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ARTICLES

RIGHTS OF VICTIMS OF CRIME – NEED FOR A FRESH LOOK*

*Dr. Justice A. S. Anand***

I Introduction

IN A general sense, every crime has at least three components –The criminal or offender, the crime and the victim of crime.

The growing menace of intimidation or allurement of the victims or witnesses during the trial at the instance of the accused or other vested interests brings to fore the question: Do the victims of crime have any rights in the prevailing criminal justice delivery system? The law's response to the 'rights' of the victims of crime has been inadequate and more often than not "merely a lip service".

The history of crime is as old as of mankind itself; but in the primitive period " a tooth for a tooth, an eye for an eye and a life for a life", was the essence of criminal justice. As the civilization developed, new ideas regarding an individuals rights and his corresponding duty to his fellow human beings took shape. The crime was no longer considered an offence against an individual only, but a revolt against the norms of an organized society and an attack on the civilization itself. Soon the state took upon itself, the right to identify and punish the offenders.

Definition of victim

The term victim is lacking descriptive precision. It implies more than the mere existence of an injured party, in that innocence or blamelessness is suggested as well as a moral claim to a compassionate response from others. The term victim is defined in Oxford English Dictionary as:

> "victim is a person who is put to death or subjected to misfortune by another; one who suffers severely in body or property through cruel or oppressive treatment: one who is destined to suffer under some oppressive or destructive agency: one who perishes or suffers in health etc., from some enterprise or pursuit voluntarily undertaken."

As per Collins English Dictionary

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* This paper was delivered on April 30, 2005 as Kelkar Memorial Lecture, at the Faculty of Law, University of Delhi, Delhi -110 007.

** Chairperson, National Human Rights Commission; former Chief Justice, Supreme Court of India.

identify and apprehend the offender, subject him to a fair trial and if found guilty, to punish him. The right to a fair trial is, thus, a constitutional imperative. Substantive penal laws prescribe punishment, whenever there is an invasion of this right of the citizens. Thus, in the prevailing criminal justice system, whenever a crime is reported, it is the State, which gets the crime investigated by its agency, moves the Court for trial of the offender and prosecutes him in the Court of law.

Neither at the stage of the framing of a charge nor at the time of passing of an order of discharge, are the views of the victim ascertained, let alone considered. He is not to be consulted during the trial. Even after the case ends up in a conviction, it is the State, which defends the judgment of the trial court in appeal, if any, filed against the conviction and sentence.

Broadly speaking, there are two systems of dispensation of criminal justice presently — Adversarial and Inquisitorial. The system followed in India is the adversarial system of common law inherited from the British rulers. In this system, the accused is presumed to be innocent and the burden of proving his guilt beyond reasonable doubt lies on the prosecution. The accused also enjoys the "right of silence" and he cannot be compelled to answer the queries. In the adversarial system, the truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before a neutral judge. The judge acts as a referee and decides whether the prosecution has been able to prove the guilt of an accused beyond a reasonable doubt. The system, *per-se*, appears to be fair and justified, but viewed from the perspective of the victim, it is heavily loaded in favour of the accused and is insensitive to the rights of the victims or their plight because generally the judge, in his anxiety to maintain his position of neutrality, fails to take initiative to find out the truth.

The presumption of innocence gives rise to various constitutional and legal rights insofar as an offender is concerned, such as, his right not to be arrested except in accordance with the law; right to be produced before the Magistrate within 24 hours of his arrest; right to know the grounds of his arrest; right to be represented by a counsel; right to legal aid in certain cases; right to bail; right to public trial; right to test the evidence by cross-examining; right to be heard on the question of sentence; immunity from compulsory testimony and so on and so forth. Thus, we find that the rights of an accused have been well-safeguarded in the scheme of criminal justice delivery system but in all those laws, there is hardly any reference to the "rights" of the victims of crime. After setting the criminal justice mechanism in motion, the victim is reduced to the status of being merely an "informer" — ignoring that he is a major stakeholder in the scheme of justice delivery system since he has suffered at the hands of the offender. There are some "illusory" rights available to the victims of crime, but even those are grossly inadequate. The victim of crime has hardly any role to

play in the whole proceedings except that he may, if alive, be examined by the prosecution as a witness. It is strange that in spite of the fact that a victim of crime, who suffers at the hands of the accused and moves the State through the police or the courts to seek justice is given the impression that after having lodged the report or the complaint, he is a "Mr. Nobody". The victim of crime is, thus, a mute witness to the whole drama. If alive, he may appear as a witness and there again the provisions of the Evidence Act, 1862 of relevancy of facts not withstanding, he is subjected to continual questioning, with the court almost silently watching. The law, today, fails to address the needs of the victims to be treated with dignity, to protection from intimidation, inside or outside the court room. Expressing concern particularly about the treatment of victims of sexual offences in the courts during their cross-examination, in *State of Punjab* v. *Gurmit Singh & Ors.*[2], the Supreme Court observed:

> There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the creditability of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence."

Though the Supreme Court in *Delhi Domestic Working Women's Forum* v. *Union of India*[3] indicated some broad parameters particularly for assisting

2. (1998) 2 SCC 384.
3. (1995) 1 SCC 14.

the victims of rape, like their right to legal representation at the police station as well as during the trials, the legislative and the executive response is grossly inadequate.

An indifference to the rights of the victims of crime is fast eroding the faith of the society in general and the victim of crime in particular in the criminal justice system and this has already given rise to the incidents of crime and lawlessness, in the form of terrorism, raising their ugly head to settle private and political scores over the adversary with a barrel of gun.

Right to bail, is regarded as a right of an accused with no corresponding right available to the victim or his heirs to oppose the grant of bail. It is left to the State only to oppose or not to oppose the grant of bail. Indeed, Sec. 439(2), Criminal Procedure Code, 1973 as interpreted by the Courts, recognizes the right of the complainant or any "aggrieved" party to move the High Court or the Court of Sessions for cancellation of bail granted to an accused person[4] but that is at a subsequent stage. Of course, thanks to the judiciary, no case can be compounded without the participation of the complainant under Sec. 320, Cr. P.C. nor a closure report be accepted by the Court without hearing the informant.[5] The Supreme Court even set aside the order of the trial court, allowing the prayer of the state for withdrawing prosecution on a plea of the father of the policeman killed by the forest brigand *Veerappan*.[6] An appeal against an order of acquittal can be preferred by the complainant, but only with the prior leave of the High Court. The right to file a Special Leave Petition under Art. 136 of the Constitution was granted to a near relative of a victim, who was not a party to the proceedings, to challenge an order of acquittal passed by the High Court[7] — but that again was a response of the judiciary to the plight of a victim of crime.

Under the Criminal Procedure Code, 1973, a victim of crime has a very limited right of revision and that too under exceptional circumstances. An accused has the statutory right to be heard on the question of quantum of sentence after conviction is recorded, but unfortunately a victim of the crime is not so heard. Even where he engages a counsel, during the trial of a case, instituted on a police challan or at the hearing of an appeal, his counsel is treated only as a "counsel by sufferance" and may or may not be heard by the court depending upon the attitude of the State counsel. He can at the best assist the public prosecutor but that also in case the public prosecutor really wants to be assisted

4 *Puran* v. *Rambilas* (2001) 6 SCC 338; *R. Rathiram* v. *State* (2000) 2 SCC 391.
5 *Union Public Service Commission* v. *S. Papiah* (1997) 7 SCC 614.
6 *Abdul Karim* v. *State of Karnataka* (2000) 8 SCC 710.
7 *P.S.R. Sadhanantham* v. *Arunachalam* 3 SCC 141(1980).

by him. Thus, it is seen that a victim of crime in this country has hardly any guaranteed rights except may be of getting some assistance by way of payment of compensation, but even here the statutory provisions[7A] are grossly inadequate. These provisions suffer from inherent limitations and are invoked grudgingly, sparingly and often inconsistently by the courts despite the apex Court exhorting criminal courts to take recourse to the provisions, since "this power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system". The Supreme Court, observed:[8]

> "Sec. 357 (2) is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to the crimes. It is indeed a step forward in our criminal justice system."

In the scheme of the Code of Criminal Procedure 1973, and the Evidence Act, 1862, if there are gaps or faults in the investigation, the benefit generally goes to the accused. This is because the right of an accused, under the criminal justice system, takes precedence over the right of the victim. However, it must be remembered that a victim of crime has a stake in the result of the trial of the offender. It humiliates and frustrates a victim of crime when the offender goes unpunished or is let off with a relatively minor punishment, as the present system pays no attention to his injured feelings. Imposition of appropriate punishment on the criminal or the offender is the response of the courts to the society's cry for justice. Dealing with the object of sentencing, in *Bheru Singh* v. *State of Rajasthan*[9], wherein the appellant had murdered his wife and five children, the Supreme Court observed:

> "The object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking on overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.
>
> In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

7A The Code of Criminal Procedure, Sec. 357 (3) (1973).

8 *Hari Singh* v. *Sukhbir Singh* 4 SCC 551(1988).

9 1994 (2) SCC 467.

II International Conventions

The United Nations General Assembly at its Plenary Session on November 29, 1985, adopted a declaration of 'Basic Principles of Justice for Victims of Crime and Abuse of Power'. This declaration is in a way the magna carta of the rights of victims globally and contributes an important recognition of the needs to care for victims of crime. The declaration has made certain suggestions for dealing with the problems of victims of crime including victims of abuse of power. For example:

(a) Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to promote redress, as provided for by national legislation, for the harm that they have suffered.

(b) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

(c) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.

(d) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected without prejudice to the accused and consistent with the relevant national criminal justice system.

(e) Providing proper assistance to victims throughout the legal process.

(f) Taking measures to minimize inconvenience to victims, protect their privacy where necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

The European Convention on "Compensation of Victims of Violent Crimes" also contains many of the rights recognized in the U.N. Declaration of 1985.

Need of the Hour

It is high time that rights of the victim of crime are recognized in this country – it may in the longer run even help in checking the rise in the crime rate and also bring credibility to the criminal justice system.

In its 154th Report, the Law Commission of India also recommended incorporation of a provision for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the Courts. The recommendation, however, has not so far been acted by the Government.

Award of fair and reasonable compensation to the victim of crime may not act only as a balm on his wound but may also deter, to whatever little extent, the criminal from committing the crime. But there is no such statute in this country, which takes care of it. Under clause 12, of the U.N. Declaration of 1985, the onus is on the State to "endeavour to provide financial compensation to both victims who have suffered bodily injury or impairment or physical or mental health as a result of serious crimes as well as the family of those who have died as a result of victimization".

When sovereign functions are purportedly done by bosses and minions of Government and the citizens are damnified, sovereign immunity is often invoked. When a solider shoots at a citizen without any justification or a police officer tortures an innocent citizen in his custody, no democracy, which honours human rights, can vaccinate the Republic against liability for criminal or wrongful conduct. In such cases, sovereign immunization negates the Rule of Law and discriminates unjustly in favour of the sovereign. The Supreme Court in *Nilabati Behera* v. *State of Orissa*[10] held that the concept of sovereign immunity is not applicable in cases of violation of the right to life and liberty guaranteed by Art. 21 of the Constitution. The Court observed:

> "The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Art. 32 by this Court or under Art. 226

10 (1993) 2 SCC 746.

> by the High Courts, for established infringement of the indefeasible right guaranteed under Art. 21 of the Constitution, is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Arts. 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

The court relied upon the following passage from the First Hamlyn Lecture by Lord Denning titled "Freedom under the Law":

> "No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do, and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the mining of coal, so also the procedures of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They mush be replaced by new and up to date machinery by declarations, injunctions and actions for negligence.....This is not the task for Parliament..... the courts must do this. Of all the great tasks that lie ahead, this is the greatest. Properly exercised, the new powers of the executive lead to the Welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country."

The court held that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. It cautioned that the old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. It felt that the Courts shave the obligations to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations and observed:

> ".....The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law – through appropriate proceedings. Of course, relief in exercise of the power under Arts. 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with *Rudul Sha* v. *State of Bihar* granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Arts. 32 or 226 of the Constitution of India, nothwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole."

The enforceable right to compensation was further developed in *D.K. Basu* v. *State of West Bengal*[11] wherein it was observed that the "award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages....." and that "the relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them.....".

Emotional assistance or charity has its own limitations. A permanent mode of compensation has to be worked out. It may be worth considering as to whether the State, which fails to protect the life and property of the citizen, should not be made to pay compensation to the victim of crime, of course, reserving the right of the State to reimbursement from the guilty. Setting up of a fund for payment of compensation to victims of crime as is in vogue in Canada, Australia, New

11 (1997) 1 SCC 416.

Zealand, United Kingdom, under the control of a Board, for awarding compensation to victims of crime would constitute a positive and a welcome step to assure the victims of crime that "We care". (State of Tamil Nadu has already created a Victim Assistance Fund.)

III Conclusion

A beginning can be made by bringing about a model legislation based on the U.N. Declaration of 1985 and by setting up a fund for payment of compensation to the victims of crime under an independent Board for awarding compensation to the victims of crime. The State which creates the fund should be entitled to reimbursement from the offender or the guilty party in the same manner as a decree holder, the manner of reimbursement, in cash or kind, being left to the State to be decided on the facts of each case and the capacity of the individual. It may be treated as a charge on the estate of the offender or the guilty party. It is necessary that due compensation is paid to the victim of crime to assure him that the society cares and feels for him. He needs justice and the society is obliged to give him justice and not merely lip service. Therefore, a beginning is imperative. Victims of crime, today, feel left out, ignored and are crying for attention and justice. It is time that their loud cries are heard as tomorrow may be too late. There is an urgent need, thus, to take a fresh look and recognize the rights of the victims of crime in the criminal justice delivery system.

CELEBRATING PROFESSOR M. P. JAIN

*Upendra Baxi**

THE RECENT sad demise of Professor M.P. Jain brings literally to a close the era of the founders of modern Indian legal education and research[1]. He contributed immensely and enduringly to the life of law in contemporary India. He shaped, and sustained, the cultures of institutional innovation at the Benaras Hindu University Law School and the Delhi Law School and also eminently serviced the formative moment of the Indian Law Institute. A true scholar, Professor Jain continued to contribute robustly to developments in the public law domain till the very last working day of his life. In this truly exemplary genre of encyclopaedic exegetical scholarship, he also exemplifies nobly the authentic meaning of his first name: *Mahavir*.

'M.P.' (as he used to be hailed with warm fondness, and he did not chafe at my calling him by his first name) inspired *affection*, but never a sense of *awe*, usually associated with and distinctively Indian law school modes of wielding often tyrannical academic institutional power and authority; in this, it must be said, Mahavir differed from many of his luminous contemporaries. As a teacher, researcher, and author, Mahavir remained accessible to all; he wrote clearly and cogently. He did not believe that simplicity in writing betrayed the complexity of the field. He made the law bare in all its august yet technical, turgid, and prosaic detail. If there was ever the whisper of romance, excitement, and extravagance of adventure in legislative or judicial texts, Mahavir ensured a rather smooth, and flattened, passage of all this in a linear doctrinal narrative. I suspect he did so with a sense of fidelity to the virtues of legalism; M.P. believed that law has an autonomous life of its own, with histories that may not

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1 When Professor Lotika Sarkar brought this sad news to me, we recalled, in a longish telephone conversation, many a moment of our decades long association with him at the University of Delhi. We recalled with fondness his capacity to laugh away life's adversities; the robust patience with which he handled the demeaning practices of institutional politics by some of his equally eminent contemporaries; and his jovial yet often gruff collegiality. We also recalled his presence and participation, long after his retirement, at many public lectures and events. M. P. Jain in this respect always encouraged his erstwhile colleagues. We also mourned together the fact our deferral a year ago of a promised visit to him at his Daryaganj home (in old Delhi, unlike many of his contemporaries and successors he never moved to more 'fancy' New Delhi locations!) I still recall fondly my visits to his home when dear Kunti, his 'long suffering spouse' (as I called her!) was alive and later when M.P. continued to work amidst utter desolation (also for long years after the murder of his cousin, and a very dear friend, Professor S.N. Jain.)

be reduced to the social, economic, and the political, and that the stories concerning the development of the law must be so told as to foster a public ethic of rule following, especially among those who make and interpret rules.

For him then the pursuit of the doctrinal development of the law was not a lapsparian fault but rather a badge of scholarly honour. Mahavir pursued rather a homegrown pragmatic understanding of Indian law, in its manifold development. This contrasted radically with some of his contemporaries (in particular, Dean Anandjee and Professor R.S. Murhty, and partially even Gyan Swaroop Sharma) who strove to emulate the difficult diction of the Yale mentors— Myers McDougall and Harold Laswell. Instead, Mahavir strove to exemplify the resilient best in the common law scholarship resisting forms of understandings of the law as *one* among *many* policy sciences. He had the better of his contemporaries, thus consolidating a rival source and stream of the ways in which the life of the colonial and postcolonial law may be narrativised. M.P. never wavered in his choice of indwelling the worlds of blackletter law legal doctrine. A robust pragmatist, Mahavir believed that doctrinal criticism held the best promise there was for ameliorating legislative and adjudicatory waywardness.

M.P. also affirmed the importance of understanding the craft of legal history. His many editions of *The Indian Legal History* command the highest citation index; no Indian legal scholar, in my knowledge, has achieved or since rivalled this honour. But he primarily conceived the legal historian's craft as a rather relentless pursuit of the dull detail of the development of legal institutions and doctrines. This, he wrote concerning the *retail* not the *wholesale* imposition of forms and practices of colonial legality. This imposition, in his view, came in bits and pieces. M.P. doubted grand designs and equally grand narratives and would have agreed with the extraordinary assertion of John Robert Seeley, writing in 1883, that the British 'seem... to have conquered and peopled half of the world in a fit of absence of mind[2].' While certainly he would have, at many points,

2 Quoted in Robert j. c. Young, *Postcolonialism: An Historical Introduction* (2001; Oxford: Blackwell) Seeley draws our attention not to any '*absent-mindedness*' but rather of 'the *absence of mind.*' Colonialism as an unfolding Eurocentric psychopathology thus offers a fresh perspective for postcolonial studies!

Professor Werner Menski recognizes the principal contribution of M.P. Jain when he writes that while he emphasised the 'importance of English law in India,' Jain also provided 'evidence that many of the early laws were either gradually rendered defunct or gradually abolished.' Jain would have agreed with Menski that the 'notion that India is a common law jurisdiction implies a political statement about the historic impact of British colonial rule, rather than an accurate description of the present legal system': see Werner G. Meneski, *Hindu Law: Beyond Tradition and Modernity* 212,fn.13 (2004; Delhi, Oxford University Press).

3 Upendra Baxi, 'The Colonial Inheritance', in *Comparative Legal Studies: Traditions and Transitions*' 46-75(2003) Cambridge, Cambridge University Press; Pierre Legrand and Roderick Munday Eds.)

agreed with my description of colonial 'predatory legality[3]', M.P. would not have shared my anxious narratives of a hegemonic imperial design.

For the moment, it remains important for me to affectionately recall Mahavir's distinctive conceptions of legal history. For a long time, he maintained that legal history- writing ought to devote as far as it can to the detailed presentation of the dynamic of its institutions and processes. Power, ideology, and struggle were, he acknowledged, crucial categories but their importance for the legal historian lay only in the measure of their impact on the design and process of legal institutions. And very often, Mahavir was able to demonstrate the pertinence of chance and contingency, contrasted with any overall design for domination pursued a coherent ideological mastery.

Even so, I recall asking him why the early work of Ranajit Guha[4] (in contrast to the later Guha, the founder of subaltern studies), or the work on agrarian history, for example by David Washbrook[5] and Elizabeth Whitcombe[6], should not matter, even decisively, for his vision of practice of legal history. His candid and honest immediate response, as far as I may now recall, was that a legal historian was not always competent to perform the tasks apt for historians of ideas and of political economy. He thus chose to bear unique disciplinary burdens. However, even when we agreed to disagree, his openness to alternate modes of doing legal history[7] did register somewhat in the final edition of his book on Indian legal history.

Yet, Mahavir resolutely chose to ignore the genre of Marxian and subaltern historiography. Sadly enough, thus, Mahavir had no use, and actually resisted, anti-imperial class struggle oriented narratives of Indian legal history. Nor did he, in his many revised editions of his germinal work, quite choose to grapple with the new feminist[8] and eco-history readings[9] of the colonial and post-colonial moment. He remained cast in earlier histories of mentalities thus, after all,

4 Ranajit Guha. *A Rule of Property for Bengal: As Essay on the Idea of Permanent Settlement* (1963; Paris and The Hague : Mouton)

5 For example, see, Washbrook, 'Law, State, and Agrarian Society in Colonial India,' *Modern Asian Studies* 15 no. 3 (1981: 649-721).

6 *Agrarian Conditions in Northern India : the United Provinces under British Rule, 1860-1900 9v.1)* (1972; Berkeley, University of California.)

7 In particular at least to Lloyd and Susanne Rudolph's superb *Modernity of Tradition* (1967; Chicago, University of Chicago Press.)

8 Nor does M.P. Jain have much use for the classic study by Vasudha Dhagamwar entitled *Law, Power, and Justice* (1974, Bombay, N.M Tripathi; revised and reprinted by the same title by New Delhi, Sage.) I do not here mention the subsequent feminist readings of the colonial and postcolonial law, save to mention Rajeswari Sunder Rajan, *Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (2003) Durham, Duke University Press)

9 Here I desist from citations but may instance the many –splendoured corpus of Ram Guha and Madhav Gadgil.

privileging himself as a gifted raconteur of the globalizing capitalist law. Even so, he foresaw the organic connexion between global capitalism and state sponsored racism. Indeed, he went so far as, among other matters\ things, to devote a whole precious chapter concerning the constitution of racial discrimination in the high colonial British Indian state and law. His still remains the most adequate account, on my reading, that explains why the jury system failed to institutionalise itself in postcolonial India. Overall, what he finally offers remains worthy of patient and scrupulous reading, even by those of entirely opposed ideological or methodological persuasions.

Mahavir's contributions to Indian public law development (alongside with S.N. Jain) remain cast, overall, in the legalist (in the very best sense of that discursive term) mould. The range and depth of his analytic coverage remain as impressive as the labours of Durga Das Basu and H. M. Seervai, whose corpus has been rightly compared with Blackstone and Chancellor Kent. Mahavir's corpus, I believe, deserves the same order of praise, with even a happy caveat that he has innovated, and put to work, even richer uses the tradition of comparative constitutional studies. Unlike them, Mahavir wears his comparative learning lightly. Enormously conversant, and fluent, with the Euroamerican development in constitutional and administrative law and jurisprudence, his prepoderent interest lay in essaying a deeper understanding of the practical ways in which these may be related to the courage, craft, and contention of Indian decisional law and jurisprudence. He admires measured judicial activism but remains quick to critique (what he thinks to be) its excesses. Likewise, he looks, with considerable disfavour, at the legislative activism, especially manifest in profuse constitutional amendments. Above all, M. P. values the rule of law as the single most critical resource for any serious-minded pursuit of the Indian constitutional vision because of the discipline its enacts against the expedient populism of power. Mahavir also believed that legal academics ought also remain disciplined by the virtues that it proselytises for political and policy actors, including Justices: put another way, he insisted that search of an ideal policy ought never to neglect the disciplinary sway of legal doctrine.

Many generations of students and colleagues held M. P. Jain in great affection and owe a considerable debt to him as a mentor [10]. So still do his students and colleagues at the Faculty of law, University of Malaysia, as well as the Bar and the Bench in Kula Lumpur. His treatise on Malaysian administrative law continues to be studied, and cited, thus also marking a contribution not usually associated with expatriate lifeworlds of Indian scholarship. Many a Third World

10 And although not as often cited in the Indian judicial decisions, his texts have, on all available evidence, nurtured many an unacknowledged forensic legal career at the Indian Supreme Court.

student and scholar associates the habits, or rather (as Pierre Bourdieu names this in anthropological contexts) the *habitus* of the study of public law with the M.P. Jain scholarly tradition. For the same reason, it remains important for us all to recall with him the values of doctrinal scholarship, which for him remained also a vehicle of social critique and Indian reconstruction.

The 'Jain' scholarly virtues need now a fuller re-visitation in these halcyon days of contemporary Indian globalization –a moment in which past frameworks of judicially imposed corpus of restraints on executive and legislative power seem irritatingly irrelevant to the task of making India 'safe' for the community of foreign investors. The 'Jain' virtues now reaffirm the potential of legalism (an ethic of following rules) itself as a Global South constitutional, juristic and judicial resource. 'M.P.' lived truly a rich, learning and learned, republican life as a Member of Parliament of Commonwealth of Learning. Even as we may now miss his presence amidst us, those privileged to know him will never miss his authentic voice.

NEW COMPETITION REGIME OF INDIA: AN APPRAISAL

*S. K. Verma**

I Introduction

IT IS a common knowledge that for the last two decades, some of the dominant economic themes have been the process of globalisation[1], liberalization and the progressive integration of world economy. Under globalisation, countries rely more on market forces, in which the questions of ensuring competition and efficient functioning of markets assume critical importance as the number of new entrants in the market increases. These entrants may be instrumental in giving rise to greater potential for competition in markets regardless of their geographical location/scope, yet have the potential to play havoc on the national economies by their anti-competitive policies/practices. It is notable that as the number, size and scope of activities of these enterprises increases, to remain competitive at the micro-level, they adopt global strategies, including forging strategic alliances, and their commercial practices, at times result into anti-competitive practices to the detriment of economic development of a country and prejudicially affect consumer interests. Such practices tend to undermine the benefits of liberalization and thus need to be checked.

There is also a close connection between trade and competition. Vigorous competition is vital to innovation, strong and effective markets, and consumer interest and productivity growth in the economy. Trade laws, which regulate trade policies, and competition laws, which regulate competition policies, have the common objective, namely, to achieve economic efficiency, by improving the business environment for more efficient resource allocation. In order to achieve the objective of maximum economic efficiency, the liberal trade policy must be complimented through a sound competition policy by preventing anti-competitive business practices and unnecessary government intervention. Further, competition law or policy is an essential complement to investment liberalization as well. A sound competition policy and law can contribute to

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1 The term 'globalisation' is primarily associated with the western model of market economy. It is premised on the removal of national barriers to trade and investment. It is associated with contemporary phenomenon of privatisation, de-regulation, the expanded provision of incentives for entrepreneurial behaviour, structural adjustment programs and related pressures on developing countries to open-up their markets for international financial institutions and developed countries. *See* S. K. Verma, Globalization, Marketization and Constitutional Mandate, 42 JILI 395 (2000).

securing an attractive environment for foreign investment, particularly foreign direct investment by providing stable and transparent legal framework and signaling a commitment to market institutions and mechanisms. The competition law should be capable of providing safeguards against possible abuses of market power by foreign investors. Thus, there is a need for an appropriate competition law to protect fair competition and to control, if not eliminate, anti-competition practices in the trade and market. A good competition policy[2], along with a sound competition law, should help in fostering competition, economic efficiency, consumer welfare and freedom of trade, which should equip the governments in meeting the challenges of globalization by increasing competition in local and national markets.

It is incumbent on the governments to adopt a competition policy, which should preserve and promote competition by enforcing competition law against restrictive business and trade practices of national and multinational enterprises and by influencing the formulation and/or implementation of governmental (State) policies or measures affecting competition. A good competition policy would not only encompass the liberalized trade policy but would also prevent anti-competitive business practices and unnecessary government intervention. Competition law primarily deals with anti-competitive business agreements, abuse of the dominant market position by enterprises and regulation of mergers, amalgamations and acquisitions. However, both the competition policy and law, aim at promoting and fostering competition, economic efficiency, consumer welfare and freedom of trade and therefore, they are complimentary to each other.

II Competition Policy Under the WTO Dispensation

Most of the WTO agreements, viz., the General Agreement on Tariffs and Trade (GATT), 1994, Trade-Related Intellectual Property Rights (TRIPS), General Agreement on Trade in Services (GATS) and Trade-Related Investment Measures (TRIMS), agreement on agriculture, the agreement on government procurement, which extends competition rules to purchases by government entities, and other agreements, aim to support fair competition. However, despite

2 'Competition Policy' is generally being defined as "those Government measures that directly affect the behaviour of enterprises and the structure of industry". See R.S.Khemani and Mark A. Dutz, "The Instruments of Competition policy and their Relevance for Economic Policy", PSD Occasional Paper No. 26, World Bank, Washington DC (1996). Competition policy encompasses government policies like privatization, de-regulation, trade policy, industrial policy, consumer policy, regulations governing capital and competition law. Competition law, which is a speeie of competition policy, deals with anti-competitive business agreements, abuse of dominant market position by enterprises and regulation of mergers, amalgamations and acquisitions.

this emphasis on fair competition, the WTO Agreement has the potential of anti-competitive practices because of level of trade liberalization, investment and international protection of intellectual property under TRIPS, but surprisingly it does not contain any separate law/agreement on the subject of competition. The attempts, mainly by the European Community, to have an agreement on competition policy under the WTO started in the right earnest at the Singapore Ministerial Conference of 1996 by putting it on the list of potential future issues for WTO trade negotiations and by establishing the (still existing) WTO Working Group on the Interaction between Trade and Competition Policy.[3] The Group was to examine the relationship between trade and investment; and interaction between trade and competition policy, including anti-competitive practices. Since then, in the jargon of WTO negotiations, the topic of trade and competition policy has become known as one of the four so-called Singapore issues along with foreign investment, trade facilitation and transparency in government procurement.

At Doha Ministerial Conference of 2001, the members agreed that negotiations on WTO competition law would start after the following Ministerial Conference.[4] At Cancun Ministerial Conference in September 2003, developing countries insisted negotiations on all the four Singapore issues and refused to negotiate on a single Singapore issue[5], with the result that no agreement could be reached on the issue of competition policy and the Conference failed. From a legal point of view, the WTO Doha Declaration of 2001 remains the basis for

3 WT/Min (01)/DEC/1, 13 December 1996, No. 20 Ministerial Declaration of 13 December 1996, http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e. htm.

4 Doha Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, No. 23-25, http:/wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm. The Declaration reads as follows:
(23). Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.
(25). In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

5 Developing countries agreed to negotiations on the Singapore agenda provided that there would be future progress in the field of trade in goods and agricultural products in partlcular, see Josef Drexl, "International Competition Policy after Cancun: Placing a Singapore Issue on the WTO Development Agenda", *World Competition* 2 (2004, September).

future work as long as no other mandate gives new direction to multilateral trade negotiations. In the meantime, the only international agreed document on restrictive business practices remains the set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the UNCTAD in 1980[6], which is very limited in its scope.[7]

III Competition Law in India

Since independence, India's foreign trade policy had been highly restrictive and it relied on import curbs except for highly essential commodities. Its industrial, foreign trade and investment policy was highly regulated and government controlled. The important foreign trade-related legislations, including those related to company law, competition, foreign exchange and financial services were reflective of a regulated economy. The philosophy behind this "tight jacket" approach was to protect domestic industry from foreign competition. This philosophy got an initial jolt in mid-1980s but a perceptible change became visible from early 1990s, particularly after India became a party to the WTO agreement.

After four decades of mixed economy and planned development, in 1991, the Government of India, in an attempt to integrate the Indian economy with the global economy, embarked on the process of liberalization of Indian economy by declaring a new economic policy (NEP), which provided market-oriented free economy as the model. The NEP marked a philosophical shift from the erstwhile pursuit of the command economy to the liberal economy by replacing the system of controls. It was devised to accelerate economic development and to keep pace with the international developments that had resulted through the coming into force of the WTO and other agreements under its umbrella. Being a member of the WTO and recognizing the important linkages between trade and economic growth, the Government of India took many steps to align its economy and national laws with the WTO mandate and enhance its thrust on globalisation.

In the pursuit of globalisation, India has responded by opening up its economy, removing controls and resorting to liberalization. It has adopted a number of policies to liberalize trade and capital flows combined with domestic privatisation and deregulation as well as enacted many new laws or has amended existing laws to make them WTO compliant. The new industrial policy adopted in 1991,

6 See UN Doc. TD/RBP/Conf/10, May 2, 1980; noted at 19 ILM 813 (1980).

7 See S.K. Verma, "International Regulation of Restrictive Trade Practices of Enterprises", 28 IJIL 389 (1988).

opened many areas to foreign investors. A liberalized foreign investment policy[8] was complimented by the new trade policy. The natural corollary of these efforts was that the Indian market should be geared to face competition from within and outside the country. Like many countries in the world, India had enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act (MRTP Act), and made it an integral part of the economic life of the country.[9]

As an off shoot of the Singapore Ministerial Declaration of 1996, and also finding the ambit of the MRTP Act inadequate for fostering competition in the market and eliminating the anti-competitive practices in national and international trade, the Government of India set up an Expert Group to study interaction between trade and competition. The Expert Group, which submitted its report in January 1999, recommended, among others, for the constitution of a regulatory agency to control and eliminate anti-competitive practices that may emerge during the implementation of different WTO agreements.[10] It also suggested for a new Competition Law, which should be an effective instrument for engendering and protecting competition in the market.

In October 1999, the Government appointed a High Level Committee on Competition Policy and Law (the Raghvan Committee) to advise on the new competition law consonant with international developments and to suggest a legislative framework either in the form of a new law or by appropriate amendments to the existing MRTP Act. Acting on the report of the Committee (submitted in May 2000), and considering the suggestions of the trade and industry as well as the general public, the Government enacted the new Competition Act, 2002,[11] which has replaced the earlier Monopolies and Restrictive Trade Practices (MRTP) Act, 1969.

IV The Genesis of The Competition Act, 2002: The MRTP Act

The MRTP Act is still the extant competition law in India, as the Competition Act has not yet been fully implemented.[12] The genesis of the MRTP Act is traceable to Articles 38 and 39 of the Constitution of India. The Directive Principles of State Policy in those Articles lay down, *inter alia*, that the State shall strive to promote the welfare of the people by securing and protecting as

8 India became a signatory to the Multilateral Investment Guarantee Agency (MIGA) in April 1992.

9 The Act was in furtherance of the fulfillment of the constitutional mandate under Arts 38 and 39 of the Constitution of India.

10 See S. Chakravarthy, *New* Indian Competition Law on the Anvil, Rajiv Gandhi Institute for Contemporary Studies, RGICS Working Paper Series, No. 22, (2001) 33.

11 Act No. 12 of 2002 (w.e.f. 14.01.2003). The Act became operative in part from 31.3.2003.

12 The main provisions, Secs. 3 (Prohibition of anti-competitive agreements), 4 (Prohibition of abuse of dominant position), 5 & 6 (Regulation of combinations) are not in force as yet.

effectively as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the state shall, in particular, direct its policy towards securing that the ownership and control of material resources of the community are so distributed as best to sub- serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The MRTP Act was enacted in 1969 with the objectives of preventing concentration of economic power to the common detriment control of monopolies; prohibition of monopolistic trade practices; prohibition of restrictive trade practices;[13] and prohibition of unfair trade practices.[14]

The MRTP Act was designed to "ensure that the operation of economic system doesn't result in the concentration of economic power to the common detriment and to prohibit such monopolistic and restrictive trade practices prejudicial to public interest."[15] The declared economic philosophy behind this Act was "Small is beautiful". The MRTP Act, however, was unable to adequately deal with anti-competitive practices like cartels, boycotts and refusal to deal, predatory pricing, bid rigging, abuse of dominance, etc. arising out of the implementation of WTO agreements. Although the MRTP Commission and the Supreme Court have tried to fit these into the ambit of monopolistic trade practices (MTPs) and restrictive trade practices (RTPs), the different and varied interpretations have lead to conflicting policies and in some cases the offending parties have used these technical imperfections to escape indictments. Under the Act, there existed the MRTP Commission with civil court powers, and amongst others to perform investigative functions. The Commission often faced the allegation of being bureaucratic and over-burdened with matters of improper distinction and division of work. The Commission also is said to have functioned in a manner not conducive to the dynamics of the growth of the economy. Moreover, the provisions related to unfair trade practices (UTPs), that were included in the MRTP Act in 1984, look somewhat outside the scope of a competition enactment.[16] Thus, the MRTP Act has become obsolete in the light of international economic developments relating more particularly to competition

13 The MRTP Act defines a restriction trade practice as a trade practice, which has, or may have the effect of preventing, destroy or restricting competition in any manner.

14 Under the new dispensation, the Unfair Trade Practices will now be dealt under the Consumer Protection Act, 1986, as amended in 2002 (Act No. 62 of 2002). The amended Act has become effective w.e.f. 15.3.2003.

15 The statement of objects clause of the MRTP Act proclaims to this effect.

16 UTPs, under the India law, fall under the following categories: (i) misleading advertisements and false representation; (ii) bargain sale, bait and switch selling; (iii) offering of gifts or prizes with the intention of not providing them and conducting promotional contests; (iv) product safety standards; and (v) hoarding or destruction of goods. Making false or misleading representation of facts disparaging the goods, services or trade of another person is also a prohibited trade practice under the Indian law.

laws and the need was felt to shift the focus from curbing monopolies to promoting competition.

The MRTP Act was based upon the behavioural and reformist doctrines. In terms of behavioural doctrine, the conduct of the enterprises and bodies, which indulge in trade practices in such a manner as to be detrimental to public interest, was examined with reference to whether the said practices constitute monopolistic, restrictive or unfair trade practices. In terms of reformist doctrine, the provisions of the Act provided that the MRTP Commission, if on enquiry, comes to the conclusion that an enterprise has indulged in restrictive or unfair trade practices, it can order for the discontinuance of such practices and issue an order enjoining the erring party not to repeat those in future. The Commission could also accept an assurance from a delinquent enterprise regarding removal of prejudicial effects of such a practice. Thus, the veneer of the Act was essentially advisory or reformist in approach.

Major amendments were effected to the MRTP Act in 1991, to make it pro-competitive. By these amendments, the thrust of the Act was shifted on curbing monopolistic, restrictive and unfair trade practices with a view to preserving competition in the economy and safeguarding the interest of consumers by providing them protection against false or misleading advertisements and/or deceptive trade practices. The Statement of Objects and Reasons for the 1991 amendment *inter alia* stated:

> With the growing complexity of industrial structure and the need for achieving economies of scale for ensuring higher productivity and competitive advantage in the international market, the thrust of the industrial policy has shifted to controlling and regulating the monopolistic, restrictive and unfair trade practices rather than making it necessary for certain undertakings to obtain prior approval of the Central Government for expansion, establishment of new undertakings, merger, amalgamation, take-over and appointment of Directors.

By this amendment, size as a factor to discourage concentration of economic power, in a manner was given up. Provisions relating to concentration of economic power and pre-entry restrictions with regard to prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and take-overs of undertakings were deleted from the Act. The Act had an extra-territorial reach in respect of prohibited trade practices, a part of which was perpetrated within India.

Despite these amendments, the reformative philosophy of mere "censuring" a delinquent enterprise and direction to offset the loss caused by it to an aggrieved person was found, over a period of time, to be ineffective in combating irresistible

greed to reap unreasonable profits by resorting to and repeating the objectionable business practices by enterprises. The competition regime envisaged under it was out of tune with economic reforms initiated by the Government since 1991 and the Act was also out of tune with process of globalization, liberalization and privatization sweeping across the world, making it obsolescent, unworkable and even in some cases counter-productive. Thus, a situation had arisen in which there was no harmony between government policies and the law. Such a situation does not augur well for the economic reforms being undertaken by the government as their success hinges upon the implementation of policy and law in coherence.

A perusal of the MRTP Act also shows that there was neither a definition nor even a mention of certain offending trade practices, which are restrictive in character. For example, abuse of dominance, cartels, collusion and price fixing, bid-rigging, boycotts and refusal to deal, and predatory pricing were not covered under the Act.[17] To address these lacunae as well as to control and eliminate anti-competitive practices that may surface during the implementation of WTO agreements when the market would be open to international competition prompted the Government to draft a new legislation on the subject. The resulting Act *viz*, the Competition Act, 2002 contains many innovative provisions, which are expected to deter corporate entities, their boards and key executives from contravening the Act and disrespecting the orders of the Commission.

V Salient Features of the New Competition Regime

The Competition Act intends to provide, keeping in view the stage of economic development of the country, for the establishment of a Commission to prevent trade practices, having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers[18] and to ensure freedom of trade to all the participants in markets in India, and for matters connected there with or incidental thereto. The Preamble of the Competition Act, 2002 reads:

> An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition

17 S. Chakravarthy, *New Indian Competition Law on the Anvil*, Rajiv Gandhi Institute for contemporary studies, RGICs Working Paper Series no. 22 (2001) at 30. The MRTP Commission, however, over the years has attempted to fit these practices under different provisions of the Act through interpretation of the language of those provisions.

18 "Consumer" has been defined in Sec. 2(f) in identical terms as under the Consumer Protection Act, 1986, Sec. 2 (1)(d).

> in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets...."

Thus, setting up a Competition Commission is the predominant intention under the Act, as stated at the outset. The Commission, known as the Competition Commission of India (CCI) has been entrusted with the task of implementation of the Act. The other main features of the Act are discussed as under:

A. The procedure for registration of agreements, containing restrictive clauses has been dropped.[19]Hence, restrictive business agreements are altogether exempted from registration.

B. Anti-competitive Agreements

Any trade agreement (including Memorandum of Understanding or Arrangement, formal or informal) is void if it is in contravention of section 3, which provides that, "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India".[20]

Four anti-competitive agreements, *viz*., agreements relating to price fixation, output restrictions, market allocation and bid rigging are *per se* presumed to have appreciable adverse effect on competition and are hence prohibited.[21] These agreements are in the nature of horizontal agreements, which are entered into between enterprises that are at the same stage of production chain and in the same market, and have an appreciable adverse effect on competition and are generally prohibited per *se* in all the developed jurisdictions. Under the Act, however, an agreement entered into by way of joint venture, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services, has been kept outside the purview of this rule.

Other restrictive business agreements like exclusive supply/distribution dealing, refusal to deal, tie-in arrangement sales etc., are not prohibited *per se*[22] but they are to be judged on the touch stone of "rule of reason" as against rule of *per se* anti-competitive, to ascertain their impact on competition and legal

19 The MRTP Act, 1969, Sec. 33 requires the registration of certain agreements relating to restrictive trade practices.

20 Clause (1) of Sec. 3. Other clauses of Sec. 3 have extra-territorial application, clause (3).

21 The Competition Act, 2002, Sec. 3(3).

22 Sec. 3(4), such an agreement is presumed to be anti-competitive if it causes or is likely to cause an appreciable adverse effect on competition in India.

sustainability.[23] The "rule of reason" test is required for establishing the illegality of an agreement and is generally applicable in the case of vertical agreements,[24] which are considered less harmful than the horizontal agreements.

Prohibition of abuse of dominant position

The concept of dominant undertaking prevailing in the MRTP Act has been discarded. Entity having dominant position is not *per se* bad or illegal, but abuse of such dominance is illegal. Under the Act, the acquisition of dominance by an enterprise is neither frowned upon nor it is legally assailable.[25] But the abuse of dominant position, affecting consumer interest is made actionable at law[26] and there are no escape routes unlike section 38(1) of the MRTP Act, 1969 which contained 11 safety valves including the frequently solicited balancing clause, i.e., that the advantages of restriction imposed overweigh the disadvantages flowing there from and thereby a gateway for quashing of Restrictive Trade Practice Enquiry no more subsists.

Dominance has been described under the Act as "a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour."[27] The Act, while prohibiting abuse of dominant position, does not provide any threshold for the same. But certain factors have been mentioned to ascertain the abuse of dominance in individual cases. However, for assessing whether an undertaking is dominant or not it is important to determine, as in the case of horizontal agreement, what is the "relevant market" – the product market or the geographic market. The Act defines the "relevant market" to mean the

23 The Supreme Court in *Tata Engineering & Locomotive Co.* v. *RRTA*, AIR 1977 SC 973, held that whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will *per se* be a restrictive trade practice. To determine this question three matters are to be considered. First: what facts peculiar to the business to which restraint is applied; second: what was the condition before or after the restraint is imposed; and third: what is its actual and probable effect. The spirit and substance of this principle is also reflected in Sec. 19(3) of the Act, which states that the Competition Commission while determining whether a restrictive agreement has an appreciable adverse effect on competition or not shall have regard to all or any of the following, viz., (a) entry barriers to new players; (b) driving away of existing players; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvement in production or supply of goods or services; (f) promotion of technical , scientific and economic development by means of production or supply of goods or services.

24 Vertical agreements are between enterprises at different levels of manufacturing, sale or distribution processes, such as between a manufacturer and a wholesaler.

25 Sec 4(2) reads: There shall be an abuse of dominant position... if an enterprise, (a) directly or indirectly, imposes unfair or discriminatory - (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service.

26 The Competition Act, 2002, Sec 4.

27 Explanation to Sec. 4 (2).

market "which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets".[28]

Dominance is said to be abused when there is an appreciable adverse effect on competition due to the actions of a dominant undertaking. Appreciable adverse effect on competition occurs when an enterprise, directly or indirectly imposes unfair purchase or selling price, including predatory prices of goods or service; limits production, market or development to the prejudice of the consumers; indulges in action resulting in denial of market access; makes contracts with obligations which have no connection with the subject-matter; or uses dominance in one market to move into or protect other markets.[29]

However, reasonable actions to protect one's commercial and legitimate interests, including aggressive competitive practices like vehement and large scale advertising incentives and offers on products are not regarded as abuse of dominance.

Regulation of combinations

The new Act contains adequate provisions for the regulation of mergers, amalgamations and acquisitions.[30] Mergers are a legitimate means for the firms to grow but from the point of view of competition policy, the horizontal mergers are generally under suspect, as they tend to abuse their dominant position.[31] The Act mandates that "No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void."[32]Combinations include mergers, amalgamations, joint ventures, acquisitions, takeover, (friendly or hostile). Combination regulation touches upon the earlier two aspects of anti-competitive agreements and abuse of dominance. But, specific threshold limit is prescribed and a pre-notification procedure is provided in relation to combinations. Pre- notification in the case of combinations above a particular threshold under the Act has been made optional.[33] Hence,

28 See further on this point, S.Chakravarthy, *op. cit.* 17, at 41.

29 The Competition Act, 2002, Sec. 4.

30 *Id.*, Secs. 5 and 6.

31 There are also conglomerate mergers entered into between enterprises operating in different markets such as between software firm and an electronic firm.

32 Supra n. 29 Sec. 6(1).

33 Sec. 5 (2), *Id.*, where there is notification, the Commission will decide within a stipulated time, failing which it will be presumed that the Commission does not have any objection to the combination (Sec. 31).

mergers and amalgamations below the threshold are made very easy and simple.[34] The Act states that a pre-notification of the said combination or intended combination to the (CCI) is mandatory if the combined assets of two parties exceed Rs. 500 crores or the turnover exceeds Rs. 1500 crores and if one of the parties belongs to a group (business conglomerate managed by a single individual) whose assets value Rs. 2000 crores or whose turnover is Rs. 6000 crores. For this purpose, a "group" means two or more enterprises, which, directly or indirectly, are in a position to – exercise 26% or more of the voting rights in the other enterprise; or appoint more than 50% of the members of the board of directors in the other enterprise; or control the management or affairs of the other enterprise.[35]

A period of 90 days for approval or rejection of the proposed combination is provided for the CCI and if the CCI does not give any decision even after the completion of 90 days after notification, the proposal is deemed to be accepted[36].

The Act does not provide any list of factors to be taken into account while considering the application for approval or undertaking an investigation into combinations. However, the draft law listed certain factors to determine the nature of combination which may have the effect or is likely to have appreciable adverse effect on competition, viz. – actual and potential level of competition through imports in the market; the extent of barriers to entry to the markets; the level of combination in the market; the degree of countervailing power in the market; the likelihood that the combination would result in the parties to the combination being able to significantly and consistently increase prices or profit margins; the extent of effective competition remaining in the market; the extent to which substitutes are available in the market or is likely to be available in the market; the market share of the parties involved in the combination, individually and as a combination; the likelihood that the combination would result in the removal from the market of a vigorous and effective competitor; the nature and extent of vertical integration in the market; the possibility of a failing business; the nature and extent of innovation; and whether the benefits of the combination outweigh the adverse impact of the combination, if any.[37]

Unfair trade practices

The provisions relating to unfair trade practices as enumerated in sections 36 to 36E of the MRTP Act have been omitted and pending complaints against

34 Threshold limit under the Act has been fixed on the basis of assets rather than market share, as the latter may not be the correct barometer to determine affectation adversely of competition.

35 Sec. 5.

36 Sec. 31 (11).

37 Cf. S. Chakravarthy, *op. cit.*, at 52-53.

such trade practices before the MRTP Commission have been transferred to relevant consumer fora after the commencement of the Act.[38]

Competition fund

The Act provides for the establishment of Competition Fund, which will be credited by:[39] (a) all Government grants received by the Commission; (b) the monies received as costs from parties to proceedings before the Commission; (c) the fees received under this Act; (d) the interest accrued on the amounts referred to in clauses (a) to (c).

The competition commission of India (CCI)

As stated above, the Act provides for the establishment of an effective competition authority with a well-defined role as an adjudicator and a catalyst in the promotion of competition advocacy. In furtherance of this mandate, the CCI, in place of MRTP Commission, has since been constituted.[40] The CCI shall consist of a Chairperson and not less than two and not more than ten other members to be appointed by the Central Government.[41] For the selection of the chairperson and other members of the CCI, the Central Government would constitute a committee.[42] The CCI will have a principal bench and additional benches and will have one or more mergers benches, as the case may be, to deal exclusively with matters related to combinations 42A. Its task is to look into violations of the Act, a task which could be undertaken by the Commission based on its own knowledge or information or complaints received and references made by the Central Government, state governments or statutory authorities.

38 The Consumer Protection Act, 1986, has been amended to this effect in December 2002, which became effective w.e.f. 15 March 2003.

39 Sec. 51 of the Act.

40 Commission was constituted w.e.f. 14.10.2003, without a chairman so far. Its constitution became a disputed issue and was challenged before the Supreme Court of India, as it would not be headed by a judge, like other commissions and tribunals constituted under other Acts, but by a person who is qualified to be a judge of a high court or has special knowledge or professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management etc. which in the opinion of the Government may be useful to the Commission. The case has since been decided after the Government has agreed to make necessary changes in the Act in this regard. *Brahm Dutt v. Union of India*, (2005)2 SCC 431.

41 The Competition Act, 2002, Sec. 8,. The Chairperson and other members should be person of ability, integrity and standing.

42 The committee shall be consisting of a retired judge of the Supreme Court or a High Court or a distinguished jurist or a senior advocate for five years; a person with professional experience of not less than 25 years in international trade, economics, business, commerce or industry; joint secretary in the Ministry of Finance and Company Affairs; and a nominee of the Central Government who shall act as the Chairperson of the Committee. See The Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, *2003* vide G.S.R. 303(E), dated 4.4.2003, published in the Gazette of India, Ext., Pt. II, S. 3 (i), dated 4.4.2003.

The Commission can pass orders for granting interim relief or any other appropriate relief and compensation or an order imposing penalties, etc.[43] The CCI has the power to impose penalty for the contravention of its orders, failure to comply with its directions, making of false statements or omission to furnish material information, etc. It can levy upon an enterprise, exemplary penalty for offences committed under the Act up to 10 per cent of the average of the turnover for the last three preceding financial years. Further non-compliance with the orders of the Competition Commission entails civil imprisonment up to one year and a penalty of not exceeding Rs. 10 lakhs.[44]

The decision or order of the Commission is appealable to the Supreme Court of India. Any person aggrieved by any decision or order of the Commission may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order to him on one or more grounds specified in section 100 of the Code of Civil Procedure, 1908 arising out of such decision or order. However, in case of delay in filing such appeal, the Supreme Court may allow filing of appeal within a further period not exceeding sixty days if the appellant can satisfy the Court that he was prevented by sufficient cause from filing the appeal within the said period of sixty days.[45] The CCI is empowered to adopt procedures and rules specifically suited to competition cases.[46]

The CCI is not merely a law enforcement agency, but would be actively involved in the formulation of the country's economic policies, which may adversely affect competitive market structure, business conduct and economic performance. Apart from giving advise to the Government on competition policy, it shall also take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.[47] Thus, the CCI has been entrusted with the following two basic functions: i) to administer and enforce competition law and policy to foster economic efficiency and consumer welfare; ii) to be involved proactively in Government policy formulation to ensure that markets remain free, fair, open, flexible and adaptable.

Extra-territorial jurisdiction

Looking into the reach of international agreements, entered into in pursuance of different WTO Agreements, the new Act has extra-territorial reach. In case any agreement that has been entered outside India and is anti-competitive in terms of section 3 of the Act; or any party to such agreement is outside India; or any enterprise abusing the dominant position is outside India; or a combination

43 Sec. 33 and 34.
44. Chapter VI of the Act.
45 Sec. 40.
46 Sec. 36.
47 Sec. 49.

has taken place outside India; or any party to combination is outside India; or any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, if such an agreement, combination or abuse of dominant position has or are likely to have an adverse effect on competition in the Indian market, the CCI shall have the power to inquire into such agreement or abuse of dominant position or combination if they have or are likely to have an appreciable adverse effect on competition in the relevant market in India.[48]

VI MRTP Act and The Competition Act – A Comparison

The Competition Act has brought out certain fundamental changes in the MRTP (which is still the extant law in substantial respects) that are enumerated in the Table below.

S. No	MRTP Act, 1969	Competition Act, 2002
1.	Based on the pre-liberalization era	Based on the post-reform scenario.
2.	The objective of the Act is to prevent concentration of economic power to common detriment, to control monopolies to prevent monopolistic and restrictive practices.	The objective of the Act is to prevent practices having adverse effect on competition and to promote as well as sustain competition to protect consumer interests at market places to ensure freedom of trade.
3.	The size of the firm is the factor to determine dominance.	Based on the structure as a factor.
4.	Competition offences implicit and not defined.	Competition offences explicit and defined.
5.	Lists out 14 ofences per se negating the peinciple of natural justice.	Recognizes only 4 offences, deemed to be against the principle of natural justice, rest are subjected to the "rule of reason".
6.	Entity having the status of dominant position is considered bad.	The entity having dominant position is not bad *per se,* but abuse of dominant position is considered bad.
7.	Registration of agreements, in general, compulsory.	There is no requirement of registration of agreements.
8.	No regulation on combinations.	Combinations are regulated beyond a threshold limit.

48 Sec. 32

9.	Definition of "group" wider.	"Group" definition has been simplifies.
10	MRTP Commission's role mainly advisory, no role in competition advocacy.	MCCI can initiate *sue motu* aproceedings and levy penalities; has competition advocacy role.
11	The Commission members were appointed by the Government	CCI members selected by a committee constituted by the Government.
12	The Act covered unfair trade practices.	Unfair trade practices are omitted from the Act and transferred to consumer fora.
13	No provision for a fund for its activities,	Provision for a Competition Fund has been made.
14	Focused on consumer interest at large.	Focuses on competition in the economy and public interest at large.
15	The Act was reactive and rigid.	The Act is proactive and flexible.

VII WTO Agreements and The Competition Act, 2002.

While enacting the new Competition Act different WTO agreements have been kept in view, for example, licensing of IPRs, technical barriers to trade, professional services, government procurement, foreign investment; mergers acquisitions and take-overs. The Act aims, *inter alia*, to check the abuse of dominant positions and establish procedures dealing with mergers and acquisitions.

The Act covers horizontal as well as vertical agreements. The provisions are more stringent in case of horizontal agreements. Agreements regarding prices, quantities, bids and market sharing are *per se* illegal, but other horizontal agreements are made subject to the "rule of reason" test to term them illegal (based on US law approach). Vertical agreements, on the other hand, have not been subjected to the rigours of competition law. However, where a vertical agreement has the character of distorting or preventing competition, it will be placed under the surveillance of the law. The tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, resale price maintenance are subjected to "rule of reason" test.

The Act, however, does not deal directly with the intellectual property rights, which are monopoly rights in context. On the contrary, the provisions relating to anti-competition agreements will not restrict the right of any person to restrain any infringement of intellectual property rights granted in India or to impose

such reasonable conditions as may be necessary for the purposes of protecting or exploiting such intellectual property rights. But licensing arrangements related to intellectual property rights, which are likely to affect adversely the prices, quantities, quality or varieties of goods and services and will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with intellectual property rights. Examples of this juxtaposition may be related to refusal to deal, in order to create or maintain monopoly; refusal to license technology without any reasonable justification, at the cost of consumers' interests; anti-competitive licensing practices to manipulate the market; vertical agreements or mergers to limit competition; non-working and inadequate supply of a protected innovation; and exclusive grant back conditions, etc.

However some of the activities of the holder of the IPRs merit their consideration under the Act. For example, there are increasing instances of abuse of patent rights by patent holders by means of controlling output and supply, maintaining thereby artificial prices and imposing unjustified conditions upon licensees. Further, the owner of a copyright, patent or other forms of IPRs may issue a license for someone else to produce or copy the protected invention, design, work, trademark etc. and in the process the terms of the licensing contract may restrict competition or impede technology transfer. There should be a place in law to take action to prevent anti-competitive licensing that abuses IPRs. TRIP agreement allows member countries to deal with such abusive trade practices under Articles 31 and 40.[49] However, by not containing any provision on the IPR abuses, the Competition Act in a sense, infers that IPR laws override competition law but in fact the contrary is the truth. The competition authority envisaged under the Act, if acts in the spirit of the objects of the Act, will be the ideal body to deal with IPR abuses and provide necessary inputs to the government on the subject matter. The inadequacy in the Act should be addressed suitably to deal effectively with IPR abuses to strike a balance between IPR protection and competition law.

VIII Drawbacks in the Act

The Competition Act has so far become operative only partly and the CCI, which has been constituted by the Government as a market regulator, has not been constituted fully. The actual impact of the Act will be known only after its substantive provisions viz. sections 3 to 6, come into force. As such, however, the Act manifests certain lacunaes. For example, section 54 (in force) confers

49 Arts., 31 and 40 of the TRIPs agreement provide for, compulsory licenses and control of anti-competitive practices respectively.

unfettered powers on the Central Government to exempt any class of enterprises from the application of the Act, or any provision thereto and for any such period, in the interest of the security of the State or public interest or for giving effect to any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any country/ countries or any enterprise which performs a sovereign function on behalf of the Central or a state government. The grounds on which this exemption power will be invoked are not well defined and are vague. As a result, a large number of enterprises can be left out of the purview of the Act. Moreover, it will give the handle to the Government to invoke this power on any flimsy ground or extraneous considerations.[50] This requires reconsideration and the CCI should be empowered to review the action taken by the Government under section 54, to avoid any abuse of this power.

The Central Government also enjoys unbridled power in the matters of policy framing and issuing directions on questions of policy, other than those relating to technical and administrative matters, which shall be binding on the CCI.[51] The decision of the Central Government whether a question is one of policy or not shall be final. The Government also has the power even to supersede the CCI, against which the CCI can make a representation to the Government.[52] Such provisions thus seriously affect the independence and efficacy of the CCI. The CCI should be allowed to function in an independent manner and should have the power to review government policy on competition. In fact consultation by the Central Government in evolving competition policy with the CCI should be made mandatory, instead of discretionary, as contemplated in the Act.[53] This reflects a half-hearted approach on the part of the Government to empower the CCI to be the sole arbiter in competition matters.

The Act is vague on the relationship between CCI and other sectoral regulators. For example, there is a need to have some provision related to exit barriers in the case of sick industries under the Sick Industrial Companies Act (SICA), which have to be referred to the Board for Industrial and Financial Reconstruction (BIFR), and the corresponding provisions in the Industrial Disputes Act, 1947, to keep an enterprise competitive. The CCI should have the over-riding on all other sectoral regulators, if the actions taken by them affect competition. The other drawbacks are that, the Act does not address the

50 The experience with such an exemption power under other laws has been very controversial, for example under the Essential Commodities Act; the Industrial (Development Regulation) Act, etc. It is doubtful that public interest is the sole motivating factor in these cases.

51 Sec. 55, in force.

52 Sec. 56.

53 Sec. 49, paras (1) and (2).

abuses of IPRs, which are monopoly rights for limited period of time; The definition of the term, 'group', given in Explanation (b) under Section 5 of the Act appears to be inadequate to describe the realities of group control; the terms like 'agreement', 'cartel', 'person', 'dominant position' appear to be defined in a manner, which may not fully cover the concepts. The most important term for decisions of the Commission is 'appreciable adverse effect on competition.' The Act provides for the factors to be considered, for example, market share, size of competitors, economic power of the enterprise, benefits to consumers, relevant geographic market, relevant product market etc. in deciding the cases related to anti-competitive agreements, dominant position and combinations. Additionally, however, these factors need reliable statistics relating to industry and trade. The gap in the relevant statistics is particularly felt after the announcement of the policy of liberalization, when such regular collection of statistics at the firm level was discontinued by Government agencies.

Attention may be invited to the provisions of Section 20(3) of the Act to enhance or reduce the assets or turnover limits of the enterprises to fall within the jurisdiction of the Competition Commission for inquiry into combinations. These variations are to be effected on the basis of the Wholesale Price Index. The constituents of this Index and those of the assets of an enterprise are totally unrelated and hence the use of this Index is not suitable for the purpose.[54]

IX Conclusion

The efficacy of the new competition law has to be seen in its implementation, which will be evident in due course of time. But the new Act is a step in the right direction by harmonizing the competition policy with international trade and policy. The stated drawbacks, however, require some consideration on the part of policy makers to make the new Act effective and workable. The unbridled powers of the Government in all important matters, including the power to supersede the CCI need to be examined if the Act has to create an impact.

54 V.T.Korde, "The Competition Act, 2002: Introduction and Critical Review" paper presented at the National Seminar on *India's New Economic Laws: WTO in Context*, organized by the ILI in April 2003.

HUMAN RIGHTS AND SOCIAL AUDITING OF LEGAL EDUCATION IN BANGLADESH: WHY, WHEN AND HOW?

Dr. Mizanur Rahman[*]

I Introduction

LEGAL EDUCATION in Bangladesh dates back to the days of *British raj* in India. Upon independence from Pakistan in 1971, Bangladesh inherited a legal education that well suited the requirements of a colonial power. It did not even experience the filtration process that was deemed necessary to make legal education socially responsive and reflect the aspirations of a newly independent country. To be precise, legal education in Bangladesh hitherto has not received the treatment it deserves. Its role in the ultimate delivery of justice in the society has not been sufficiently studied and its potential power in the dispensation of justice has remained largely unexplored. Resultant effect is poor quality of legal education with its consequential impact on the administration of justice.

Legal education provides the nation the personnel who run the vehicle of justice in the society. To quote an author:

> "Legal education needs to be viewed as part of total commitments for a legal order and the rule of law in relation to the society and its development. Law, legal education and development are not only interrelated with each other but have become an integrated concept for any developing society seeking to ameliorate the socio-economic condition of the people through democratic and peaceful means."[1]

It is in the class rooms of the law faculties and law colleges, that the future lawyers, judges and substantial number of legislators, human rights activists and social reformers are nurtured and groomed. Therefore, the questions as to what is taught in the law classes, who are taught, how are they taught, by whom they are taught and what goals and visions are set before them, are paramount questions for the society. Unfortunately, in Bangladesh the education of the future lawyers, who see their task to work for social change, has met historically with formidable indifference.[2] We just don't seem to care much and

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1 M.Amir-ul-Islam, "In the Quest for a Modern Education in Law"- Paper presented at Bangladesh Law Teachers' Association(BLTA) Symposium on 'Legal Education in Bangladesh: Problems and Prospects, Dhaka, (21-22 November 1992), 10.

2 Mizanur Rahman, Anti-Generic Learning and Rebellious Lawyering: A Challenge to Regnant Legal Education and Lawyering in Bangladesh, in Mizanur Rahman (ed), *Human Rights and Empowerment, Dhaka* 139 (2001).

certainly do almost nothing about specially preparing those whose vocation is to work with the subordinated: the poor, the women, the minorities etc.

Legal education in Bangladesh regularly resists change- change of any sort. Calls for transformation of what goes on in our law faculties somehow get deflected, delayed or diluted. Inertia no doubt plays its role as does flat-out laziness. Academicians of every ilk not only prefer thinking that they already do a good job but would rather dodge the possibility that they themselves may not be equipped to participate meaningfully in a newly conceived training programme.

Under these circumstances, it may not be surprising to note that no serious institutional research has been conducted to evaluate legal education in the country. However, sporadic and isolated studies accomplished by a few individuals, both academicians and practicing lawyers, reflect the social mood regarding legal education in the country. This article is based on a few such studies.

The prevailing general impression about legal education is that it is divorced from social realities and the graduates it produces are indifferent, if not totally antagonistic, to the 'social engineering' functions of a lawyer. This is, the author contends, the outcome of traditional learning and regnant lawyering. In order to bring about a fundamental change in legal education, this article proposes to resort to 'anti-generic learning' and 'rebellious lawyering' in its various manifestations.

II Objectives of Legal Education in the Context of Bangladesh

Almost a decade ago I wrote elsewhere that "Legal education in Bangladesh has been a dismal failure."[3] Nothing noticeable has taken place since then. Contemporary legal education teaches law students to approach practice as if all people and all social life were homogeneous. As regards their academic training, Dr. Shahdeen Malik, rightly points out, that legal education in our country primarily aims at familiarizing students with main provisions of law and explaining doctrinal foundations of legal regulations of society."[4] Another law teacher, attempting to broaden and rationalize the aims of legal education in Bangladesh writes:

> "Legal system and legal education modeled on English pattern is based on analytical thought and tradition, which consider law to be a self contained discipline whereunder the principles of law applicable to a

3 Mizanur Rahman, "Clinical Legal Education in Bangladesh: Establishing a New Philosophy?", Chittagong University Studies-Law, Vol.I 1 (1996).

4 Shahdeen Malik, Continuing Legal Education; pamphlet circulated by Legal Education Committee of the Bangladesh Bar Council 1 (1995).

particular fact-situation can be deducted from the statutes. Such an approach completely disregards any enquiry into the socio-economic-political consideration and conditions under which the law was passed and into the socio-economic background of the conflict-situation which may be before the court for decision. Thus, analytical approach cannot contemplate social justice in the context of the country's multifarious problems of over-population, scarcities and violence. Problem solving approach rather than a merely analytical/ definitional approach is the need of our society and the legal education must be oriented in this direction."[5]

Writing on the same problem of aims and objectives of legal education, Barrister Amir-Ul-Islam observed:

"Besides helping the students to master the lawyering skills, legal education must be able to help develop inter-disciplinary approach for building the personality and the intellectual ability to understand the society and the human situation in a changing social order."[6]

An American scholar giving his views on legal education in Bangladesh wrote:

"a. Legal education must inform students about crucial societal issues, including poverty alleviation, the role of women, the environment and human rights, and must focus on ways in which the legal system can help to solve the problems plaguing society. In other words, legal education must not teach students simply what the current law says, but rather it must provide students with the vision and skills to make the law more responsive to the development needs of this country. Put simply, it must train students to be social engineers.

b. Legal education must not only teach students about legal theory, but must prepare students to engage in the practice of law or law-related professions. Students, therefore, must learn not only how to be outstanding lawyers but also outstanding members of the judiciary, government service, NGOs or industry. To accomplish that goal, legal education must impart skills in research, drafting, oral communication, interviewing, interpreting and advocacy....."[7]

The message is clear. Law graduates must be versed in legal knowledge and information, which is relevant for social and economic development. They

5 Shafique Ahmed, "Legal education in Bangladesh: Problems and Prospects", key-note paper presented at BLTA Symposium, *op.cit.* at 1.

6 M.Amir-ul-Islam, *op.cit.*at10.

7 Jay Erstling, Reform of Legal Education in Bangladesh, Consultant's Report submitted to the Bangladesh Bar Council 3 (1994).

must be conscious of the social values of law. They must be sensitized to the needs of cross sections of people and they must learn to apply law to maximize social benefits; to use law to reform society and hence promote social engineering role of law. Dean Shah Alam writes: "Law graduates, the would-be lawyers, judges and legislators must acquire sufficient motivation to take law to the people in order to serve them in distress and, when necessary, to make laws or to reform existing ones to serve them better. Law is called upon to defend people from ills and evils of the society and to accelerate social advancement that must manifest in economic growth, poverty alleviation and protection of human rights. Law graduates must understand this mission of law and be motivated to ensure that law does not fail in its mission."[8]

III State of Contemporary Legal Education in Bangladesh

Most people don't ever pay much attention to law, much less legal education. Perhaps this should not be surprising. Even law students and law teachers do not spend much of their day-to-day time talking about legal education- at least not in any serious and publicly shared way. For most people "legal education somehow seems not quite intellectual enough to be taken seriously and not quite interesting enough to inspire anything provocative."[9]

Let us begin with what academics might call a critique of legal education but what more accurately portrays what we should realize about what we do and how we do it in our law faculties.

Too few general approaches- some think only one-dominate our legal education

A look at the course offerings of all the law faculties in Bangladesh portray an awful homogeneity of general approach. Even the four- year undergraduate course offered by the university law faculties does not differ from the two-year post graduate course offered by the law colleges affiliated with the National University. This homogeneity may simply mean that law faculties have "got their act together"- they have all agreed (if only tacitly) about what it is they are doing and how to do it best. However comforting this view may be few people I know in legal education actually buy it. Moreover, few other self conscious disciplines train their future practitioners in so peculiarly uniform fashion. Elsewhere, vying conceptions of competence and excellence make for often radically different approaches to learning and training. Our law faculties simply seem unwilling or unable to imagine and to implement serious alternatives to what nearly all of them now find themselves doing.

8 Professor M.Shah Alam, Legal Education in Bangladesh: Search for Reforms, Consultant's Report to the World Bank, TOR 4 5 (1997).

9 Gerald P.Lopez, Rebellious Lawyering. One Chicanoes Vision of Progressive Law Practice, Westview Press 309 (1992).

Our legal education has more or less cleverly avoided confronting the fundamental question. Instead, our teachers engage in largely empty analysis bend over an incomplete methodology of inquiry that lacks a positive ethical, moral and political grounding. These factors, together with others that include an ancient curriculum structure that restricts experimentation, and perhaps more importantly, relieves our faculties of serious obligations to develop more inventive and flexible approaches to the basic substance of legal education, the status and power of the Bangladesh Bar Council examination, and the value structure of the job of the lawyer, fashions a system that is one only of law but not of justice.

Too few models of teaching and learning-some think only one-shape the structure and routines of the general approach to legal education in Bangladesh

You know in advance what most courses will look like at the different law departments- they will meet always as a large group in a classroom for three/ four hours a week throughout the academic year. The 'big classroom' model dominates our teaching and learning. The other model of segregating big classes into small tutorial groups have long been banished by the Dhaka University Department of Law, presumably the best centre of learning in the country.

It is true that within the same department you can also find different models of teaching and learning, but it is the 'big classroom' model that sets our legal education's rhythm and fulfills its claim to educational legitimacy.

It is not just that in the big classroom model the group always meets as a group in a classroom for three or four hours a week. It is also true that in the big classroom there is just too much of the same kind of teaching and too much of the same kind of learning. In fact, it would not be surprising to find most of the teachers' ideas in the student notes from previous years classes. One critic, speaking of legal education in another jurisdiction, observed: "Instead of a partnership in the learning process and a method by which teacher and student discuss a problem in order to further the understanding of each..... prevalent style in law schools is merely a means to direct the student to a position predetermined by the teacher."[10] To be more accurate, in our teaching model, teachers exercise, but almost never share power with students and teachers are the ones ultimately who act and students are the ones ultimately acted upon.

However, in challenging the big classroom model of teaching, no one should want to convert learning into a non-aural, atomistic enterprise. Nor should anyone

10 Carolyn S. Bratt, Beyond the Law school Classroom and Clinic- A Multi-Disciplinary Approach to Legal Education, 13 New England Law Review 199 at 203 (1977).

underestimate and under-appreciate the importance of reinforcement and reemphasis, nor neglect the role of a teacher's influence on the students' learning spirit. Still, why not convert previous lecture notes in to written commentary on the principal text? And why not aspire to an aural community of learning by employing a set of pedagogic vehicles that demand more from students than simply taking yet another set of lecture notes? Instead of having so much pass through the teacher, why not help student galvanize one another?

Why not? The truth is that most teachers who practice their teaching in the big classroom don't have a very self-conscious idea of why they do what they do. They simply find themselves, like their students, trapped in a largely unexamined set of structures and routines. Indeed some teachers and students seem to have cut somekind of a deal. The students permit themselves to be bored, boring and infantilized, so long as no one challenges too openly their disengagement. The teachers permit themselves to be bored, boring and thoroughly unambitious so long as no one examines too closely their teaching. Neither demands too much of the other and neither exposes the considerable fatuousness of their time spent together.

True, there are extraordinary teachers, who challenge the status-quo and involve students in a two-track power-sharing process. Yet, even if these extraordinary teachers were everywhere in legal education, a curriculum dominated by the conventional big classroom model of teaching and learning would still badly under-educate our future lawyers.

Too few skills make their way into and get serious attention in the general approach to legal education.

For a long time and until very recently and then again in very limited terms, legal education in Bangladesh seems resolutely against offering anything like adequate training in the range of skills demanded of various lawyers. Some claim "skills training" is beneath law departments- the elitism hypothesis. Still others claim, that "skills training is beyond those who teach in the law faculties"- the incompetence hypothesis. Finally, others still claim that "skills training" is best done after you become a lawyer- the wise division of responsibility hypothesis.[11]

There is continuing truth of one sort or another in each of these hypothesis. If 'skills training' isn't in fact beneath, beyond, too expensive, or too unwise for law faculties to provide, then certainly there are many who perceive the truth in one or more of these self absolutions. However, the reality is that our legal education always taught skills- not many to be sure, and obviously not nearly as

11 Keeton, Teaching and Testing for Competence in Law Schools, 40 Madison Law Review, 203, 212-214 (1981).

well as they might. Still, skills are, in part, precisely what's being passed on in the curricular preoccupation with learning to read and use cases. But that the very idea of skills training remains, even today, off to the side of the basic legal education curriculum reflects, in my opinion, a largely unappreciated fact that legal education has been and still is almost entirely about law and is only incidentally and superficially about lawyering. Law teachers think, teach and write about the law of contract, or the law of environment, and only barely about what lawyers do for and with people partly defined by contract law or environmental law. Law teachers spend enormous energy tinkering with the doctrinal formulations of discrimination law but devote almost no resources discovering whether and in what ways discrimination law and the work of discrimination lawyers penetrate the lives of millions of people for whom they are ostensibly designed.

Too little theory, of any sort, makes its way into and gets serious attention in the general approach to legal education

Since our legal education focuses on too few skills, one might assume that they at least pay serious attention to theoretical questions. But that again is wrong. Our courses spend a great deal of time and effort transmitting the law of property, tort, company, constitution in a way which is nothing much more than the fairly uninspired and uncritical statement of rules or principles of law- what some like to call "black letter law". By contrast, our courses invest very little time and effort explicitly identifying and elaborating underlying theoretical conceptions- conceptions of human interaction, of conflict, of the capital market, of problem-solving, and of the state. At the end of four years of honours education, law students probably are not sufficiently, if at all, equipped to describe and critique the political and economic theories underlying various legal arrangements. It seems questionable, whether our students truly comprehend even the "black letter law" since they "do not have an understanding of its social and political history and how it concretely affects everyday problems."[12] Thus, our legal education continues to reflect, as much as anything, what the teachers feel both equipped to put into their teaching and rewarded for doing with their teaching. Law faculties do now what they have always done and teachers train now much as they themselves were trained. Consequently and ironically, our legal education and law teachers simply reproduce one another.

Our teaching and learning model has created a stereotype: during the first year, students seem generally to accept the need for and may respond well to

12 *Ibid.* at 205-206.

the unfolding of method through content- the regnant style of teaching, with long hours in the library reading reference books etc. But certainly beginning in the second year, and perhaps even earlier, most of the students come to understand that they can pick up the patterns of arguments, rules and policy concerns that constitute a particular body of doctrine without engaging at all actively in the regimen that the teacher pursues in and around the classroom. Students appreciate that they need only read cases cursorily (if at all), need only become passive and happy listeners in the classroom (if they attend at all), and still learn and use legal doctrine in just the way demanded by the teacher and eventually become an honours graduate. All they need do is diligently gather the appropriate note book, get hold of the class notes from a classmate or from a senior student, and spend a short intense period of time making the information of their own, in part by putting it to use on old exam questions. Thus, the joint efforts of teachers and students in our legal education have transformed the big classroom into something much resembling a "correspondence course."

Too little of everyday life makes its way into and gets serious attention in the general approach to legal education

Theory and skills are not the only aspects of thought and practice sacrificed to doctrine. So too is everyday life. Too little of what people do think and feel and too little of how institutions work and change and get reinvented makes its way into the curriculum. On the whole, law faculty materials, exercises and conversations tend to abstract away from both daily routine and rich description and to position students at a considerable distance from the very human events with which law and lawyers regularly deal. Too much of legal education seems, in short, schematic, ungrounded and bloodless. "Abstracting law both from human events and from the emotional responses which those events should spark implicates serious political concerns."[13] As long as far too little of everyday life makes its way into and gets serious attention in the general approach to legal education, we can expect that too many of our future lawyers will continue to believe that they do their best work only and always at a distance from and without a deep appreciation for those with whom they work. By ignoring the soul of the law and that of human being who happens to be a lawyer, our legal education converts law students into expressions of "technique", causing their human side to atrophy and leaving many of them unprepared to face the moral chaos and distortions inherent in law practice in Bangladesh.

13 M.V.Tushnet, Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education, 52 G.Wash.L.Rev 276 (1984).

Too little conversation and too little coordination, simultaneous and sequential, mark the general approach to legal education

Even if law teachers don't pay close attention to theoretical literature, practice or to everyday life, you might at least expect that most do know a great deal about and talk a great deal about what's going on in their own curriculum. But here again, one would be extremely disappointed. Law teachers know how to grouse to one another about evaluating examination scripts, how to complain to one another about administrative lapses in the Chairman's office, how to moan to one another about certain pushy students, and, of course, how to gossip about one another. But by and large, law teachers don't appear to think much about and certainly don't talk to each other about precisely what's going on in their own courses and their own teaching. And as a group they seem never to have figured out how to learn about and how together to do something about the training they provide and the collective impact they have on their own students and on the communities their students ultimately serve.

When teachers don't talk, the possibilities for sensible coordination-simultaneous or sequential- are severely limited. How can teachers who teach the same first year students sensibly coordinate when they don't even know exactly what and exactly how they variously teach? How can teachers who teach courses that students perceive as related and sequential, coordinate if they don't learn about and discuss what each does and might do with their respective materials and in their respective classrooms? Moreover, when teachers don't talk regularly about how and what they teach, it becomes increasingly difficult for them even to see themselves as a team with a collective impact on students. The prevailing picture in the law faculties, I am afraid, depicts that too many law teachers have largely abandoned collective responsibility both for the curriculum as a whole and for the experience of students who progress through their own departments.

Too generic a vision of people, traditions, and experiences pervades the general approach to legal education

Contemporary legal education in Bangladesh conceives of and treats people-their traditions, their experiences, their institutions- as essentially generic. Legal education teaches law students to approach practice as if all people and all social life were homogeneous. The bulk of our law graduates have been working with or litigating for the subordinated. However, anticipating and responding to the problems of the politically, socially and economically subordinated group demands a range of practical know-how and intellectual sophistication that extends beyond litigation competence. It demands knowing how to work with clients and not just on their behalf, it demands knowing how to collaborate with

allies rather than ignoring their actual or potential role in the situation, it demands knowing how to take advantage of and how to teach self-help and lay lawyering and not just how to be a good formal representative, and it demands knowing how to build coalitions, and not just for purposes of filing a lawsuit. In sum, anticipating and responding to the problems of the politically and socially subordinated group requires training that reflects (and in turn, helps produce) an idea of lawyering, compatible with a collective fight for social change- a "rebellious idea of lawyering" at odds with the conception of practice that now reigns over legal education and the works of lawyers.

Too fragmented, too regnant legal education imparted by the Bangladesh Bar Council

Bangladesh Bar Council's (BBC's) decade old initiative in launching a set of continuing legal education programmes was primarily in response to the lapses of regnant legal education in the country. But these courses almost never extend outside the boundaries of litigation. Like the four years of law study at the universities, it basically shuns entire dimensions of practice, integral to the needs of the subordinated people and the lawyers with whom they work. Worse still, BBC courses are offered by people many of whose qualifications, both academic and professional, are at the least, doubtful. Moreover, these 'new teachers' have internalized the very same idea of lawyering that generic legal education teaches and that serves so inadequately for all those in the fight against subordination. Worse still, they seem all too willing to protect their own "achievements" by refusing to extend the boundaries of both continuing (post-law faculty) legal education and their own conception of practice. In short, the BBC programme, along with the law faculties, has become part of the problem for the subordinated rather than becoming part of the solution.

The as yet unsettled dilemma over the language of the law

Dean Shah Alam writes: " Bangladesh is a mono-lingual country. Yet, it has a language problem in legal education, and for that matter, in legal profession."[14]

Our language problem can be traced to long presence of English as the dominant language in legal arena, both in legal education and in profession, which has overshadowed Bengali and never actually allowed it to come to prominence, although it was only too natural to expect that the mother tongue, the state language of Bangladesh, Bengali, would gradually replace English. But it did not happen. Rather we have steeped in a linguistic dilemma which received a very interesting reflection in Professor Erstling's words:

14 M.Shah Alam, *op.cit.* at 20.

> It is ironic that Bangladesh, a country whose quest for independence includes a struggle for the maintenance and integrity of Bangla, still faces the question of what role the English language must play in legal education. I think it is fair to say that Bangladesh, like many other developing countries, suffers from what might be termed "language imperialism". Bangladesh not only inherited a transplanted English legal system that adopted English as the language of the law, but now finds that English is the predominant language of international commerce, diplomacy and law. The unfortunate but undeniable result is, that legal education in Bangladesh faces a dual burden. If law students are to be educated to play a meaningful role in this nation's future, they must develop competency in English. At the same time, steps need to be taken to fortify the role of Bangla in legal education to ensure that the national language has a healthy future in the law.[15]

Thus legal education in Bangladesh is beset with age old problems. No meaningful intervention' whether governmental or in public initiative, has yet taken place. The consequence has been utterly frustrating for legal education in general. The present status of legal education resembles much the same way as was described by an insider almost ten years ago:

> Law graduates having traditional legal education through lecture method of teaching in big classrooms feel unprepared to interview and counsel clients, draft and file papers, prepare a case, conduct trials, examine witness and argue a case before the judge. They in fact do not acquire the skill to apply the knowledge of substantive laws learned in classes to the actual situations of clients. *They also feel that they have not gained the experience to understand the role of a lawyer in the society.* [16]

Here, I would like to expound a personal experience. In successive courses of Continuing Legal Education conducted by the Bangladesh Bar Council, I used to ask the participants on why they chose to be lawyers? With the exception of a negligible few, who consider the profession to be financially lucrative, the obvious answer was their determination to fight the inequalities inherent in our socio-economic system and they thought that the best way to fight them is through lawyering. Quite interestingly, their perception and understanding of the 'inequalities' is not a product of law school training but is a result of their personal observation and experience. The natural question that emanates from

15 Jay Erstling, *op.cit.* at 18.

16 Shafique Ahmed, "Post Final Practical and Creative Skills Training Course", CLEP Bulletin, Vol.1, No.2 (July, 1994) 8.

this scenario is: should not legal education be able to help develop the intellectual ability to understand the society and the human situation in a changing social order?

IV Winds of Change: Clinical Legal Education in Bangladesh

By the early 1990s the situation of legal education became such that the students no longer wanted to be taught the traditional way and the teachers could no more teach the former way. To these objective, conditions was added the subjective conditions of physical presence, albeit temporary, of such actors as the Ford Foundation (David Chiel), the Asia Foundation (Kim Mcquay), Prof.David McQuaid Mason of the University of Natal, South Africa, and Prof.N.R.Madhava Menon of the National Law School of India University, Bangalore, India. Interaction of the objective and the subjective factors led to what today may be termed as 'revolutionary changes in the legal education in Bangladesh' in the form of introduction of clinical legal education (CLE).

Introduction of CLE was considered a thoughtful and careful effort and response to the needs of legal education. However, CLE was perceived differently by different schools though in essence CLE "....is directed towards developing the perceptions, the attitudes, the skills and the responsibilities which the lawyer is expected to assume when he completes his education in the Law School..... It is certainly not limited to the mere training in certain skills of advocacy. It has wider goals in enabling the students to understand and assimilate responsibilities as a member of a public service in the administration of the law, in the reform of the law, in the equitable distribution of the legal services in society, in the protection of individual rights and public interests and in upholding the basic elements of 'professionalism'. Clinical experience in law school, therefore, is a unique opportunity for the student to learn under supervision, many aspects of the 'hidden curriculum' essential for preparation to think and act like a lawyer".[17]

Thus the broad objectives of CLE in a country like Bangladesh are: a) to acquaint the students with the lawyering process and to develop skills of advocacy; b) to expose students to the social reality and instill sense of societal responsibility in professional work; c) to make one aware of the limits of legal system and appreciate alternative lawyering skills including exposition to alternative dispute resolution; d) to sensitize students to the necessity of ensuring access for all to justice; and e) to develop a sense of professional ethics.

17 N.R.Madhava Menon, Clinical Legal Education: Concepts, Concerns and Methods. Paper presented at the BLTA Symposium on 9-11 November, Dhaka (1993) 1.

V Societral Realities and New Dimensions in Legal Education: Human rights as Core Values

Street Law

Very soon it was realized that in a society with mass illiteracy, objectives of CLE were almost unattainable. If basic human rights and specific rights of any particular community are to be protected, it is necessary that the people are conscious and aware of the rights they are entitled to as human beings or as members of any particular group or profession. Ignorance of individual rights is more likely to render the rights vulnerable to violation by public authorities or by private circles. Need for public legal education was thus quite acutely felt. While legal aid is issue based, whether it concerns individuals or groups, seeking remedies when injustice or conflict has already taken place, public legal education is general in nature, seeking to minimize the chances of violation of rights, arming the citizens to be on their guard to defend their rights. In this context, Law clinic[18] introduced Street Law as a vehicle for imparting public legal education.

Street Law has its own background and history in Bangladesh. But its sophistication and development is intricately related to Prof. David McQuaid Mason and his experiments with Street Law in South Africa. Much has been drawn from the experience of street law in countries of Eastern Europe and the Commonwealth of Independent States, especially the contributions of Prof. Arkady Gutnikov of St.Petersburg and Prof. Monika Platek of Warsaw have been crucial. However, street law has been adapted to the conditions of Bangladesh and within a short time its vernacular counterpart- Protidiner Ain[19] (Everyday law) became popular with the school children in Dhaka and Chittagong.

From rebellious to empowerment lawyering

No sooner did our street lawyers went to the slums and hard core poor, that they realized that mere dissemination of knowledge and information is not enough for empowerment of the poor. Encounters with the harsh realities of life made it clear to our students that regnant legal education leads to traditional lawyering which leads to no structural change in the power-frame of the society. Students understood that regnant approach to learning and traditional lawyering are unacceptable and rebellious lawyering[20] is therefore indispensable.

18 Law clinic is the acronym given to the clinical legal education programme of the Faculty of Law, Dhaka University. The programme was designed by Mizanur Rahman jointly with Cathy Lincoln under a Ford Foundation grant.

19 A text book entitled *Protidiner Ain* has been written by a group of law students and edited by Mizanur Rahman. It has been widely acclaimed in the secondary schools of Dhaka and Chittagong.

20 Mizanur Rahman in *Supra* n. 2.

Law clinic believes that rebellious lawyering must involve: legal and non-legal approaches to problems; know how to work with others at fighting social and political subordination; understands how to be part of coalitions, how to build them, for greater than litigation, interests; nurture sensibilities and skills compatible with a collective fight for social change; and do the work i.e. lawyering, from within, close to the ground.

Rebellious lawyering is ultimately lawyering for empowerment. In its turn, empowerment lawyering envisages that litigation is only one of many means to an end; involvement of the poor/community in everything the lawyer does; willing to confront lawyer's own comfort with an unjust legal system; necessity of community legal education for purposes of: informing individuals and groups of their rights, writing manuals and other materials, training lay advocates, and educating groups for confrontation.

Empowerment lawyering is essentially a deliberate and well thought political act of the lawyers. No sooner than the idea of empowerment lawyering was mooted in the Lawclinic, the traditionalist (which is also the conservative school) forces erected stumbling blocks: anti-generic learning and rebellious lawyering was ostracized as unbecoming of a law school. What could not be done within the formal structure of the law faculty had to be done outside the faculty, at its periphery. A small group of public spirited law teachers together with a few students established their own platform to pursue pro-people legal education and training. Very soon it came to be known as ELCOP- Empowerment through Law of the Common People, now registered as a society. In subsequent development, ELCOP in its attempt to train students in the spirit of rebellious lawyering, introduced two important, distinct but intricately related, programmes, namely the Human Rights Summer School and the Community Law Reform.

Human Rights Summer School (HRSS)

Human Rights Summer School (HRSS) has been contemplated as the breeding ground of anti-generic rebellious lawyers, sensitized to the needs of the time and society. It is a two-week long residential programme directed to intensive training in human rights jurisprudence and advocacy. In a short span of three years, the HRSS has been able to reshape existing concept of legal education, question the efficacy and validity of traditional learning and regnant lawyering, remold the graduates in the spirit of social engineering and imbibe in them a commitment to engage in empowerment lawyering. Within a short period since its inception in 2000, the HRSS has become a truly international centre of human rights learning and teaching, and the law students crave to have placement there.

21 Stephen Wexler, Practicing Law for the Poor, 79 Yale Law Journal 1049 (1970).

Community Law Reform (CLR)

The HRSS is followed by the Community Law Reform project (CLR). The CLR is also an off-shoot of the vision of anti-generic learning and rebellious lawyering. As we started the street law programme and the human rights summer school, as we interacted more and more with the poor and the downtrodden, we understood that "poverty will not be stopped by people who are not poor. If poverty is to be stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve the poor must put his skills to the task of helping poor people organize themselves."[21] Therefore, we concluded, what is necessary is a kind of progressive lawyering that will enable a community or a group to gain control of the forces which affect their lives. In other words, social justice to become a reality must be preconditioned by empowerment of the poor and disadvantaged people. Quite regrettably, even progressive forms of lawyering within the regnant set up fall within the pitfalls of traditionalism and empowerment of the community does not take place. So CLR was initiated with a view that students, the would-be rebellious lawyers could go to the community, live with the community members, share their grief and agony, organize the community, identify its potential leaders and subsequently train them. In ELCOP parlance we call it Developmental lawyering or Community Lawyering.

Developmental lawyering focuses on the role of a lawyer in community development and empowerment.[22] The foundation of the developmental lawyering model consists of being prepared to take on roles that more closely fit the multifaceted needs of the community. These roles can only be defined by the particular contexts in which the developmental lawyer functions. The paradigm of the 'rebellious lawyer' must expand to accommodate that reality. Certainly, the developmental lawyer must bring to the table his or her 'legal' skills. These skills may be why the client approached the lawyer in the first place. But we know only too well that the chronic problems in poor societies like in Bangladesh are not strictly, or even primarily, legal. The need is to create community leaders and institutions capable of marshalling and utilizing power. Thus, the developmental lawyer must be prepared to participate, albeit in varying degrees, in community organization, project planning, development and implementation. He or she must be aware of and participate in the social, political, and economic aspects of community action.

What follows from the foregoing analysis is, that a developmental lawyer cannot dispense with his or her full gamut of responsibilities unless he or she is

22 Mizanur Rahman, Developmental Lawyering- A Wake-up Call, in Mizanur Rahman (ed), Human Rights and Development, Dhaka 177-188 (2002) 1.

a good community organizer. Loosely organized groups or community often need organizational support to enable them to undertake programmatic missions. Developmental lawyers need to provide this kind of support to new, nascent or loosely organized, poor and vulnerable groups.

A developmental lawyer's ultimate objective is to identify and train community organizers and leaders from within the community. But until that happens, the developmental lawyer has to discharge that responsibility. Participating in an organizing capacity offers flexibility not generally found in a lawyer-client relationship in other forms of lawyering. In this case, the developmental lawyer must function as an organizer until outside assistance can be obtained or until internal capacity comes to the fore. An organized group is a precondition to a successful struggle against subordination. Some authors define it as community lawyering.[23] The year 2000, has essentially been a turning point in legal education and prospective rebellious lawyering in Bangladesh when a group of law students from the Dhaka and the Chittagong university under the supervision of some of faculty members had literally gone to the communities.[24] Two weeks of community advocacy contributed to a fundamental change in their lives- they now refused to be educated in the old, traditional way.

VI Conclusion

It is still premature to construe whether the new dimensions in legal education in Bangladesh has been able to produce this new breed of lawyers able to impact administration of justice in the sense of empowerment of the poor. The challenge is huge and daunting. This is unlikely to happen until we have a new breed of lawyers trained in anti-generic legal education. ELCOP understands that law students will appreciate and understand the magnitude of the problems of the poor only when they go to them, live with them, listen to their vows and share their sorrows and sufferings and in that context organize them. The experience, which they will get, will stir their minds and they will be more responsive to the social needs of the underprivileged when they enter their profession. Developmental lawyers can assist their clients to voice their concerns effectively and achieve greater access to justice through avenues other than litigation. Our developmental lawyers, therefore, must be both 'rebellious' and 'progressive' at the same time.

23 Jane E. Schukoske, Empowerment of Community Members Through Grass-Roots Organization: What Roles for Lawyers? in Mizanur Rahman (ed), Human Rights and Empowerment, Dhaka 102-109 (2001).

24 Findings of the first community law reform research have been published in : Mizanur Rahman & Tanim Hussain Shawon (Ed), Tying the Knot, Confidence Building and Community Law Reform in the Chittagong Hill Tracts, Dhaka (2001).

Meanwhile, what started as a mere protest to regnant legal education has, over the years, gained specific socio-political dimension. CLE movement with emphasis on human rights has provided students with sufficient space to freely exercise their minds, has directed teachers to switch from 'monologue' to 'dialogue/discussion', has 'empowered' the students to challenge the *status-quo* and has implanted the belief that the fundamental task of lawyers is not only to interpret the law but also change the law. Legal education in Bangladesh has thus and only recently begun to engage the students in social engineering.

ENVIRONMENTAL POVERTY, DEVELOPMENT AND THE STATE IN PERSPECTIVE OF LESS DEVELOPED COUNTRIES

*Vijay Kumar**

I Introduction

THE NEED for adoption of developmental model based on the concern for environment came to be reflected in the Stockholm Declaration adopted by the United Nations three decades back. It became more pronounced with the publication of World Conservation Strategy in 1980 by the World Conservation Union, the Brudtland Report (Our Common Future, 1987) and the Rio Conference (1992) supplying the developmental basis of free trade at international level. However, in view of the different developmental stages of the developed and less-developed countries, the environmental and developmental norms have different repercussions in these countries. With no perceptible change in the developmental and environmental conditions and with that in the living conditions of the people in our country and in other less-developed countries, these issues remain quite open requiring constant scrutiny.

The problem

Human development through various stages has been marked by exploitation of nature, the extent of such exploitation differing from one stage to the other, dependent on human capability. The excessive use of natural resources for the sake of development on the one hand, and unevenness of such development on the other, have affected the nature-man relationship adversely, particularly with the development of industries. Although the industrial development saw the man come out of the feudal shackles, it brought in its wake its own shackles in the form of capitalism[1] and consequently haphazard urbanization and slums as also the pollutants like toxic gases, smoke and wastes causing impoverishment of the environment. The concomitance of such an environmental poverty with both development and non-development is indicative of the fact that environmental problems arise not only due to man's interaction with nature but also with man. Since human living is confined to several political entities having different economic and social bases, the perceptions about life and environment came to be circumscribed by these factors. With the state regulating human

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1 See Bertrand Russell (in collaboration with Dora Russell), *The prospects of Industrial Civilization*, 37-38 and 62 (1923); G.D.H. Cole, *A Short History of the British Working Class Movement* 1789-1947 20-23 (1947) and *Introduction to Economic History*, 1750-1950, Macmillan & Co., London, 41-43 (1952).

conduct and taking on developmental activities, it became the pivot of human life. However, various states being at different levels of development having variations in respect of resource-people relationship, methods of production and distribution, their outlook towards the human beings and nature came to differ.

The economic, social and political contradictions among various countries and limiting of the developmental outlook of the states generally to their own territorial boundaries inspite of the development of the international legal order and organizations gave rise to narrow and biased perspective and paved the way for environmental exploitation of the less-developed countries by the more developed ones. The devastating effects of modern weaponry[2] and the increasing activities of multinational corporations[3] in less-developed countries have the effect of creating harmful environmental conditions. In fact, the profit motive and capital accumulating approach as also the lop-sided competitive conditions have the built-in mechanism detrimental to human life and environment. The transmission of the developmental environmental poverty of rich nations to the non-developmental environmental poverty[4] of the poor ones enlarges the sphere of the latter. The economic poverty of the less-developed countries facilities such a shifting such as diversion of toxic wastes[5] mostly labelled as recyclables. The industrialized countries legally pour scrap iron, lead (including acid batteries) other materials and discarded plastics all over the world[6]. The poorest people of the main importing countries in eastern Asia working on these materials-smelting the metals separating Pb from batteries and sorting plastics likely to be contaminated with hazardous chemicals or germs without adequate safeguards

2 For the ill-efforts of the chemicals used in Vietnam war or rice and other crop planatations as well as vast areas of forest land, (see Evgeni Fyodorov, *The Arms Race and Ecology in Social Problems of Man's Environment; where we live and work* (under the general editorship of P. Fedoseyers and T. Tinofeyev 271 (1981). Also see David Day, *The Eco Wars, True Tales of Environmental Madness* (First Ed. London, Harrap, 238 1989). In respect of the computerized Gulf war causing civilian casualities and environmental destruction on a large scale in Iraq and Kuwait, see Chris Hables Gray H.B.Fenn & Co., (1996) *Post modern war: The New Politics of Conflict*, London: Routledge 36-50 (1997).

3 While the commercial behaviour of these corporations results in changing consumption and production pattern in less-developed countries to their detriment, the negligent behaviour causes colossal loss to human life and environment as happened due to the leakage of lethal Methyl Isocynide (MIC) gas from a subsidiary company of Union Carbide Corporation at Bhopal on the night of December 2-3, 1984.

4 The term 'Developmental Environmental Poverty' indicates impoverishment of the environment caused by the harmful effects of development and the term 'non-developmental environmental poverty' denotes such impoverishment caused by harmful effects of non-development.

5 Between 1986 and 1991, 175 million tonnes of hazardous wastes were offered on formal world markets. See Guardian 1992, quoted in Jennifer A. Elliott, *An Introduction to Sustainable Development* 63 (1999). It was reported by the American Environmental Protection Agency that 80 million tons of hazardous waste was being produced by America alone each year. See David Day, Eco Wars, *supra* n. 2 at 199.

6 See John J.W. Rogers and P. Geoffrey Feiss, *People and the Earth:Basic Issues in the Sustainability of Resources and Environment*, Cambridge University Press, 265 (1998).

- become the most sufferers of such imports[7]. Trading in such wastes connotes trading in environmental poverty. A policy bias is, indeed reflected in getting rid of their developmental environmental poverty by the developed countries by making less industrialized countries dumping grounds for their toxic wastes[8] at the cost of millions of poor. The Basel Convention of 1993 attempting to regulate the dumping of many types of toxic wastes came to be diluted because of having no penalties for violation and also that European Union reclassified much of the hazardous waste as non-hazardous, just before the convention was signed[9]. Such a policy bias, obviously, lacks comprehensiveness of the environmental problem and simply leads to a conflicting environmental situation at the global level since the pollutants have the effect of disturbing the ecological balance of the biosphere wherever they are placed. The notion that it affects the ecology of a society of different race, colour, religion, culture, language and thinking smacks of a narrow racist view of the environmental problem[10]. Taking a complete view of the environment and its problems at the global level, indeed, requires a whole view about the people and the nature divided into various political entities.

The more pervasive problem pertaining to the environment and development affecting the less-developed countries adversely is the thrusting of the free trade agenda on these countries by the developed countries through the international forums like the GATT, WHO, WTO, Rio Summit (Agenda 21) and the Johannesburg Summit. The free trade based developmental policy, being in contradiction to the welfare policies of the less-developed countries, has the effect of widening the economic contradictions between the haves and the have-nots in the long run.

II Development Perspective

At the international level, the development perspective has differed both historically and geographically - from the old laissez faire to the modern trade liberalism via the interventionist welfare state, on the one hand, and radical changes in economic relations (individualistic to socialistic) and with that in the relations of the people with the state, on the other, providing different models of development. However, with the disintegration of the Soviet Union and

7 *Ibid.*

8 Asia's vulnerability led it to receive 5.4 million tonns of toxic wastes between 1990 and 1993 from Australia, Canada, Germany and United States as per Green Peace estimates. See Daman J. Singh, 'Clamp Down on Toxic Waste Trade', The Hindustan Times, New Delhi, Nov. 30 16, (1995). The crowded Europe sent waste to Africa where people living near the waste dumps got sick and died. See *supra* n. 6.

9 See *supra* n. 6.

10 Such an environmental racism is visible within the United States also where much of the waste is put in areas occupied either by the African Americans or native Americans (Indians). See *supra* n. 6.

dominance of liberal capitalist economy at International level, the free-trade based development perspective became pronounced and came to be reflected in International documents as a panacea even for the less-developed countries, where unlike the western countries, the natural course of development has not been characterized by free-trading and capitalism. This trend influences the policy choice of the less-developed countries for development negatively.

Development being basically a systemic positive phenomenon signifying not only the material welfare of the people but also humane values based on cooperation and non-exploitation requires a positive societal change. However, the qualifying word 'sustainable' prefixed to it is indicative of the fact that the negative interaction between the developmental activities and the natural resources has affected the environment adversely. This puts a question mark before the basic relationship between the resources, people and the state. Since development denotes a positive change in living conditions of the people, sustainable development would require systematic and scientific development and not a haphazard one. Mere economic growth at macro level would not thus meet the requirement of sustainable development[11] for making the concepts of liberty and equality meaningful. Shifting of emphasis from economic and social development and basic needs to human development[12] hardly negates the basic needs factor. If human development aims at enhancing the capabilities of the people ensuring their participation in the developmental process[13], it cannot be achieved with hunger and deprivation of the people. Thus, enhancement of capabilities[14] or the well being freedom[15] too implies the fulfillment of basic requirements.

The aftermath of the Second World War saw the recognition of Human rights by the international documents and incorporation of basic human needs of food, clothing, housing, medical care, education and necessary social services into them[16]. As a remedial measure, the International Covenant on Economic, Social and Cultural Rights, 1966, (entry into force 23 march 1976) enjoined the states parties to improve methods of production, conservation and distribution

11 See Francis Stewart, *North-South and South-South* 36-37 (1992).

12 Such a shifting came with the publication of the report of the United Nations Committee for Development Planning in 1988, the United Nations International Development Strategy for the 1990s (1989) and the first annual Human Development Report by the UNDP (1990). See Griffin Keith, *Studies in Globalization and Economic Transitions* Macmillan, 231-33 (1996).

13 *Id.*, at 233-34.

14 *Id.*, at 233.

15 See Amartya Sen, *Inequality Reexamined*, Oxford, Oxford University Press 40 (1992).

16 See the Universal Declaration of Human Rights, 1948; The International Covenant on Economic, Social and Cultural Rights, 1966 and the Declaration on the Right to Development, 1986.

of food, inter alia, by developing or reforming agrarian systems. However, the experience of the less-developed countries depicts that the legal measures could bring about only peripheral changes in the agrarian systems and thus basic needs of the vast population remained unfulfilled in these countries. For instance, the Indian effort for reforming the agrarian system through the zamindari abolition and ceiling laws could not bring about the desired changes in accordance with the Constitutional norms of distributive justice contained in clauses (b) and (c) of Art. 39[17]. The Ninth plan unequivocally states that the basic character of the agrarian economy has not undergone any structural change despite attempts at land reforms over the successive plan periods[18]. Thus, despite the land reforms, land holdings remain concentrated with a small section of the rural society[19]. Indeed, reforming the agrarian system through the legal measures involves the built-in hurdles generated by the economic and social set-up, which limit the making as well as implementation of laws. This also holds good in respect of other less-developed countries having feudal base and less capitalistic development. However, in contrast to this, China's success in improving the living conditions[20] reflects the importance of resource-people relationship in providing basic needs with added force.

The Stockholm Declaration in linking environment with economic and social development acknowledges the fact that poverty forms the base for environmental problems in less-developed countries. In order to avoid environmental degradation and to confer social, economic and environmental benefits on all, the Declaration enjoins the states to apply planning for developing

17 The Zamindari abolition laws were particularly marred by exemptions in the form of self-cultivated holdings and payment of huge amount of compensation. The Ceiling law too, were generous in providing for exceptions and fixing the ceiling limit, besides their circumvention by the big landholders. See Vijay Kumar, The Continuation of Zamindari by the Zamindari Abolition Laws, KLJ (1987-89) 13-15 Kurukshetra University, Kurkshetra; Fallacy of Distributive Justice in Land Relations in Rural India 34 J.I.L.I. (1992).

18 See Government of India, 9th Five Year Plan (1997-2002) 24.

19 Distributive ordering in land relations came to have its obvious limitations due to availability of less quantity of surplus land as a result of implementation of ceiling laws, (being less than 2 percent of the total cultivated area) and a large number of beneficiaries. It came to be revealed that out of the total 74.9 lakh acres declared surplus, 52.13 lakh acres could be distributed among 5.5 million beneficiaries by the end of the Eighth Plan The position remained virtually the same at the end of the Ninth Plan and there could be no progress in the detection of concealed land and the distribution to the landless rural poor. See Government of India, 9th Five year plan (1997-2002) Vol.-II 25 and 37; and 10th Five Year Plan (2002-2007) vol.-II, 301.

20 See Jean Dreze and Amartya Sen, India: Economic Development and Social Opportunity, Oxford University Press, Delhi 33-34 (1995) and Hunger and public Action Oxford University Press 204-205 (1989).

human settlements and urbanisation[21]. However, such a planning and consequential benefits being dependent on overall developmental planning in a country are, obviously, limited by economic and social relations and the character of the state. The fundamental rights to freedom, equality and adequate conditions of life[22], therefore, also become circumscribed in the like manner. The Declaration on the Right to Development[23] by making right to development an inalienable human right and the human person the central subject of development recognizes the individuality of human beings irrespective of natural barriers. By putting the individual and collective responsibility of human beings for development in promoting and protecting an appropriate political, social and economic order for development and recognizing the right of self-determination[24], it professes the individual and collective freedom for a systemic choice, thus putting serious limitations on state actions. This connotes that the individuals have a right not to be forced by their respective states to accept developmental plans unlikely to improve their living conditions which, in turn, means that they can, in no way, be coerced to submit to the exploitative conditions. This may have contradictory affect since the state establishment in less-developed countries largely controlled by conservative elites interested in maintaining existing societal relations, can hardly relish systemic change.

Brundtland's definition of 'sustainable development' in terms of present and future needs[25] is subject to several constraints. It is, indeed, difficult to measure needs of the present and future in absolute terms and strike a balance between the two. Again, needs of the people would differ according to the production and consumption patterns and the way of life. Then, there is the crucial question - who will determine the needs? Obviously, these needs are determined by people controlling the state who can hardly remain unbiased in determining such needs because of their status quoist approach. This may give rise to a wide gap between the determined needs and the actual needs of the common people particularly in the less-developed countries where the elitist approach of planning has a tendency to neglect the peripheral areas and the

21 See United nations on the Human Environment: Final Documents (adopted on June 16, 1972) Principles 8, 15. Declaration of the United Nations Conference on the Human Environment, Stockholm, (adopted on June 16, 1972).

22 *Id.*, Principle 1.

23 Adopted by General Assembly Resolution 41/128 of December 4, 1986.

24 *Id.*, Preamble and Art. 2.2.

25 Brundtland defines sustainable development as, "development that meets the needs of the present without compromising the ability of future generations to meet their needs". Quoted in IUCN/UPEP/WWF (1991). Caring for the Earth, A Strategy for Sustainable Living, (Gland, Switzerland: (1991); 10 and David Reed, *Sustainable Development, An Introductory Guide*, Earthscan Publication Limited. xv, (1995).

people[26]. With the making and implementation of welfare laws in such countries being grounded in political manoeuvring, this neglect becomes characterized by systemic conditions like resourcelessness, poverty, illiteracy, feudal outlook and corruption. The elitist planning lacks motivation and approach for the development of the rural areas and the urban peripheral areas particularly the slums. Such a bias is not, therefore, only urban as against rural areas as viewed by Michael Lipton[27] but also a systemic one. Consequently, while the developmental planning in cities in respect of houses, roads, sewer age, drainage, water, electricity and transportation facilities is totally on elitist lines, there is utter lack of planning in respect of these matters in villages. The operational rural base of such countries being feudal in character, the institutions responsible for the development of villages are generally utilized by feudal elements for their own benefit in collusion with the state officials. The Indian experience depicts that the functioning of the *Panchayat* institutions has been marred by vested interest seeking their own benefit instead of people's welfare[28].

Thus, the elitist developmental planning carries contradictions and results in deprivation of resource base of the vast populace as is further reflected by the construction of bid dams and utilization of forests by the state for commercial purposes[29] at the cost of survival of millions of affected village people, the fulfillment of whose needs is linked with the agricultural land and the forests. This makes people's interest and the state's interest contradictory. Legal prohibition in respect of the usufruct rights of the local population in the forests for fuel, fodder, and minor forest produce makes it more explicit[30]. Such a developmental approach can hardly be in tune with sustainable development or human development. In the absence of systemic change in resource-people relationship, incorporation of basic needs into national human rights documents

26 While tracing the causes of the spread of the planning ideology in South Asia, Gunnar Myrdal observed three decades back, '... those who think, speak and act for the new nations - politicians, planners, administrators, professionals, industrialists and businessmen-are only a minute upper stratum in the total population forming a rather secluded circle and living fairly comfortably, they must be inclined to protect themselves by a system of illusions in whose preservation they have a vested interest. See Myrdal, Gunnar, Asian Drama: An Inquiry into the Poverty of Nations, Vol.II, Harmondsworth : Penguin, 721 (1968).

27 John Harris (ed.) Why Poor People Stay Poor, in Rural Development, Theories of Peasant Economy and Rural Change. (published 1982, reprinted 1992) 66-69.

28 See Report of the Committee on Panchayat Raj Institutions (Aug. 1978), New Delhi, 7. Even giving of constitutional status to panchayats by the Constitution 73rd Amendment 1992, could not revitalize them due to pervading feudal outlook besides the lack of proper and effective control mechanism and audit system regarding accountability of the Village Headmen for utilization of funds. See Vijay Kumar, "The Constitutional Status of Panchayats - Old Wine in a New Bottle" AIR 1996 (Vol.83) Journal Sec. 171.

29 The Indian Forest Act, 1927, Sec. 5 empowers the state governments to make grants and contracts.

30 *Id.*,Sec. 5 and 26.

either directly or through judicial interpretation[31] does not have any significant bearing on development since such rights are merely declaratory leaving the people at the mercy of adversarial litigation against the mighty state. Moreover, they do not lay down any binding duty on the state to provide basic needs in material terms.

III Liberalizing the Environment and Development

The free-trade based developmental and environmental norms thrust on the less-developed countries by the developed ones which are dominating the United nations organization and other international forums, without keeping in view the varied economic and social conditions of the less-developed countries, has given rise to inconsistencies in international policies. This is vividly depicted by the norms of the United Nations Conference on Environment and Development held at Rio. The Conference sought to achieve environment and development goals, inter alia, by trade liberalization and making trade and environment mutually supportive[32]. Accordingly, trade liberalization has been made the basis for sustainable development not only in industry but also in agriculture and other sectors[33], irrespective of its likely diverse effects on the economies of less-developed countries. Agenda 21 links sustainable agricultural development with free-trade with a view to facilitating the integration of agricultural and environmental policies[34] without having regard to varying agrarian relations in different countries. This in fact is an echo of GATT negotiations in the form of Dunkel proposals at the time. The objectives set forth in the Agenda clearly require the governments to take into account the results of the Uruguay round of multilateral trade negotiations while promoting an open multilateral trading system. It may be mentioned that providing of the global remedy of free trade as the basis of sustainable development overlooks the fact that sustainable development is basically a national phenomenon. Needless to say, sustainable development through free trade has to be basically limited by the resource-people relationship and the character and policies of the individual states.

31 For instance, the Indian Supreme Court has interpreted Art. 21 of the Constitution guaranteeing right to life or personal liberty to include, *inter alia*, livelihood (*Olga Tellis* v. *Bombay Muncipal Corporation*, AIR 1986 SC 180; *Ahmedabad Muncipal Corporation* v. *Nawab Khan Gulab Khan*, AIR 1997 SC 152; shelter (*Prabhakaran Nair* v. *State of Tamil Nadu*, AIR 1987 SC 2117 and *Chameli Singh* v. *State of Uttar Pradesh*, AIR 1996 SC 1051); for pollution free water and air (*Subhash Kumar* v. *State of Bihar*, AIR, 1991, SC 420); education (*Mohini Jain* v. *State of karnataka*, AIR 1992, SC 420 and *Unni Krishnan* v. *Union of India*, AIR 1995 SC 922) health and medical care during service and post retirement (Consumer Education and Research Centre v. 401 AIR 1995 SC 422).

32 See Agenda 21, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 03-14, 1992) 2.

33 *Id.*, at 3.

34 *Id.*, at 162.

Free-trading has come in western countries in the natural course of development on capitalistic lines while it is not so in case of less-developed countries where economic systems are characterized by subsistence agriculture. The agricultural sector of the western countries came to be industrialized with industrial development and the machinery replaced the man and animal power in various agricultural operations. In this process, agriculture came to be dominated by big farmers and they, in turn, are controlled by the multinational corporations due to their dependence on these corporations for trading as well as for various farming needs[35]. This led to trading in agricultural products becoming oligopolistic[36] and more beneficial for the industrially developed countries[37] with a wide network of transnational corporations[38] controlling the vast market throughout the world[39]. The agricultural set-up of the less-developed countries is not so industrialized. The farming in such countries still depends largely on man and animal muscle. With small and scattered farms and traditional farming, the agriculture is of subsistence nature. Lack of capital and credit facilities makes it a slow moving occupation. Thus, there is little scope for free-trade mechanism to attain sustainable agricultural development in the given set-up of such countries. Particularly, in less-developed countries like India and others of South Asia having feudal base and its structural constraints[40], concentration of land with few people, vast number of agricultural labourers including the bonded ones, petty farmers having small strips of land, a large number of scattered small size holdings[41], old methods of agriculture and less

35 See Annje Taylor, World Trade and its Environmental Impacts in Philip Sarre and John Blunden (ed.). *Environment, Population and Development*, Hodder and Stoughton 217-18 (1996).

36 It has been found that 77% of the world trade in cereals is controlled by the biggest five transnational companies, the Canadian giant Cargill alone controlling 60% of the world trade in cereals. See a Report by Christian Aid, Madden, (1992) and the Ecologist 79-80 (1993), quoted in Annie Taylor, *supra* n. 35 at 218.

37 Looking the World Exports by major areas, while the share of Industrial area (all western Europe, United States, Canada and Japan) in 1990 and 1995 was 71.1 and 69.7 percent respectively, that of developing countries (including Korea, Hong Kong, Taiwan and Singapore) was only 21.9 and 22.2 percent respectively in the said years. See GATT and WTO, International Trade, Various Issues quoted in A.G. Kenwood and A.L. Lougheed, *The Growth of the International Economy 1820-2000 : An Introductory Text*, 4th edn., Routledge, 4th Ed. 300, (1999).

38 Of the World's largest transnational corporations, 176 belong to 6 developed countries (Japan 62, USA 53, Germany 23, France 19, UK 11 and Switzerland 8) having 85.5% of global profits. See Le Diplomatique, April (1997) at 6, quoted in David P. Forsythe, *Human Rights in International Relations* 193 (table 82) (2000).

39 It may be noticed that 500 such corporations control 70% of the total world trade, 80% of foreign investment and 30% World Gross Domestic product. See The Ecologist, *supra* n. 36.

40 See Ghose, Ajit Kumar (ed.), *Agrarian Reform in Contemporary Developing Countries* 9-11, (1983) Ronald J. Herring, Land to the Tiller; The Political Economy of Agrarian Reform in South Asia, Yale University Press 17-49 (1983); and Pradhan H. Prasad, Poverty and Agricultural Development, Economic and Political Weekly, Dec. 14 (1985) at 21.

41 According to 10th Five Year Plan, small and marginal holdings constitute 78.2% of all holdings and operate about 32.4% of total area. See *Supra* n. 19 at 528.

yield, introduction of open market system would lead to further widening of the already existing contradictions. This would give rise to more migration from rural areas to urban areas in view of payment of higher wages thus leading to further environmental problems in cities. Since it is the small section of big farmers only who have self-sufficiency for investing on inputs and modern methods of production, they would be the only beneficiaries under such a system. The vast number of middle and small farmers, tenants, share-croppers and agricultural labourers who are actually involved in production making process, would remain silent spectators due to paucity of funds and non-availability of proper credit facilities[42] as also due to the build-in hurdles of subsistence agriculture. In such a situation, how can the development and environment be mutually supportive if there is no opportunity for development for a large section of society? Poverty itself is an anti-environment factor, for instance, in case of poor rural migrants living in urban slums. Thus, linking of an open, multilateral trading system with environmental policies appears to be contradictory since in the absence of proper development, adoption of merely multilateral trading system and sound environmental policies may not have positive impact on environment. Agenda-21 is, indeed, more concerned about trade than environment is clear from the fact that it lays emphasis on ensuring that environment related regulations or standards including those related to health and safety standards do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade[43]. In view of this, even an environmentally sound regulation may be declared to be arbitrary or unjustified if trade interests are not to be compromised. It is evident that the free-trading system has led to the disturbing of consumption and production patterns of less-developed countries due to introduction of consumer goods of different choice by the multinational corporations of developed countries, for example, junk food and drinks. Consumption of food and drinks by the people not consonance with their climatic conditions and food habits invites diseases and creates unsound environmental conditions. Production of such consumables in less-developed countries creates unnatural demand for such goods with the same result. The fact that such a demand for consumer goods is created by luring the children into accompanying play things advertised extensively, depicts the unfair nature of such a trading bordering on criminality.

42 The plan document shows that the much publicized cooperative credit came to be controlled by the rural rich and the lower sections of the rural society - small and marginal farmers, tenants, share croppers, landless agricultural labourers and rural artisans could not be benefited by it. See Government of India, 6th Year Plan (1980-1985) 177.

43 *Supra* n. 32 at 8.

Agenda 21 recognizes the stressing effect of the growth of world population and production together with unsustainable consumption patterns on the use of land, water, air, energy and other resources[44] but it appears to have side-tracked the question of entitlement and the relationship between resources and the people. The effects of the growth of the population, production and consumption patterns depend on the relations which the control-mechanism over land, water and other resources creates in different countries. With concentration of ownership of resources with a small section of the people and subsistence agriculture characterized by scattered holdings of marginal and small farmers, the growth of population has the effect of creating poverty, slums, illiteracy, unemployment and, in turn, the environmental degradation. The uneven agrarian relations in such countries generate built-in hurdles which hinder the developmental process. In view of the given agrarian relations, reviewing and developing of policies in respect of use of land and the sustainable management of land resources[45] have to remain confined to the limits of such agrarian relations. With feudal base and hold of propertied interests over law-making in less-developed countries, the direction to the governments for implementing policies to influence land tenure and poverty rights positively[46] do not carry much weight in view of the vast population in less-developed countries being dependent on agriculture including a large number of agricultural labourers.

The Agenda, in fact, recognizes the limited role of states in the given set-up and, in a way, their failure in providing for encouragement to the establishment of non-governmental organizations for reducing urban poverty and improving the quality of life for low income families[47]. But the non-governmental organizations and individuals lack enough resources and capacity besides motivation[48] to cope with the huge problems of systemic poverty and environmental degradation.

Needless to say, the action plan of the Rio Summit remained unimplemented thus requiring another Summit with a view to reducing poverty world wide and lowering damage to environment. Like the earlier Rio Summit, the Johannesburg Summit[49] also appeared to be a forum for the rich countries to push their agenda

44 *Id.*, at 27.

45 *Id.*, at 106.

46 *Id.*, at 161.

47 *Id.*, at 59 and 61.

48 The motivations of NGOs are controlled by the funding agencies. An NGO is considered as a collection of people who work for the poor live with the rich and pretend to change the world to make a better place for themselves. See Suhel Seth, The Hindustan Times, New Delhi, Jan. 22, (2004) at 10.

49 United Nations World Summit on Sustainable Development held at Johannesburg from Aug. 26 to Sept.04, 2002.

of free-trade in the name of environment, sustainable development and poverty eradication. The Summit reaffirmed its commitment to achieve sustainable development based on the Rio Principles in accordance with the global porgramme entitled Agenda 21[50]. The Plan of Implementation of World Summit on Sustainable Development, 2002, while endorsing the Rio Principles and the full implementation of Agenda 21, laid emphasis on sustainable development goals in respect of developing countries as related to the internationally agreed poverty related targets and goals including those contained in Agenda 21, the relevant outcomes of other United nations conferences and United Nations Millennium Declaration[51]. Although the Plan recognizes the role of national policies and development strategies[52], the basic contradiction between the free trade and the fundamental developmental goals of the less-developed countries[53] have obviously been sidetracked. It is the vast difference between the interests of the less developed and developed countries that led to the failure of the Cancun WTO Ministerial Meet in Sept. 2003, due to the united opposition from the less developed countries to the agenda of the developed countries setting aside the developmental agenda of Doha conference of 2001[54]. The global norms of free-trade have the effect of the dilution of the welfare activities of the state thus affecting the character of the welfare state negatively. Privatization, lessening of the protection of labourers and lesser spending for poverty - reduction and basic facilities like health, education, shelter and social security are its obvious consequences. This limits the reach of the developmental activities, thus widening the hiatus between the rich and poor further. The poverty in less developed countries, being not only relative but also absolute[55], negatives its solution on self-help basis. Indeed, poverty and deprivation continue to haunt the various parts of the world, with 1,100 million people living on less than

50 See Johannesburg Declaration on Sustainable Development (42 ISIL, 2002 (Indian Society of International Law, N. Delhi) 565-569.) Also see www.johannesburg summit.org/html/documents/ summit_docs/.

51 See Official Documents 42 IJIL, 2002, *supra* n. 50 at 570-652.

52 *Ibid.*

53 The constitutional documents of the less-developed countries basically provide for economic and social justice for fulfilling the basic needs of the vast population and developing the backward people. For instance, see The Constitution of India, 1950, Part IV, Directive Principles of State Policy; Constitution of People's Republic of Bangladesh 1971- Part-II, Fundamental Principles of State Policy; Constitution of Islamic Republic of Pakistan, 1973, Part II, Chapter-2 Principle of Policy; Constitution of Kingdom of Nepal, 1990, Part 4- Directive Principles and Policies of the State; Constitution of Sri Lanka, 1997, Chapter VI- Directive Principles of State Policy; Constitution of Brazil, 1988, Fundamental Principles.

54 See K.A. Bardi Nath (Cancun, Sept. 15, 2003), The Hindustan Times, New Delhi, Sept. 16 2003, 17.

55 The Human Development Report reveals that about 790 million people remain hungry and food insecure and about 1.2 billion live on less than $ 1 a day in income

$1 (PPP US $) a day and 831 million people remaining undernourished [56]. Region wise, South Asia, Sub-Saharan Africa and East Asia and Pacific have larger share of such a poverty and deprivation, the people living on less than $1 (PPP US $) a day and remaining undernourished being 432 millions and 312 millions respectively in South Asia, 323 millions and 185 millions respectively in Sub-Saharan Africa and 261 millions and 212 millions respectively in East Asia and the pacific[57]. Besides, 1197 million people do not have access to improved water resources and 2,742 million people are deprived of adequate sanitation in the world[58]. In South Asia, 225 million people are without access to improved water resources and 944 million people do not have access to adequate sanitation[59]. In Sub-Saharan Africa and East Asia and the Pacific people without access to improved water resources are 273 million and 453 million respectively and adequate sanitation is not available to 299 million people and 1,004 million people respectively in these regions[60].

IV Conclusion

Diversion of poverty of their environment in the form of hazardous wastes by the developed countries to the environment of less-developed ones does not solve the problem on the global level but simply shifts its place and the likely victims. Instead, devising of their means by the concerned countries to cope with it may better the environmental cause. The environmental poverty being inextricably linked with economic and social poverty in less developed countries, the isolated interaction of legal norms with environmental factor is rendered ineffective. The ultimate solution of the harmonious nature-life relationship lying in correcting the economic and social distortions originating from the very set-up, the character and behaviour of the state becomes of prime importance in this respect in the given set-up. Such a systemic poverty of the less developed countries, having its roots in the long course of development militates against the uniform solution based on the application of liberal trade mechanism. The developmental process in less developed countries, being slow and haphazard and grounded in political manoeuvring is obviously limited to peripheral changes, leaving structural hurdles untouched. The working of the free trading system in such countries would, therefore, be circumscribed by such limitations. Indeed, the introduction of free trading system at the global level through the international law and the institutions has affected the character of the state negatively, thus reducing the ambit of state welfare in less developed countries.

56 See United Nations Development Programme, Human Development Report (2004) Table 2, Eliminating Poverty: Massive Deprivation remains (2000) 129. Available at http://hdr.undp.org/ reports/global/2004.

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

SEXUAL HARASSMENT IN EMPLOYMENT AND EDUCATION: CAUSES, CONSEQUENCES AND PREVENTION

Dr. Suman Gupta[*]

I Introduction

SEXUAL HARASSMENT is a social evil and a rights issue. Unfortunately, it continues to be a significant problem not only in workplace but also in educational institutions and in society at large. Sexual harassment though is widespread[1] but only recently it has been investigated cross-culturally. The increasing awareness and emphasis on gender justice is leading to growing resentment towards incidents of sexual harassment. There is an increase in the efforts to guard against such violations, but the problem requires international examination. It is because globalization is bringing different cultures in contact[2] as well as individuals of different nationalities and cultures are interacting through multinational corporations, Internet, international conferences, universities etc.[3]

II Causes of Sexual Harassment

Sexual harassment in the workplace has undoubtedly existed from the day women sold their labour in the marketplace. Until recently, it was unacknowledged and invisible only because it was so widespread as to be experienced as normative. The entry of increasing number of women both in the workplace and in education has greatly affected the interactions between men and women. Historically, men have occupied the majority of high-status positions in the workplace as well as in education, whereas most women have been employed in low-income and low-status occupations. Women's jobs had

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1 A. Barak Cross-cultural perspectives on sexual harassment. In W.O' Donohue (ed.) *Sexual Harassment: Theory, Research, and Treatment*. Needham Heights, MA: Allyn & Bacon (1997).

2 HJM, Hermans, & Kempen, HJG (Moving cultures: The perilous problems of cultural dichotomies in a globalizing society. *American Psychologist*, 53, 1111-1120, (1998).

3 Mataloni, RJ. US Multinational companies: Operations in 1998. Surveys of current business 80, 26-45.MNCs are biggest employer overseas. MNCs influence workers' perceptions, customs, behaviors, and local laws (2000).

been traditionally seen as "extensions of the female sex role"[4], in which women are expected to be caring and accepting male authority and domination. The increasing employment of women, however, has created an impetus for change within the family, school, college, and community at large, in which traditional gender roles are involved. These dramatic changes have inherently brought conflict.

The Power Theory of sexual Harassment,[5] explains that sexual harassment is both a tool and a result of male dominance in the society. The function of sexual harassment is to manage the ongoing male-female interactions and to maintain male dominance occupationally and therefore economically by intimidating, discouraging, or precipitating removal of women from work.[6] Some men find women who enter into male-dominated domains a threat to male supremacy and thereby are motivated to harass such women. Thus, sexual harassment is related to the traditional inferior social status of women. It is less prevalent where women have the highest social status e.g., Scandinavian countries Conversely, it is more common where women have the least social status e.g., India.

Sexual harassment across countries where there are differences in the status culturally ascribed to women can also be proved by using Gender Empowerment Index (GEM) developed by the United Nations Development Programme (UNDP).[7] The GEM reflects differences between men and women in a country across three major areas: income-earning power (economic empowerment), share in professional and management jobs (occupational empowerment), and share of parliamentary seats (political empowerment).

Risk factors for sexual harassment

The factors responsible for sexual harassment are (1) Gender, Age, and Physical attractiveness, showing that the younger and attractive women are more frequent targets of sexual harassment. (2) Marital Status, as unmarried, divorcee, separated, or cohabitating women face higher rate of harassment in

4 Martin, S.E. Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women's Economic Status, in J. Freeman (ed.), *Women: A feminist perspective*. Mountain View, CA: Mayfield (1989).

5 Rospenda, K., Richman, J., & Nawyn, S. Doing Power: The Confluence of Gender, Race, and Class in Contra power Sexual Harassment. Gender & Society, 12, 40-60 (1998).

6 Tangri, SS., Burt, MR., & Johnson, LB Sexual Harassment at Work: Three Explanatory Models, 38, Journal of Social Issues, 33-54 (1982).

7 United Nations Development Program, *Human Development Report 1997*, New York: Oxford University Press (1997).

comparison to married and widowed women, (3) Workplace characteristics, i.e. high levels of sexual harassment are associated with male-dominated work groups. The unprofessional environment where employees are treated with disrespect, or where employees are expected to engage in activities not formally a part of the job, reports more sexual harassment than in professional environments. The presence of negative stereotypes and prejudices can create a fertile ground for discrimination and sexual harassment. Further, environments in which women are viewed as sex objects and/or as inferior to men create a climate more conducive to the domination and denigration of women. (4) Generally the men, who hold more traditional attitude towards women, exhibit stereotypic behaviors, emphasize male social and sexual dominance, and demonstrate insensitivity to others, are usually sexual harassers. Men simultaneously experience both positive and negative feelings about women, especially in workplace. They reflect coexisting desire for dominance and intimacy, which results in hostile and benevolent forms of sexism.

Hostile sexism refers to sexist antipathy towards women based on ideology of male dominance and superiority and hostile form of sexuality. Benevolent sexism refers to positive and protective (but sexist) attitudes towards women and a desire for heterosexual intimacy. Either form increases the men's tendency to engage in sexually harassing behaviors, although their motivations and awareness that their behaviors are harassing may greatly differ. Women are also more likely a target of harassment as they avoid reporting harassing behavior because of; self-blame, self-doubt; fear of retaliation; lack of support; feelings of humiliation and embarrassment; lack of knowledge about sexual harassment, the laws, and /or institutional remedies and a fear that they will not be believed and/or that their complaints will not be handled objectively or effectively.

Consequences of sexual harassment

Sexual harassment may be best conceptualized as one manifestation of the way in which sexual violence against women is committed in society. In the rape-prone culture, women are socialized to expect violence in their everyday lives, and such violence is treated as normal. Sexual violence is the most graphic and visceral tool of women's subordination and sexual harassment is a tool of oppression. Harassing words are meant to instill fear, heighten bodily discomfort, and diminish the sense of self-respect. Even those women who do not experience any direct form of sexual violence, experience fear which invade nearly all aspects of their public and private lives. Although most of the sexual harassment is not physically violent, women subjected to harassment demonstrate elevated

fears of rape, and of crime, in general. They avoid places and people where they have been or may be harassed further.

Sexual harassment can result in myriad effects on both the harassed individual and the organization in which they are employed. It occurs in a multitude of forms with varying degrees of physical, psychological, and financial threat to its victims. The result is that the victims suffer highly negative physical, emotional, social, and work-related performance costs, which have been identified as 'sexual harassment trauma syndrome'[8]. In organizations, where authorities take casual attributions, victims of sexual harassment suffer depression and helplessness. Victims become assured that all their attempts to end sexual harassment are futile and this results in helplessness, hopelessness, depression, or other psychological sequel. Sexual harassment that also involves sexual coercion or any type of sexual assault has the capacity to induce fear, anxiety and other negative emotions. Sexual harassment has the power to shatter assumptions about the world, which can result in feelings of betrayal, distrust, and questions regarding one's ability to judge other people. This is particularly true when the harasser is someone the victim respects. Additionally, if the victim attempts to cope with the harassment by ignoring it, but it persists, feeling of helplessness may intensify and victim's sense of vulnerability may increase. Intrusive thoughts, nightmares, and somatic symptoms may result from the struggle to assimilate the harassment. Sexual harassment victims suffer losses in many areas of their lives other than the financial losses. Social relationships are changed and psychological and physical health may be compromised. It also threatens one's financial resources, work, family status, self-esteem, and belief systems. Many other losses, which may be suffered by the victims occur, include a lost job, loss of status among workers, failure to receive a raise or promotion, loss of inter personal support systems, and many other traumatic experiences.

Sexual harassment, thus, affects its victims, whether in employment or in educational institutions as they don't talk much in the workplace/or in class, don't want to go to work/or to school or college, they want to change their work/or seat to get away from the perpetrator, they find it hard to pay attention in work/or class, they stay away from particular places in work premises/or school, college; they find it hard to concentrate or study, they have trouble in sleeping, they want someone to protect them, they put less efficiency/or lower grades than they would have otherwise, they think about changing the school or college

8 A. Paludi, & R.B. Barickman, *Academic and Workplace Sexual Harassment: A manual of resources*. Albony, NY: Sunny Press (1991).

employer/school or college. The list is lengthy and formidable. Some victims of sexual harassment refuse to report because institutional policies often require confrontation and are thus incompatible. They prefer to deny harassment, ignore or trivialize it and avoid perpetrators. Changing employer, absenting from work or dropping classes or leaving school/college are typical responses that may adversely damage the future of employees or students and their careers.

Effect of sexual harassment on organizations

Earlier, it was believed that sexual harassment does not have any impact upon organizations. However, later on when it was found to exist, it was often dismissed as relatively benign expression of the biological attraction between males and females. However, various researches have shown that sexual harassment results in decreased job satisfaction, declined job performance, decreased motivation, high job changeover and interrupted careers, decreased morale, lowered productivity, increased absenteeism, impaired relationships between co-workers and less social reputation.

Responses to sexual harassment

Majority of people believe that sexual harassment can be and should be handled individually by the person who is sexually harassed. However, sometimes the nature of sexual harassment is such that there are more than one harasser involved. For example, a work environment may be permeated with jokes, graffiti, and comments that are tolerated, supported, and perpetrated by many individuals. Thus, responses to sexual harassment can be on two axis. The first axis is individual attempt to cope with harassment and coping with responses involving other parties like the supervisor, co-workers, spouse, lawyer, or any outside sexual harassment agency. The second axis comprises of indirect responses like ignoring, avoiding, evading or direct responses such as confronting, consulting superiors, or filing grievances. The intersection of these axis gives rise to four possible categories of responses and coping strategies: individual direct, individual indirect, other-involved direct and other involved indirect.[9] In an individual indirect response, usually, the harasser is more powerful both physically and organizationally as a result of which the first or even several harassing events are ignored. Thus, the first responses to sexual harassment are that they are ignored. Another individual indirect coping response of victim of harassment is that of avoidance. In individual direct responses, the direct strategies for coping

9. Gutek, B., & Koss, MP Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment 42, Journal of Vocational Behavior, 28-48 (1993).

with sexual harassment can range from confronting the harasser verbally or via a written document, filing a formal complaint, and reporting the harassment to a supervisor, to hitting or insulting the harasser.

Sexual experiences questionnaire (SEQ)

To compare sexual harassment experiences across cultures, Fitzgenard and her colleagues[10] developed Sexual Experiences Questionnaire (SEQ). It is the most frequently used instrument to assess sexual harassment, and is based on Till's[11] classic conceptualization of sexually harassing behavior and was designed to assess experiences with five types of sexual harassment, viz., (1) Gender harassment: Generalized sexist remarks and behaviors that is not designed to elicit sexual cooperation but rather to convey insulting, degrading, or sexist attitudes; (2) Seductive behavior, i.e. inappropriate and offensive sexual advances; (3) Sexual bribery, i.e. solicitation of sexual activity or other sex linked behavior by promise of reward; (4) Sexual coercion (5) Sexual imposition i.e. fross sexual imposition, assault and rape, other sexual crimes and misdemeanors.

III Legal Issues Surrounding Sexual Harassment

Sexual harassment is a crucial area of the law and now an impressive body of case law has emerged. The threat of litigation has forced the employers, and educational institutions to take sexual harassment more seriously. These Institutions have now drafted policies and procedures to educate employees and management in workplaces, as well as students, staff, faculty and administrators in universities/colleges/schools. Consultants from academia as well as from business also aid them.

Sexual harassment is a violation of the fundamental rights of 'gender equality', the 'right to life and liberty', and the 'right to practice any profession or to carry out any occupation, trade or business'. The fundamental right to carry out any occupation, trade or business depends on the availability of a safe working environment. The right to life means life with dignity. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. It is the responsibility of the State

10 Fitzgerald, LF, Shullman, S., Bailey, N., Richards, M., Sweeker, J., Gold, Y., Ormerod, M., & Weitzman, L The incidence and dimensions of sexual harassment in academia and the workplace. 32, Journal of vocational Behavior, 152-17 (1988).

11 Till, F *Sexual Harassment:* A Report on the Sexual harassment of students. Washington, DC: National Advisory Council of Women's Educational programs (1980).

to ensure such safety and dignity through suitable legislation and mechanism for its enforcement. The international recognition of sexual harassment as a human rights issue has continued to gain momentum and has now a global acceptance through various International Conventions and norms.

The 1979, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the *Beijing Declaration* directs all States to take all appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women. In 1993, at the ILO seminar in Manila, it was recognized that sexual harassment of women is a form of 'gender discrimination against women'. Article 7 of the International Covenant on Economic, Social and Cultural Rights recognizes women rights to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work, which may violate the working environment. The Inter-American Convention to Prevent and Eradicate Violence against Women, held in 1994, in Belgium de Para, explicitly recognized the "Right to work in an environment free of sexual harassment"[12]. The Organization of the American States adopted such a right in the same year. On December 23, 2000, a new complaint procedure for female victims of discrimination was passed by United Nations, (UN) allowing women to submit sexual harassment complaints to the UN, if the home country is unwilling to investigate such allegations.

> According to Angela King, special adviser on gender issues to the UN Secretary General, "This is a historic step forward in giving women the right of redress...at the international level.... It will act as an incentive for governments to take a fresh look at the means currently available to women at the domestic level to enforce their rights"[13].

Many countries are now developing sexual harassment laws. These laws vary widely from country to country influenced by the cultures and legal systems of each.[14] Some countries have very specific laws and other have general laws. Unfortunately, many countries still have no laws protecting women against sexual

12 Inter-American Convention to Prevent, Penalize and Eradicate Violence Against Women. General Assembly of the organization of the American States. Inter-American Common of Women, 24th Session, 33, I.L.M. 1534, (1994).

13 Cited in Lederer, New Complaints Procedure for Discrimination, Against Women Take Effect. Associated Press World Stream CX 2003 58U6181) (2000, Dec.23).

14 Sigal, J., & Jacobson, H. A Cross-cultural exploration of factors affecting reactions to sexual harassment. Psychology, Public Policy and Law, 5, 760-785 (1999).

harassment. Countries not only differ in how they define the term "sexual harassment", they also differ in how they deal with the problem. In some countries, sexual harassment is a crime punishable by imprisonment (France, Brazil), in many other countries monetary damages are awarded to the victim. In some countries, sexual harassment is viewed as a violation of an employee's right to equal treatment, in others it is a labour problem, and in some as a tort. So regardless of how sexual harassment is viewed and treated, there is a momentum to deal with the problem and rules continue to be promulgated.

Japan has developed its own regulations regarding sexual harassment (referred as "Sekuhara") that closely resemble those of United States.[15] Other countries that have developed laws prohibiting sexual harassment in the workplace include Australia, Canada, Germany, South Africa, Argentina, Peru, Bolivia, Venezuela, Columbia, New Zealand, Philippines, France, and Brazil etc.[16] In Germany, regulations explicitly mention that touching the body and making sexual remarks as well as publicly displaying objectionable pictures are examples of sexual harassment under Protection of Employees Act, 1994.[17]

IV Legal Definitions of Sexual Harassment

European commission

The concept of sexual harassment is not universally defined. A boost in the direction of a more standardized law and an international definition of sexual harassment occurred when the European Commission in 1990, passed a Council Resolution that defined sexual harassment for the member states. The resolution is similar to the US definition in that it refers to unwelcome, unreasonable, and offensive nature of the conduct.[18] It also includes the concept of the impact of submitting to or rejecting the conduct on the victim's employment. It concludes by discussing the idea of hostile environment sexual harassment, which involves conduct that is hostile, intimidating, or humiliating to the recipient. Countries aspiring to join the European Union are beginning to pass legislation in their efforts to harmonize their laws with those of existing European union members.

15 Kopp, R. Ricochet Effect of US Sexual Harassment Suit, Japan Quarterly, 43, 42-50 (1996).

16 *Ibid.* Aeberhard-Hodges.

17 Protection of Employees Act, 1994. Second Act on Equality for men and women (Germany), Sec. 10.

18 Aeberhard-Hodges, J. Sexual harassment in employment: Recent Judicial and arbitral trends. 135, International Labor Review, 499-533 (1996).

United States

United States began dealing with the problem of sexual harassment only in 1964, and it is still ahead of the World in combating it. In United States, sex discrimination was prohibited in the workplace in 1964, under Title VII, of the Civil Rights Act. This Act prohibits discrimination in the workplace based on race, colour, religion, sex, or national origin. In United States, the Congress passes laws, and the agencies such as EEOC are given the authority to develop work-place rules and courts interpret those laws and rules.

EEOC definition

The Equal Employment Opportunity Commission (EEOC), a U.S. federal agency that oversees the enforcement of Title VII has provided three guidelines for what comprises sexual harassment. According to it, unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature constitutes sexual harassment when: Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive work environment.[19]

The first two examples are *quid pro quo* type of sexual harassment (a demand or request for sexual activity in exchange for a job related benefit or academic related benefit). The third is referred as hostile environment. Hostile environment is the most common-form. The concept of hostile environment has challenged courts to expand their views of sexual discrimination and offensive conduct.

CEDAW's definition

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) observed, that equality in employment could be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in work place. It recommended that States should take all appropriate measures to eliminate discrimination against women, and provide effective complaints procedures and remedies, including compensation.

> Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances. Sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.

19 Code of Federal Regulations, Vol,29, Sec.1604.11 (2000) 186.

The Supreme Court of India

The Supreme Court of India in *Vishaka v. State of Rajasthan*[20] took note of the growing social menace of sexual harassment of women at the work place and of the fact that civil and penal laws in India are not adequately providing specific protection to women from sexual harassment. In Vishaka's case, the Supreme Court not only suggested definition of sexual harassment, but also prescribed various guidelines to be adopted by institutions to prevent sexual harassment.[21] Thus, according to the Supreme Court sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as: physical contact and advances; demand or request for sexual favours; sexually-coloured remarks; showing pornography; any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work, whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. Adverse consequences might be vested if the victim does not consent to the conduct in question or raises any objection thereto.

In *Apparel Export Promotion Council* v. *A.K. Chopra*[22], it was observed, Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.

20 (1997) 6 SCC 241.

21 (1997) 6 SCC, 252, para 17. Verma, J., (as the former Chief Justice then was), speaking for the three-Judge Bench.

22 (1999) 1 SCC 759. Anand, J.,(as the former Chief Justice then was) at 775, para 25.

The australian human rights and equal employment opportunity commission definition

Sexual harassment is an unwelcome conduct, such as sexual advances and requests for sexual favors, when a reasonable person would feel offended, humiliated, or intimidated by the conduct.[23]

V Judicial Evolution of Concept of Sexual Harassment in United States

Williams v. *Saxbe* (1976)[24] was the first case to recognize the legal concept of *quid pro quo* harassment. *Bundy* v. *Jackson* (1981)[25] was the first to recognize the concept of hostile environment. In *Bundy's* case it was ruled that employers could be liable for sexual insults and propositions even if the workers did not lose any job benefits as a result. *Bundy's* is case was followed by *Henson* v. *City of Dundee* (1982)[26]. *Henson* further elaborated on hostile environment:

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[27]

In 1985, in *McKinney* v. *Dole*[28] the court held that physical violence that is not sexual could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee's sex.

Supreme court of United States on sexual harassment

In United States, though the Congress passed Title VII, of the Civil Rights Act and it became the law in 1964 and the EEOC developed rules on sexual harassment in 1980, however, the US Supreme Court for the first time in 1986

23 Human Rights and Equal Employment Opportunity Commission. A Guide to the 1992 amendments to the Sex Discrimination Act of 1984. Canberra: Australian Government Publishing Service (1993).
24 413 F.Supp.654 (DC Cir.1976).
25 614, F. 2d 934 (D C Cir.1981).
26 682, F.2d 897, 902 (D.C.Cir.1982).
27 *Id.*, at. 902.
28 765 F. 2d 1129 (D.C.Cir.1985).

issued an opinion on the subject in *Meritor* v. *Vinson* (1986)[29]. The US Supreme Court ruled that sex harassment is a type of sex discrimination, and is thus prohibited by Title VII. In 1993, the Supreme Court in *Harris* v. *Forklift Systems*[30] ruled that conduct need not seriously affect an employee's psychological well being to be considered as hostile environment sexual harassment. In *Ellerth* v. *Burlington Industries* (1998)[31] the Supreme Court held that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. The defense comprises two necessary elements: that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. It means, that if a tangible employment action is taken by a supervisor against a victim of hostile environment, the employer is vicariously (automatically) liable for the behavior. Similarly, even if the employee suffers no adverse employment action, the employer is vicariously liable unless it can establish both elements of the affirmative defense established by the Supreme Court. The ultimate goal of this is to encourage employers to do all in their power to eliminate sexual harassment in the workplace and to likewise encourage victims to report harassment to their employer so that they may deal with it promptly.

The EEOC's definition of sexual harassment developed in 1980 has remained unchanged in the US, but what has changed is the way in which US Courts have interpreted the sexual harassment laws. The Supreme Court in *Harris*[32] noted that mere utterance of an epithet that engenders offensive feelings in an employee would not rise to the level of harassment. The conduct must be severe and pervasive enough to create an objectively hostile or abusive work environment, one that a reasonable person would find hostile or abusive. The

29 477 U.S. 57 (1986).
30 *Harris v. Forklift Systems*, 510 U.S. 17 (1993).
31 524 U.S. 742 (1998).
32 *Supra* n 30.

court mentioned several factors to consider, such as, frequency and severity of the conduct, whether it was physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

An important aspect of *Harris* was, the court's mention of the reasonable person standard. It refers to an element of proof that must be provided by a plaintiff in a hostile environment sexual harassment claim. The victim must prove in part that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; the conduct was unwelcome; and the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. This third element contains two parts: a subjective component (i.e., the behavior must be harassing to the actual victim); and an objective component (i.e., the behavior, to be considered harassing must be so viewed by a reasonable person).

However, two more Supreme Court decisions in 1998 altered the standard of proof required in hostile environment sexual harassment cases under Title VII. Prior to these two decisions, plaintiffs were required to establish that their employer knew or should have known of the harassment and failed to take appropriate remedial action. However after *Faragher* v. *City of Boca Raton*[33] and *Ellerth* v. *Burlington Industries*[34] that is no longer the case.

Sexual harassment in educational institutions in United States

Sexual harassment by teachers specifically in schools is commonly experienced and it is a major barrier to career development. In colleges, although the majority of harassment is student-to-student, but there are also cases of harassment by teachers or employees. The most disturbing factor is, that despite having Committees on Sexual Harassment, students who are victims of sexual harassment rarely come forward to report sexual harassment. If they ever tell about sexual harassment, it is usually to a friend. Educational employees also echo the same silence. In United States, sexual harassment in academic institutions is prohibited under Title IX, of the 1972, Education Amendments (work Place sexual harassment is prohibited under title VII of the 1964 Civil Rights Act). United States Congress applied Standards of Title VII of the Civil Rights Act of 1964 when it enacted Title IX, of the Education Amendment Act of 1972. Title IX, prohibits discrimination on the basis of sex and covers virtually all employees, students of university and colleges.

33 524 U.S. 725 (1998)
34 524 U.S. 742 (1998).

The first case involving students was *Alexander* v. *Yale University*.[35] It established that students have a valid claim for harassment under Title IX just as earlier workplace litigation established employment liability for discrimination under Title VII. In 1986 the US Supreme Court in *Meritor Savings Bank* v. *Vinson*[36] ruled that, without question, sexual harassment is a form of sex discrimination and that hostile environment as well as *quid pro quo* harassment violate Title VII, of the Civil Rights Act of 1964. It also violates Title IX for sexual harassment in educational institutions. The Supreme Court ruled that sexual harassment claims are not limited to simply those for which tangible job benefit is withheld (*Quid pro quo*), but also include those in which the complainant is subjected to an offensive, discriminatory work environment. The Supreme Court extended the EEOC guidelines to the academic community especially to students who are not covered by the statutes governing employer/ employee relations. It recognized the significance of harassment in *Harris* v. *Forklift Systems, Inc,*[37] and *Faragher* v. *Boca Raton,*[38] *Franklin* v. *Gwinett County Public School,*[39] *Gebser* v. *Logo vista Independent School District,*[40] *and Davis* v. *Monroe County board of Education*[41].

VI Supreme Court of India on Sexual Harassment

The Supreme Court of India in *Apparel Export Promotion Council* v. *A.K.Chopra*[42] opined that each incident of sexual harassment at the place of work, results in violation of the fundamental right to gender equality and the right to life and liberty, the two most precious fundamental rights guaranteed by the Constitution of India. The sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.[43] It also considered the nature of approach that courts should take while dealing with cases of sexual harassment. The Court held[44], that in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not swayed by insignificant discrepancies or narrow technicalities or the dictionary meaning of

35 459 F.Supp.1 (D.C.Conn.1977).
36 477 U.S. 57 (1986).
37 510 U.S. 17 (1993).
38 118 S, ct. 2275 (1998).
39 503 U.S. 60 (1992).
40 118 S. ct. (1988).
41 526 U.S. 629 (1999).
42 *Supra* n. 22.
43 *Id.*,at 761.
44 *Ibid.*

the expression 'molestation, they must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated, and where the evidence of the victim inspires confidence, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the delinquent superior officer is wholly misplaced and mercy has no relevance. Any lenient action in such a case is bound to have a demoralizing effect on working women.[45] The court further held that in cases involving violation of human rights, the courts are under an obligation to give effect to the principles embodied in international conventions and instruments for constructing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law, and also to see that the messages of the international instruments is not allowed to be drowned.

The Supreme Court in *Vishaka* v. *State of Rajasthan*[46] noting the absence of enacted civil and penal laws to provide for the effective enforcement of the basic human rights of gender equality and guarantee against sexual harassment, laid down the guidelines and norms for due observance at all work places or other institutions until a legislation is enacted for the purpose. It directed that these guidelines will be strictly observed and shall be binding and enforceable in law until suitable legislation is enacted.

The Supreme Court guidelines

The guidelines and norms prescribed for the preservation and enforcement of the rights to gender equality of the working women[47] specifically provide that it is necessary and expedient for employers in workplaces as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women.

Duty of the employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required. All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the steps to ensure express prohibition of sexual harassment (as defined above) at the work place

45 *Id.*, at. 762.
46 *supra* n. 20
47 (1997) AIR SC 3016.

The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender. As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946. Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

Criminal proceedings

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

Disciplinary action

Where such conduct amounts to misconduct in employment, as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

Complaint mechanism

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

Complaints committee

The complaint mechanism should be adequate to provide, where necessary, a Complaint Committee, a special counselor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment. The Complaints Committee must submit an annual report to the Government department concerned of the complaints and actions taken by them. The employers and persons in charge will also report on the compliance with the aforesaid guidelines

including on the reports of the Complaints Committee, to the Government department.

Workers' initiative

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

Awareness

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

Third party harassment

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

The Central/ State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.

These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

General strategies adopted during sexual harassment

Most of the students and employees do not tell the harasser to stop. The initial attempts of sexual harassment are often ignored, especially when they are experiencing hostile environment sexual harassment in which the behavior is typically more subtle than in *quid pro quo* sexual harassment.[48] Furthermore, victims fear retaliation should they confront the harasser. They also do not want their career threatened.[49] Usually, the students and employees adopt certain strategies,[50] like avoiding the harassment by staying away from perpetrator; minimizing the harassment and treating it as a joke; denying the harassment;

48 Herskowitz Elaine and Kallem Howard The role of the Equal Employment Opportunity Commission and Human rights Commission in dealing with sexual harassment, in Michele Paludi and Carmen, A. Paludi (eds), in Academic and workplace sexual Harassment, Westport, CT Connecticut London (2003).

19 Fitzgerald. L., & Omerod, A, Sexual harassment in Academia and the Workplace, in F.Denmark & M. Paludi (eds.), Psychology of Women: A Handbook of Issues and Theories, Westport, CT: Greenwood Press (1993).

50 Fitzgerald, L., Gold, Y., & Brock, K Responses to Victimization: Validation of an Objective Policy, 27 Journal of College Student Personnel, 34-39 (1990).

and attempting to forget it, putting up with the harassment out of the belief that there is no help available, or fearing retaliation, refusing sexual, social offers; or verbally confronting perpetrator, reporting the harassment and filing a complaint, seeking support of others to validate perceptions of the harassment, attempting to evade the perpetrator without confrontation; attempting to placate the perpetrator, or taking responsibility for the harassment. In addition, they do not disseminate and/or enforce the policy statement prohibiting sexual harassment or report information regarding sexual harassment, or have no/ or have inadequate training for teachers, staff and students, or do not intervene officially when sexual harassment occurs, do not support sexual harassment victims, do not quickly remove sexual graffiti, do not give sanctions to individuals who engage in sexual harassment, or do not inform about the sanctions for offenders institutions incidence of sexual harassment.

Comprehensive approach to eliminate sexual harassment in workplace and educational institutions

The curtailment of sexual harassment demand constant scrutiny specifically in higher education, where fluctuation in student constituencies can produce widespread environmental change. The educational institutions and workplaces should exercise "reasonable care" to ensure a sexual harassment free environment and retaliatory-free environment for students and employees. This *reasonable care* adopted from the US Supreme Court ruling in *Faragher v. Boca Raton*[51] includes: establishment and dissemination of effective anti-sexual harassment policy, establishment and dissemination of effective investigative procedures, and offering training in sexual harassment in general and in the organization's policy and procedures specifically.

An effective policy statement, an effective investigatory procedure, and an effective training program can establish an atmosphere of trust that would encourage individuals to come forward with their complaints of sexual harassment. It shall also ensure support outside of the educational institutions and workplace.

Thus effective and enforced policy statements, investigatory procedures, training programs on sexual harassment are three major aspets of exercising reasonable care.

VII Conclusion

The increasing awareness about sexual discrimination and sexual harassment has encouraged various organizations to provide support to women seeking

51 *supra* n. 38

redress in courts. However, legal and technical issues should not be allowed to dominate sexual harassment cases. Any business house or education or administrator who allows his institution to become so oppressive that it reaches the level of a legally defined "hostile environment" is not displaying good management skills. Fighting a legal battle against sexual harassment is not only financially very expensive but is time consuming and mentally exhausting. It also puts tremendous cost on employee or student morale and career potential. Thus, it is better to deal with sexual harassment long before it reaches the courts or causes legal liability. This necessitates a complete understanding of sexual harassment: What it is, how it affects employees and students and how it can be handled in an appropriate manner.

Education about sexual harassment is also necessary for students, not only for life in academics but also in workplace, where most are preparing to enter. The advancements are impressive, but problems remain. This is because the research, publications and studies dealing with sexual harassment are not qualitative.

INDIA AS AN EMERGING POWER IN THE PRESENT SCENARIO - ACCELERATING FACTORS CONTRIBUTING TO ITS GOVERNANCE

*Dr. Mahavir Singh Kalon**

I Introduction

A NEW balance of power is taking shape in the world. India is gaining in stature as a major player in the unfolding scenario, a full fifty eight years after independence[1]. On March 25, the US announced its new strategy to help India to build itself as a major world power in the 21st century. Following that announcement, the visiting Chinese Prime Minister Wen Jiabao, for the first time, recognized that India was more than a regional power and had a global role to perform. His enthusiasm, in fact, envisioned China and India dominating the world economy. It is noteworthy that Russia has never had any difficulty in recognizing India's international role. The European Union also treats India as a strategic partner: When the Japanese premier visited India at the end of April 2005, he could not help but recognize the stark reality and had to look at India beyond the traditional India-Pakistan hyphenation.

The present global balance of power system is different from the 19th century European balance of power under Pax Britannica. In that system Russia, Germany, France, Austro-Hungarian Empire and Britain were able to maintain peace in Europe for almost a century, till it broke down in 1914 leading to the first World War. The 19th century, witnessed balance of power in the shape of the Prussian-Austrian war, the Franco-Germany war, the Crimean war, the Balkan wars and wars of Italian unification. The 20th century bipolar world, too, was a balance of power era. China switched sides leading to the containment of the Soviet Union and its break-up. The 2020, vision document of the National Intelligence Council, called 'Mapping the Future', forecasts that the new balance of power in the 21st century will not lead to any war among the major powers, armed as they are with nuclear weapons and missiles. It is not just the destructive potential of such a conflict, but the globalization process that has reduced such a war to a near-impossibility.

Today, the US and China, the top two rivals in the international system, are also the two engines of global economic growth, symbiotically linked together.

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1 K Subrahmanyam, The New Deal : India as an Emerging Player in the World Order, Times of India, April 26, 2005.

The US strategy towards China is not containment as was adopted towards the Soviet Union in the Cold War, but of economic interaction which will bring about transition to democracy within China. US appears to have concluded that a strong India's interaction with China will help in that transition to democracy. Bipolar deterrence ensured that there was no war between the superpowers. The unprecedented global arms race ended in Paris Agreement, of November 1991. Multipolar balance will be even more stable. The globalised economy will make every power pause and reflect on the global economic and demographic consequences of war, which were not considered in detail during the bipolar era and the second World War. The industrialized world is ageing and its fertility rate is declining. These are serious disincentives in considering the possibility of a global war. Therefore, the new balance of power will operate without military might as the primary currency of power. That does not mean that there will be no global rivalries. Major nations will compete with each other over trade, technology, research and development and per capita incomes. Leading nations will become knowledge-based societies, with knowledge becoming the primary currency of power. The yardstick of determination of new balance of power will be therefore knowledge pools that nations are able to develop on their own, or in collaboration, with one another.

The US understands this well, and that explains its avowed support to help India achieve a significant place in the world by the 21st century. China understands it too, as is evident from the Chinese Premier's plea to augment cooperation with India. Russian President Putin, paid a visit to Bangalore to woo Indian minds. Therefore, those who look at the world in terms of blocs led by the US and China and suggested that India should join China-Russia block are totally out of sync with the emerging situation.

In the emerging reality, there are likely to be no blocs and no wars. The six actors – the US, Japan, the European Union, China, Russia and India, can compete and cooperate with each other to optimum advantage. With respect to the Sino-Indian cooperation, the US state department spokesperson observed, that China was a friend and India a very good friend of US, therefore, the US, was not concerned about the growing cooperation between the two sources. However, a question arises, is India ready with its own strategy in the new world order? Indian reactions to the March 25, announcement of the US and the Chinese Premier's visit to India only suggests that large sections of the political, administrative and academic establishments are trapped in the Cold War mindset. They have yet to adjust themselves to the international system of the 21st century. This is the kind of issue the National Security Council is meant to address.

The emergence of Indian stature in world scenario is flourishing from the major factors duly recognized by Indian intelligentsia for stacking the claim in

the global economy and politics. A number of accelerating factors have enabled India to emerge as a power which include, research and development in science and technology, empowering and educating women, judicial activism, sustainable development, diverting more funds towards health and technical education, right to education's declaration as a fundamental right, strengthening of external affairs, extension of co-operation with neighboring countries.

II Growth in Science and Technology

Importance of science in the present context[2]

Soon after independence, our country was infested with problems to bring in urgently needed technologies for steel, civil structures, hydro, and thermal power stations. It concentrated on solving basic problems such as feeding the population, providing water, shelter and healthcare. Although India had a weak economy, the political visionaries of the time decided wisely to set up what ultimately became the country's science base – atomic energy, space, CSIR, DRDO, DST, etc. The country also set up a powerful educational base including the creation of Indian Institutes of Technology and many universities, having a unique blend of science and technology. Today the country commands a strong position in the world in terms of scientific manpower in capability and maturity. Its economy has strengthened and it is therefore in a position not only to understand technologies that it may borrow but also to create its own technologies with extensive scientific inputs of indigenous origin. In many areas such as pharmaceuticals, India delivers products to the world, backed by a large amount of research and development.

India has thus, come a long way since independence. From mere buyers of technology it has achieved the status of a nation that has made science and technology an important contributor to national development and societal transformation. In a world where power is determined by a nation's share of the world's knowledge, it is important for India to put her act together and become a continuous innovator and creator of science and technology intensive products. Present day scientific knowledge and study must have innovativeness, foresight, and vision.

Scientific challenges for the future

In the last three decades, we have witnessed an unstinted growth in miniaturization of informative technology products. Central to this silicon technology, the feature size transistors has been decreasing relentlessly. It is predicted that miniaturization using silicon microelectronics will find its plateau

2 A. P. J. Abdulkalam, Challenge to science: attracting youth, The Hindu, April 12, 2005.

and its limit will be reached within the next decade. The world is on the lookout for an alternative to silicon. The transformation from microelectronics to nano science and technology is knocking at the door with endless alternatives including molecular transistors, quantum computing and nano electronics etc. In addition to these challenges, Indian scientists are confronted with the task of the development of an anti-HIV/AIDS vaccine, seeds that require minimum water and can provide high yield per hectare to compensate for reduced land availability. There is a need to work on thorium-based nuclear power plants, an integrated mission for stem cell research, a hypersonic reusable launch vehicle, and discoveries and innovations to provide better quality of life to differently challenged people.

III Empowerment of Women

Concept of women's empowerment[3]

Empowerment of women is a yardstick to assess the progress of a nation. Indian Women therefore need a greater degree of self-confidence, a sense of independence and capability to resist discrimination imposed by the male dominated society. 'Empower' means to make one powerful or equip one with the power to face the challenges of life to overcome the disabilities, handicaps and inequalities. It is an active, multidimensional process enabling women to realize their full identity and powers in all spheres of life, by providing greater access to knowledge and resources, greater autonomy in decision-making, greater ability to plan their lives, greater control over the circumstances that influence their lives and freedom from the shackles imposed on them by custom, belief and practice. Empowerment does not mean setting women against men, rather it aims at making both men and women realize their changing roles and status and develop a consensus for harmonious living in the context of an egalitarian society. It means redistribution of work roles, reorienting their values to the changing world and attitudes and evolving new kinds of adjustments, understanding and trust with each other. Thus, it can be termed as an ideology for carrying democratic values into the family and society, and which demands a basic change in the system of marriage and family, husband-wife relationship, attitude towards gender socialization and remarriage.

It is an established fact that women have been subjected to multifarious exploitation in our male dominated society. Since independence, the Government of India has been making several efforts to empower women, both educated and otherwise, by providing employment opportunities in the organised and unorganized sectors, which the later have used to their full advantage by entering

3 Ambarao Uplaonkar, Empowerment of Women, Mainstream, March11-17, 2005.

fields that were traditionally dominated by men. Women now are in the role of police officers, constables, bus conductors, business women, autorikshaw drivers, petrol pump managers etc. In order to provide economic independence to the large masses of rural women, the Government of India has launched Self-Help Groups (SHGs) by providing financial assistance and training in small scale industries. In local bodies, women have been given thirty-three per cent representation for asserting their claim in governance of democracy at the grass root level. Moreover, this representation in legislature is also being contemplated by a Bill for representation of women in the governance of the country.

Protection for women

In public sphere, one of the issues of major concern is custodial violence. The utter helplessness of a woman, where guardians of law turn beasts and perpetrate barbaric and inhuman behavior with arrogant triumph full of contempt for law was brought to the notice of the court by a social activist *Sheela Barse.*[4] In this case the writ petition was based on a letter addressed by *Sheela Barse*, a journalist, to the court complaining about custodial violence against women prisoners whilst confined in the police lockup in the city of Bombay. The court's concern was evident as it directed the Inspector General of prisons in Maharashtra, to issue a circular to all Superintendents of Police to send a list of all under-trial prisoners to the Legal Aid Committee of the district. Similarly, in another case[5] the court issued numerous directions for the protection and the welfare of women[6]. The court held, that appropriate directions have been given by the courts to the inmates of protective and remand homes for women and children for providing suitable human conditions in homes and for providing appropriate machinery for effective safeguard of their interests. It also issued a number of directions to the government and various social organizations for taking up appropriate measures for prevention of women from taking up prostitution and to rehabilitate their children through welfare measures[7]. Directions were also issued for taking disciplinary action against the Station House Officer, the Sub-Inspector and the Lady Medical Officer concerned, in Gajraula Nuns Rape Case. The Court also directed the state to pay compensation of Rs. 2,50,000 to each of the two sisters who were rape victims and Rs. 1,00,000 to the other sisters who were assaulted. The exhaustive guidelines to prevent sexual harassment of working women in places of their

4 *Sheela Barse* v. *State of Maharshtra*, AIR 1983 SC 378 and *All India Democratic Women Association* v. *Union of India*, AIR 1989 SC 1280.

5 *Upendra Baxi* v. *State of U.P.*, (1983).2 SCC 308, Joint Women's Programme v. State of Rajasthan, AIR 1987 SC 2060.

6 (1983) 2 SCC 308, *Joint Women's Programme* v. *State of Rajasthan*, AIR 1987 SC 2060.

7 *Gaurau Jain* v. *Union of India*, AIR 1990 SC 292.

work until a legislation is enacted for this purpose by the legislature were issued by the court in case of *Vishaka* v. *State of Rajasthan*.[8] The Supreme Court accorded similar protection to a Bangladeshi woman[9], who was raped by the Railway employees in Railway building. Rejecting the argument that the petition was not maintainable, the Court held that even a foreign national could be granted relief under public law.

IV Sustainable Development: Protection of Environment

When the saying, government of the people, for the people and by the people, not appear to be feasible and the policies and programmes are read only on paper and the ground realities do not improve, the judiciary often steps in to provide relief to men and protect the natural resources of the country. The dynamism of our judiciary is evident through a plethora of cases. Its concern to prevent damage to the ecological system was witnessed in *Rural Litigation and Entitlement Kendra* v. *State of U.P.*[10] where it ordered the closure of lime stone quarries that were flouting the norms of safety of the surrounding inhabitants. In *Shriram Food and Fertilizer's case*[11], the court gave directions to the Company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighbourhood for taking adequate safety measures before resuming the manufacturing plant. Taking in view, the prime need of a mechanism to protect the environment of our country, the Apex Court in case of *M.C. Mehta* v. *Union of India*[12] came down heavily on the Government for its failure to take effective steps to obviate the grave public nuisance caused by the tanneries at Kanpur. In *Indian Council for Enviro-Legal Action* v. *Union of India*[13], the Court reiterated that if it finds that the Government or authorities concerned have not taken any action required of them by law and that results in violation of the right to life of the citizens, it will be the duty of the court to intervene. The Apex Court gave specific directions for the protection of the rights and benefits of the workmen. Again in *M.C. Mehta* v. *Union of India*[14], dealing with the issue of pollution of Taj Mahal and terming it as necessary for protection of Indian heritage, the 292 polluting industries locally operating in the area, that were the main source of pollution were directed to change over within fixed time schedule to natural gas as industrial fuel failing which, they were issued an ultimatum till 31st December,

8 AIR 1997 SC 611.
9 *Chairman, Rly Board* v. *Chandrama Das* , AIR 2000 SC 988.
10 (1985) 2 SCC 431.
11 *M.C. Mehta* v. *Union of India*, (1986) 2 SCC 176.
12 (1987) 4 SCC 463.
13 (1996) 3 SCC 212
14 AIR 1997 SC 735.

1997 and were directed to be reallocated to alternatives plots in the industrial estate outside Taj Trapezium. Similarly in *Narmada Bachao Andolan* v. *Union of India*[15] and *N.D. Jayal* v. *Union of India*[16] (Tehri Dam Case), the court noted with concern that despite the fact that some deficiencies in respect of adherence to the environmental norms, the Sardar Sarovar Project and Tihri Dam cases were cleared.

V Cleansing of Public Administration from Corruption

One of the evils that India is facing currently is corruption in public dealings. On account of corrupt officials and their corrupt working, it is impossible to translate ideals of justice into socio-economic reality as desired in the Constitution and welfare legislations. It is a trite saying that the 'power corrupts' and 'absolute power corrupts absolutely'. The discretion and arbitrariness contaminate each other. In this situation there are more chances for the authorities to be corrupt, and thus, there is an urgent need to check corruption in public administration. The role of judiciary in this context becomes significant, even though the courts are required to function within its limits. The court has often taken cognizance of such cases through public interest litigations. It questioned the licensing power of the executive in *Chaitanya Kumar* v. *State of Karnataka,*[17] a case that has made political history. The contracts for bottling arrack to the appellants and others was questioned in the High Court of Karnataka and the order of the State Government was struck down on the ground that it was unlawful, arbitrary and capricious. In *D.C. Wadhwa* v. *State of Bihar,*[18] the promulgation of the ordinance again and again by the State of Bihar was challenged on the ground of misuse of the power and fraud on the Constitution. In case of *Municipal, Ratlam* v. *Vardichand,*[19] the Supreme Court affirmed the order of the Magistrate directing the Municipality of Ratlam to perform its public duty towards members of the public as it had failed to maintain roads and provide sanitary facilities. It was revealed through public interest litigation in *Manohar M. Galani* v. *Ashok N. Advani,*[20] that there was a serious scandal in functioning of some subordinate courts. The High Court took cognizance of the matter and directed an inquiry to be conducted, but here the Supreme Court held that the action of the High Court was illegal.

15 (2000)10 SCC 664.
16 (2003) 7 SCC 54.
17 AIR 1986 SC 825; *Giani Devender Singh Sant Sepoy Sikh* v. *Union of India*, 1995, SC 1847.
18 AIR 1987 SC 579; *Sheo Nandan Paswan* v. *State of Bihar*, AIR 1987 SC 877 at 879.
19 AIR 1980 SC 1622.
20 AIR 2000 SC 202.

The public interest litigation mechanism has proved to be a strong and potent weapon in the hands of the court enabling it to unearth many scams and corruption cases in public life and to punish the guilty involved in those scams. Hawala Scam, Urea Scam, Fodder Scam in Bihar, St. Kits Scam, Ayurvedic Medicine Scam and Illegal Allotment of Government Houses and Petrol Pump have come to light through the public interest litigation. In case of *Union of* India v. *Association for Democratic Reforms,*[21] the petitioners for Democratic Reforms filed a PIL and requested for a direction to implement the recommendations made by the Law Commission, in its 170th report on March 2, 2002. The Supreme Court directed the Election Commission to issue a notification making it compulsory for those contesting elections, to make available information about their educational qualifications, assets, liabilities and criminal antecedents at the time of filing of nomination-papers for the benefit of voters. The Parliament amended the electoral law (Peoples Representation Act) but not as per the guidelines of the Supreme Court. The Supreme Court therefore held, that Parliament has no legislative competence to direct the state authorities to disobey the order of the Court and therefore the amendment made in Sec. 33, of the Peoples Representation Act was violative of the fundamental right of voters to know about their representatives and hence were invalid. It restored its May 2, 2002 order and directed the Election Commission to issue fresh order.

VI Right to Education as a Fundamental Right

The advancement and progress of a nation is closely linked to the education system. While, education in the government and government aided institutions is people friendly in terms of fee structure, lately there has been a mushroom growth in private or self funded educational institutions. Since the seats in the government or government aided institution are limited, a large number of student aspiring for higher education have no choice but to turn to the private institutes. Unchecked and uncontrolled till recently, these institutes charged arbitrary and exorbitant fees from students totally commercializing the education pattern and making a mockery of the Constitutional goal of making education as a fundamental right of all Indians. In a landmark judgment in *Mohini Jain* v. *State of Karnataka*[22], popularly known as the " First Capitation Fee Case," the Supreme Court has held that the right to education is a fundamental right under Art. 21 of the Constitution which cannot be denied to a citizen by charging higher fee known as the capitation fee. The right to education flows directly from right to life. The right to life under Art. 21 and the dignity of an individual cannot be

21 AIR 2002 SC 2112.
22 (1992) 3 SCC 666.

assured unless it is accompanied by the right to education. In this case, the petitioner had challenged the validity of a notification issued by the government under the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, which was passed to regulate tuition fee to be charged by the private Medical Colleges in the State. Under the Notification, the tuition fee to be charged from students was as follows: Candidates admitted against Government seats Rs.2,000/- per year, Karnataka Students Rs.25,000/- per annum and students from outside Karnataka Rs.60,000/- per annum. The petitioner was denied admission on the ground that she was unable to pay the tuition fee of Rs.60,000 per annum. The two judge Division Bench consisting of Justice Kuldip Singh and R.N. Sahai, held that the right to education at all levels is a fundamental right of citizen under Art. 21 of the Constitution and charging capitation fee for admission to educational institutions is illegal and amounted to denial of the citizen's right to education and is also violative of Art. 4, being arbitrary, unfair and unjust. Capitation fee makes the availability of education beyond the reach of poor. The right to education is concomitant to the fundamental rights enshrined under Part III, of the Constitution. The fundamental right to speech and expression cannot be fully enjoyed unless a citizen is educated and conscious of his individualistic dignity. The education in India has never been a commodity for sale, their Lordships declared. Similarly, in *Unni Krishnan* v. *State of A.P.*[23], the Supreme Court was asked to examine the correctness of the decision given by the Court in the *Mohini Jain's case*. The petitioners running Medical and Engineering Colleges in the State of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu contended that if Mohini Jain decision is correct and followed by the respective State Government they will have to close down their colleges. The five Judge bench by 3-2 majority, partly agreed with the Mohini Jain's decision and held that the right to education is a fundamental right under Art. 21, of the Constitution as 'it directly flows' from right to life. But as regards its content the court partly overruled Mohini Jain's case and held that the right to free education is available only to children under 14 years, but after that the obligation of the State to provide education is subject to the limits of its economic capacity and development. The obligations created by Arts.,41, 45 and 46 can be discharged by the State either by establishing its own institutions or by aiding, recognising or granting affiliation to private institutions. Private educational institutions are a necessity in the present day context. Mohini Jain's case was not right in holding that charging of any amount must be described as capitation fee and saying so, amounts to imposing an impossible condition. It is not possible for the private educational institutions to survive, if they charge fee prescribed by government institutions. The private sector should be involved and encouraged

23 (1993) SCC 645.

in the field of education. But they must be allowed to do so under strict regulatory controls in order to prevent private educational institutions from commercializing education. The charging of the permitted fees by the private educational institutions, which is bound to be higher than that charged by, in similar government institutions cannot itself be characterized as capitation fee. The majority, accordingly held that admission to all recognised private educational institutions particularly medical and engineering shall be based on merit, but 50 per cent of seats in all the professional colleges be filled by candidates prepared to pay a higher fee. The court held that there shall be no quota reserved for the management or for any family, caste or community which may have established such college. The criteria of eligibility and all other conditions shall be the same in respect of both "free seats" and "payment seats". The only distinction shall be the requirement of higher fee by payment students. The Court evolved a scheme which would provide more opportunities to meritorious students, unable to pay higher fee prescribed by Government for such colleges.

The Apex Court accordingly framed a scheme relating to the grant of admission and the fixing of the fee. In their anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students, would be greater than the remaining 50%. The scheme had created certain problems and raised thorny issues. It has, therefore, been overruled in the *T.M.A. Pai Foundation* v. *State of Karnataka*[24]. The court further stated that the unaided professional institutions, may be allowed to adopt a rational fee structure. They are allowed to collect fees and charges they find appropriate, the only caveat being, that they should not appear to be charging capitation fee for profiteering. Realising that education is increasingly being run as a business and that the cost of running it is escalating, the Apex Court has conceded the need to have surplus income generated to meet the cost of expansion and augmentation of facilities. The Court, however required that appropriate machinery could be devised by the State or University to ensure that no capitation fee was charged and that there was no profiteering.

The Constitution (86th Amendment) Act, 2002 has added a new Art. 21 A after Art. 21, and has made education for all children of the age of 6 to 14 a fundamental right. It provides that "the *State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine*".

The framers of the Constitution realising the importance of education have imposed a duty on the State under Art. 45, as one of the directive policies of

24 AIR 2003 SC 355.

State to provide free and compulsory education to all children until they complete the age of 14 years within 10 years from the commencement of the Constitution. The object is to eradicate illiteracy from the country. It was expected that the elected governments of the country would honestly implement this directive, but it is extremely unfortunate that even 55 years of the Constitution, no concrete steps have been taken to implement this directive. The question arises as to how this gigantic ambition would be implemented. For making it viable, the only alternative is to encourage non-governmental organisations to come forward and participate in it to fulfil the mandate of the Constitution and the day will not be far when India would be able to boast of 100% literacy.

VII Conclusion

It is submitted that the factors discussed in this article are contributing in the growth of Indian politico-economy which led India as an emerging power in the present scenario. For maintaining the pace of this growth, people from all walks of life have to contribute and participate in this nation building exercise as without the progress of the nation, the global status acquired by an individual becomes meaningless.

It will not be out of context here, to mention that for achieving the intended results, India must divert significant amount of funds towards health, education and research. This concept has been recongised by Indian Government, as a significant amount of budget has been allocated for this purpose. Further, social goals are more important than economic goals, and therefore empowerment of women and poor people in the governance of the democracy, become an imminent necessity. The process has started and has gained a momentum which must be maintained by India if it wants to stand on an equal footing with other super powers.

COMPETENCY AND JURISDICTION OF ARBITRAL TRIBUNALS : SOME ISSUES

Jaya V.S.[*]

I Introduction

ARBITRATION IS becoming the most important method of dispute resolution in international transactions. Inspired by international conventions, arbitration is now seen as more effective than litigation before a national court. Commercial arbitration whether national or international has got a different feature when compared to litigation in the ordinary courts. It enables the parties to exercise a high degree of control over proceedings,[1] the terms of reference[2] and composition of tribunal.[3]

In its role as an alternative to national courts, arbitration has been proved to be a successful one.[4] Parties entering into economic agreements often include arbitration clauses in their contracts to ensure that any dispute can be solved without recourse to expensive and time consuming litigation. The significance of the study of commercial arbitration especially international commercial arbitration lies in the fact that, in the contemporary world of changing dimensions it has become a sophisticated mechanism for consensually dealing with international disputes. Beyond its practical importance, international arbitration is worthy of attention because it involves a framework of international rules and institutions. This, with remarkable success, provides a fair, neutral, expert, durable and efficient means for resolving difficult transactional problems. These rules have evolved over a time, in multiple countries through the joint efforts of governments and big corporations. The driving and dominant force of international commercial arbitration depends on a number of factors. Though it is different from ordinary court procedures many a times, the intervention of court becomes necessary to make it more effective.

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1 Unlike litigation before ordinary courts, in arbitration, parties are given the freedom to determine the rule of procedure.

2 Parties are also given the freedom to decide what all disputes are to be referred to arbitration, under the present law.

3 Regarding the appointment of arbitrators also, the parties are given the right to choose arbitrators as they like.

4 Arbitration offers a suitable framework for the amicable settlement of commercial disputes with the assistance of one or more impartial and independent individuals.

International commercial arbitration is a consensual means of dispute resolution. It has the binding effect only by virtue of a complex framework of national and international law. National arbitration laws, international conventions and institutional arbitration rules provide a specialised legal regime for most of the international arbitrations. This legal arena enhances the enforceability of both arbitration agreements and arbitral awards. It seeks to insulate the arbitral process from undue interference from national courts. At the same time it is also necessary to have such interference from the part of the courts. Such type of situation arises when there are questions as to competency or jurisdiction of an arbitral tribunal.

Incompetency and lack of jurisdiction are grounds for judicial intervention. In proper cases, the judiciary can give remedy to the parties by setting aside an arbitral award.5 Hence the issues connected with some basic necessities of an arbitral tribunal such as competency and jurisdiction are considered here.

Competency of an arbitral tribunal

The validity of an arbitration agreement itself shows the competency of an arbitral tribunal. What the law requires is, that there should be an arbitration agreement between the parties to refer the differences or disputes to arbitration.[6] When there exists an agreement between the parties to refer the disputes to arbitration and afterwards a dispute arises, the very next step is the appointment of arbitrators. Now the issue is whether the appointed arbitrators suffer from any kind of disqualification such as bias or lack of qualifications. Another question is with regard to the jurisdiction of the arbitrators. These three factors primarily determine the competency of arbitrators.

Appointment of arbitrators

The foundation of the arbitral proceeding is the existence of an arbitration agreement between the parties. This makes it important that the arbitration agreement must be an unambiguous and clear one. Then only the true intention of the parties with regard to arbitration becomes clear. In case the parties fail to appoint the arbitrators as per the agreement or due to some other reason, the law provides for the method of appointment of arbitrators.

The method under which the arbitral tribunal is constituted has a major role in deciding its competency.

5 The Arbitration and Conciliation Act, 1996, Sec.34.

6 *Id.*, Sec.7. It reads, "An Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not".

Appointment of arbitrators by agreement

The law provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.[7] If there are two arbitrators appointed by each of the parties, then the appointed arbitrators are free to appoint a third arbitrator, who shall act as the presiding arbitrator.[8] The parties can agree as to the nationality of an arbitrator. If they are not specifying the nationality of an arbitrator in their agreement, a person of any nationality can be appointed as an arbitrator.

In *Grid Corporation of Orissa Ltd.* v. *AES Corpn*[9], the issue was regarding the nationality of the presiding arbitrator. Here, Supreme Court held that, in international commercial arbitration, the presiding arbitrator might be of a nationality other than that of the parties. Again the court explained the principal factors behind the appointment of presiding arbitrator. It was held that the requirement of law is satisfied, (1) if it is actually made, (2) if it is made in consultation between the two original arbitrators and (3) if the Information as to appointment is communicated by both or either of the parties.

The Supreme Court in a recent case[10] held that under the 1996 Act there is no mandatory rule that the number of arbitrators shall not be even. The Court also reiterated that, it couldn't be said that the agreement prescribing two arbitrators is not valid. In such a situation the two appointed arbitrators should appoint a third arbitrator. Further it was held that, if the two arbitrators do not disagree and give a common award, there would be no frustration of the arbitration proceedings and the award would prevail. There may also arise a situation where the parties fail to name the arbitrators in the agreement. There are also situations where the parties fail to specify the method of appointment of arbitrators. In both these cases the court has to step in to facilitate the arbitration proceedings.

Appointment of arbitrators by law

The Act prescribes the procedure to be followed, if the parties fail to appoint the arbitrators. In the matter of appointment also, there is the requirement of *consensus ad idem*. In the absence of that, the law has to step in. The circumstances under which the appointment by law takes place are, (1)The party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party, or (2)The two appointed arbitrators fails to agree on the third arbitrator within 30 days from the date of their appointment, or (3) A person including the institution fails to perform any function entrusted to him or follow any procedure.

7 *Id.*, Sec.10 (I).
8 *Id.*, Sec.11 (3)
9 (2002) 7 SCC 736.
10 *Narayan Prasad Lohia* v. *Nikunju Kumar Lohia*, (2002) 3 SCC 572.

The Chief Justice or any person or institution designated by him shall make the appointment upon request of a party.[11] Again, if the parties fail to comply with the agreement under S.11 (2) as to the appointment of a sole arbitrator, within 30 days from the request by the other party, the Chief Justice or a person or any institution designated by him can appoint a sole arbitrator upon the request by that party[12]. In the case of appointment of sole or a third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than that of the parties.[13]

Thus it can be seen that, the parties are free to agree on a procedure for appointing arbitrators.[14] The failure to follow an agreed procedure can arise when, either one of the parties or both parties fail to follow the procedure, or the arbitrators fail to follow the procedure or reach an agreement expected of them, or a third party including an institution, fails to perform any function entrusted to it.

Court's power to decide the validity of an agreement

When an application is made for the appointment of an arbitrator, the court may decide whether the particular clause is an arbitration agreement or not. The Supreme Court in a recent case[15] said that, Sec. 16 of the Act did not exclude the jurisdiction of the nominee of the Chief Justice of India to decide the question as to the existence of a valid arbitration agreement[16]. Under Sec. 11 of the Act, it is permissible to decide a question as to the existence or otherwise of the arbitration agreement. But when the correspondence and the exchange of documents between the parties are not clear as to the existence or non existence of an arbitration agreement, in terms of Sec. 7[17] of the Act, the appropriate course would be that the arbitrator should decide such question under Sec. 16 of the Act rather than Chief Justice or his nominee under Sec.11.

In another case[18] the court observed, since the nominee of the Chief Justice of India under Sec. 11 exercises the power, it is in the nature of an administrative order. In this case if the Chief Justice or his nominee is not absolutely sure that

11 The Arbitration and Conciliation Act, 1996,11(4)
12 *Id.*, Sec.11 (5)
13 *Id.*, Sec.11(9).
14 The Arbitration and Conciliation Act., 1996, Sec. 11(2) See *supra* n. 3, 4.
15 *Wellington Associates Ltd.* v. *Kirit Mehta*, AIR 2000 SC 1379.
16 The Arbitration and Conciliation Act, 1996, Sec.16. It reads, "the arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of an arbitration agreement."
17 *Supra* n. 6.
18 *Nimet Resources Inc.* v. *Essar Steels Ltd.*, AIR 2000 SC, at 3108 per Rajendrababu, J.

there exists no arbitration agreement between the parties, it would be difficult to state that there was no reference to arbitration.

Later in *Konkan Rly Corporation* v. *Rani Construction Pvt. Ltd.*,[19] the Supreme Court reiterated its earlier ruling[20] that appointment of an arbitrator by the Chief Justice or his nominee is not an adjudicatory process but merely an administrative one. The amendments now propose to replace the words, 'Chief Justice of India' and the words, 'Chief Justice' by the words, 'Supreme Court' and 'High Court' respectively[21]. This may convert the process of appointment of arbitrator from being an administrative act to a judicial one. It will surely re-introduce to the law of arbitration, the old delays.

Analysing these decisions, it becomes very clear, that the courts are reluctant to interfere with the power granted to the courts under Sec. 11(6). At the same time, taking into consideration, the modern trends in commerce and industry especially in the area of international commercial arbitration, what is seen today is the reluctance on the part of the courts to interfere with the mandate of arbitrators appointed by parties. The amendments proposed by the Law Commission are somewhat contradictory to this basic premise.

Method of appointment in the absence of an agreement between the parties

From the above discussion, it is feasible that each party shall appoint one arbitrator, and those two arbitrators shall appoint a third arbitrator who shall act as a presiding arbitrator. If there is a failure by the parties regarding the appointment of arbitrators, presiding arbitrator or the sole arbitrator, within 30 days from the request to do so, the appointment shall be made, upon a request from the party by the Chief Justice or his designated person or institution. When the Supreme Court appoints an arbitrator, the questions regarding their qualification and jurisdiction may arise. It may not be decided by the court, but may be referred to the arbitrators. From the cases decided by the Supreme Court[22], it is clear that usually the arbitrators will decide the matter.

The power of the arbitrators to decide upon their own mandate is something like a 'judge deciding his own cause'. But the court has power to interfere with the award only at the final stage. So judicial intervention at that stage is a

19 (2002) 2 SCC 388.

20 *Konkan Rly. Corporation Ltd.* v. *Mehul Construction Co. Ltd.*, (2000) 7 SC 201. Here, the court held that appointment of an arbitrator under Sec. 11(6) is an administrative act and not amenable to judicial review under Art. 136.

21 The 16th Law Commission of India in its 176th Report on arbitration has introduced amendments to the Arbitration and Conciliation Act, 1996. It has the effect of increasing the grounds for challenging an award.

22 *Malaysian Airlines System* v. Stic *Travels Pvt. Ltd.*, (2001) 104 Comp. Cas. 29 (SCC), followed in *Konkan Rly Corpn. Ltd.* v. *Rani Construction Pvt. Ltd.*, (2002) 2 SCC 388.

necessary evil. To protect the integrity of judicial system, it is necessary. Just like the issue of appointment of arbitrators, the qualification of an arbitrator may also lead to disputes. The first and the foremost requirement is the impartiality and independence of the arbitral tribunal.

II Rules of Major Arbitral Institutions Regarding Appointment

Rules of the International Chamber of Commerce (ICC) contain provisions regarding appointment of arbitrators. As per its rules, the disputes shall be decided either by a sole arbitrator or by three arbitrators[23]. If a party fails to nominate an arbitrator, the court shall make the appointment. The court shall appoint the third arbitrator, who will act as the chairman of the arbitral tribunal[24].

It also deals with the appointment and confirmation of the arbitrators. If the Secretary-General of the ICC considers that the appointment of a co-arbitrator, sole arbitrator or chairman of an arbitral tribunal should be confirmed, the matter shall be submitted to the court[25].

Under the rules of the American Arbitration Association, the parties may mutually agree upon any procedure for appointing arbitrators and shall inform the administrator as to such procedure[26]. If the parties have not agreed upon the number of arbitrators, one arbitrator is to be appointed unless the administrator determines in its discretion that three arbitrators are appropriate[27]. On the failure of the parties to appoint the arbitrators, the administrator can appoint them[28].

As per the London Court of International Arbitration rules, the LCIA court alone is empowered to appoint arbitrators. The court will appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties[29]. In the case of a three-member arbitral tribunal, the LCIA court shall appoint the chairman who will not be a party nominated arbitrator[30]. It also states that the nationality of the sole arbitrator shall be different, if the parties belong to different nationalities[31].

Bias of arbitrators

A person to be appointed as an arbitrator or who has been so appointed is

23 Rules of Arbitration of the International Chamber of Commerce, Art. 8 (1)

24 *Id.*, Art. 8(4)

25 *Id.*, Arts. 9(1), 9(2)

26 Rules of the American Arbitration Association, Art. 6(1)

27 *Id.*, Art. 5.

28 *Id.*, Art. 6(3).

29 The London Court of International Arbitration rules, Art 5.5.

30 *Id.*, Art. 5.6.

31 *Id.*, Art. 6.1.

obliged to disclose in writing any circumstances that are likely to give rise to justifiable doubts as to his independence and impartiality[32]. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or if he does not possess qualifications agreed to by the parties[33]. This follows another condition that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only by reason of which he becomes aware after the appointment has been made[34].

Thus it becomes clear that an arbitrator must possess impeachable integrity and the requisite qualification. He should not act with a mind leading to predisposition towards an issue. He is likely to suffer from bias when his competence, qualification, impartiality or independence is challenged.

The conditions under which the bias need not be proved are, when the arbitrator has an interest in the parties, or has an interest in the subject matter of inquiry, or a pecuniary interest.

These three circumstances should be substantial to create a reasonable suspicion of bias. The doctrine of bias is inversely associated with other two principles namely, 1) no man shall be a judge in his own cause and 2) justice should not only be done, but manifestly and undoubtedly seem to be done. For challenging the arbitrator on the ground of bias, the likelihood of and not the actual bias needs to be proved. What is required to be established is the circumstances which would lead a reasonable man to infer that there is real likelihood of bias. The Supreme Court had observed that, what has to be seen is whether there is reasonable ground for believing that a particular person concerned was likely to have been biased[35]. In deciding the question of bias, human probabilities in the ordinary course of human conduct have to be taken into consideration. A famous author made the following remark,

> "In cases where a departmental officer is himself the arbitrator in a contract of the department, it is not necessary that he should be biased or officially interested. The very fact that the arbitrator is appointed with the consent of the parties does not prevent the affected party to challenge the arbitrator with bias".[36]

Usually the parties challenge the arbitrators, when the personal interests of the arbitrator override his interests of justice. In cases, where the bias or arbitrator's interest in the subject matter has been proved, the immediate remedy

32 The Arbitration and Conciliation Act, 1996, Secs. 12(1) and 12(2)
33 *Id.*, Sec. 12(3)(a), 12(3)(b).
34 *Id.*, Sec. 12(4).
35 *Dr. G. Sarana* v. *Lucknow University*, AIR 1976 SCC 2428.
36 V.G. Ramachandran, "Arbitrator – Proof of bias or fraud", (1983) 2 SCC 13 (Jour.).

available to the parties is to challenge the arbitrators. However, the proof of bias or the pecuniary interest is very difficult to establish. So the actual practice is to establish the circumstances that lead a reasonable man to infer that there is a real likelihood of bias.[37] It is observed that in the absence of a judicial remedy or an institutional device in the Arbitration Act, 1996 for the removal of a biased arbitrator at the very threshold of arbitration or at the earliest after the discovery of likelihood of bias by a party is a matter of great concern.[38] It is true that the present Act has reduced the element of court intervention. But at the same time, it has increased the burden of the parties to get through a free and impartial arbitral proceedings. Under the Act, the parties are left with no remedy to challenge the biased arbitrators through a judicial forum at the initial stage itself. If one party doubts the impartiality of an arbitrator, he will have to wait till the award is made.

It has also been held by the Supreme Court that though the appointment of an arbitrator is purely an administrative function performed by the Chief Justice or his designate, factors such as independence and impartiality of arbitrators is a prime factor to be looked into. In *Agio Countertrade Pvt. Ltd.* v. *Punjab Iron and Steel Co. Ltd.*,[39] it was held that the Chief Justice or the person or institution designated by him, while exercising the power under the Act shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and other consideration as are likely to secure the appointment of an independent and impartial arbitrator.[40] Any way the decision taken under the Act is final.[41] On this premise, the parties to the arbitration are being deprived of their right to challenge the arbitrators in a court of law at the preliminary stage. The Arbitration Act, 1996, confers power to the tribunal to determine a challenge against them. In these circumstances, one is forced to accept the negative rule of a judge deciding his own cause. So only after the award is made, the parties have been given the freedom to go before a court of law. An analysis of the Sec. 12[42] and the challenge procedure[43] in the Act shows that the aggrieved parties are at the mercy of the tribunal unless the opposite party agrees to the challenge on the impartiality of the arbitrator or the arbitrator

37 *S. Parthasarathy* v. *State of A.P.* AIR 1973 SCC 2701.
38 Sunil Gupta, "No Power to Remove a Biased Arbitrator Under the New Arbitration Act of India", (2000) 3 SCC 1(Jour.).
39 (2000) 100 Com. Cas. 826 (SCC)
40 *Konkan Ply Construction Copn. Ltd.* v. *Rant Construction Pvt. Ltd.*, (2002) 2 SCC 388.
41 *Id.*, Sec. 11 (7)
42 The Arbitration and Conciliation Act, 1996, Sec.12 (1). It reads, " when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence and impartiality"
43 *Id.*, Sec. 13

withdraws himself from the office. Again, if a challenge under any procedure agreed upon by the parties is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. At this stage only, the aggrieved party can approach a court of law to get his grievance remedied. That will again result in lapse of time through lengthy proceedings in the court. Considering this, a famous writer says,

"As a matter of fact one can hardly come across any arbitration. Since the promulgation of the 1996 Ordinance, India was endeavouring to get a foothold as an appropriate venue for international arbitration. Now, the proposed amendments to the arbitration law in the direction of widening the grounds for challenge to an award and enlarging the scope of judicial review would definitely disable India from having any meaningful place in the global village or international arbitration".[44]

The Arbitration and Conciliation Act, 1996, removes judicial interference during the pendency of arbitration and restricts the grounds of challenge of awards. Hence the Act as it stands, does not allow for filing an appeal immediately on the decision by the arbitrator on his own independence and impartiality. As the aggrieved party has to wait till the award is made, he has to bear the cost of the proceedings that is very high compared to dispute resolution through ordinary courts, especially in international commercial arbitrations. If, before the court, the challenge were accepted, the entire arbitration process and the involved cost would be a waste. Further the parties are subjected to incompetent proceedings, even without a proper remedy.

III The Rules of Major Arbitral Institutions Regarding Qualifications

Rules of the International Chamber of Commerce mandate the independency and impartiality of the arbitrator.[45] The arbitrator is bound to disclose in writing

(2) "An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him".

(3) "An arbitrator will be challenged only if—

a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality,

b) He does not possess the qualification agreed to by the parties".

(4) "A party may challenge an arbitrator appointed by him, or in whose appointment he has participated only for reasons of which he becomes aware after the appointment has been made".

44 D. M. Popat, "Law of Arbitration and Alternative Dispute Resolution", 32 *Chartered Secretary*, 998 (2002).

45 Rules of Arbitration of the International Chamber of Commerce, Arts.7(l), 7(2).

to the Secretariat all facts and circumstances[46]. The decisions of the ICC court as to the appointment, confirmation and challenge of an arbitrator shall be final.[47]

Rules of the American Arbitration Association ensures the impartiality and independence of arbitrators and the need to disclose the circumstances which caste doubt on their impartiality[48]. If the other party or parties do not agree to the challenge or the challenged arbitrator does not withdraw, the administrator in its sole discretion shall make the decision on the challenge.[49]

Under the rules of the London Court of International Arbitration, the LCIA court has the power to determine the challenge or revocation of appointed arbitrators[50]. Under this rule, any party may also challenge the arbitrator if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.[51]

The validity of the arbitration agreement itself confers jurisdiction to an arbitral tribunal. International arbitration agreements, therefore give rise to questions of validity of contract formation. The New York convention and most national arbitration statues, give effect to an international arbitration agreement only if it was validly formed.[52] The arbitration clauses contained in contracts generally determines the scope of the arbitration and the jurisdiction of the arbitral tribunal in deciding the dispute between the contracting parties. Over the matter of jurisdiction of the arbitral tribunal, the provision in the Arbitration and Conciliation Act, 1996 is similar to the UNCITRAL Model Law.[53]

46 *Id.*, Art. 7(3)

47 *Id.*, Art. 7(4)

48 Rules of the American Arbitration Association, Art. 7(1)

49 *Id.*, Art. 8(1), (3)

50 Rules of the London Court of International Arbitration, Art. 10.1.

51 *Id.*, Art. 10.3.

52 Gary B. Born, *International Commercial Arbitration*, Transnational Publishers & Kluwer Law International, New York 167, 2nd ed. (2001) 167.

53 The Arbitration and Conciliation Act, 1996, Sec.16(1). It reads, "The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

a) An arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract; and

b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause".

(2) " A plea that the arbitral tribunal does not have jurisdiction shall be raised not later that the submission of the statement of defense. However a party shall not be precluded from raising such plea merely because that he has appointed or participated in the appointment of an arbitrator".

(3) "A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings".

IV Jurisdiction of an Arbitral Tribunal

Jurisdiction in law means, the authority to take cognizance and decide matters in respect where of, the court, tribunal or authority is empowered to perform its functions. The power in this regard is explained by the Andhra Pradesh High Court in the following words,

> "One of the settled principles of law is that a court, tribunal or authority of limited jurisdiction can decide upon its own jurisdiction. In case it decides and assumes jurisdiction, the superior court in exercise of its power of judicial review, can always examine the jurisdictional facts. It can also decide whether the issue of limited jurisdiction has been properly determined by the court, tribunal or authority of limited jurisdiction or not".[54]

The arbitration clause that forms part of the contract shall be treated as an agreement independent of the other terms of the contract[55]. A plea that the arbitral tribunal lacks jurisdiction, if unsuccessfully challenged before the tribunal, will not give any remedy like immediate appeal to the court, as provided by the UNCITRAL Model Law.[56] The parties will have to wait till the award is made to file an application for setting aside the award. Under the Indian Law, the arbitral tribunal may admit a later plea if it considers the delay is justified. Where the arbitral tribunal rejects the plea, it will continue with the proceedings and make an arbitral award.[57] Once the matter has been referred to the arbitration, the arbitral tribunal is competent to rule on its own jurisdiction, including determination of the preliminary state of facts on which the exercise of jurisdiction depends. The existence, validity and scope of the arbitration agreement as well as the existence and the arbitrability of the dispute are decided by it. The court will not intervene at this stage. However, if a request is made after the award is passed, the court can examine whether the arbitral tribunal has assumed jurisdiction not vested in it or not[58].

Once an arbitral tribunal is entrusted with power, right or authority to decide the matter between the parties through a valid agreement, they get the jurisdiction to decide the issues as per law. The tribunal has to act within the scope of its authority and keep itself confined to its contents and limits. Any transgression would mean exceeding the scope of its authority. Normally, the issues connected

54 *United Steel Allied Industries Pvt. Ltd.* v. *Fair Growth Financial Services Ltd.*, (1998) 94 Comp. Cas. 212 (A.P.).
55 The Arbitration and Conciliation Act, Sec.16(1) (a).
56 The UNCITRAL Model Law, on International Commercial Arbitration Art. 16(3).
57 The Arbitration and Conciliation Act, 1996, Secs. 16(4), 16(5).
58 *Ibid*, Sec. 34.

with jurisdiction of the tribunal arise when, (1) The arbitration agreement is not valid (2) The award deals with a dispute not contemplated by or not falling within the terms of the submission to the arbitration. (3) The award contains a decision on matters beyond the scope of the submission to arbitration.

Apart from this, other issues that may come into picture are, that in the course of enquiry the tribunal departs from the rules of natural justice or asks itself the wrong questions the tribunal takes into account the matters that they are not supposed to take and the tribunal fails to make enquiries into something agreed upon or turns the enquiry into something not agreed upon. Though these allied issues come under the purview of procedural irregularities, they may also lead to lack of jurisdiction. Under Sec.16, the Supreme Court in a recent case, ruled that the power of the tribunal to decide the issue of the existence of a valid arbitration agreement does not exclude the power of the Chief Justice of India to decide the issue at the stage of appointment of arbitrators[59]. In another case the court upheld the validity of an arbitration agreement and the tribunal constituted under Part 1 of the 1996 Act in International Commercial Arbitrations taking place outside India.[60]

In *Olympus Superstructures Pvt. Ltd.* v. *Meena Vijay Klietan*[61], the Supreme Court adopted a harmonising approach in interpreting two different arbitration clauses in two related agreements between the same parties. Here the court held that where the dispute and differences in connection with the subject matter of the main agreement existed, the situation would be governed by the general arbitration clause in the main agreement.

Under the earlier law, the arbitration clause in the contract was considered as not independent of a contract[62]. The agreement of the parties to arbitrate was treated as a contract. Since the relation of the parties was contracted, their rights and obligations were held to be governed by the law of contract. So the court had ruled that the arbitration agreement was also a part of the contract[63]. Hence if the original contract had no legal existence, the arbitration clause also could not operate. Now the Arbitration and Conciliation Act, 1996, makes it clear that the clause or an arbitration agreement is to be treated as a clause or an agreement separate and independent from the other terms of the contract[64]. The fact that the contract is null and void, does not entail invalidity of the arbitration clause.

59 *Wellington Associates Ltd.* v. *Kirti Mehta*, AIR 2000 SCC 1379.
60 *Bhatia International* v. *Bulk Trading S.A.*, (2002) 4 SCC 105.
61 (1991) 5 SCC 651.
62 *Infra* n. 68.
63 *Union of India* v. *Kishori Lal*, AIR 1959 SCC 1362.
64 *Supra* n. 55.

Hence, even if the arbitral tribunal decides that the contract is null and void, that decision would not lead to the invalidity of the arbitration clause. If an agreement is collateral to another facilitating the carrying out of the object of the agreement though it is void, is not prohibited by law. It may be enforced as a collateral agreement. This is the case with arbitration agreements in void contracts.

Another question is regarding the validity of arbitration clause, when the agreement or contract is frustrated. Frustration of the contract means the automatic discharge of the contract. The arbitral tribunal can also decide the disputes arising out of such frustrated contract. If this is not allowed the very purpose of such an arbitration clause will be defeated.[65]

V Separability of Arbitration Agreements

The arbitration clause survives even if the contract containing it is invalid.[66] It is treated as separate. The principle of separability was discussed in *Harbour Assurance Co (U.K.)* v. *Kansa Oriental International Insurance Co.*,[67] the court made the following remarks. (i) The arbitration agreement is a separate instrument, capable of surviving the invalidity of contract; (ii) Its validity and existence or effectiveness is not dependent upon the validity, existence or effectiveness of the underlying substantive contract; (iii)The issue as to separability only arises where the challenge is directed on the contract rather than on the validity of the arbitration agreement; (iv)An issue of initial illegality of the contract is beyond arbitrator's jurisdiction; (v) The arbitrator can still hear the disputes where the contract is terminated for breach, repudiation or frustration or avoided for fraud, misrepresentation, undue influence or duress. Regarding this position the Indian Supreme Court said, "it is very difficult to determine how and when a contract is found to be bad or any portion of it can be held to be good. What is required is that when the whole contract perishes its parts must also perish, "*exnihilo nil fit*".[68]

On principle it must be held that where a contract is invalid every part of it must also be invalid. Therefore an arbitration agreement ancillary to that contract is incapable of conferring jurisdiction to arbitrators to determine disputes arising within the scope of the agreement including the disputes as to whether the illegality has rendered the contract unenforceable.[69]

65 *Naihati Jute Mills Ltd.* v. *Khayaliram Jagannath*, AIR 1968 SC 522.
66 The Indian Contract Act, 1872, Sec. 28, Exception 1.
67 [1993] QB 701.
68 V. Prasad, "Seperability of the Arbitration Clause from the Contract", MadLJ (2000) II. 5.
69 *Jaikishen Dass Mull* v. *L. Khanoria & Co.*, AIR 1974 SC 1579.

Under the Arbitration Act 1940, the arbitrator could not, by his own finding, clothe himself with jurisdiction. This concept will create undue burden on the parties and may defeat the object of the Act itself. Taking into consideration, the prompting needs of the society, the Arbitration and Conciliation Act, 1996 has purposefully avoided such a provision. Now the arbitral tribunal can decide the question as to the validity of an arbitration agreement or the jurisdiction of the arbitral tribunal[70]. To minimise the court's intervention, the Act has provided the arbitrators with ample powers that can be exercised till an award is made.

VI Rules of Major International Arbitral Institutions Regarding Jurisdiction

Rules of the International Chamber of Commerce permit the challenge of an arbitrator, whether for an alleged lack of independence or otherwise, by submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is made. Finally the court shall decide on its admissibility.[71]

Rules of the American Arbitration Association also deal with jurisdiction of the tribunal. The tribunal has the power to rule on its own jurisdiction, including any objection with respect to the existence, scope or validity of the arbitration agreement[72].

Rules of the London Court of International Arbitration also deal with the jurisdiction of the arbitral tribunal[73]. The arbitral tribunal may determine the plea regarding its jurisdiction or authority. It has the power to decide the award on its merits, as it considers appropriate in the circumstances.[74]

VII Analysis

Resolution of disputes through arbitration, whether the national or international, involves a complex network of issues. Parties are going for such costly methods to avoid the contentious litigation in courts. The Arbitration and Conciliation Act, 1996, has modified the power of judicial review by reducing its ambit. At the same time it has inadvertently increased the burden on the parties through the procedure enumerated in the Act. From the rules of international arbitral institutions and the UNCITRAL it appears that the unification in the

70 The Arbitration and Conciliation Act, 1996, Sec.. 16(1).
71 Rules of Arbitration of the International Chamber of Commerce, Arts. 11(1), 11(3)
72 Rules of the American Arbitration Association, Arts. 15(1), 15(2).
73 Rules of the London Court of International Arbitration, Art. 23.1.
74 *Id.*, Art. 23.3.

arbitration laws has made arbitrations less feasible to the current trends in the business community due to the enormous cost involved in it.

Though India has modelled its Act in line with the UNCITRAL model law, immediate appeal to the court, provided in it, does not find a place in the Indian legislation. The parties may find it very difficult to enjoy the fruits of arbitration in such situations. Provisions regarding appointment of arbitrators contained in the proposed amendments show a tendency to make the arbitration more court-oriented. Whether it is feasible to give judiciary such wide powers is to be looked in to. In the case of biased arbitrators also, the parties have to face problems due to the lack of opportunity to approach the court at the earliest. Arbitrators handling more than one case at a time are another problem to be faced by the parties. After going through the rules of other international arbitral institutions and the UNCITRAL on which the Indian Act has been compiled, it seems, that the unification in the arbitration laws has its impact in the national system. Though we have modelled our Act according to the UNCITRAL model law, Art.16 (3) of UNCITRAL, which permits immediate appeal to the court if a challenge is failed, is not adopted by our legislation. Even though Indian arbitration law also gives the parties the freedom to choose arbitrators and challenge their mandate, pitfalls are still in existence.

So in a way we are permitting parties to select the forum of courts instead of going for expensive arbitration proceedings because of the lack of suitable remedial measures in our legislation.

VIII Conclusion and Suggestions

> "Discourage litigation. Persuade your neighbours to compromise wherever you can. Point out to them how the nominal winner is often a real loser. In fees and expenses and waste of time..."

These are the words of the famous American leader, Abraham Lincoln. The highly technical and formal procedures of courts have in fact stimulated the need for less formal and speedy dispute resolution mechanisms. In the context of liberalisation of the economy and globolisation of world markets, the Government of India realised that for the effective implementation of economic reforms in India, it was necessary to introduce reforms in the business laws. As part of such an effort, changes were also made in the arbitration law in India. The Arbitration and Conciliation Act, 1996, has been enacted with the objective that, dispute arising in international commercial relations shall be settled in a fair, efficient and expeditious manner.

One of the main areas where reforms are made is the sphere of judicial intervention in the arbitration process. The tendency was to keep the judicial

forum away from the sphere of arbitration. To achieve this, the present law of arbitration in India is made in close resemblance with the UNCITRAL Model law of international arbitration. This is the reason why the settlement of international disputes through arbitration has got a tremendous impact in these recent years.

Major policy issues involved

Speedy settlement of disputes itself means the absence of long and delaying technicalities of ordinary courts. But the aspect of judicial interference in the arbitration process is against this objective. The right to go for judicial review is an accepted fundamental right and each party to the dispute has got the freedom to exercise it. The scope and extent of that freedom is an important issue in the context of alternate dispute resolution mechanisms. Over interference on the part of the judiciary will definitely result in the lagging of arbitration process, causing much worry to the disputants.

No law is static. In the same way, the law of arbitration has also been a subject of discussion for change. Recently, the Law Commission of India has proposed certain amendments to the arbitration law in India. The changes they have proposed, gives an impression that, it will surely re-introduce into the law of arbitration, the old procedural difficulties and high expenses. The question as to whether the areas where changes have been introduced are in tune with the needs of the society is also to be examined here. As an alternative to dispute resolution through ordinary courts, the arbitration process has to be separated from the formal technicalities.

Appointment of arbitrators

The appointment of arbitrators is a major step in the international commercial arbitration proceedings. So greater caution is required to be exercised by the parties during the selection of arbitrators. The parties are given the freedom to select the arbitrators of their own choice. If the parties fail to do so, the judiciary is given the freedom to choose arbitrators. The amendments now propose to replace the words, 'Chief Justice of India' and the words, 'Chief Justice' by the words, 'Supreme Court' and 'High Court', respectively, so as to convert the process of appointment of arbitrators from being an administrative act to a judicial one. This will make the arbitration law in India in conformity with the UNCITRAL Model Law as the latter empowers the court to make appointment of arbitrators. Taking into account the Indian conditions it is not at all feasible to bring in court intervention into each and every step in the arbitration process. So inconsistencies are to be kept wherever it necessitates.

The provisions as it stands now, should either be retained or the Chambers of Commerce of various states or other arbitral institutions shall be given the

power to appoint arbitrators, as they are well versed in the matter of arbitration both domestically and internationally. This will definitely help the trading industries also.

Next problem is with regard to the number of arbitrators. The highest judicial forum is always manned by two judges, so that the chances of committing errors are less as one man's mistake can be pointed out by his colleague. In arbitration also, instead of the sole arbitrator, the tribunal shall be constituted by two arbitrators. This will ensure confidence in those who are seeking for arbitration. Again, the fact that one of the parties to the dispute chooses one arbitrator and the other party to the dispute would choose another arbitrator would not at all ensure confidence in the forum of arbitrators. As a remedy to this, it is suggested that, both the arbitrators must be nominated by both the litigants. The appointed arbitrators can together select the presiding arbitrator.

Competent arbitral institutions can assist the parties in choosing the right persons to act as arbitrators. After the appointment is made, the institution would keep contact with the proceedings to ascertain the performance of arbitrators. Another problem area is the overburdening of retired, eminent persons with several arbitration cases at a time. Here, the remedy is that no person should be appointed as an arbitrator, until he has finished the case in his hand. There should also be a reasonable time for the completion of arbitration cases. This will provide a check on prolonged arbitral process.

Qualification of arbitrators and the extent of their powers

When there is a clear proof of bias or misconduct on the part of the arbitrators the courts are given the power to set aside an arbitral award. The power is given to the court only after the final award is made and not before that. In such a case, the parties have to wait till the entire arbitration proceedings are over. In such a case, there is wastage of both money and time. So it would be better to give the court the power to interfere with the arbitration process at an early stage, when there is a reasonable apprehension as to the absence of impartiality and independence of arbitrators. Similar is the case with jurisdictional matters. Also, when it is clear from the arbitration agreement that the arbitrators have no jurisdiction to decide the dispute, the parties shall be given the freedom to approach the proper judicial forum, at the initial stage itself. The extent of the arbitrator's power is decided by the arbitration agreement. So when there is a doubt as to the validity of the arbitration agreement, the proper remedy is to refer the matter to the judiciary for consideration. This power of judicial review should not be exercised by the courts in a defensive manner. Keeping in mind the interest of the business community and public policy, it is desirable that the courts exercise its power of judicial review in the right place at the right time.

Procedural justice for the parties

Procedural justice is the most important aspect of arbitration process. Equal justice for all is the cardinal principle on which the entire system of administration of justice is based. Violation of the principles of natural justice is a ground for inviting the interference of judiciary. Like judges in an ordinary court, the arbitrators are also bound by these rules. An arbitral award can be challenged successfully, if it is proved that, there is a violation of the principles of natural justice by not giving a notice, or not allowing the other party to present his version of the dispute.

The term 'natural justice' itself is a vague term. Its meaning differs from case to case. If unlimited power is given to the judiciary in deciding the sanctity of the whole arbitral proceedings, that will definitely affect the integrity of the arbitration process. So it is suggested that, the judiciary should keep some kind of restraint over its power to review arbitral award on the ground of violation of the procedural justice.

Legality and fairness of arbitral awards

Legality of an arbitral award mainly depends on the propriety of the substantive law applied to the arbitration. The interpretation of the applicable law also matters here. Often the arbitrators find it very difficult to come up with an interpretation of law in accordance with the intention of the parties. Extending the scope of judicial review over arbitral awards may cause necessary hardships and suffering to parties in such situations. So it would be better to limit the scope of judicial review in such situations.

Fairness in the final award may also invite the attention of courts when there is a patent irregularity in the award made. An award passed without reasons can be one among such situations. But how far the judiciary is permitted to intervene in such cases is a serious problem to be solved. Because all cases where a non-speaking award is given cannot be counted as a case of unfair award. Now, the proposed amendments also contain a provision as to set aside an award on the ground of error apparent on the face of the decision. It is not desirable to extend the scope of judicial review to such circumstances because each case differs from the other. A common standard cannot be adopted in every case, because that will definitely go against the national interest. So also the element of fairness depends on the facts and circumstances of each and very case.

It is suggested that only in cases where there is a substantial violation of the fundamental principles of legality and fairness, the award can be challenged before a court of law. Where there are inner discrepancies in the application of the law or its interpretation and that too without affecting the final outcome,

there is no need to exercise the review power by the courts. It is to be remembered that fairness and justice should not be sacrificed at the altar of speed. Unnecessary and enormous sittings of arbitration should be curtailed. Both the arbitrators and the lawyers are paid normally on the number of sittings they hold and appearances they make. The arbitrators should act as public officers discharging the public function of dispensation of justice.

Finality and enforcement of arbitral awards - need for an alternate forum

Under the present law, there is a presumption of finality of awards. In domestic arbitration, the awards are enforceable as a decree of the court due to this finality aspect. But this is not the case with international or foreign awards. In an international arbitration, issues relating to different national laws will come into play. As a result, during the enforcement process, it has to get through a number of hurdles. The law specifically says about certain conditions under which, the court can intervene in the enforcement process of an arbitral award. Though there is uniformity in the aspect of conditions for enforcement in the international level, the interest of individual nations overweighs such uniformity.

Instead of judicial review what is needed is an alternate forum for judicial review during the process of enforcement. The international arbitration court may be useful in this matter. What is needed first, is an acceptable universal code for the enforcement of international commercial arbitral awards. This will be implemented by the international arbitration court irrespective of the overriding provisions in the national laws. So wherever an international commercial arbitration award is made, the question of its enforceability will come before this court. The court shall be consisted of members of major arbitral institutions and others who are experts in the field of international arbitration. The court will look into the conditions for enforcement and if they are satisfied, the award will be enforced.

This can definitely help the parties in avoiding the delay by getting the problems connected with enforcement to be remedied at the earliest. Under the present law, the parties even after getting the arbitral award without any delay, have to wait for a long time, if the opposite parties raise a claim as to its non enforcement. Opposite parties preferring appeals are in a way preventing the other party from getting it enforced. At this point, the common fear of arbitrators running the finances and commerce of the parties may also come into reality. To get it remedied, it will be useful if such an alternate forum is established to deal with such enforcement issues. This can also cure the infirmities, present in the international commercial arbitration process, especially in the aspect of enforcement of awards.

"Arbitrate and don't litigate" shall be the principle in mind while going for an alternate dispute resolutions mechanism to resolve disputes. Lawyers and businessmen are frequently criticised for judicial interference in arbitration process. There are horror stories of arbitrations being delayed for years by the parties fighting through the courts in an attempt to delay an inevitable result. It is quiet natural that the parties want minimum judicial interference in such situations. Though it is not possible to exclude judicial intervention fully, if the aforesaid suggestions are followed, this can be reduced to a great extent. By this way, the loopholes in the present law can also be remedied.

Most of the areas, where the issue of judicial review of arbitral award arises, have a close connection with the conduct of arbitrators. Any kind of misconduct or *malafide* acts from the arbitrators will definitely vitiate the arbitral award. It is therefore, necessary that there should be an internationally accepted code of conduct for the arbitrators, while resolving the disputes. On the basis of that, the court can decide the fairness in the award made in an arbitration process. The arbitrators should adhere to those standards, which are expected out of them. A feeling of responsibility should there in the mind of arbitrators. This may enhance the uniformity in arbitration laws in the international level. The limitations, which are to be there in the sphere of judicial review will help the business community in achieving the objectives of Indian arbitration law and thereby promoting the international trade activities of the country.

SELF DETERMINATION AND TERRORISM

*Anupam Jha**

'Whoever stands by a just cause cannot possibly be called a terrorist'

-Yasser Arafat (1929-2004)

I Introduction

THE IDEA of self-determination as a political doctrine has its origin around the 18th century though as a legal doctrine, its status is highly controversial[1]. This doctrine carried very little legal significance in that period, as during this period international law permitted waging of war and establishment of titles to territories by conquest and aggression. Colonialism also negated the right of self-determination. In the twentieth century, the President of USA Woodrow Wilson, appeared supportive of the idea of self-determination. He mentioned it in the famous 'Fourteen Points' presented to the Paris Peace Conference after the First World War. In spite of its appearance in that document, the concept of self-determination failed to get unqualified support. This principle was not even mentioned in the Covenant of the League of Nations[2].Finally, the principle of self-determination made its way in the United Nations (UN) Charter in 1945, in Arts. 1 and 55. Even then, the founding fathers of the UN Charter did not realize that they were creating a precise principle of international law capable of giving rise to specific rights and obligations of States.

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1 See Rosalyn Higgins, *The Development of International Law through the Political Organs of United Nations* (London: Oxford University Press 90-106, (1963), Rahmatullah Khan, *Kashmir and the United Nations*, Delhi, Vikas Publications (1969), 75-103; D.W. Bowett, "Self-Determination and Political Rights in the Developing Countries" in Proceedings of the American Society of International Law , (April 28-30, 1966), 129-135; also " Problems of Self-Determination and Political Rights in the Developing Countries', a Panel Discussion of American Society of International Law, April 29, 1966, Proceeding of the American Society of International Law, 60th Annual Meeting (1966) 129-150; R.G.Gilbert, "The 'Law' and 'Transnational Terrorism" Netherland Yearbook of International Law, vol. XXVI 3-32 (1995).

2 For the proposals of President Wilson see, U.O. Umouzurike, *Self-Determination in International Law*, (Connecticut:: Archon Book 18-19 and 26, (1972), see also Albert Cobban, *National Self – Determination*, (London: Oxford University Press 16-34 (1944).

An attempt to define terrorism was first made in the 1937 Geneva Convention for the Prevention and Punishment of Terrorism[3], concluded under the aegis of the League of Nations. This Convention never entered into force, and obtained only one ratification[4]. Predominantly the main reason for reluctance of the states to ratify the Convention was the wide scope of definition of terrorism in the convention[5]. When the United Nations came into existence, it also began the task of defining terrorism. On 18 December 1972, the UN General Assembly, on the recommendation of the Sixth Committee[6], decided to establish an Ad Hoc Committee on terrorism, composing of thirty-five members.[7] The United Nations position on terrorism has changed over the last three decades, and a shift from a position that, at least arguably, permitted terrorism in support of the struggle for self-determination, to one that unequivocally condemns terrorism as criminal and unjustifiable wherever and by whomever committed is apparent[8].

Self-determination is of two kinds: external and internal self-determination. When people fight for independence against colonial domination and alien occupation and against racist regimes, it is termed as external self-determination. On the other hand, when in an independent country, any one or other minority groups struggle for secession or self-government, it is called internal self-determination. The present paper is an attempt to answer some issues of significant importance viz., can a group of people take resort to acts of terrorism in pursuance of the right to external or internal self-determination? When agencies of one State support the cause of self-determination of a political group of another State, does that State incur any responsibilities under international law? The first part of this paper deals with external self-determination and terrorism, and the second part of the paper analysis internal self-determination and terrorism. The third part deals with State terrorism and individual criminal responsibility.

3 Hereinafter cited as the 1937 Geneva Convention

4 Although the Convention was signed by 24 countries, only India ratified it on Jan 1, 1941. The signatory states were: Albania, Argentina, Belgium, Cuba, Czechoslovakia, Dominican Republic, Egypt, Ecuador, Estonia, France, Greece, Haiti, Norway, Netherlands, Peru, Romania, Spain, Turkey. USSR (Union Soviet Socialist Republic of Russia), India, Monaco, Venezuela and Yugoslavia.

5 T, M. Frank and B. B. Lockwood, 'Preliminary thoughts towards an International Convention on Terrorism', 68 Am J Int L 68 (1974) 70.

6 UN Doc. A/8969 (1972)

7 GA Res. 3034, 27 UN GAOR Supp. (1972) Para. 9. The thirty-five members of the committee included: Algeria, Austria, Barbados, Canada, Congo, Czechoslovakia, Yemen, France, Greece, Guinea, Haiti, Hungary, India, Iran, Italy, Japan, Mauritania, Nicaragua, Nigeria, Panama, Sweden, Syria, Tunisia, Turkey, Ukraine, USSR, UK, Tanzania, USA, Uruguay, Venezuela, Yugoslavia, Zaire, Zambia.

8 Malvina Halberstam, 'The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed', 41Col J Trans L3 573-584 (2003).

II External Self-Determination and Terrorism

The attitude of western states during the initial 15 years after the establishment of the United Nations, was to keep any discussion on self-determination out of the United Nation with a view to avoid any questions concerning their colonial possessions. Art. 73 of the UN Charter obligated the members of UN administering those territories that had not attained self-governance, not to terminate the obligation to provide its people an opportunity to exercise the right to self-determination.It is noteworthy that whereas Art. 55, of the Charter refers to the self-determination of 'peoples', Art. 73, refers to 'people'. The reference to "people' in this Article as well a reference to "peoples" in Art. 55, was a subject of considerable discussion in legal circles, although with a general agreement that the reference to "peoples" in the UN Charter indicates 'people' subject to colonial domination or those who inhabit a non-self-governing territory. This is in contrast to metropolitan areas, even if backward peoples, who cannot be said to have attained a full measure of self-government as specified in Art. 73, inhabited such metropolitan areas.[9]

Three General Assembly Declarations have made a major contribution to the development of the "concept or right or ideal or vision of self-determination"[10]. The first Declaration, named The UN Declaration on the Granting of Independence of Colonial Countries and Peoples[11] for the first time, stated that "the subjection of peoples to alien subjugation, domination and exploitation constituted a denial of fundamental human rights, and is contrary to the Charter of the United Nations". Accordingly, the Declaration affirms the right of all peoples to self-determination. However, the declaration also make it very clear that any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations. From this it is quite clear that the right of self-determination referred to in the 1960 declaration only addressed territories under colonial possession. The International Court of Justice

9 See A.Rego Sureda, *The Evolution of the Right of Self-Determination; A Study of the United Nations Practice* (1973),102, 104-105, 107 and 110; see also M.K. Nawaz, "Colonies, Self-Government and the United Nation": Vol. XI Indian Year Book of International Affairs, (1962) 3-47; James Crawford, *The Creation of States in International Law*, Oxford: Clarendon Press, 356-384 (1979).

10 Henry J. Seiner & Philip Alston, *International Human Rights in Context*, (2000)

11 See the UN GA Resolution 1514 (XV) of 14 December 1960. A 'Declaration' is a resolution of the General Assembly, which technically, has the same legal force as any other resolution. However, the term is generally used with respect to resolutions of a fundamental character and particular importance.

also endorsed this, in both the *Namibia*[12] and *Western Sahara*[13] cases. In these cases, the Court found that the declaration of the General Assembly only affirmed the principle of equal rights and self-determination as a policy in relation to Trust and non self-governing territories.This principle was also endorsed recently by the Court, in the *East Timor* case[14]. The Court here held that in its view "Portugal's assertion that the right of peoples to self-determination evolving from the Charter in accordance with the United Nations practice has an *erga omnes* character, and is, irreproachable"[15]. After citing its previous decisions on the matter, the court also noted that "it is one of the essential principles of contemporary international law"[16].

The principle of self-determination also came up for consideration as part of the UN Declaration on Friendly Relations[17]. The Declaration reiterated the basic principle of the right of self-determination with a view to bring a speedy end to colonialism. It also emphasized that this endorsement of the right of self-determination should not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples, as described in the Declaration, and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color. In this connection, paragraph 4 of the Declaration on equal rights and self-determination has special significance for it notes that full independence is not the only mode of implementing the right of self-determination. It also mentions

12 ICJ Reports, (1971) 58.

13 ICJ Reports, (1975) 31.

14 ICJ Reports, (1995) 90.

15 *Id.*, at 13.

16 *Id.*, para. 29, at 13. However, it may be noted that the Commentary to Art. 48, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts finalized by the International Law Commission in its second reading does not indicate any such clear conclusion or restriction on the application of the right of self-determination while referring to observation of the ICJ in the East Timor case. Two members of the Commission, Mr. Rosenstock and Mr. Simma opposed any such restricted scope for the right of self-determination. The occasion, however, did not permit the members to explain the full scope of the right of self-determination, as this was not the main subject matter of the Draft Art. 48.Any such discussion further would, as the commentary itself noted, "go well beyond the task of codifying the secondary rules of State Responsibility..." (para 9 of the commentary). In any case, commentaries are only indicative in value of the principles explained. (See para 9 of the commentary to Art. 48 of the draft Art. on Responsibility of States for Internationally Wrongful Acts completed in second reading by the International Law Commission and submitted to the 56th General Assembly, Supplement No. 10 (A/56/10)).

17 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the UN Charter, GA Res. 2625, (XXV) UN GAOR, Supp. (No.28)(1970).

alternative possibilities, such as free association or integration with independent States or the emergence into any political status freely determined by the peoples.

The third Declaration, viz., the 1993 Vienna Declaration, reinforced this right as a human right in the following words, :

> " The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right."[18]

The struggle for external self-determination has been historically of two kinds: non-violent and violent, involving armed struggles. Such armed struggles, according to international law, come within the purview of international humanitarian law[19], when 'peoples' fight against colonial domination and alien occupation and racist regimes in the exercise of their right of self-determination, rules of international armed conflict come into operation[20]. The law of international armed conflict that elaborates a set of prohibitions of terrorist acts, also applies to struggle for national liberation[21].

In addition to the Geneva Conventions, the UN General Assembly adopted a resolution, establishing a thirty-five member Ad Hoc Committee on International Terrorism in 1972. The third paragraph of this resolution, reaffirmed the inalienable right to self-determination. It is worth examining as to why a paragraph reaffirming the right to self-determination included in a resolution on terrorism? Perhaps, it implied the possible use of terrorist acts in the cause of self-determination[22]. The subsequent resolutions of the Assembly also included a paragraph on reaffirmation of the principle of self-determination. However, a paradigm shift has occurred in the approach of the Assembly since 1993. Starting from the UN Declaration on Measures to Eliminate International Terrorism

18 World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF. 157/ 23, Art. 2 (1993)

19 International humanitarian law refers to a body of rules governing armed conflicts. Such rules are primarily derived from the four Geneva Conventions, 1949 and their Additional Protocols, 1977. The four Geneva Conventions are the following: Geneva Convention for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Geneva Convention for the Amelioration of the condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949. Additional Protocol I, 1977 deals with international armed conflicts whereas Additional Protocol II, 1977 deals with non-international armed conflicts.

20 Art. 1(4) of Protocol I Additional to the Geneva Conventions, 1977.

21 For example, Protocol I Additional to the Geneva Conventions, 1977, Arts. 48, 50, 51.

22 *Supra* n. 9, at 574.

adopted by the Assembly in 1994[23], all subsequent resolutions on terrorism do not include a paragraph on self-determination. Thus, if inclusion of a reference to self-determination in the earlier resolutions suggested that resort to terrorism might be justified in the struggle for self-determination, the omission of any such reference in the later resolutions is a clear rejection of that position. The broad language used in the General Assembly and Security Council Resolutions since 1993 condemn terrorism, "wherever and by whomever" committed[24].

III Internal Self-Determination and Terrorism

The 1970 UN Declaration on Friendly Relations is clear about the application of the right of self-determination in case of people under colonialism or those belonging to non-self governing territories. What is not clear however, on the basis of the language of the declaration, is the circumstances and the extent or form of that right when it is claimed by a group of people or minority communities, who are otherwise nationals of an existing independent State. One commentator, however, noted that the enunciation of the principle of the right of self-determination under the 1970 UN Declaration, goes beyond situations of colonialism or non-self governing territories and also applies to situations within an existing independent state. Such a conclusion could be extracted by a reading of paragraph 7, of the principle of right of self-determination, which emphasizes upon the "duty to promote the respect for an observance of human rights and fundamental freedoms in accordance with paragraph 3"[25]. However, any such extension of the right of self-determination to situations within an existing independent State has to be clearly governed by paragraph 7 of the Declaration which highlights the need to seek the benefits of this right within the constitutional structure of the State itself, particularly, when the State concerned is "possessed of a government representing the 'whole people' belonging to a territory without distinction as to race, creed and color".

The above analysis is equally applicable to the interpretation of the right of self-determination incorporated in Art. 1, of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural rights. This provision, and the subsequent Declaration of 1993, made at the UN

23 GA Res. 49/60, UN GAOR, 49th session. For the significance of a 'Declaration', see *supra* n. 11.

24 *Supra* n. 9, at 577.

25 Robert Rosenstock, " The Declaration of Principle of International Law Concerning Friendly Relations: A Survey", 65 Am J Int L 713-35 at 732 (1971).

World conference on Human Rights did not change the situation. It has been so recognized by the Canadian Supreme Court in *In re Secession of Quebec*[26]

The Canadian Supreme Court also recognized the right of colonial peoples to exercise their right of self-determination by breaking away from the imperial power as undisputed[28]. It was argued before the Supreme Court of Canada, that those people who were made victims of attacks on their physical existence or integrity or of a massive violation of their fundamental rights could claim the right of secession. In this connection, the Court stated, that it remained unclear as an international law standard, whether people are entitled to seek secession as a last resort if blocked from the meaningful exercise of this right to self-determination internally.[29]

In the context of the exercise of the right of self-determination, we may also note that the principle of territorial integrity and political independence was also strongly endorsed by the Badinter Commission. Following the disintegration of former State of Yugoslavia, a question arose of whether Serbian People in Croatia and Bosnia-Herzegovina have a right to self-determination. The Badinter Commission was established to examine, among other things, this question. Even while it endorsed the need to protect the rights of minorities within a state, the commission was of the view that:

> The Commission considers that international law as it currently stands does not spell out all the implications of the right to self-determination. However, it is well established that whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti posseditis juris*) except where the States concerned agree otherwise.[30]

26 For a very interesting discussion on the right of self-determination in connection with the claim of Quebec, a province of Canada to secede from Canada, see *In re Secession of Quebec*, (1998) 2 SCR 217 of Canada. It is stated that while the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both defined the ambit of the right to self –determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of territorial integrity of existing State including Canada and the right of a people to achieve a full measure of self-determination. A State whose government represents the whole of the people or peoples resident within its territory on the basis of equality and without discrimination and respect the principle of self- determination in its own internal arrangement is entitled to protection under international law of its territorial integrity.

27 See *Ibid.*, paras 130 and 134.

28 *Ibid.* paras 134-135. It is argued that when a people is blocked from the meaningful exercise of its right to self-determination internally its is entitled as a last resort, to exercise by secession, the Vienna declaration requirement that the governments represent the whole people belonging to the territory without distinction of any kind adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

29 See 31 ILM 1488-1498 (1992).

30 The UN Charter, Art. 2(4).

The above analysis brings out the conclusion that the right of self-determination involving the right of people under colonialism to gain independence from colonial powers; to borrow the phrase used by the International Court of Justice, is 'irreproachable'. This is known as the right of external self-determination. It is also clear, that there is another variety of right of self-determination, the right of internal self-determination. This involves struggles engaged in by a national minority, to gain rights and freedoms within the polity of the State. The same cannot be undertaken through armed struggle and the territorial integrity and political independence of the State must be respected, particularly in the case of a state with a government representing the whole people without any discrimination as to race, religion, color, creed or any other similar consideration.

Just as the use of force is prohibited in international relations[31], the same is even more emphatically prohibited within a State. Force can only be used in accordance with law, in defense of law and under conditions of accountability to commonly established institution of authority and control of the State. That being self-evident, every movement for internal self-determination is subject to the constitution, law and other legal procedures of the State.

The case is equally clear if a group of nationals of a State gain control of a part of territory of a State and commence a civil war, the armed struggle between the dissident group and the armed forces of the government would come within the terms of either Art. 3 of the Geneva Conventions[32] or under the provisions of the Protocol II of 1977, additional to the Geneva Conventions of 1949 subject to the fulfillment of conditions prescribed in Art. 1(1) of the Protocol II. In this context, it is obvious that the struggle for internal self-determination must be conducted without affecting the human rights of other citizens of the State. Violence could only be justified, if at all it can be justified, if it were to be the sole means of enhancing democracy and human rights[33]. The State has every duty to protect its citizens against torture, abduction and being taken as hostage and protect their right to life with all the lawful authority at its disposal.

It is further submitted that the Geneva Conventions, 1949, Protocol I and II and the law of human rights and the respect for rule of law in any democratic society prohibits terrorism as a means or method for pursuing any struggle, however legitimate the cause may seem to be.

30 *Supra* n. 20 for the name of the Geneva Conventions.

32 See generally J. Rawls, *A Theory of Justice* (1972) and *Political Liberalism* (1993).

33 Robert Rosenstock, "An International Criminal responsibility of States?" in ILC, International Law on the Eve of Twenty-first Century; Views from the International Law Commission (1997) 265-285.

IV State Terrorism and Individual Criminal Responsibility

The concept of State terrorism or State crimes is not recognized in international law, as the State itself cannot be punished[34]. Invariably, it is the individual in possession of the sovereign function as the Heads of the State or Government or senior functionaries of the State including the Army General, who can be called upon in their individual capacity to answer for the crimes committed on behalf of or in the name of the State. The State can be made accountable for its internationally wrongful acts by addressing itself to the consequences arising out of the State responsibility[35]. The International Law Commission, has not approved of the concept of State crimes till now, rather, it favors the concept of "serious breaches of obligations under peremptory norms of general international law" in its second and final readings of the draft Article on State responsibility. Accordingly, it is submitted that violations of principles of international humanitarian law or law of human rights committed by armed forces or other functionaries of the State are as much open to prosecution and punishment, as violations of the same committed by individuals, groups of individual or organized military units or guerilla forces fighting different kinds of struggles.

International law is constantly evolving and the exercise of universal jurisdiction in respect of offences involving the abuses or excesses committed by state authorities, armed forces, security and police forces in-charge of law and order is constantly growing. Simultaneously, states are also urged to undertake obligations to punish such crimes under their own laws and within their jurisdiction even if the crimes are committed outside its territorial frontiers and the offender and sometimes the victim has no special link to that State. The immunities of officials concerned including Heads of States is being reviewed with a view to facilitate prosecution of such offences. In addition, the evolving concept of crimes against humanity and the legal regime concerning serious breach of obligations under peremptory norms of general international law may also provide a basis for any State to prosecute egregious breaches of human rights e.g.

34 Mr. Alain Pellet who strongly defends the concepts of State crime in international law, however, accepts that the word crime may be misleading, even though the concept is definitely indispensable in contemporary international law. He also noted that in these cases th responsibility of the individual 'through whom' the State has committed its own responsibility. He noted that "this being said it must be kept in mind that, in international law, analogies with domestic law are rarely helpful an usually misleading. International responsibilities presupposes the existence of the tribunals which has jurisdiction to establish the crime a condition which is not fulfilled in international law", See Alain Pellet, "Can A State Commit a Crime Definitely, Yes!" 10 EJIL 425 433-434 (1999).

genocide, systematic and wide spread torture, killing, etc, and violations of grave breaches or international humanitarian law[35].

V Conclusion

The right of external self-determination has been well established in the context of the right to be free from alien control, in the sense of colonialist rule or foreign occupation. Beyond that context, it has been a controversial and ambiguous right[36]. The right to internal self-determination explicitly prohibits terrorist activities. The resolutions of the Security Council and the General Assembly also unequivocally condemn all kinds of terrorist activities. In addition to the above mentioned resolutions, there are a number of treaties on specific aspects of terrorism, such as hijacking[37], attacks on internationally protected persons[38], terrorist bombings[39], and the financing of terrorism[40], even though each of these conventions were narrowly drawn and carefully avoided the word 'terrorism', except the last two. Now the UN does not recognize terrorist acts in the name of self-determination. The responsibility of one State promoting the cause of self-determination in the another independent State can be fixed under international law, as the international community is recognizing the universal jurisdiction principle. However, minority rights should be protected in an independent State, and even autonomy may be granted to a minority group within a State, but when these groups take resort to terrorist activities, they should be punished not only domestically, but also at any suitable international forum.

35 It is argued that international crimes that rise to the level of *jus cogens* constitute *obligatio ergo omnes*, which are imderogable,. Legal obligations which arise form the higher status of such crimes including the duty to prosecute or extradite, the non-applicability of statures of limitations on such crimes, the non applicability of any immunity up to and including heads of States, the non-applicability of the defense of "obedience to superior orders" (save as mitigation o sentence), universal application of these obligation whether in time of peace or war, their non-derogation under "states of emergency ", and universal jurisdiction over perpetrator of such crimes. See M. Cerif Bassiouni, "International Crime: Jus Cogens and Obiligatio Erga Omnes", 59 (1996) Law and Contemporary Problems (Autumn) 63, 63-74 (A special edition on accountability on international crimes and serous violations of fundamental human rights edited by M. Chevif Bassiouni and Madeline H. Morris).

36 Frances Raday, 'Self-determination and minority rights', 26 Fordham ILJ (2003) 453-499.

37 Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 UNTS, 195 (1972) .

38 International Convention against the Taking of Hostages, Dec. 17, 1979, 18 ILM 1456-63(1979).

39 International Convention for the suppression of Terrorist Bombings, 37 ILM 249(1998).

40 International Convention for the suppression of the Financing of Terrorism, GARes. 54/109, UN Doc. A/RES/54/109(1999).

THE BIOLOGICAL DIVERSITY ACT, 2002 : IS IT THE RIGHT SOLUTION?

Aditi Choudhary[*]

I Introduction

ALL HUMAN activities on earth are interconnected and our environment is a perfect example of it. It is a complex web of relationships and interrelationships where mutual interdependence of all living forms is essential for their subsistance. This is also a fact, that out of all life forms that constitute the environment, humans possess unlimited ability to wreak havoc on it, and the advancement of science and technology, population explosion, industrialisation, urbanisation, poverty, overexploitation of resources, are abusing our planet and causing irreversible harm to its biodiversity.

II Biodiversity and its Importance

Biodiversity (biological diversity) is a blanket term for the natural world and its biological wealth. Stated specifically, it means the variability among living things from all sources and the ecological complexes of which they are part and includes diversity within species or between species and of ecosystems.[1]

Biodiversity can be expressed, most conveniently but not exclusively in relation to three hierarchical categories which describe different aspects of living systems measured in different ways: (i) genetic diversity – the variation of genes within a species, (ii) species diversity – the variety of species within a region, (iii) ecosystem diversity – the variety of ecosystem within a region. Other expressions of biodiversity include the relative abundance of species, the pattern of communities in a region, the age structure of populations, changes in community composition and structure over the years.[2]

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1 The Biological Diversity Act. 2002, Sec 2(b).

2 Philippe Sands, *Principles of International Environmental Law* 498 2nd Ed; (2003) Cambridge University Press

The importance of biodiversity is beyond measure. Firstly, it provides an actual and potential source of biological resources (eg. food, pharmaceutical etc.), secondly, it contributes to the maintenance of the biosphere in a condition which supports human and other life, and thirdly, it is worth maintaining for non-scientific reasons of ethical and aesthetic value.[3]

III Threats to Biodiversity

The 2004, IUCN (The World Conservation Union) Red List of 'Threatened Species', reveals that a total of 15,589 species face extinction. One in three amphibians and almost half of all freshwater turtles are threatened, one in eight birds and one in four mammals are known to be in jeopardy,[4] unfortunately due to environmental damage caused by mankind.

The continued loss at the current rate, it is estimated, would destroy up to 15 percent of the earth's species over the next twenty five years, with twenty to seventy five species per day being condemned by 2040.[5] Realising the gravity of the situation several governments made a commitment to address biodiversity loss at the 2002 World Summit on Sustainable Development by setting the target of significantly reducing the current rate of loss of biological diversity by the year 2010, echoing a similar target agreed by parties to the Convention on Biological diventy (CBD) earlier that year.

Threats to biodiversity may be a result of a direct human action like hunting or indirect human activities like habitat destruction or modification due to industrial or agricultural activities, but the casuality is the capacity of ecosystems to regenerate themselves. Further, population growth, increase in resource consumption, ignorance about species and ecosystems, poorly conceived policies, and effects of global trading systems are the factors that contribute to biodiversity loss in habitats.[6] The introduction of exotic species into a new environment also threatens the native species.[7] Pollutants strain ecosystems and reduce or eliminate populations of sensitive species. Ozone depletion, climate change and global warming are also changing habitats and distribution of species. Scientists therefore warn that even a one degree increase in the 'average global temperature' if it comes rapidly, will push many species over the brink.[8]

3 *Ibid.*

4 http://www.iucn.org/themes/scc/red_lists.

5 *Supra* n. 2 at 500.

6 *Ibid.*

7 Sarah Fitzgerald, International Wildlife Trade: Whose Business is it? Washington D.C. : World Wildlife Fund, 1989.

8 WRI/IUCN/UNEP; Global Biodiversity Strategy, V (1992).

IV Convention on Biological Diversity (CBD), 1993

Realising that the problem of conserving biodiversity had to be tackled at the global level before it was too late, the United Nations convened the UN Conference on Environment and Development (the Earth Summit) in 1992. It was at the Earth Summit that the legally binding Convention on Biodiversity (CBD) was opened for signature. It came into force on 29 December 1993, and as on December 15, 2004 there were 188 parties to the Convention. The CBD has three main objectives: (i) The conservation of biodiversity, (ii) Sustainable use of the components of biodiversity, and (iii) Sharing the benefits arising from the commercial and other utilization of genetic resources in a fair and equitable way.

The CBD goes beyond the 1972 Stockholm Declaration and the Convention on International Trade in Endangered Species, 1973 (CITES), and establishes a general obligation for preserving biodiversity and to provide a coherent framework for action in future (evidenced by the Biosafety Protocol 2000).

The CBD recognises the sovereign rights of the states to exploit their own resources in accordance with their environmental policies. It imposes responsibility on them to ensure that activities within their jurisdiction and control does not cause environmental damage to the other states. It recognises the principle of state responsibility for transboundary environmental damage.[9] It also recognises the principle of equitable sharing of the benefits arising out of the utilisation of genetic resources, and imposes a specific obligation on each state to share in a fair and equitable manner, the results of research and development with the party providing the genetic resources. However, such sharing shall be on mutually agreed terms,[10] as a balance is visualised between conservation, sustainable use and sharing of benefits. The right to an equitable share follows logically from the principle of sovereignty over natural resources.

Acknowledging the sovereign rights of the states over their natural resources, the CBD requires each party to endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other parties and not to impose restrictions that run counter to the objectives of the CBD.[11] It however gives authority to the national governments to determine access to genetic resources[12], that is to be granted on mutually agreed terms[13] and subject to prior informed consent of the party providing the resources.[14]

9 Convention on Biological Diversity, Art. 3.
10 *Id.*, Art. 15(7).
11 *Id.*, Art. 15(1), 15(2).
12 *Id.*, Art. 15(1).
13 *Id.*, Art. 15(4).
14 *Id.*, Art. 15(5).

The CBD establishes a general obligation for all parties to provide access to and transfer of technology, of two particular kinds to other parties.[15] The first includes those technologies which are relevant to the conservation of genetic resources, such as in gene banks and which may make it easier for the country of origin of those resources to implement the convention's conservation obligations. The second includes technologies which make use of genetic resources and do not cause significant damage to the environment. With regard to the latter category, this obligation is additional to the requirement of fair and equitable sharing of the benefits with countries that have provided the genetic resources.

The CBD imposes an obligation on each party to take legislative, administrative or policy measures to provide for the effective participation in biotechnological research activities by those developing states which provide the genetic resources for such research.[16]

It requires parties to develop or adopt national strategies, plans or programmes for the conservation and sustainable use of biodiversity into relevant sectoral or cross-sectoral plans, programmes and policies[17] including in situ and ex situ conservation measures.[18]

The parties are under an obligation to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles viz. traditional knowledge relevant for the conservation and use of biological diversity.[19]

V The Biological Diversity Act (BDA), 2002

India signed the CBD on 5th June 1992 and ratified it on 18th February 1994. In order to give effect to its obligations under the CBD, the Biological Diversity Act 2002, (BDA) was enacted.

The Act, provides for the conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.[20] Some of the salient provisions in the BDA for regulation of access to biodiversity, its conservation and sustainable use are: (i) Conservation and development of areas important from the standpoint of biological diversity

15 *Id.*, Art. 16.
16 *Id.*, Art. 19(1).
17 *Id.*, Art. 7.
18 *Id.*, Art. 8.
19 *Id.*, Art. 8(j).
20 See Introduction to The Biological Diversity Act, 2002.

for declaring them as biological diversity heritage sites. (ii) Protection and rehabilitation of threatened species, (iii) Protection of traditional knowledge of local communities related to biodiversity. To secure sharing of benefits with local people as conservers of biological resources and holders of knowledge and information relating to the use of biological resources.[21]

In exercise of the powers conferred by S. 62 of the BDA and in supersession of the National Biodiversity Authority (Salary, allowances and conditions of service of Chairperson and other members) Rules, 2003, the Union Ministry of Environment and Forests (MoEF) notified the Biological Diversity Rules 2004 (BDRs) on April 15, 2004 for carrying out the purposes of the BDA.

Implementation mechanism

The BDA provides for setting up of a three tiered structure with the National Biodiversity Authority (NBA) at the national level, State Biodiversity Board (SBB) at the state level and Biodiversity Management Committee (BMC) at the local level.

National Biodiversity Authority (NBA)

The BDA provides for the establishment of the National Biodiversity Authority (NBA) by the Central Government for the purposes of the Act. It is a body corporate with its head office at Chennai. With the approval of the Central Government, the NBA may also establish offices at other places in India. The authority is to be headed by a Chairman, with ten ex officio members (representing various relevant ministries of the Central Government) and five non-official members (specialists and scientists having special knowledge of biodiversity) who are all Central Government appointees.[22]

The Chairman is appointed by the Central Government either on deputation basis or by selection from outside the Central Government,[23] with a three years term and eligibility for reappointment. The term of non-official members is also three years.[24] The NBA is required to meet at least four times a year.[25] It can appoint a Secretary who will inter alia coordinate and convene its meetings.[26]

21 Pratibha Brahmi, R.P. Dua and B.S. Dhillon, The Biological Diversity Act of India and Agro-biodiversity Management. Available at http://www.ias.ac.in/currsci/mar102004/ 659.pdf.

22 *Supra* n. 1, Sec. 8.

23 The Biological Diversity Rules 2004, Rule 3.

24 *Id.*, Rule 6.

25 *Id.*, Rule 10(1).

26 *Id.*, Rule 9.

The NBA also has the power to constitute any number of committees for such purposes as it may deem fit.[27]

The NBA is required to deal with matters relating to request for access by foreign individuals, institutions or companies[28]. It is also looks into all matters relating to transfer of results of research to any foreigner[29], imposition of terms and conditions to secure equitable sharing of benefits and approval for seeking any form of Intellectual Property Rights (IPRs) in or outside India for an invention based on research or information pertaining to a biological resource obtained from India.[30] It is also required to lay down the procedure and guidelines to govern these activities.[31] It may advise the Central Government on matters relating to conservation and sustainable use of biodiversity and equitable sharing of benefits arising out of the utilisation of biological resources, advise the state government in selection of heritage sites and perform such other functions as may be necessary to carry out the provisions of the Act.[32] It also coordinates activities of the SBBs, provide technical assistance guidance and grants to them.[33]

On behalf of the Central Government the NBA is empowered to take any measures necessary to oppose the grant of IPRs in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India[34], and for this purpose, it can take necessary measures including appointment of legal experts to oppose grant of IPRs.[35] However, the NBA in discharge of its functions and duties under the BDA is bound by such directions on questions of policy as the Central Government may give in writing from time to time.[36]

The NBA can commission studies and sponsor investigations and research, collect, compile and publish technical and statistical data etc. and organise through mass media a comprehensive programme relating to conservation, sustainable use of biodiversity and equitable sharing of benefits arising out of the use of biological resource and knowledge, it may also plan and organise training of personnel engaged or likely to be engaged in programmes for conservation and sustainable use of biodiversity and also it is required to take steps to build up

27 *Id.*, Rule 11(1).

28 *Supra* n. 1, Sec. 3.

29 *Id.*, Sec. 4.

30 *Id.*, Sec. 6.

31 *Supra* n. 23, Rule 12 1.

32 *Supra* n. 1, Sec. 18(3).

33 *Supra* n. 23, Rule 12 (iii), (iv) and (xvii).

34 *Supra* n. 1, Sec. 18(4).

35 *Supra* n. 23, Rule 12 (xix).

36 *Id.*, Sec. 48.

database and to create information and documentation system for biological resources and associated traditional knowledge through Biodiversity Registers and electronic data bases, to ensure effective management, promotion and sustainable uses. It is to give written directions to SBBs and BMCs for effective implementation of the BDA, report to the Central Government about its functioning and implementation of the BDA and undertake physical inspection of any area in connection with the implementation of the BDA.

The expenses of the NBA are to be defrayed out of the Consolidated Fund of India.[37] The BDA also provides for the constitution of a National Biodiversity Fund[38] to which shall be credited grants and loans made to the NBA by the Central Government[39], all charges and royalties received by the NBA and other sources decided by the Central Government. This fund is to be applied for channelling benefits to the benefit claimers and conservation and promotion of biological resources and development (including socio-economic) of areas from where such biological resources or knowledge associated thereto has been accessed.[40]

The NBA is also required to settle disputes between State Biodiversity Boards (SBB) when the Central Government refers the same to it.[41]

State Biodiversity Boards (SBB)

The BDA provides for the establishment of a State Biodiversity Board (SBB) at the state level.[42] The SBB is a body corporate,[43] and consists of a Chairperson, not more than five ex officio members representing concerned departments of State Government and not more than five members from among experts of biodiversity.[44] The functions of the SBB are to advise the State Governments, subject to guidelines issued by the Central Government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilisation of biological resources and to regulate by granting of approvals or otherwise, requests for commercial

37 Vide Rule 12 of the Biological Divesity Rules 2004 *Id.*, Sec. 17.
38 *Id.*, Sec. 27(1).
39 *Id.*, Sec. 26.
40 *Id.*, Sec. 27(2).
41 *Id.*, Sec. 50(4).
42 *Id.*, Sec. 22(1).
43 *Id.*, Sec. 22(3).
44 *Id.*, Sec. 22(4).

utilisation or bio survey and bio utilisation of any biological resource by Indians and perform other functions necessary to carry out the provisions of the BDA as may be prescribed by the Central Government.[45]

The SBB deals with matters relating to access to biological resources by Indians for commercial purposes[46] and can restrict any activity which violates the objectives of conservation, sustainable use and equitable sharing of benefits.[47] The SBB in the discharge of its functions and duties under the BDA is bound by directions on questions of policy as the state government may give from time to time.[48]

The expenses of the SBB are to be defrayed out of the consolidated fund of the state.[49] The BDA provides for the constitution of the State Biodiversity Fund and to which any grants and loans made by the state government, NBA or other sources decided by the State Government are to be credited.[50] This fund is to be applied for the management and conservation of heritage sites, compensating or rehabilitating persons economically affected by notification of heritage sites, conservation and promotion of biological resources, socio-economic development of areas from where such biological resources or knowledge associated thereto have been accessed; and meeting the expenses incurred for purposes authorised by the BDA.[51]

Disputes between SBBs are to be settled by the NBA while between the SBB and NBA by the Central Government.[52]

Biodiversity Management Committee (BMC)

The BDA provides for involvements of institutions of self-government in the broad scheme of the implementation of the Act through constitution of Biodiversity Management Committees (BMCs).

BMCs are to be set up by institutions of self-government (Panchayats and Municipalities) in their respective areas for conservation, sustainable use, documentation of biodiversity and chronicling of knowledge relating to biodiversity.[53] BMCs are to be consulted by the NBAs and SBBs on matters

45 *Id.*, Sec. 23.
46 *Id.*, Secs. 7 and 24.
47 *Id.*, Sec. 24.
48 *Id.*, Sec. 49.
49 *Id.*, Sec. 25.
50 *Id.*, Sec. 32 (1)
51 *Id.*, Sec. 32 (2)
52 *Id.*, Sec. 50.
53 *Id.*, Sec. 41(1).

related to use of biological resources and associated knowledge within their jurisdiction.[54] The main function of the BMC is to prepare the Peoples Biodiversity Register (PBR) in consultation with the local people. The register is to contain comprehensive information on the availability and knowledge of local biological resources, their medicinal or any other use or any other traditional knowledge associated with them.[55] The BMCs are also responsible for maintaining and validating the PBRs. The NBA and SBBs are required to provide guidance and technical support to the BMCs for preparing the PBRs.[56]

The BMCs are also required to maintain a register providing information about the details of the access of biological resources and traditional knowledge benefits derived, and the mode of their sharing.[57] The other functions include advising on any matter referred to it by the SBB or NBA for granting approval and to maintain data about the local *vaids* and practitioners using the biological resources.[58]

The BDA provides for the constitution of a Local Biodiversity Fund to which grants and loans made by the State Government, NBA, SBB, fees levied by BMC for access or collecting biological resources for commercial purposes from its jurisdiction, other sources decided by the State Government shall be credited.[59] The Fund is to be used for conservation and promotion of biodiversity.[60]

Access and benefit sharing

All foreign nationals/organisations require the prior approval of the NBA for obtaining any biological resource occurring in India or knowledge associated thereto for research or for commercial utilisation, bio-survey or bio-utilisation.[61] Indian individuals and entities require the prior approval of NBA before transferring the results of any research relating to any biological resource occurring in or obtained from India to any foreign national or organisation or citizen of India who is an NRI or body corporate or organisation registered or incorporated in India but having non-Indian participation in its share capital or management.[62] However, such restrictions do not apply to certain collaborative research projects.[63] Before applying for any form of IPRs in or outside India

54 *Id.*, Sec. 41(2).
55 *Supra* n, 23, Rule 22(6).
56 *Id.*, Rule 22(9).
57 *Id.*, Rule 22(11).
58 *Id.*, Rule 22(7).
59 *Supra* n. 1, Sec. 43.
60 *Id.*, Sec. 44.
61 *Id.*, Sec. 3 and 19.
62 *Id.*, Sec. 4.
63 *Id.*, Sec. 5.

for an invention based on research or information on a biological resource obtained from India, prior approval of the NBA is required.[64] While granting such approval the NBA may impose benefit sharing fee or royalty or both, and impose conditions including the sharing of financial benefits arising out of the commercial utilisation of such rights.[65]

Indian citizens and organisations are required to give prior intimation to the concerne ' SBB about obtaining any biological resource for commercial use. The exception to this requirement are local people and communities of the area, including growers and cultivators of biodiversity and *vaids* and *hakims* who have been practising indigenous medicine and have free access to use biological resources within the country.[66] The SBB may prohibit or restrict the activity if it violates the objectives of conservation, sustainable use and benefit sharing.[67]

When granting approvals for access, NBA can impose terms and conditions so as to secure equitable sharing of benefits. These benefits include: (i) grant of joint ownership of IPRs to the NBA or where benefit claimers are identified to such benefit claimers, (ii) transfer of technology (iii) location of production, research and development units in such areas (to facilitate better living standards) (iv) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilisation (v) setting up venture capital fund for aiding the cause of benefit claimers (vi) payment of monetary compensation and other non-monetary benefits to the benefit claimers as the NBA may deem fit.[68]

Benefits will be given directly to individuals or group of individuals or organisations only in cases where biological resources or knowledge are accessed directly from them. In all other cases monetary benefits will be deposited in the Biodiversity Fund which in turn is used for the conservation and development of biological resources, and socio-economic development of areas from where resources have been accessed.

Rule 14 of the BDR provides the procedure for access to biological resources and associated traditional knowledge. Any person seeking approval of the NBA for access o biological resources and associated knowledge for research or for commercial utilization is required to make an application accompanied by a fee of ten thousand rupees. The NBA is required to dispose of the application

64 *Id.*, Sec. 6(1).
65 *Id.*, Sec. 6(2).
66 *Id.*, Sec. 7.
67 *Id.*, Sec. 24.
68 *Id.*, Sec. 21.

as far as possible within a period of six months from the date of its receipt. Disposal is to be after consultation with concerned local bodies and after collecting additional information from the applicant and other sources. Approval for access may be granted subject to terms and conditions and is in the form of a written agreement between the NBA and applicant. The agreement may include, inter alia clauses regarding conditions under which the applicant may seek IPRs, restrictions on transfer of the accessed biological resources and the traditional knowledge to any third party without prior approval of the NBA, a guarantee to deposit a reference sample of the biological material sought to be accessed with the repositories, submission of a regular status report, commitment to abide by the BDA and related legislations, facilitation of measures for conservation and sustainable use of biological resources accessed and minimising of environmental impacts of collecting activities. The NBA has the power to restrict activities related to access to biological resources in situations inter alia where the request is for any endemic and rare species, or the request would adversely effect livelihood of the local people, or may result in adverse environmental impact which would be difficult to control and mitigate or cause genetic erosion or affect the ecosystem.[69] The NBA may on the basis of any complaint or suo moto withdraw the approval granted for access and revoke the written agreement where there has been violation of the BDA or any conditions on which the approval was granted, or failure to comply with the terms of the agreement or conditions of access or on account of public interest or for protection of environment and conservation of biodiversity.[70] On revocation, the NBA will direct the concerned SBBs and BMCs to prohibit access, assess the damage if any caused and take steps to recover the same.[71]

Any person aggrieved by any determination of benefit sharing or order of the NBA or SBB under the BDA has the remedy of appealing to the High Court against such determination.[72] Also every determination of benefit sharing made by the NBA or a SBB or High Court (in case of appeal) shall, on a certificate issued by the concerned officer of NBA, SBB or Registrar of the High Court as the case may be deemed to be decree of a civil court and shall be executable in the same manner as a decree of that court.[73]

69 *Supra* n. 23, Rule 16 (1)
70 *Id.*, Rule 15(1).
71 *Id.*, Rule 15(2).
72 *Supra* n. 1, Sec. 52.
73 *Id.*, Sec. 53.

Protection of traditional knowledge

The BDA ensures that the holders of traditional knowledge, which is still not in the public domain, should be able to get the benefit arising from the use of such knowledge and therefore it provides for the protection of knowledge of local people relating to biodiversity through measures such as; registration of such knowledge at local, state and national level and development of a sui generis system by the Central Government.[74]

Duties of the central and state governments (for conservation, promotion and sustainable use of biodiversity)

The BDA enjoins the Central Government to develop National strategies, plans etc. for conservation, promotion and sustainable use of biodiversity including measures for identification and monitoring of areas rich in biological resources, promotion of in situ and ex situ conservation of biological resources, incentives for research, and public education to increase awareness of biodiversity.[75] Where the Central Government has reason to believe that biodiversity of an area is threatened, it is required to issue directives to the concerned State Government to take immediate ameliorative measures offering such state government, technical and other assistance.[76] The Central Government is required to undertake measures wherever necessary for assessment of environmental impact of projects that threaten biodiversity, and to regulate manage or control the risks associated with the use and release of living modified organisms, resulting from biotechnology, likely to adversely affect biodiversity and human health.[77] The BDA requires the Central Government to endeavour to respect and protect the knowledge of local people relating to biological diversity, as recommended by the NBA through such measures as registration of such knowledge at the local, state, or national levels, and other measures for protection including *sui generis* system.[78]

The State Government in consultation with the local bodies is required to notify in the Official Gazette, areas important from the standpoint of biological diversity as biodiversity heritage sites and frame rules for their management and conservation in consultation with the Central Government.[79] The Central Government in consultation with the concerned State Government has power

74 *Id.*, Sec. 36(5).
75 *Id.*, Sec. 36(1).
76 *Id.*, Sec. 36(2).
77 *Id.*, Sec. 36(4).
78 *Id.*, Sec. 36(5), *Supra* n. 74.
79 *Id.*, Sec. 37.

to notify threatened species[80], and in consultation with NBA it can designate institutions as repositories for safe keeping of biological material.[81]

Penalties under BDA

In order to provide teeth, several offences have been created to provide safeguards against unauthorised exploitation of biodiversity and theft of traditional knowledge. The offences under the BDA are cognizable and non-bailable.[82] The contravention, attempt to contravene or abetting contravention of provisions of S. 3 [82A], 4[82B] and 6[82C] are punishable with imprisonment upto five years, or with fine upto ten lakh rupees and where the damage caused exceeds ten lakh rupees, such fine may be levied which is commensurate with the damage caused, or with both.[83] Similarly, in case of contravention (including attempt or abetment) of S. 7[83A] or S. 24(2)[83B] the offender shall be liable to be punished with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.[84]

In case of contravention of any direction or order of the Central Government, State Government, NBA or SBB for which no punishment has been separately provided under this Act, the offender shall be punished with fine which may extend to one lakh rupees and in case of a second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuous contravention with additional fine which may extend to two lakh rupees every day during which the default continues.[85] Where the offender is a company, the person/persons incharge of the conduct of the business of the company shall be deemed to be guilty of the offence except where he/they prove that the offence or contravention was committed without his/their knowledge or that he/they had exercised all due diligence to prevent commission of such offence.[86]

VI Apprehensions about the BDA

The BDA through lauded as "an Act for the new millennium" and as a "significant piece of legislation", there are apprehensions about its effectiveness.

80 *Id.*, Sec. 38.
81 *Id.*, Sec. 39.
82 *Id.*, Sec. 58.
82A Certain persons not to undertake biodiversity related activities without approval of NBA.
82B Results of research not to be transferred to certain persons without approval of NBA.
82C Application for IPRs not to be made without approval of NBA.
83 *Id.*, Sec. 55(1).
83A Prior intimation to SBB for obtaining biological resource for certain purposes.
83B State Government may prohibit or restrict activities detrimental to biological diversity.
84 *Id.*, Sec. 55(2).
85 *Id.*, Sec. 56.
86 *Id.*, Sec. 57.

It was expected to be an umbrella legislation which would take care of loopholes in the various Acts and conflicts in the legislative control measures of such Acts dealing piecemeal with biodiversity.However, when finally enacted, it has disappointed many, by acquiring the status of a complementary Act, that will have to be operated alongside a whole range of other Acts, including in particular those pertaining to forest, wildlife, panchayati raj (village governance) institutions, plant varieties and farmers right and patents.[87] There are conflicts in the working of these Acts which will need to be resolved in order to make the BDA effective. For instance while the BDA explicitly provides for benefit sharing measures with local communities, the Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFRA) has no such provision. Moreover the BDA attempts to include local community representatives at various levels of decision making, while the PPVFRA almost completely excludes them. Moreover, the BDA requires impact assessment to ensure that all developmental activities are in harmony with biodiversity conservation and sustainable use, the PPVFRA does not require any such assessment for plant variety protection applications.[88] While the NBA has regulatory powers and is required to ensure equitable benefit sharing in relation to biological resources, the authority under the PPVFRA also has the power to determine benefit sharing, in relation to a registered variety. But the benefit sharing provisions under the two Acts are not identical. The NBA at the time of giving approval is to determine the benefit sharing while the authority under the PPVFRA does that after the plant variety is registered and then dispose off such claims. So in the case of a plant variety the onus is on the community (any person, government or NGO is entitled to register a community claim and get it) to raise the issue of benefit sharing whereas under the BDA the onus is on the authority to ensure equitable benefit sharing. Moreover each legislation provides for its own fund where the amount of benefit sharing may be deposited (in some cases it may be given directly to the community). A cause for concern is the ability of these two authorities under the two Acts to coordinate smoothly in case of benefit sharing, relating to a medicinal plant that is also registered as a plant variety.[89]

One also needs to guard against the many entrenched interests wanting to ensure that NBA and SBBs end up being ineffectual because of the provision in the BDA (Sec. 48) that they must accept all directives of the Central and State Governments. Along with bureaucratisation, there is also the danger that the

87 Madhav Gadgil, India's Biological Diversity Act 2002: An act for the new millennium. Available at http://www.ias.ac.in/jbiosci/mar2003/145.pdf.
88 Ashish Kothari, Biodiversity and Intellectual Property: Can the two coexist. Available at http://www.iisd.ca/journal/kothari.html.
89 Sangeeta Udgaonkar, Protection of medicinal plants in India. Available at http://envis.frlht.org.in/sangeeta.htm.

regulations may merely breed harassment and corruption rather than effective action. There are loopholes that may render the BDA toothless. For instance, any biological resource that is considered a commodity, or biological material that is blended and mixed, may be exempted from the provisions of the BDA.[90]

The BDA has also been criticised for facilitating access to biodiversity and indigenous knowledge for IPRs and thereby facilitating and legalising biopiracy instead of preventing it. Further, all that the biopirates will require is a "cozy relationship with the NBA", more specifically so in the case of indigenous seeds and agricultural crops. Sec. 6(1) provides for application for IPRs not to be made without approval of the NBA while Sec. 6(3) makes an exception in case of persons making an application for any right under any law relating to protection of plant varieties enacted by Parliament. The effect of this would be that companies can take even those varieties that the farmers have evolved over the millennia and patent the traits and qualities which are a result of farmers breeding.[91] The BDA has failed to recognise the legal standing of local communities and their inalienable rights to their biodiversity inspite of the constitutional framework provided by 73rd and 74th Amendment and Art. 8(j)[92] of the CBD.[93] As local communities will have no say in the granting of patents on biological material or in deciding what will be 'equitable' for the purpose of benefit sharing, all this would be in the hands of bureaucrats in the NBA.[94] Moreover, the BDA is not designed to regulate seed giants and stop biopiracy, but like earlier forest laws carries the risk that it could allow the huge new "Biodiversity Bureaucracy" that the BDA creates to criminalise innocent tribals and rural communities since their everyday survival is dependent on biodiversity.[95] The setting up of the BMCs could have enabled local communities to have some voice in the conservation, sustainable use, and equitable benefit sharing of biological resources. But in the BDRs the role of BMCs is limited to the preparing of Peoples Biodiversity Registers (PBRs). This undermines immensely the rights of local communities, who have an important stake when it comes to conservation of biological resources, with documentation without any legal

90 *Supra* n. 87.
91 Vandana Shiva, The Biodiversity Act: facilitation or prevention of biopiracy? Available at http://www.diversewomen.org/pdf_files/ bija2002.pdf.
92 Recognition of community rights and indigenous culture and knowledge.
93 *Ibid.*
94 Kanchi Kohli, Biodiversity ruled out! Available at http://www.indiatogeter.org /2004/jul/ env-bdrules.htm.
95 *Supra* n. 91.

protection an invitation to theft or piracy is predominant and BMCs have no power to prevent this.[96]

Biodiversity is not just an environmental issue but also a social and economic one. As members of any community, women are the most dependent on biodiversity and are also its best nurturers and so have a high state in its conservation and sustainable use. The preamble to the CBD recognises the vital role that women play in the conservation and sustainable use of biodiversity and the need for full participation of women at all levels of policy making and implementation for biodiversity conservation. Similarly, also the Johannesburg Declaration on Sustainable Development, 2002, affirms the commitment to ensure that women's empowerment and emancipation and gender equality are integrated in all activities encompassed within Agenda 21, the Millennium Development Goals and the Johannesburg Plan of implementation. However, the BDA recognises the special role of women in biodiversity management in a limited manner. It is only in the BMC where out of all the persons (not more than six) nominated by the local body, one third are required to be women. It is suggested that should have reserved posts for women in the constitution of the NBA and SBBs. Issues of gender need to be central to conservation and sustainable use strategies.

The NBA, SBBs and BMCs are responsible for promoting documentation of biodiversity and its uses, and organise them into a Biodiversity Information System (BIS) in the form of Peoples Biodiversity Registers. In order to implement the provisions of BDA, a BIS of unparalleled size and complexity needs to be set up. The BIS will compile information inter alia on issues like status of the country's ecological habitats, current status of population of a whole range of biodiversity elements and impact of natural and human processes, demand and consumption of biodiversity resources and IPRs, customary as well as through the legal regime over biodiversity resources. This is a stupendous task, which poses many challenges like inventorying of elements of biodiversity with hundreds of thousands of entities, species, genes and ecosystems, all exhibiting tremendous variation in space and time. Most information is embodied in oral traditions with persons, majority of whom are illiterate.[97] The BIS will serve as a knowledge base for the three tiered management structure (NBA, SBBs, BMCs) but it itself will have to have an overall four tiered framework: global,

96 Ranjit Devraj, Biodiversity or Biopiracy? Available at http://www.indiatogether.org/ environment/articles/biodiv02.htm.
97 *Supra* n. 87.

national, state and local. This whole endeavour poses a number of formidable scientific and technical challenges.[98]

Another criticism against the BDA is, that it openly recognises biodiversity as a commodity to be traded, bought and sold, and does not mention people and communities as being stakeholders of bioresources. Further, the NBA and SBBs create a highly centralised decision making structure with potential for authoritarian misuse and the whole process of selection is undemocratic.[99] In exercise of the powers conferred by sub-sections (1) and (4) of Sec. 8 of BDA the Central Government, established the NBA on and from October Ist, 2003. Till date the constitution of the NBA is a big disappointment, since there are no representatives from tribal or other communities or from independent NGOs, despite the requirement of the BDA with regard to non-official members. It is further apprehended that the BDA, may discourage research with its "strong tangles of bureaucratic red tape" as research proposals would now need to be vetted by the NBA.[100]

VII Concluding Remarks

India accounts for 7-8% of the Earth's total biodiversity. It is one of the 12 mega diverse countries which together possesses 60-70% of the world's biodiversity.[101] Thus, not only India, but the whole world has a stake in the effectiveness of the BDA. The BDA, definitely is a much needed legislation but its effectiveness (the apprehensions about which are manifold) is yet to be seen. What remains as the primary challenge, is getting the major custodians of biodiversity most of whom are impoverished and illiterate to realize, the important role the world expects them to play in saving its biodiversity.

India has kept its commitment under the CBD. It is doubtful whether but for the commitment, a legislation like the BDA would have seen the light of the day. The path has been chosen, the direction determined. However, the success of the BDA inturn also depends on the will of us, Indians, to make it a success.

98 Prof. Madhav Gadgil, *Designing a Biodiversity Information Systems for India*. Envis Newsletter, October 2003. Available at http://www.wgbis.ces.iisc.ernet.in/ biodiversity/ newsletter/issue1/ article.html.

99 Sagari Ramdas and Dr. Nitya Sambamurti Ghotge, The Biological Diversity Act of India and Peoples Bio-Diversity Registers: Sôme Questions and Concerns. Available at http:// www.anthra.org/advocacy/advoc05.htm.

100 *Supra* n. 95.

101 Report available at http://timesfoundation.Indiatimes.com/articleshow/894171. cms.

INTERNAL DISPLACEMENT OF PEOPLE: ABSENCE OF LAW AND THE URGENT NEED TO FRAME ONE IN INDIA

*K. Ratnabali**

I Introduction

MAN, BY nature, has a strong bonding with the land and environment where he is born and brought up. But by situations beyond his control, he is compelled or forced to leave his home within his own country. Indeed for a variety of multi-dimensional and inter-related reasons, including famine, environmental degradation, inter-state war, internal conflict, impoverishment and persecution, a large section of humanity is currently on the move[1]. At present, the global crisis of internal displacement is acute, affecting some 20-25 million persons in at least 40 countries worldwide, uprooting them from their homes, exposing them to physical and psychological danger, and depriving them of basic needs[2]. Indeed, internal displacement has emerged as one of the greatest human tragedies of the modern world. The severity of the problem, both in intensity and scope is obvious from the number of persons displaced and the fact that virtually no region of the world is spared from this epidemic. India too is a victim of the problem of displacement.

India is a host to a large number of refugees from its neighbouring countries[3] but it generates few refugees because of several factors, such as (i) an accommodative federal structure in such a large country; (ii) comparatively independent States which accommodate strife within themselves and flights of forced migration from one State to another, (iii) a high absorptive capacity of shocks and tensions except for some prolonged movements, (iv) non-congenial

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1 Chalk, Peter; "The International Ethics of Refugees: A case of Internal or External Political Obligation?" Vol. 52, No. 2, 149; Australian Journal of International Affairs, Vol. 52, No. 2, 149 (1998).

2 Deng, Francis; Annual Report to the UN General Assembly, World News, 24th August 2001, www.unhcr.ch.

3 Tibetians from China, Tamils from Sri Lanka, Chakmas from Bangladesh, Rohingas from Myanmar, Afghans from Afghanistan, Bhutanese, etc.

physical and political conditions in neighbouring countries; and (v) keeping aloof from India's internal problem by most South Asian countries despite the long and porous borders. But the problem of internal displacement is grave and there is need to seriously look into it since India produces quite a significant number of internally displaced people (in short IDPs). According to the World Refugee Survey 2002, more than 500,000 people were internally displaced in India because of political violence, including about 350,000 Kashmiris and an estimated 157,000 others in the Northeast India. The Indian Social Institute in Delhi places the number of IDPs at 21.3million (mainly conflict induced displacement) and the Global IDP Project places it at 3.9 million (conflict induced internal displacement)[4]. It has been observed that development-induced displacement has overwhelmingly dominated the IDP scenario in India.

A clear definition of who constitutes internal internally displaced persons has to be laid down in order to identify the beneficiaries of assistance and protection schemes. Just as all persons who flee from their country are not termed as refugees legally, similarly all those who leave their homes may not be termed as internally displaced. Therefore, the need arises to determine at the outset who constitute internally displaced persons.

Who are internally displaced people?

There is no single definition of Internally Displaced People (IDP) which is universally accepted. But achieving one is essential both for the development of accurate statistics and information and for comprehensive and coherent action. Some definitions are too wide to include almost all situations of displacement, while some are too narrow to serve the very purpose for which the issue of internal displacement is raised. Amongst all, the most widely used definition is the one which is set out in the UN Commission on Human Rights Report presented in 1992 by the then Secretary-General Boutros Ghali. It defines IDPs as

> *"persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters and are within the territory of their own country"*[5]

4 Walter Fernandes, Director of the Programme of Tribal Studies of the Indian Social Institute; Hampton J (ed), Internally Displaced People: A Global Survey, Earthscan Publications Ltd, London,. (1998).

5 Commission on Human Rights; Analytical Report of the Secretary-General on Internally Displaced Persons; E/CN. 4/1992/23 (United Nations Feb. 14, 1992), para. 17.

Limitations of the above definition

This definition of IDPs has some loopholes. The phrases "*suddenly or unexpectedly*", "*in large numbers*" and "*forced to flee* "narrow down the scope of the definition thereby excluding cases of serious displacement. For example:- (i) the phrase "*suddenly or unexpectedly*" does not include those situations where people are displaced not suddenly or unexpectedly but after giving considerable period of notice; (ii) it not necessary that in all cases people flee "*in large numbers*" because in Columbia people fled in small numbers in order to make themselves inconspicuous; (iii)similarly there are cases where people are expelled instead of 'fleeing' as in Myanmar the military Junta forcibly moved people for political reasons, and in the case of Bosnian Muslims, the government expelled them from their homes in Banja Luka and other areas of Bosnia for ethnic reasons.

Formulation of another definition

Realizing these limitations, Francis Deng, the Special Representative of the UN Secretary-General for Internally Displaced Persons[6], was given the task to formulate the definition of IDPs. Francis Deng, in consultation with other eminent lawyers, formulated a definition which was a modified version of the above definition. It defines IDPs as

> "persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular, as a result of, or in order to avoid the effects of, armed conflicts, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized state border"

This definition[7] is the broadest one in use at the international and regional level. It is a part of the *Guiding Principles of Internal Displacement*[8]. The phrase "in particular" has been deliberately used in order to include other possible reasons for internal displacement. But the negative point of having flexible definition is that it makes monitoring difficult because the definition cannot be repeatedly and predictably applied. It can also make protection more difficult because states cannot rigorously be held to a definition that is open to interpretation.

6. He was appointed to this post in 1992.
7. See Vincent Marc, "IDPs: rights and status", FMR 8 August 2000; www.fmreview.org/text/FMR/08/contents.htm p.2. The team of international legal experts who prepared the Guiding Principles on Internal Displacement, 1998 avoided the use of the term 'definition'. Walter Kalin asserted that what the Principles give us is "a descriptive identification of the category of persons whose needs are of concern to the Guiding Principles".
8. Framed by the United Nations Office For the Coordination of Humanitarian Affairs – OCHA in 1998.

Some other definitions of IDPs

Other definitions adopted by UNHCR[9] and CPDIA[10] are quite narrow as compared to the above definition. UNHCR, the UN agency which has been given the mandate to work for refugees[11], has included only a particular type of IDPs who are in "refugee-like situations" i.e. only those who have fled their homes because of persecutions, situations of general violence or violations of human rights and do not enjoy the full protection of their own government. The CPDIA uses a definition that pertains only to persons who would be refugees if they were to cross state border. The modified UN definition which was given by Deng recognizes that the reasons for displacement are often complex and interrelated and that persons uprooted by natural disasters and also by development projects may be persecuted and discriminated against, and thus be of special concern as internally displaced persons. This modified definition, therefore, tried to strike a balance between too narrow a framework that risks excluding people and one so broad that it could prove unmanageable.

Causes of displacement

Displacement is a phenomenon caused by several complex and interrelated reasons. Many a times it is impossible to pin point a single reason as the cause of any displacement, though one reason may stand out predominantly than the others. The causes of displacement may be broadly grouped into two types: (i) Man-made factors, (ii) Natural factors. These two types of causes of displacement are not at the two ends of a continuum; there are gray areas in between where it is difficult to point out one as the causal factor. For instance the earthquake that occurred in Latur, Maharashtra that caused displacement, was found to be a dam-induced seismic activity. Though an earthquake is a natural phenomenon, yet the above example shows that there can be a human element in it. But one fact remains clear that when we place a cause in the man-made category, the indulgence of the human hand is very direct and obvious too.

Man-made factors

All those actions of man that are within his control and which results into displacement of people as a fallout of his actions can be grouped under this. It consists of a wide spectrum of factors – ranging from war to development.

War or armed conflict

An immediate and unavoidable fallout of the modern warfare[12] is displacement – internal or external. The Gulf war in 1991 as well as the US led

9. United Nations High Commission for Refugees.
10. Consultations on Internal Displacement in the Americas.
11. See *infra* n. 41 for the definition of "refugees".
12. In olden days wars and battles are confined to the areas demarcated as battlefields, affecting less civilian populations. But now because of the widely destructive nature of the weapons that are used in modern day warfare, as well as the strategy of targeting the civilians to weaken the morale of the country, displacement has become the obvious fall out of any war.

war against Iraq has displaced people within the country and in the neighbouring areas. Even in low conflict areas such as the areas near the LOC[13] in Kashmir, people have fled from their homes to save themselves from shelling. Since 1989 approximately 34,000 people, including thousands of civilians, have reportedly died in the context of the conflict between militants seeking either independence or accession to Pakistan, and Indian security forces and police[14]. Additionally, some 350,000 persons from Kashmir have been internally displaced as a result of this armed conflict, and live in the cities of New Delhi (some 100,000 people) and Jammu (some 240,000 people)[15]. Many of those registered at the camps have also been dispersed according to the exigencies of employment and opportunities for education, trade or business[16]. The main causes of displacement are the terrorists' threats and apathy of the government.

Internal conflicts (political reasons)

After the decolonization of large number of nations in the second half of the twentieth century, many political uprisings were seen happening in many parts of the world. The colonizers had generally not divided the country or the region according to the ethnic commonality or differences but according to administrative and cartographical convenience[17]. Therefore, when the states became independent from the foreign rule, it became incompatible to carry on the same; this in turn became one of the reasons for internal conflicts. These political uprisings were either for secession from or autonomy within the existing state. In India too, after independence from the British rule there was a lot of hiccups while trying to create the Indian Union. The immense cultural, linguistic, ethnic diversity, though a valuable heritage, yet resulted in difficulty in assimilation to create a unified "Indian culture". The unaccomplished task has resulted in the present day secessionist and separatist movement in the North-west and North-east India where such movements are not confined to non-violent protest and demonstrations but involve use of arms and ammunitions. They not only target the state apparatus but also attack the civilians to the wield power and attention.

Ethnic conflicts or caste-induced violence

Most regions of the world are inflicted by the ethnic violence. Some three thousand ethnic groups exist in the world today, and most do not have their own nation-states[18] nor do they necessary identify with or feel loyal to the state in which

13. Line of Actual Control.
14. AI, 3 October 2001, quoted in www.idppproject.org
15. USCR 2000, 166; SAHRDC, 16 March 2001, quoted in www.idpproject.org.
16. *South Asia Terrorism Portal* (SATP), July 2001.
17. For example in Africa, many regions were divided according to administrative convenience and simple cartography; therefore, the boundaries of many African countries have straight lines.
18. Cohen, Roberta and Deng, Francis; *Masses in Flight: The Global Crisis of Internal Displacement*; Brookings Institution Press, Washington D.C. 21(1998).

they live. In reality, it is seldom mere differences of identity based on ethnic or religious grounds that generate conflict, but the consequences of those differences when it comes to sharing of power and distributing the nation's resources and opportunities which causes conflicts[19]. India too is a victim of ethnic violence. There have been frequent tensions between the Muslims and Hindus who constitute the majority population in the states where they cohabit together[20]. Incidences like the Babri Masjid demolition, retaliatory or reprisal attacks of the Godhra train incident, etc. have fomented communal violence and riots leading to displacement of large number of people, mostly Muslims.

India's north-east, which house 200 of the 430 tribes in India, is also not free from ethnic clashes. India's north-eastern states are like a melting pot of different ethnic cultures which has not yet amalgamated to form a unified culture with multiple patches of cultures. Though common ethnicity binds people, yet it is the other interests which drives the conflicts between one or more ethnic groups of people. Moreover, the influx of migrants from neighboring areas has led to ethnic conflicts over land and strive for political autonomy or secession. Several political and/or armed insurgent groups have been formed, many of which resort to "ethnic cleansing" activities in order to defend their interests against a real or perceived ethnic enemy.

Since the 1980s, ethnic cleansing has become much more systematic in the Northeast and has been the major cause of large-scale internal displacement[21]. The Northeast has witnessed seven major cases of strife-induced internal displacement in the last fifty years. They are as follows: (a) the displacement of Bengalis from Assam (particularly Bodo areas) and Meghalaya (b) the displacement of Bengalis from Tripura; (c) the displacement of 'tea tribes' in western Assam; (d) the displacement of Reangs from Mizoram; (e) the displacement of Nagas, Kukis and Paites in Manipur; (f) the displacement of Chakmas from Arunachal[22].

Another type of civil violence characteristic to the Hindu society is the caste-induced violence that occurs in many parts of India. The movement to bring a change in the long existing power equations in the society between the

19. *Ibid.*
20. Except of course in the state of Jammu and Kashmir where the Muslim population is higher than the Hindus.
21. Subir Bhaumik, quoted in http://www.idpproject.org. According to Bhaumik, "What began as ethnic strife between 'indigenous' and 'foreign' groups...turned into ethnic clashes between populations that...[had] essentially [become] local to the area." It is largely these tensions that have resulted in the conflicts that have led to the displacement of hundreds of thousands of people in Northeast India.
22. *Ibid.*

higher and lower castes gave rise to confrontations between different caste strata.

Human rights abuses

State power may be used to suppress those activities or ideologies which are not in conformity with the one represented by those in power. The legality of the action or the ideology will make such state action violative of human rights. When the human rights abuse derogates the life, liberty or security of man, it may force the victims to flee from it leading to forced displacement of people. For instance in Kashmir the "confrontation"[23] between state forces and militants, the killing of Kashmiri *Pandits* by fundamentalist secessionist groups, the widespread anarchy created by political instability and the continuous violation of fundamental human rights by both the state and militant groups, have led to large scale displacement, mainly of Kashmiri *Pandits* (estimated at 250,000), to Jammu and cities like Delhi. Despite the election and restoration of a popular government in 1996, those displaced have not been able to return due to the continuing reality of sporadic massacres in Kashmir[24].

Environmental and development induced

Human beings are dependent on the environment for their survival, therefore, its disruption can cause migration of populations. Those migrations are relevant where people are forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption, triggered by people, which jeopardized their existence and /or seriously affected the quality of their life[25].

Environmentally displaced people may be grouped into three types: those temporarily displaced as a result of sudden environmental change which is irreversible, such as those who flee industrial accidents; people permanently displaced through long-term or irreversible environmental change such as those forced to move by dam construction or sea level rise; and those who leave in search of a better quality of life as environmental degradation has eroded their resource base such as salination of the soil or deforestation. During the last

23. The government of India specifically denies that there is internal conflict going on in Kashmir; because if it so accepted then, India has to follow the international norms which are relevant in times of internal conflict and international community/ agencies will have to be given access to the area.
24. Mahendra P. Lama; "Internal displacement in India: causes. Protection and dilemmas"; FMR 8 August 2000; http://www.fmreview.org/fmr088.htm.
25. Ecological change and displacement may result from the disruption, either during war or peacetime, of the economy, of resource-use patterns, and of networks. See McGregor, JoAnn; "Refugees and the environment" in Richard Black and Vanghan Robinson (eds.) Geography and Refugees: Patterns and Process of Change; Belhaven Press, New York; (1993) 157.

fifty years, some 3,300 big dams have been constructed in India. Many of them have led to large-scale forced eviction of vulnerable groups (40-50% tribal people). As a result of misguided (or non-existing) state policy, project-affected communities have been subject to sudden eviction, lack of information, failure to prepare rehabilitation plans, low compensation, loss of assets and livelihoods, traumatic relocation, destruction of community bonds, discrimination and impoverishment. Even though thousands of dams have been constructed in the name of development, but 250 million people do not have access to safe drinking water, more than eighty per cent of rural households do not have electricity and flooding and droughts remain severe[26].

Natural factors

Scholars have different opinions regarding the question of including the people displaced by natural disasters in the definition of internally displaced persons. Some scholars such as K.C. Saha[27] is of the opinion that inclusion of natural disaster-induced displacement is too general and not substantiated by enough studies. He is further of the opinion that including natural disaster or development-induced displacement will lead to loss of coherence in the protection regime. On the other hand, the supporters of the second view are of the opinion that during such displacement too, there can be human rights abuses at various stages: setting up of camps, distribution of relief and assistance, manner of compensation and relocation of people. If such a situation is used to serve ulterior motives to the disadvantage and infringement of the right of the displaced then, it may be logical to include them without going too deep into the technicality of the cause of the displacement.

Strategy of rights

The modern era is a time where 'right' has taken center stage in almost all spheres of our lives. Relationships are conceived in terms of rights and duties that nothing seems to be implementable without the strategy of rights[28]. Especially in legal matters, without rights there is no remedy[29]. Thus, whenever we talk about protection and assistance of some special class of persons, there has to be a legal mechanism through which this can be achieved. Let us look into the various international conventions or declarations which are relevant to internal displacement as well as the national policy or legal instrument on the issue; their

26 INEE list-serve, 16 April 2002, E-mail to NRC, Geneva as quoted in http://www.idpproject.com.
27 K.C. Saha; "Rethinking the Guiding Principles: the case of Kashmiri Pandits"; FMR 8 August 2000; http://www.fmreview. org/fmr089.htm.
28 Alan Buchanan is of the opinion that 'right' is the trumping feature which presides over all other considerations.
29 *ubi jus ibi remedium*

effectiveness, loopholes / limitations and whether there is need to amend the existing instruments or frame a new one.

Existing principal sources of international legal instruments which are relevant to IDPs

The principle sources of the existing standards for protection, as well as the foundations for articulation for further protections, are found in the international human rights law, humanitarian law and refugee law, specifically; (i) The Universal Declaration of Human Rights (UDHR), 1948, (ii) International Covenant on Civil and Political Rights (ICCPR), 1966, (iii) International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, (iv) Humanitarian law which comprises of the four Geneva Conventions of 1949[30] and the two Additional Protocols of 1977, and (v) The refugee law embodied in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. India has either signed or ratified the above cited instruments except the two Additional Protocols to the four Geneva Conventions and the convention on refugees.

II Human Rights Law

The International Bill of Human Rights which mainly comprises of UDHR, ICCPR and ICESCR[31] are considered as the basic documents which speak about human rights applicable universally. The provisions enumerated in them are applicable to all in all situations – whether within or outside it's country, during peacetime or otherwise. Therefore, by the extent of their scope, they are applicable to IDPs also. The provisions of ICCPR are applicable to India as India has signed the Covenant on 10th April 1979.

A government that is responsible for or condones the large-scale displacement of its own citizens violates its obligations under the Charter of United Nations. Specifically, under Arts. 55 and 56, of the charter of the United Nations, according to which all member states of the United Nations are obliged to promote universal respect for, and observance of, human rights and fundamental freedoms for all. These clauses are the foundation of the law of human rights, and the World Court[32] has authoritatively confirmed their obligatory character[33]. Though these articles do not specify or define "human rights and fundamental freedoms", the Universal Declaration of Human rights is widely

30 The Geneva conventions of 12th August 1949 were ratified by the President of India on October 16, 1950 and came into force in India on May 9, 1951. To implement the convention, the Parliament of India has passed the Geneva Conventions act, 1960 which came into force since 14-8-1961.
31 The others include the1966 First Optional Protocol and 1989 Second Optional Protocol to the ICCPR, (XLII) of ECOSOC, and Resolution 1503 (XXVIII) of ECOSOC.
32 International Court of Justice.
33 See *Barcelona Traction* case and *Legal Consequences of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution* 276 (1970), Advisory opinion of June 21, 1971.

recognized as an authoritative interpretation of a member State's obligations under the Charter[34]. If a State is also party to one or more of the universal and or regional human rights treaties, such as the ICCPR, ICESCR, the American, African, or European human rights conventions, or CRC[35], it has thereby been assumed that a solemn duty vis-à-vis other states parties and to its own citizens exist to respect and ensure the rights guaranteed in these instruments.

The wide array of the rights enshrined in the corpus of human rights law is applicable to situations common to the displaced. These rights cover the minimum standards of human existence and dignity such as physical protection, shelter, food, clothing, basic health, work and the integrity of the person and the family as the most fundamental social unit.

Humanitarian law

Humanitarian law, which is also known as laws of war, is generally applicable in situations of armed conflict, but it also contains principles which are applicable to the displaced, such as the principles which states that those who are not participating directly in hostilities should be treated humanely. Since India has ratified the four Geneva Conventions it is under an obligation to abide by it.

Art.3[36], which is common to all the Four Geneva

34 See Buergenthal, T., Norris, R. and Shelton, D.; *Protecting Human Rights In The Americas;* Selected Problems (Second Ed.) (1986), 29. According to their view "UN practice .... indicates agreement that governmental policies instituting or tolerating large scale denials of basic human rights violate the UN Charter because such measures are incompatible with the obligations to 'promote' human rights".

35 Convention on the Rights of the Child, 1989.

36 Common Art. 3 to the four Geneva Conventions of August 12, 1949 states that "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Conventions[37] The four Geneva Conventions are, is particularly relevant because it prohibits violence to life and/or person, taking of hostages, and outrages upon the personal dignity of persons. While other articles deal with international armed conflicts, Art. 3 is the only article that talks about non-international armed conflicts. But nowhere it is defined what category of conflicts is included in it[38].

Unlike human rights law, which generally restrains violations inflicted by the government and its agents, the obligatory provisions of common Art. 3[39], expressly bind both the parties to the conflict, that is, government and insurgent forces. Moreover, the obligation to apply common Art. 3 is absolute for both parties and independent of the obligation of the other party. Accordingly, individual civilians, including those forcibly or voluntarily displaced by virtue of the hostilities, are entitled to common Art. 3's absolute guarantees when they are captured by or subjected to the power of either government or dissident forces. Moreover, the warring parties must accord civilians these protections even if they had fought for the opposing party or indirectly participated in hostilities by providing either party with food or other logistical support.

In addition, both common Art. 3, inferentially, and customary international law, expressly prohibit direct attacks upon displaced persons and other civilians living in the combat zones or areas controlled by the enemy. Deaths resulting from such attack or because of summary executions or torture do tantamount to homicide.

37 The four Geneva Conventions are

a). Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949;

b). Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949;

c). Geneva Convention Relative to the Treatment of Prisoners of War, 1949 and

d). Geneva Convention Relative to the Protection of Civilian Persons in time of War 1949. They came into force on Oct. 21, 1950.

38 By state practice it applies to armed strife between governmental armed forces and organized insurgents. It also applies to cases in which two or more armed factions within a country confront one another without the involvement of governmental forces when, for example, the established government has dissolved or is too weak to intervene.

39 Although Art. 3, does not by its term prohibit attacks against the civilian populations in non-international armed conflicts, such attacks are prohibited by customary law. United Nations General Assembly Resolution 2444 ('Respect for Human Rights in Armed Conflicts"), expressly recognized this customary principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times. The preamble to this resolution clearly states that these fundamental humanitarian law principles apply "in all armed conflicts" meaning both international and non-international armed conflicts.

Additional Protocol II[40]

Protocol II contains detailed rules applicable to the displaced and other persons affected by hostilities. It develops and supplements the provisions of common Art. 3 without modifying that article's existing condition of application. Thus Protocol II applies cumulatively and simultaneously with Art. 3. Though Protocol II is applicable to hostilities within the territory of State Party to that instrument[41], its provisions are, by no means, irrelevant to purely common Art.3 armed conflicts. Since Protocol II incorporates, clarifies, and strengthens common Art. 3's customary law rules, it is reasonable to argue that its provisions should also be regarded as declaratory of customary law and thus applied by parties to all internal armed conflicts.

An important article which is relevant to forced displacement of people is Art. 17 of Protocol II Additional to the Geneva Conventions (1977), entitled "Prohibition of Forced Movement of Civilians" which stipulates that "the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilian involved or imperative military reasons so demand". This wording makes it clear that Art. 17 prohibits, as a general rule, the forced movement or displacement of civilians during internal hostilities. The forced displacement of civilians is prohibited unless the parties to the conflict were to show that the security of the population or a meticulous assessment of the military circumstances so demands. Clearly, imperative military reasons cannot be justified by political motives, such as the movement of population in order to exercise more effective control over a dissident ethnic group. It provides guarantees to the civilian populations if these movements, for imperative reasons, have to take place and prohibits them to be compelled to leave their territories for reasons related to the conflict. According to the Protocol, this provision applies only to persons displaced because of armed conflict, and only to States parties to it. But as mentioned above, they become relevant even in the case of armed conflicts not of an international character because of their complementary character to the common Art. 3 of the four Geneva Conventions, which has now, by practice, become a part of customary law.

40 Protocol Additional to the Geneva Convention of 12th August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts was adopted on June 8th 1977.

41 Art. 1, paragraph 1 of Protocol II limits the instrument's application to non-international armed conflict that "takes place in the territory of a high Contracting Party between its armed forces and dissidents armed forces or other organized armed groups. India has not ratified the Protocol till date.

Refugee law

The definition of refugee[42] in the 1951 Convention Relating to Status of Refugees applies only to persons who have crossed an international border. Though this has been argued by some to be an arbitrary distinction, yet the presence of a person inside or outside his or her own country is of enormous consequence. But given the fact that some IDPs are also placed in refugee-like situations, certain analogy may be drawn from refugee law for the protection of IDPs. For instance : (i) Right not to be returned forcibly to areas where the life or the freedom of the displaced person could be threatened[43]; (ii) Right to seek residence in a safe place; (iii) Right not to be identified as displaced person if that would result in discrimination[44]; (iv) The freedom of movement especially in and out of the camp or other shelter for the displaced[45]; (v)Right to be provided with adequate documentation[46]; (vi) Right to benefit from measures towards family unification[47]; and (vii) The right to voluntary return to the original area of residence.

Such analogy cannot be made from refugee law if it is limited to provisions guaranteeing refugees not more than equal treatment with aliens in the country of refuge[48]. This is so because IDPs are themselves citizens of the country where they are residing, therefore, analogous application of refugee law in such cases would lower their rights in an unacceptable way.

42 Art. 1 A, of the Convention states that "For the purposes of the present Convention, the term "refugee,, shall apply to any person who: (2) As a result of events occurring before I January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

43 The corresponding article in 1951 Refugee Convention and refugee law principles from which analogy has been drawn are given in Art. 33 – (prohibition of expulsion or return/ '*refoulement*') of the 1951 Convention on refugees.

44 Art. 3 – (non-discrimination).

45 Art. 26 – (freedom of movement).

46 Art. 27 – (identity papers).

47 The principle of family unity is a part of refugee law.

48 For example Art. 17-19, of the 1951 Refugee Convention gives refugee the right to be treated in terms of employment at least equal to the treatment meted out to the aliens in that country. If such an analogy is drawn for IDPs from this provision then it will be detrimental to them because the IDPs themselves are lawful citizens of that country and hence they deserve the same treatment as that of other citizens.

Limitations in the existing mechanisms

Narrow scope of the provisions

Though a myriad of provisions can be found in international human rights and humanitarian law, and in refugee law by analogy, but some are applicable in certain circumstances and not in others. For instance, (i) the human rights law can be derogated from in times of public emergency or internal strife which coincides with the times of greatest need for protecting the displaced; (ii) it is also not binding on insurgent forces; (iii) humanitarian law too applies only to armed conflict situations, and not to lesser situations of civil strife in which many internally displaced persons are caught up.

The narrowness of the scope of the provisions is also enhanced by the fact that some states have not ratified key human rights treaties, the Geneva Conventions and their Additional Protocols and, therefore, are not formally bound by their provisions unless they are reflective of customary law.

Incoherence

Though there is no doubt on the applicability of some of the provisions of these laws, yet no one instrument sets forth these principles in a coherent fashion.

Existence of gaps

Clear gaps exist in the law when we look for specific provisions dealing with particular situation of IDPs. For instance there is no law relating to the documentation for the displaced or restitution or compensation for property lost during displacement; and although there is a general norm for freedom of movement, there is no explicit right to find refuge in a safe part of the country nor an explicit guarantee against the forcible return of the displaced persons to places of danger. In any kind of crisis women, children, old and disabled are more vulnerable than the others. But in all the instruments there is no explicitly articulated protection of such internally displaced groups. Governments are not explicitly obliged to accept international humanitarian assistance or to ensure safe access of IDPs to essential facilities and commodities needed for survival.

Lack of clarity

Neither human rights nor humanitarian law is sufficiently explicit in its protection of the internally displaced. In some it is possible to infer specific rights from existing general norms or by law analogy, in others, however inferences strain interpretation. Human rights law does not directly address some of the most critical situations affecting the displaced, such as forcible displacement or return to unsafe areas and access to humanitarian assistance.

An express prohibition of arbitrary displacement is contained in international humanitarian law and in the law relating to indigenous peoples[49]. In human rights law, by contrast, this provision is only implicit in various provisions, most particularly freedom of movement and choice of residence, freedom from arbitrary interference with one's home, and the right to housing. These rights, however, do not provide adequate and comprehensive coverage for all instances of arbitrary displacement, as they do not spell out the circumstances under which displacement is permissible. In addition, they are subject to restrictions and derogation

Thus the existing law provides substantial coverage for the internally displaced, but there are significant areas in which the law fails to provide sufficient protection. Some weaknesses relate to the need for an expressed right not to be unlawfully displaced, to have access to protection and assistance during displacement, and to enjoy a secure return and reintegration.

Need for new legal mechanisms

The above loopholes in the existing mechanisms shows that the way for amending it is to frame a new comprehensive legal document for IDPs. Therefore, what is needed is a definitive statement of legal principles that recapitulates and clarifies in one coherent document the existing norms, makes explicit the gray areas in the law, and remedies identifiable gaps. Such a document will reinforce and strengthen existing protections, will provide a modicum of legal protection for the IDPs where the norms are in consolidated form to attain adequacy and effectiveness and not dispersed and diffused, will help in raising international public awareness of the needs of IDPs, and will give human rights and humanitarian agencies a document to point to when dealing with governments and insurgent forces to gain access to the internally displaced and also it will act as a document to turn to when advocating on behalf of the internally displaced.

Arguments against a new legal instrument come mainly from those who believe in placing emphasis on implementing existing norms rather than creating new ones. They are of the view that the existing norms provide adequate coverage; and development of new standards would merely detract from efforts

49 The International Labour Organization (ILO) adopted at its forty-sixth session in Resolution 1994/95; E/CN.4/Sub.2/1994/2/Add.1 (ILO) No. 169 concerning Indigenous and Tribal People in Independent Countries. Art. 16 (1) of the convention provides that indigenous people "shall not be removed from the lands which they occupy". If "the relocation of these people is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent" or, if such "consent cannot be obtained ... only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned

to implement what exist and could even undercut existing standards and the extensive coverage[50] they provide. Some are also of the view that a normative framework specifically tailored to the needs of the internally displaced would discriminate against other groups[51].

After the need for a new document was felt, the UN General Assembly and the Commission on Human Rights had requested the representative of the Secretary-General to develop a normative framework for the protection of IDPs. In 1998, the *Guiding Principles on Internal Displacement*[52] was framed.

Guiding principles on internal displacement

These Principles[53], which are based upon existing international humanitarian law and human rights instruments, are to serve as an international standard to guide governments as well as international humanitarian and development agencies in providing assistance and protection to IDPs. These principles pertain to all phases of displacement: they include the norms applicable before internal displacement occurs (that is, protection against arbitrary displacement), those that apply in actual situation of displacement, and those that apply in post conflict period.

It contains 30 principles which are divided into five sections:

Section I: General principles (1-4)

This section talks about the principle of equality, universality, harmonious interpretation of the principles in conformity with the accepted norms of international and domestic law. It also points out that the primary duty and responsibility to provide protection and humanitarian assistance is of the national authorities.

50 International Committee of Red Cross (ICRC) in particular has expressed fear that any attempt to develop new standards could risk undercutting the extensive coverage that already exists under the Geneva Conventions. See Roberta Cohen, "Protecting the Internally Displaced" U.S. Committee for Refugees, World Refugee Survey (1996).

51 See *Supra* n. 17 at 75-76; the purpose of compiling a body of principles tailored to the needs of internally displaced would not be to discriminate against others but to ensure that, in a given situation, IDPs, like others, are protected and that their unique needs are acknowledged and addressed.

52 The Inter-Agency Standing Committee (IASC) fully supports the Guiding Principles, and encourages its members to share them with their Executive Boards and with their staff, especially those in the field, in order to ensure that the Principles are applied in their activities on behalf of internally displaced persons. See OCHA Online publications at http://www.reliefweb.int/idp/partners/ian/htm.

53 The Guiding Principle is a non-binding instrument which could help create the moral and political climate needed to improve protection and assistance for the internally displaced; and they eventually they might attain the force of customary international law and then lead to the development of a binding legal instrument.

Section II: Principles relating to protection from displacement (5-9)

This section reminds all authorities and international actors to respect and ensure respect for their obligations so as to prevent and avoid conditions that might lead to displacement of persons. It also talks about protection against arbitrary displacement, taking well-informed decision by the authorities regarding displacement of persons, proper manner of displacement and protection from displacement of groups with special dependency on and attachment to their lands.

Section III: Principles relating to protection during displacement (10-23)

Some of the rights enshrined in this section are right to life and its associating rights (such as right to dignity and physical and moral integrity), freedom of movement, right to seek asylum, right of recognition as a person before law, right to respect of his family life.

Section IV: Principles relating to humanitarian assistance (24-28)

This section clearly states that all humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality without discrimination. It also recognizes the right of the international organizations to offer their services and to be considered in good faith and free passage and protection to the persons engaged in such humanitarian assistance.

Section V: Principles relating to return, resettlement and reintegration (28-30)

This section deals with the duty and responsibility of the competent authority to the safe return of displaced people to their homes or resettle voluntarily in another part, to assist in recovering their lost properties, to ensure full participation of IDPs at all levels and to allow access to international humanitarian organizations to assist the IDPs in the above matters.

A right to be protected against arbitrary displacement from one's home or place of habitual residence is explicitly defined and detailed in the principles. They specify the grounds and the conditions by which displacement is impermissible and the minimum procedures guarantees to be complied with, should displacement occur. The displacement makes it clear that displacement shall not be carried out in a manner that violates the right to life, dignity, liberty, or the security of those affected.

Available national instrument or policy

India has no legal instrument or a well-defined policy to deal with IDPs or refugees. Therefore, the governmental action is incoherent while dealing with similar or different types of displacement. Under the Constitution, rehabilitation

is the responsibility of individual states. In the absence of a national comprehensive rehabilitation policy and legislation on displacement and rehabilitation, the whole process of dealing with the issue of displacement remains *ad hoc* and piece-meal even today. There is no uniform approach adopted by individual states towards the displaced persons (DPs) and project affected persons (PAPs). The three State governments that have separate Acts on rehabilitation are Maharashtra, Madhya Pradesh and Karnataka. Besides the State laws and policies, two public sector companies have also formulated policies on resettlement and rehabilitation of DPs. They are: (a) The NTPC, which promulgated its policy in 1993 and a revised version in the same year (b) Coal India Ltd., which promulgated its policy in December 1994.

The only draft policy that has been prepared by the government was the Draft National Policy for Rehabilitation of Persons Displaced as a Consequence of Acquisition of Land proposed by the Ministry of Rural Development. It deals only with displacement that arises from land acquisition. It disregards the plight of those fleeing human rights violations, physical violence and communal and other sources of tension.

India officially does not recognize its displaced persons as IDPs[54], since giving IDP status to the displaced will entail international involvement and more scrutiny. The government for the most part bars international visits to areas of conflict (in Jammu-Kashmir and the northeastern states), and it does not invite or allow international assistance. As far as national assistance to IDPs is concerned, it is minimal and the government does not support the displaced's search for long-term solutions, such as return or resettlement.

The lack of policies and procedures for responding to IDPs' needs is of great concern today. The only relevant documents, legal or otherwise are: (i) Land Acquisition Act, 1894, (ii) Draft National Policy on Developmental Resettlement of Project Affected people (iii) State rehabilitation policy of Madhya Pradesh, 1992.

Displacement and the Land Acquisition Act, 1894

The developmental projects like dams require acquisition of lands, uprooting of people that has wide effects in their social, economic and cultural life. Since such projects are mostly confined to the tribal or indigenous people inhabited areas, they are the ones who are majorly displaced in these developmental projects.

The Act is meant to acquire land for a 'public purpose'. Compensation is to be paid to the *patta* holders and the rest are ignored. As mentioned above, the

54 This reflects its strong opposition to international involvement in its internal affairs.

majority of the people being illiterate, are not aware or do not possess legal papers of their land. Moreover, they are attached not only to the land they live in, but also to the surrounding environment, that is the forest etc., which can be called the "common property resources (CPRs)[55]" for their subsistence. The compensatory land given to the displaced does not include CPRs in their scheme of compensation.

Draft National Policy on Rehabilitation, 1998

After a few earlier drafts (1993, 1994), the Ministry of Rural Development had finally come up with the Draft National Policy on Rehabilitation in 1998. This draft policy has some positive features. (i) In the first place it does acknowledge that displacement results in "state-induced impoverishment" (ii) It also recognizes that "no developmental project can be justified if a section of society is pauperised by it."

In brief the draft policy seemed to correct the shortcomings of the existing legal regime and to a large extent tried to bridge the gap between the constitutional aspiration of social justice and the anti-people and anti-poor law on acquisition.

It is significant to note that at about the same time the draft policy was drafted, the same Ministry also finalized the Land Acquisition (Amendment) Bill (LAB), 1998 widely regarded as anti-people and which actually ignored the draft policy on rehabilitation. On the 31st of October1998, the Union Cabinet approved the Land Acquisition (Amendment) Bill, 1998, the Union Cabinet rejected the Draft National Policy on Rehabilitation.

In spite of the lack of separate legal instrument on internal displacement in India, the basic document where we can rely for legally preventing the arbitrary displacement of people is the Constitution of India where the fundamental rights are enumerated.

There are three provisions – clauses *(d)* and *(e)* of Art. 19 and Art. 21, which are relevant in the protection of an individual from arbitrary displacement from his home or place of residence. Clauses (d) and (e) of Art. 19(1) guarantees to the citizens the right to move freely and reside and settle in any part throughout the territory of India. These freedoms can be curtailed by a law made by the state imposing reasonable restriction on the grounds of public interest or for the protection of the interest of any Scheduled Tribe[56]. The right to movement means the right of locomotion and the qualifying adverb 'freely' connotes that the freedom to move is without restriction and is absolute, i.e. to move wherever

55 Resources for which there are no clearly defined property rights; property owned in common by a society. [FACS] www.garlic.com/~lynn/paygloss.htm 370.

56 Clause (5) of Art. 19.

one likes, whenever one likes, and however one likes, subject to any valid law enacted under clause (5)[57]. The rights guaranteed in these two clauses of Art. 19 are overlapping; cumulatively they guarantee the right to reside in a place of one's choice and to move from that place to another only according to one's volition. In other words no one can be forced to leave his home or place of habitual residence involuntarily. Any law made by the state to restrict this right must be reasonable and in the interests of the general public or for the protection of the interest of the Scheduled Tribes. Externment or internment orders e.g., orders requiring a person to leave a certain area or not to enter a certain area or not to leave a certain area would, no doubt, curtail the freedom guaranteed in clause (d). Hence, a law authorizing externment or internment to be valid must within the limits of permissible legislation of clause.

In a case[58], Sec. 3(1)(b) of the M.P. Public Security Act, 1959, which authorized the State Government to order a person to reside or remain in such a place or within such area in M.P. as may be specified in the order, was challenged as being violative of the right guaranteed by Art. 19(1)(d). Under the Act, if the person so ordered failed to carry out the directions, he could be removed to the area or place designated and could also be punished with imprisonment. The Act did not give the opportunity to the person concerned of being heard before the place where he was to reside or remain was selected. The place selected could be one in which the person might have no residential accommodation and no means of subsistence. He might not be able to secure the means of subsistence in this area. Further, the Act, did not indicate the extent of the place or the area, its distance from the residence of the person externed or whether it was inhabited or uninhabited. It also nowhere laid down that the person directed to be removed would be provided with any residence, maintenance or means of livelihood in the place selected. It was held that the restriction was unreasonable and therefore void.

A conclusion can be drawn that the freedom of movement and the freedom to reside and settle in any part of the country is guaranteed subject to reasonable restriction for reasons provided in the article; the right not to be forcibly removed from a citizen's home or place of residence is a corollary of the above right; it is desirable to hear the opinion of those who will be displaced while choosing the area where their resettlement is to be done; where the person displaced is not to be provided with any residence, maintenance or means of livelihood in the place selected, then regard should be taken whether the person will have residential accommodation and the means of subsistence before the decision for such an action is taken.

57 *Kharak Singh* v *State of U.P.*, AIR 1963 SC 1295.
58 *State M.P.* v *Bharat Singh*, AIR 1967 SC 1170.

In the *Pavement Dwellers* case[59], the Court held that right to livelihood is included in the right to life[60] "because no person can live without the means of living"[61]. Therefore, if a displacement deprives a person of his means of livelihood in such a way that he is left without means of subsistence in the new area then, it will severely affect his right to life[62].

'Public interest' which is one of the grounds of reasonable restrictions that can be imposed on this right is a very wide concept. What constitutes an interest of the general public is for the courts to determine. Though leaving the determination of the scope of this ground of restriction to the court imparts it the quality of being flexible, yet it suffers from inconsistency and uncertainty. Moreover, a court's decision is generally related to the matter and the issues relating to the particular case before it and can never be a comprehensive norm which takes into account all aspects of the issue. Therefore, it will be better if a particular legal instrument is created relating to the prevention, tackling and healing the scars of such crisis.

Formulation of legal mechanism

The above discussion clearly shows the lacuna in the legal mechanisms or policy to deal with internal displacement. The urgent need to frame a legal instrument on the issue need not be overemphasized. But whenever the task of framing a legal instrument / policy on the issue is taken up certain rights and freedoms discussed below have to be taken into account.

Points that need to be complied with in the international regime

Freedom of movement

Forced displacement is the denial of the exercise of freedom of movement and choice of residence since it deprives a person of the choice of moving or not and of choosing where to reside. This freedom is expressly recognized as a human right in Art. 13(1) of the Universal Declaration and is similarly guaranteed in Art. 12(1) of the ICCPR which guarantees that "everyone lawfully within the territory of a State shall, within that territory, have the liberty of movement and freedom to choose his residence".

59 *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545.
60 Art. 21 of the Indian Constitution guarantees the right to life and personal liberty.
61 Similarly held in the following cases: *Delhi Transport Corporation* v. *D.T.C. Mazdoor Congress*, AIR 1991 SC 101; *Delhi Development Horticulture Employees' Union* v. *Delhi Administration*, AIR 1992 SC 789.
62 Right of agriculturalist to cultivation is part of their fundamental right to livelihood, held in *Dalmia Cement (Bharat) Ltd.* v. *Union of India*, (1996) 10 SCC 104; *Charan Singh* v. *State of Punjab*, (1997) 1 SCC 151.

Most universal and regional human rights instruments permit states to place restrictions on freedom of residence and movement during situations of tensions and disturbances, or during disasters. But according to Art. 12(3) of ICCPR this freedom can be restricted only if it is provided by law, and is necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. Thus the application of such restriction must be prescribed by law, be based on one of the enumerated grounds justifying limitations, respond to a pressing public or social need, pursue a legitimate aim, and be proportionate to that aim[63]. The decisive criterion for determining whether this standard has been observed is the principle of proportionality in a given case. Every interference to the freedom of residence and movement thus requires a precise balancing between the right to freedom of movement and those interest to be protected by the interference[64].

Under Art. 12(3) of the ICCPR, the permissible reasons for interference are national security - national security is endangered only in grave cases of political or military threat to the entire nation; such a situation may call for temporary relocation of people; public order – restriction on this freedom under this ground could justify displacement in certain development and infrastructure projects where the interest of general welfare are clearly overriding; public health and morals– under this ground exception might include relocation away from areas in which acute health dangers exist; and the rights and freedoms of others – it may justify evictions to respect private property. However, state parties are obliged to ensure that interference in favour of private owners is proportional to public benefit[65].

The Sub-Commission on Prevention of Displacement and Protection of Minorities adopted a resolution at its forty-sixth session, called "The Right to Freedom of Movement" which affirmed "the right of persons to remain in their own homes, on their own lands and in their own countries[66]. Art. 18 of the Draft Code of Crimes against Peace and Security of Mankind[67], entitled "Crimes

63 The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. *www.article23.org.hk/English/research/iccpr.doc.*

64 Nowak Manfred, *United Nations Covenant On Civil And Political Rights: CCPR Commentary Kehl, Germany ; N. P.Engel(1993) at 221..*

65 *Id* at 216.

66 Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Right of Freedom of Movement, Resolution 1994/24 (Aug.26,1994) as quoted by Cohen in *supra* n. 17 at.88.

67 International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/51/10 (1996) – the text adopted at the second reading in 1996.

against Humanity" lists five manifestations of practices constituting crimes, one of which is - when committed in a systematic manner or on a large scale, one of them being "forcible transfer of population".

Protection from interference with one's home

The provisions relating to privacy i.e. Art. 17 of the ICCPR[68] protects individuals from arbitrary or unlawful interference with his "home". The protection of home does not only relate to dwellings but also to all types of residential property regardless of legal title or nature of use[69]. Therefore, any activity that deprives a person of his home altogether, without his consent, will amount to the interference of the above right. Any interference will be "unlawful" if it contravenes the national or international legal system. In addition, it will be "arbitrary" if it contains elements of injustice, unpredictability, and unreasonableness[70].

While determining whether an act of state enforcement organ has violated this right or not the following issues have to be looked into: (i) whether in addition to conforming to national law, the specific act was legal on the basis of the Covenant in its entirety, (ii) whether it was predictable in accordance with the rule of law, and (iii) whether it was reasonable (proportional) in relation to the purpose to be achieved.

The decision to make use of such authorized interference must be made only by the authority designated under the law and on a case-by-case basis.

Right to housing

The right to housing also provides protection against arbitrary displacement. Art. 11(1) of the ICESCR enumerates this right[71] but it has not been defined what constitute this right. In addressing this right, the Committee on Economic, Social and Cultural Rights, stated that "instances of forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law[72].

68 Art. 17 para. 1: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

69 Supra n. 17 at 302.

70 Supra n. 17 at 293.

71 "..(it) recognize(s) the right of everyone to an adequate standard of living for himself and his family, including adequate food; clothing and housing...The State Parties will take appropriate steps to ensure the realization of this right...."

72 General Comments on the Committee on Economic, Social and Cultural Rights, General Coment 4 : The Right to Adequak Housing. See http://cesh.org/genecalcomments.

Limitations on this right must comply with the requirements of Art. 4 of ICESCR i.e. it should be determined by law, it should be applied only insofar as this may be compatible with the nature of the right, and it should be imposed solely for the purpose of promoting the general welfare in a democratic society. Further, Art. I(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity defines "evictions by armed attack" as a crime against humanity, whether committed in peace or in war[73].

Points that need to be complied in the national front

The Constitution of India has put the twin rights[74] in Part III which relates to the fundamental rights and thus guarantees a special status as compared to the other rights. Its position in the Constitution indicates that it should not be derogated arbitrarily without any reasonable basis. It is to be noted here that every forcible movement, however, is not discriminatory. If it is based on reasonable and objective criteria, and not targeted at any specific group or person on invidious discriminatory grounds, it may not be prohibited. The decisive question is whether a specific distinctive distinction between groups of persons who finds themselves in a comparable situation is based on unreasonable and subjective criteria. The principle of proportionality is also relevant here. If the displacement is due to some unavoidable reason which is meant for the larger good, such as developmental programmes, then it should be done in a way compatible with Art. 14 of the Constitution[75]. It means that the classification or selection of the area, people and property to be dislocated should not be discriminatory. Such a classification should be founded on an intelligible differentia that distinguishes persons or things that are grouped together from those that are left out of the group, and the differentia must have a rational relation to the object sought to be achieved by it[76]. The new approach taken in Art. 14 has widened the scope of its application. Now one need not allege any discrimination vis-à-vis others[77], an arbitrary or unreasonable action is *per se* discriminatory. This aspect of the equality principle has been used to strike

73 *Supra* n. 17 at 89.
74 Clauses *(d)* and *(e)* of Art. 19 which relates to freedom to move freely throughout the territory of India and the freedom to reside and settle in any part of India respectively.
75 It guarantees equality before law and equal protection of laws to all citizens.
76 It was expressed by Das J. in *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75 and followed in many later judgments.
77 *A.L. Kalra* v. *Project and Equipment Corpn.*, (1984) 3 SCC 316.

down clearance given by the government to set up developmental or industrial projects without looking into or giving due consideration to the environmental impact assessment (EIA) as being arbitrary. Taking a cue from this, and applying it to the current discussion, we can say that decision to displace people should be taken by the State authorities for a valid reason taking into account the overall impacts it will have on the socio, economic, culture and environment. In the absence of it, the action taken or order given should be void.

One way of achieving it is to lay down in the statute the procedures or the guidelines to be followed by the concerned authority so that any step taken inconsistent with it will be void. As laid down by the Supreme Court in *Narmada Bachao Andolan* that proper rehabilitative measures are to be incorporated when there is displacement of people due to construction of dams. While looking into the rehabilitation of the displaced, regard should be had not only to the compensation of the lost land but also to the common property shared by the community and on which they depend to meet their other subsistence needs such as firewood, fodder, etc.

The Guiding Principles on Internal Displacement should be taken into account while making the domestic law so that there is conformity between it and the internationally recognized principles. Though the *Principles* are not binding in character, because of its nature of being a declaration as well as its lack of characteristics of attending the status of customary international law, more and more States are citing it and trying to abide by it while dealing it with displacement of peoples. Since the principles are in no contradiction to the Constitution, it will be helpful to consider it while making our own laws. The resolving of the issue of displacement by way of return and resettlement in their original homes may not be an issue when these places and properties are occupied by the rival groups. There has to be a judicial authority in the form of a tribunal or otherwise in order to tackle such property disputes in a quick and effective manner. It may be reiterated that even while giving land for land, in the case of acquisition of land, the provision for 'common property resource' should not be ignored since it is this resource that many communities depend upon for subsistence.

III Conclusion

Internal displacement is indeed of serious concern because of the magnitude, extensiveness and repercussions of the problem. Internal displacement is of concern to the international community because of coercion that impels their movement, their subjection to human rights abuse as a result of this uprooted

ness, and the lack of protection available to them within their own countries. Moreover, internal displacement can have severe repercussions to the other side of the international border.

The lack of legal mechanism till date in India to deal with internal displacement is a stumbling block in tackling the problem effectively. Experience shows that it is a wise option not to leave to the governments without any policy or guidelines to deal with issues affecting the lives of the citizens, and more so when it is the State's action or inaction that has resulted in the problem faced by the citizens.

The gaps in the existing system of norms for dealing with displacement and displaced persons have brought to the forefront the necessity of laying down legal mechanism governing this situation. The important points to be kept in mind while framing the rules, both in the general context as well as Indian context, has been emphasized. In both the cases, the law so made should not curb the rights which are guaranteed to the other citizens unless there is reasonable basis for doing so. In short, a body of principles that restates and reinforces the essential rights of internally displaced persons shall provide authoritative guidance in dealing with this sensitive problem. And it is in the interest of the nation to have a legal framework for dealing with internal displacement at the earliest so that the rights that are enshrined in Part III of our Constitution do not remain rhetoric.

THE PRINCIPLE OF EQUALITY AND DISCRIMINATION IN THE POST APARTHEID SOUTH AFRICAN CONSTITUTION

*Rajen Narsinghen**

I Introduction

SOUTH AFRICA, under the apartheid regime had been characterized by gross inequality, so much so that it can be said that inequality, social, political and economic was the very pillar on which the apartheid system was based. This inequality and discrimination was largely structured on racial considerations, although the existence of other factors like gender inequality cannot be ignored. However the focus of this paper is racial inequality and the constitutional, legislative and judicial developments that have taken place post apartheid period to combat this inequality, and the consequences therein.

The post-apartheid constitution, (both interim and final) not only had to restore equality, but also had to rid the country of all the wounds of inequality, that had previously been inflicted on the black population by the white rulers. Such an immense challenge is difficult to uphold as an objective to mitigate the effects of past discrimination and implicates recourse to 'positive-discrimination'. Among other countries that also faced a similar difficult task of reconciling equality and remedying of the consequence of past inequality is India, which in fact provides a good example of how this issue was dealt with by a newly democratized country and what were the consequences thereof. The scope of the present paper is to analyze how the South-African constitution succeeds in an almost impossible task of reconciling the twin objectives of restoring equality and removing the scars of past inequality. The Constitution of South Africa itself describes the State and the Bill of rights, as being based on the values of equality, freedom and human dignity[1]. In fact in a landmark case [2] the court, commenting on this principle of equality stated that,

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1 The South African Constitution, Sec. 1, states.
1. The Republic of South Africa is one sovereign democratic state founded on the following values:
a.Human dignity, the achievement of equality and advancement of human rights and freedoms.
b.Non-racialism and non-sexism.
c.Supremacy of the constitution and the rule of law.
d.Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

"the South African constitution is primarily and emphatically an egalitarian constitution. The Supreme law of comparable constitutional states may underscore other principles and rights, but in light of our particular history and our vision for the future, the Constitution was written with equality at its center. Equality is our Constitution's force and its organizing principle".

II The Constitutional Foundation of Equality

Sec. 9 of the Constitution of South Africa[3] deals with the principle of equality. South African law, like many other countries makes a distinction between "mere differentiation" (the equivalence of classification in India) and "discrimination". For example, it would be perfectly legal and constitutional for the South African authorities to give a driving license to those aged 18 and above, and not to those below this age. However, the differentiation should be justifiable because either the government has a legitimate purpose to differentiation or the differentiation is rationally connected with the purpose. Otherwise, differentiation may amount to discrimination. South African law makes a further distinction between "fair discrimination" and "unfair discrimination" which has been very well

Sec. 36. says, (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

a. the nature of the right;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the relation between the limitation and its purpose; and

e. less restrictive means to achieve the purpose.

(2) Except as provided in subsec (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

2 Republic of *South Africa and Another* v. *Hugo*, 1997 (4) SA 1 (CC).

3 The Constitution of South Africa, Sec. 9, (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. 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.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsec (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsec (3) is unfair unless it is established that the discrimination is fair.

conceptualized in the case of *Harksen* v. *Lane*[4]. The Constitutional Court, in this case summarised its approach to the interpretation of the right to equality under Sec. 8, of the Interim Constitution. The Court ruled that this interpretation is equally applicable to Sec. 9, of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions. The stages in the enquiry were: (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of Sec.8 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. (b) Does the differentiation amount to "unfair discrimination". This requires question in itself a two-stage analysis: (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will be deemed to be established. If it is not on a specified ground, then whether or not there is a discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed but it if is on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

The court further held that in order to determine whether or not the discriminatory provision has impacted on the complainant unfairly, various factors must be considered, that include amonsgst others, (a) The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not; (b) The nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving worthy and important societal goals, such as, for example, the furthering of equality for all. This purpose may, depending on the facts of that particular case, have a significant bearing on whether the complainants have in fact suffered the discrimination in question; (c) With due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature. Under the Constitution,

4 *Harksen* v *Lane*, No. 1998 SA 300 (CC)

this is not the end of the enquiry, as the respondent still has a further opportunity to seek to justify a finding of unfair discrimination under the general limitations clause"[5]

Thus, not all forms of discriminations will be considered to be unconstitutional. However discrimination based on the specified grounds stipulated in the Constitution such as race, gender, sex, disability, religion, pregnancy, marital status, ethnic and social origin, color, sexual orientation, age, conscience etc would be unconstitutional and would be considered unfair. In contrast, discrimination on the basis of nationality is not unfair from a legal point of view. In spite of such a restriction, an aggrieved person has to convince the court that the alleged ground of discrimination, which is not specified, is yet analogous or sufficiently similar to those listed in the Constitution. Such analogous ground may be unconstitutional if it has the potential to impair the dignity of a person in the same serious manner, as one of the specified grounds would do. Royappa's[6] case in the Indian Context is an example of classification which is arbitrary as it states that "where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14". Classification is permissible only when it is grounded on reasonable and intelligible differentia which distinguishes persons or groups, from others left out of the group and secondly, where the differential has a rational relation to the object sought to be achieved by the impugned legislative act or executive action.

However, later cases make it obvious that many laws and actions have been struck down as violating equality even when they could not be classified as arbitrary. The rational behind such classification is that men are unequal and consequently, a right of persons to not be denied 'the equal protection of laws' cannot mean the application of the same laws for all[7].

It is here that the doctrine of classification in India, or differentiation in South Africa or Mauritius assumes significance, as it steps in and gives content and significance to the guarantee of the equal protection of the law. According to this doctrine, equal protection of one particular law is meant for all persons similarly situated. Hence, classification is allowed when it is a 'permissible classification' satisfying the two conditions mentioned earlier. Such a law based on permissible classification is valid and fulfills the guarantee of equal protection of the law.

5 http://www.justiceinitiative.org/activities/ec/ec_russia/moscow_workshop/OSullivan/3. See also the constitution of South Africa, Sec. 36.

6 *E. P. Royappa* v. *State of Tamil Nadu*, (1974) 4 SCC 3,38, AIR 1974 SC 555.

7 HM Seervai-*Constitutional Law of India*, 4th ed. 439.

Like the Indian Law[8], the new South African law also makes a distinction between discrimination involving the state, which is also known as vertical application of discrimination, and discrimination involving individuals, known as horizontal application of equality. Furthermore, the South African law makes a distinction between direct discrimination as opposed to indirect discrimination. A measure or action constitutes 'direct discrimination', if explicitly allows impermissible differentiation, whereas indirect discrimination does not explicitly differentiate impermissibly, but its effect can amount to impermissible differentiation.

III The Redress of Inequality

In South Africa, racial inequality was primarily redressed through legislations and therefore the blatant forms of discrimination were removed, even before the advent of the new regime. Inequality on the basis of sex and gender was addressed in a variety of ways. At the political level, the leading political party established a quota system, where at least 25% of candidates on the party list were required to be women. Other legislations, like the Domestic Violence Act, the Recognition of Customary Marriage Act and the Employment Equity Act were passed signifying the reformative character of the legislations.

The judiciary has also contributed to redress inequality that legislations have not been able to address in a comprehensive manner. The concept of equality entrenched in Sec. 9, which although vaguely worded, has been applied in several cases. The court had an opportunity to adjudicate the equality test in one case, viz. *Pretoria City Council* v. *Walker*[9]. The issue before the court was whether or not the City Council of Pretoria had violated Walker's right to equality?. Among several separate local councils, amalgamated in terms of the LGTA into the Pretoria City Council were two formerly black areas, Mamelodi and Atteridgeville and a formerly white suburb, referred to as old Pretoria. Residents of Mamelodi and Atteridgeville paid for their electricity on the basis of a 'flat rate', which is a fixed amount, based on the average usage of electricity in their area. However, residents of old Pretoria paid for their electricity on a 'metered rate', an individual amount based on the actual usage of electricity by the consumer. The metered rate was higher than the flat rate. The Council had started to install meters in Mamelodi and Atteridgeville, but continued to use the flat rate in those areas until all the meters were installed. In terms of the recovery of arrears, legal action was instituted against residents of old Pretoria only, whereas the municipality endorsed a 'benevolent' approach towards the residents

8 The Constitution of India 1950, Art 14.

9 1998(2) SA 363 (CC)

of Mamelodi and Atteridgeville, which resulted in them not being sued to enforce payment of arrears in those areas. Walker, a resident of old Pretoria was sued for arrears in respect of charges for electricity provided by the municipality. He challenged the constitutionality of the municipality's actions in respect to its policy on the delivery of electricity services. He was of the opinion that the council had infringed his right to equality and that he was being discriminated against. In the application of the equality test, the Constitutional Court distinguished between the differentiation in rates and the selective enforcement of payment of arrears. Concerning the first allegation, the court held that there was no unfair discrimination. They observed that the 'old practice' of flat rate system was applied in a more well off area, and that it was a valid assumption, that, this area used more water that the other occupied by not so wealthy persons. One flat rate throughout Pretoria would have resulted in greater prejudice to the old townships. Furthermore, the measure taken also did not impair the dignity of the residents of 'old Pretoria'. However, in relation to the second allegation, the court found that the selective enforcement of debt was unfair and could not be saved by the limitations clause[10].

To a great extent, the legislature and the judiciary have been able to deal with considerations of equality satisfactorily, but a major concern that must be addressed is that the practice of discrimination in the past has produced several disadvantages for the citizens presently. How can the law and especially the Constitution remedy the situation and set the pendulum right? One way of doing that is resorting to affirmative actions. However, the recourse to affirmative actions or positive discrimination may pose a number of other complex problems, like perpetrating new injustices against individuals for the sake of those of who come from traditionally disadvantaged groups.

The rationale of affirmative action

Segregation on the basis of race, religion, castes, and culture leads to inequality in the medium and long term. Segregation under Apartheid also was focused primarily on generating injustice, inequality and unequal development in different groups and religions. The result was a wide economic gap among segregated groups. Affirmative action, in contrast tries to catch up with the handicaps suffered by those who were discriminated under the previous regime. In principle, 'affirmative action' in countries like India[11] or United States is of a temporary nature and an exception rather than a general principle.[12] In principle,

10 *Ibid* at. 366.

11 Art. 16 (4), of the Indian Constitution says "Nothing in this article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state.

12 H. M. Servai-opt cit 611.

affirmative action, once they have enabled the disadvantaged groups to catch up and be at par with the other group can be phased out. Some measures can however, also be permanent, especially those destined to benefit handicapped persons or pregnant women. The logic behind affirmative action is to facilitate the integration of the oppressed group into the mainstream and therefore, it is not be suitable where the objective is to encourage the creation of separate or autonomous groups. For example, in the United States, affirmative action was designed to benefit the African Americans who wanted to be part of the mainstream society. In the case of South Africa, the end of Apartheid led to chaos and the country was virtually on the verge of a civil war. Owing to the positive contribution of the President, Nelson Mandela and of De Klerk[13], a civil war was avoided. Political negotiations were successful and a new democracy was set up. Affirmative actions emerged in this scenario as a compromise where the main objective was to enable the oppressed group to catch up with the privileged groups and to allow for the demise of the unfortunate and abominable consequences of apartheid. The South African Constitution adopted affirmative action as a constitutional principle, rather than as exception in comparison to the situation in India. Such elevation of the concept of affirmative action as a Constitutional principle is quite rare and is probably unique in the world. Sec. 9(2), of the South African Constitution allows the legislature to pass laws in order to mete out differential treatment to different groups. For example, under the Employment Equity Act, 1986 the prime objective is to secure jobs for the previously disadvantaged group. It can be a justifiable strategy to remedy the blunder of the past, but at the same time, it may be a threat to democracy in the long run. At the most, affirmative action must be used with utmost caution, and it must be endowed with some special safeguards. For example, affirmative action needs to be applied within a specific time frame so as not to be in conflict with the principle of equality.

Inherent danger from the new constitutional principle

Affirmative action is primarily geared towards according differential treatment to different groups. At the same time, even at an individual level, differential treatment may be meted out to two individuals who are at the same level but taking into account different considerations. This may happen where, for example, a poor black is competing against a poor white for a job. It is true that for the time being, such an occurrence would be rare and highly improbable because 95% of blacks are poor as opposed to 0.7% of whites who can also be covered under the poor category are also poor[14]. Yet these cases are theoretically possible.

13 President Mandela & De Klerk were bestowed with the noble peace prize in 1993. N. Mandela spent 27 years in prison.

14 Racial Categories are still used in South Africa by statistical officers.

The rationale and justification behind such recourse to positive discrimination is based on a quest for justice. Sec. 9 of the South African Constitution, further enunciates that discrimination though apparently unjust on face value, may be ultimately justified .In the new Constitution, prohibited discrimination is the one which is grounded in personal or individual traits or qualities and when it is not geared to attain laudable objectives, viz. such as to remedy past injustices. If injustice was being perpetrated in order to deprive a white or colored person from a job, without trying to attain any legitimate purpose, it would nevertheless amount to discrimination. So far as the discrimination is based on justified differentiation using objective criteria, there is nothing that is fundamentally objectionable. However, when there is a shift from justified discrimination to unjust discrimination, there is also a shift from objective to subjective criteria.

On the moral plane, positive discrimination assumes a new theoretical foundation. It is a way to attain a sort of collective equality or to strike a balance among various groups or to remedy the past injustice. In the process of discriminating positively in favour of a group, an individual may also suffer injustice, for example, a young white South-African, who has never discriminated personally, may be prejudiced personally by the provision of the new law. At the same time, a rich black person may benefit from the positive discrimination clause. The individual situation of a person is not taken into consideration, rather his belonging to a specific group will allow him to benefit from a special treatment[15]. Therefore, because of the inherent danger encapsulated in affirmative action as a principle, any implementation becomes even more hazardous.

Implementation through legislation

The post-apartheid new regime does not only consecrate affirmative action as a Constitutional principle, but it goes further to include the principle in other legislations, for example, the Employment Equity Act, 1986 which has two objectives namely, eradication of unfair discrimination.[16], and the restriction of equality through affirmative action. These objectives, according to the Act are to be attained within a seven years timeframe. However, no Constitutional provision specifies such a timeframe. In fact, the timeframe should have been imposed by the Constitution itself. As a measure once adopted is rarely withdrawn, exceptional measures can become permanent. The analogous situation is different in the U.S. and some other countries, which practice affirmative action. Secondly, it

15 TP. Van Reenen 'Equality, discrimination and affirmative action:on analysis of S/9 of the Constitution of South Africa South African public law,151(1997).

16 John-Grogan, *"work place Law-Juta law Ltd"*, Chapter 1, at 1.

is to be noted that only medium enterprises and firms are affected by this law, that is, those who are employing more than 50 employees or are having a designated turnover. These criteria presently will embrace around 100,000 firms. To the others, the provision of the Employment Equity Act may or may not apply. For those firms that are governed by this Act, there is an obligation, of every employer to submit a report to the Ministry of Labour, giving the profiles of the employees. The Ministry after looking into the profile sends back a report to the concerned firm. On the basis of the report, the employer is to make amends for future recruitments to catch up with any prevailing inequality[17]. Though, there is no quota for recruitment of any group, but there are numerical goals in terms or percentage that should be attained[18] Such mechanism may exclude any individual having the same qualifications and competence due to the fact that he belongs to a privileged group, which will be the 'whites' here, especially when the oppressed group is under represented in the firm. Furthermore, the yardstick for employment is not only actual qualification and experience, but also the potential for a person to progress and to acquire competence on the work place within a reasonable time. The employer who complies with the law, will be awarded a certificate of good conduct, which makes him eligible to compete in the public market. Contrastingly, non-compliance with the law entails sanctions, such as heavy fines. Practically, the application of this law is not easy, especially when vague, ambiguous and subjective criterion such as the ability to acquire necessary competencies, are used in the legislation.

17 E. Cidiey. – La democrate de la Nouvelle Afrique du Sud: acterurs., institutions, dynamiques.- Paris- Juillet 1999.

18 Refer to Art. 15.3 of the Employment Equity Act which prohibits recourse to quota.
15. Affirmative action measures:-
(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.
(2)Affirmative action measures implemented by a designated employer must include-
(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups; (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people; (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer; (d) subject to subsec (3), measures to- (i)ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.
(3)The measures referred to in subsec (2) (d) include preferential treatment and numerical goals, but exclude quotas.
(4)Subject to Sec. 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

Such formula is bound to trigger unnecessary disputes. The burden of proof is on the employer the moment the employer makes a simple allegation. Such reversal of the burden of proof may tempt workers to make an abuse of the whole system to their advantage. It is also clear that in this whole process, the employer loses his discretion, and the labour contract loses much of its value. However, a question arises; will the affirmative measures be beneficial to all the blacks? One can be skeptical as only 10% of the blacks are educated and may gain from such affirmation action, but the overwhelming majority is uneducated and not in a position to reap any benefit from these laws. Even in the US, affirmative action has not yielded positive results. Yet another challenge is that South Africa is a multiracial country, with people coming from different parts of Africa, Europe, and India. In this multi social country, apartheid brings about an artificial classification, on the basis of social, religious, cultural and tribal differences by distinguishing whites from blacks, calling the later oppressed. The new affirmative actions are still grounded indirectly on race, which may oppress other innocent whites or colored persons (the Indians). The affirmative actions are meant for integration and to form an egalitarian western society, that makes complete abstraction of the cultural and racial realities but the new regime based on racial criteria may not be fully beneficial for the blacks, or even for the whole society.

Dangers of collective equality

The requirement to classify the manpower on the basis of racial criteria brings into play the same problem of racial perception and coloration for recruitment, promotion and internal politics of the firm. The racial criterion unfortunately relegates competence, qualification, and skills to secondary roles. All these shortcomings make affirmative actions and other mechanisms put in place to enforce affirmative actions in a way responsible to bring racism back in force. All blacks that succeed will be tagged with the privilege that they have benefited from affirmative action, though they could have succeeded without it. Hence, they will be living perpetually in a state of an inferiority complex. The principle also denies a white who is competent and has never been guilty of apartheid to become a victim of the new form of discrimination.

The theory to discriminate between groups is not devoid of danger. There can be justification to discriminate between regions, or between a normal person and a handicapped person, but the same justification is not easy when the criterion is to discriminate one race from another, because all individuals who are members of the group will be treated equally, though each one is in a different situation. Finally it can be observed that the pursuit of affirmative action is fraught with difficulties, because it goes against the equality principle at individual level.

Use of affirmative action in limited situations

Affirmative action grounded on race is fraught with several negative side effects. It can be used as an exception, based on some judicious criteria like economic, social, geographic, poverty or under representation level. For example, it is possible to subsidize the studies of poor students or to give a special grade to people living in slums.

All the arguments stated above are based on personal interpretation of the text and opinions of various jurists. At one time, the court in South Africa gave some hope where in a landmark case [19], it stated that:

> "Disadvantage arising for discrimination is not necessarily to be equated with race in South Africa, but of course disadvantage and race have gone hand in hand for decades".

Nevertheless, the Constitution has recognized that even within a racial group which has suffered discrimination there may be and indeed are persons who have had opportunities and who have not been disadvantaged to the extent of their fellows. Affirmative action within the South African context is not primarily intended for their benefit. Affirmative action as used in the Constitution is not premised on the American affirmative action that is racially based for remedial action. Sec. 9 (2), stipulates that affirmative actions may be designed in favor of previously disadvantaged individuals or groups. Interpreted subjectively, "designed" in the above sentence means 'intended', that is, if the objective is to benefit those who were disadvantaged, then the discrimination is legitimate. However, when interpreted subjectively, 'designed' implies that there must be a rational connection between the objectives (goals) of measures and the means. The case of Public Services Association of South Africa, has followed the objective approach. In this case[20], a number of qualified whites applied for a job in the Department of Justice, but they were not invited for interview. This was done in terms of the departmental policy to reduce racial imbalances. The court found that the measures were haphazard and over hasty. It concluded that the decisions were not measures 'designed' to achieve affirmative action. However in practice, the pronouncement made in the case of Public Services is not easy to apply. The case of *Motala* v. *University of Natal*[21] justifies such a conclusion. In this case, the Natal Medical School had a policy in terms of which it admitted only 40 Indian students. This left more room for black students, who normally would not have been qualified, if the merit criteria was applied. Motala, who was an Indian student with five distinctions is the final school year, was refused

19 *George* v. *Liberty Life Association of Africa Ltd.* 1996 8 BLR 985(IC).
20 *South Africa* v. *Min. of Justice* 1997 BCCR 577.
21 1995(3) BCLR 374.

entrance into the medical school due to adoption of this policy. Both Africans and Indians have severely been disadvantaged by apartheid, yet the apartheid society has created a hierarchy of races and the present post-apartheid system is perpetuating it.

IV Conclusion

While everybody acknowledges the irreparable harm perpetrated by apartheid, there are still many other crimes that can be considered as crimes against humanity. However it must be said that the Leaders of Post Apartheid South Africa have been generous and magnanimous in their victory. It goes to their credit for having instituted a commission for truth and reconciliation, instead of resorting to retaliation, torture, and violence directed against the criminals found guilty for abominable crimes under apartheid. However, the recourse to positive discrimination should have been based on other objective criteria's such as poverty, lack of education, conditions of living, residents of neglected areas and so on. Thus, the real challenge that South Africa is faced with today, is to cater to the needs of the disadvantaged citizens of South Africa, including the vast majority of not only blacks but also colored people and a few whites and for this they need to massively invest in education, training and health.

THE BASEL PROTOCOL : INTERNATIONAL LEGAL REGIME ON CIVIL LIABILITY AND COMPENSATION FOR TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES

Piyush K. Sharma[*]

I Introduction

HAZARDOUS WASTES are highly toxic in nature and pose substantial or potential threats to public health and the environment and generally exhibit one or more of these characteristics e.g. ignitability, corrosivity, reactivity (explosive), toxicity and their infectious nature. The Industrialization has the effect of generation of huge quantities of hazardous wastes. The generation, storage, treatment, transport, recovery, transboundary movement, and disposal of hazardous wastes pose formidable problems for society and present a serious danger for human health and the environment. The true amount of hazardous wastes generated is not known, although the approximate amount is 400 million tones a year.[1] The Organization for Economic Cooperation and Development (OECD) estimates that, on an average, a consignment of hazardous wastes crosses the frontier of an OECD nation every 5 minutes all year round.[2] More than 2 million tones of those wastes are estimated to cross national frontiers of OECD European countries annually on the way to disposal sites.[3] Other movements, which are illegal, are motivated by the possibility of important gains in transferring the problem to places where controls or standards are less strict. An added factor is that vast territory and scant resources in importing countries make any attempt at serious surveillance impossible.

The hazardous wastes require adequate and proper control and handling and serious efforts are required to minimise it quantum. In developing nations, there are additional problems including that of dumping of hazardous wastes on their lands by some of the nations where cost of destruction of such waste is

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1 J. Kitt , Waste Exports to the Developing World: A Global Response,Vol. 7 (2) Georgetown International Environmental Law Review (1995) 485.

2 See http:// www.unep.ch/basel , visited on 24th November, 2004.

3 *Ibid.*

heavy. The export of hazardous wastes for disposal in developing countries represents a failure of environmental justice on a global scale. This poses a significant threat to human health and the environment. Due to alarming situation, created by dumping of hazardous wastes, its generation and serious and irreversible damage to the environment, flora and fauna, health of animals and human beings, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,1989 (Basel Convention)[4] was adopted. The convention was the first comprehensive global attempt to address these problems. It has been considered a landmark instrument addressing one of the greatest environmental threats resulting from industrialization viz., the hazardous wastes. This labeling is seen as well justified, given the Convention's primary and laudable aim of protecting developing countries from being the targets of hazardous wastes movements originating in industrialized countries. This protection becomes critical when the recipients do not have adequate capacity to manage and dispose of such wastes in a safe and environmentally sound manner. The main principles of this global environmental treaty are that the transboundary movements[5] of hazardous wastes should be reduced to a minimum consistent with their environmentally sound management[6], hazardous

4 28 ILM 657(1989). Entered into force on 5th May 1989. India signed the Convention on 5th March 1990 and ratified it on 24th June 1992. UNEP has been involved since the early 1980s in the manifold aspects of hazardous waste management, including control of their transboundary movements and their environmentally sound disposal. Following recommendations of the 1981, Montevideo Meeting of Senior Government Officials, Expert in Environmental Law, adopted by the UNEP Governing Council in 1982, UNEP initiated work with government experts to develop guidelines for environmentally sound management of hazardous wastes. Work was completed in 1985, and guidelines were adopted in 1987 by the UNEP Governing Council. These guidelines are known as the Cairo Guidelines. When the Cairo Guidelines were adopted, the Governing Council asked the Executive Director to prepare a global legal instrument to control transboundary movements of such wastes and their disposal because of increasing awareness of uncontrolled movements of hazardous wastes particularly to developing countries. This led to adoption of the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal. Recently, UNEP has launched a program to advocate low- and non-waste technologies through its Cleaner Production Programme. The Basel Convention was adopted unanimously in 1989 by 116 states participating in the Conference of Plenipotentiaries. UNEP convened the conference in Basel, Switzerland. The Final Act of the Basel Conference was signed by 105 states and the European Economic Community (EEC); see Armin Rosencranz, *Environmental Law And Policy In India* (2002) 582.

5 The Basel Convention, Art.2(3), lays down : "Transboundary movement" means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement.

6 *Id.*, Art. 2(8), lays down: "Environmentally sound management of hazardous wastes or other wastes" means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.

wastes should be treated and disposed of as close as possible to their source of generation, and hazardous waste generation should be reduced and minimized at the source. Currently, 132 States and the European Community (EC) are Parties to the Convention.

However, the issue of civil liability and compensation was left open by the Basel Convention. The Convention required the Parties to cooperate with a view to adopting, as soon as practicable, a "Protocol" setting out rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.[7] Although work on the "Protocol" commenced in 1990, it has taken ten years of protracted negotiations to reach any agreement. The Basel "Protocol" on "Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal" ("Protocol") was adopted in December 1999. The "Protocol" entered into force 90 days after the twentieth ratification.[8] The Basel "Protocol" is not yet in force as it has 13 Signatories (Chile, Colombia, Costa Rica, Denmark, Finland, France, Hungary, Luxembourg, Monaco, Sweden, Switzerland, the Republic of Macedonia, and the United Kingdom) without ratification, acceptance, formal confirmation, approval, or accession.[9] The "Protocol" contains 33 Articles and 2 Annexes. It examines the legal regime established by the Basel "Protocol" in the field of liability and compensation for damage resulting from the transboundary movement of hazardous wastes and evaluates its likely success in achieving its objectives.

II Background

The Basel "Protocol" on Liability and Compensation talks began in 1993 in response to the concerns of developing countries about their lack of funds and technologies for coping with illegal dumping or accidental spills. The Basel "Protocol" was adopted at the Fifth meeting of the Conference of Parties (COP-5) to the Basel Convention. COP-5 was hosted by the Swiss Agency for

7 *Id.*, Art. 12.

8 The Basel Protocol, Art. 29.

9 See http://www.basel.int/ratif/"Protocol".htm, visited on 19th November, 2004. Full information List of signatories and ratifications of the Basel "Protocol" on Liability and Compensation is available on the web site of the Treaty Section of the United Nations at the following http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty20.asp.

the Environment, Forests and Landscape and they met in Basel, Switzerland from 6th to 10th in December 1999.[10] With over 450 participants in attendance and 115 Parties represented, delegates celebrated the 10th anniversary of the adoption of the Basel Convention.

The early inertia of the Basel "Protocol" was the reluctance of developed countries to ban the transboundary movements of wastes to developing countries and concerns expressed about developing countries' lack of capacity for cleaning up unwanted hazardous waste dumps and spills in their territory. Without a general prohibition of such transboundary movements, the elaboration of a "Protocol" setting rules on liability and compensation for damage resulting from these movements was seen as a counter to the consequential risks to human health and the environment. Only after five years of debate, was the legal working group able to lay down a structure and the constituent elements of the "Protocol". The controversy focused on rules to govern liability and compensation and on funding measures for this purpose. At its 10th session, the ad-hoc Working Group was expected to reach an agreement on the text of the "Protocol" to be adopted at COP-5. However, even after 10 sessions, the group could not even agree to the essential ingredients, much less put the cake in the oven. The controversial atmosphere that characterized deliberations at the 10th session of the ad-hoc Working Group did not bode well for the 10th anniversary of the Convention to be celebrated at COP-5.[11]

With the arrival of COP-5, essential ingredients for the "Protocol" were still not blended. These included inter-alia, definition of its scope, including clarity of circumstances where the "Protocol" would not apply; a financial mechanism to supplement the "Protocol", and insurance and financial limits to liability.[12] Regarding the scope of the "Protocol", varying positions clashed on the fine line between a universal and comprehensive regime on one hand and accommodating practical and workable regional arrangements on the other. In the end, in the interest of finalizing the "Protocol", mutual trust prevailed over the suspicions of some developing countries that industrialized parties were trying to circumvent the intent of the "Protocol". The agreement on exemptions

10 See http://www.basel.int/meetings/cop/cop5/docs/prot-e.pdf, visited on 24th November, 2004.

11 Report of the 10th Meeting of the Ad Hoc Working Group of Legal and Technical Experts to Consider and Develop a Draft "Protocol" on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, by Basel Action Network, 30 August - 3 September 1999.

12 Jonathan Krueger (2001), The Basel Convention and the International Trade in Hazardous Wastes, Yearbook of International Co-Operation on Environment and development 43-51 (2001/02).

for equivalent arrangements reflects a workable compromise for addressing such concerns and needs.

To mark the tenth anniversary of the Basel Convention, the Ministers at COP-5 adopted a declaration, setting the main areas of attention during the next decade. These include: the prevention, minimization, recycling, recovery and disposal of hazardous and other wastes subject to the Basel Convention, active promotion and use of cleaner technologies and production, further reduction of transboundary movements of hazardous and other wastes, monitoring and prevention of illegal traffic, greater cooperation at all levels among countries, public authorities, international organizations, industries, NGOs and academia, and to further development of mechanisms for assuring the implementation of the Basel Convention.[13] The meeting also agreed to establish a fund to be supported by voluntary contributions for assisting developing countries in cases of emergency and making compensation for damage resulting from transboundary movements of hazardous wastes and their disposal where compensation under the "Liability "Protocol"" is insufficient. The agreement is an interim one, to be reviewed when the "Protocol" enters into force. African countries argued that this financial mechanism would not adequately ensure that the developing countries had the resources to deal with emergencies. However, they went along with the interim arrangement. Klaus Topfer, Executive Director of the UNEP, hailed the adoption of the "Protocol" as a major breakthrough. "For the first time we have a mechanism for assigning responsibility for damage caused by accidental spills of hazardous materials during export or import".[14]

The objective of the "Protocol" is to provide for a comprehensive regime for liability as well as adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes, including incidents occurring because of illegal traffic in those wastes.[15] The "Protocol" addresses who is financially responsible in the event of an incident. Each phase of a transboundary movement, from the point at which the wastes are loaded on the means of transport to their export, international transit, import, and final disposal, is considered.

13 *Ibid.*

14 Iwona Rummel, Bulska, M.D., *The Basel Convention:* A Global Approach for the Management of Hazardous Wastes, SCIENCE CORNER (United Nations Environment Programme/ Secretariat of the Basel Convention, Geneva, 1993) at 27, See also http://www.basel.int/ , visited on 9th December, 2004.

15 See www.basel.int/pub/protocol.html

However, financial limits for strict liability were missing. In spite of resolve to overcome this hurdle, the legal and technical difficulties with this exotic ingredient proved almost insurmountable and underscored the complexities of the financial limits to strict liability. Attempts to bypass this complexity through political pressure proved impossible given conflicting positions and the need for better understanding of the implications. The ingenious solution arrived at was to retain the scale of the financial limits as discussed and formulate a new provision stating that COP-6 may, before the entry into force of the "Protocol", amend the scale of financial limits for liability. This allowed adoption of the "Protocol" and time for gaining a better understanding of the subtleties of this issue as another dimension of breaking new ground in international law on compensation and liability. A Strategic Plan for the implementation of the Basel Convention (to 2010) was adopted by the COP-6 in December 2002.[16] It operationalizes the Basel Declaration on 'Environmentally Sound Management' (ESM -1999).[17] In order to implement the plan, the Conference agreed to mobilize resources for 2003–04 and to develop a financial strategy for 2005–10.[18]

III The Liability Regime

Under International Law, the term "liability" is normally associated with the obligation to provide for compensation for damage caused to persons, property and the environment. Liability and redress in the context of the "Protocol" concerns the question of what would happen should the transboundary movement of hazardous wastes and disposal results in damage. This issue was one of the themes on the agenda during the negotiation of the Basel Convention. The negotiators were, however, unable to reach any consensus regarding the details of a liability regime under the Convention. The matter was, nevertheless, considered both critical and urgent and an enabling clause to that effect was included in the final text of the Basel Convention.[19] The Basel Convention, therefore, provided for the consideration of this issue at the earliest opportunity following its entry into force.

Definition of "Damage"

Under the "Protocol" damage is defined as to include loss of life, personal injury or damage to property.[20] Pure environmental damage unassociated with

16 See http://www.normalct.bawi.org/wiki/moin.cgi/basel.int/COP6/Cop6.htm, visited on 27th November, 2004.

17 Earth Negotiations Bulletin, Vol. 20 No. 06, 13 December 1999, A Reporting Service for Environment and Development Negotiations published by the International Institute for Sustainable Development (IISD), Canada. See http://www.iisd.ca/ download/pdf/enb2006e.pdf.

18 Ibid.

19 *Supra* n. 7.

20 The Basel 'Protocol', Art. 2 (2) (c) (i) &(ii).

economic loss is not covered by the "Protocol". Environmental damage can only be recovered if it relates to (i) the loss of income directly deriving from an economic interest in any use of the impaired environment, taking into account savings and costs[21] and (ii) the cost of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken[22] and the costs of preventive measures, including any loss or damage caused by such measures, to the extent that it results from the hazardous properties of the wastes involved.[23] Failure to provide for pure environmental damage is clearly related to the general unavailability of insurance to cover such damage.[24] Nevertheless, it is regrettable that the environment does not warrant protection in its own right.[25]

Two kinds of liability regimes i.e. strict liability[26] and fault-based liability[27] have been imposed under the Basel "Protocol". Strict liability regime holds a person liable for damage resulting from their activities whether or not they are at fault. Fault-based liability imposes a further requirement of proving some mental element, usually intention or negligence. Fault is often difficult to establish and it may be hard to identify the offender where a number of persons are involved in a transaction. For these reasons, the "Protocol" follows the practice of most international conventions to provide for strict liability for specific persons and fault-based liability for others.

Strict liability

The strict liability under the "Protocol" has been assigned to the person who notifies in accordance with Art. 6 of the Convention, until the disposer has taken possession of the hazardous wastes.[28] Thereafter the disposer is liable. If the exporting state is the notifier, or if no notification has taken place, the exporter is liable for damage until the disposer has taken possession of the wastes.[29] Further, no liability can be imposed if it can be proved that the damage was the result of an act of armed conflict, hostilities, civil war or insurrection,[30] a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character,[31]

21 *Id.*, Art. 2 (2) (c) (iii).

22 *Id.*, Art. 2 (2) (c) (iv).

23 *Id.*, Art. 2 (2) (c) (v).

24 *Supra* n.12.

25 *Ibid.*

26 The Basel 'Protocol', Art. 4.

27 *Id.*, Art. 5.

28 *Id.*, Art. 4 (1). Art. 6 of the Basel Convention requires notification of transboundary movements of hazardous waste to be given to the state of import and each state of transit. The notifier can be the state of export, the generator or the exporter.

29 *Ibid.*

30 *Id.*, Art. 4 (5) (a).

31 *Id.*, Art. 4 (5) (b).

compliance with a compulsory measure of a public authority of the State where the damage occurred[32] or the wrongful intentional conduct of a third party.[33] This kind of liability holds the notifier/exporter liable and satisfies the "polluter-pays principle",[34] as persons proposing the transboundary movement should arguably be liable for any adverse consequences. The advantages of channelling liability in this way are that the victim will easily be able to identify the person liable so that claims can be settled quickly.[35] However, if two or more persons are liable than the claimant has a right to seek full compensation for the damage from any or all of the persons liable.[36]

Fault-based liability

Fault-Based Liability regime has been enunciated under the "Protocol" that any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the Basel Convention or by his wrongful intentional, reckless or negligent acts or omissions.[37] Further, it does not affect the national laws of the Contracting Parties governing liability of servants and agents.[38]

The "Protocol" also requires, that any person in operational control of hazardous wastes at the time of an incident shall take all reasonable measures to mitigate damage[39] and where damage is caused by wastes covered by the "Protocol" and wastes not covered by the "Protocol", a person otherwise liable shall only be liable according to the "Protocol" in proportion to the contribution made by the wastes covered by the "Protocol" to the damage.[40]Regarding contributory fault, the "Protocol" lays down that compensation may be reduced

32 *Id.*, Art. 4 (5) (c).
33 *Id.*, Art. 4 (5) (d)
34 Principle 16, of the Rio Declaration contains "Polluter Pays Principle" which provides as follows: National authorities should endeavour to promote the internationalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should in principle bear the cost of pollution with due regard to the public and without distorting international trade and investment.
35 Environmental groups have argued that channeling primary liability to the generator of the waste would be more consistent with "cradle-to-grave" liability and the "polluter-pays principle". They argue that the liability regime in the "Protocol" will promote waste exports since generators will see it as an opportunity to extinguish any liability for damage under their own national laws. This could lead to "the proliferation of small and shady mailbox companies that can become the broker/notifier/exporter".
36 The Basel "Protocol", Art. 4 (6).
37 *Id.*, Art.5.
38 *Id.*
39 *Id.* Art. 6(1).
40 *Id.* Art. 7(1).

or disallowed, if the person who suffered the damage by his own fault has caused or contributed to the damage having regard to all circumstances if he is responsible under the national laws.[41]

Commencement and termination of liability

Liability under the "Protocol" commences where the wastes are loaded on the means of transport in an area under the national jurisdiction of a state of export[42]. However, an option is given to the parties to declare that the "Protocol" shall not apply to incidents within their national jurisdiction.[43] There is a practical difficulty in determining the liability under this article. For example, at what point can it be said that wastes are in fact loaded onto the means of transport? There could be several loading procedures before a consignment of wastes is loaded onto the final means of transport which will take it out of the country of export. The "Protocol" provides for liability to cease on completion of the relevant "disposal operation."[44] "Disposal operations" are dealt with in Annex IV of the Basel Convention and encompass final disposal as well as some recovery and recycling operations. Possible final disposal operations listed in Annex IV, A, include: "DI Deposit into or onto land" and D7 "Release into seas/oceans". In such cases, the operation will be complete once the waste has been deposited in landfill or released for final disposal at sea. Where waste is to be recycled or re-used, Annex IV B, specifies a number of disposal operations, for example: R4 "Recycling/ reclamation of metals and metal compounds", R8 "Recovery of components from catalysts", etc. In these cases, the likely interpretation is, that liability under the "Protocol" will cease the moment recycling or processing is completed.

The "Protocol", however, does not extend liability to damage, arising after disposal operations have been completed, since this is when the most significant problems relating to environment and human health are likely to arise. For example, when waste is consigned to landfill, environmental or health problems may only arise some time after the wastes have been deposited. Where recycling occurs, damage generally results from inadequate management of residues and emissions. Greenpeace research in the Philippines into imports of lead acid batteries has revealed that even legitimate hazardous waste recycling operations promoted by the Philippine government are polluting the environment with toxic emissions and in many cases creating residual hazardous waste more toxic than

41 *Id.*, Art. 9.
42 *Id.*, Art. 3(1)(b).
43 *Ibid,*
44 *Id.* Art. 3(2)(b).
45 Greenpeace, (Lead Astray: the Poisonous Lead Battery Waste Trade,) A Greenpeace Report,(1994) Vol.6.

the original waste.[45] Developed countries, on the other hand, have not been prepared to assume liability for mismanagement in other States. They argue that these risks should be borne by the trader in the State of import, who is better placed to prevent these incidents and will benefit economically from the process.[46]

Bilateral, multilateral or regional agreements

The "Protocol" also contains an exclusion clause to escape liability. It is permissible for the parties to the "Protocol" to exclude the operation of the "Protocol" by concluding bilateral, multilateral or regional agreement in accordance with Art. 11 of the Basel Convention[47] if: (a) the damage occurred in an area under the national jurisdiction of any of the parties to the agreement or arrangement;[48] (b) there exists a liability and compensation regime in force which meets the objectives of the "Protocol" by providing a high level of protection to persons suffering damage;[49] (c) the party to the Art. 11 agreement in which the damage has occurred has previously notified the depositary that the "Protocol" does not apply to damage in its territory;[50] and (d) the parties to the Art 11, agreement have declared that the "Protocol" shall not apply.[51]

Any liability and compensation regime need not necessarily be a specific liability regime in the "Protocol" itself but could be so under the national laws of the Parties. This means that a number of different liability regimes with varying levels of protection could apply. However, there is no guarantee that these regimes will provide the same level of protection as the "Protocol" as long as they meet the general objective of the "Protocol" and provide a "high level" of protection. The willingness of the parties to allow the exclusion of movements of hazardous wastes pursuant to Art. 11 agreements, from the scope of the

46 Greenpeace (2002), "Who To Blame Ten Years After Rio? The Role of the USA, Canada, and Australia in Undermining the Johannesburg Summit," Greenpeace International, (August 2002) Amsterdam.

47 Art.11 of the Basel Convention permits Parties to enter into bilateral, multilateral or regional agreements or arrangements regarding the transboundary movement of hazardous wastes with Parties or non-Parties provided that these agreements do not derogate from the environmentally sound management of waste, taking into account the interests of developing countries.

48 The Basel "Protocol", Art.3 (7) (a) (i).

49 *Id.*, Art. 3 (7) (a) (ii).

50 *Id.*, Art. 3 (7) (a) (iii).

51 *Id.*, Art. 3 (7) (a) (iv).

"Protocol" may be the forerunner of a similar compromise in relation to the Basel Ban Amendment.[52]

The relationship between the Protocol and the other transportation treaties.

There is an enabling provision within the "Protocol" regarding conflict between the "Protocol" and other international liability regimes. It provides that whenever another bilateral, multilateral or regional agreement applies to liability and compensation for damages caused by an incident arising during the same portion of a transboundary movement of hazardous waste, the "Protocol" will not apply.[53] The agreement must be in force or open for signature when the "Protocol" was opened for signature, but can be amended afterwards.[54] The consequence of this provision is, that other multilateral agreements relating to damage caused during the transportation of the wastes take precedence over the "Protocol".

Since, liability regimes already exist for most forms of transportation, for example, the "Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances at Sea" and the "Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels", and these will take precedence, the "Protocol" will only apply to sections of the transboundary movement for which the conventions are not in force. Consequently, its scope is likely to be somewhat limited.

IV Compensation Regime and Financial Limits

Financial responsibility limits

The "Protocol" provides minimum levels of compensation for strict liability.[55] However, it does not set out any financial limits for fault based liability.[56] Financial

52 Basel Ban Amendment in 1995, amends the Basel Convention by incorporating a new Art.4A, which prohibits transboundary movements of hazardous wastes for final disposal or recycling from Annex VII (largely OECD countries) to non-Annex VII countries (non-OEC). Although the Ban Amendment has not yet come into force, some States have taken the view that even when it does, hazardous waste movements can continue between Annex VII and non-Annex VII States provided Art. 11 agreement has been concluded, see www.basel.int/ratif/ratif.html and "Country Status—Waste Trade Ban Agreements," at www.ban.org., visited on 1st December, 2004.

53 The Basel 'Protocol', Art. 11.

54 *Ibid.*

55 *Id.*, Art. 12(1).

56 *Id.*, Art. 12(2).

limits for strict liability are to be determined by national law and minimum levels of compensation have been provided. Annex B, of the "Protocol" specifies these financial limits and are based on tonnage and differentiation between shipment and disposal. Minimum limits of liability for any one incident ranges from 1 million SDR (Special Drawing Rights, equivalent to approximately US$1.38 million) for a shipment of up to 5 tons; 2 million SDR for shipments up to 25 tons; 4 million SDR for shipments up to 50 tons; 6 million SDR for shipments up to 1,000 tons; and 10 million SDR for shipments up to 10,000 tons. An additional 1,000 SDR is imposed for each ton over 10,000 tons up to a maximum of 30 million SDR (US$41.5 million).

These limits only apply to the notifier or exporter. A disposer, regardless of tonnage, is liable for minimum of 2 million SDR. It has been argued by environmental organizations that these limits are "shockingly low". However, they are in the same range as those imposed in other international conventions for the transportation of dangerous goods. The limits for a cargo of 2,000 tons varies from 10 million SDR under the "Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea" (London 1996) to a maximum of 30 million SDR under the "Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels" (Geneva 1989).[57] There are, however, a number of problems in linking compensation to tonnage. Severity of damage is not always dependent on the volume of waste transported. Small volumes of high hazardous wastes may be underinsured while large volumes of low hazardous waste may be over-insured. It may be preferable to conduct a risk analysis of the hazardous characteristics of the waste and to set financial limits according to the hazardous nature of the waste. Further, the "Protocol" also imposes time limit for the claims of compensation, which is ten years from the date of the incident, otherwise claims will not be admissible.[58]

Insurance and financial guarantees

Persons subject to strict liability under Art. 4, of the "Protocol" are required to establish and maintain insurance, bonds or other financial guarantees covering their liability for not less than the minimum amounts specified in Annex B, and States may fulfil their obligation by a declaration of self-insurance.[59] This would

57 *Supra*, n. 46.
58 The Basel 'Protocol', Art. 13(1).
59 *Id.*, Art. 14(1).

permit parties to use bonds or other financial guarantees as an alternative to mandatory insurance.[60] Under the "Protocol" any amount of claim may be asserted directly against any person providing insurance, bonds or other financial guarantees.[61]

Compensation fund

The "Protocol" provides for emergency and compensation measures additional to the "Protocol" by using existing mechanisms, in order to ensure adequate and prompt compensation for all damages resulting from the transboundary movement of hazardous wastes. An important issue during the negotiations was, whether the liability under Art. 4, (strict liability) should be financially limited and whether the limitation of liability should coincide with the level of financial guarantees and especially with the level of liability insurance. For the potentially liable party, a limitation of liability provides protection against the consequences of accidents. To the extent the liability is fully covered by insurance, the compensation is furthermore financed by the insurer and not by the liable party himself. Setting the limit of financial guarantees at the same level as the limit of liability thus may be advisable if one wants to protect the operator of a socially valuable activity against losses resulting from liability claims. For the victims, a limitation of liability has no positive effects. They remain unprotected to the extent the damages exceed the limitation of liability, unless these damages are compensated by a compensation fund. If the liability is unlimited, or is limited to an amount higher than the insurance coverage, the liable party will have to respond with his personal assets for at least part of the losses. This should provide a stimulus for greater care and stimulate prevention.

60 In response to concerns of a number of delegations regarding the availability of insurance, the Basel Secretariat contracted a consultant to prepare a report on this matter. The report points out that liability insurance for environmental damage differs from other liability insurance. In some countries environmental liability insurance is not available, or in certain cases only a limited number of insurers offer special environmental policies. This problem has, to some extent, been overcome by the emergence of a limited number of specialized insurers, who write policies under the domestic law of most countries but coordinate their operations internationally. Insurers with special policies often offer cover of US $ 50 million, and over US $100 million for major installations. The report concludes that there is presently "substantial capacity in the international insurance market for pollution liability insurance" but imposing routinely very high financial guarantees is not without its problems. Insurance will not be available to operators who do not observe technical and safety standards. Further, the insurance can be costly. For example, premiums for a cover of US $10 million may be at least US $ 5,000. The premium will depend on the type of operation, the upper limit of liability, the wording of the cover and other factors. Premiums covering a continuing operation may be less than those taken out for an isolated transaction, See Donna G. Craig Nicholas A. Robinson & Koh Kheng-Lian, *Capacity Building For Environment Law In The Asia And Pacific Region*, Vol.-II, Asia Development Bank. (2002) at 479.
61 The Basel 'Protocol', Art. 14 (4).

Developing countries have consistently argued for the "Protocol" to include a mandatory compensation fund to provide immediate response measures in an emergency situation and for compensation where the person liable is unable to cover the costs, or cannot be found. Most developed countries, on the other hand, strongly oppose the establishment of a fund within the "Protocol" on the grounds that the need for it has not been established since other funding mechanisms are available. A compromise was reached at COP-5, whereby the parties agreed to a financial mechanism to cover situations where compensation under the "Protocol" does not cover the costs of damage. In these cases, the "Protocol" permits additional and supplementary measures aimed at ensuring adequate and prompt compensation using existing mechanisms.[62] This was coupled with an agreement to keep the establishment of a fund under review.[63] The "existing mechanisms" available refers to the existing UNEP Technical Cooperation Trust Fund.

V Procedural Issues

The "Protocol" also provides for procedural issues under which a victim is given a choice of fora to represent his claims. Claims for compensation may be brought in the State where the damage was suffered,[64] where the incident occurred, [65]or where the defendant resides or has their principal place of business.[66] States are required to ensure that their courts are competent to determine these claims.[67] It also provides for mutual recognition of and enforcement of judgments.[68] Without these provisions, there would be significant difficulties in bringing a claim in a foreign court.

VI The Primary Defects of the Protocol

There are many fundamental flaws within the key legal provisions of the "Protocol" which are as follows: (a)The "Protocol" fails to include damages which occurs after the initial act of disposal (e.g. deposit in a landfill or burning in an incinerator). As, most of all damage that occurs from hazardous waste does not occur during shipments, initial deposit or processing, but rather after residues have accumulated or leached into groundwater, the "Protocol" becomes

62 *Id.*, Art. 15 (1).
63 *Id.*, Art. 15 (2).
64 *Id.*, Art. 17 (1) (a).
65 *Id.*, Art. 17 (1) (b).
66 *Id.*, Art. 17 (1) (c).
67 *Id.*, Art. 17 (2).
68 *Id.*, Art. 21.

largely meaningless. This is especially true considering that a liability regime already exists for the "Transport of Hazardous and Noxious Substances". The failure to cover "aftercare" as part of disposal actually provides an incentive for the construction of highly polluting incinerators or leaky landfills[69]. (b) The "Protocol" fails to make the generator liable, unless the state involved requires the generator to be the notifier and only then up to the point where the waste passes to the disposer. This is contrary to the "polluter pays principle" and will actually create numerous situations where waste producers will actually have an incentive to generate and then export wastes in order to avoid liability they would otherwise face under domestic legislation[70].(c) The "Protocol" allows countries to opt-out of the "Protocol" by virtue of a bilateral, multilateral or regional agreement, as long as there exists a liability regime meeting or exceeding the objectives of the "Protocol". As the objectives of the "Protocol" are non-specific and are thus subject to subjective interpretation, there is little assurance that the replacement regimes which might be national laws will be even as comprehensive as the weak "Protocol" itself[71].(d)The "Protocol" fails to provide for a mandatory compensation fund to provide compensation funds in cases where funds are needed quickly, where responsible parties are unable to be found, or for preventative measures particularly in developing countries[72]. (e)The "Protocol" fails to provide an adequate minimum financial limit or "floor". While it allows countries to exceed this minimum level, in many cases this will not occur and the fund will be inadequate to the task[73].

VII Conclusion

The quantity of generated wastes of all kinds is still increasing, and the rapid pace of industrialization worldwide will necessitate careful attention. In response to growing recognition of health and environmental risks associated with hazardous wastes, governments have brought into force a series of national laws to control the generation, handling, storage, treatment, transport, disposal, and recovery of these wastes. To mitigate such potential threats, urgent measures should be taken to avoid or reduce generation of hazardous wastes, optimize environmentally sound recovery of wastes, reduce to a minimum or eliminate transboundary movements of hazardous wastes, manage wastes in an environmentally sound and efficient way and dispose of wastes as close as possible to the place where they are generated.

With the Basel Convention, the world community has the opportunity to implement a truly global legal instrument dealing with control of transboundary movements of hazardous wastes and their disposal. The Basel Convention,

69 Art. 3, paragraph 2.
70 Art. 6, paragraph 1.
71 Art. 3, paragraph 6.
72 Art. 15.
73 Annex B.

could contribute substantially to improving the situation worldwide by reducing transboundary movements and by promoting environmentally sound management of hazardous wastes. Parties to the Convention should cooperate actively with each other to implement the Convention and, in particular, to help developing countries develop sound management practices and cleaner technology methods. Provisions of the Basel Convention must, therefore, be implemented as soon as possible, effectively and efficiently, in a spirit of solidarity, to be able to truly contribute to solving hazardous wastes management problems worldwide and to render accessible, practicable, and environmentally acceptable options to deal with hazardous wastes.

One would have hoped that the "Basel Liability Protocol" which deals with a unique subject matter of something that society is hoping to eliminate viz. toxic waste, and a practice i.e. the waste trade, which the 'Basel Convention' seeks to minimize, would have established a very rigorous and high level of protection, far above the international norm for transboundary movements of goods and services. We would have hoped for a "Protocol" that encouraged waste minimization, national self-sufficiency in waste management and the minimization of transboundary movements and for responsible transportation and disposal of wastes and a "Protocol" with an adequate, certain, and capable fund for quick response to incidents and recovery of victim damages. Instead with its range of opt-outs, side agreements, extremely narrow scope, and counterproductive incentives, the treaty offers very little that is positive and much that is highly negative. Transboundary shipments, it seems will be managed instead under a patchwork of bilateral, multilateral and regional agreements with no real promise of adequate liability provisions. Shipments under the convention might be encouraged for the purpose of escaping and terminating domestic liability, with a clear incentive to externalize costs through the use of the cheapest, more irresponsible transporters, notifiers and disposers. Finally, the long-term damage after disposal or resulting from poor recycling practices will not be covered, leaving this instead to domestic law which in the case of many countries is inadequate to the task. Even if it can address the problem, the original polluter (the waste generator) remains off the hook, and if this was not bad enough, any two countries (the minimum necessary for a transboundary movement) can simply opt-out of the "Protocol" by establishing a bilateral agreement utilizing a national or other liability regime of their own design.

It is a sad picture. What was adopted at Basel in 1999, after 10 years of negotiations, represents a successful attack on the Basel Convention's own fundamental principles and a dangerous international precedent. Only time will tell, whether the "Protocol" will remain as weak as it is currently drafted or whether it will be amended to assure real victim protection and provide incentives for industry to reduce transboundary movements and generation of hazardous wastes.

DOMESTIC VIOLENCE OR VIOLENCE AGAINST WOMEN : LAW AND PRACTICE

Gurmeet Kaur[*]

I Introduction

THE CHOICE of the phrase 'domestic violence' is deliberate and ignores the problems of terminology in this area. A variety of phrases have been used to describe such violence such as domestic violence, family violence, domestic disputes, spouse abuse, wife abuse, battered wives, battered women, etc. There is a plethora of terms which are used interchangeably to describe the same phenomena and often they serve to confuse rather than clarify. Many of these phrases, however concentrate on a marital relationship between the victim and perpetrator of violence. On the other hand the phrase 'domestic violence', is much wider and is used to describe actions and omissions that occur in varying relationship 'Domestic' can signify a large number of inter-familial relationships. The primary context of this article is the violence occurring or alleged to have occurred between married or cohabiting partners, or those who have been in intimate relationship with the perpetrator, though certain other kinds of violence suffered by women have also been discussed in brief.

The phrase 'domestic violence', according to Morris[1], hides who is the perpetrator and who is victim, but it does denote the fact that the victim has been subject to a criminal act. It is not a new problem, but one, which has only attracted the attention of the concerned people comparatively recently. Though, it originated in Western Europe, North America, Australia and New Zealand, the insidious nature of domestic violence has been documented across nations and cultures worldwide. It is universal a phenomenon, however, the awareness about the extent and nature of these issues come to forefront during 1970's in USA as a result of National Family Survey[2] in India it was only during the early

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1 Morris A. Women, Crime and Criminal Justice, Oxford Blackwell (1987).

2 Id., Martin 1978

1980's, in the wake of dowry and related problems that crime against women came to be recognised as an important social problem.

Extent of "Domestic Violence"

'Mirless-black[3] says that 11% of women report some degree of physical violence in their relationships. Zorza[4], states that in the United States, violence against women accounts for 1/5th of hospital emergency room cases. The national 'Crime Victimisation Survey' in the United States, estimated that during each year, between 1987 and 1991, on an average, women were victims of more than 572,000 violent crimes committed by an intimate partner and 20% of all females victims who were or had been married to the perpetrator reported being victim of 3 or more assault in 6 months prior to survey.[5] In a National survey conducted in Canada in 1993, 29% of women reported at least one incident of violence by their partners or ex partners[5A].

Statistics on domestic violence are more scarce in most of the developing countries. In India, in the year 2002, there has been an increase in cases of dowry death, rape and harassment of women by the in laws and husband, besides incidents of eve teasing. As against 113 dowry deaths, reported in 2001, there were 115 incidents of death on account of dowry in the year 2002[5B], The annual figure, updated till December 16, 2002 – released by police commissioner R.S. Gupta shows that the number of rape cases had been pegged at 379 as against 380 in previous year. In 2004, 525 cases of rape are reported in Delhi[5C]. The National Family Health Survey (1998-99) also shows that 20% of married women between 15 and 49, had at some time been exposed to some form of domestic violence[6]. In Delhi, the figures for physically abused married women above 15, stood at 14.1%, second in the northern region. A retrospective study of 170 cases of murder of women in Bangladesh between 1983 & 1985 revealed, that 50% occurred within family. In Thailand, statistics indicate that

3 Mirrless-black, "Estimating the extent of domestic violence: Findings from 1992 British Crime Survey", Research Bulletin 37: 1-19 (1995).

4 Zorza, "The criminal law of misdemeanour domestic violence, 1970-90" Journal of Criminal Law and Criminology 83(1): 46-72 (1992).

5 Buzawa and Buzawa, Introduction in Buzawa and Buzawa (eds.), No Arrest and retraining orders works" Thousand oaks, CA: Sage Publications, 122 (1996),.

5A Deboran Lockton and Richard Ward *'Domestic Violence'* (1997), Cavendish Publishing Limited, London, Sydney. Pg. No. 2/Statistics Canada, 'wife assault : the finding of a National Survey' Juristat Service Bulletin 14(9) march (1994).

5B Vimla Mehra, Joint Commissioner, Crime Against Women, while addressing the annual press conference of Crime Against Women's cell.

5C Orchis Mohan, "No justice for Rape Victims", Sunday, Hindustan Times, February 20, 2005.

6. Pallavi Majumdar, Domestic Violence in NRI watcher on Rise, TOI, Oct 13, 2004, 1.

more than 50% married women in bank OK's biggest slum are regularly beaten by their husbands. In Peru, 70% of all crimes reported to the police, involved women beaten by their husbands.

More recent survey indicate that despite greater public awareness, the problem is still vast. Research has also acknowledged, that in addition to the immense personal costs of domestic violence, there are huge social and financial costs to society as a whole. Australian analysis in 1993[7], estimated, that cost of the violence in a 10 year relationship, in terms of hospital visits, police calls – acts and court applications would be approximately £ 29,000.

However, true extent of such violence is still unknown, a fact acknowledged by all working in this area. The reason for this are manifold. Many researches note that domestic violence is under reported to the police although there is discrepancy among researchers as to amount of under reporting.

II Domestic Violence : Its Nature and Types

Domestic violence is violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood or law. Despite the apparent neutrality of the term, domestic violence is nearly always a gender specific crime perpetrated by men-against women.[8] Although, admittedly the reverse does occur, women do strike against their male partners, such incidents barely put a statistical dent into the gendered nature of domestic violence.

Domestic violence has traditionally and repeatedly been labelled as family violence. Earlier the family was attached with a as sanctity in which tranquility and family harmony regions supreme and domestic violence is veritable in congruity, a contradiction in terms but now at least in the western countries this myth has undergone a drastic transformation in which the family has been labelled as a cradle of violence, violence shatters the peaceful image of home, the safety that kinship provides, the construction and institutionalisation of family structures give rise to violence.

In narrower sense, domestic violence is used, and identified with incidents of physical attacks, where it may take the form of physical and sexual violations such as, pushing, pinching, spitting, kicking, biting, punching, stabbing, throwing, boiling water, or acid and setting fire. Physical offence is often accompanied by or culminates in sexual violence, where the victim is forced to have sexual

7 Changing the Landscape: Ending Violence – achieving equality Canadian Penal on Violence against Women (1993).

8 Radhika Coomarswamy, Report of the special Rapporteur on violence against women, its causes and consequences, U.N. Doc. E/CN. 4/1996/53, see para 22 and 23.

intercourse with her assailant or take part in unwanted sexual activity.[9] It may also be used to include psychological or mental violence, which can consist of repeated verbal abuse, harassment, excessive possessive confinement and deprivation of physical, financial and personal resources, and controlled contact with family members and friends. Such forms of violations may vary from society to society.

There are many facets of domestic violence. Young girls and children are very often the victim of sexual assault within the family. Elderly family members and infirm may also be subject to ill-treatment, female domestic servants are another category of people who are often at the receiving end of violence. In extended families, mother-in-laws are often violent towards their daughter-in-laws. However, it is not confined to legally married couples but extends to cover couples who are cohabiting or couples who are living apart.

As its most complex manifestation domestic violence exists as a powerful and multifaceted tool of oppression (particularly of women). Violence not only denies freedom but also sustains the dominant gendered paradigm. According to United Nation declaration on elimination of Violence Against Women, 1993:

Domestic violence, may be defined as encompassing but not being limited to "physical, sexual and psychological violence occurring in the family including battering, sexual, abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women."

Violence and its effect on individual women

Violence against women has both short term and long term effect on individual women.

Studies examining short term effect emphasis on the emotional and physical health of battered women, which demonstrate that they have significantly higher levels of anxiety, depression and somatic complaints than women who have not suffered abuse. Often abused woman suffer from 'battered woman trauma syndrome'. In such cases they exhibit a paralysing terror that is augmented by the stress of an ever present threat of attack.[10] A study of battered women conducted in found that women who were referred to psychiatric clinics were found to be passive, unable to act on their own behalf, fatigued and numb, without energy to do minimal household chores or engaged in child care. Such

9 United Nations, Strategies for Confronting Domestic Violence: A Resource Manual, New York, 8 (1993).

10 L. Walker, *The Battered Woman*, New York, Harper and Row (1977).

women further, frequently view themselves as incompetent, unworthy and unloveable and indeed, deserving of abuse source.

Emphasing on the long term effects of domestic violence, frequent assertions are made that violence in the family of origin begets more violence. This means that children whose mothers were abused by their fathers will go on to repeat the pattern when they themselves establish their families. It is suggested that young men learn to batter their wives from the behaviour of their fathers while young women learn to become victims of abuse because of the response of their mothers.

Causes of domestic violence : It's theoretical perspectives

Different perspectives – psychodynamic, economic, structural-stress, feminist Marxian etc. have emerged to understand domestic violence in the context of family and gender[8A] .

The feminist, Marxist and other critiques on the status of women, primarily sought to explain the roots of family violence as connected with structural and ideological roles of men and women and their asymmetrical power relationships both inside and outside family, where the family accept male dominance and female submissiveness as the norm. Victorian society as well as Asian society have to some extent been responsible for projecting concept of female subordination. Several theories developed to explain and verify factors associated with family violence and wife abuse, of which some are theory of relevance. They are:

Resource Theory[8B]: This proposes that a person with more resources at his command plays a dominant role of man in the family and conversely a husband with fewest resources resort to violence to compensate his loss of dominant role.

Exchange Theory[8C]: According to this theory, use of violence by person is guided by the extent of cultural tolerance by using violence against women in a society and by the principle of costs and rewards for that behaviour.

The Structural Stress Theory[8C]:According to this theory, violence is product of socially structured stress such as low income, illness, unfulfilled expectations etc., and violence is a used in such context if its use is an accepted response to stress.

8A Gelles 1978: 175-179; Gelles 1987: 39-43.
8B Goode 1971.
8C Gelles 1983, cited in Gelles 1987: 42.
8C Gelles 1974, cited in Gelles 1987: 42.

The Behaviourist System Theory[8D]:The broadline of argument of this theory is, that violence is learned and reinforced in the socio-cultural context and that violent spouses normally have violent home background. These theories are more general and eclectic in their approach.

The cause of violence against women in the home has been analysed in detail by United Nation in a report on the violence against women in the family, Among the causes that are discussed are: (i)Alcohol and drug abuse by the perpetrator,(ii)A cycle of violence, (iii) 'Provocation' by victim to the abuser, but they are not the norm. (iv) Low socio-economic status, unemployment, low wages and inadequate housing as being causes of domestic violence. However, domestic violence exists in wealthy circles as well; and other causes are: social isolation and low community embeddedness, low self concept, personality problems and psychology.

Domestic violence as a violation of human rights

The gendered reality for women determines the nature and circumstances of the human rights violation specific to women, as well as the availability and accessibility of remedies for them. It is therefore important to draw into human rights framework, the impact of gendered social reality on the women's rights.[11] For example, in a cultural context such as India, where women are perceived as custodian of cultural, the violations of their right to life and bodily integrity is different from men in situation of communal or caste violence. Significant number of women "are reactively subject to torture, starvation, terrorism, humiliation, mutilation, and even murder within the family simply because they are female source. Crimes such as these against any group other than women would be recognised as a civil and political emergency as well as gross violation of the victims humanity".[12] Other types of violations, documented by women's group in India, range from female foeticide, infanticide domestic violence, dowry death, unequal distribution of food, nutrition, health care, education and other resources within the family. However, the human rights for most part of its existence fail to recognise such violations as falling within its purview, despite its claim of universality.

Crimes against women are both social as well as economic crimes. Women have to face gender discrimination at all levels of her life whether it is home or work place. In a modern state, it is the duty of the state to ensure that the

8D Staus et al. 1980; Martin 1978: 111.

11 Madhu Mehta, "And miles to go – challenges facing women's human rights", 40 JILI 121-122 (1998).

12 Charlotte Bunch, "Women's rights as human rights: Towards a revision of human rights", 12 Human Right Quarterly 491 (1991).

offenders of women's dignity should be seriously punished to create fear among the would-be offenders but unfortunately, state policies, as manifested by its action or inaction, may perpetuate/condone violence. The political attitudes of state today only add to the secondary status of women. It has been therefore argued that the role of state inaction in the perpetuation of violence combined with the gender specific nature of domestic violence require, that domestic violence be classified and treated as human right's concern, rather than as mere domestic criminal justice concern.[13]

III International Aspect of Domestic Violence

Till 1970's, women issues were generally related to problems of political and economic discrimination and wife victimisation was regarded as a matter of occurrence in domestic sphere and disregarded. But recent framework within the United Nations and other international organisation have resulted in recognising domestic violence as a grave violation of women's human rights. However, the problem has arisen in fixing of human rights framework to correspond to specific form or type of violations.The International Bill of Human Rights, comprising the Universal Declaration of Human Rights[14] and the International Convention on Civil and Political Rights and the Economic and Social Cultural Rights[15] enumerate the basic Human Rights and thus establish general rights for victims of domestic violence. Apart from this, the Declaration on the Elimination of Violence Against Women (DEVAW) specifically adopted in 1993 is a comprehensive statement and the first guideline of international standards on the protection of women from domestic violence, A-4 of which requires states to condemn violence against women without invoking customs, traditions or religion to avoid that obligation. In addition, states are to pursue a policy of eliminating violence against women without any delay. Following Vienna and Beijing[16], the ratification of Convention on the Elimination of All Forms Of Discrimination Against Women (CEDAW) reinforces the different dimensions of human rights violation of women. Since then, the slogan "women's right are human rights" have come to be formally acknowledged and adopted at intergovernmental level.

CEDAW's general recommendation 19, para II deals exclusively with the issue of violence against women. It urges states to take appropriate and effective

13 Indira Jaising, "Domestic violence and the law", Journal of the NHRC, Vol. 1, 73 (2002)

14 General Assembly Resolution 217A, Annex. III.

15 General Assembly Resolution 2200A, Annex. XXI.

16 This refers to consensus declaration from World Conference on Human Rights at Vienna (1993) and 4th World Conference on Women at Beijing (1995).

measures to overcome all forms of gender based violence, whether private or public, necessary to protect women from all forms of abuse, including domestic violence. Para 31-32 of recommendation, deals with family violence. They recommend measures necessary to overcome domestic violence such as adoption of criminal and civil remedies and legislations.

The first regional treaty on violence against women (1994) is inter-American Convention on the prevention, punishment and eradication of violence against women. The Convention protects women from both public and private acts of violence.[17] Most importantly, the convention sets up a mechanism for protecting the rights articulated therein.[18] However, in relation to family, unlike the declaration, the Convention explicitly includes people, who do not and have never share the same residence but are people involved in interpersonal relationship within the definition of a family or a domestic unit.

'Apart from these major international documents with regard to domestic violence, the issue of violence against women was taken up by the economic council in recommendation and conclusion arising from review and appraisal of the implementation of the Nairobi Forward looking strategies.[19]

All international and regional human rights instruments recognize the right to life of every individual.[20] For example, the International Convention on Civil and Political Rights (ICCPR) states, that every human being has the inherent right to life and this right has to be protected by law. The American Convention too has a similar provision in Art. (1).The European Convention for the prevention of human rights and fundamental freedom[21] require, that individuals be free from torture or inhuman or degrading treatment. Although these similar provisions do not explicitly refer to a State's duty to combat domestic violence, their language implies the duty. The implied duty seems in part from the stark reality that domestic violence often kills women.

IV Analysing Domestic Violence in India : Existing Law and Judicial Process

Constitution of India has declared equality of sex as a guiding principle but in reality the family emerges as a unit where subordination of women to men

17 Inter American Convention, Art. 3.
18 Inter American Convention Chapter IV.
19 General Assembly Resolution 1990/IS of 24th May 1990.
20 See International Convenhon on Civil and Political Rights) 1966, Art. 6(1), European Convention, Fro Convenhan of Human Rights and Fundamental Freedom 1950 Art. 2; American Convention Art. 4.
21 See Art. 3.

and junior to senior pervades. Family, with its underlying basis of hierarchical structure (gender, age and economic status) and sexual division of labour, is a unit where violence is used as a tool to maintain the structure of family and to ensure the continuation of the assigned role. Even though, wife beating is a universal phenomenon, in Indian families domestic violence is not only inflicted by husbands alone but the entire husband's family participates in it, especially the 'mother-in-law' emerges as dominating figure, who inflicts violence or harasses the daughter-in-law. Violence is also seen in the form of rape, dowry deaths, amniocentesis and female infanticide. The statistical profile of India shows that the sex composition of population is displaying a steady decline from 972 females per thousand males in 1901 to 929 in 1991 census. Around the 1991 census it was 1070 in USSR, 1060 in UK and 1050 in USA.[22]

Although India is a ratifying party to both general and special human rights standards set out in the ICCPR, ICESCR and CEDAW, women's rights continue to be marginalised from the normative framework of human rights regime by the State. It should be noted that while the position set out here, is by no mean's specific to India and indeed reflects the problem areas within international human rights order.

Remedies available to victims of domestic violence-The criminal law, civil law remedies or matrimonial relief.

Penal sanctions against acts violative of women rights

To provide women the status she deserves, the status of dignity and equality of respect and recognition, since independence, many efforts had been made in India. The remarkable development can be seen in Criminal Law when it comes to prioritising women rights.

Dowry related violence

To detect and curb the growing menace of social evil of dowry, the Dowry Prohibition Act 1961 was enacted, which makes not only the actual act of giving or taking dowry an offence punishable with imprisonment up to 5 years, but also the very demand of dowry at the time, before or after the marriage an offence punishable with imprisonment up to 2 years[23]. This Act was amended twice in 1984 and 1986. Insertion of Sec. 7(3) in Act in 1986, now saves the giver of dowry thereby making legal action possible under the Act. These offences are made cognizable for purpose of investigation by police. By way of interpretation of Sec.4 of the Dowry Prohibition Act 1961, the Supreme Court[24]

22 Dr. S. Radha and Dr. Amer Singh, "Gender Bias of Contractual Labour Discrimination", Indian Bar Review, Vol. 24(3&4) 36 (1997).
23 The Dowry Prohibition Act, 1961, Secs 3 and 4.
24 See *L.V. Jadhav* v. *S.A. Pawar*, (1983) 4 SCC 23, also *S. Gopal Reddy* v. *State of Andhra Pradesh*, (1996), 3 Crimes 35 (SC).

had laid down that the offence of dowry under Sec.4, of Dowry Prohibition Act 1961 is complete when demand for dowry is made. Consent for meeting the demand is not necessary. The demand of dowry for a proposed marriage which does not materialise for non-fulfilment of demand is an offence punishable with imprisonment up to 2 years.

In addition to criminalising dowry, the Indian Parliament has criminalised dowry related violence against women. Sec. 498A was inserted in the Indian Penal Code, 1860, which punishes husband and his relatives for perpetrating cruelty upon the wives, which may extend up to 3 years or fine. Cruelty was defined broadly enough to encompass physical as well as mental cruelty.[25]

The substantive as well as procedural law was amended in 1986 to prevent dowry death of newly married women. If any woman dies an unnatural death within seven years of marriage and if she is subjected to cruelty or harassment for demand of dowry by her husband or in-laws, then they can be punished with imprisonment for 7 years which may extend up to life[26]. Indian Evidence Act, was also amended in 1983 and 1986, which provides that the presumption of dowry death can be raised in cases where a woman has committed suicide or her death occurred within seven years of her marriage, if she is subjected to cruelty or harassment soon before her death by her husband or relatives.

In *Pawan Kumar* v. *State of Haryana*[27] it was held that cruelty need not be physical. Even mental torture in a given case would be case of cruelty and harassment within meaning of Secs.304B and 498A I.P.C. It was also held that a wilful conduct means, conduct wilfully done which may be inferred by direct or indirect evidence such. However, every type of harassment or cruelty is not covered under the definition of Sec.498A I.P.C. In *Smt. Sarla Prabhakar* v. *State of Maharashtra*[28] it was held that not every harassment or every type of cruelty that would attract the application of Sec.498A I.P.C. last the beating and harassment must be to force the bride to commit suicide or to fulfill illegal demands.

Other sexual offences

Sexual harassment and molestation

Sexual harassment at work-place is another form of violence that women have to suffer. Under Sec.509 I.P.C., any person using any word or picture or

25 Explanation (a) to Sec. 498 provides: cruelty means any wilful conduct which is of such nature as is likely to drive the women to commit suicide or to cause grave injury or danger to life, limb or health of woman. Explanation (b) to Sec. 498 – brings any harassment to the woman with a view to coerce her or her relative to succumb to dowry demand under the purview of cruelty.
26 IPC, Sec. 304.
27 [3 SCC (1898)]
28 1990(2) Recent Criminal Reports, see also *Richhpal Kaur* v. *State of Haryana & Punjab*, Recent Criminal Reports.

gesture or act or sound with intention to insult the modesty of any woman can be punished with imprisonment up to one year.[29] This is popularly known as sexual harassment. The term "sexual harassment" includes such unwelcome behaviour (whether directly or by implication) as (i) physical contact or advances, (ii) a demand or request for sexual favours, (iii) sexually coloured remarks, (iv) showing pornography, (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Further, the Supreme Court of India, SC[30] by an epoch making judgment has laid down the guidelines and norms for effective enforcement of the basic human rights of gender equality and guarantee against sexual harassment at work place. Now, it shall be duty of employer or other responsible persons in work-places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide procedures for resolution, settlement or prosecution of acts of sexual harassment by taking all steps required. To deal with the offence of molestation a provision is made under the penal laws, that any person using criminal force on a woman with intention to outrage her modestly is liable for offence punishable with imprisonment up to 2 years[31] Both the offences of molestation and sexual harassment, are cognizable and the police is empowered to investigate the cases without any permission from magistrate. In *Rupan Deol Bajaj* v. *Kunwar Pal Singh Gill*[32], the Supreme Court laid down in unambiguous terms, that the sequence of events culminating in slapping on the posterior of a woman in public function disclosed in the First Information Report of the Police amounted to prima facie an offence under Sec. 354 of the IPC.

Rape

Rape can occur anywhere in general community or even in a family where it can take the form of martial rape or incest. Sexual intercourse with any woman against her will or without her legal consent amounts to rape which is an offence punishable with maximum sentence of life imprisonment.[33] However, sexual intercourse with any girl below sixteen years of age amounts to rape irrespective of her consent. Any person having sexual intercourse with any women by deceitful means can be punished with imprisonment up to 10 years.[34] By way of law reforms in 1983, provisions have been made in IPC by which the (i) police officer, (ii) public servant, (iii) medical officer, (iv) superintendent of jail, (v) superintendent of remand home, committing sexual intercourse not

29 IPC, Sec. 509.
30 *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241; The Hindu, 14 August 1997.
31 *Supra* n.29., Sec. 354.
32 1995 (1) SCC (Cr.) 1059.
33 *Supra* n.29, Sec. 376.
34 *Id.*, Sec. 493.

amounting to rape with any woman kept in his custody, will be punished with imprisonment up to five years.[35] The Evidence Act has also been amended to shift the burden of proof on the accused so far as consent of the victim girl to such sexual intercourse is concerned.[36] The Supreme Court in *Delhi Dairy Domestic Working Women's Forum* v. *Union of India*,[37] has laid down broad parameters about the legal assistance which is to be given to the victims of rape through competent lawyer from the stage of interrogation by the police till the conclusion of the trial.

Offence against ju dicially separated wife

Sexual inter-course with wife even without her consent is not rape. Therefore sexual intercourse with the judicially separated wife could not be rape within the meaning of that word as used in Sec.375 of penal code. Even though its is not rape, Sec.376A IPC made it an offence and provided for two years imprisonment and fine as punishment for it.

Kidnapping, abduction and prostitution

Women are kidnapped and abducted for various reasons. One prompt reason behind such crime is, sex gratification. They are also kidnapped for selling and prostitution. The acts of kidnapping and abduction have been made offences punishable with imprisonments, which may extend from 7 years up to life.[38] Further, to prevent sexual exploitation for commercial purposes, the act of procuring, inducing or taking away any woman with intention to exploit for the purpose of prostitution is recognized as an offence under the Immoral Traffic (Prevention) Act, 1956.

Female foeticide

Female foeticide is one of the worst forms of violence against women where a woman is denied her most basic and fundamental right – the right to life enshrined in Art. 21 of Indian Constitution. The son preference in the Indian Community negates the fundamental right to equality guaranteed under Arts. 14 and 15 of our Constitution. In one hospital, a study showed that out of 8,000 abortions performed, 7,999 were female foetuses.[39] Hence the Government passed the Pre Natal Diagnostic (Prevention and Misuse of Techniques) Act, 1994 in response to the increasing number of abortions performed on women carrying female foetuses, which came into force on January 1, 1996. The Act is

35 *Id.*, Sec. 376 B and Sec. 376 D.
36 The Indian Evidence Act, 1872, Sec. 114 A.
37 (1995) 1 SCC 14.
38 IPC, Sec. 363-373.
39 See Shailaja Bajpai, Indian Lost Women, World Press Rev, at 49 Apr. 1991.

both prohibitive and regulatory, and prohibits the couples from using technical means to determine the sex of a foetus.

Adequacy of criminal justice system in india

However, the question still remains for our consideration, whether the criminal justice system in India is adequate to deal with violence against women so that a woman who is subjected to physical and sexual violence receives justice. It is ironic that in spite of stringent laws to deal with crime against women, statistics on criminal offence against women continue to show a steady rise in India, whether it is dowry deaths, rape, kidnapping or other forms of violence against women. As far as the provisions of Pre Natal Diagnostic Technique (Regulation & Prevention Act), 1994 are concerned, owing to lack of social sanction, it is practically difficult to implement them. The need of the hour is to have a mechanism whereby people can be sensitized towards the need of more females in the country. The public awareness can prove to be better and most powerful tool to combat with the decreasing sex ratio and to achieve a balance in the 21st Century.

Regarding the law relating to rape, it may be pointed out, that though the law is stringent, still, the large number of rape cases remains unreported because of social stigma attached to the victims of rape and due to the fear of harassment and the trauma which the victim has to undergo while narrating facts to the police which is followed by medical examination and then cross-examination in court, which is further enhanced by delay and adjournments in court proceedings. Apart from this, for successful prosecution of rape cases, it is to be proved, that victim was a not consenting party to sexual intercourse. The character of victim is often made an issue in order to discredit her version before court. The Judiciary also insists on the, corroboration of testimony of rape victim. All these only add to the grievance to the victim rather than to provide her justice.

The efficiency of criminal law also fundamentally depends upon the role of police. Police response to domestic violence cases is often viewed as inadequate. Hence prosecutions and courts often fail to effectively prosecute the case. In *Gudaline MJ Cherian* v. *Union of India*[40] investigation of rape case was done in perfunctory manner by police and it was brought to the notice of the Supreme Court by way of a public interest litigation. The CBI was then directed to investigate the case. A fresh investigation by the CBI revealed, that 4 persons implicated by local police as accused were innocent and that vital clues and evidence in the case had been lost due to perfunctory investigation on the part of the Station House Officer and the Medical Officer of Moradabad Hospital.

40 AIR 1995 SC 925.

Another obstacle that comes across the effective implementation of criminal law is, usually that it fails to address the fact that the victim of domestic violence is usually economically dependent upon her abusive partner. By failing to provide financial assistance to victim and her family, Penal Codes, inhibit their effective usage as female victim will be reluctant to send her abusers to jail for an extended period, as she is financially dependent on him.

Civil remedies to the women victims of domestic violence

In addition to criminal remedies, women victim of violencs can also avail civil remedies. For example, an injunction, can be obtained that forbids abuser from having any contact with victim survivor, and one that may exclude the abusers from the shared room. Where domestic violence is concerned, in granting an injunction, it can be done as an incidental or ancillary proceeding, to the main proceedings for divorce, nullity or judicial separation.

However, generally this judicial remedy is limited to married couples, only excluding a section of population who are not married but have intimate relations with each other. This is largely due to the traditional, and cultural aspect of India, where recognition is given to relations formed by marriage alone. Further, there are procedural difficulties, such as litigation fees which often inhibit women to resort to this remedy. Even when low cost legal advice is available, the victim may not be eligible to receive legal help.

Matrimonial relief for the victims of domestic violence

The matrimonial reliefs such as divorce and separation only provides a remedy for victim/survivors of domestic violence where marital relationship exists, but these reliefs are not helpful if woman wants the marriage to continue but the violence to end.

Apart from resorting to the criminal process, the civil law provisions relevant to this subject are of little practical use and therefore unsatisfactory. Only in couple of cases has the judiciary seen the woman as an independent human being who is capable of making her own decisions. In the landmark judgment of *T. Sareetha* v. *Venkata Subharah*[41], a judge of AP High Court held that the remedy of verification of conjugal rights "violates the right of privacy and human dignity guaranteed by and contained in Art. 21 of the Constitution.". While adjudicating on a petition of restitution of conjugal rights filed by the husband against his wife under Sec.9 of the Hindu Marriage Act, 1955, the court said that the restitution of conjugal rights is an old English remedy retained by Indian legislature in both Hindu Marriage Act and Special Marriage Act of 1914, which is the only optional civil law of marriage and divorce. He pointed out that the

41 AIR 1983 AP 356.

purpose of the remedy was to coerce the unwilling party to have "sex" against the persons without her consent and free will, The judgment further states that a decree for restitution of conjugal rights constitute the grosser violation of an individual's right of privacy. It deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to sensed and when and how her body is to become the vehicle for procreation of another human being. The judgment is significant because it makes a clear break from the earlier judgments and upholds the right of an Indian woman to live with dignity, and lays stress on an individual's happiness.

The Supreme Court however in a later judgment[42] reversed the effect of this judgement and held that these were sufficient safeguards in Sec. 9 of Hindu Marriage Act, which allows a spouse to sue for restitution of conjugal right to prevent it from being a tyranny, as only financial sanction could be applied under the law to the erring who willfully refused to obey the decree for restriction of conjugal rights. The Court held that the decree serves a social purpose as an aid to the prevention of breaking up of marriage.

In upholding the remedy, the apex court totally ignored the effect that such decree could have on an Indian woman, who under the threat of judicial and social pressure and financial sanctions may well be forced to go back to matrimonial home. As a result of her vulnerable position she may be faced to have sex and live a life of misery in an atmosphere she obviously abhors. The said judgement completely overlooks the fact that marriage is supposed to be voluntary union and the state cannot force two people to remain married.

Domestic Violence Women (Prevention) Bill, 2001

Recently some noteworthy development and building of alliances between international law bodies, municipal judiciaries, lawyers, human rights and women's rights movements can be seen in bringing violence against women into Human Rights framework. The lawyers collective, an NGO working in the field of human rights drafted a model law on domestic violence in 1992, which was widely circulated. In 1994, the National Commission for women set up a committee to look at this law. It then drafted a proposed law to safeguard women from domestic violence. Thereafter in 1998, the lawyers collectively, drafted the Domestic Violence To Women (prevention) Bill in consultation with various women's group. This Bill was drafted in accordance with the UN framework for model legislation on domestic violence and had the broad support of the women's movement for its major provisions. After much pressure from the women's groups, the Government of India introduced the Bill on domestic violence in the Lok Sabha (Bill No. 133 of 2001) titled "The Protection" From

42 AIR 1984 SC 1562.

Domestic Violence Bill, 2001". At the moment, the bill is pending before the Standing Committee for the Ministry of HRD, GOI for its recommendations. However, this bill has invited sharp criticism from the women's movement. Activist fells that this bill, if passed and implemented, might turn out to be very dangerous in its implication for women facing domestic violence.

V Concluding Comments

Domestic violence would not decrease unless there is a change in the socio-political system. Until violence countries, in larger world as tools of oppression and maintenance of subordination, it would continue to be so in the family also. But certain policies and programmes will be of immense help to victims of domestic violence. Since domestic violence is a crime that takes place within the family, between people who are emotionally and financially involved with each other, special policies are necessary to redress such issues. Two policy approaches are crucial to the success of criminalisation strategy. *Firstly*, policies must reflect the singular nature of domestic crime and must provide support and help to the victim. *Secondly*, policies must take into account the cultural, economic and political realities in the country concerned.[43]

The criminalisation strategy is fundamentally dependent on the role of police. Since the police will be the body called upon for an initial response in a complex situation, it is important that there be clear standards with regard to police action in the context of domestic violence.[44] The law as an effective mechanism to combat domestic violence has been unquestionably accepted by all countries, but it is equally true, that laws cannot be enforced in isolation. Since domestic violence is considered as, a crime against an individual, the police, the judiciary, the bureaucracy as well as the community at large share equally and contribute unconditionally to stop this menace. If any branch of this system shows any lapse, the whole structure will collapse and women necessarily continue to be victims of domestic violence. In those cases of domestic violence, where proof of violence is available along with the incidence of alcoholism, wife could be given maintenance from the source itself (this is possible only in formal sector). The understanding of domestic violence issue should be reflected through various government policies such as housing, loan facilities, income generating schemes, jobs etc. Treating this group as target group of economic development and welfare service, can make rehabilitation an easier job.

43 Strategies for Confronting Domestic Violence: A Resource Manual, United Nations, New York (1993).

44 Preliminary report on violence against women, its causes and consequences, United Nations (1994/95).

The psychological assistance and mental health concerns, can act as means of rehabilitation for battered women, which in turn can break the cycle of violence. Therefore, the interactions with activist groups, social workers and psychiatrist may be of help to bring about desirable changes. It is therefore necessary, to train law enforcers and medical and legal professionals who come in contact with victims to understand gender violence, to appreciate the trauma of the victim and to take proper evidence for criminal proceedings.

The nature of crime of domestic violence requires the intervention of the community to assist and support the victims. Community workers can play an important role in identifying violence, raising awareness about such issues and in directing victims to the correct procedures for seeking redress.

VI Strategies

States should be required to encourage the setting up of shelters for women victims of violence and to provide resources for their activities. The shelters must be well planned, of decent standard, well funded and well staffed. Only shelter or refugee system must be viewed only as component of a coordinated and multifaceted approach to domestic violence. Any relief given to women victims must be accompanied by 'counselling'. Sensitisation programmes for assaulters should be established in India. The Governmental agencies should work with existing Mahila Manuals both in urban and rural areas, as with the help of continuous dialogue and other programmes of these groups could be strengthened as they could provide support on the spot where it most often lack. Campaign against domestic violence should be undertaken to create more awareness and for building up public opinion on this issue. Camps for young adults (men and women) on the issue of domestic violence, man-women relationship and women's subordinate position may help to have better understanding and sensitivity. The overall strategies could be both long term and short term viz. long term for addressing the entire social problems of domestic violence and short term for providing more effective help to the victims of violence. Therefore, it appears that an integrated approach is necessary in dealing with domestic violence. While highlighting these issues, certain research areas could also be identified and attention should be given to the real life context of the victims, their hopelessness, dependency, restricted option and her consequent need for empowerment. Generally women victims come to the women's group, only at later stage where atrocities are intolerable or when she has been deserted by her husband. The aim to work with the battered woman should be to develop her capacity to decide her own future. She should be seen as an economic component of development rather than a sex-symbol.

A society's progress can really be judged by how well half of our society progresses. And if they are to progress fast, half the talent, half the energy cannot be ignored. Women must be allowed full freedom of action and movement.

CHILD LABOUR AND ADJUDICATORY SYSTEM IN INDIA

Latika Srivastava*

I Introduction

"Today we search for your unwritten name
You seem just off the stage like an imminent star of the morning
Infants bring again & again a message of Reassurance
They seem to provide Deliverance, light, dawn

-Ravindra Nath Tagore, 'New Birth' 1940

THESE WORDS of Gurudev have become a sad contradiction in his own homeland where millions of half-fed, half-naked and illiterate children contribute 20% of the total G.N.P. to a nation of one billion people. Society and state have failed consistently to eradicate child labour in India. Reasons for this failure are many. It is often believed that a major part of this failure can be attributed to our adjudicatory system and judicial institutions[1] This paper attempts to evaluate the efficacy of our adjudicatory system and judicial institutions in curbing and eradicating child labour by adequately and effectively punishing the violation of laws which prohibit and regulate child labour.

Non-enforcement of legislations relating to Child labour, especially Child Labour (Prohibition & Regulation) Act, 1986, it is usually perceived, is due to the existing judicial process for the trial of the offences under the Act and the approach of the Judiciary towards the problem of Child labour. Not only the substantive law but the judicial institution and the judicial process through which the violations of child labour laws are sought to be punished are inherently lacking and inappropriate.

II Adjudicatory System

The factors which adversely affect the prosecution of violators of child labour legislation are mainly following:

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1 Professor Baxi has opined that among the root causes of non-enforcement of child labour legislation is ".... the state of law both normative and institutional. In so far as rights are to be enforced by the court, the whole nature and history of the adjudicatory system and lawyering manifests itself as among the primary root causes". " Upendra Baxi, Reclaiming our common future: Human rights of Children –12, The Child and the law, UNICEF, India country office, New Delhi.

Judicial process

Adversarial form of procedure

Adversarial form of procedure in our judicial system makes it difficult for the poor and illiterate complainants to prove their case. This shortcoming was first pointed out by the Hon'ble Supreme Court long back in 1980. Bhagwati J. stated, in *Bandhua Mukti Morcha* v. *Union of India*[2] :

> "when the poor come before the Court, particularly for the enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure which will make it possible for the poor and the weak to bring the necessary material before the court for the purpose of securing enforcement of their fundamental rights. It must be remembered that the problems of the poor which are now coming before the Court are qualitatively different from those which have hitherto occupied the attention of the court and they need a different kind of lawyering skill and judicial approach..... We have therefore to abandon the laissez faire approach in the judicial process particularly where it involved a question of enforcement of fundamental rights and forge new tools, device methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses of people[3]."

The judgement significantly highlights the gross inadequacies in an adversarial system where parties to the dispute stand on an unequal footing due to resourcefulness and awareness of one and poverty and ignorance of the other. This inherent inequity in our system, which results in injustice to the weak and poor has not been removed by the legislature. Restricted and compelled under this situation, the Supreme Court has gone out to liberalise and relax the degree of burden of proof to be discharged by the weak and the poor, so that justice may be done. In *People's Union for Democratic Rights* v. *Union of India*[4], it rejected the argument of the accused that the prosecution should prove beyond doubt that the labourers were bonded labourers. Formulating a new rule of presumption, the court stated that "when a person works for a wage that is lesser than minimum wage, he works under some compulsion". Therefore, when a labourer proves that he works for a wage lower than the prescribed minimum wage, it should be presumed that he is a bonded labourer, and the burden to prove that he is not so, should shift onto the accused employer. Thus,

2 AIR 1980 SC 809, at 815-816.
3 *Ibid.*, Bhagwati J. at 815, 816.
4 AIR 1982 SC 1473.

uncomfortable with the failure of legislature to remove this inequity in the system the court has been searching new devices and principles so that it can deliver justice to the poor and weak.

Under our judicial system, labour inspector of the Department of Labour Commissioner has been assigned the task of proving the charge against the offender and procuring his conviction. This adversarial system has greatly restricted the capacity of labour inspector to discharge his duty. The burden of proving that a child is below 14 years of age lies on the Inspector[5]. During a raid on a premises where children are found working, there is no quick and scientific method of assuring the age of children, and a complaint is filed by the Inspector simply on his assessment that prima facie the child appears to be below 14 years of age. More often than not, the employer succeeds in proving that the child is above the age of 14 years. Trial period for a case may generally extend from one year to five year since the date of filing the application. During this period, there is no provision in law or fact for the boarding, lodging and custody of the child labourer, who meanwhile either shifts to another employer or goes back to his parental home that may often be in some remote and obscure area. The labour Inspector is not entitled to custody of the child. In such circumstances, it becomes very difficult for the labour Inspector to locate and produce the children in the court.

All these factors enhance the labour Inspector's difficulties in proving the charges against the accused employer. In the light of *People's Union for Democratic Rights* v. *Union of India*, it has been suggested[6] that once the Inspector has proved that a particular child was found working in a workshop the burden to prove that he was above the prohibited age, should shift on to the accused employer.

Strict adherence to rule of evidence

This is another aspect of the judicial procedure which has been found to be a great hinderance in proving a case against the accused employer. The trial court insists on the evidential proof of minutest details of the facts and circumstances[7]. The prosecution is asked to state the minutest details about the situation and structure of the premises raided, the identity and number of the persons present there and such other details as from which door, the Inspector and his staff entered into the building what door and what window faced which

5 Child Labour (Prohibition and Regulation) Act, 1986 prohibits employment of children below 14 years of age in hazardous industries, Sec. 3.

6 AIR 1982 SC 1473

7 Statement given on personal interview by the researcher as part of the field study on the work, Mr. Ravinder Singh, field officer, Department of Labour Commissioner, Varanasi, July 1997.

direction, at which particular place a particular child labour was found engaged, in what particular activity and so on. As a matter of practical wisdom, almost always, all the suspected premises in a particular locality are raided on one single day. At the time of raid there is great chaos, with employers trying to hush up the matter and hide children and crowd of curious onlookers thronging the place. In such a situation, it is obviously very difficult to remember the minutest details of place and other details of raid. Also time taken for the trial is long enough to erode away the minute details from the memories of staff and officers partaking in the raid.

All these factors taken together make it very difficult for prosecution to prove the case against the accused employer.

Long delays

Long time taken by the courts in disposing off a case has been so far the most glaring defect in our judicial system. In Varanasi division, out of a total of 1861 complaints filed under C.L.A.'86, during a period of five years since 1991 to July 1997, only 42 were decided till July 1997[8]. A very important judgement in *M.C. Mehta* v. *State of Tamil Nadu & others*, was delivered by the highest court of the land after 10 years of filing the writ[9].

Such long delays not only cool down the matter but also dilute the gravity of the offence. This excessive time disheartens and discourages the prosecution, increases the expenses of the prosecution, results in the fading away of the memory of evidence making it difficult to collect and produce the evidence. Meanwhile, the chances of the accused employer to obliterate and manipulate the evidence become great. In case of a child, by the time the relief is granted by the courts, the victim reaches adolescence or adulthood. Hence, in the context of C.L.A.86, such delays are particularly fatal and erode away the very *raison d'etre* of the Act, the primary object of which is to protect the children against exploitation, punishment of offenders being only secondary and incidental.

Enforcement of judgement

In any process for securing justice, the initiation step is the filing of a complaint. Enforcement of a verdict is the ultimate step. Instances can be gathered for both the enforcement and non-enforcement of the Court's judgements. Apex court's judgements are sometime obeyed and implemented by ho a but sometimes they do not do it as is apparent from the following cases In *People's Union for Democratic Right* v. *Union of India*[10] Bhagwati J.

8 A report by Department of Labour Commissioner, Varanasi.

9 Writ Petition (C) No. 465 of 1986 decided in 1996(SC).

10 AIR 1982 SC 1473.

had stated that construction work is hazardous for a child below 14 years of age. In accordance with this judgement, the construction work has been added as item No. 7 as prohibited occupation in Part 'A' of Schedule to Child Labour Act of 1986.

However, the Court's observation that Child Labour is always 'forced labour' and should be completely prohibited by law has not been accepted by the legislature. However in *Salal Hydro Project* v. *State of J&K*[11] in violation of the judgement of the Supreme Court of 1982, the children were employed in the construction work with their families. The Court directed for strict implementation of Art. 24 of the Constitution of India and for educating the children of workers and made following suggestions in this regard: (a) The Central Government would do well to persuade the workmen to send their children to nearby schools and arrange, not only for the school fees paid but also provide free of charge books, and other facilities such as transportation etc; and (b).....whereas the Central Government undertakes a construction project which is likely to last for some time it should either itself or where it entrusts the Project - work or part thereof to a contractor that contractor should provide for schooling of the children of workers living at or near the projects.

No information is available as to any rules, regulation bye-laws or direction which have been made by the Government in this regard. In *Bandhua Mukti Morcha* v. *Union of India*[12] & *Unnikrishnan*[13], the Supreme Court held that right to life under Art. 21, of the Constitution of India includes in case of a child below 14 years of age, a right to compulsory primary education.

Referring to its opinion as laid down in the *Francis Coralie*[14] case, the Hon'ble court reiterated that Art. 21, means not only the right to mere animal existence but right to live with human dignity free from exploitation. This concept of human dignity owes its legitimacy to Directive Principles contained in Part-IV of the Constitution of India, especially clauses (e) and (f) of Art. 39 and Arts. 41 and 42. There is a close relationship between fundamental rights and Directive Principles of State Policy. Similarly, the Supreme Court in *Unni Krishnan's* case accorded the right to primary education of a child under 14 years of age, a status of fundamental right[15]. Now after about ten years Constitution (86th) Amendment Act, 2002 has added Art. 21-A and amended Art. 45. Art. 21-A gives all children in the age group of 6-14 years a fundamental

11 AIR 1984 SC 177, 183.
12 AIR 1984 SC 802.
13 (1993) (1) SC 645.
14 AIR 1981 SC 746.
15 *Supra* n. 13

right to education. Art. 45, imposes a duty on the state to provide early childhood care and education to all children until they complete the age of 6 years. However, the legislature has failed to pass a law that prohibits Child Labour during school hours.[16] In *Bandhua Mukti Morcha* v. *Union of India*[17], the Supreme Court held that the provision under Sec. 13, of the Bonded Labour System (Abolition) Act, 1976, that lays that every State Government shall constitute Vigilance Committees at district and Sub-divisional level to carry into effect the provision under Secs. 13, 14 and 15 is mandatory. It also held that State of Haryana was not justified in not complying with this mandatory provision simply on the assumption that there are no bonded labourers in the state.

However, this judgement has by and large been ignored by the State Governments. In *People's Union for Civil liberties* v. *Union of India & Other's*[18] the court noted it and observed that in most of the cases, either the Vigilance Committee has not been constituted or if constituted has not been functioning properly. In this particular case the court found that due to inaction of the concerned Vigilance Committee and District Magistrate, the victims Shiva Murugan and three other child labourers could not be protected from the inhuman torture and exploitation by their employers.

A glaring example of the State Government's disregard for the verdict of the highest Court of land as well as legislative will is, Varanasi division, wherein a Vigilance Committee at the divisional level was constituted in February 1996, despite the fact that one of the largest concentration of bonded labourers including bonded Child Labour is to be found in the Carpet belt of Varanasi, Bhadohi and Mirzapur. In *M.C. Mehta* v. *State of Tamil Nadu and Others*[19], a scheme was provided for constituting 'Rehabilitation Fund' for the victim child labour so that the root cause for the child labour could be removed. The enthusiasm and hope which the judgement initially invoked have gradually died down with scant enforcement.

III Judicial Approach

The Supreme Court has depicted from its various pronouncements its sensitivity towards the issue of child labour, but the lowest judiciary in general

16 Since 1939 Sri Lanka has used this device of prohibition of employment during school hours. 6% of its budget goes to primary education and it ranks highest in seven – South Asian countries with respect to percent of children below 14 years who have received primary education.
17 AIR 1984 SC 825, 835.
18 Writ Petition (Civil) No. 560 of 1994.
19 AIR 1997 SC 699.

treats the violations of child labour laws as minor offences, and in most of the cases, the accused - employer have been acquitted or fined a paltry sum of money not exceeding two hundred rupees[20]. The amount of fine, however now after passage, of C.L.A. of 1986 has been considerably enhanced[21] fixing a minimum fine at Rs.10,000 in case of violation of prohibitory provision of the Act under Sec.3. By the 1987 Amendment, of the Factories Act, violation of prohibitionery provision under Sec. 67 of the same Act is punishable with a fine of one lakh rupees. But as no minimum amount has been fixed in case of violation of regulatory provisions, and it continue to attract a wild fine.

In a report appearing in the Times of India, it was stated that since the passage of 1986 Act, 4000 cases were registered against offenders of child labour laws of which about 35,000 offenders were let off with a paltry amount of Rs.200/-[22]. According to yet another report, betweens 1986 and mid 1993, there were 3,4888 prosecutions under C.L.A. 1986 with only 1,426 convictions in whole of India.[23]

Thus very rarely is an offender punished with imprisonment because, these judicial authorities and jurists[24] believe that exploited child and his family benefit more from money received as fine from the accused employer than his imprisonment. They do not realize that imprisonment of a single accused employer can have more deterring effect on the like minded other employers in the area, than imposing a were pecuniary liability. In *M.C. Mehta* v. *State of Tamil Nadu & Others*[25], the apex court tried to provide a mechanism to prevent the Child labourer from returning to the work and observed that two things are essential in this regard namely Compulsory schooling of the child, and An 'income aliunde for a family member of the Child labourer to replace his forgone income for achieving its, the Hon'ble Court has laid down an exhaustive and comprehensive scheme to create a 'Rehabilitation cum-Welfare Fund' based on two principles, the principle of joint responsibility of the defaulting employer and the state, and secondly, the technique of reward and punishment, the later with a view to initiate parents and guardians into educating their children and keeping them away from exploitative labour.

20 *People's Union for Democratic Rights and others* v. *Union of India & Others*, AIR 1982 SC 1473. Quoted by Meena Gupta, in 1991 : Special problems of enforcement of Child Labour laws & Regulations.
21 The Child Labour (Prohibition and Regulation) Act., 1986, Secs. 14 and 20.
22 Dr. Gauri Modwel quoting T.O.I. 1995, in Legal News and Views Vol. II NOI, Jan. 97.
23 Balram Gunvanti : 1992 'Small Change', Bombay Times of India quoted in 'Child Labour in India' by CACL(Compaign Against Child Labour).
24 Jose Varghese, an Advocate in Supreme Court, has expanded this view in his book *'Laws on the Employment of Children'*.
25 AIR 1997 SC 699.

Rehabilitation - cum - Welfare funds

The Court stated, that in every case of violation of prohibitory provision under Sec.3 of C.L.A. 1986, every defaulting employer would pay a sum of Rs.20,000/- to create a Rehabilitation-cum-Welfare Fund for each child labour employed by him. The liability of the employer would not cease even if he would desire to discharge the child presently employed. The fund so generated would be used only for the concerned child. To create greater income, the fund can be deposited in high yielding scheme of any nationalized bank or other public body.[26]

As the aforesaid income could not be enough to dissuade the parent / guardian to seek employment of the child, State owes a duty to perform its obligation under Arts. 39(e) and (f) 41, 45 and 47. It would try to give a job to an adult member of the family whose child is in employment in a factory, mine or other hazardous work. Where it is not possible to provide job as above mentioned the appropriate Government would, as its contribution / grant deposit in the aforesaid Fund, a sum of Rs.5,000/- for each child employed in a factory or mine or in any other hazardous employment[27]. The parent / guardian of the concerned child would be paid the income which would be earned on the corpus, which would be a sum of Rs.25,000/- for each child every month. The employment given or payment made would cease to be operative if the child would not be sent by the parents / guardians for education. Further, it would be the duty of the Inspector to see that this call of the Constitutions is carried out,[28] and with the executive head of the district enjoined to keep a watchful eye on the work of the Inspectors. In view of the magnitude of the problem, a separate cell in the labour - Department of the appropriate Government would be created monitored by the Secretary of the Labour Department, with overall supervision of the Ministry of Labour, Government of India.[29]

In case of non-hazardous jobs, the Inspector shall see that working hours of the child are not more than 6 hours a day and it receives education for at least 2 hours a day with the entire cost of the education to be borne by the employer.[30] This judgement was initially received with great enthusiasm and hope both by NGOs and enforcement directorate but not much has been done to enforce this judgement.

26 *Id.*, Para 27.
27 *Id.*, Para 28 and 29.
28 *Id.*, Para 31.
29 *Id.*, Para 31.
30 *Id.*, Para 31.

IV Conclusion

Social justice is the main precept of a welfare state and on the principle of 'access to justice' the doctrine of locus standi has accommodated the new doctrine of 'public interest litigation'. To treat unequals as equals is a negation of rule of law which allows positive discrimination by the state in favour of the weaker and unprivileged so that they may stand equal to the strong and resourceful.

In every litigation related to child labour legislation, parties are at inherently unequal position and adoption of adversarial form of judicial process does not hold any rational or legitimacy. The in-appropriateness of adversarial process becomes all the more obvious in view of the fact that an offence relating to child labour is distinct from any other offence, wherein the main object of the prosecution is retributive and deterring securing the punishment of the offender. But in the case of an offence relating to 'child labour, the main object is to protect the children from being exploited by bringing the culprits to book and punishing them. The case is further distinguished from other litigations on the ground that herein the victim child labourer is not himself a contesting party but the case is contested for his benefit by the State represented by the Labour Department or by NGOs or Social activists. The very nature of this kind of litigation demands that the courts should abandon the conventional approach and come forward for the help of the child victim. It should not insist upon the strict adherence to the technical rules of evidence. Lengthy trial and long time taken in the final disposal of cases are particularly fatal in the case of child[31]. The protection extended to a child by the legislature becomes meaningless if the child cannot get this protection at the time he is being exploited. The gravity and magnitude of the litigation relating to offences against child labour require an early change in the judicial system and institution. The need is for the adoption of inquisitorial system as exist in French administrative tribunals, provision for summary trial as is provided for bonded labour cases and a separate court on the pattern of labour court, family court or a quasi-judicial tribunal for the trial of offences relating to child labour. If a separate court or tribunal cannot be established then at least all the courts should be directed to decide such cases on top priority basis.

Child labour is a crime against humanity. It not only adversely affects the growth and progress of a child but that of his family, future generations, community and the whole nation. The lower judiciary should take seriously the violation of prohibitory and regulatory provision of child labour legislations. Making of laws, executive's attempts to enforce them, and prosecution for the violation of law, all become meaningless, inconsequential and futile if the judgements of the courts are not enforced. For a person whose progress has been strangulated by the power politics dwarfing the interests of milling multitudes to the interest of a powerful minuscule - obedience to the oracles of a conscientious judiciary is the only ray of hope, as also, if a civilized society governed by the rule of law is to endure, the governments should obey the Court of Justice.

31 It makes it very difficult for the prosecution to prove the charges against the defaulting employer.

BOOK REVIEWS

MITRA'S CO-OWNERSHIP AND PARTITION (2003), By M. R. Mallick. (8th Ed.) Eastern Law House, Kolkata. Pp. [85]+553. Price Rs.575/-.

OWNERSHIP OF a property consists of a bundle of rights, fundamental among them being right to possess, right to enjoy and right to alienate it. Austin describes ownership as a right over a determinate thing, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration. Where the aggregate of the rights, which forms the ownership, is held and enjoyed by one person, he is the sole owner of the property. Where more than one person share these rights in the same property, they are the co-owners of the property. Co-owners have co-ordinate interest in the property. This co-ownership in a property may either be created by the act of co-owners or it may be a creation of law, Co-owners can bring an end to co-ownership by partition either amicably or through intervention of civil court.

Although co-ownership is widely prevalent in our country, the legislatures have done very little to regulate the relationship amongst the co-owners themselves and between them and others. In the absence of statutory law, the law as to co-ownership has to be found in the reported decisions which is often difficult to get hold of. The book under review is a commendable effort made by the author in this area.

The celebrated work, first published in 1959, has now appeared in its eighth edition, thoroughly revised, enlarged and updated by the author. The work deals exhaustively with the entire gamut of the law (statutory, customary, religious and judge made) of co-ownership and division of jointly owned property among the joint owners. The book delves deep into various forms of co-ownership prevalent among Hindus, Buddhist, Muslims, Parsis and Christians.

The book[1] is broadly divided into two parts. The first part comprising five chapters discusses the law of co-ownership in depth and the second deals with the law relating to partition. In Chapter One, the author gives an insight into the conceptual and jurisprudential aspects of ownership and co-ownership. Meaning of co-ownership, modes of creating forms of co-ownership and how co-owners are different from co-sharer, shebaits, mutawallis, partners and members of a company or of a society is being explained here very elucidatively. However,

1 Book under review, Chapter 1.

one can find a number of printing and grammatical errors which at times change the meaning of a term itself.

According to the author, in our country, there are three forms of co-ownership, namely–joint tenancy, tenancy-in-common and coparcenary. A joint tenancy is said to be distinguished by four unities – unity of possession, unity of interest, unity of title and unity of the time of commencement of such title. On the dealth of a joint tenant, joint tenancy devolves by the rule of survivorship on the surviving joint tenant. To constitute a tenancy-in-common, there must be an equal right to the possession of the property i.e., unity of possession. The other three unities need not be there so that the interest of the tenants-in-common may be unequal, their title may be different and such title might have commenced at different times. On the death of a tenant-in-common intestate, his share would devolve on his heirs and not by survivorship on the surviving co-tenant.

Owning property in coparcenary is a peculiarity of Hindu Law, which has no parallel in any other system of law. There are two main schools of Hindu Law – the Mitakshara School and the Dayabhaga School. In Chapter Two, the author has dealt with the Mitakshara joint family and coparcenary, its composition, nature, kinds of property in Hindu law, karta, partition of coparcenary property in detail. Coparcenary is a narrower institution within a joint family comprising only of male members falling within three generations of the last holder of the property. Under Mitakshara Law, women cannot be coparceners[2]. But in States of Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka, right by birth in the coparcenary property has been conferred in favour of an unmarried daughter.[3] The Hindu Succession Amendment Bill, 2004, which has now been referred to the select committee has also incorporated changes identical to these states, for introducing daughters as coparceners in a Mitakshara coparcenary.

Though, Mitakshara coparcenary resembles a joint tenancy, as per the author, the two concepts are different. A joint tenancy requires unity of possession, unity of interest, unity of title and unity of the time of commencement of such title. In a Mitakshara coparcenary there is unity of possession and community of interest. In joint tenancy, shares are defined and equal. In Mitakshara Coparcenary, shares are not defined and are fluctuating and may be unequal and there is no unity of the time of commencement of such title. In the words of author:

2 *Pushpa Devi* v. *Commissioner of Income Tax*, AIR 1977 SC 2230.
3 Hindu Succession (Andhra Pradesh Amendment) Act, 1985.
Hindu Succession (Tamil Nadu, Amendment) Act, 1989.
Hindu Succession (Maharashtra Amendment) Act, 1994.
Hindu Succession (Karnataka Amendment) Act, 1994.

"A coparcenary is a creature of Hindu law, but a joint tenancy may be created either by operation of law or by act of parties. A coparcenary is confined only to male members of a joint Hindu family, but any two or more persons may hold as joint tenants. Individual members of a coparcenary have some peculiar rights and obligations which are unknown to joint tenants. Similarly, the *karta* of the joint family and the father as head of the family enjoys certain special powers and privileges which no joint tenant can exercise[4]."

The author discusses the law relating to categorization of property in Hindu law. Property under Hindu law can be classified under two heads: viz. coparcenary property, and separate property. The rule of Hindu law is well settled that the property which a coparcener gets as his share at the time of partition and the property which a Hindu man inherits from any of his three paternal ancestors, namely, his father, father's father and father's father's father is ancestral property in his hands as regards his male issues and the doctrine of survivorship applies to it. The Supreme Court has in some cases held, that the son inheriting the property from any of his three male ancestors under Sec. 8 of the Hindu Succession Act 1956, would take it as his exclusive property, with no right of his male descendants over it[5]. Relying on these decisions, the author wrongly concludes :

"This well known rule of traditional Mitakshara joint family that when ancestral property has been divided among the coparceners the share allotted to each of them in his hand is ancestral property as regards his own issue though it is looked upon as separate property as regards the separate members does not hold good in view of Sec. 8 of the Hindu Succession Act. In *Wealth Tax* v. *Chandra Sen,* Supreme Court has held that it would be difficult to hold in view of overriding effect of the Hindu Succession Act that the property which devolves upon the son under Sec. 8 of the Hindu Succession Act would be undivided property vis-à-vis his own sons. It has been held that the said share allotted to the son shall be his separate property. This is followed in *Jadhishir* v. *Ashok Kumar* in which the Supreme Court has again reiterated that the income from the assets inherited by the son from (sic) whom he has been separated by partition can be assessed as the income of the son as individual since under Sec. 8 of the Hindu Succession Act, the property of the father who died intestate devolves upon his son in his individual capacity and not as karta of his joint family. However, when

4 *Supra* n. 1 at 26.
5 *Commissioner of Wealth Tax* v. *Chander Sen,* AIR 1986 SC 1753; *Yudhister* v. *Ashok Kumar* AIR 1987 SC 558.
6 *Supra* n. 1 at 28.

the Mitakshara (sic) got the property by partition prior to the passing of the Hindu Succession Act 1956, such property was to be treated as ancestral property qua the sons who got a right in it by birth[6]."

In fact the true effect of these Supreme Court decisions is that the property which a Hindu inherits from his father after the commencement of the Hindu Succession Act 1956 in his hands will be separate property and his own son will not acquire interest by birth in that property. These decisions have no application to property received at the time of partition which remains ancestral property in the hands of the son acquire an interest by birth.

In this chapter, one can find a number of other doubtful statements like "Hindu undivided family and coparcenary – different concept but treated as one for taxation"[7]; "where after the death of the sole surviving coparcener, a widow of a deceased coparcener gives birth to or adopts a son, the heir of the sole surviving coparcener shall be divested and the estate shall pass to the natural or adopted son of the deceased coparcener"[8] and "the eldest coparcener has, however, no inherent right to be appointed the head of the family"[9]. There are several avoidable repetitions, lack of coherency in substance and faulty drafting of sentences.

In Chapter Three of the book, there is a brief discussion on Dayabhaya joint family and coparcenary, a system of law prevalent in Bengal and Assam. As per this system of law, there is no coparcenary between father and sons. Coparcenary comes into existence after the death of father among his sons and coparceners hold property jointly as tenants-in-common and not as joint tenant.Chapters Four and Five discuss the mutual relationship of coparceners and other co-owners and their relationship with strangers with reference to various statutes and the recent judicial pronouncements. The tax libility of the Hindu joint family which is treated as a unit for the purpose of taxation has also been dealt with threadbare. Since partition is the ultimate remedy of a dissatisfied co-owner, in Part II of the Book, the author discussed skillfully and in detailed manner, the law and procedure as to partition among co-owners by their agreement as also through the intervention of the court. The whole law of partition and different methods by which the coparceners and other co-owners can divide their property has been duly dealt with Chapter Six, which undertakes a discussion on meaning of partition, different forms of partition, proof of partition, restraint on partition, right to partition, mode of partition and reopening of partition, reunion, etc.

Chapter Seven deals with partible and impartible property. Impartible property does not means that the property is not physically capable of division. It is the

7 *Id.* at 17.
8 *Id.* at 16. See *Dharma* v. *Pandurang,* AIR 1988 SC 845.
9 *Id.* at 63.

character of the property that it must be owned and enjoyed by one person at a time that makes it impartible. Impartibility may arise either by custom or by the terms of a grant by the Government. Impartible estate devolve by the personal law of primogeniture applicable to the owner. Rules of lineal primogeniture in an impartible estate based on custom has ceased to have any effect after the commencement of the Hindu Succession Act, 1956[10]. However, the same rules based on terms of a grant by the government or by any enactment have been protected [11]. The author give examples of estates which are impartible and also explains the rule applicable to give enjoyment of these estates to the co-owners.

Chapters Eight and Nine deal with partition of jointly owned property by the agreement of joint owners. Chapter Ten and Eleven are devoted to partition by the intervention of court. The author here discusses the substantive and procedural aspects of partition specially the persons entitled to claim partition and rules and method of actual division of property by metes and bounds. Rights of the joint owners inter se as also co-owner and purchaser of specific property from the other co-owner are discussed here in detail.

In Chapter Twelve of the book, the author gives an exhaustive analysis of the Indian Partition Act, 1893, which empowers the court to direct sale of joint property and distribution of money amongst the co-owners according to their share where its division amongst the co-owners is reasonably or conveniently not possible. This may be due to the nature of the property itself or to the number of co-owners. The Act confers a statutory right on a co-owner to purchase the share of other co-owner who has applied for sale of the joint property. Sec. 44, of the Transfer of Property Act, 1882, prevents a stranger purchaser of a share of the dwelling house belonging to an undivided family to obtain joint possession with the other co-owners. Such a purchaser can claim partition of the share he purchased from the co-owner. When he applies for partition Sec. 4, of the partition Act, 1893 gives a right to pre-emption to co-owner member of the family to purchase such share from him. The principle underlying these provisions is to prevent strangers intruding into the privacy of an undivided family dwelling house.

Chapter Thirteen, gives a bird's eye view of the effect of partition on co-owners and on their creditors, mortgages and lessee's etc. The full text of the Partition Act, 1893 is given in the Appendix.

The book under review is a comprehensive compilation and analysis of the statutory provisions and judicial pronouncements on the subject. There is no dearth of information in the book. However, a more careful and accurate dealing of the content would have undoubtedly enhanced the value of this book manifold. Still, it is worth keeping in all the libraries.

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10 Sec. 4.
11 Sec. 5 (ii).
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THE LAW OF ULTRA VIRES (2004). By B. C. Sarma. Eastern Law House, Pp. 491, Price Rs. 480/-.

ADMINISTRATION IS all pervading specially in a welfare state like India. One comes in contact with administration at all stages of life – from issuance of birth certificate to death certificate. There has been a rapid growth of administrative law especially in twentieth century, which has resulted in vesting of tremendous powers in administrators. Today, bureaucracy is not only performing the traditional function of administration but is also legislating and adjudicating. Inevitably, administrative authorities have become symbols of power, which sometimes translate into absolute power. However, in a democratic society as ours there have to be checks and balances on the otherwise unbridled power of the administration. Doctrines such as rule of law, separation of powers, *delegates potest non delegare* have been incorporated by the judiciary into our legal framework along with the constitutional mandate of non arbitrariness[1], reasonableness[2], fairness[3], etc. to temper the unrestrained use of power. The doctrine of *ultra vires* is one such powerful tool evolved by the judiciary to restrict the administrative authorities from misusing, abusing and going beyond their jurisdictional powers.

The book[4] under review exhaustively deals with the emergence of the doctrine of *ultra vires*, its dimensions and applicability, exposition of legal issues and the consequences of *ultra vires* action of administrator. However, the author B.C. Sarma, an administrator himself has not strictly restricted himself to the doctrine of *ultra vires* as the name of the book suggests, but has also described the organizational structure of administration and the principles which are a necessary adjunct to the understanding of the doctrine. The work is not a critique of the doctrine but is a systematic and lucid narration of various aspects of administrative law and procedure, making adequate use of High Court and Supreme Court decisions.

The book is divided into fourteen chapters and three appendices and runs into four hundred and ninety one pages. The chapters have been divided into

1 The Constitution of India, 1950, Art. 14.
2 *Id*, Art. 19.
3 *Id*, Art. 21.
4 B.C.Sarma, The Law of Ultra Vires, (2004).

innumerable headings dependent on the subjects covered by the decided case law as there is no Administrative law Act in India, unlike Administrative Procedure Act of the United States.

The doctrine of *ultra vires* originated in the corporate cases in England[5] and the decisions of the English courts were followed by the United States[6] and accepted by the Supreme Court of India in 1963 in Mudaliar's case[7]. The origin, development and rationale of the doctrine is discussed in Chapter One. It appears from the introductory chapter that *ultra vires* as understood under Administrative Law alone will be dealt with, but the author has given a wider meaning to the doctrine in the chapters that follow. In these succeeding chapter he has dealt with the constitutionality of the legislative and administrative action thus, making no distinction between "constitutionality" and "ultra vires". He then makes an effort to discuss the finer distinctions between legality, illegality, rightness and wrongness of the decision.

The author, it appears, has used his experiences in administration while writing Chapter Two, dealing with the organization, functions and powers of administrative and quasi judicial authorities. This chapter gives an insight into the hierarchical structure of administration, that is, from the President of India down to the field officers.

Chapter Three of the book deals with judicial activism laying stress on the new dimensions of Fundamental Rights and expansive definition given to 'State' by judiciary[8]. This chapter is written from the perspective of Constitutional Law. The doctrine of *ultra vires* as understood under the Administrative law has two limbs, substantial *Ultra Vires*, when the administrative action is beyond the substantive powers given by the legislature to the administration and procedural *Ultra Vires* when the same is beyond the procedural powers given by the legislature. The author moves onto "judicial review" from fundamental rights in Chapter Five. Judicial review, according to the author, is an important check on administrative action. The author reposes great trust in the judiciary and to substantiate his view point he has quoted eminent jurists like Lord Denning and Krishna Iyer J.[9] About hundred pages are devoted to the concept and grounds on which judicial review can take place namely, malafide and fraud[10]

5 *Id.* at 2.
6 *Id.* at 5.
7 *Id.* at 9.
8 *Id.* at 75.
9 *Id.* at 141. For a counter view on the intellectual ability of the judges see Times of India, 3 June 2005 at 1 – A letter written by senior advocate *Ram Jethmalani* to senior judges and advocates.
10 *Supra* n. 4, chapter 7.

and non application of mind[11]. However, the work very glaringly has ignored catena of cases on substantive and procedural *ultra vires*, the two main limbs of the discussed doctrine.

Chapter Nine and Ten give a good exposition of Legitimate Expectation, a doctrine in the stage of infancy and 'Promissory Estoppel' a well established doctrine in India. The line dividing the administrative and quasi judicial functions is fast obliterating, therefore, the author has devoted only ten pages to this aspect in Chapter Eleven. However, more emphasis has been given to power of subordinate legislation which can be declared *ultra vires* under three heads: constitutionality, substantive *ultra vires* and procedural *ultra vires*.

Chapter Thirteen, appears slightly out of place in the book as it deals with legislative action of the legislative. A legislative piece is declared 'beyond jurisdiction' on the ground of constitutional validity of the law and is very seldom called invalid on the basis of doctrine of ultra vires.

The work of Dr. B. C. Sarma would have been incomplete had he not dealt with the consequence of *ultra vires* action. Therefore, to give a holistic view to the law of *ultra vires*, the last chapter is devoted to this very aspect.

The book would prove to be very useful to students of law which include the policy makers, executers and adjudicators as it has incorporated recent court decisions of various High Courts and Supreme Court of India.

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11 *Id.*, chapter 8.

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LAWS ON PUBLIC SERVICE, (2003). By K.M. Mandal. Eastern Law House, Kolkata. Pp. 53 + 643, Price Rs.480/-.

THE PHENOMENAL growth of the public sector during the last few decades with concomitant challenges to personnel management has brought to surface too many issues in service jurisprudence. In this perspective, a lucid and practical exposition of matters of service regulation is very aptly dealt with in the book under review. It[1] aims at giving an insight into the service laws regulating the employers and the employees in the public services particularly from the viewpoint of indication of rights and obligations before the legal forums. It also intends to equip the functionaries of the government and statutory bodies as well as the employees in general with the legal aspects that they very often come across when approaching the forums of justice.

The author, K.M.Mandal, is a former Vice-chairman of the West Bengal Administrative Tribunal and has divided the book in two major parts, the first deals with laws on public service, both statutory and constitutional and are grouped under several sub-heads set forth chapter-wise from chapter one to eighteen. The author, strides over the entire gamut of issues sourcing with recruitment and appointment, absorption and regularisation, probation and probationary service, covering flash points like date of birth, equality of pay, transfer and suspension, veering around seniority, promotion and resignation and also matters connected with disciplinary proceedings. The second part covers the Administrative Tribunal Act, 1985, section-wise arranged under five title heads, divided in five chapters numbered one to five. Each chapter has a 'synopsis' so as to enable the readers to see at a glance the subject title of the chapter and its various components heads.

Chapter I is titled 'Recruitment- Recruitment Process & Appointment' and the synopsis shows twenty one component subject heads, the content of which is described relatively under each head[2] . The creation of the employment relationship through the stages of recruitment, the process of selection though the Public Service Commission, Recruitment rules, judicial interference, principle of legitimate expectation pertaining to appointment have been discussed alongwith

1 Book Under review

2 *Supra* n. 1 at 1-36.

recent judicial decisions in the context of the rule-making functions under Article 309, of the Constitution[3].

Chapter 2, with the title 'Recruitment to Non-PSC Posts exempted categories" is divided into five component heads, which include circulars pertaining to policy decision regarding filling up the vacancies in the non-PSC Posts, Appointment of a member from a family of land loser, case of Death-in-Harness/Permanent Incapacitation.[4] In spite of sincere and honest efforts it may be possible that promotion is granted or orders of promotion and appointment are issued erroneously because of fallible nature of the human being. In this connection, Chapter 3 discusses how orders of appointment are issued erroneously and how the mistake is subsequently rectified by way of cancellation of the same under the procedure laid down for the purpose necessarily following the principles of natural justice.[5] Service rules relating to probationers[6] and the nature of their appointment in light of Art 311(2) of the Constitution has been thoroughly analysed with the help of a number of cases[7] under chapter 4. Under the title, 'Compassionate Appointment' the authors with fourteen component heads discusses the history and rationale of compassionate appointment, Administrative circulars/instructions to be followed, Economic crisis- only criteria, Definition of family and near relations.[8] The recent case of *Umesh Kumar Nagpal* v. *State of Haryana,* on objectives and conditions to be considered in case of appointment on compassionate ground has been thoroughly analysed.[9] In the service parlance, 'absorption' is an act of entry into service or a cadre of service, whereas, 'regularisation' means to make an employee regular. However, in both the cases, claims can be made in terms of norms/rules/guidelines, if any, or a set of principles, established through different judicial pronouncements made from time to time. Chapter 6 discusses this area and is captioned 'Absorption and Regularisation' and includes, meaning of absorption and regularisation, jurisdiction of the tribunal, philosophy behind principle of absorption and regularisation, claims for absorption or regularisation in a time bound scheme and absorption in absence of vacancy/post.[10] The date of birth of a Government

3 *Id. at 15.* See for detailed analysis, *State of Karnataka* v. *Kumari Gowri Narayana Ambiga,* AIR 1995 SC 1691; *Indra Sawhney* v. *Union of India,* AIR 1993 SC 477.

4 *Id.* at 37-43.

5 *Id.* at 44-48.

6 *Id.* at 49-57.

7 *Id.* at 50-51. *See Pavanendra Narayan Verma* v. *Sanjay Gandhi P.G.I. of Medical Sciences,* AIR 2002 SC 23; *Union of India* v. *A. P. Bajpai AIR 2003 SC 923; Dipti Prakash Banerjee* v. *S. N. Bose National Centre for Basic Sciences* AIR 1999 SC 983.

8 *Id.* at 58-71.

9 *Id.* at 63 (1994) 4 SCC 138.

10 *Id.* at 72-93.

employee is very significant in service matters as different service benefits flow taking into account the date of birth during the tenure of service and after retirement. 'Disputes relating to date of birth' is analysed aptly by the author under sixteen component heads[11]. In contrast, revision of pay scale is primarily a concern of the Government and while taking steps for revision of pay scales, the Government may take help of an expert body like Pay Commission. However, the revision shall have to be made amongst the groups of employees based on reasonable and rational classification, which should not be violative of Articles 14 and 16 of the Constitution.[12] Chapter 9, Pay and salary, scale of pay-classification of services, revision up gradation and pay protection.[13] The author does not discuss "Equal pay for equal work" under chapter III, of the Constitution, which enumerates the Fundamental Rights, rather the same has been mentioned in Article 39 (d) under chapter IV of the Constitution and the cases laying down principles of law on the aspect of equal pay for equal work[14] is covered under Chapter 10.[15]

In Chapters 11 to 14, the author deals with Career Advancement Benefit, including objectives eligibility criterion and vigilance clearance[16] 'New Intermediate Selection Grade'[17] and 'Transfer' making it clear that transfer is an incidence of service and it is necessary also[18] with the apex court's judicial review of transfer.[19] He also undertakes an article analysis of the concept of 'Seniority' including competency of the employer to fix the principle of seniority, seniority challenged after long period, change of seniority without hearing, seniority and gradation list status, inter-se-seniority of promotees versus direct recruit and determination of seniority in case of accelerated promotion of reserved category of employees.[20] The Supreme Court has dealt with umpteen cases of seniority as this is one of the important aspects of an employees' condition of service which determines his future advancement in his career. The author has

11 *Id.* at 116-134.
12 *Supra* n. 1 at 140. See also *State of Gujarat* v. *Raman Lal Keshava Lal*, AIR 1984 SC 161; *P.S. Sawhney* v. *Union of India* AIR 1996 SC 1540.
13 Id. at 135-143.
14 Id. at 144-152.
15 *Supra n.* 1 at 145. *See Randhir Singh* v. *Union of India*, AIR 1982 SC 879; *Union of India* v. *Debashis Kar*, (1995) Supp. 3 SCC 528; *State of Haryana* v. *Haryana Civil Secretarial Personal Staff Association*, AIR 2002 SC 2589.
16 *Id. at* 153-158.
17 *Id.* at 159-163.
18 *Id.* at 164-178.
19 Supra n. 1 at 176-178. See *Rajendra Roy* v. *Union of India*, AIR 1993 SC 1236; *Union of India* v. *S. L. Abbas*, (1993) 4 SCC 357; *N. K. Singh* v. *Union of India*, AIR 1995 SCC 423.
20 *Id.* at 179-201.

highlighted the ratio of *Direct Recruit class II Engineering officers' Association* v. *State of Maharashtra*[21] and *Ajit Singh II* v. *State of Punjab*[22] for determining the principle of continuous officiaton and policy of accelerated promotion of reserved category of employees.[23]

Chapter 15, elaborates on meaning of promotion, absence of scope of promotion, role of court/tribunal and judicial interference, supersession, principles of merit-cum seniority/seniority-cum-merit, sealed cover procedure, ad-hoc promotion and claim for regular promotion, deemed and retrospective promotion, uncommunicated adverse remark and promotion, double jeopardy, erroneous promotion and notional promotion.[24] It is clearly stated that no employee has a right to promotion but can claim his right to be considered for promotion, a right that flows from Article 14 and Article 16(1) of the Constitution.[25]

The punishment awarded to an employee by the disciplinary authority after holding departmental proceedings forms the major part of the cases in which the employee challenges these actions in the Courts/Tribunals. "Disciplinary Proceedings" is the core of the chapter 16 which includes eighteen sub-heads appertaining to objective of disciplinary action/when and who can initiate departmental proceedings/misconduct-charge sheet/ legal assistance/criminal and departmental proceedings simultaneously justified/enquiry report/non supply of enquiry report and scope of judicial interference.[26] The author has made an attempt to deal with the topic systematically under appropriate heads. He has also incorporated the latest decisions on the above mentioned topic.[27]

One of the most questionable/debatable area in the service matter is the suspension of an employee. It is often argued that order of suspension is uncalled for, due to malice and needs judicial intervention. Order of suspension is often challenged as punitive in nature. Therefore, the issues involving the order of suspension need discussion in the light of service rules and Constitutional safeguards. Meaning and kinds of suspension, subsistence allowance entitlement, judicial intervention and staying at the Headquarter during suspension[28].

21 AIR 1990 SC 1607.
22 (1999) 7 SCC 209.
23 *Supra* n. 1. at 182 and 195.
24 *Id.* at 202-228.
25 *Supra* n.1 at 203. See, eg, *C.O.Arunmugam* v. *State of Tamil Nadu*, (1991) Supp. 2 SCC 199.
26 *Id.* at 229-286.
27 Ibid. See *Union of India* v. *A. N. Saxena*, (1992) 3 SCC 124; *B. C. Chaturvedi* v. *Union of India*, (1995) 6 SCC 749; *Depot Manager, APSRTC* v. *Md.Yousaf Miya* (1997) 2 SCC 699; *S. K. Singh* v. *Central Bank of India*, (1996) 6 SCC 415; *Union of India* v. *Narain Singh*, (2002) 5 SCC 11.
28 *Id.*, at 287-306.

Chapter 18 deals with 'Resignation', with eight sub-heads such as implication of act of resignation; its withdrawal before and after acceptance and resignation during pendency of departmental proceedings.[29]

Part Two of the book takes an analysis of important sections of the Administrative Tribunal Act, 1985. The section wise-commentary in this part is brief but very informative. This Act provides for the adjudication or trial of disputes and complaints with respect to recruitment and conditions of service, appointment to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any Corporation or society owned or controlled by the Government in pursuance of Article 323-A of the Constitution and for matters connected therewith or incidental thereto. The tribunals, which deal exclusively with service matters, were intended to reduce the burden of the High Courts, that were formally saddled with this work, thereby giving them more time to deal with other cases expeditiously, while simultaneously providing to the civil servants a speedy remedy and access to grievance redressal.[30] This part is divided into five chapters and includes applicability and definition clauses,[31] the establishment of Central and State Administrative Tribunals,[32] 'jurisdiction, powers and authority of central and state administrative of tribunals.[33] The author has rightly pointed out that the Administrative Tribunal was conceptualised as a real substitute of High Court and after the decision in *L.Chandra Kumar* case[34], though, it has become supplemental, but, being a court of 'first instance' no dispute concerning the subject can go to any other court, including High Court straight away. Procedure is the subject matter of chapter IV.[35] Chapter V, covers exclusion of jurisdiction of courts except the Supreme Court under Article 136 of the Constitution, Transfer of cases/proceedings pending before courts other than Supreme Court and provision for filing of certain appeals.[36]

The author has done a commendable job by incorporating in the book 'Table of Cases'(nearly one thousand),[37] 'Appendices',[38] and 'Subject Index'[39]

29 *Id.* at 307-314.
30 See the Statement of Objects and Reasons, Lok Sabha Bill No.21 of 1985, Gazette of India, Extra, Part II, Sec. 2, at 25th Jan 1985.
31 *Id.*, at 319-330.
32 *Id.*, at 330-344.
33 *Id.*, at 344-358.
34 *Supra* n. 1 at 348. See *L.Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261.
35 *Id.*, at 359-390.
36 *Id.*, at 391-400.
37 *Id.*, at 391-400.
38 *Id.*, at 401-629.
39 *Id.*, at 630-643.

in alphabetical order which will go a long way in promptly locating the required references vis-à-vis public service rules or regulations versus the case law. While no single volume can hope to cover the entire branch of service law in the country, the author has attempted to cover the main aspects. The reviewer has test checked the citation of various cases and the text of the statutory provisions contained in the book and by and large they are found to be correct. The author should have given a list of full meaning of abbreviations used in the case law citations. Keeping in view the amount of information contained in it and its size, the thoroughly updated book is reasonably priced and the proper understanding of the issues covered by the book will help the executive functionaries to act and decide the disputes before then more transparently avoiding administrative adventurism. The publishers have also maintained the quality of paper, the print and the get up with minimum printing errors. There is no doubt therefore, that 'Laws on Public Service' is a valuable and handy reference guide to legal practitioners, seekers of administrative justice, academics, students, researchers in Service Jurisprudence, government and public servants as well as readers interested in rules regarding public service.

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ENVIRONMENTAL LAW IN INDIA (2005). By Gurdip Singh. Macmillan India Ltd. Pp. 421, Price 255/-.

ENVIRONMENTAL PROBLEMS in developing countries like India are of a qualitatively different nature than those in developed countries. In india, the preservation of natural resources includes within its fold the competing claims of humans on these very resources for their sustenance and livelihood, whereas, in developed countries it is a matter of clean environment and protection of what remains in nature. Indeed the reconciliation of ecological imperatives with economic necessities is one of the greatest challenges that we face in our goal of attaining sustainable development. The very nature of environmental hazards suggests that the solutions to abate pollution and improve the environment are more complex than is usually understood.

Environmental law is the growing branch of law. It is the United Nations Commission on Development and Environment (UNCDE) that deliberated the ways and means on how to reconcile the conflict between development and environment. The commission arrived at the concept of sustainable development as a guiding force to strike the balance between the two. In its view, the concept would help in bringing economic growth without disturbing the resource base seeking to meet the needs and aspirations of the present and without compromising the ability to meet those of the future. This approach that integrates production with resource conservation and enhancement, is intended to provide for all, an adequate livelihood and equitable access to resources.

'Environment' as defined by Environment (Protection) Act, 1986, includes water, air and land and the inter-relationship, which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property. This definition reflects the relationship of human beings with others, that a man cannot avoid. Historically, man has changed the environment to fit his own conception of property. He has fenced, plowed and paved the environment has proven malleable and to a large extent still is. But there is a limit to this malleability and certain types of ecologically important resources, for example, wetlands and riparian forests, can no longer be destroyed without enormous long-term effects on environmental and therefore on social stability. To ecologists, the need for preserving, sensitive resources doesn't reflect value choices but rather is the necessary result of objective observations of the laws of nature. The ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our

freedom of conduct and choice. Unlike our laws, the laws of nature can't be changed by legislative fiat, they are imposed on us by the natural world. A study of environmental law therefore becomes very important.

Recently, environmental law in India has grown tremendously and has attained the status of a distinct body of laws with plethora of rules, regulations, codes, schemes and institutions. It is often said that every structured decision by a court is a social event. This is true in case of decisions relating to environment. Credit for development of law in this field goes equally to legislature as well as to the judiciary. Judge's contribution in the growth of environment protection is remarkable. Acting in tune with the changing mores of the day, the court rendered new interpretations to old laws, scrutinized and explain grey areas in statutory provisions, decided constitutional issues and evolved and explained doctrines. Initially, the growth of law was slow and steady. Later on the courts started analyzing the problems in depth, which resulted in emerging of environmental law as a separate branch of law. The author is cautious enough to include all latest cases up to date, which makes the book very informative.

The book[1] is divided into three parts and thirteen chapters. In Part I, the author gives insight into the origin of environmental law, relating the environment with religion and also by describing that nature and man existed in hormony[2] the author attaches an element of divinity to it and pays special emphasis on sustainable development principle. The idea of sustainable development was the pole star that led the courts to embark upon the resolution of controversial issues. Sustainable development forms the foundation for evolution of today's environmental law both at national and international level[3]. A separate chapter has been devoted to constitutional development of environmental law. The right to healthy environment is a firm foundation on which environmental law. The right to healthy environment is a firm foundation on which environmental jurisprudence is being built up. The courts rendered locus standi to association of individuals by laying emphasis on the fundamental duties of citizens to protect and improve the environment. In the absence of an enacted law for remedying environmental pollution, the judiciary seems to have adopted an active role. The Chapter has exhaustively dealt with the role played by the high courts and the Supreme Court of India to raise the right to wholesome environment to the level of fundamental right.

Part II, comprising two chapters, gives the full text of public interest litigation and liability relating to environment protection. The court in order to promote the interest of socially or economically disadvantage people has liberalized the concept of locus standi. Public interest litigation has played a significant role in

1 Book under review
2 *Id.*, at 2.
3 *Id.*, at 56.

the judicial implementation of environment protection[4]. The author has highlighted, how a writ petition filed by way of public interest litigation can merge principles of international law into the principles of municipal law with the help of *Vellore Citizen Welfare Forum* v. *Union of India*[5]. While discussing about the legal question of liability, author has not discussed the latest trend in liability enunciated by judiciary in *M.C. Mehta* v. *Union of India*[6] and last by Justice Kuldeep Singh in *Vellore Citizen Welfare Forum* v. *Union of India*[7].

Part III, elaborates on statutory provisions relating to different kinds of pollution and has been divided into eight chapters. It elaborates, analyzes and evaluates the specialized environmental legislations adopted in India not only to prevent environmental pollution but also to protect and improve the environment. The shortcomings and loopholes in the environmental legislations have been dealt exhaustively in the book. Each and every environmental legislation has been explained exhaustively with latest judicial decisions which make the book a valuable digest for readers to update their knowledge in the field of environmental legislations.

Nowadays there is no dearth of books on Environmental law. The book under review by Gurdip Singh is a comprehensive work on environmental law with particular reference to India. He has many books to his credit in the field of environmental law and this contribution is another feather in his cap. The book is not voluminous, as it will cater to need of students effectively. However, the font size in the book is small which can be increased to make the reading of words comfortable.

The author has treated the work meticulously as he has presented the list of referred Indian statutes/Rules and list of foreign conferences, documents, plans, summits and conventions etc. at the beginning of the book. Incorporation of 'Table cases' and 'subject Index' in alphabetical order in the book under review is of immense help in promptly locating the required reference or cross-reference. Author has tried to make the subject of environmental law an interesting and mature experience for students. The book is drafted keeping in mind the syllabus formulated by the Bar Council of India for the Law schools as part of ongoing national campaign to improve the quality of legal education. The publisher has also maintained the quality of paper, the print and the get up with minimum printing error and the book is moderately priced to suit all pockets.

*Manju Arora Relan**

4 *Id.*, at 72.
5 AIR 1996 SC 2715.
6 AIR 1987 SC 965.
7 *Supra* n. 5.

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GUIDE TO ELECTRICITY LAWS IN INDIA, (2004). By Raj Singh Niranjan. Universal Law Publishing Co. Pvt. Ltd. Delhi. Pp. 358. Price Rs.295/-.

ENERGY IS the basic necessity of human life. It is one of the critical infrastructure on which the sustainable economic growth depends. It is also the most usable form of energy available to the modern world.

The focus of this book is the Electricity Act, 2003, However, other legislations including *inter alia* Consumer Protection Act, 1986, Legal Services Authorities Act, 1987, and National Human Rights Act, 1993 have also been covered where, they have implication on the electricity industry and its consumers. The author emphasizes that the strategy of the Government policy must focus on low cost generation, optimization of capacity utilization, controlling the input cost, encouraging technology up-gradation and economic distribution of electric service to rural areas for agriculture purposes and other agro-based industries.

The Electricity Act, 2003, is a path breaking legislation which has fundamentally modified the 'National Electricity Market' of India. The author has not only made in-depth study of the Electricity Laws in India based on Electricity Act, 2003 but has also focused on energy policy and management besides exploring the area of non-conventional sources of energy. For the sake of clarity about the Electricity Laws in India, the author seems to have done an in-depth study of the Electricity Act, 2003 and has divided discussions into six parts containing 22 Chapters in the book so that any academician of the subject, lawyers and administrative personal can have clearer picture about power generation, distribution, licensing, enforcement of electricity laws, investigation and trial of offences etc. The superb get up and presentation of the book soon fades into insignificance when one goes through its contents.

Part A of the book is devoted to Policy framework and is divided under three chapters viz. Legislative development perspective, Empowering the power sector and National electricity policy and plan. This part introduces the reader with the development of Electricity laws in India and the legislative framework of the same. It also enumerates various policies to be formulated, such as tariff Policy and National policy permitting stand-alone system and National policy on rural electrification and local distribution in rural areas.

Before presenting the law, the Author has given the legislative developments and the major milestones in the Indian Power Sector tracing the legislative history since 1887, when the first Electricity Act was enacted for protection of person and property from injury[1].

The author has correctly commented that:-

> "our country posses electricity utilities that are ranked as best in the world and the skeletal outline of a distribution network that has the potential for the widest possible spatial reach. All that is required is an enabling institutional framework that can leverage our strength to good effect..."

In Part B the author emphasizes on 'Development of Electricity Market'. All the six chapters namely generation, distribution, transmission, open access, tariff and trading, under this part have ingeniously narrated various provisions of the Electricity Act, 2003. Special and interesting information is setout in numerous boxes. In Chapter Six, the box explaining the Single point delivery (SPD) system of National Capital Territory of Delhi has provided practical solutions to resolve the difficulties in managing the SPD systems in Delhi[2]. He insists that SPD contractors may be treated as associated facilitators and may be exempted from taking a separate distribution License. Additionally, successful co-operative model of Bangladesh and other developing countries may be attempted in India on experimental basis. He also explains the law relating to Open Access and Trading in the most simplified and accurate way, which is very rare in the contemporary law books of India.

Part C describes "Regulation and Co-ordination" under the chapter titled Central Electricity Authority, Independent Regulatory Commission and Coordination between various entities in the electricity market. This part commences with an interesting question-

"How do we provide quality power at affordable price to people with adequate returns on investment to the supplier of power[3]?" Consequently the book cleverly answers the same as follows:-

> "What is planned should be installed
> What is installed should be generated
> What is generated should be transmitted
> What is transmitted should be distributed
> What is distributed should be billed
> What is billed should be realized"

1 at-7.
2 at 56.
3 *Ibid.*

Chapter 13 describes co-ordination between various entities in the electricity market by clubbing scattered legal provisions. The Electricity Act aims at wide participation and co-ordination in the Indian power sector. This chapter enumerates legal provisions establishing; Central Advisory Committee[4] State Advisory Committee[5], Co-ordination Forum[6], Forum of India Regulators[7], State Co-ordination Forum[8], District Co-ordination Committee[9], and Regional Power Committee[10].

Part D discusses several topics including Tribunal for Electricity, Offences and penalties, Investigation, Enforcement and Special Courts. This part (adjudication) cleverly highlights the Tribunal System and the important role the Appellate Tribunal of Electricity (ATE) would play.

The diagrams' providing the appellate hierarchy for the various judicial and semi-judicial authorities such as Supreme Court, High Court, Appellate tribunal of Electricity, Special Courts, Assessing officers, Appellate Authority, Adjudicating officers, etc. clarifies the role and responsibility of these Authorities.

Part E deals with 'Consumer protection'. It describes alternative redressal mechanisms under the chapters "Ombudsmen & Consumer protection and Torts & Consumer compensation". The Electricity Act provides mechanisms for consumer protection by establishing institutions like 'Forum for redressal of Consumer grievance' and 'Electricity Ombudsmen'. The author correctly observes that the Electricity Act, 2003 has been able to maintain a delicate balance between consumers' rights and utilities' rights. He suggests that alternative redressal mechanism under the Legal Services Authorities Act, 1987, the Consumer Protection Act, 1986 and the Protection of Human Rights Act, 1993 shall give additional protection against deficiency of service and negligence of the electricity utilities, and briefly narrates the alternative redressal forums available to the consumers, in Chapter 19 of this part.

Part F of the book has inserted the allied subjects under the chapters including 'Future of electricity industry', 'Environment and energy', and 'New ideas to empower the power sector'. This part includes a new vision projected by the author in the interrelated fields i.e conservation of energy and emission of green house gases.

4 The Electricity Act, 2003, Sec. 80.
5 *Id.*, Sec. 87.
6 *Id.*, Sec.166(1).
7 *Id.*, Sec.166 (2).
8 *Id.*, Sec.166 (4).
9 *Id.*, Sec.166 (5).
10 *Id.*, Sec. 2 (55).

Part G describes various tables highlighting day to day useful information, that can be optly used by a policy maker, researcher and a lawyer besides augmenting the knowledge of every person grouping for facts of power sector. This part contains twenty one tables showing various information about the power sector. The diagram at page no.220 describing the emerging structure of 'National Electricity Market', clearly presents the effect of the Electricity Act, 2003 on the national electricity establishments of India[11].

The glossary, bibliography and index, of the book needs special mention. The words in the glossary[12] are given excellent definitions by the author, for e.g. the term 'Natural monopoly' has been described as "to be occurring in an industry in which technology does not permit multiple non-colluding competitive firms to co-exist". Electricity industry he states, is the "text book example of natural monopoly".

The book has incredibly simplified the laws of electricity so that even a lay man can have an understanding of the subject after reading it. The book has highlighted the immense potential of growth in the power sector, which is about to explode. The book truly is an essential study on Power Management and is a glowing tribute to the development of electricity industry in India.

Chandra Shekhar•

11 *Supra n. 1*, at 220.

12 at 347.

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FAMILY LAW LECTURES – FAMILY LAW II (2004). By Poonam Pradhan Saxena. Lexis Nexis Student Series, New Delhi: Lexis Nexis Butterworths. Pp. Lvii + 685, Price. Rs. 395/-.

THE LAW relating to a succession and inheritance forms an integral and important aspect of family law. India is land of diversities, so are the laws relating to family matters. This variation is based on religion, prevalent customary laws in remote areas, caste, domicile and even the form of marriage the parties may have undergone through. Under Hindu law, the traditional concepts of joint family and coparcenary property have been modified considerably to suit the conditions of the modern times and in the light of the Hindu Succession Act, 1956, governing the laws relating to intestate succession among Hindus several states have further made serious inroads into this classical concept of joint family and coparcenary by introducing unmarried daughters as coparceners. Among Muslims, despite reformative enactments, personal law play a pivotal role even in the matters of inheritance. Needless to say, the laws of inheritance and succession have gained tremendous importance in today's materialistic world. However, the current multiplicity of laws and the technicalities ridden property and succession aspects are enough to baffle any reader, and any book on this subject, therefore would be of tremendous use to those wanting to know the basic concept and the law of succession.

Prof. Poonam Pradhan Saxena, the author of the book under review, specializes in family law and succession, a fact bared apparent as one goes through the book, that is an in-depth analysis of laws relating to succession among Hindus and Muslims.

The author has divided the book into four parts. Part I is the introduction; Part II is devoted to Hindu law; Part III deals with Muslim law and Part IV provides annexures.

The first part of the book introduces the readers to the subject in a very comprehensive manner. The author has pointed out the diversification of inheritance laws among various communities. The absence of uniformity in these laws in mainly because of religious differences or prevalent customs. The author has given informative glimpses of the principles of inheritance prevalent among Jews, Parsis and Christians apart from Hindus and Muslims.

She has also shown clearly, how the factors of conversion and firms of marriage affect the application of laws of inheritance.

Part II of the book is elaborated one with twelve chapters dealing with various aspects of Hindu law. This part is a complete code in itself on the uncodified and codified Hindu law. The author has, eximiously, dealt with the concepts of joint family and coparcenary by clearly brining about the distinction between two main ancient schools of thought, Mitakshara and Dayabhaga. Apart from these concepts, the categorization of properties, alienation of joint family property by Karta and by other coparceners and partition have been made crystal clear to the reader. She has also dealt with the latest amendments in the Hindu Succession Act, 1956, in four Indian States viz, Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra, wherein unmarried daughters have been introduced as coparceners. The effect of such changes on the classical law of Joint Hindu family and coparcenary are perhaps taken for the first time by any author in any book. The highlighting feature of this part is the commentary on the Hindu Succession Act 1956. The author has brought about clarity on various provisions of the Act and supplemented them adequately with important judicial interpretations and elaborate illustrations. The important provisions of the Act, e.g. Sec. 6 providing for devolution of interest in the coparcenary property; while discussing Sec. 14, the author, also traces the historical background of this section with a thorough and critical analysis of various judgments, explaining also the benefit that this section accords to Hindu woman; Sec. 23, giving rise to the controversy with respect to the partition of the dwelling house by a daughter, but set at rest by the Supreme Court[1] have been dealt with by the author quite elaborately pointing out the intricacies involved. The author has also pointed out in a lucid manner the drift from the uncodified Hindu law to the codification and its impact on the law of inheritance.

Part III divided in five chapters, comprises of insights of Muslim law, an otherwise difficult area to comprehend. The author, however, has made these various aspects of Muslim personal law easy to grasp. In simple language she has provided a basic introduction to Muslim law explaining the historical background, the concepts of gifts, Will (wasiyat) and gifts made during Marz-ul-Maut (death-bed-transactions) that have been dealt with very comprehensively. The technicalities of principles of inheritance among Muslims, especially where two important schools of thought, Shia and Sunni provide for different interpretations, have been calmed by amazing adroitness of the author.

1 *Narasimha Murthy* v. *Sushilabai*, AIR 1996 SC 1826.

Part IV contains annexures and provides all the relevant enactments dealing with the subject of inheritance among Hindus and Muslims including the recent State enactments amending the law for Hindus thereby making daughters coparceners.

The book would be a very valuable addition to any library. It would be better, however, if the titlees, of the book includes 'law relating to succession' to the existing title Family Law Lectures – Family Law II". It would give an instant idea to the readers countrywide that the book deals with the law of inheritance.

Exceptionally well written, the book contains crisp illustrations, latest statutory modifications and an in-depth analysis of the legal provisions and judgments. It is apparent that the author has poured in her immense knowledge and experience in the book, thereby creating clear communication between the reader and herself, with firm grip on the subject and clarity of expressions and that speaks volumes about the book. Although, the book is a part of student series yet it is worth being laid hands on to and be read and treasured by the researchers, advocates and academicians.

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GOYLE'S LAW OF EASEMENTS AND LICENCES, (3rd Revised Ed.) (2003). By S. A. Kadar. Eastern Law House, Pp. 53 + 392, Price Rs.350/-.

THE IMPORTANCE of ownership in the immovable property and enjoyment of rights in the property is undisputed. It is also an established fact that the bulk of the litigation in courts revolves around property disputes. The eagerness to acquire or control more land not necessarily one's own, has seen generations fighting legal battles spending considerable energy, time and finances. This defacto control often conflicts with the legal principles of ownership and a right to use somebody else's land under a licence or even an easement, and therefore, a book in this area is inherently desirable to not only clarify the basic concepts, but also to give an insight into the detailed rules governing licences and easements.

Law of Easement is a necessary adjunct to the law of property. There is hardly any land conceivable which does not depend for its enjoyment, in one way or another, on the indulgence of the owners of the neighbouring lands. The rights of property which are determined by the boundaries of man's own soil are ordinary rights and different from these, there are certain rights which are exercised over the property of a neighbour and which impose a burden upon him. These rights in the property of another (*jura in re aliena*) are known as easements. Easement is different from a licence to use land in a particular manner, as a right in easement is a right *in rem* whereas a right in licence is a right in personam. Licence only creates a right to do or continue to do something which would, in the absence of that right be unlawful.[1] It does not create any interest or estate in the property. The possession of the licence is no juridical possession, but it is only an occupation.

The book under review is divided into two parts. Part 1, deals with easements and the second discusses licences. It also contains six appendices. Chapter 1 gives an insight into the historical background and development of the law relating to easements. It discusses the ancient Hindu and Muslim laws of easement till the background of the 1882, Easements Act. It clarifies the distinctions between easement and licences and easement and *profit a prendre*, and explains easement in general, its different forms and characteristics. It is a well established fact that no co-owner can claim a right of easement against the other co-owners.

1 The Indian Easement Act, 1882, Sec. 52.

Quite opposite to the above concept, the book gives illustrations and cases of some kinds of common properties and rights of co-owners therein[2] (viz – common passage, common well, common channel, party wall etc.).This appears to be a unique contribution of the author, which to the knowledge of the reviewer has no parallel in any other book.

In Chapter 2 and 3, the author discusses the imposition, acquisition and transfer of easements, different ways of creation of easement and incidents of easement in a very simple way. Explaining these aspects with the help of illustrations, the author gives special emphasis to the acquisition of easement by prescription. It is again an accepted fact that the worth of the property goes down considerably if one could not be sure of its enjoyment without disturbance, and therefore the author also emphasis that the owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other persons[3] and deals with a discussion on "Disturbance of Easement" in Chapter 4. Aspects like infringement of easement, actual interference and actionable interference have been explained with the help of decided cases. The relevant provisions of the Specific Relief Act, 1963, the Code of Civil Procedures, 1908 and the Code of Criminal Procedure, 1973, have been incorporated at right places to make the discussion on Disturbance of Easement complete. Chapter 5 concludes the discussion on easements by bringing out the instance of extinction, suspension and revival of easements.

Part 2 of the book deals with licences and in Chapter 6, the author has given the definition of the term 'licence', and explained the distinction between lease and licence. The usefulness of this discussion is apparent as most of the litigation centers round the distinction between the two.

Grant of licences and its revocation have been discussed in Chapters 7 and 8, which contain a meaningful discussion on all the aspects of revocation viz. the general rule, exceptions to the general rule and the right of licensee etc

The appendices running into 36 pages contain relevant provisions of six different legislations viz., the Indian Easement Act, 1882 the Specific Relief Act, 1963, the Code of Civil Procedure, 1908, the Limitation Act, 1963, the Code of Criminal Procedure, 1973 and the Transfer of Property Act, 1882 for ready references.

The editor of the present edition, S. A. Kader J., a former judge of the Madras High Court, has painstakingly revised the present 3rd edition and has incorporated recent case law at appropriate places which has added to the

2 Book under review at 37-47.

3 *Id.* at 239.

utility of the book. The coverage of the book appears to be extensive from the detailed index. However, though the synopsis on each topic shows a wide range of sub headings relating to the chapters, not all sub topics have been given the same treatment. In fact some of the sub headings in Part 1, though worthy of elaborate discussion have been dismissed in just three or four lines. The discussion on the distinction between lease and licences could have been more extensive. After the case of *Errington* v. *Errington*[4], the test of exclusive possession is no more an infallible test but it is still a very good evidence in support of the document being a lease document. The exclusive possession aspect could have been explained properly with more illustrations. In Part-2, of the book some of terms like 'statutory tenant', 'tenant at will' etc. have been used without explaining their meaning at appropriate places. It may be a bit confusing for a beginner to associate these terms with the concept of licences.

Barring few shortcomings referred to above, the present editor has done a very good job in revising the treatise. It is hoped that in the future editions, these deficiencies will be looked into and this work would be further revised and kept up-to-date. Overall, it is a well presented, richly bound, moderately priced book and will be very useful to law students and researchers.

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4 [1952]1 All ER 149 (CA).

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BOOKS RECEIVED FOR REVIEW

1. I. P. Massey, *Administrative Law*, 6th Ed., (2005) Eastern Book Company, Lucknow- 226001. Pp. lxxxviii + 548, Price Rs.285-.

2. Pankaj Jain and Pandey Sangeet Rai, *Copy Right and Trade Mark Laws relating to Computers* (2005). Eastern Book. Company, Lucknow-226001. Pp. xxiv + 288. Price Rs.285/-.

3. S. A. Kader, *GOYLE's Law of Specific Performance*, (3rd Ed.)(2003) Eastern Law House, Kolkata-700013. Pp. (69) + 464. Price Rs.395/-.

4. H. K. Saharay, *The Law of Carriage of Goods by Sea and Air*. (2004). Eastern Law House, Kolkata-700013. Pp. (50) + 593. Price Rs.550/-.

5. M. N. Das, *Laws Relating to Partition*, 6th Ed. (2004) Eastern Law House, Kolkata-700013. Pp. (88) + 819. Price Rs.790/-.

6. Anupam Srivastava, *Legal ways of Money Recovery – A Handbook* (2004), Lexis Nexis Butterworths, Delhi – 110001. Pp. xix + 437. Price Rs.375/-.

7. Syamales Datta, *Valuation of Real Property: Principles and Practics*, (2nd Ed., 2004). Eastern Law House, Kolkata-700013. Pp. (22) + 592. Price Rs.585/-.

8. H. K. Saharay and M. S. Saharay, *Goyle's Supreme Court Guide to Words and Phrases*. (4th Ed., 2005). Eastern Law House, Kolkata-700013. Pp.[8] + 365. Price Rs.375/-.

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