNCs do not proceed to engage in practices, which have the effect of thwarting competition. Given the inherent advantages that MNCs possess in terms of size, technology etc. they should not resort to practices that drive Indian firms out of arena. The worst effect of liberalisation would be letting MNCs take advantage of the situation in many ways that result in limiting competition in domestic markets.[55] Freely letting the MNCs in a wide range of sectors, where India would have attained international scale or competitiveness would have encouraged competition. But such is not the case. Indian firms face handicaps in meeting competition from MNCs. Japan and Korea have gone ahead and enacted competition laws as the process of deregulation and opening up of external sector was still underway.[56]

53. Chakravarthy, *Does Competition Require Law?*, The Economic Times, 23 November, 1999.
54. *Supra* n. 12.
55. D.A. Kong, *Trade Policy and Its Implications*, 36 Foreign Trade Review (2001).
56. Mohan T. T. Ram, *Competition Policy Dilemmas*, 35 Econ. & Pol. Weekly 2499 (2000).s

Another objection taken to implementation of Competition Law is, that CCI, under the Act, has been vested with vast discretionary powers. There cannot be clear-cut rules as to what constitutes anti-competitive agreements or as to what conduct amounts to abuse of dominant position. Each matter should be subjected to 'rule of reason' test. Each instance requires an examination based on economic considerations. This all requires vesting of discretionary powers with the CCI which may be misused for want of expertise and could end up throttling competition.

But then not having a competition law is no less risky. The Indian market has been opened to MNCs and will be open to more new comers. If the market is left to regulate competition on its own, again the result might be throttling of competition. The reason being that Indian firms cannot compete against MNCs in view of the inherent strengths of MNCs as mentioned above and Indian firms lack the competitive strength. When there is a competition between such unequal entities; it is not a fair competition and the result is throttling of competition. Another consequence may be that in sunk costs, imperfect information, lumpy investments involved and barriers to competition will arise and firms will resort to practices that limit competition and impose costs on economy.

VII. Concluding Remarks

The purpose of economic liberalization is to strengthen the domestic industries by freely allowing foreign technology so as to lead to technical up-gradation of the industries, and not to lead to selling of Indian industries to MNCs. Removal of restrictions on investments and expansion by MRTP Act has allowed domestic industry to restructure its organisational behaviour. But reliance on market forces alone, to help the reorganisation of domestic industries is insufficient to provide the combative strength to domestic industry. Competition Law has its own role to play in providing a level playing field to domestic firms for effectively competing against MNCs. MRTP Act has been unsuccessful in providing such a level playing field. Thus the Competition Act 2002 should be brought into force at the earliest while allowing the State, at the same time, to help domestic industries enhance their competitive strength.

The Government has to make a choice and the choice is between market and regulators. The Government has set up so many regulatory bodies, like Telecom Regulatory Authority of India, Securities Exchange Board of India etc. These also lacked expertise at the initial stages but regulators have learnt along the way. There is a learning process involved and in case of Competition Law, the sooner the better.

The Internet Domain Name System: Interface with Trademarks, Disputes and their Resolution

*Ravinder Singh**

I. Introduction

During the last twenty five years, the Internet has evolved from the United States Government's research project into a prominent international medium of communication[1], in particular, after the invention of World Wide Web. Throughout this evolution, the domain name system has played a major role in the rise of the internet's popularity by providing a "human friendly" method of internet navigation[2], thus facilitating international commerce and global exchange of knowledge. The rapid growth[3] of the internet and development of domain name system (DNS) however, have come with a price - namely, an immense strain on the international trademark law system ill equipped to deal with cyber - controversies[4]. Disputes over rights to domain names, which serve as a source - identifying function in cyberspace, arise at the heart of this complexities presented by domain names dispute. A host of vehicles have been developed, by which aggrieved parties may assert their rights. These remedies may be obtained in one of the two forms - first, the traditional

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1. The internet has its root Apranet established in the early 1970s, gone through an evolutionary process and attained rapid growth into a mass market means of communication was set into motion in 1992, when the National Science Foundation (NSF) was given statutory authority to allow commercial activity on a national high speed network. Scientific and Advanced Technology Act of 1992, Pub. L. No. 102 - 476 S 4, 106 stat. 2297, 2300.
2. Final report of the WIPO Internet Domain Name Process, para. 54, at http://wipo2.wipo.int/process1/report/finalreport.html(last visited Aug 7, 2003).
3. Nua reported approximatley 580.78 million people had internet access, representing some 10% of the world's population - (*see* Nua Internet Surveys, Onwards and Upwards, (August 12, 2002)) at http://www.nua.com/surveys.
4. The prefix "Cyber" is derived from the term "cyberspace", and it is attched to all kinds of other words "to denote internet related things". *Sporty's Farm L.L.C.* v. *Sportsman's Market Inc.* 202 F.3d 489,493 n.5 (2nd Cir. 2000).

litigation[5] and secondly, the private arbitration under the Uniform Domain Name Dispute Resolution Policy[6] (UDRP) promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN).[7]

II. The Internet Domain Name System (IDN)

A. An Overview of Basics of Domain Name System

The Internet Domain Name System is the address regime of the virtual world - it lets the rest of the world to know where you are located on the Internet.[8] The DNS serves the central function of facilitating users' ability to navigate the Internet. It does so with the aid of two components: the domain name and its corresponding Internet Protocol (IP)[9] number. A domain name is a "human-friendly" address of a computer that is usually in the form that is easy to remember or to identify, such as www.wipo.net or www.microsoft.com and an IP number is the unique underlying numeric address, such as 192.91.247.53 is corresponding IP number for domain name www.wipo.net and 207.68.137.43 is for www.microsoft.com.[10] These user-friendly addresses are commonly referred to as Uniform Resource Locators[11], which are representing or connected to numeric Internet Network Address or Internet Protocol Number (INA).

The INA system operates similarly to traditional postal system.[12] Where a traditional address might include a house number, street, city and state,

5. Litigation commonly occurs under the existing substantive laws, i.e. laws on Trademarks which varies from country to country. The US is the only country which has enacted a specifial law on to check cybersquatting by enacting Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. $ 1125(d) (1994 & supp. 1999).
6. Uniform Domain Name Dispute Policy, ICANN at http://ww.icann.org/udrp/udrp_policy_24oct99.htm (last visited on Aug. 1, 2003).
7. ICANN controls all IP address space allocation, protocol parameter assignment, DNS management, and root server system management functions. About ICANN at http://www.icann.org/general/abouticann.htm.
8. *See* generally *Intermatic, Inc.* v. *Toeppen*, 947 F. Supp. 1227,1230 (M.D.3.1996): The DNS is sometimes referred to in literature as the Internet Domain Names (IDN).
9. A key communication protocol used in the internet is called, appropriately the internet protocol. Usually abbreviated IP, the protocol specifies, in great detail, the rules that define the details of how computer communicate. Each computer that connects to the internet must follow the rules of the internet protocol.
10. Michael V. LiRocchi, Trademarks and Internet Domain Names in the Digital Millenium 265 (1999).
11. See Margaret Sylvia, PB 1200: Information Resources in Public Justice-Internet Explanations (1998), at http://library.stmarytx.edu/classes/pb1200/internet/url/sld02.html).
12. *Paravision Int'l, L.P.* v. *Toeppen*, 141F.31316,1318(9th cir 1998).

an INA has similar elements, such as a hostname, sub-domain, second-level domain (SLD) and top-level domain (TLD). For example, in the INA "http://www.delhiuniversity.com". The "http" is the hostname[13], "www""[14] is the sub-domain "delhiuniversity" is the SLD and "com" is TLD". TLDs. are limited in number, while the numbers of SLDs in TLD is unlimited.

Prior to the authorization of ICANN to the inclusion of seven new TLDs in the DNS, the TLDs were in existence already are of two types: Generic gTLDs and Country Code TLDs (ccTLDs).

Generic TLDs (gTLD) are:

.com	for commercial use
.edu	for educational institutions
.org	for miscellaneous and non-profit organization
.net	for networking providers
.gov	for government organizations
.int	for international treaty organization
.mil	for defense

Three of these seven gTLDs are open in a sense that there is no restriction on the persons on entities that may register name in them. These three gTLDs are .com, .net, and .org. The other four are restricted, only certain entities meeting certain criteria may register names in them.

There are at present 243 Country-Code Top Level domain names(ccTLDs).[15] Each of these domains bears a two letter country code derived from standard 3166 of the International Organisation for Standardization (ISO3166), for example, au(Australia), .br(Brazil), .ca(Canada), .in(India). Each country has an agency that handles registration of geographic domain names, also known as NICs (Network Information Centers).[16]

13. The term "http" is used merely for the purpose of demonstration, as the authors recognizes the existence of additional host names such as "ftp" and "gopher". The full form of "http" is Hyper Text Transfer Protocol, which is used to access a World Wide Web document.
14. The "www" represents World Wide Web, an internet service that organize information using hypermedia.
15. See Final Report of the WIPO Internet Domain Name Process (April 30, 1999) para 7, at http://www.wipo2wipo.int.
16. For example NIC in France: NIC France; in the U.K: Nominet; In Germany: DENIC etc.

B. The Internet Domain Name Regime

There is no one body of law directly governing the Internet or IDN. There is no president, controller or legislative body having direct jurisdiction or control over the internet or IDN registration.[17] However, as the Internet has grown from its modest origins, certain regulatory authority has been imposed on the system. In 1998 the US Dept. of Commerce (DOC) signed a contract relating to the administration of IDN registration to a California based non-profit organization known as the Internet Corporation for Assigned Numbers & Names (ICANN).

a. The US Government's Green Paper

On July 1, 1997, US President Bill Clinton directed the U.S. Secretary of Commerce to develop a means to overhaul, promote international participation, and increase competition in Internet Domain Name System.[18] On July 2, 1997 the US DOC issued a request and received over 430 comments. The result of these comments is the Clinton Administration's "Proposed Rule for Improvement of Technical Management of Internet Names and Addresses", otherwise known as "Green Paper".

b. The gTLD-MOU Regime

The gTLD Memorandum of Understanding (gTLD-MOU) was one of the first attempts to address the trademark-IDN problem in response to the Green Paper, which resulted from the effort of several parties including IANA, WIPO and ITU to create a new International governance framework in which policies for the administration and enhancement of the internet's global Domain Name System are developed and deployed.[19]

c. The U.S. Government's While Paper

On July 5, 1998, the National Telecommunication and Information Agency (NTIA), part of the U.S.DOC issued its statement of policy

17. *See* David. B. Nash, *Orderly Expansion of the International Top-Level Domains: Concurrent Trademark Users Nead A Way Out of the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 528 n.65 (1997).
18. IMPROVEMENT OF TECHNICAL MANAGEMENT OF INTERNET NAMES AND DOMAINS 15 Fed.Reg. 8825 (1998)
19. *See* ESTABLISHMW OF A MEMORANDUM OF UNDERSTANDING ON THE GENERIC TOP LEVEL DOMAIN NAME SPACE OF THE INTERNET DOMAIN NAME SYSTEM at http://www-gtld_mov.org/gtld_mou.html.

concerning "Management of Internet Names and Address" (White Paper).[20] The document issued in large part in response to gTLD-MOU, provides the U.S. government's policy regarding the privatization of the domain name system in a manner that allows for the development of robust competition and that facilitates global participation in the management of internet names & addresses.

d. The Internet Corporation for Assigned Numbers and Names (ICANN)

On October 2, 1998, then Director of IANA, sent a letter on behalf of the ICANN to NTIA, in response to the White Paper.[21] The letter was to inform NTIA that the new not-for-profit corporation to take over domain names and number of responsibilities performed by IANA and other entities under government contract has been formed. The letter suggested that ICANN represents the result of numerous discussion and negotiations, and is "...fully responsive to criteria and specific recommendations set forth in the White Paper."[22]

The NTIA responded by accepting ICANN proposal. The by-laws, the composition of the interim Board and other prominent documents concerning ICANN can be found at ICANN's websit.[23]

C. Latest Development in Domain Names

a. New gTLDs

On November 16, 2000[24] ICANN authorized the inclusion of seven new gTLDs in the DNS. The new gTLDs are:

.aero	for the aeronautical industry
.biz	for business activities
.coop	for accredited cooperatives

20. U.S. Dept of Commerce, MANAGEMENT OF INTERNET NAMES AND ADDRESS. at http://www.ntia.doc.org/ntiahome/domainname/6_5_98dns.htm.
21. Letter from John Postel, Director, IANA, to William M. Daley, Secretary of Commerce, Re:Management of Internet Names & Addresses (Oct 2, 1998) (visited on July 21, 2003) at http://www/iana.org/submitted/sub_letter.html.
22. ICANN purposes : INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBER AND NUMBER, ARTICLES OF INCORPORATION (visited on Aug. 10, 2003) at http://www.icann.org/articles.html.
23. http:/Avww.icann.org/13
24. *See* http://www.ican.org/minutes/relom_report_16nov00.html#Second Annual Meeting.

.info	for various activities
.museum	for museum
.name	for personal name
.Pro	for professional entities

The new gTLDs fall into two categories:

(1) The "unsponsered" gTLDs (.biz, .info,. name and .pro), which operate under policies established by "the global community directly through the ICANN process"[25] and

(2) The "sponsored" gTLDs(.aero, .coop and .museum) each being "a specialized TLD that has a sponsoring organization representing the narrower community that is most affected by the TLD."

The seven new gTLDs are managed under contracts concluded with the ICANN.

III. The Interface Between The Domain Name System and Trademark

Domain names have undergone a process of transmutation. Initially, domain names were intended to perform a technical function in a manner that was convenient to human users of the internet. They were intended to provide addresses for computers that were easy to remember and to identify without the need to resort to underlying IP numeric address. Precisely, because they are easy to remember and to identify, domain names have come to acquire a supplementary existence as business or personal identifiers. As commercial activities have increased on the internet, domain names have become part of the standard communication apparatus used by businesses to identify themselves, their products and their activities. This increasing significance of the domain names as business identifiers have come into direct conflict with the system of the business identifies that existed prior to the arrival of the internet and no doubt these were protected by the intellectual property rights, more precisely, under the trademarks.

IV. Domain Name Disputes

In addition to their function as locator of Internet sites, domain names have a function as identifiers of business and their goods or services on the

25. *See* http://www.icann.org/tlds/.

internet, which gives them an economic value comparable to that of other identifiers. This characteristic of the domain name has given rise to great many ownership disputes with other signs that existed prior to the advent of Internet and were protected by intellectual property right, such as trademarks. One system - the DNS - is largely privately administered and gives right to registration that results in global presence, accessible from anywhere around the world. The other system - the intellectual property right system - is publicly administered on a territorial basis and gives rise to rights that are exercisable only within the territory concerned.[26] The tension that exist between the nature of the two system has been exacerbated by a number of predatory and parasitical practices that has been adopted by some people to exploit the lack of connection between the purposes for which intellectual protection exists.

To understand proper legal framework surrounding these disputes, it is essential to categorize the types of disputes that arise.

A. Cybersquatting Disputes

B. Competitors Disputes

C. "Palming off" Disputes

D. Prody Disputes

E. Conflicting Interest Disputes

V. The Resolution of Domain Name Disputes

The intersecting area wherein the roots of disputes between the trade mark and the domain name lies has three crucial and most prominent factors, first, the basic function of both to act as an identifier, one on-line while the other off-line, secondly, the underlying commercial significance of both for any entity involved in business activities, thirdly, the convenient manner with which a trademark can be used as a domain name.

A Domain name disputes can be raised under:

i. trademarl: law;

ii alternative dispute resolution mechanism.

iii. cyberspace specific enactments.

A brief analysis of the case decided under all these categories have been made through random selection from countries all around the world.

26. WIPO Primer on Electronic Commerce and Intellectual Property Issues (May, 2000) (WIPO Primer) at http://www.economic.wipo.int/primer/index.html

A. Domain Name Disputes Resolved under Trademark Law

A dispute concerning the use of a trademark on the internet through a domain name resulting in trademark infringement can be raised under trademark law. The courts, have resolved these disputes by applying the trademark law into the Internet. However, the justifications given by the courts while applying the trademark law onto the Internet vary from country to country. A brief analysis of the decided case around the world reflects this difference in courts approaches.

a. The U.S. Cases

Domain name litigation is relatively new phenomenon for the U.S. Courts. As a result it is difficult to define precisely the present state of law in this area and the numbers of opinions are insufficient to create definite trends. The case law involving trademarks and domain names has taken two basic forms. The first type is the law suits brought by the trademark holders against parties that have registered trademarks as domain names. The second type is lawsuits brought by trademark holders against NSI.

One trend from these various cases appears to be emerging that the courts generally disfavor a party whose domain name is identical to the registered trademark or service mark of another party, and issue injunctional relief to them. In such cases, the courts tend to focus on the intent and purpose of the defendant registrants as part of the court's decision-making process.

In an Oregon case, *Interstellar Starship Services Ltd. v. Epix Inc.*[27], a Federal district court granted summary judgment against trademark infringement claim that was based on the use of another company's registered trademark as a part of domain name. Epix Inc. was the owner of a federal registration for the mark EPIX for "printed circuit boards and motherboard and computer programs for image acquisition, processing, displaying an transmisison."[28] Intersteller Starship Services registered and used the domain name epix.com, and Epix Inc. charged Intersteller with trademark infringement. Interestingly, the court concluded that Intersteller's use of epix.com could "initially" confuse actual or potential consumers of Epix, Inc. because they might go to the Interstellar website when they were seeking Epix, Inc. But the court held that the differences between the parties' goods and services were such that the Epix, Inc's customers "could not be seriously confused" by the use of the domain name.

27. 983 F. Supp. 1331 (D.Or. 1997).
28. *See id.* at 1326.

The courts have struggled with finding infringement in cases of "Cybersquatting". Many of the cases related to "cybersquatting" involve Dennis Toeppen as the defendant probably the most infamous "cybersquatter".[29] Two such cases involving Toeppen are *Panavision International L.P.* v. *Toeppen*[30] and *Internatic Incorporated* v. *Toeppen.*[31] Panavision claimed that Toeppen's registration of its trademark "panavision" as a SLD name with NSI constituted, *interalia*, trademark dilution acts.[32] Similarly, Intematic claimed that Toeppen's registration of its trademark "intermatic" as a SLD with NSI constituted trademark infringement, dilution and unfair competition under State and Federal law trademark law.[33] Toeppen admitted in both cases that plaintifs's marks were "strong" or "well-known" marks, and further that one of the motivating reason for registering the trademarks of plaintiffs as IDN was for the purpose of extortion.[34] However in neither case did Toeppen use the marks in connection with any goods or services related or unrelated plaintiffs' or any other conventional "commercial" use, nor was there any evidence of actual confusion.[35]

In both cases the courts were able to find that Teopean's conduct constituted trademark dilution under the Lanham Act.[36] Both the California and Illinois courts found that the registration of the plaintiff's marks for the purpose of extortion was a "commercial use" within the language of § 43(C) of the Lanham Act.[37]

There are also cases where the plaintiff attempted an end liability against NSI for allowing individuals to register marks as SLDs which infringe the plaintiff's trademarks.[38]

One of the most noted case of this type is *Lockheed Martin Corp.* v. *Network Solutions, Inc.* Lockheed Martin brought infringement, unfair competition and dilution action against NSI for allowing third parties to

29. Dennis Toeppen registered about 243 domain name as that of famous company's trademarks.
30. Panavision Int'l V. Toeppen, 945 F. Supp. 1296, 1304 (C.D. Cal. 1996), aff'd 141 F. 3d 1316 (9th Cir 1998).
31. Intermatic Inc. v. Toeppen, 947. F. Supp 1227 (N.D. Ill, 1996).
32. Panavision, 141 F. 3d at 1319.
33. *Intermatic* 947 F. Supp. at 1232.
34. *Panavision*, 141 F.3d at 1325; *Intermatic*, 947 F. Supp. At 1239.
35. *Panavision*, 141 F.3d at 1324-24; *Intermatic*, 947 F. Supp. at 1236.
36. *Id* at 1236; *Panavision*, 141 F 3d at 1327.
37. *Intermatic*, 947 F. Supp. at 1239, *Panavision*, 141 F.3d at 1324-25.
38. *Lockheed*, 985 F. Supp. at 949.

register marks similar to Lockheed's "skumk works" mark as an IDN.[39]The court stated essentially that NSI served merely an administrative function regarding registration of IDNs and in no way "commercially" used any marks that it allows to be registered as IDNs, and therefore was not liable for infringement of Lockheed's mark. On essentially the same reasoning, the court dismissed Lockheed's claim against NSI for unfair competition and trademark dilution.

Based on the foregoing cases, it would appear that in determining whether or not to extend protection to registered marks from unauthorized use as IDN, be they famous or not, courts focus on the intent and purpose of the user.[40] Where the defendant's conduct involves either traditional unauthorised use of a mark or that of a cyber pirate, and thereby indicating corrupt intent, the defendant will be subject to liability. However, where the defendant is an entity like NSI, courts relying on their equitable power to prevent subjecting such parties to liability.[41]

The US Patent and Trademark Office (PTO) has adopted a policy regarding IDN which is in accordance with the case law. Many courts have found that mere registration of a trademark as an IDN, without use or corrupt intent, will not rise to the level of "trademark type" usage and therefore not be actionable. Similarly, the PTO has stated that while an individual may register an IDN as a trademark with the PTO, the applicant will have to show that it offers services on the Internet and that the mark is used in conjunction with those services before the marks will be registered. "The use of an IDN as a mere directional reference, similar to use of a telephone number or address on stationary, business cards or advertisements is not use of the name as a source identifier.[42] The PTO has further limited the scope of services that are acceptable. Ultimately, the courts and the PTO are in relative accord on the significance of one's registration or use of a mark as an IDN.

b. The UK Cases

An early trademark dispute involving parties of the two states was *Prince PLC* v. *Prince Sports Group, Inc.*[43] In this case, *Prince Sports*

39. *Ibid.* The marks registered were "skunkwrks as an e-mail address and "shunkwerks" as an IDN for website.
40. Compare *Panavision*, 141 F.3d at 1323-24 with Lockheed, 985 F. Supp. at 961.
41. *Lockheed*, 985 F. Supp at 961.
42. *Id.* (citing In re Advertising & Mktg. Dev., Inc., 821 F. 2d 614, 620).
43. *Prince PLC* v. *Prince Sports Group, Inc.*, Ch 2355 (1997); see Sally M. Abel, Connie L. Ellerbach, "TRADEMARK ISSUE IN CYBERSPACE: THE BRAVE NEW FRONTIER", 29-31 (Rev. 10.1) (1997).

Group, Inc. (PSG), a manufacture of sports equipment, sought to register the IDN "prince.com".[44] However, Prince PLC, an information technology company, had already registered the domain names" prince.com" and "prince.co.uk" Although PSG had valid trademarks registration for "prince" in both the US and the U.K., Prince PLC also had valid common-law rights in the UK to use the mark "prince". PSG, in an effort to start NSI dispute procedure, sent a case and desired letter to Prince PLC, threatening to sue if Prince PLC did not immediately transfer the IDN to PSG. As required by the NSI dispute policy, Prince PLC had 30 days to relinquish the IDN or produce a valid trademark registration. Instead, Prince PLC brought an action for declaratory relief in London's High Court, Although, Prince PLC had not satisfied NSI policy requirements, NSI nonetheless deposited the IDNs with the UK court.

The UK Court found that there was no actual infringement of PSG's made by Prince PLC. Because PSG was involved in goods such as sporting goods and related accessories and was in no way connected with information technology (the type of services provided by Prince PLC), the Court found no likelihood of confusion. The Court therefore declared the PSG's threats were unjustified and granted an injunction against any further threats.

While the Prince Case involved parties that both had valid claims to the disputed IDN, another well known case, *Harrods Limited* v. *UK Network Services Limited, et al.*, was a classic cyber squatter story.[45] In the case, UK Network Service Limited (UKNSL) has registered the IDN "harrods.com". Harrods initiated NSI's dispute resolution proceedings and further brought trademark action against UKNSL in England alleging, *inter alia*, that UKNSL had threatened to use the IDN in the course of trade and was really attempting to secure payment from Harrods for the IDN.The Chancery Division of the High Court ordered UKNSL to give up "harrods.com" and to refrain from infringing or passing off its services as those of Harrods Limited.

On the cyber squatting front, in *Marks & Spender PLC* v. *One In A Million*[46], the High Court of Justice, Chancery Division, recently enjoyed the activities of two cyber-dealers and their related companies, who had obtained and were offering for sale or "hire" numerous domain names containing well known marks, such as burgerking.co.uk, motorola.co.uk, britishtelecom.co.uk, spice-girls.net and virgin.org. In this group of cases.

44. *See Prince PLC* v. *Prince Sports Group, Inc.*, Ch 2335 (1997).
45. *Harrods Ltd.* v. *UK Network Services Ltd.*, 1996 H 5453 (1996).
46. *Marks & spencer PLC* v. *One In A Million*, [1998] F.S.R. 265 (Ch 1997).

the court enjoined the "threat of passing off" (a threat which would become a reality if an offending domains was sold to and used by a stranger to the trademark owner).

c. Indian Cases

There are not many cases decided on the domain name in India. Probably the first reported Indian case is *Yahoo! Inc.* v. *Akash Arora*,[47] wherein the plaintiff, who is the registered owner of the domain name "yahoo.com" succeeded in obtaining an interim order restraining the defendants and agents from dealing in services of goods on the internet or otherwise under the domain name "yahooindia.com" or any other trademark or domain name which is deceptively similar to the plaintiff's trademark "Yahoo".

In *Rediff Communication Ltd.* v. *Cyberbooth*[48] the petitioner, Rediff Communications Ltd., registered the domain name "Rediff.com" with Network Solution Inc. on 8.2.97. On 31.1.99, the defendant, Cyberbooth, registered the domain name "Radiff.com" with Network Solution Inc. Aggrieved by that action of the defendant in registering the domain name "Radiff.com", the plaintiff initiated proceeding under the trade and Merchandise Marks Act 1958. The petitioner alleged that the defendants had adopted the word "Rediff" as part of their trading style deliberately with a view to pass off their business services as that of the plaintiffs. The petitioner also contended that this was deliberately done by Cyberbooth to induce members of the public into believing that Cyberbooth is associated with Rediffusion group, and thereby illegally trade upon the reputation of the plaintiff.

The Court held that there is every possibility of the internet user getting confused and deceived in believing that both domain names belong to one common source and connection although the two belong to two different persons. The Court was satisfied that the defendants have adopted the domain name "Rediff" with the intention to trade on the plaintiff's reputation and accordingly the defendant was prohibited from using the same domain name.

In *Titan Industries Ltd.* v. *Prashant Kooapati*, the defendant registered the domain name "tanishq.com". The plaintiff company, which has been using the trademark "tanishq" with respect to watches manufactured by it, used for passing off alleged that the use of the domain name by the

47. 1999(2) Ad (Del) 229.
48. AIR 2000 Bom. 679.

defendant would lead to confusion and deception and damage the goodwill and reputation of the plaintiff. The Delhi High Court has granted an ex-parte ad interim injunction restraining the defendants for using the name "TANISHQ" on the Internet or otherwise and from committing any other act as is likely to lead to passing off the business and goods of the defendants as the business and goods of the plaintiff.[49]

In *SAO AG & Anr* v. *Davinderpal Singh Bhatia & Anr*, the defendant who had registered "sapwizard.com" and "sapmaster.com" offered to sell the two domain names to SAP America for US $ 38,000. The defendants were immediately restrained by the Delhi High Court.

B. Domain Name Disputes Resolved under Alternative Domain Name Dispute Resolution Mechanism

In response to concerns about the judicial remedies and the conflict between territorial trademark systems and the "global dimension" of domain name disputes, in June 1998 the World Intellectual Property Organization (WIPO) accepted the United States proposal that to develop the recommendations for a consistent international approach. Within a year, WIPO published a report concluding that ICANN should create a uniform administrative procedure for the resolution of disputes concerning generic top-level domain (gTLD) registrations. ICANN implemented most of WIPO's recommendation in its Uniform Domain Name Dispute Resolution Policy (UDRP).[50]

The UDRP represents a substantial departure from traditional international trademark law. International trademark issues customarily have been addressed through complex and time-consuming negotiations that results in multinational treaties.[51] However, these traditional mechanisms are ill suited to the fast moving, dynamic world of Internet.[52]

49. See at http://www.gewf.com/articles/journal/jil_July99_1.html, see also at www.indiaip.com/main/iplaw/caselaw.main.html.
50. SECOND WIPO INTERNET DOMAIN NAME PROCESS, at http://wipo2.wipo.int/process2 (last visited on Aug. 9, 2003).
51. *See*, e.g., TRIPs, (providing international minimum standards for trademark protection); Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted June 27, 1989, WIPO Pub. No. 204(E) (international standards for registration).
52. Marcelo Halpern & Ajay K. Mehrotra, *From International Treaties to Internet Norms: The Evolution of International Trademark in the Internet Age*, 21 U. PA. J. INT'L ECON. L 523, 523(2000) (characterizing the old treaty process as "economically obsolete"); David R. Johnson & David Post, *Laws and Borders-the rise of Law in Cyberspace*, 48 STAN. L. REV 1367, 1367 (1996) (suggesting that the internet necessitates a radical shift in legal analysis).

In this complex and sometimes contradictory setting, the UDRP has emerged a hybrid system, applying what is essentially established national trademark law, but administering it through an organization whose direction are selected partially through international common law principles.

a. An Overview of the Fundamentals of the UDRP

The registrants are required to submit to a mandatory administrative proceeding conducted by a dispute-resolution service provider approved by ICANN where a complainant asserts that:

(1) the domain name is identical or confusingly similar to a trademark or service mark in;

(2) which the complainant has rights; and

(3) the registrant has no rights or legitimate interest in respect of the domain name; and

(4) the domain name has been registered and is being used in bad faith.

To succeed, the complainant must prove that all the elements are present.[53] The policy provides some guidance as to what constitutes evidence of bad faith registration and use of a domain name.[54] They include:

(1) circumstances indicating that the registrant has acquired the domain name primarily for the purpose of selling, renting or otherwise transferring it to the complainant who is the owner of the trademark or service mark, or to a competitor of the complainant, for valuable consideration in excess of "out-of-pocket" costs directly related to the domain name;[55] or

(2) the registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that a pattern of such conduct is evidenced;[56] or

(3) the domain name has been registered primarily for the purpose of disrupting the business of a competitor;[57] or

53. ICANN Policy, section 4(a)(i) (ii) ad (iii).
54. *Id.* S. 4(b).
55. *Id.* S. 4(b)(i).
56. *Id.* S. 4(b)(ii).
57. *Id.* S. 4(b)(iii).

(4) the domain name has been registered primarily for commercial gain through creating a likelihood of confusion.[58]

A respondent can demonstrate rights or a legitimate interest in a domain name by presenting evidence that:

(1) before any notice to the respondent of the dispute, the respondent used or prepared to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services;

(2) the respondent has been commonly known by the domain name, even if no trademark or service mark rights have been acquired;

(3) legitiamte non-commercial or fair use of the domain name, without intent to divert consumers or tarnish the trademark or service mark for commercial gain, is being made.[59]

A proceeding commences when the complainant submits a complaint to an ICANN approved dispute resolution service provider of their choosing. The complainant must specify whether the dispute is to be decided by a single-member or three-member panel. The fee for a single-member panel is paid entirely by the complainant.[60] In the event that a three-member panel is requested, the complaint must submit names and contact of three candidated from a roster of any ICANN-approved provider to serve as one of the panelists.[61]

ICANN Policy provides that panelists should be "impartial and independent" and must disclose any circumstances that may give rise to justifiable doubt as to the panelist's impartiality or independence. Parties must be treated with equality by the panel, with each party according a fair opportunity to present its case.[62]

b. Recent status of Proceedings under UDRP.

There are five Dispute resolution providers (Listed Below) who apply UDRP along with supplemental rules to resolve Domain Name disputes respectively.

58. *Id.* S. 4(b)(iv).
59. *Id.* S. 4(c) (i) - (iii).
60. *Id.* S. 6(b).
61. *Id.* S. 4(b) (iv).
62. ICANN Rules, S. 10(b).

CPR=CPR Institute for Dispute Resolution

DeC=Disputes.org/eResclution Consortium

eRes=Disputes.org/eResolution Consortium

NAF=National Arbitration Forum

WIPO=World Intellectual Property Organisation

Thousands of cases have been decided since UDRP implementation. The latest status of the proceedings under UDRP.[63]

c. A Survey of Indian Cases Decided Under UDRP

TATA Sons Ltd. v. *The Advance Information Technology Association*[64] and *TATA Sons Ltd.* v. *D and V. Enterprises*. TATA a well known business group in India was forced to file complaints against the respondents. In the first complaint, the respondent is the registrant of domain name tata.org registered with Network Solutions Inc. (NSI).

The Panel reached the conclusion in first case that all the three essentials ingredients of the UDRP have been satisfied and ordered the transfer of the domain names to the complainant.[65]

The Panel in the second complaint where the domain name bodacioustata.com was in issue found that, although, the domain name in question is not similar to the complaint's registered trademark as it adds the word bodacious in his domain name, nevertheless, the respondent tries to "cash ride" on the complainant's image and status. It was also found that the respondent is portraying their explicit sexual and pornographic material which gives an impression that the complainant has entered into these business activities and thus tarnishes the image, reputation and goodwill of the complainant.

Mahindra and Mahindra Limited v. *Neoplanet Solution*.[66] A cybersquatting case where the respondent registered domain name <mahindra.com> with the Network Solutions Inc (NSI). The Panel concluded that the respondent is a cyber pirate and he does not have any rights or interest in the disputed domain name which he was registered and used in bad faith.

63. Available at http//www.icann.org/udrp-stat.htm
64. WIPO case No. 2000-0479.
65. Case No. D2000-0248 http://arbiter.wipo.int/domain/decisions/htm/d2000-0248.html
66. WIPO Case No. D2000-0263 http://arbiter.wipo.int/domains/decisions/html/d2000-0263.html

Some other case are *The Cox and Kings India Ltd.* v. *Rabesh Sud*[67] *Standard* v. *Realy*[68], *Pifzer, Inc.* v. *Deep Soni and Ashok Soni.*[69] *NIIT Ltd.* v. *Parathasarthy Venkatraman and Hero Honda Motors Ltd.* v. *Rao Tella.*

The more recent cases are *Red Bull GmbH* v. *Bayer Shipping & Trading Ltd.*[70], *Deutsche Telecom AG* v. *Ginjupali Krishan Kishore*[71], *NIIT Ltd* v. *Vanguard Design*.[72]

C. Domain Name Dispute through Cyberspace Specific Laws

To date, the most active area for legal skirmishes has been domain name disputes that involve accusation of trademark infringement, usually by cybersquatters. Until recently there has been no legislation which governs the trademark infringement issues on the internet. The US is the first country to introduce cyberspace-specific trademark legislation with the Anti-Cybersquatting Consumer Protection Act of 1999 (ACPA), which is now part of the U.S. trademark law.

A. The Anti-Cybersquatting Consumer Protection Act

Trademark holders were given specific statutory protection against cyber squatting in 1999, which the enactment against the ACPA.[109]

Prior to the enactment of ACPA cyber squatting cases has been decided in the U.S. Federal Court on dilution grounds.[74] The remedy section of the Lanham Act was correspondingly amended[75] to provide trademark holders a strong weapon against cyber squatters up to $ 100,000 in statutory damage per domain name.[76]

67. Case No. D 2000-00411.
68. 1967 RPC 589.
69. WIPO Case No. D 2000-07-82.
70. 2003 (27) PTC 164 (WIPO).
71. 2004 (28) PTC 225 (WIPO).
72. 2004 (28) PTC 98 (WIPO).
73. Pub. L. No. 106-113, 113 Stat. 1502 (1999).
74. *See*, e.g. *Panavision*, 141. F.3d 1316, 1324-27 (9th Cir.1998).
75. Pub. L. No. 106-113 Stat. 1501, 1536 (codified as amended at 15 U.S.C. § 1117 (d) (1994 & supp. V. 1999).
76. *Id* at 1537. The Courts have not hesitated to grant this remedy against particularly egregious cyber squatters. *See*, e.g., *Elecs. Boutique Holding Corp.* v. *Zuccarini*, No. C4A.00-4055, 2000 WL 1622760, at 1-7 (E.D. Pa.Oct.30, 2000) (assessing $ 5,00,000 in statutory damage against notorious cbersquatter John Zuccarini for registering misspelling of plaintiff's domain name and profitting by ensnaring users in a "mousetrap" of advertising windows).

The Act states that cyber squatting occurs when the person registering a domain name containing a trademark "has a bad - faith intent to profit from the mark" and "registered, traffics in, or uses" a domain name that contains the trademark, either verbatim or in a diluted form ("identical or confusingly similar to or dilution of the mark").[77]

B. Brief Survey of Cases Decided Under ACPA

Sporty's Farm LLC v. *Sportsman's Market, Inc.*[78] The 2nd Circuit found that Sporty's Farm, a Christmas tree company, registered an Internet domain name in bad faith in order to take advantage of Sportsman's Market, Inc.'s well-known mark. The court found that Sporty's Farm had violated the Federal Trademark Dilution Act, 15 U.S.C., 1125(C), and enjoined Sporty's Farm from using the Internet domain name "sportys.com" This was the first case decided under the ACPA.

Virtual Works, Inc. v. *Volkswagen of America, Inc.*,[79]The fourth circuit held that plaintiff violated the Anticybersquatting Consumer Protection Act by registering and offering to sell to defendant the domain name vw.net, which contains defendant Volkswagen's famous "vw" mark.

Some other cases are *Mattel Inc.* v. *Adventure Apparel*,[80] *People for the Ethical Treatment of Animals* v. *Doughney*,[81] *E. and J. Gallo Winery v. Spider Webs Ltd.*,[82] *The Toronto-Dominion Bank* v. *Boris Karpachev*,[83]*Sallen* v. *Corinthians Licenciamentos Ltd*,[84] *Bird* v. *Parsons*.[85]

VI. Conclusion

The infrastructrue and technology used in the domain name system allows network users to easily locate and connect to host computers around the world. Technically speaking, the DNS can be described as a distributed, replicated, data query service chiefly used in Internet for translating specific domain names into their underlying Internet Protocol

77. 15 U.S.C. § 1125(d) (1)(A)(1) & (2).
78. (2d Cir. March 2, 2000).
79. 238 F.3d 262 (4th Cir., January 22, 2001).
80. S.D.N.Y. September 19, 2001.
81. 263 F.3d 359(4th Cir., August 23, 2001).
82. 129 F. Supp. 2d 110 (S.D. Tex., January 24, 1001) aff'd., 286 F.3d 270(5th Cir., 2002).
83. 188 F. Supp. 2d 110 (D. Mass Intellectual Property, March 6, 2002).
84. 127 F.3d 14(1st Cir. 2001).
85. 289 F. 3d 865 (6th Cir. 2002).

(IP) numbers, which serve as the routing addresses for specific host computers located on the network.

Of course, domain names have also taken a second overriding and non-technical function by serving as common business and personal identifiers. This function is much more in line with the widely held understanding of a domain name, particularly as its technical functions are, as with so many other user-friendly computer applications, invisible to the user. With the expansion of the Internet following the advent of World Wide Web the domain names been considered a valuable part of many companies brands.

Domain names can be expected to continue to play an important role for businesses as well as for other non-commercial, public or personal purposes. This is particularly true for a domain name to effectively serve, at one and the same time, as a branding or identification device for a business or an organisation or a person, and as the functional mechanism to locate its website. The domain name has thus evolved to present a novel and potent characteristic by combining these two features into one user-friendly label.

These particular features of the domain name leads to a conflict with existing identifiers i.e. the trademarks. A variety of domain name disputes have already emerged. The prevalent mechanism for the domain name dispute resolution takes place in three ways, firstly, under traditional trademark law, secondly, under UDRP and thirdly under cyber specific legislations, such as, ACPA. All three mechanism are functioning well though not effectively and not up to the predetermined objectives, still their significance cannot be under estimated. It requires a more comprehensive, harmonised and dynamic approach to resolve domain name disputes more effectively with special emphasis on cyber specific legislations.

The International Criminal Court and Universal Jurisdiction

*Anju Rani**

The International Criminal Court (ICC) is a treaty-based organisation governed by the countries that have ratified or acceded to its treaty, the Rome Statute. Unlike the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), created by Security Council Resolutions, the jurisdiction of the ICC is not chronologically or geographically limited.

The establishment of the ICC and its jurisdiction over nationals of non-party states allegedly in violation of the Vienna Convention of the Law of Treaties, have been the subject of intense debate. In the note, however, it is not that aspect that shall be discussed, but instead the nature and extent of the jurisdiction of the ICC and how it compares with the concept of universal jurisdiction.

I. Jurisdiction of the ICC

A perusal of the Rome Statute gives us the following jurisdictional regime of the ICC.

The preamble to the Rome Statute states that 'the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions.'[1]

Article 11 lays down the temporal jurisdiction of the ICC. According to paragraph 1 the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute; the Statute does not have retrospective operation. The Rome Statute entered into force on the 1st of July 2002. Thus crimes committed before the 1st of July 2002 do not fall within the jurisdiction of the ICC.

Paragraph 2 lays down that if a State becomes party to the statute after its entry into force, the Court may exercise its jurisdiction only with respect

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1. Preamble, para. 10, Rome Statute.

to crimes committed after the entry into force of the statute for the State unless the State has made a declaration under Article 12, paragraph 3. In a situation where crimes falling within the subject matter jurisdiction of the Court have been committed by a national of a non-state party, and the State has subsequently acceded to the Statute, then the ICC shall not have jurisdiction over such crimes if that State has not made a declaration under Article 12, paragaraph 3.

Article 12 lays down the preconditions to the exercise of jurisdiction by the ICC. Paragraph 1 of Article 12 states that a State which becomes party to the Statute accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5. Article 5 limits the jurisdiction of the Court to 'the most serious crimes of concern to the international community as a whole'. These are listed as (a) the crime of genocide (b) crimes against humanity (c) war crimes, and (d) the crime of aggression. Article 5 paragraph 2 provides for the future adoption of the provision with regard to the crime of aggression. Crimes listed under (a), (b) and (c) have been further defined under Articles 6, 7 and 8 respectively. In keeping with the objective of dealing with 'only the most serious crimes of concern to the international community as a whole', the definitions of these crimes delineate the categories therefor. Thus crimes against humanity are defined as meaning 'any of the following acts when committed *as part of a widespread or systematic attack* against any civilian population, with knowledge of the attack' (emphasis supplied). Similarly, Article 8 provides that the Court shall have jurisdiction in respect of war crimes in particular when committed *as part of a plan or policy or as part of a large-scale commission of such crimes* (emphasis supplied). Therefore, further qualifications have been appended to the existing definitions under international law of crimes against humanity and war crimes for the purposes of the exercise of jurisdiction by the ICC.

Article 12 paragraph 2 provides that if one or more of the following States is party to the Statute or has accepted the Court's jurisdiction via an appropriate declaration then the ICC may exercise jurisdiction: (a) the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State or registration of that vessel or aircraft; (b) the State of which the person accused of the crimes is a national. The jurisdictional basis for the above two cases is referred to under international law as the principle of territoriality and the principle of nationality, respectively. There are well settled principles of customary international law.

The jurisdiction of the ICC over a crime referred to in Article 5 may be exercised upon reference thereof to the Prosecutor by a State party, or

upon a referral to the Prosecutor by the Security Council acting under chapter VII of the UN charter, or by proprio motu initiation of investigations by the Prosecutor.[2]

Article 17 embodies the principle of complementarity referred to in the preamble of the Rome Statute. According to this principle, the ICC does not seek to supplant or replace national jurisdiction but to complement it. As a result, primacy is given to the national jurisdiction and the jurisdiction of the ICC is triggered under specific conditions. Thus a case is determined inadmissible where it is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution[3] or, where the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute,[4] or to avoid double jeopardy (doctrine of *ne bis in idem)*[5], or if the case is not of sufficient gravity.[6] The Statute also lays down what amounts to 'unwillingness'[7] and 'inability'[8] on the part of the State concerned.

Article 124 provides an opt out clause for State parties from the jurisdiction of the ICC over war crimes committed by their nationals or on their territory for a maximum period of seven years i.e. till 2009 when the said clause shall be subject to review. This may give rise to a situation where the national of a non-party State may fall within the jurisdiction of the ICC for war crimes and the national of a state-party may be exempt from the jurisdiction of the ICC in respect of such crimes by virtue of Article 124.

II. Universal Jurisdiction

The term 'jurisdiction' refers to the legitimate assertion of authority to affect legal interests, Jurisdiction may describe the authority to make law applicable to certain persons, territories, or situation (prescriptive jurisdiction); the authority to subject certain persons, territories, or situation to judicial processes (adjudicatory jurisdiction); or the authority to compel compliance and to redress non-compliance (enforcement jurisdiction).

2. Art. 13.
3. Art. 17.1 (a).
4. Art. 17.1 (b).
5. Art. 17.1 (c).
6. Art. 17.1 (d).
7. Art. 17.2 (a), (b) and (c).
8. Art. 17.3.

There are two alternative premises underlying universal jurisdiction. The first involves the gravity of the crime. Many of the crimes subject to the universality principles are so heinous in scope and degree that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender. The second involves the *locus delicti* (place of the act). Many of the crimes subject to the universality principle occur in territory over which no country has jurisdiction or in situations in which the territorial state is unlikely to exercise jurisdiction, because, example, the perpetrators are state authorities or agents of the state. Crimes subject to universal jurisdiction include piracy, genocide, was crimes, crimes against humanity, torture, and certain acts of terrorism.[10]

Thus this principle provides every state with jurisdiction over a limited category of offences generally recognized as of universal concern, regardless of the situs of the offence and the offended. While the other jurisdictional bases demand direct connections between the prosecuting state and the offence, the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offences that states universally have condemned.[11]

In the landmark case of *Attorney-General* v. *Adolf Eichmann*, the principle of universal jurisdiction was emphatically asserted by the Israeli court:

> The abhorrent crimes defined in this law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("*delicta juris gentium*"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.[12]

The concept of universal jurisdiction, however, is not undisputed. On the one hand, there is the proposition that breaches of *jus cogens* norms

9. Michael P. Scharf, Law and Contemporary Problems (2001).
10. *Ibid.*
11. Kenneth C. Randall, *Universal Jurisdiction Under International Law* 66 Tex. L. Rev. (1988).
12. http://www.nizkor.org/hweb/people/e/eichmannadolf/transcripts/judgment/judgment-002.html.

attract universal jurisdiction, and on the other this proposition stands controvered.[13]

From the idea of States exercising universal jurisdiction in national tribunals with respect to specific crimes, we now examine the exercise of universal jurisdiction by international tribunals.

The Nürnberg Tribunal was established through the London. Agreement of August 8, 1945, signed by the United States, Great Britain, the Soviet Union, and France, and adhered to by nineteen other Allied Countries. The Tribunal was established to try the major German war criminals "whose offenses have no particular geographical location."

In the world of the Nürnberg Tribunal:

> The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.
>
> ... Individuals can be punished for violations of international law, Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.
>
> ... The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.[14]

Citing the Nürnberg precedent, fifty years later, in its Report to the Security Council, the U.N. Commission of Experts on the Former Yugoslavia stated:

> States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of national jurisdiction of the States parties to the London Agreement setting up that Tribunal.[15]

13. "[I]n so far as the invocation of the principle of universality in cases apart from war crimes and crimes against humanity creates misgiving, it may be important to maintain the distinction." Ian Brownlie, Principles of Public International Law 305 (1990).
14. Cited in Michael P. Scharf, *supra* n. 9.

The legal foundation of the Nürnberg Tribunal is to be constrasted with that of the Tokyo tribunal, which was established with the consent of the Japanese government which continued to exist after the war. Professor Hans Kelsen pointed out in 1945 that the occupying Powers never sought to conclude a peace treaty with Germany (which could have included a provision consenting to trial of German war criminals), because at the end of the war no such government existed "since the state of peace has been de facto achieved by Germany's disappearance as a sovereign state."[16]

It has been argued by Prof. Scharf that like the Nürnberg tribunal, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) represent a collective exercise of universal jurisdiction of States.[17]

In the context of the ICC , the legality of a treaty based international tribunal being delegated universal jurisdiction by member States has been hotly contested. Thus, Ambassador Scheffer and Professor Morris argue that the ICTY and ICTR are distringuishable from the ICC in their mode of creation. In their view, the member States of the Security Council decided to establish the ICTY and ICTR by means of a binding decision of the Security Council. In doing so, they acted not as individual States on their own behalf, but rather as member States of the Security Council of the United Nations acting on behalf of the international community of States.[18]

In the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* where the Democratic Republic of Congo had *inter alia* challenged the legality of the universal jurisdiction claimed by Belgium, various pronouncements in the judgment dealt with the issue of universal jurisdiction by way of *obiter* as this particular issue was subsequently withdrawn by the Democratic Republic of Congo.

The alleged crimes were punishable in Belgium irrespective of where they were committed or the nationality of the perpetrator or the victims. Prosecutorial action could be taken against an accused person despite their absence from Belgian territory.

15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. Cited in Sacharf, *supra* n. 9.

The question of universal jurisdiction was an issue needing clarity in international law. The composite of treaty practice and customary international law established a patchwork application that lacked uniformity. Although the Court's comments on universal jurisdiction can arguably be considered *obiter dicta*, the dispute offered the first opportunity for the court to address the question of universal jurisdiction and its status in international law. President Guillaume, in a Separate Opinion concurring with the majority, noted that the 'territorial character of criminal law is fundamental' in all systems of law. This then evolved to include nationality as a basis of jurisdiction. The President noted that, historically, universal jurisdiction was accepted in only one case, that being piracy, perhaps because the crimes are committed on the high seas and outside national jurisdiction. Where the principle *aut dedera aut prosequi* (duty to prosecute or extradite) was codified in many treaties, jurisdiction was no longer relied on, either territoriality or nationality. In practice this did not allow States to exercise jurisdiction when the alleged perpetrator was not present in the territory of the state exercising the jurisdiction.

Reference can be made to various national courts, such as in France, that have refused to exercise universal jurisdiction without the presence of the accused in the State exercising jurisdiction. This may be the only link between the State and the accused person but it still differes from what is known as universal jurisdiction. Judges Higgins, Kooijmans and Buergenthal acknowledged that the exercise of jurisdiction. Judges Higgins, Kooijmans and Beurgenthal acknowledged that the exercise of jurisdiction based on finding a perpetrator of an international criminal act on your territory, should not be confused with universal jurisdiction since the former is a treaty-based obligation to exercise jurisdiction over persons who commit acts elsewhere and are within your territory. This distinction limits the definition of universal jurisdiction to its purest form - exercising jurisdiction over international crimes without any other basis of jurisdiction in international law.

Reference was also made to the opinion of Lord Slynn of Hadley in the first *Pinochet* case that universality of jurisdiction is subject to customary international law rules. Other cases from French, Austrian, Dutch courts were also cited - all of which fell short of the State practice of universal jurisdiction since there either was a nationality or passive personality basis to exercising jurisdiction or the basis was treaty-based. In any event, judicial decisions were held by Judges Higgins, Kooijmans and Buergenthal to be insufficient proof of a rule of universal jurisdiction, since it cannot evidence international practice amounting to custom. The same would apply to treaties that contain provisions on universal jurisdiction, as they

do not demonstrate state practice. However, the corollary was raised in that there was no State practice contrary to the exercise of universal jurisdiction.

Judge Van den Wyngaert ruled that universal jurisdiction is not restricted to cases where the accused offender is in the State exercising the jurisdiction. To support this, Judge Van den Wyngaert asserted that there are no customary international law rules denying universal jurisdiction *in absentia*. Some States such as Spain and New Zealand have legislative authority to assert universal jurisdiction without the presence of the accused on its territory. In the *Bouterse* case, the Court ruled that although the national court required territorial presence under Dutch law, this did not preclude that universal jurisdiction is contrary to international law.

The opinion of Judges Higgins, Kooijmans and Buergenthal suggests that universal jurisdiction is nearing the status of customary law in light of the international consensus that perpetrators of international crimes should not have impunity. However, its application may still be fragmented in light of the various instances that it may be exercised. It is only for States to respond to the inconsistencies in treaties and national legislation in order to meet the requirements of customary international law. Positive steps by national legal systems such as mandating universal jurisdiction in their legislation might be a necessary step to establish *opinio juris*.

There is thus a reasonable amount of controversy regarding the status of universal jurisdiction under customary international law.

Moreover, as noted by Judge Guillaume the principle of complementarity, enshrined in the Statute of the International Criminal Court, might come into conflict with universal jurisdiction since states may opt to prosecute an international crime committed in another country rather than under the auspices of the ICC prosecutor. An ICC proceeding would be based on the territoriality principle and the active personality principle, since the crime must occur in a State party or the person prosecuted must be a national of a party State.

As a consequence of the foregoing judgment, in 2003 Belgium abandoned its adherence to a universal jurisdiction independent with any link with Belgium. The new legislation provides for a limited form of extraterritorial jurisdiction, i.e. only when the perpetrator or the victim is Belgian or resides in Belgium. In addition, it limits the direct access of victims to justice (through the 'constitution de partie civile') only to cases where the perpetrator is Belgian or resides in Belgium. In all other cases, the decision to prosecute is left to Prosecutorial discretion.

III. Conclusion

In conclusion it may be said that, the jurisdictional basis of the ICC is certainly not universal jurisdiction but that of delegated active personality and territorial jurisdiction. Reiterating what has been observed by scholars in this regard, it would in the other circumstance have required just two nations to enter into a treaty establishing an international criminal tribunal and delegating the universal jurisdiction claimed by them to it for the tribunal to assert jurisdiction over crimes committed anywhere by anyone.

Be that as it may, the international community is unanimous in its desire to end impunity. Therefore, although universal jurisdiction cannot be arrogated by the ICC to itself, nor can universal jurisdiction be delegated to it by State parties, the ICC can nonetheless strive for universality by persuading more and more States to accede to the Rome Statute.

Electricity Act 2003: A Critical Analysis

*Gaurav Tomar and Kamaldeep Dayal**

I. Introduction

Within a fraction of a second of clicking the power switch, the consumer puts into motion an intricate transaction involving a power generation company like National Thermal Power Corporation (NTPC), a power transmission company like Powergrid, and a bulk power purchaser and retail distributor like Delhi Vidyut Board.

Unlike other commodities, electricity cannot be stored for future use. In other words, its generation and consumption have to be simultaneous and instantaneous. The unique features of power as a commodity or service make the dynamics of its supply and demand difficult to manage. Installing power generation, transmission and distribution capacity is a complex, time consuming and expensive process. Power is amongst the most capital intensive infrastructure sectors.

II. Background of Reforms

The nineties in India were a turning point of sorts in the history of India's macro-economic reforms for they signalled a distinct change in the broad policy of governance that lead to reduction of government control over different sectors in the economy. Coming as it did at the end of a period of moderate recession (and propelled by a crisis in balance of payments) it precipitated external and internal pressure to deregulate and privatise major segments of the economy that had been tightly controlled for nearly half a century of independent India.[1]

It is in this light that the reform of the electricity sector assumes significance. The laws governing electricity supply and generation had

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1. Individual measures included policies to free up currency and capital markets, reduce government control on bank and other financial institutions, drastically cut back on licensing requirements for industry, and allow the entry of private players in electricity generation.

been in place from 1910 onwards. Changes were made in the laws that sought to encourage the entry of privately owned generating companies into the electricity sector (and which later became the Electricity Laws (Amendment) Act 1991). The amended law permitted private entities to establish, operate and maintain generating power plants of virtually any size and to enter into long-term power purchase agreements with State Electricity Boards (SEBs). The initial steps provided several incentives to independent power producers (IPPs) and opened the sector to the generators.

In 1998, the Electricity Regulatory Commission Act was passed and a central regulatory body was formed to generally regulate the functioning of the central sector players and inter-state supply. Thereafter, several states have passed their own regulatory laws, setting up state commissions and going ahead with the reform process. The culmination of the legal reform was the enactment of the Electricity Act 2003.

The initial mood with respect to the reforms in various quarters of government and business throughout the early 1990s was quite euphoric. This was matched by the overwhelming response from both domestic and international investors. By mid-1995, there were about 189 offers to increase capacity by over 75GW, involving a total investment of over US$100 billion. The surge was led by the Enron sponsored Dabhol Power Project (the largest IPP in the world at the time) with over 95 projects for a total installed capacity of 48, 137 MW being proposed. The major foreign investment came from multinational energy majors like Enron, GE, Bechtel, CMS Energy, AES, PSEG and Covanta (Formerly Ogden) along with Indian companies like the Tata Group, LANCO, BSES, GVK Industries, Jindal Group and the Birla Group. Electricity generation which was only about 4.1 billion units in 1947 increased to about 350 billion units in 1995.[2]

III. A Critique of the Prior Legislation[3]

In order to understand the significance of the Electricity Act 2003 and what it is supposed to achieve, it becomes necessary to realise the reasons for the failure of the original policy regarding power. It is in light of this that one would be able to comprehend the changes that the new Act proposes. What then really went wrong that necessitated need for reform, and thus the introduction of the new Act?

2. This figure went up further to about 500 billion units in 2000-01. See www. infraline.com.
3. Electricity Act 1910, Electricity Supply Act 1948, Electricity Regulatory Commission Act 1998.

A. Contracts

The SEBs, the monopoly distributor in most states entered into a series of Power Purchase Agreements (PPAs) with the Generation Companies for long term purchase of power. These contracts invariably provided for purchase of power at a specific Plant Load Factor and capacity by the SEBs irrespective of demand. In many cases, the actual growth in demand for power was half of the projected demand.[4] Further, no mechanism of correction of this mis-estimation was in place wherein the power could be sold to another state or to a bulk buyer willing to purchase this excess power.

The contracts, although binding on both the SEB and IPP created one-sided obligations, which could not be fulfilled by the SEBs. The energy costs from these projects, frequently turned out to be between one-and-a half to twice that of comparable existing SEB or other NTPC projects. It simply became impossible for the SEBs to pay for such power because they themselves could not recover these high costs from their consumers, and several of these contracts had either to be renegotiated or scrapped altogether.

B. Reform Mismatch

The IPPs had entered into PPAs with SEBs, many of which were on the verge of bankruptcy, This lead to two important problems. Firstly, generation companies demanding financial safeguards such as counter guarantees and escrow mechanisms to be built into the financing structure, resulting in increased costs. Secondly, despite such safeguards, the inefficiencies inherent in the state-run distribution business including subsidies, tariff collection problems and transmission and distribution losses, bogged down returns to those generators. The SEBs that were unable to collect tariff from their consumers were unable to pass on the tariff to the generation companies.

With most of the SEBs failing to implement strategies to improve operational efficiencies and rationalise tariff, the introduction of IPPs and their PPAs only exacerbated the precarious financial situation, further draining the SEB finances.[5]

4. The Godbole Committee has pointed out that while the actual increase in the demand for power was merely 1173 MU and 2583 MU in 1997 and 1998 respectively, the assumption when the PPA was about 5000 to 6000 MU. See Government of Maharashtra, Energy Review Committee (2001).
5. In 1992-93, the total financial losses of the power sector came to Rs. 46 billion whereas in 2002, the figure had gone up to Rs. 260 billion.

C. Transmission and Distribution Problems

Since inception, the SEBs have been focussing towards attaining the objectives of the government of providing electricity to larger sections of society and to agriculture at low rates. Another important reason for lack of commercial orientation has been the absence of incentives for improving efficiencies. Under government ownership, performance-based rewards or penalty for the staff and the management of the SEBs is weak. This has a greater impact on the distribution operations, which employ a large number of staff and require proactive supervision and management to achieve efficiency. As a result, the performance on the distribution side has remained poor with high levels of technical and commercial losses.

The technical and commercial losses in 2000-01 were officially reported to be about 25 percent. The reported figures of distribution losses underestimated the real extent of energy lost (or unaccounted for) because a substantial part of the losses were being shown as non-metered agricultural consumption.[6]

D. Tariff Setting

Tariff revision required political decision-making, as a result of which sound commercial principles had to be repeatedly sacrificed to meet the compulsions of political populism. Further, the tariff structure has also been characterised by a high level of cross-subsidisation resulting in distorted tariff structures across different consumer segments. While cross-subsidies may have served a useful purpose initially these, have now become counter-productive.

E. Generation Sector

The real problem with this sector is not one caused primarily due to any inherent flaws in generation but really due to assorted reasons which have contributed towards keeping the level of generation low vis-à-vis the demand, resulting in power shortages. In the Electricity Supply Act 1948 the SEB played the role of a transmission company (Transco) and a distribution company (Distco) under the single buyer model. In the course of its functioning in these two spheres of activity it perpetually suffered

6. See www.infraline.com. The technical losses are mainly due to over-extended and over-loaded low voltage distribution lines and weak distribution network. The commercial losses or theft are due to illegal tapping of low voltage lines, faulty metering and under billing.

from certain problems which within a few decades became unmanageable. The problems that can be cited briefly are high T & D losses, very low billing and even lower realising of bills, large subsidies and lastly power thefts. After the setting up for SEBs under the Electricity Supply Act 1948, it was a matter of time before the State Governments began to play an influencing role in the functioning of SEBs. Tariff decisions came to be taken more on political will then commercial understanding and feasibility. Lack of technical know-how and lower quality equipment resulted in high T & D losses.

Due to the above reasons SEBs ran into huge deficits which disabled the honouring of any contractual agreements with the generator, the dues owned to generating companies were not paid back in time and many times were not paid at all. In this scenario, it was evident that projects relying on payments for purchase of power by these entities were not likely to be financed and investment in capacity addition did not materialise.

F. Functioning of Regulators

The regulators themselves behaved a little more than the arms of the government. State government appointed the regulators and controlled their terms and remuneration. These bodies also lacked the technical, financial[7] and legal resources that they require to function independently. One of the most important issues facing by the IPPs before the regulators was their reluctance to increase tariffs. Coupled with various subsidies in place, the regulator was unable to let various licensees increase their tariff to reflect the actual cost of functioning.[8]

IV. Electricity Act 2003

The most obvious aspect of the Electricity Act 2003 (henceforth the Act) is its universality. In one legislation, the Act cover what was previously spread over three Acts and various notifications and various State Acts. Further, it provides for the reform process to go ahead on all fronts. Distribution is being reformed at the same time as generation and transmission. Simultaneously, the restructuring of the SEBs is being attempted. Also, it makes an attempt to deal with the basic problem, that is, of the

7. The Second Report of the Godbole Committee has suggested a surcharge of 1 paise per unit for funding the regulatory commission so as to make it financially independent from the state government. See *supra* n. 4.

8. The position of the regulator as the final authority to determine tariff has been recently upheld in a decision by the Supreme Court of India in *West Bengal Electricity Regulatory Commission* v. *CESC Ltd.* JT 2002 (7) SC 578.

structure of the market where the change has been towards more competition.[9] By enabling competition for bulk supplies and putting a strong independent regulation in place, the Act moves towards more efficient and market determined outcomes. State governments will be forced to rationalise subsidies to levels that their Budgets can bear and to improve efficiencies. The object to move the state out of the electricity sector over time will eventually be achieved.[10]

A. Scope of the Act

The Act proposes the following important changes in policy and regulation of the electricity laws in India:

a. Generation

The act gives freedom to establish, maintain and operate generation plants without a license. Generation would thus be free from licensing and the Techno-Economic Clearance requirements under the old Act are no longer required. Generation would only need to conform to certain technical standards for grid connectivity and co-ordinate with the transmission utility for evacuation of power.[11]

Captive generation has also been made free of licensing. Captive generation would also have open access through the grid to its own premises subject to availability of adequate transmission facilities. Surplus power from captive power plants can be supplied through the grid subject to regulatory control. Generation from non-conventional and renewable sources is to be promoted and Regulatory Commissions may from time to time prescribe a minimum percentage of power to be purchased from such sources.

b. Transmission

The load despatch functions, which are critical for purposes of grid

9. One way of doing this would through by–passing the state distribution system and allows such customers to generate their electricity or to buy directly from efficient independent generators anywhere in competition with the state distribution system. This Act provides the framework for this.
10. However, there has been some concern that by this rapid privatisation envisaged and the elimination of cross subsidies, the cost of power to the low-tension customer would go up. A strong and independent regulator would be able to address this concern.
11. This is the case except for hydel projects. Hydel project would still require to be licensed under the Act. Further, it has been proposed by the Standing Committee that captive generation be defined so as to include group companies also.

discipline and stability, would be performed by a National Load Dispatch Centre for scheduling and the Regional Load Dispatch Centres for despatch, which would be Government Companies/ Organisations. Disputes and grievances relating to this function would be settled by the Regulatory Commissions. Neither the Load Despatch Centre nor the transmission utility/ licensee would be allowed to trade in power. There would be a transmission utility at the Centre and one each in the States. Such utilities would be Government companies with responsibility for co-ordinated and planned development of the transmission network.

Private sector participation would be permitted in transmission through transmission licences to be guided by the Regulatory Commissions.[12] There would be neutral and non-discriminatory open access transmission. Transmission tariffs are to be determined by the Regulatory Commissions.

In addition to the transmission tariff, there would be a surcharge to take care of the current level of cross subsidy being generated from distribution licensees who have a better consumer base. The surcharge would be progressively reduced and eliminated along with cross subsidies.

c. Distribution

Distribution has been liberalised and the Distribution Licensees would be free to take up generation and generators would be free to take up Distribution Licences. Consumer tariffs to be charged by the Distribution Licensee would be determined by the State Electricity Regulatory Commission. The State Government would have to provide subsidies upfront if it wishes the tariff for a class of consumers to be lower than that prescribed by the Regulatory Commission.[13] Metering has also been made mandatory.

Open access may be allowed in distribution by SERC in phases to enable bulk consumers to access generators/ traders directly.[14] Provisions regarding theft have a focus on revenue enhancement rather than criminal

12. Time bound and single window clearance for these projects has been provided for.
13. This position is reflective of the decision of the Supreme Court in West Bengal Electricity Regulatory Commission v. CESC Ltd. Supra No.6 where the court held that any subsidy that the state government wished to offer must be met by the state government and not by the distribution entity.
14. This is coupled with provisions relating to better management of supply. For this purpose there is provision of bulk purchase of power and management of local distribution in rural areas through Users Association, Co-operatives, Franchisees, Panchayat Institutions or any other person.

proceedings with provisions for compounding and on the spot penal assessment of unauthorised use of electricity.[15]

Consumers have been enabled to purchase power from a distribution licensee other than the licensee for the are where the consumer is situated subject to payment of a surcharge.

d. Trading

Trading is being permitted as a distinct activity with licensing. For the first time, trading in electricity has been recognised as a distinct activity.

e. Regulatory Aspects

The creation of SERC, which has till now been optional has been made mandatory. A Commission has to be established within six months of notification[16] with the powers specified in the Act. These powers are wider than the powers under the old Acts wherein it was at the discretion of the State Governments.

Provisions have been made for the Commission to retain the fees it receives and for the government to make grants for this purpose. An Appellate Tribunal to be headed by a Supreme Court Judge is being created to hear appeals against the orders of the CERC/ SERCs.[17]

The responsibility of Government for development of the power sector has been emphasised. Government would have the responsibility for making National Electricity Policy and specific policies for tariff, development of renewable sources of energy and rural electrification. The Central Electricity Authority would have the responsibility for preparing National Plans and prescribing safety and other technical standards. It would be the technical advisor to the Government as well as the Regulatory Commissions.

f. SEB Restructuring

There are provisions enabling the State Government through statutory transfer scheme(s) to create one or more company/ies from the SEBs.

15. The theft of electricity is punishable with imprisonment of up to three years with the authorities being given the powers of search and seizure for this purpose.
16. Commissions that have already been established shall continue as will the acts and deeds taken under the old Acts. The membership of the Commissions, both State and Central remains primarily governmental.
17. Appeals against the orders of the Appellate Tribunal would lie only before the Supreme Court and not before the State High Courts as it was before.

Thus, the unbundling exercise is now embodied in law.[18] The State Governments are being given adequate flexibility to undertake power sector reforms in the manner they consider appropriate.

B. Two New Concepts: Power Trading and Open Access

a. Open Access

Section 2 (47) of the Act, defines Open-Access as, "a non discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission".

The Act allows generating companies to sell directly to distribution companies and bulk consumers, thus creating a competitive market where producers can take investment decisions based on their perception of demand, and without relying on intermediaries such as the SEBs or State Government. This would bring electricity at par with other goods and services where competition and market forces determine efficiency levels, investments and pricing.

Allowing new producers to access bulk consumers directly would enable capacity creation to take place without any burden on the SEBs or the Government. Further, bulk consumers buying directly from the SEB supply for utilisation elsewhere, thus improving availability for the other consumers in the SEB system. In the light of the forgoing, a framework aimed at elimination of monopolies and introduction of competition in the electricity industry has been put in place.

b. Power Trading

The creation of a market is predicated upon freedom to trade. Freedom of trade is also a constitutional guarantee in India. Article 301 of the Constitution mandates the free flow of goods through the territories of India, and the Supreme Court has held that Constitution frowns upon any measure by the states that would in any manner impair the free flow of goods. As a matter of law, electricity has been held to be 'goods' and it should be possible to trade in it like any other commodity. Undue restrictions on trading are likely to introduce distortions in production, demand, supply and pricing.

18. However, the State Government may continue with the State Electricity Board if they wish to do so.

The Act defines Power Trading as, "a purchase of electricity for resale thereof and the expression trade shall be construed accordingly".[19] This Act introduces and recognises the concept of "trading" as a distinct licensed activity. The intention of the Act by introducing trading is to provide choice before the consumers and to introduce the competition.

There are CERC functions that are directly related to trading. In the first instance, the issuing of licenses to persons in order to function as electricity traders with respect to inter-state operations.[20] The Act stipulates that the appropriate commission may specify the technical requirement capital adequacy requirement and credit worthiness for being an electricity trader.[21] The CERC may also fix the trading margin in the inter-State trading of electricity, if considered necessary.[22]

It is important to mention from the outset that the Act distinguishes trading and the prerequisite trading license according to the geographical spread of the activity undertaken, Inter-State trading License; and Intra-State trading License.[23]

The definition of an *electricity trader* reads as follows, "..a person who has been granted a license to undertake trading in electricity under.[24] From the above it is clear that trading would necessarily involve both the purchase and the resale of electricity by the same person. Or conversely, the single activity of sale or the mere purchase of electricity by a person would not suffice to qualify as trading, since it does not combine both activities by the same person.

In other words, trading of electricity implies that the trader buys electricity from one party and sells it to another party for some consideration. Furthermore, a person under the act "...shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person".[25]

19. ELECTRICITY ACT 2003, S. 2 (71).
20. *Id.*, S. 79 (c).
21. *Id.*, S. 52.
22. *Id.*, S. 79(J).
23. A literature review indicates that other countries have depending on their local market conditions distinguished trading licenses along different lines, e.g., under the ELECTRICITY INDUSTRY ACT 2000, in Australia both wholesale and retail trading licenses have been developed. In the recent legisation adopted by Bosnia-Herzegovina a demarcation is made between a 'first tier license' for the sole supplier for non-eligible customers (regulated prices) and a 'second tier license' for selling to qualified customers and traders (negotiated prices).
24. ELECTRICITY ACT 2003, S. 2 (26).
25. *Id.*, S. 2(49).

No person shall undertake trading in electricity unless he is authorised to do so by a license issued by the Appropriate Commission,[26] i.e. the CERC or the SERC respectively the CERC may, on application made to it, grant a license to any person to undertake trading in electricity as an electricity trader, in any area which may be specified in the license. Importantly, the Act states unambiguously that the license shall continue to be in force for a period of twenty-five years, unless such license is revoked.[27]

V. PRESENT MARKET SCENARIO

With the enactment of the Electricity Act 2003 trading in India has received a legal shape. However, trading did occur in India, albeit modestly and mainly by a single player - the Power Trading Corporation of India Ltd. (hereinafter PTC). Prior to the establishment of PTC, in April 1999, trading only took place sporadically. In the beginning the PTC was set up with the mandate to catalyse development of mega and other large power projects by acting as a single entity to enter into PPAs with the IPPs and SEBs. Subsequently PTC has entered into short-term contract and real time contract for trading.

PTC has mainly developed its trading activity around inter-state transactions by organising the purchase from any surplus location and then selling it to the deficit region. For instance, PTC is buying surplus power from Himachal Pradesh and selling it to Delhi. Similarly, PTC is trading power from Uttaranchal to Delhi. It has also undertaken trading with neighbouring countries like Nepal and Bhutan (Chukha (336 MW) and Kurichhu (60 MW) plant, and anticipates this market potential to expand. PTC has been designated Nodal agency for exchange of power between India and NepaL and it is already trading about 50 MW. PTC has also entered into a contract with Bhutan for Tala project (1020 MW), which is scheduled for commissioning by 2005-06.

A. Payment Security Mechanism and Trading Margin

In order to resolve the payments issues which are persistent with some utilities a weekly billing for the transactions has been devised as a payment security mechanism by PTC. This mechanism includes direct payment, payment through letter of credit and escrow or access to revenue stream of the utilities. This has brought down the instances of default significantly.

26. *Id.*, S. 12.
27. *Id.*, S. 15 (8).

The possibility of default cannot be ruled out in future and therefore while determining the eligibility criteria capital adequacy and security mechanism needs to be developed. In the existing scenario, a regulator does not fix trading margin. The PTC charges 5 paise per unit extra to the buyer as a trading margin.

Till now, there has been light hand regulation that enabled trading of power. However, with the enactment of the Act, the Commission is mandated to formulate eligibility criteria for traders and accordingly will issue license. While framing these criteria it has been kept in mind that enabling arrangements needs to be developed, such that, more traders are encouraged to venture into this business, to facilitate the overall success of the power sector reforms.

B. Future Market Scenario

As we know trading has become a separate activity and the legal system has opened the conditional doors for any person to participate in trading activity. Indian electricity market is poised for myriad changes as in future, competition between players will be high. Prediction of future market is a complex exercise and requires considerable understanding of market players and their relationship.

However, an electricity trader would attempt to offer the customer electricity that it purchased from another market player at competitive rates, keeping a suitable margin for itself. In this scenario, the trader is not (necessarily) a traditional market player, such as a generation company or a distribution company, since its main activities are to purchase electricity for resale therefor without owning any physical assets required for the flow of electricity. Hence, the trader would guarantee to its contracting party the purchase and/or delivery of electricity at a particular time and at a particular price without necessarily owning a physical network enabling the delivery. There would thus be a separation between the commercial business contracts and the physical transactions of electricity.

This emerging market structure will trigger a variety of commercial arrangements. This section explores the various possibilities (theoretical and practical) of players in trading and level of trading. In the new scenario where Central Transmission Unit (CTU) and State Transmission Unit (STU) are excluded from trading business, they will act as an entity that holds the wire business and facilitates the flow of power between generators and consumers. This way a trader will act as a bridging link between the two. Let us understand the kind of roles each is going to play. The main players in the market will be generators, transmitters, distributors, system

operators and traders. Traders may purchase electricity from generating company or from another trader and will sell to its customers, through the network of transmitters of distributors, which may be a distribution company, another trader, consumer (bulk or captive).

a. Mechanism of Trading

Based on international experience in electricity trading we anticipate that the following arrangements may emerge:

1. Long-term Bilateral Contract Market

In a long-term bilateral contract market, customers, traders, generators and other market players have a choice of entering into contractual arrangements, which typically cover long-term commitments between buyers and sellers of electricity and have a fixed volume over a specified period of time. These contractual agreements are purely financial trade instruments. Typically, these long-term bilateral contracts are the cornerstone of all electricity trading markets. Alternative mechanisms (such as the ones listed below) are mainly developed to cover additional demands, shortages, as a risk management tool, etc. for instance, in the US electricity market, the majority of sales occur under bilateral market contracts, with the day-ahead and real-time markets not accounting for more than 20 per cent of the sales.[28]

2. Short-term Forward Trading Market

The Short Term Forward Trading market is a market for buying and selling electricity in advance. A forward contract is an agreement to buy electricity from another party at a specified time in the future at a specified price with money changing hands at the future delivery date. These are bilateral physical trades, which mean that two parties such as a generator and a trader may enter into a bilateral contract to deliver electricity at an agreed time in future which may be say, for the coming winter or the following summer. In international power markets like UK these types of contracts are used both to manage price risk and speculate against futures prices to avoid the risk of having to buy or sell electricity at the last minute through balancing mechanism or the spot market where prices are very volatile.

28. .Energy Regulators Regional Association, Electricity Market Development and Market Contractual Agreements in the USA, in the EU members and in the member countries of ERRA. *Available* at www.eranet.org.

b. Spot Trading Market

In a spot trading market, the supply and demand of electricity is balanced at any point of time. There is a possibility that the electricity market may shift to pool arrangements along with bilateral contacts.

c. Balancing Mechanism

Some one has to perform the role of balancing mechanism. In such a scenario, a system operator can play a role of information provider as he would be the most competent person to provide the information on availability and deficit of power in a region or any separating company can be made responsible.

It is anticipated that well developed spot-markets in electricity trading may emerge in India in the medium to long-term, whereas the short-term forward trading market may emerge in the short-term. In view of this, power exchanges may also develop in India over time.

Therefore, in due course of time the regulatory commission should come up with guidelines regarding rules and regulations for the operation of a power exchange in India. Until now, PTC has been engaging mostly in match trading, whereby they match demand and supply requirements, keeping a margin for the themselves in the process.

VI. Power Sector and Electricity Act 2003

An Assessment

While the passage of the Electricity Act 2003 may pave the way for the unbundling of integrated SEBs and the setting up of independent regulators by the states, it may not bring about any major change in the sector beyond that. The open access and limited competition by the traders though envisaged in the Act, is likely to play a relatively minor role till an appropriate tariff framework are in place and some leeway is made available within long-term contracts between generators and suppliers/ distributors without their consent.

Unfortunately, the Act is quite restrictive on the use and evolution of appropriate tariffs by the regulators. The Act does not positively remove restrictions on inter-state trading of electricity, does not enable excess supply of captive generators to meet peak demand, and does not create enough pressures for the removal of cross-subsidies and inefficiencies in the system. More damaging than all of these criticisms is of course the

provisions which preclude the possibilities for the sector in future such as competition in supply, development of pool or spot markets. Any such move will require further legislative change, a time-consuming and costly process. The passage of the Act, however, can be expected to hasten the reforms and restructuring at state levels (even though the direction may be away from optimal), more inter-state transfer of electricity (once again, less than optimal), and possibly the emergence of new sets of problems and issues built in the new framework. These are expected in the areas of regulatory co-ordination, conflicts between state and the regulators, T & D losses, and conflicts between state and central transmission utilities, besides the political fallout of attempted tariff rationalisations.

The problems associated with the power sector are complex. Apart from Commissions, governments and utilities have to respond with equal commitment if significant changes are to be expected in the functioning of the sector. Things obviously do not change overnight However, the long road to reform and increasingly transparent liberalisation has been opened up. The political class as well as the business class ought to realise that reforms are inevitable. In the electricity sector itself, the restructuring of the sector at all levels is occurring. It can be but a stepping-stone to the rejuvenation of the electricity sector.

Arbitration Rules: A Comparative View

Harjyot Singh Bhalla[*]

With the growth of World Trade Organisation and free movement of goods and services across the globe, a numerical increase in trade related disputes are also inevitable. Over the years, arbitration has established itself as one of the most popular dispute resolution mechanism as far as international commercial contracts are concerned. At this juncture a question need be answered, i.e. while drafting an international commercial contract and in particular an arbitration clause in the said contract, what criteria must a legal adviser keep in mind while selecting the arbitration rules for the same? The above question impliedly answers a different question – whether or not the choice of a particular set of rules really matters? Alternatively, worded in a different manner, the question could be – what difference does it makes if a party adopts International Chamber of Commerce (ICC), United Nations Commission on International Trade Law (UNCITRAL), World Intellectual Property Organisation (WIPO), American Arbitration Association (AAA) or any other set of Rules national or international? Some of the recognised international Rules are : the ICC Rules of Conciliation and Arbitration (ICC Rules), the LCIA (London Court of International Arbitration) Rules of Arbitration (LCIA Rules), the International Center for the Settlement of Investment Disputes Rules (ICSID Rules), the American Arbitration Association Rules (AAA Rules), the WIPO Arbitration Rules (WIPO Rules), the Stockholm Chamber of Commerce Rules (SCC Rules).

Generally, the adoption of particular means for settling any disputes depends upon the terms of the contract itself. Such contracts are drafted by a lawyer/lawyers conversant with the various available sets of rules. This note points to certain issues, which may help in the selection of the appropriate rules for a given situation. The object of the arbitral process is to secure a fast and fair dispute resolution at a reasonable cost, and this is precisely the reason of its popularity. Thus, what this note suggests is that a look be taken at a few selected areas like the appointment of the Tribunal, the venue, the award, and the costs of the arbitration - areas

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which may influence achievement of the said objective. With the exception of passing references to other institutions e.g., WIPO, AAA Rules, this note will confine itself to the ICC Rules and compare them from time to time with the UNCITRAL Rules.

I. Institutional or Non-Administered Arbitration

There is no permanent arbitral tribunal to which international commercial arbitrations are submitted. A tribunal has to be established for every arbitration requested. While selecting the governing arbitration rules it must be determined whether the parties prefer an administered or institutional arbitration to a non-administered or *ad hoc* arbitration. *Ad hoc* arbitration has the apparent attraction of being cheaper than institutional arbitration as it necessarily avoids the payment of the administrative fees which institutions charge. On the other hand, "Although institutional arbitration requires payment of a fee to the administering institution, the functions performed by the institution can be critical in ensuring that the arbitration proceeds to a final award with a minimum of disruption and without the need for recourse to the local courts."[1] While some writers find further merit in *ad hoc* arbitration, others strongly advice that the *ad hoc* arbitration should be avoided at all cost.[2]

These remarks may probably apply with greater force to the type of *ad hoc* arbitration rules devised by the parties in their agreement and not to the situation where the parties agree to apply the UNCITRAL Rules which are accepted universally as a flexible formulation for non-administered international arbitrations. It seems that if one were to choose non-administered form of arbitration, one would choose UNCITRAL rules over drafting one's own set of *ad hoc* rules for the contract.

1. http://www.iccwbo.org/court/english/arbitration.
2. Compare the comments of Campbell & Summerfield, Effective Dispute Resolution For The International Commercial Lawyer 13 (1990) who hold that "... there is greater control over the dispute resolution process and the likelihood of a quicker result if ad hoc arbitration is used." with those of. Craig, Park and Paulsson, International Chamber Of Commerce Arbitration para.. 4.03: (1990) that "parties should generally be cautioned against adopting ad hoc arbitration clauses in an international contract, no matter how well drafted. ... It is impossible to foresee and provide for all the procedural issues which may come up. Moreover, every time the defendant creates delays, or fails to file pleadings or evidence, or refuses to participate in hearings, the claimant has an unattractive choice: A) to ask a judge to intervene, thus ending up in an ordinary court, which is exactly what one wanted to avoid by drafting the arbitration clause, or B) to ask the arbitrators to proceed by default, which will increase the risk that their award would be challenged by the losing party.
Whatever its merits in a purely domestic situation, the ad hoc arbitration clause in an international setting frequently frustrates the party seeking to enforce the contract."

UNCITRAL has no administration for arbitration carried on under its Rules, thus, those who desire the flexibility of the UNCITRAL Rules but at the same time want some institutional supervision over the activities of the tribunal are advised to choose one of the institutions which administer the UNCITRAL Rules. e.g. the LCIA, WIPO, as additional, alternative arbitration rules.

The *ad hoc* procedure benefits the parties involved in the dispute. This view, "however, is disputed by those who believe that with the ad hoc arbitration, problems of control of members of the Tribunal in the course of the hearing, e.g. inability of member(s) to participate at required times, may arise."[3] There could also be delays in writing the award. In the case, for example, of a President who delays in the writing of his award where the other members have long submitted their input for it, how is the problem resolved? "Without a supervisory body, there is apparently no one other than the Tribunal itself to complain to."[4] A complaint to the Tribunal brings no joy. If the inordinate delay occurs at the end of the hearing, the suggestion that the parties may cause the removal of the defaulting President becomes impractical. In the first place, the parties may not agree on that remedy; besides considerable costs would without doubt be incurred in getting a substitute. Even where the Rules permit an award by two members (of a Tribunal of three), without the participation of the third member, an award in this situation may prove impractical where the remaining two are in disagreement. And there are jurisdictions where lower credibility is given to an award by two of a three-member Tribunal.

II. Parallels and Differences between the Arbitration Rules of ICC and UNCITRAL[5]

UNCITRAL Rules "have been used as a model or basis for most of the recently promulgated arbitration rules, bearing witness to their continuing and undiminished attractiveness which, despite their age of almost 20 years, are not in need of revision."[6]

3. Austin Amissah, Choice of Arbitration Rules: The Dilemma of an African Adviser, http://www.jus.uio.no/lm/choice.of.arbitration.rules.march.1997.austin.amissah.a/doc.html (visited on 19 October, 2003)
4. *Ibid.*
5. The ICC Rules are in force as from 1 January 1998, the AAA Rules are effective as from 1 November 2001) and UNCITRAL Arbitration Rules were adopted by the General Assembly on December 15, 1976.
6. Gerold Herrmann, Secretary, United Nations Commission on International Trade Law (UNCITRAL), Vienna, Conference on Rules for Institutional Arbitration and Mediation, 20 January 1995, Geneva, Switzerland. *Available* at http://arbiter.wipo.int/events/conferences/1995/

Established in 1923 as the arbitration body of the ICC, the International Court of Arbitration has pioneered institutionalised international commercial arbitration, as it is known today. "Since its inception, the Court has administered well over 10, 000 international arbitration cases involving parties and arbitrators from more than 170 countries and territories. Demand for its services grows year by year in line with the expansion of international trade and the rapid globalization of the world economy."[7]

A. The Number of Arbitrators

Article 8 of the ICC Rules says that a dispute shall be decided either by a sole arbitrator or by a tribunal of three arbitrators. The parties shall agree on the number of arbitrators. If they do not agree the institution shall appoint a sole arbitrator or determine the number of arbitrators according to the circumstances of the case, i.e. the amount in dispute.

Under the AAA Rules too[8], the number of arbitrators depends on the agreement of the parties. In the absence of an agreement, an administrator determines the number, according to the circumstances of the case.

On the other hand if the parties have opted for UNCITRAL non-administered arbitration, they may have agreed beforehand on a sole arbitrator, in which case, they have to identify the person. If the parties have not agreed on a sole arbitrator, the Rules unequivocally (Article 5) prescribe a panel of three arbitrators.

This of course has immediate cost consequences, because the costs of the arbitration will, if there are three arbitrators, immediately increase.

B. Multiple Parties

As far as the issue of multiple parties to an arbitration is concerned the ICC Court of Arbitration has made provisions under the Rules to regulate how the arbitrators are to be nominated in case there are multiple parties to the arbitration.[9] However, as far as the question of involving third parties in the arbitral proceedings is concerned the Rules like the other Rules are silent. Further, the Rules are silent as to procedure to be followed in cases where more than one claimant, or more than one respondent, claim to nominate the party-appointed arbitrator. Since, the two claimants/respondents have an interest in the arbitration, they may prefer appointing

7. http://www.iccwbo.org/court/english/arbitration (visited on October 21, 2003).
8. Art. 5
9. Art. 10.

their own arbitrator thus, often resulting in delay. UNCITRAL Rules or the AAA Rules are also silent as far as arbitration involving multiple parties is concerned.

C. The Appointment of Arbitrators

"The provisions in arbitration rules governing the appointment of the arbitral tribunal are of crucial importance to the success of an arbitration. These provisions determine the respective roles of the parties and the administering institution in the selection of the arbitrator or arbitrators, and should provide solutions for dealing with potential delay caused both by deliberate attempts to slow the process and by accidental occurrences that could, if not managed, lengthen the process unnecessarily."[10]

As per both the ICC and UNICITRAL Rules it is up to the parties to appoint the arbitrators for the tribunal. However if the parties cannot agree within the stipulated time, under the ICC Rules it is upon the institution to decide on the arbitrators. Under the UNCITRAL Rules an Appointing Authority appointed by the parties for the purpose shall perform this task. However, if the said authority also fails to perform the task, the parties may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority. The appointing authority shall appoint the arbitrator as promptly as possible using the 'list-procedure' provided for, unless the parties or the circumstances require otherwise[11].

Both Rules, thus, provide for the fullest exercise of party autonomy, while assuring that the institution is available to act if the parties cannot reach mutual agreement. The fact that the Secretary-General himself does not appoint the arbitrator(s) but designates an appointing authority to do so, could result in delay in the process.

When the ICC Court has to appoint an arbitrator, a special task of finding a suitable candidate is undertaken by National Committees in the ICC system. If the ICC wants to appoint someone of a particular nationality, it will contact the local National Committee to assure that the Committee finds the most suitable candidate. "The National Committee appointment procedure has also been criticised for causing delays in the

10. Albert Jan van den Berg Stibbe, Simont, Monahan, Duhot, Amsterdam; Vice-President, NAI, Constituting the Arbitral Tribunal, Conference on Rules for Institutional Arbitration and Mediation. See *supra* n. 6.
11. UNCITRAL RULES, Art. 6. http://www.jus.uio.no/lm/un.arbitration.rules.1976/doc.html (visited on 19 October, 2003).

constitution of the tribunal. Indeed, the time involved in determining which National Committee should make the proposal, communicating with the ... Committee, [its] search for a suitable candidate, and the appointment of that candidate by the ICC Court ... may be considerable in some cases."[12]

The list-procedure may suitably be described as a mixed baggage of blessings and curses. The list-procedure may be time-consuming, as it requires the designated list to be sent to the parties for them to strike out the names of those they do not want and to rearrange and return the list containing the remaining names to enable the appointing authority to make the appointment. The same list-procedure is said to eliminate what may be called the "burning factor"[13]. The list-procedure set out in the UNCITRAL Rules has no equivalent under the ICC or LCIA Rules however it finds place under the WIPO Rules.

D. Commencement of the Proceedings

As per UNCITRAL Rules arbitral proceedings is deemed to commence on the date on which the notice of arbitration is received by the respondent[14] whereas, the date on which the Request is received by the Secretariat is deemed to be the date of the commencement of the arbitral proceedings under ICC Rules[15].

E. Time for Defence Statement

Art. 5 ICC Rules sets the space of time within which the respondent has to deliver his statement of defence i.e., within 30 days from the receipt of the Request from the Secretariat, unless extended upon request by the respondent. The AAA Rules contain similar provision.[16] Only the wording seems to be different. The UNCITRAL Rules provides that the respondent shall communicate his statement of defence in writing to the claimant and

12. Robert H. Smit, *An Inside View of the ICC Court*, 15 ARBITRATION INTERNATIONAL 53, 62 (1994).
13. "The burning factor is a rather frequently encountered phenomenon of the automatic rejection of the name of a candidate for the mere reason that the suggestion of the name originated from the other party. Where a name suggested by one party is rejected automatically by the other party, this may lead to a situation of continuous rejections, each party rejecting the other's suggestions, not for substantive reasons, but simply because the name came from what is regarded by each party as a suspect source." - Constituting the Arbitral Tribunal, *supra* n. 10.
14. UNCITRAL RULES, ART. 3.
15. ICC RULES, Art. 4. ICC Publication 808 (Cost scales effective as of 1 July 2003).
16. AAA RULES, Art. 3.

to each of the arbitrators within the period specified by the tribunal[17] which should not exceed 45 days.[18] According to Article 2 (2) AAA Rules this is the date on which the administrator receives the notice of arbitration.

In the ICC Rules the Claimant / Respondent is supposed to send his Request / Reply for Arbitration to the Secretariat.[19] After having received this the Secretariat will send a copy of the Request / Reply to the Respondent / Claimant.[20] On the other hand under the UNCITRAL Rules the communication is more direct. Consequently, the time consumed in communicating is more or less the same under both Rules.

F. Terms of Reference

The ICC Rules require that the Statement of Claim should accompany the request for arbitration. This, without a shadow of doubt avoids the time taken between the notification of or request for the arbitration and filing of Statement of Claims. In the case of the UNCITRAL Rules, such statement must include the "general nature of the claim and an indication of the amount involved, if any" and the submission of proper Statement of Claim later. In an ICC arbitration, parties must have "Terms of Reference", a procedure somewhat identical to pre-hearing conference, wherein, the arbitrator will draw up a document defining his terms of reference (a document covering a summary of the parties' respective claims; a 'definition' of the issues to be determined; and the particulars of the applicable procedural rules to be applied[21]), which is subject to review by the ICC.

Once the Terms of Reference have been signed or approved by the Court, claims or counterclaims, which fall outside the limits of the Terms of Reference, cannot usually be entertained.[22] The 'terms of reference procedure' could thus be criticised for being time-consuming, expensive and not being flexible enough especially in those cases where the drafting of Terms of Reference can be dispensed with.

G. Place and Language of Arbitration

In deciding on the place / language of arbitration both set of rules contain more or less identical provisions. In the absence of an agreement

17. UNCITRAL RULES, ART. 19.
18. *Id.*, ART. 23.
19. ICC RULE, Arts. 4(1), 5(1), 5(3), 5(4).
20. *Id.*, Arts. 4(5), 5(4).
21. Austin Amissah, *supra*. n 3.
22. ICC RULES, Arts. 3, 19..

by the parties the Rules hands over the power of determination to the Arbitral Tribunal.

H. Applicable Laws

Both Rules attach importance to the parties' agreement. Only if an agreement is missing the Tribunal should apply the law, which in its opinion is appropriate. Both Rules also put emphasis on the provisions of the contract and relevant trade usages[23].

I. The Award

a. Making the Award

The Rules about the making of the arbitral award can be found in Article 25 ICC Rules and Article 31 UNCITRAL Rules, which correspond concerning the requirement of a majority for making an award. The ICC Rules provide that in cases where there is no majority, the Tribunal's chairman shall make the award alone, this provision as far as UNCITRAL Rules are concerned extents only with respect to procedural matters.

b. Scrutiny of the Award

According to Article 27 ICC Rules the ICC Court of Arbitration reviews the arbitrators' final award, prior to its signing, to ensure its enforceability. The Court at this stage may lay down modifications as to the form of the award. There is no corresponding provision in the UNCITRAL Rules.

J. Costs

Determination of costs of any dispute resolution proceedings though a hypothetical question weighs heavily as single most important consideration on the minds of those involved in drafting the contract. Thus, one's choice between the available rules is often based on the costs involved.

Institutions like the ICC charge for the cost of administration based on the amount in dispute, whereas some others base theirs on the time spent on the administration. As per the ICC Rules, each request to open arbitration must be accompanied by an advance payment of US $2500 for administrative expenses. Any request for arbitration would be entertained

23. *Id.*, Art. 17 and UNCITRAL RULES, Art. 33.

only if it is accompanied by an appropriate payment. Further, the entire amount of estimated costs must be paid for the arbitration process to move beyond signing of the Terms of Reference.

According to Article 30 ICC Rules the Claimant and the Respondent to an arbitration are obligated to pay in equal shares a provisional advance to cover the costs of the arbitration. This advance is fixed by the Court and may be subject to readjustment at any time during the arbitration. Decisions on costs shall then be made by the Tribunal within the final award according to Article 31 ICC Rules. These costs shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court and reasonable legal and other costs. The Tribunal may apportion those costs among the parties.

If the proceedings are under the UNCITRAL Rules the arbitrators/ Tribunal determines the fees to be paid and is obliged to take into account any schedule of fees which has been issued by the appointing authority. Though one may be able to avoid institutional fees in an non-institutionalised arbitration, the fees and expenses of the arbitrators, the appointing authority and in certain cases, the expenses of the Secretary General of the Permanent Court of Arbitration would have to be paid.

III. Conclusion

The biggest different perhaps between the ICC rules and the UNCITRAL rules is the institutional backup. Even though that sounds like stating the obvious the consequences cannot be ignored. ICC charges administrative fees but in the same time it renders certain services which ensure that the arbitration proceedings are conducted in a smooth manner. As a necessary corollary arbitration under the UNCITRAL Rules lacks a supervising authority. However, the flexibility available under the UNCITRAL Rules may suit the parties in certain cases. In cases where the parties choose to use the UNCITRAL Arbitration Rules to govern any arbitration one can also wish to draw on the long experience of the ICC in appointing arbitrators they may agree to appoint ICC as the appointing authority. Thus ensuring security of a supervisory body while preserving the freedom and flexibility that are characteristic features of *ad hoc* arbitration. Thus a careful consideration of various elements may be helpful in determining which set of Rules ought to be included in the draft contract.

U.S. Action in Iraq and the Rule of Law: Practice v. *Opinio Juris*

*Poonam Chojar**

I. Introduction

Terrorism is a grim problem that has become a cause of serious concern for most of the nations of the world today. Besides being the cause of enormous loss of life and property across the globe it has also posed a dire threat of unprecedented use of weapon of mass destruction against civilian targets. Till the end of the last century, terrorism was understood as being confined to South Asian, Middle East and the African nations. The attacks on the twin towers of the WTC and Pentagon have however demonstrated that even the world's most powerful nations of the world such as the US are vulnerable to terrorist attacks. The 9/11 attacks have made the international community realise that trans national terrorism is a menace from which the world needs special protection. This realisation has led to initiation of a global war against terrorism. The western nations like the USA and UK have been the leaders in the anti terrorism campaign in the post 9/11 era. The armed actions carried on by the US forces in Iraq in pursuance of its anti terrorism campaign have however given rise to some controversial issues such as "role of international law in the inter state matters; the law governing use of force by states; the legal regime of armed invasions and the law governing treatment of prisoners of wars and detainees."[1] These issues have given rise to an apprehension that the actions undertaken by the US administration may lead to erosion of the rule of law from the international regime. This note is an endeavor to examine the compatibility of the armed invasion of Iraq by the US forces with the doctrine of rule of law. However, before dealing with the question of legitimacy of the US action in Iraq I shall make a reference to the various multilateral conventions and the U.N. Charter law on transnational terrorism and shall try to find out as to how effective these have been in combating the problem of terrorism at the international level.

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1. Vaughan Lawe, *The Iraq Crisis: What Now?*, 52 Int'l Comp. L. Q. 859 (2003).

II. Multilateral Conventions, Resolutions and Declarations

Diplomats from various nations have been meeting from time to time to discuss the problem of terrorism and to find the plausible solutions to it. As a consequence of consistent efforts of peace loving nations several major multilateral Conventions have been drafted so far aiming at subduing and preventing terrorist attacks such as the Tokyo Convention of 1963[2], the Hague Convention of 1970[3], the Montreal Convention of 1971[4], the Montreal Protocol of 1988[5], the Montreal Convention of 1991[6], the European Convention of 1977[7] and the Bonn Convention.[8] Under each Convention, the signatories are obligated to punish the described offences by *severe penalties*[9], take such measures as are necessary to establish their jurisdiction over the offence and its parties[10], take individuals into custody[11], make preliminary enquiry into the facts[12] and notify the perpetrator's state of nationality[13]. Treaties between nations to extend diplomatic as well as military cooperation, the extradition treaties and the cease-fire agreement often from a part of multilateral Conventions on terrorism. A cooperative and multilateral approach in addressing the daunting challenge posed by the transnational terrorism certainly appears to be the ideal one. A dialogue is, however, possible when there is reciprocity and mutual trust.[14] Can there be a reciprocity and mutual trust between the nations that are victim of terrorism and the *rogue nations*[15]? One cannot shake hands with clenched fist.[16] Most of the anti terrorism Conventions have proved to be of little effect for certain obvious reasons *viz.* lack of uniformity in state action

2. Convention on Offences and Certain Other Acts Commited on Board Aircraft 1963.
3. Convention for the Suppression of Unlawful Seizure of Aircraft 1970.
4. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971.
5. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988.
6. Convention on the Marking of Plastic Explosives for the Purpose of Detectors 1991.
7. European Convention on Suppression of Terrorism 1977.
8. Joint Statement on International Terrorism.
9. Hague Convention Art. 2, Montreal Convention Art. 3.
10. Hague Convention Art. 4, Montreal Convention Art. 5.
11. Hague Convention Art. 6(1), Montreal Convention Art. 6(1).
12. Hague Convention Art. 6(2), Montreal Convention Art. 6(2).
13. Hague Convention Art. 6(4), Montreal Convention Art. 6(4).
14. Kashmir: Denying Peace a Chance, SCR 15, (September 2000) issue.
15. The nations that sponsor, aid and provide training bases to terrorist organizations are infamous in the international community as rogue nations.
16. Indira Gandhi. *The Quotable Lawyer:* 137.17.

regarding prosecution and extradition and failure of the Conventions to define the term *severe penalties*.[17] According to Dr. Abeyratne the reasons of failure of most of the anti terrorism conventions are:

(i) little number of signatory states.

(ii) absence of an effective enforcement mechanism.

(iii) exemption to most political offences from extradition.

(iv) lack of rigorgus obligations to search for and arrest suspects.[18]

The success of any anti-terrorism Convention is dependent upon the sincere realization by the signatory nations that "terrorism and weapons of mass destruction threaten devastating and indiscriminate long-term damage to large segments of the civilian population and environment."[19] This calls for a world wide cooperation to prosecute terrorists and imposed meaningful sanctions on states that provide safe heaven for or support the terrorists.[20] "The acid test of sincerity of purpose is not words but deeds. Terrorism and dialogue do not go together."[21]

III. The U.N. Charter

Subscribers to the rule-book conception[22] of the rule of law might argue that the only effective way to eliminate terrorism while giving due respect to the doctrine of rule of law is to fight an institutionalised was against terrorism. This calls for establishment of a powerful international political institution having the power to enact rules aiming at prevention of terrorism. Such an institution is also required to be equipped with the power to take punitive measures against the rogue nations. The United

17. Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 Colum. J. Transnat'l L. 649,673 (2003).
18. RIR Abeyratne, *Some Recommendations for a New Legal and Regulatory Structure for the Management of the Offence of Unlawful Interference with Civil Aviation*, 25 Transp. LJ. 115, 116 (1998).
19. *Legality of the Threat for Use of Nuclear Weapons* (Advisory Option), 1996 ICJ Rep. 95 at p. 36.
20. Paul Stephen Dempsey, *supra* n. 17.
21. Extract from the speech of the then Prime Minister of India Mr. Atal Bihari Vajpayee delivered while addressing the United Nations Millennium Summit in New York on Sept. 8, 2002.
22. See Ronald Dworkin, *Political Judges and the Rule of Law*, in Mahendra P. Singh (ed.) Comparative Constitutional Law (1989). The *rule-book* conception, insists that whatever rules are put in the book must be followed until changed. The *rule-book* conception requires assignment to a political institution the responsibility and power to decide how to enforce rules.

Nations Organization is the forum that has been genuinely working for maintaining international peace and security for the past six decades. Article 1 para 1 of the U.N. Charter provides that the primary purpose of the United Nations shall be to maintain international peace and security and to take effective collective measures for the breaches of peace. The Security Council fulfils this very purpose of the U.N. The Council initially adopts peaceful measures to suppress terrorist activities such as calling upon the parties to settle the dispute peacefully[23], carrying out investigation in the areas affected by terrorism and recommending appropriate procedures and methods to combat terrorism to the affected nations taking into consideration the procedure, any, already adopted by such nations.[24] In addition to these, the Security Council is also empowered to undertake certain enforcement actions against the terrorist organization and the rogue nations. The Security Council has undertaken such enforcement actions in the form of a number of resolutions concerning demilitarisation and disarmament particularly between 1990 and 2003. Some of the important measures undertaken by the Council in the past fifteen years that highlight the UN's concern towards global terrorism are: the economic sanction against Iraq[25]; arms embargo on Liberia[26], Rwanda[27], Yugoslavia[28], Taliban[29] and Iraq[30]; arms and air embargo on Libya[31]; arms and oil embargo on Haiti[32] and against the Angolan Rebels[33]; trade sanctions against Cambodia[34] and the diplomatic sanction against Sudan.[35] The Security Council is also equipped with the authority to use force in pursuance of its object of maintenance of international peace and security through special agreements[36], the military committee or joint action under Article 106 of the UN Charger. The foregoing discussion on the powers of the Security Council and the role-played by it in the maintenance of international peace and security shall necessarily leave an impression that Security Council is a self sufficient and effective fora to initiate an institutionalised

23. UN CHARTER, Art. 33.
24. UN CHARTER, Art. 36.
25. Security Council Resolution 661 (Aug 6, 1990).
26. Security Council Resolution 788 (Nov 19, 1992).
27. Security Council Resolution 918 (May 17, 1994).
28. Security Council Resolution 1160 (March 31, 1998).
29. Security Council Resolution 1333 (2000).
30. Security Council Resolution on 1441 (Nov 8, 2002).
31. Security Council Resolution 731 (Jan 31, 1992).
32. Security Council Resolution 841 (June 16, 1993).
33. Security Council Resolution 861 (Aug 27, 1993).
34. Security Council Resolution 792 (Nov 30, 1992).
35. Security Council Resolution 1044 and 1054 (1996).
36. UN CHARTER, Art. 43.

war against terrorism. However, the facts that the Council is essentially a recommendatory body, the limited jurisdiction enjoyed by it and the political nature of the institution have been the major impediments in United Nations' endeavors to eliminate terrorism.[37] The UN Charter law, as it stands today, *speaks too softly to be heard amid the din of arms.*[38] In order to be effective in the war against terrorism, the UN Charter law is required to be "suitably modified so as to adapt to evolving security challenges and on relationship between sustantive legitimacy of forcible action and procedural framework for authorizing military enforcement."[39]

IV. ARMED INVASIONS OF THE ROGUE NATIONS

The post 9/11 attacks era has witnessed a material departure from the policy of tolerance and multilateral dealing in the campaign against terrorism. The armed invasion of Iraq by the US forces had demonstrated the will of the western nations to deal with terrorism sternly, swiftly and effectively. This requires that the strategy to fight against terrorism must be changed from one of investigating attacks and prosecuting terrorists to that of identifying threats of future terrorist attacks preventing them from happening and punishing would be perpetrators of their plans of terror.[40] The international community seems to have realised that taking proactive actions is but a necessity "in the face of the fundamental security challenge posed by non-state actors who reject the most basic rules of international law and deliberately target civilians for brutal destruction."[41] Yet the invasion of Iraq by the US and the UK forces has received multiple reactions from the international community. Whereas the western nations viz. the USA, the UK, Australia and France feel that invasion of Iraq was essential to uphold the security of the civilized portion of the world[42], other

37. V.S. Mani, *Human Rights and The United Nation: A Survey*, 40 JILI 38, 66 (1998).
38. Caius Mauris. The Quotable Lawyer, 137.4.
39. Ruth Wedgwood, *The Fall of Suddam Hussain Security Council Mandates and Preemptive Self Defence*, 97 AM. J INT'L L. 574 (2003).
40. Memorandum from John Ashcroft. Attorney General, U.S.A., to Heads of the Components of the Department of Justice (Nov 8. 2001). *See*: Robert M. Shesney, *Civil Liberties and the Terrorism Prevention Paragigm: Guilt by Association Critique*, 101 MICH. L REV. 1409 (2003). Attorney General Ashcroft has explained. "The central thrust of our campaign terror must be proactive preventions and disruption, and not primarily reactive investigation and prosecution. We cannot wait for terrorists to strike to begin investigations and make arrests. We must prevent first and prosecute second."
41. Jane E. Somerseth, *Law and Force after Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 634 (2003).
42. Richard A. Falk. *What future for the U.N. Charter system of war prevention?*, 97 AM. J. INT'L L. 590 (2003).

nations including Russia[43] fear that use of such a methodology in the war against terrorism "carries the risk of a serious and indefinite erosion of fundamental legal rights and indeed erosion of the rule of law itself."[44] Yet another set of international lawyers argue that albeit the preemptive use of force in the anti terrorism campaign is not altogether unlawful its legitimacy is however conditioned on the evidence of an imminent threat of attack.[45]

A. The US Explanation : Preemptive Self Defense

The Bush administration has justified the military action undertaken by the US forces in Iraq on the plea that it has acted in preemptive self-defence and such an action was necessary to forestal future terrorist attacks. The doctrine of preemptive use of force has been so strongly reinforced by the Bush administration that the doctrine is gaining popularity as the Bush doctrine. The Bush doctrine openly declares that preemptive use of arms forces for thwarting of terrorist networks and the rogue nations does not require any Security Council action. There is, however, a difference of opinion within the international community with respect to the legality of the preemptive use of force in the antiterrorism campaign. The supporters of the *National Security Strategy* of President Bush find sufficient justification in the preemptive warfare undertaken recently by the Bush administration in view of the interface between weaponry of mass destruction and extremist tactics of the mega terrorists.[46] William H. Taft[47] and Todd F. Buckward[48] have argued that both the US and the international community had a firm basis for using preemptive force in the face of the past action by Iraq and the threat that it posed as seen over a protracted period of time.[49] Subscribers to the classic realist theory of international politics on the other hand view it as "yet another case of use of imprecise legal rules by the powerful to advance their interests and

43. "Russia repeatedly spoke against the attempt to interpret the resolution on Iraq adopted by the Security Council as constituting in its entirety, a sufficient basis for use of force against Iraq." *Source:* Legal assessment of the use of force against Iraq, a document prepared by the legal departmetn of Ministry of Foreign Affairs of Russian Federation in March 2003 published at 52 INT'L COMP. L. Q. 1059 (2003).
44. Vaughan Lawe, *supra* n. 1.
45. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 17, 2002) available at http://www.whitehouse.gov/nsc/nss.pdf
46. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 17, 2002) available at http://www.whitehouse.gov/nsc/nss.pdf.
47. Legal Advisor of the U.S. Department of State.
48. Assistant Legal Advisor for Political Military Affairs of U.S. Department of State.
49. William H. Taft and Todd F. Buckwald, *Preemption, Iraq and International Law*, (97 Am. J. Int'l L. 557 2003).

powers under the pretext of United Nations authority."[50] The legality, however, deservers to be seen as a question of degree rather than an all or nothing choice.[51]

Preemption essentially means taking action in advance so as to avoid an undesirable anticipated happening. The doctrine of preemptive use of force is based upon the principle of anticipatory self-defence that is a well-established aspect of inherent right of self-defence.[52] Though the doctrine has gained the attention of the international lawyers only in the view millennium after the 9/11 attacks, the origin of the doctrine is not so recent. For centuries, international law recognized that nations need not suffer an attack before they can lawfully take actions to defend themselves against forces that prevent an imminent danger of attack.[53]

The UN Charter law imposes broad prohibition explicitly requiring nations to refrain in their international relations from threat or use of force against territorial integrity or political independence of any state.[54] Article 51 of the UN Charer, however, provides for an exception to this general prohibition and permits the exercise of the inherent right of individual or collective self-defense if an armed attack occurs, until the Security Council has taken measure necessary to maintain international peace and security.[55] Article 51 thus recognises and affirms right of self defence under international law. The *traditional view* is that the UN Charter law allows preemptive use of force only in self-defence against an imminent armed attack. Most of the UN members subscribe to this traditional view and argue that a preemptive use of force intended to have a deterrent effect on the terrorist organizations or the rogue nations falls beyond the scope of the permissible limits of use of preemptive forces under the UN Charter law. For them in cases other than self-defence, the UN Charter allows for the use of force only on the basis of appropriate Security Council decisions adopted under Chapter VII of the UN Charter.

50. Carsten Stahn, *Enforcemetn of the Collective Will After Iraq*, 97 AM. J. INT'L L. 804 (2003).
51. Ruth Wedgwood, *supra* n. 39.
52. John Yoo, *International Law and War in Iraq*, 97 Am J Int'l L, 565, 571 (2003).
53. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 17, 2002) *available* at http://www.whitehouse.gov/nsc/nss.pdf.
54. U.N. CHARTER, Art. 2 (4).
55. Art. 51 of the UN Charter provides as under:
    - Nothing in the present Charter shall impose the inherent right of individual and collective self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

B. A Shift from Caroline Doctrine to the Bush Doctrine

The classic formulation of the right of anticipatory self-defense arises from the *Caroline* incident that took place in 1837. The attack by the British forces on the steamer *Caroline* was held to be a justifiable act of self-defence as the steamer had been used and might be used to ferry supplies to insurgents fighting British rule in Canada.[56] The Caroline incident laid a twin fold test to assess the legitimacy of the use of armed forces in self-defence. *Firstly* the use of preemptive force in self-defence must be in response to an imminent threat of attack that had left no choice of means and no moment of deliberation. *Secondly* such a use of force must be proportionate to the threat. If the above two tests are accepted to be the criteria for judging the legitimacy of the preemptive warfare undertaken by the Bush administration after 9/11 attack the conclusion would invariably be that the American operations are unlawful. This is so because even if we concede that the force used was proportionate to the threat posed by the terrorist organizations, it cannot, by any stretch of imagination, be said that the USA at the time of undertaking such operations was under an imminent threat of attack. However, faced with the potentially lethal combination of terrorists and weapons of mass destruction we need to rethink on the scope of the right of nations to resort to preemptive self-defence. The Bush doctrine has exponentially expanded the range of permissible preemption from that of *Caroline* doctrine, which requires a necessity of self-defense and leaving no choice of means and no moment for deliberation, to something like a balancing of reasonable probabilities. "We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that their use or any sudden change in their deployment may well be regarded as a definite threat to peace."[57]

C. The UK Explanation: Material Breaches by Iraq

Unlike the US, the UK government rests its claim that armed invasion of Iraq is lawful on the ground that Iraq has been guilty of material breaches of the various UN Security Council resolutions.[58] The UK

56. For more details about the incident Abraham D. Sofair, *On the Necessity of Preemption*, *14* EUR. J. INT'L L 209 (2003).
57. John F. Kennedy, Radio and Television Report to American People, *See:* Ruth Wedgwood, *supra* n. 39.
58. Security Council Resolution 1441 (Nov. 8, 2002) identified that Iraq has been and remains in material breach of its obligations under relevant resolutions including Resolutions 660, 678 and 687.

government has put forth the argument that the Bush administration does not need any preemption rationale since the armed operations against Iraq derive legal basis from UN Security Council Resolution 678 passed on Nov. 29, 1990 that authorised the member nations to use all necessary means to uphold and implement the previous and subsequent resolutions and to restore international peace and security. Does it however mean that Resolution 678 grants the right to all member nations to take, individually or jointly, any action, any time, any where they consider necessary to maintain international peace and security? Further, a reference to Security Council Resolutions 687 (April 3, 1991) brings forth the fact that the UN Charter law has by means of the aforementioned resolution retuned to the Security Council, the prerogative to decide upon the maintenance of international peace and security including use of forces, which was previously delegated by resolution 678 to the member states. According to the UK government however the UN Charter law, by virtue of Security Council Resolution 1441 (Nov. 8, 2002), has revived the authorisation to the member states to resort to armed action to maintain international peace and security. The UK also vehemently emphasizes the fact that under the Security Council Resolution 1441 (Nov. 8, 2002), Iraq has been found to be in material breach of its obligations under the Security Council Resolution 687. Nothing in Resolution 1441, however, suggests that the authorisation to use all necessary means to restore peace and security has been revived. A reference to the debate on Resolution 1441 also brings to light the opinion of several member nations that a specific resolution explicitly granting authorisation to use force must be passed before force could be used against Iraq.[59]

The UK government has tried to find answer to the military actions in Iraq within the legal regime. This is a sure indication of the commitment of the UK towards the achievement of a universal rule of law. The arguments put forth by the UK administration however fail to acknowledge the fact that there is a difference between the actions undertaken by the UN Security Council and the individual actions undertaken by the member states.[60] And the latter in order to be legal must have been undertaken under authorisation of the UN Security Council.

V. CONCLUSION

It is a very sorry state of affairs that even in the new millennium, with

59. Vaughan Lawe, *supra* n. 1.
60. Joan Fitzpatric, TERRORISM AND MIGRATION (2002), *availabel* at: http://www.asil.org/taskforce/fitzpatr.pdf

all vaunted progress of science and technology we have, in this very world, rules with a medieval mind harping on anarchist slogans like *jehad*. And even more unfortunate is the face that there still does not exist a single system of international legislation with universal support to counter and suppress terrorism.[61] Since these anti-social elements threaten world peace, the must themselves be threatened. We must not, however, forget that *without laws civilization dies.*[62] For the sake of very existence of a civilized society we need to maintain the rule of law. The interest of the international community would be best served by adhering to a law-oriented methodology in its campaign against terrorism. Granting of an unrestrained freedom to a nation to use forces against any for it perceives as potential threat to its security at any time of its choosing with any means at its disposal shall lead to creation of even greater forms of terror. "The relaxation of the constraints of immenence, necessity and a high level of impending harm could be destablizing and potentially catastrophic."[63]

We must acknowledge that despite having received enormous support from the western part of the world, the US practices do not find sufficient legal basis under the current U.N. Charter law nor are they authorized by any other piece of international legislation. In absence of any specific law that validates the US actions, the fear of gradual erosion of the universal rule of law is not unfounded. "As the most powerful nation in the world, the US has a special unilateral capacity to implement its convictions. But it also has a special obligation to justify its actions by principles that transcend the assertion of preponderant power. It cannot be in either the American national interest nor the world's interest to develop principles that grant every nation unfettered right of preemption against its own definition of threats to its security."[64] There is a gap between the U.N. Charter norms and the US practices. This gap, according to Prof. Anne Marie Slaughter[65], "can be filled if the Security Council adopts a resolution recognizing that the following set of conditions would constitute a threat to the peace sufficient to justify the use of force:

(1) Possession of weapons of mass destruction or clear and convincing evidence of attempts to gain such weapons.

61. Nicholas Matte, TREATISE ON AIR-AERONAUTICAL LAW 373, (1981). Paul Stephen Dempsey, *supra* n. 17.
62. Jewish folk saying.
63. Miriam Saprio, *Iraq: The Shifting Sands of Preemptive Self Defense*, (2003) 97 Am J Int'l L 599.
64. Henry A. Kissinger, *Consult and Control: By words for Battling the New Enemy*, Wash Post, September 16, 2002 at A 19.
65. Dean, Prinston's Woodraw Wilson School.

(2) Grave and systematic human rights abuses sufficient to demonstrate the absence of any internal constraints on government behavior.

(3) Evidence of aggressive intent with regard to other nations."[66]

However, given the unlikehood of immediate amendments in the U.N. Charter law is well as adoption of the aforementioned resolution the only plausible way of ensuring the compatibility between the doctrine of rule of law and the Bush doctrine is to encourage the international community to recognize that the UN Charter law not permits member nations to advance military support for the enforcement of anti terrorist measures undertaken by the council but also authorizes them to act proactively in face of dire threats to the human existence.

As students of law we need to stand tall for the rule of law to help design the framework of rules, procedures and institution within which persons and people can live productively at peace with one another.[67] The first step in this direction is to recognize human existence".[68] Next, we need to let the spirit of law prevail over our individual interests and aspirations. In short, we have to let the law rule in order to achieve a rule of law.

66. Anne Marie Slughter, *Chance to reshape the United Nations, Wash. Post*, April 13, 2003 at B7.
67. Thomas M. Frank, *What Happens Now? The United Nations After Iraq*, (2003) 97 AM. J INT'L L at 620.
68. Margret Mead, *New York Times Magazine*, November 26, 1961: *The Quotable Lawyer*, 116.5.

The Price of Education: Prohibition of Capitation Fees

*Mohit Gogia**

I. Introduction

India has 197 universities, 34 deemed universities, 2.87 lakh teachers and around 50 lakh students.[1] To finance such a large system, governments even in rich countries would throw up their hands in despair. This is true especially because, over time, universities have become infrastructurally one of the most expensive institutions in the world. Running a library, a computer system and having laboratories are all very capital intensive. Despite all this, one domain in which India compares favourably with the developed world is higher education and research. Nevertheless, it is time to rethink our education policy as this advantage in education is beginning to erode.

With a view to streamline the educational system, on August 14th, 2003, while interpreting its own judgment in *T.M.A. Pai Foundation* v. *State of Karnataka*[2], the Supreme Court has banned the collection of capitation fee (by whatever name called) for admission to professional colleges. This radical interpretation by a five-judge Constitutional bench headed by Chief Justice V.N. Khare comes in the wake of an eleven-member bench apparently granting some freewheeling rights to the managements of minority and unaided institutions. The effect of the latest judgement[3] is to restore the *status quo ante*[4] in many respects while prescribing the basic admission and fee procedures to be adopted in future.[5] The Supreme Court's latest judgement on capitation fee is commendable as it removes the confusion created by the judgement in the *T.M.A. Pai Foundation case*. The situation had come to such a state, that several petitions were filed in various high courts seeking elucidation. However, *Islamic Academy of Education case* is unlikely to give any relief to those students and their parents who have suffered on account of wrong interpretation of the previous verdict. Even so the judgement is significant as it enforces a total ban on capitation fees and profiteering and it clearly empowers the states to implement a scheme that has been reasonably prescribed.[6]

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1. Kaushik Basu, *Education and Finance* India Today, 17 November, 1997. *Available* at http://people.cornell.edu/pages/kb40/11.17.97.pdf. Visited: 30 December, 2003.
2. AIR 2003 SC 355.
3. *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697.
4. As per Interim Order in *State of Karnataka v. Dr. T.M.A. Pai Foundation* (2003) 6 SCC 790.
5. Doing Away with capitation Fees, Online Edition of the Hindu, 18 August, 2003; http://www.hinduonnet.com/thehindu/2003/08/18/stories/2003081800921000.htm. Visited: 30 December 2003.

II. Need of an Educational System Free of Capitation Fee

The need for education best emerges from Article 26(1) of the Universal Declaration of Human Rights, which states:

> Everyone has the right to education. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.[7]

During the national awakening in 19th century and the freedom movement in early 20th century, the stalwarts of our country like Raja Rammohan Roy, Ishwarchand Vidyasagar, Lala Lajpat Rai, and Rabindranath Tagore, upheld the concepts of universal, secular, scientific and democratic education. They unequivocally demanded that government must shoulder the entire financial responsibility to make available, completely free education up to the highest levels to all its citizens. Government expenditure in other heads such as police and military budget should be curtailed for that purpose if necessary, but students should not be considered as the source of fund in any case.

Education is not only the chief defence of a nation but it is also a power that enables its citizens to participate in achieving the objectives enshrined in the Preamble to our Constitution. *Mohini Jain (Miss) v. State of Karnataka and Others*[8] also provided for education as a fundamental right at all levels. However, in *Unni Krishnan's case*[9], it was laid down that the

6. http://www.tribuneindia.com/2003/20030823/mailbag.htm. Visited: 30 December 2003. See *supra* n. 3 paras 7, 21 and 147.
7. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies: *Supra* n. 2.
8. (1992) 3 SCC 666.
9. (1993) 1 SCC 645.

State could be obligated to ensure a right to free education of every child only up till the age of 14 years. Further, it is the duty of the state under the constitution to discharge the obligation of providing education.[10] The State is directed to strive for the right to education, make provision for free and compulsory education (Article 45), and promote the educational interests of Scheduled Castes and Tribes, and other weaker sections (including women). Thus, Education is primarily the responsibility of the State Government, but the Union Government has certain responsibilities specified in the Constitution on matters such as planning, higher education and promotion of education for weaker sections.[11] However, higher education calls heavily on national economic resources and the states obligation to provide it is not absolute and immediate but relative and progressive.

But practically speaking, the Government in particular is unable to aid any private educational institution financially at levels higher than at present. It has, therefore, been the policy of the Central Government to involve private and voluntary efforts in the sector of education in conformity with accepted norms and goals. A combination of unprecedented demand for access to higher education and the inability or unwillingness of government to provide the necessary support has brought private higher education to the forefront. The private sector should be involved and indeed encouraged to augment the much needed resources in the field of education, thereby making as much progress as possible in achieving the constitutional goals in this respect.

Indian civilization recognizes education as one of the pious obligations of the human society. To establish and administer educational institutions is considered a religious and charitable object and is not a 'business, occupation, trade, profession or industry.[12] Education in India has never been a commodity for sale. However, it is common parlance that everything comes for a price, and so does education. It is an equally accepted social and judicial notion that there must not be any overcharging for such education or in other words there must not be any 'Capitation fee' charged for the purpose of imparting education.[13] But is it that simple?

10. In this regard Art. 45 of the CONSTITUTION OF INDIA states: "Provision for free and compulsory education for children. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."
11. Constitution of India, 7th Sch. List I, Entry 66.
12. *Supra* n. 2.
13. It is not permissible in law for any educational institution to charge capitation fee as a consideration for admission to the said institution: *Supra* n. 9.

Capitation fee is nothing but a price for selling education. Capitation fee means any amount, by whatever name called, paid or collected directly or indirectly in excess of the fee prescribed by the Government.[15] In the Indian higher educational context, capitation fee has an extortionist connotation suggesting, in fact, something like a hefty bribe for admission. Also, it needs to be pointed out that some private managements have been charging exorbitant capitation fees from the students in the name of development or amenity charges. The concept of 'teaching shops' is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage.[15]

The state action in permitting capitation fee to be charged by state-recognized educational institutions is wholly arbitrary and as such violative of Article 14 of the Constitution of India.[16] Equality as envisaged by Article 14 is directly opposed to arbitrariness.[17] However, capitation fee brings to the fore a clear class bias. It enables the rich to take admission whereas the poor have to withdraw due to financial inability. A poor student with better merit cannot get admission because he has no money whereas the rich can purchase the admission. Such a treatment is patently unreasonable, unfair and unjust. There is, therefore, no escape from the conclusion that charging of capitation fee in consideration of admissions to educational institutions is wholly arbitrary and as such infracts Article 14 of the Constitution.

III. CHARGING OF FEES

In *Mohini Jain's case*[18], it was held that any prescription of fee in excess of what was payable in government colleges was a capitation fee and would, therefore, be illegal. The correctness of this decision was challenged in *Unni Krishnan's case*[19], where it was contended that if

14. As per Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984. Similar provision is also contained in Maharashtra, Tamil Nadu and Andhra Pradesh State legislations.
15. 56th All India Medical Conference, December 1980, Cuttack: A resolution was passed condemning the policy of admission on the basis of capitation fees, as commercialization of medical education endangers the lowering of standards of medical education and encourages bad practice.
16. *Article 14* states: "Equality before law- The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
17. *Ramana Dayaram Shetty v. International Airport Authority of India* (1979) 3 SCC 489: (1979) 3 SCR 1014; *Ajay Hasia v. Khalib Mujib Sehravardi* (1981) 1 SCC 722: 1981 SCC (L&S) 258: (1981) 2SCR 79.
18. *Supra* n. 8.
19. *Supra* n. 9.

Mohini Jain's ratio were applied, the educational institutions would have to be closed down, as they would be wholly non-viable without appropriate funds, by way of tuition fees, from their students.

In *Unni Krishnan's case*, the Court held that private unaided recognised affiliated educational institutions running professional courses were entitled to charge a fee higher than that charged by government institutions for similar courses, but that such a fee could not exceed the maximum limit fixed by the state.[20] With regard to private aided recognised/affiliated educational institutions, the Court upheld the power of the government to frame rules and regulations in matters of admission and fees. Also, with regard to professional institutions, a scheme was framed.[21]

However, even thereafter, sufficient funds were not available for the development of educational institutions. Another infirmity which was brought about in the above case was that experience showed that most of the "free

20. To meet further shortfall in funds, The Supreme Court, by interim orders via its review judgment, (1993) 4 SCC 111, had permitted, within the payment seats, 5 percent of seats to be allotted to Non-Resident Indians, against payment of a higher amount as determined by the authorities.

21. The scheme that was framed, *inter alia,* postulated:
   (a) ...
   (b) That 50% of the seats in every professional college should be filled by the nominees of the Government or University, selected on the basis of merit determined by a common entrance examination, which will be referred to as "free seats", the remaining 50% seats ("payment seats") should be filled by those candidates who pay the fee prescribed thereof, and the allotment of students against payment seats should be done on the basis of *inter se* merit determined on the same basis as in the case of free seats
   (c) That there should be no quota reserved for the management or for any family, caste or community, which may have established such a college
   (d) That it should be open to the professional college to provide for reservation of seats for constitutionally permissible classes with the approval of the affiliating university
   (e) That the fee chargeable in each professional college should be subject to such a ceiling as may be prescribed by the authority or by a competent court
   (f) That every state government should constitute a committee to fix the ceiling on the fees chargeable by a professional college or class of professional colleges, as the case may be. This committee should, after hearing the professional colleges, fix the fee once every three years or at such longer intervals, as it may think appropriate
   (g) That it would be appropriate for the University Grants Commission to frame regulations under its Act regulating the fees that the affiliated colleges operating on a no grant-in-aid basis were entitled to charge. The AICTE, the Indian Medical Council and the Central Government were also given similar advice. The manner in which the seats were to be filled on the basis of the common entrance test was also indicated.

seats" were generally occupied by students from affluent families, while students from less affluent families were required to pay much more to secure admission to "payment seats". The education of these more affluent students was in a way being cross subsidised by the financially poorer students who, because of their lower position in the merit list, could secure only "payment seats". Thus, for these reasons, *T.M.A. Pai Foundation case*[22] held the scheme framed under *Unni Krishnan's case* to be unconstitutional.

When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the constitution.

While throwing out of the window the concept of capitation fees, the Apex Court in *Islamic Academy of Education case*[23] has allowed considerable flexibility to the educational institutions on the fee structure. Reiterating that educational institutions were set up for charitable purposes, the Constitutional Bench said that the Government should consider framing regulations to cancel the recognition and the affiliation given to private colleges if they charge capitation fee or indulge in profiteering from the admission fee asked from the students.

There can be no fixing of a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus[24], which must be used for the betterment and growth of that educational institution. Since the object of setting up an educational institution is by definition 'charitable', it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution. This will require reworking of the fee structure to permit such surplus.[25]

Thus the profit/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or any other business or

22. *Supra* n. 2.
23. *Supra* n. 3.
24. Reasonable surplus doctrine can be given effect to only if the institutions make profit out of their investments: *Supra* n. 3.
25. *Supra* n. 2.

enterprise.[26] However, this has not been always been so.

The Constitution recognises the right of the individual or religious denomination, or a religious or linguistic minority to establish an educational institution.[27] If aid or financial assistance is not sought, then such institution will be a private unaided institution. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the government.

The 11-judge bench also believed imposing restrictions on private institutions would have an adverse affect on their autonomy[28]. The essence of a private educational institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institutions and the government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence.[29]

Further, to avoid or control profiteering and/ or charging of capitation fees, the majority judgment provides that in professional colleges admis-

26. *Supra* n. 3.

27. For detailed discussion on Right to Establish institutions see: Arunav Patnaik, *The right to establish and administer minority educational institutions* XXIV DLR 208 (2002).

28. *University Autonomy* - Freedom of individual development is the basis of democracy. Exclusive control of education by the State has been an important factor in facilitating the maintenance of totalitarian tyrannies. In such States institutions of higher learning controlled and managed by governmental agencies act like mercenaries, promote the political purposes of the State, make them acceptable to an increasing number of their populations and supply them with the weapons they need. We must resist, in the interests of our own democracy, the trend towards the governmental domination of the educational process.
Higher education is, undoubtedly, an obligation of the State but State aid is not to be confused with State control over academic policies and practices. Intellectual progress demands the maintenance of the spirit of free inquiry. The pursuit and practice of truth regardless of consequences has been the ambition of universities. Their prayer is that of the dying Goethe : "More light" or that of Ajax in the mist "Light, though I perish in the light: As laid down by- University Education Commission, appointed on 4th November, 1948, having Dr. S. Radhakrishnan as its Chairman and nine other renowned educationists as its members.

29. *Supra* n. 2.

sion must be on the basis of merit and hence what is necessary is a special approach keeping in mind the need for merit based selection and the fact that it is now well established all over the world that those who seek professional education must pay for it. In this regard it was laid down by the court as follows:

> It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the Management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the Management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counseling by the state agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the government according to the local needs and different percentage can be fixed for minority unaided educational and non-minority unaided and professional colleges....Appropriate machinery can be devised by the state or university to ensure that no capitation fee is charged and that there is no profiteering though a reasonable surplus for furtherance of education is permissible.

With regard to Private Aided Professional Institutions it was laid down:

> While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit coupled with the reservation policy of the state. In the case of such institutions, it will be permissible for the government or the university to provide that consideration should be shown to the weaker sections of the society. The state, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the state. At the same

> time it has to be ensured that even an aided institution does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the Management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by government or as a wholly owned and controlled government institution and interfere with Constitution of the governing bodies or thrusting the staff without reference to Management.

Further it was observed that with regard to a large number of other educational institutions, like schools and non-professional colleges, which cannot operate without the support of aid from the state, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the state. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedure. In other words, the autonomy of a private aided institution would be less than that of an unaided institution.

In order to give effect to the *T.M.A. Pai Foundation case*, the Supreme Court in *Islamic Academy of Education case*[30] provides for the setting up by the respective state Governments/ authorities, in each State, a five-member committee headed by a retired judge. Another four-member committee headed by another retired judge would do the determination of management quota in private colleges and unaided Minority Educational Institutions. The Chief Justice of the respective state would nominate both the retired judges. The fee-scrutiny committee would include a chartered accountant of repute, an eminent doctor or an engineer depending on the nature of the college, Secretary of Medical Education or Technical Education of the state government and an eminent personality of the State. It was held that each institution could have separate fee structures depending on the facilities, infrastructure, and salary paid to its staff and the investments made for future. Further, the professional colleges would submit their proposed fee structure to the committee. The committee after scrutinising the details of various aspects could fix a fee structure which would remain

30. *Supra* n. 3.

valid for three years (except under exceptional circumstances) and only thereafter the institution could approach the committee again for revision. Taking into account the fact that several institutions were charging fees for the entire four or five year course, the Constitutional bench said no institution could charge fee for more than one semester or at the most for a year.

The Constitutional bench also looked into the admission process for the management quota seats and the general seats offered by each of the private professional colleges including those run by Unaided Minority Educational Institutions (UMEIs). The *T.M.A. Pai Foundation*, majority judgement, in making a distinction between private unaided professional colleges and other educational institutions i.e. schools and undergraduate colleges recognised that it is in national interest to have good and efficient professionals. It is for this reason that in professional institutions (both minority as well as non- minority)[31], merit has been made the criterion for admission. The other committee (as mentioned above) would fix the percentage of fee for the state as well as the management depending on local requirements. That is to say that the quota to be given to the management and state in admitting students would be decided by this committee. However, a proper reading of *T.M.A. Pai Foundation* judgement indicates a further distinction between minority and non-minority professional colleges. In fixing the admission percentage of non-minority institutions, by the Government, local needs have to be looked into. Whereas, in the case of a minority institution, in addition to local needs, the interest or needs of the community in the state also have to be seen. Under the *T.M.A. Pai Foundation* case, a UMEI might have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent.[32] However, in *Islamic Academy of Education case*, the Supreme Court ruled that UMEIs did not have an absolute right to select and admit students of their choice.[33] While allowing

31. Minority institutions are as much subject to regulatory measures as non- minority institutions are- Hence, rights of minorities and non minorities in this regard are equal: As per majority view in *Islamic Academy of Education case*, *supra* n. 3.
32. While accepting the principle that the minority institutions had certain special rights, the court did not approve of their interpretation of the earlier verdict under which they were entitled to admit 100 per cent students by evolving their own methods of admission. It reaffirmed the point that while under no circumstances should the government's control or intervention lead to their closure, they cannot admit more than 50 per cent of the students from whatever minority community they belonged to: http://www.tribuneindia.com/2003/20030823/mailbag.htm. Visited: 30 December 2003.
33. http://www.southasiamonitor.org/india/2003/aug/15ind2.htm. Visited: 04 January 2004.

the States to fix a quota for the private minority institutions, the Court has recognised the 'preferential right' of these institutions to accord priority in admission to students from their communities. It was also observed, that in admitting students under the management quota, the institutions could not ignore the merit of the students and that the seats falling vacant under management quota would go to the candidates passing Common Entrance Test conducted by the respective state governments.

IV. Conclusion

The new interpretation of an earlier verdict that caused widespread doubts and apprehensions will be welcomed by students, educationists and others seeking fair equality of opportunity and social justice. While students consider the ban on capitation fee as the most positive aspect of the verdict, private colleges are not so enthused, as they feel that the managements will not only have to forgo capitation fees, but will also have to depend on the mercy of the committee to be constituted for fixing the fee structure. To an effect, the latest ruling on Capitation fees, restores, in large part, the situation prevailing before the October 31, 2002 judgment[34] of the Supreme Court. It restores the scheme laid down in the *Unni Krishnan's case* (except the system of 'free' and 'payment' seats). A system of checks and balances has now been prescribed to check the hyper-commercialisation of professional education. It is likely that some of the better colleges, with good infrastructure and teaching, will set their fees beyond the reach of needy students. Thus, there will be a need now, of generous scholarship schemes. It is now the primary responsibility of the State Governments, especially in the southern region where the practice of capitation fees is rampant, to regulate the functioning of professional colleges, streamline admissions, and implement the judgement in letter and spirit.

Though the Supreme Court's ruling on capitation fee is well meant, it cannot be welcomed without some reservations. It is also feared that there are still many grey areas in the Apex Court's verdict, which may open the floodgates of litigation. One such is with regard to the Apex court entitling each institution to have its own fee structure based on its infrastructure, salary paid to the teaching staff, future expansion plans and development as well as better management. The verdict has virtually allowed the private managements of the institutions almost complete authority to determine the fee structure in their respective institutions according to their whims. Thus

34. *Supra* n. 2.

the approach to fixing the amount for tuition fees is very similar to that of determining the price of a commodity produced by a private limited company. This would enable the private investment agencies to extort from the students exorbitant amount of money, equivalent to capitation fees in reality, camouflaged as tuition fees with a legal stamp.

Whether the recent judgement proves to be a fool- proof plan or a Pandora's box will have to be seen. But till the time the Government enacts an appropriate legislation to the effect of the judgement, the directions given would operate under Article 141[35] of the Constitution, and hence be binding.

35. Article 141 provides that the law declared by the Supreme Court is the law of the land and all authorities shall abide by it.

BOOK REVIEWS

THE HINDU SUCCESSION ACT, 1956. By S.A. Kader. Kolkata: Eastern Law House, 2004, Pp *xxx* + 465. Rs. 480/-

Succession and inheritance forms an important part of family laws. In India, where the existence of multiple diverse laws is the general norm, the applicability criterion range from the religion of the parties, their sect in that religion, tribe and domicile and even the form of marriage they might have undergone. Besides the variation reflected in the different religious communities, 'Hindus' themselves display an extensive diversity in the application of succession laws. There is therefore no single 'Hindu law of succession' that applies to Hindus uniformly. Hindu in the states of Jammu & Kashmir, Goa, and Union territories of Daman, Diu and Pondicherry have distinct laws of succession. A large numbers of tribal communities following Hindu religion are governed by their distinct non-codified customary laws, and Hindus marrying non-Hindus under Special Marriage Act 1954, are subject to the application of the Indian Succession Act 1925. The rest of the Hindus who constitute a large majority, are governed by the provisions of the Hindu Succession Act 1956. A study of the Act therefore becomes very important, and a commentary on the same would undoubtedly be very helpful for those wanting to familiarise themselves with the basic principles of succession among Hindus.

The book[1] is divided into four parts and nine appendices. In Part I, the author gives an insight into the sources of Hindu law, schools of Hindu law and the law relating to Hindu joint family and Mitakshara and Dayabhaga coparcenary very briefly. This entire portion has been summarised in around twenty pages.

Part II comprising of four chapters gives the full text of the Hindu Succession Bill (Bill No. 13) of 1954, with the Report of the Joint Committee of the Houses of the Parliament on this Bill and the Minutes of Dissent of the Parliamentarians. The full text of the Hindu Succession Bill (Bill No. 13B) of 1954, is the subject of Part III of the book, and Part IV gives a section-wise commentary on the Hindu Succession Act 1956.

Right in the Introduction the author quotes with approval the observations of eminent jurist John D. Mayne, that Hindu law is the oldest pedigree of any known system of jurisprudence and even now has shown

1. S. A. Kader, THE HINDU SUCCESSION ACT, 1956 (2004).

no signs of decrepitude[2]. Describing also as an age old yet an ageless system, the author attaches an element of divinity to it, while tracing the sources to the *Shrutis*[3].

The full text of the Hindu Succession Bill, the Report of the Joint Committee and the Minutes of Dissent would provide a good research material enabling the readers to understand how difficult it must have been for the Indian Parliament to enact the Act in to present form, more so as the charges against the Bill described it as a blatant attack on Hindu religion itself. However, as both the Bills show little deviation from each other, rather than reproducing both of them, one could have been retained, and the deviation could have been highlighted.

The section-wise commentary on the Hindu Succession Act 1956, is brief but very informative. This is one of the very few books that the reviewer has come across, which is so specific and accurate on the territorial application of the Act. The author also compares the applicability provisions of the Hindu Succession Act, with those under the Indian Succession Act 1925[4], and highlights the conflict between the two[5]; and calls for its resolution by the judicial intervention. Explaining the meaning of the term 'related' to the intestate, the author discusses the rights of illegitimate children and children born out of void and voidable marriages. In his analysis of the case of *Daddo* v. *Ragunath*[6], the author disagrees with the issues of the Bombay High Court, where the Court had lamented the denial of succession rights to the son of a permanently kept concubine of a male intestate, expressing a hope that the same might be remedied in future by the legislature. The author correctly differs from the views expressed by the Court and points out that perpetuation of immoral customs may take society back to the days of recognition of concubinage as an institution, which is not in tune with the march towards an egalitarian society with equal rights to men and women. He argues[7] that permission to men to have concubines and recognition of their off spring may seriously affect the rights of legally wedded wives and children.

The highlights of the book are the discussion on Hindu women's estate; succession to the property of a female Hindu and devolution of a dwelling house. Section 14 has been elaborately discussed and includes

2. *Id.* at 1.
3. *Ibid*
4. INDIAN SUCCESSION ACT 1925, S. 29 and HINDU SUCCESSION ACT 1956, S. 2.
5. *Supra* n. 1 at 126.
6. AIR 1979 Bom 176.
7. *Supra* n. 1 at 142.

the concept of *streedhana*, succession to it as it stood prior to 1956 and post 1956; constitutional validity of Section 14 and conversion of limited estate into absolute estate. Section 23, that has been thoroughly analysed from virtually every angle, shows a very balanced rationale and a fair approach. In the area of family laws where patriarchal attitudes invariably creep in, the author's approach is very refreshing and honest, as his comments display a sensitivity without expressing a single biased statement towards any sex. The criticism of the legislative provisions are supported with powerful arguments that would leave the reader with little choice but to agree with him. Criticising the approach of the Supreme Court in *Narasimha Moorthy's* case[8], he equates the position of a daughter to that of a person waiting for the waves to subside before taking a bath in the sea.[9] He shows clearly how the object of the Hindu Succession Act, that was to ameliorate the condition of a Hindu woman and raise her status to that of a man, is frustrated by denying to her, her legal rights in the dwelling house by the interpretation given by the Supreme Court. Tracing the meaning of the term 'related' in various dictionaries the author shows[10] that Section 23 applies only in cases where there is a plurality of Class I male heirs and the Apex Court's decision extending its application to the case of a single male heir is wholly inappropriate.

The book is very informative and well written and contains a very good analysis of the statutory provisions and judicial pronouncements. It would prove to be immensely useful to those trying to familiarise themselves with the legislative developments and the principles of succession laid down in the Hindu Succession Act 1956.

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8. *Narasimha Moorthy* v. *Sushilabai* AIR 1996 SC 1826.
9. *Supra* n. 1 at 385
10. *Id.* at 384-385

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DRUG CONTROL. By P.K. Dutta. Kolkota, New Delhi: Eastern Law House, 2003. Pp 661 (hard cover), Rs.700/-

Drug is the greatest weapon of mankind to fight disease and death. It is at this very point of death that the specific drug of highest quality and purity has to win the battle for life. There one cannot compromise for anything less. Hence drug control.

Drug Control is a social and public health measure enforced by Government to regulate the import, manufacture, sale and standards of drugs. The main objective of drug control is to ensure availability of drugs, which are of required standards of quality, purity and strength, to the people. Drug control in India is exercised not only on Allopathic drugs but also on drugs used in different systems of medicines viz. Ayurvedic, Siddha, Unani, Homoeopathic and even the veterinary system.

The genesis of Drug Control in India can be traced back to the pre-Independence era when in August 1930, the Government of India appointed a Drugs Enquiry Committee under the stewardship of Col. R.N. Chopra, "to enquire the extent to which drugs of impure quality or defective strength were being imported, manufactured or sold in India and to recommend steps for controlling such import, manufacture and sale in public interest". In pursuance of the recommendations the Chopra Committee Report the Government of India passed the Drugs Act 1940 to regulate the (i) import; (ii) manufacture; and (iii) distribution and sale of drugs. The Rules related to drugs were framed in 1945 to give effect to the provisions of the Act. The Act along with the Rules came into force in all the Part A & Part C states from 1st April 1947 and subsequently in Part B states also.

The book under review first published in 1990, has been thoroughly revised and updated by the author in the third edition of 2003 including a comprehensive chapter on Control of Biotechnological Products {Genetically Modified Organisms (GMO)} contributed by Dr. P.K. Ghosh, Advisor to the Department of Biotechnology, Government of India. Describing the work rightly as an encyclopaedia of drug control, the author has divided the book into four parts.

Part-I of the book has as many as twenty-six small chapters giving a bird's eye view of the guidelines and significant features of the drug control. Chapters 1 and 2 tracing the origin and genesis of drug control,

deal with the main features of drug control which is exercised by a system of licensing and inspection by State Drug Control Organisation over drugs which are imported, manufactured, sold or distributed. Also a special control is exercised for which approval from Drugs Controller General (India) has to be obtained. While analysing the Indian scenario, reference to United States' Federal Food, Drug & Cosmetics Act 1968 and U.K. Medicines Act 1968 has been made for the purposes of a comparative analysis. Drug testing for maintaining the quality of drugs, done by a two-tier enforcement agency at the central and state level, has been dealt with in Chapters 3 and 4. For the framing of rules relating to drug control and their all-India compliance, two statutory bodies, viz. (i) Drugs Technical Advisory Board; and (ii) Drugs Consultative Committee exist. Failing compliance with regulations results in offence(s)/penalties viz. fine, confiscation, suspension and cancellation of licences compared with imprisonment that has been dealt with in tabulated form in Chapter 26 of the book.

Chapters 6-9 deal with the control measures at the stages of manufacture and sale of drugs highlighting the main objective of drug control as standardisation of quality of drugs. Chapter 7 specifically includes the mechanism of control with respect to (i) Large Volume Parenterals (Intravenous Fluids); (ii) Whole human blood and blood products; and (iii) Sera and Vaccines. Control measures with reference to production of contraceptives, surgical dressings, umbilical tapes, etc., have been dealt with in Chapter 16. Chapter 9 dealing with sale of drugs gives a detailed insight into the various types of sale licence *viz.* retail, wholesale, restricted licence and wholesale distribution of a drug from a motor vehicle explicitly bringing out the different categories of retailers like drug store, chemist & druggist, pharmacist, dispensing chemist, pharmaceutical chemist.

The import and export of drugs has been treated in Chapters 5 and 12 respectively. Chapter 5 details the initial objectives laid down, the resulting experiences entailing into comprehensive amendments deemed appropriate to plug the loopholes by bringing the manufacturer of a drug abroad whose products have to be imported within the ambit of Indian drug laws. Chapter 12 laying down the requirements under Drugs & Cosmetics Rules at the stage of export also include the World Health Organisation Good Manufacturing Practices and Certification Scheme that is to be adhered to.

Chapters 18, 19, 20 and 21 deal with the control measures relating to Homeopathic medicines, Ayurvedic, Siddha and Unani medicines, veterinary drugs and cosmetics respectively.

Chapter 15 analyses the exemptions granted to certain drugs or institutions or some professions from complying with the requirements of standards, import, manufacture or sale of drugs as per Schedule D&K to the Rules.

Chapters 10 and 17 deals with a list of Licence Forms with application forms for various categories like import, manufacture and sale of drugs. Chapter 17 gives a bird's eye view to the whole list of schedules appended to the Drugs & Cosmetics Act and the Rules as well. Chapter 25 incorporates the various amendments brought to the Act since 1955 till 1986 whereas Chapter 22 deals with the Consumer Protection and their rights under Drugs & Cosmetics Act.

Chapter 14 highlights the need to have minimum required standards of quality, purity and strength in detail bringing out the minutiae of Sections 8 and 16 of The Drugs & Cosmetics Act with the Second Schedule to the Act.

The treatise on drug control by P.K. Dutta in its Part II & III consists mainly of the Act, the Rules and the amendments if any made till date on various issues relating to sale, manufacture, labelling etc. of drugs and cosmetics.

Part IV of the book has been developed as an important piece of literature on a debatable issue of Genetically Modified Organisms (GMO), Biopharmaceutical Products and the Environment.

The book under review is a comprehensive compilation of laws and rules relating to drugs ranging from Allopathic, Homeopathic, Siddha, Unani to veterinary and even cosmetics. The reader will find it interesting as the language used is simple and absorbing. The law and rules have been analytically laid down which can be helpful even to a novice in the field of drugs.

The volume of the book can mostly be attributed to the rules that have been provided in Part-II of the book. However, for any person carrying research in the area of Genetics or Biopharmaceutical Products, the 55 pages contribution as Part-IV will serve as a radar to such a researcher.

The author overall has worked hard and compiled this voluminous edition which shall be useful to present and potential researchers in the area of law, medicine, intellectual property and consumer protection.

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LAW OF ARBITRATION & CONCILIATION : PRACTICE AND PROCEDURE. By S.K. Chawla. Second Edition. Kolkata : Eastern Law House, 2004. Pp. 80+1060, Rs. 875/-, ISBN 81-7177-156-4.

Following globalisation of the Indian economy, there was an increase in the foreign direct investment (FDI) in India. With the arrival of multinational companies in large numbers in India, it became a necessity to enact a law on arbitration and conciliation as the traditional justice dispensing system is costly, cumbersome and time consuming. The Parliament therefore enacted the Arbitration and Conciliation Act 1996 (hereinafter 'the Act').

The book under review is a commendable effort made by the author. This is second edition of the book. The first edition was published in 1998. Since then, a large number of judgements have been delivered by Supreme Court and various High Courts which find place in the second edition.

According to author, the Act is very different from its predecessor the Arbitration Act 1940 and therefore, provisions of this Act are to be interpreted uninfluenced by the principles underlying the Act of 1940. The Act, though based on UNCITRAL Model Law, deviates from it. In *Konkan Railway Corporation Ltd.* v. *Rani Constructions Pvt. Ltd.*, the Supreme Court has observed that although the Model law was taken into account in drafting the present Act, still both are not identically drafted and therefore UNCITRAL Model Law, judgements and literature thereon are not a guide to the interpretation of the present Act, and especially of Section 11 where word 'Chief Justice' is used and not 'Court' as used in Article 11 of the Model Law.

The book contains text of the Act followed by introduction of the subject. The book thereafter provides section wise commentary. The commentary on preamble gives historical background of the subject and also refers to methods of alternative dispute resolution (ADR). A discussion is also made on Section 89 of the Civil Procedure Code 1908 (CPC), which provides that where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for arbitration; conciliation; judicial settlement including settlement through

Lok Adalat; or mediation.

Criticizing Section 89 of the CPC, the author writes that the formulation (or reformulation) of the terms of possible settlement is the last act of the Conciliator, vide Section 73(1) of the Act of 1996, whereafter the parties may reach a settlement agreement vide Section 73(2). If the court has to do the entire exercise of a conciliator in formulating or reformulating the terms of possible settlement as per Section 89 of CPC, it is not known what precious little is left for conciliator to do in conciliation proceedings under the 1996 Act. In view of ambiguity and consistency in section 89 CPC, it is doubtful if enough recourse would be made to the arbitration or conciliation as provided by the Act of 1996.

As the present Act is based on UNCITRAL Model Law on International Commercial Arbitration 1985, the author mentions corresponding provisions of the Model Law and also the provisions of Arbitration Rules and Conciliation Rules; Arbitration Act 1940; Arbitration (Protocol and Convention) Act 1937; Foreign Awards (Recognition and Enforcement) Act 1961; Arbitration Act, 1996 of England; Rules of Arbitral Institutions such as ICC Rules of Arbitration, ICC Rules of Optional Conciliation and Arbitration, London Court of International Arbitration Rules, Rules of Arbitration and Conciliation of the Indian Council of Arbitration and the ICADR Arbitration Rules 1996 etc.

The book contains exhaustive commentary on the provisions of 1996 Act and refers latest Indian and foreign case laws. Further, enriched appendices increase the importance of book manifold as various enactments and rules on the subject are available to the readers which are useful not only for teaching or research but also for practice. The book is extremely useful for teachers, researchers, judges, lawyers, students and others. The book is a valuable asset for the libraries.

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INTERNATIONAL LAW. By Gurdip Singh. Delhi: Macmillan India Ltd., 2003. Pp. xiv + 585, Rs. 270/-, ISBN 1403 909946.

International law is confronted with many difficulties and problems to keep pace with the rapidly changing times and circumstances. In the absence of a world legislative body, treaty making is the most important legislative process for international law. It is, therefore, more difficult to meet new situations and conditions resulting from the far-reaching scientific and technological developments and other significant changes in the field of international law which require the consent of different states with different traditions and ideologies. Nonetheless, international law gathers dynamism and endeavours to mend itself to the needs of the day. The task of international law is to effect difficult conciliations, such as stability with change, solidarity with variety, peace with justice, and international relations with national independence.

During the last century and the beginning of this century, international law has expanded enormously due to significant developments at international level. The dimensions of international law have witnessed drastic changes. The growing complexity of international relations between states has called for their institutionalisation. The process of institutionalisation has resulted in the introduction of new dimensions in the international law and emergence of international organisations.

The book under review is in two parts and contains twenty six chapters. Part I deals with law of peace and contains chapters on development of international law, nature of international law, sources of international law, relation between international law and municipal law, position of individual in international law, recognition, state responsibility, modes of acquisition and loss of territorial sovereignty, individual and the state, treaties, jurisdictional immunities of states, diplomatic and consular relations and the law of the sea.

Part II of the book deals with conflict resolution, war, neutrality and human rights and contains chapters on diplomatic modes of conflict resolution, arbitration, international court of justice, United Nations, peacekeeping operations, compulsive methods short of war, war, economic warfare, nuclear warfare, star wars, international and national measures of implementation of human rights, World Trade Organisation and international environmental law.

The book is written in a simple way easy to understand and provides updated information on the topics it covers. Due to increasing uses and importance of the sea, the chapter on Law of the Sea has been discussed threadbare. The author explains the Law of the Sea with the help of certain drawings which makes the study of that chapter more interesting and easy to understand. The book is enriched with case law. It is a judicious blend of specialised international jurisprudential knowledge and perceptive understanding of the broad political and social forces that have shaped international law. The value of the book increases significantly due to the discussion by author on Indian interests, policy and law in order to assess their compatibility with the international obligations undertaken by India. The book becomes indispensable for policy makers. As the author is from developing country, the book also reflects the view points of developing countries. The book analyses and evaluates the trends of contemporary international law with a view to determine whether the interests of the developed and developing states have been balanced.

The book, however, does not contain chapters on air law, space law and international terrorism may be due to paucity of space. A full-fledged chapter on international humanitarian law is highly desirable in the light of contemporary of developments particularly, the attacks on World Trade Centre, confinement members of Al-Qaida by United States at Guantanamo Bay, and the attack on Iraq by United States. The coverage on international institutions is not adequate. A table of cases may also be given in the next edition of the book which does not find a place in this edition. The value of the book may increase manifold if the author brings it out in two volumes and covers topics which are left out.

The book is useful for law teachers, researchers, judges, lawyers practicing in national courts as well as in international tribunals, diplomats, policy makers and students. The book is worth keeping in the libraries. The publisher Macmillan India Ltd. deserves appreciation for publishing the book in an excellent manner with proper proof reading and giving a good typographical set up.

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BHAUMIK ON THE RAILWAYS ACT, 1989. By H.K. Saharay. Eight Edition. Kolkata, New Delhi: Eastern Law House, 2003, Pages 645, Rs.480/-

The twentieth century witnessed the emergence of Indian Railways as a major carrier of passengers, goods and animals across the country. Today, the sheer magnitude of the field of its operations is baffling and unparalleled and highlights and enhances its responsibilities as a carrier. Its obligations of safe carriage is absolute like an insurer, barring a few exceptions, and a default in discharge of this obligation is to be made up by payment of monetary compensation to the aggrieved party. Carriage by Railway holds a centerstage in law of carriage and importance of any legislation dealing with Railways as carrier cannot be overemphasised.

The first legislation to deal with railways was the Indian Railways Act 1890. At that time the railways in India, which was first constructed and run by East India Company in 1849, were constructed and managed by many private companies, sometimes with financial assistance from the government which acted, mainly as a coordinating agency and regulated certain matters like inter-railway movement of traffic, fixation of rates, sharing of revenue earning, apportionment of claims and liabilities among the railways. To keep up with the technical and structural changes in the railway system that occurred within a span of about a century, the Act of 1890 was many a times amended, and finally repealed and replaced by the Railways Act 1989. The main object of this Act is to accommodate and provide for the changeover of Indian Railways from a private enterprise to a government owned, managed and controlled enterprise as also, the stupendous expansion of railway network all over the country, necessitating the creation of new railway zones. Other significant provisions incorporated in the Act are entrustment of rate fixing power to the central government, statutory recognition of the railway receipt as a negotiable instrument, limitation of monetary liability of railway administration in respect of payment of compensation for loss, damage etc. of the goods, rationalisation of existing offences and inclusion of some new offences. This Act has been amended by the Railways (Amendement) Act 1994. Besides the Act of 1989, other important legislation dealing with the railways are the Railway Claims Tribunal Act 1987, The Railways Property (Unlawful Possession) Act 1966, The Statutory Investigation into Railway Accident Rules 1998, and The Railways (Notices of And Inquiries into Accidents) Rules 1998.

The first edition of Bhaumik on the Railways Act (1949) appeared in 1950. The 8th edition of this book is by Mr. H. K. Saharay. The author purports to make it a thoroughly revised commentary on the Railways Act 1989, as amended in 1994. He has taken a section-wise discussion of the Act. Corresponding provision in the old Act of 1890 have also been reproduced verbatim. As it is a section wise commentary, the book has been divided into 16 chapter and 200 sections.

In addition it has 23 appendices which include important legislations. Like the Railway Claims Tribunal Act 1987, Railway Property (Unlawful Possession) Act 1966, Railway Protection Force Act 1957, Indian Railway Board Act 1905, Statutory Investigation into Railway Accidents Rules 1998, Railway Notices of and Inquiries into Accidents Rules 1998, and Table of Cases and Index.

The text is very informative and important sections been have dealt with exhaustively; the commentary on section 93 (Chapter XI) runs into about 53 pages (Pages 177-229), Section 98 into 19 pages (Pages 249-268) and Section 107 (Chapter-XI) into 30 pages (299-329). A number of cases including the latest ones have been referred to illustrate and elaborate the legislative provisions.

There is no dearth of information in this book, and the author's hard work in collection and assimilation of this extensive material on law relating to railway as a carrier must be acknowledged and appreciated. A more careful dealing of the content however, would have undoubtedly enhanced the value of this book.

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FORM IV

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

Place of Publication	Faculty of Law University of Delhi Delhi-110 007
Language	English
Periodicity	Annual
Printer's Name, Nationality and Address	Surendra Prasad, Indian, Dean, Faculty of Law University of Delhi, Delhi-110 007
Publisher's Name, Nationality and Address	Surendra Prasad, Indian, Dean, Faculty of Law University of Delhi, Delhi-110 007
Editor's Name, Nationality and Address	Surendra Prasad, Indian, Dean, Faculty of Law University of Delhi, Delhi-110 007
Owner's Name	Faculty of Law University of Delhi Delhi-110 007

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