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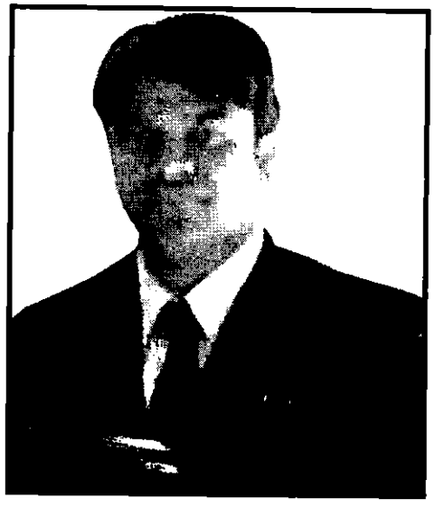

MR. RAJIV PANDEY

This volume of Delhi Law Review Students' Edition is dedicated to Late Mr. Rajiv Pandey, a Final year student of Campus Law Centre, who left us untimely on Februay 10, 2006.

DELHI LAW REVIEW (Students' Edition)

VOLUME II : 2005

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EDITORIAL

"Communication is the essence of every society. Unless its members can communicate with one another, a society can not exist as a social community... We talk, we listen, we read and we write for much of the time we are awake".

G.C. Thornton, *Legislative Drafting*, 3, 1970, Butterworths.

The Delhi Law Review provides an opportunity to the law students to articulate their opinion and concerns on societal and legal issues and enables them to engage their minds on evolving legislative and judicial trends.

The struggles and endeavours to put together a journal of this kind has been both exciting and challenging. While the initial enthusiasm has brought us a number of contributions from our students, the challenge has been to verify the qualitative dimensions of the articles and align them with the focus of this journal. The thematic structuring has been such as to put a collection of articles on legal issues of contemporary relevance and reflect the emerging trend in judicial discourse pertaining to those issues.

There are certain articles debating the contradictions of law and morality, while others examine interesting concepts like law and theology, judicial activism and the concept of rights. Also included are articles that are purely an amalgam of information and intellect, as well as articles that provide a comparative and international focus to certain issues. While we have included articles from many reputed Indian law colleges and institutes, a fact that deserves special mention is the inclusion of an article from the Pakistan College of Law in Lahore.

As members of the editorial team we honestly felt that each article, was an academic accomplishment by itself, backed in thorough research and sound legal analysis and it was a highly gratifying experience for those of us working on it. We hope that such endeavours will have a profound impact on the development of law in India and the hard work put in by the authors in their research and analysis will be taken into account by

members of the legal fraternity in considering issues on which the authors have crafted suggestions and clarifications.

As a guideline for prospective authors, we would like to mention that they should ideally start researching early in the session so as to ensure well-researched papers. The system of citation to be followed should be according to the Harvard Blue Book. We have made certain modifications in the standard citation format and the prospective authors can follow the modified format by referring to the present edition.

Lastly, we would like to thank Prof. Nomita Aggarwal, Head and Dean, Faculty of Law for her constant support and encouragement, and Prof. S.K. Verma and Dr. Gitanjali Nain for guiding us through this endeavour.

Students' Editorial Team

CROSS BORDER INSOLVENCY: GROWTH OF INDIAN TRADE CALLS FOR A SOLUTION

*Rajiv Pandey**
*Ritika Ganju***

I. INTRODUCTION

The dynamic and rapidly growing global economy has led to rich and widespread international trade. Further, this expansion in international trade has brought with it increasing possibilities of cross border insolvency proceedings. This is mainly attributable to growth of multinational businesses through out the world with the onset of twentieth century. In its simplest form, Cross Border Insolvency may involve an insolvency proceeding in one country, with creditors located in at least one additional country. In the most complex case, it may involve subsidiaries, assets, operations and creditors in dozens of nations.

One of the most noteworthy features of international insolvency law is the lack of legal structures, either formal or informal to deal with an insolvency that transgresses national borders. The expansion and growth of international trade has made aspects, such as the choice of law and conflicts that may arise in circumstances of such diverse municipal laws, an important consideration in the context of the global economy. Companies may be connected to more than one jurisdiction, either by foreign creditors that may press claims, or by having assets or branches in more than one country, which in turn would result in decrees that may be passed in different legal jurisdictions resulting in further complexities in enforcement and recognition.

The issue of cross border insolvency poses a serious challenge to India. There are inadequate provisions in the Indian common law regime to enable the Indian courts to recognize and enforce the rights and claims of foreign creditors and the judgments passed by the courts in foreign jurisdictions. Above all, there is absolutely no provision in the existing Insolvency Legislation or in any other enactments to deal with cross border insolvency cases. In the light of the above prevailing circumstances, it has been often strongly suggested that India should adopt the United Nations Commission on Trade Law (UNCITRAL) Model Law on Cross Border Insolvency which would be an ideal solution.

II. THE MODEL LAW

According to UNCITRAL, a legal body within the United Nations system in the field of international trade, national Insolvency laws were for the most part either lagging behind or ill-equipped to deal with the cases of cross border Insolvency. The

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problem has always been that each country has its own way of dealing with the issue of cross border insolvency and the various national Insolvency laws and practices are simply too diverse. Some countries have signed treaties with each other but there has never been a uniform approach to resolve cross border insolvency issues. This led to a fear that this uncertainty would ultimately hamper cross border investment.

Recognizing the need for certainty and clarity on these issues, UNCITRAL adopted the text of the Model Law on Cross Border Insolvency on May 30, 1997.This Model Law and its Guide to Enactment were drafted by the UNCITRAL Working Group on Insolvency Laws. The Model Law was approved by resolution of the United Nations (UN) General Assembly on December 15, 1997.

During the time of the preparatory work, the project got experts' advice from International Association of Insolvency Practitioners (INSOL) and consultative assistance from Committee J (Insolvency) of the Section on Business Law of the International Bar Association (IBA).

The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of Insolvency law. It offers solutions that help in several modest, yet significant ways. These include — foreign assistance for an insolvency proceeding taking place in the enacting State; foreign representative's access to courts of the enacting State; recognition of foreign proceedings; cross-border cooperation; and coordination of concurrent proceedings[1].

There has been a positive international response towards the concept of a uniform legal framework, pertaining to cross border insolvency proceedings. But unfortunately, so far, only few countries have actually adopted it. Nevertheless, drafting of the Model Law has not gone in vain, as many countries, have in their own way taken some concrete step to adopt the Model Law and will adopt it, sooner or later. International Organizations, including, the World Bank, International Monetary Fund and Asian Development Bank have welcomed this Model Law and recommended it in their various publications.

The Model Law has now been adopted by Eritrea, Japan, Mexico, Poland, Romania, South Africa, the United States, British Virgin Islands (overseas territory of the United Kingdom), and within Serbia and Montenegro. Countries actively considering adoption of the legislation include Australia, New Zealand and the United Kingdom.

III. THE SCOPE OF APPLICATION OF THE MODEL LAW

The Model Law addresses specific issues set out in the body of its text. These issues are the rights of foreign creditors, the rights and duties of foreign representatives, recognition of foreign proceedings, coordination of proceedings and cooperation between authorities in different states. It applies only where there is an incident of

[1] *See United Nations adopts UNCITRAL Model Law, available at* http://www.uncitral.org.

cross border insolvency and assistance is sought in the enacting states by a foreign court or a foreign representative in connection with a foreign proceeding. This implies that a proceeding would have been opened somewhere else and the insolvent in those proceedings has assets or legal interests in the enacting state. The Model Law also applies where insolvency proceedings have been opened in the enacting state and the authorities in the enacting state require the assistance of a foreign court or foreign authorities. Another instance where the Model Law would be applicable is a case where insolvency proceedings concerning the same debtor are taking place in the enacting state and in the foreign state at the same time.

Lastly, the Model Law would apply where creditors and other interested persons from a foreign state are interested in requesting the commencement of, or are eager to participate in Insolvency proceedings taking place in the enacting state.

However, the Model Law has been drafted with special care towards banks and insurance companies, which have been excluded from its application. This is to provide flexibility to the enacting states, as far as the above entities may be subject to separate or special Insolvency rules in respective countries[2].

It is of significant importance to note that the Model Law does not address issues relating to choice of applicable law, but provides for foreign assistance in an insolvency proceeding taking place in the enacting State. Various Articles have been incorporated in the Model Law that provide for direct access to the foreign representatives to the courts of the enacting State.

A key purpose of the Model Law is to establish the principle of recognition of foreign proceedings. For recognition the Model Law requires certain connections:

A. Recognition of Foreign Proceedings

The Model Law sees recognition as the key to cooperation and makes an important procedural step with subsequent effects and entitlements for the foreign representative.[3]

One of the Model Law's primal intentions is to save costs of administration. Article 15 establishes that a certificate from a foreign court or a certified copy of the judgment or any evidence of the domestic court opinions is the only document needed for the application for recognition. The domestic court is free to make sure that the documents are genuine and that the certificates are convincing proof of any statement contained in them.[4] Recognition is therefore, if not confronted by any interested party, made into an uncomplicated process relying almost entirely on the construction of the documents.

[2] UNCITRAL Model Law, 1997, art. 1(2).
[3] *Id.* arts. 15-17, 19.
[4] *Id.* art. 16.

According to Article 17, the Model Law calls for recognition of a proceeding at the earliest opening after a request is made. The proceedings are divided into two categories: main and non-main proceedings. A proceeding is defined as main if it has been commenced in the State where the debtor has the centre of its main interests.[5] The Model Law further presumes that a company's place of incorporation is the centre of its main interests, unless proof of the contrary is presented. Non-main proceedings are proceedings in a foreign country, based on the presumption that the debtor has at least an establishment in that country, or a domestic proceeding in the enacted State, if the debtor has assets within the State. Recognition of foreign main proceedings is subject to whichever limitations that would be relevant under national law. This means that it does not affect the opening of local proceedings concerning the same debtor, or the beginning of proceedings that are essential to preserve a claim against the debtor.[6]

The effect of recognition is also to give the foreign representative standing[7] to commence prevention actions (against creditors), although where the recognition is linked to non proceedings, standing is narrowed to cover merely assets related to those proceedings.[8] According to Article 24 similar standing is given to the foreign representative to intervene in any proceeding in which the debtor is party. The purpose of Article 24 is set out in the Guide (paragraph 168) and is to avoid the refusal of standing to the foreign representative to intervene in proceedings simply because the procedural legislation does not consider the foreign representative with those having such standing. It is significant that the article only covers procedural standing, which means that all other conditions of the domestic jurisdiction (concerning intervening) remain intact.

It is important to be aware of the fact that a conflict could arise between the recognition procedure stated in the Model Law and international obligations of the enacting State.

Quite a few states are signatory to bilateral or multilateral treaties on mutual recognition and legalization of documents.[9] If a conflict occurs, a treaty prevails over the Model Law.[10]

To sum up, recognition of foreign proceedings are important mainly to control the debtor's assets and equalize the relationship between foreign and domestic creditors.

[5] *Id.* art. 2.
[6] *Id.* art. 20 ¶¶ 2-4.
[7] Referring to paragraph 166 of the Guide to Enactment, standing is an "active procedural legitimating", "active legitimating" or legitimating, to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors.
[8] Model Law, *supra* note 2, art. 23.
[9] Convention on Abolishing the requirement of Legalization for Foreign Documents, 1961, (adopted under the sponsorship of the Hague Conference on Private International Law which administrates procedures for the legalization of document initiated by parting states); or Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
[10] Model Law, *supra* note 2, art. 3.

B. Cooperation and Coordination Between Foreign Courts

One of the most progressive parts of the Model Law, Chapter IV, strives to achieve cooperation between courts and representatives. For states in which the legal basis for cross border insolvency is an international agreement, such as bilateral or multilateral treaty, based on the principle of reciprocity, Chapter IV of the Model Law can serve as a model for the extension of such international cooperation agreements.[11] The importance of flexible and discrete cooperation between courts was highlighted at the second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency[12]. It was declared that communication between courts could be especially useful for clarifying conflicting information, keeping track of foreign proceedings, obtaining explanations of foreign law, and developing insolvency plans and solutions agreeable to parties in both jurisdictions. The lack of that kind of guidance in the laws had also been discussed at a prior Colloquium.[13]

The Model Law empowers the national courts to communicate directly with foreign courts and representatives and they are required to cooperate to the maximum extent possible with foreign courts or foreign representatives.[14] The capacity to communicate directly between courts is intended to avoid the use of time-consuming procedures normally in use, such as letters of request (rogatory).[15] Cooperation may arise out of several different conditions set out in a non-complete list in the Model Law, which gives the States an opportunity to list others. The forms of cooperation provided by the Model Law include appointing a person or body at the direction of the court, communication of information about the debtor's assets, and coordinating control of the debtor's assets or proceedings involving the debtor.[16] The list is especially made for being helpful in the States with limited cross-border juridical cooperation.[17]

C. Coordination of Concurrent Proceedings

Another method for certified efficient administration of Insolvency proceedings is through the coordination of several concurrent proceedings. The court shall then seek cooperation and coordination under Articles 25, 26 and 27. The enacting State is under the Model Law free to commence or continue Insolvency proceedings. Where foreign main-proceedings are recognized, domestic proceedings can be opened although

[11] *See* Guide ¶ 176.
[12] *See* Report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, Vienna, May 1995, A/CN.9/413.
[13] *See* Report on UNCITRAL- INSOL Colloquium on Cross-Border Insolvency, New York, May 1994, A/CN.9/398.
[14] Model Law, *supra* note 2, art. 26 ¶¶ 1-2.
[15] *See* Guide to Enactment of UNCITRAL Model Law on Cross Border Insolvency ¶ 179.
[16] Model Law, *supra* note 2, art. 27.
[17] Guide, *supra* note 15 ¶ 181

the effect will be limited to assets present within the jurisdiction as well as those related to that jurisdiction.[18] This stand is according to the Guide, and has already taken in a number of States. In some States, though the jurisdiction to commence depends on more than mere presence of assets. Here the debtor must be engaged in an economic activity in the State, referred to as 'establishment'.[19] Therefore a restriction limited to the cases where the debtor has an establishment in the enacting State, is allowed within the policy of the Model Law.

The domestic proceedings visualized in Article 28 would generally be limited to the assets located in the State. But there are exceptions. Sometimes a significant administration of the local proceeding may have to contain specific assets abroad, particularly when there is no foreign proceeding needed or available in the State where the assets are located. Even so, the effects of a local proceeding of assets located abroad are restricted. The restrictions are noted by the text "to the extent necessary to implement cooperation and coordination" under Articles 25, 26, 27, and that, those foreign assets must be subject to administration in the enacting State "under the law of the enacting State".[20]

In Article 29 the Model law deals with coordination between a local proceeding and a foreign proceeding concerning the same debtor. In the Guide (paragraph 188) an underlying principle in Article 29 is recognized, that an initiation of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. The principle is said to be essential for the enacting States to be able to provide relief in favour of the foreign proceeding. Relief granted where recognition of foreign proceedings is made, whether it is main or non-main and where domestic proceedings are already taking place, it must be consistent with the proceeding in the enacting State. Furthermore, relief already granted to foreign proceedings will be reviewed to ensure that it's not inconsistent with the needs of domestic proceedings.[21]

The Model law also facilitates coordination between two or more foreign proceedings (in more than one foreign State) concerning the same debtor and foreign representative that seek recognition or relief in the enacting State. Differing from Article 29 (which gives superiority to the local proceeding), Article 30 gives preference to the foreign main proceeding if one exists. The domestic court is required to ensure consistency and coordination.[22]

It is now interesting to see as to why and how India should adopt the Model Law and derive benefit out of it.

[18] Model Law, *supra* note 2, art. 28 in conjunction with art. 29.
[19] Guide, *supra* note 15 ¶ 185.
[20] Guide, *supra* note 15 ¶ 187.
[21] Model Law, *supra* note 2, art. 29.
[22] Model Law, *supra* note 2, art. 30.

IV. SHOULD INDIA ADOPT THE UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY ?

Despite the apparent widespread praise for the Model Law, one might ask as to what are the concrete benefits for India by its enactment. It might be argued that enacting the Model Law does more to assist foreign administrations than it does to assist domestic ones. However, the above argument is quite misleading and imports a high degree of responsibility on those who claim to prove the same. The advantage for India on adoption of UNCITRAL Model Law can be anticipated well by looking at its growing trade aspects and arena, a leadership role played by it in Asia, lack of any existing law pertaining to international Insolvency and the difficulties posed by the existent approaches. Much of the justification for the adoption of UNCITRAL Model Law on Cross Border Insolvency, especially in the Post-1991 era, can be found by undertaking a detailed study of the above stated reasons. In other words, it would not be incorrect to state that adoption of UNCITRAL Model Law on Cross Border Insolvency in India has become inevitable with the onset of liberalisation, globalisation and privatisation.

A. Current Position — No Existing Law on Cross Border Insolvency

The uncertainty that arises in cross border insolvencies is widely seen as a barrier to trade and free flow of trans-national investment. India presents a much poorer picture in this area compared to many other countries. The existing laws provide no legal foundation to resolve a matter pertaining to international Insolvency. In India, the bankruptcy procedures are still governed by an age-old statute that has worn out with the passage of time. The Provincial Insolvency Act, 1920, an eighty six-year old piece of legislation seems to be totally incapable to deal with the issue of Cross Border Insolvency, a concept that is a decade and a half old. The Act was last amended in 1978. Hence, it has been more than twenty five years since any change was brought in this statute. Thus, the shortcomings of the statute are evident on its face.

The Law Commission of India took up the revision of these laws of Insolvency on a reference made to it by the Government. In the year 1964, Commission proposed a comprehensive Insolvency legislation for the whole of India. But it appears that the Government did not accept this Report called the '64th Report on Insolvency Laws'.

As far as the Companies Act, 1956 is concerned, the foreign companies are dealt as unregistered and covered under the heading of unregistered companies. However, it suffers from a shortcoming due to absence of any provision dealing with foreign proceedings, foreign representatives and foreign judgments in India.

In the year 1999, the Government of India set up a High Level Committee headed by Justice V.B. Balakrishna Eradi,[23] a superannuated Judge of Supreme Court of India for remodelling the existing laws relating to Insolvency and winding up of companies and bringing them in tune with the international practices in this field. One of the main recommendations of this Committee was that Part VII of the Companies Act, 1956 should incorporate a new substantive provision to adopt the UNCITRAL Model Law and the Model Law itself may be incorporated as a Schedule to the Companies Act, 1956, which shall apply to all cases of cross-border insolvency.

Following some of the important recommendations of the Eradi Committee, the Companies (Second Amendment) Act, 2002 was passed. But, unfortunately, this Amendment has ignored to provide any framework for cross border insolvency with recognition of foreign proceedings. Hence, the current position being that if a foreign company is taken into liquidation outside India, its Indian business will be treated as a separate matter and will not be automatically affected, unless an application is filed before an Insolvency court for winding up its branches in India. This problem can, however be, resolved through the machinery of coordination and cooperation between foreign courts provided by the UNICTRAL Model Law.

Thus, the adoption of UNCITRAL Model Law on Cross Border Insolvency will enable India to meet the demands of globalisation of economy and to deal with international Insolvency. This will radically change the orientation of Indian law and make it suitable for dealing with the challenges arising from globalisation and increasing integration of Indian economy with the world economy.

B. Difficulties Posed by the Existing Approach

There has been a debate world over for many years on the issue that, whether Insolvency has universal application or whether its application is limited to the place of adjudication. These competing theories are known as the "universality" and "territorial" theories of Insolvency laws respectively.

According to territoriality approach, effects of Insolvency proceedings do not extend further than the territory where the Insolvency proceeding is opened.[24] The basis for this approach is a principle of sovereignty according to which a judgment of a court in one country has no effect in second country unless there is consent from the second country.[25] The problem with this approach is that it favours local creditors to the

[23] The Committee was constituted on October 22, 1999. It submitted its report to the Hon'ble Prime Minister on August 31, 2000.

[24] Japan is one of the countries which favoured this approach prior to its adoption of the Model law. The Netherlands still favours this approach.

[25] RAY AUGUST, INTERNATIONAL BUSINESS LAW, TEXT, CASES AND READINGS, 184 (4th ed. 2003, Pearson).

detriment of foreign creditors. Another problem it creates is that since a proceeding from the first country has no effect in the second country, there will have to be, multiple proceeding undertaken in each country where the debtor possesses assets. It may also make difficult to rescue companies that have assets in more than one country because assets that could otherwise be sold in one country to help the company as a whole may not be easily accessible.

Under the universality approach, developed in some cases into the unity approach, Insolvency proceedings commenced in one country have universal effect and assets can be administered in a single Insolvency proceeding, wherever they are located. An Insolvency proceeding commenced in one country will have full effect in the other country.

India follows the territorial approach which is quiet evident from the way the relevant sections dealing with the foreign judgments under Code for Civil Procedure, 1908[26] are phrased. India has strictly adhered to the Doctrine of Reciprocating Territories[27], which acts as a major stumbling block in harmonization of effective international Insolvency proceedings.

Looking at the need for international co-operation on the issue of international Insolvency, it is indispensable for India to abandon the territorial approach. This is must for India to be at par with other countries, which are actively contributing to bring reforms to the current disorganised international Insolvency procedures.

The Model Law reflects a universal approach to Cross-Border Insolvency. It is based on the principle that the domestic courts of each home country should endeavour to cooperate with the courts of other countries in Cross-Border Insolvency cases. It is generally accepted that adoption of such an approach is more likely to successfully address the problems of Cross-Border Insolvencies than a territorial approach.

A key feature of the Model Law is that it is not based upon a principle of reciprocity between States. There is no condition or requirement that a foreign representative wishing to access facilities under the Model Law must have been appointed, or foreign proceedings commenced, under the law of a State, which has itself enacted the Model Law. The underlying assumption is that some countries will, in enacting the Model Law without any precondition of reciprocity, set an example for others and, in this way, raise levels of international awareness and cooperation.

Thus if the Model Law is adopted by India, there will necessarily be a degree of shift in the domestic law of India towards what might be described as a more

[26] Code of Civil Procedure, 1908, §§ 13, 14.

[27] Section 44 A of the Code of Civil Procedure, 1908 deals with the enforcement by Indian Courts of decrees passed by Courts in "Reciprocating Territories". A reciprocating territory is a country or territory outside India, which the Government of India has, from time to time, by notification in the Official Gazette declared to be a reciprocating territory. A decree, however, does not include an arbitration award since enforcement of foreign awards is dealt with separately under the Arbitration and Conciliation Act, 1996.

universalist approach. This universal approach is acknowledged to provide greater security to foreign creditors; resulting in more incentives for foreign firms to invest and the same benefits shall accrue to India as well.

C. Harmonization of Trade

With the advent of liberalisation, and changing trade patterns, it has become indispensable for India to join the race along with its leading trading partners to seek uniformity in international Insolvency laws. Current Insolvency laws are thoroughly incompetent to deal with the challenges posed by the international markets. This position jeopardizes international trade, and makes it difficult for both debtors and creditors to safeguard their interest.

An insight of the trading activities, currently being pursued by India, is a must to appreciate the bright incentives to adopt the UNCITRAL Model Law on Cross Border Insolvency. This is so, as it is important to analyze and note that the legal framework set up in the leading trade partners of India, in resolving Cross Border Insolvency issues is more or less parallel to the UNCITRAL Model Law. Some of these trading partners and the endeavours taken by them for meeting new challenges of trans-national insolvencies are:

1. *European Union.* — The European Union is the major trade partner of India having a share of 21% in its total Export and share of 16% in its total Imports[28]. The European Union has a regulation (significantly, not a convention, which has been the favoured form of agreement for almost the entire forty year history of the search for EC Cross Border bankruptcy accord). This regulation[29] was enacted on May 29, 2002 and came into force on May 31, 2002. It has the powerful centralizing forces of direct effect in the member states and interpretive power and authority of the European Court of Justice. This regulation should not be seen as a reply to UNCITRAL Model Law, 1997 on Cross Border Insolvency. The scope of regulation is limited to its fourteen member states out of which Denmark is kept out. This regulation aims at proper functioning of internal market (inter EU), which requires that Cross Border Insolvency proceeding should operate efficiently and effectively.

This regulation is confined to provisions governing jurisdiction for opening Insolvency proceedings and judgments, which are delivered directly on the basis of the Insolvency proceedings and are closely connected with such proceedings and are closely connected with such proceedings. It contains provisions regarding the recognition of those judgments and the applicable law, which also satisfy that principle. This regulation however like U.N. Model law does not cover Insolvency proceedings concerning insurance undertakings, credit institutions and investment undertakings.

[28] April-November 2003-04 to 2004-05 (US $ million), Source: CMIE.
[29] Council Regulation (EC), No. 1346/2000.

Despite the difficulties, uncertainties and shortcomings in the regulation, it does seem overall to be far better than the present situation. No one can doubt that EC's regulation on Insolvency proceedings makes a profound attempt to meet the challenge of cross border insolvency. Practitioners and judges in the U.K. have the opportunity to make the regulation work in harmony with domestic laws by a liberal and imaginative interpretation forsaking any parochial concerns. In particular, the English jurisdiction is held in high esteem throughout the E.U. and could well set a lead in interpretation and application of the regulation.

2. *United States of America.* – United States of America has a share of 17.7% in India's total Exports and 6% in India's total Imports[30]. On April 20, 2005, recognizing the increasing globalization of business enterprises and the need for cooperation between domestic and foreign jurisdictions with respect to Cross–Border Insolvency cases, the United States enacted the Bankruptcy Abuse Prevention and Consumer Protection Act 2005, which adds to the U.S. Bankruptcy Code a new Chapter 15 that closely follows the Model Law. Chapter 15 came into effect from October 17, 2005. As stated by Congress:

The provisions of Chapter 15 are intended to provide greater legal certainty for trade and investment as well as to provide for the fair and efficient administration of cross–border insolvencies, which protects the interests of creditors and other interested parties, including the debtor. In addition, it serves to protect and maximize the value of the debtor's assets.[31]

Before the enactment of Chapter 15, the Bankruptcy Code contained only one relatively short provision concerning the conduct of Cross-Border Insolvencies. Chapter 15 provides a new and very technical framework for the governance of Cross-Border Insolvencies. For the most part, Chapter 15 enhances the opportunities for foreign creditors and debtors to avail themselves of the unique and powerful remedies provided in the US Bankruptcy Code.

3. *Australia.* — Australia forms a share of 3.41% in India's total Imports.[32] Australia follows an approach like other common law countries where it enacts legislation specifically dealing with recognition of foreign Insolvency proceedings. The legislation allows courts in the home jurisdiction to recognize certain foreign Insolvency proceedings, and provide assistance to foreign courts conducting such proceedings.

Notwithstanding the existence of some provisions in Australia's corporate and personal Insolvency laws to tackle Cross Border Insolvency matters, they are quite

[30] April-November 2003-04 to 2004-05 (US $ million), Source: CMIE.
[31] Report of the Committee on the Judiciary House of Representatives to Accompany, ¶ 256, 109th Congress, 1st Session, 109-31, Part I, at 20.
[32] April-November, 2003-04 to 2004-05 (US $ million), Source: CMIE.

skeletal. The provisions have been criticized because they contain elements of both the territorial and the universal approach. Further, Australia is not a party to any conventions to deal with its Cross Border Insolvency issues.

The Australian Government has made serious proposals to adopt UNCITRAL Model Law to confront the ever-increasing Insolvency problems posed since the onset of globalization of trade. Among other reasons and incentives for Australia to adopt the Model Law, its enthusiastic participation in developing uniform law to deal with Cross Border Insolvency has been said to be the driving force for it to adopt The Model Law.

4. *Japan.* — Japan is an important Asian trade partner of India having a share of 3% in its total Imports[33]. In Japan, the Law on recognition and assistance of a foreign Insolvency proceeding (hereinafter 'the law')[34] was adopted in November 2000 and came into effect on April 1, 2001.

While the law deals with the issues addressed in Model Law, it differs in many respects from the Model Law, and in some cases addresses issues that are not even dealt within the Model Law. A large number of provisions of the Model Law have been left out and others, like the ones on coordination of multiple proceedings have been completely ignored in favour of a different approach.[35]

One of the major differences between the law and the Model Law is that it is only the foreign representative who has a right to apply for recognition of foreign proceeding. The debtor also has the same right[36], and the court can order both the applicants to appoint a representative when necessary.

Thus, though Japan has adopted the Model Law; but has done so with numerous modifications. This however, is still better than the status quo, in terms of which Insolvency proceedings commenced in other countries were not recognized in Japan[37].

Hence, 'Harmonization of Trade' — is an attempt to present the line of approaches followed by the major trading partners of India. It throws light on the need to adopt the uniform international Insolvency law as a step in the Indian economic reform, which will enable India and its trading partners to fully utilize the enormous potential for mutual trade and economic cooperation on a level playing field.

Apart from the India's trading partners who have adopted UNCITRAL Model Law or are in the process of adopting it, India possesses a great potential to play the leadership role for the rest to pursue them to adopt the same.

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[33] *Id.*

[34] *Copy of English translation of the law, available* at http://www.iiiglobal.org/country/japan.html#legislation.

[35] *See* Commentary on §§ 16, 17 of Japan's Law.

[36] *See* Japanese Law on Recognition and Assistance of a Foreign Insolvency Proceeding § 3.

[37] The old Insolvency Act, 1922 specifically provided that foreign Insolvency proceedings will not be recognized and will have no effect on assets in Japan.

D. Wait and See Approach

The major benefits, in terms of equality of treatment for Indian creditors, ease of recovering assets from foreign jurisdictions and more efficient treatment of international insolvencies involving Indian businesses will come only if other jurisdictions also enact the Model Law. The Model Law does not rely on reciprocity for effectiveness. However, many jurisdictions may adopt a 'wait and see' approach, and not proceed to enact the Law until critical masses of jurisdictions have done so.

Since 1997, only a handful of nations have enacted the Model Law. A number of other nations have made positive statements at government level about incorporating the Model Law into their legal systems, including the United Kingdom, Canada, New Zealand and Malaysia.

In 1995 UNCITRAL agreed to establish a Working Group to develop model legislation relating to Cross Border Insolvency. Working Group, which was composed of all States members of UNCITRAL, held the present session at Vienna from 7 to 18 October 1996. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Chile, China, Ecuador, Egypt, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Nigeria, Poland, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

India also participated in Multinational UNCITRAL – INSOL Colloquium, March 22-23, 1995, Toronto, Canada. Former Justice D.P.Wadhwa and Chairman of INSOL India who shared his valuable views on the need for judicial co-operation and access and recognition represented it.

Lastly, India has a well established and active Member Association of INSOL International, a worldwide federation of national association of lawyers and accountants who specialize in Insolvency. All Members of INSOL India are Members of INSOL International. INSOL works with many international organizations including the United Nations Commission on International Trade Law, World Bank, and International Monetary Fund and with ancillary groups on number of international Insolvency related projects.

Given India's active involvement in developing the Model Law and its position in the international Insolvency community, other jurisdictions will be monitoring progress of India's consideration of the Model Law's implementation. If India were not to proceed with enactment in the near to medium term, this is likely to have a direct influence on the position of other countries, particularly in the Asia.

V. CONCLUSION

The globalisation of trade and commerce has produced international pressure on nations to enact laws and provide institutions that can deal with a variety of Cross Border Insolvency issues.

In the absence of specific legislation for dealing with Cross-Border Insolvency, courts in India are yet to be prepared for the ever-increasing international insolvency issues. The mix of legal approaches, as exhibited and discussed above, frequently results in inadequate and inharmonious consequences, which in the end hamper the rescue of financially troubled businesses. This uncoordinated international and local approach is not conducive to a fair and efficient administration of cross-border insolvencies, and ultimately impedes the execution of a process that maintains the maximum value of the assets in India and abroad. By contrast, coordinated administration of cross-border insolvency cases is in the best interest of creditors and debtors, providing greater predictability and consistency of process. Factors that contribute to the stability of commercial relations inevitably help to improve foreign investment and trade for the adopting state.

India, being one of the fastest growing economies of the world, has many bright prospects to enhance and enrich its growth in a drastic manner. Judicial involvement and devotion in regulating its economic aspects, is nothing but a natural corollary to its economic development. UNCITRAL Model Law on Cross Border Insolvency has the potential to confer an opportunity on India to equip its judiciary to regulate one such economic aspect — Cross Border Insolvency by empowering its courts to extend coordination to foreign courts and accrue benefits out of the reciprocating coordination.

MEDIATION IN PENAL LAW

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I. INTRODUCTION

A. Delay in Disposal of Criminal Cases

The fundamental principle behind justifying the existence of any judicial system is to ensure dispensation of justice at the earliest opportunity. It may not be a hyperbole to state that trials in our country are ordinarily not speedy. As a consequence of delays at different stages, the Indian prisons are overflowing with prisoners languishing for justice. There is a sharp decline in the percentage of completed trials from 1961 to 2004. The following Table shows disposal of criminal cases under the Indian Penal Code, 1860 (IPC) by Courts, excluding withdrawn/compoundable cases:

S. No.	Year	Total No. of Cases for Trial (Including Pending Cases)	No. of Cases Tried	Percentage of Trial Completed
1.	1961	8,00,784	2,42,592	30.3
2.	1971	9,43,394	3,01,869	32.0
3.	1981	21,11,791	5,05,412	23.9
4.	1991	39,64,610	6,67,340	16.8
5.	2001	62,21,034	9,31,892	15.0
6.	2002	64,64,748	9,81,393	15.2
7.	2003	65,77,778	9,59,567	14.6
8.	2004	67,68,713	9,57,311	14.1

It implies that since the percentage of completed trials in 2004 is 14.1, therefore 85.9 % are still pending, i.e. 58, 14,324 approximately are pending out of 67, 68,713 cases. This is the position of cases with respect to offences under Indian Penal Code, 1860. There are numerous cases pending under Special laws.

Such a heaving system of courts fails to provide speedy trial, which has been recognized as an implied Fundamental Right under Article 21 of the Constitution of India.[2] An inordinately delayed justice is no justice at all. Justice Krishna Iyer has recommended that improving efficiency of the Criminal Justice System be incorporated in a Five Year Plan[3]. The Tenth Five Year Plan (2002-2007) has finally noted the decaying

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[1] Chapter 4, National Records Crime Bureau, Ministry of Home Affairs, Crimes in India, 2004.
[2] Hussainara Khatoon v. Home Secretary, Bihar, AIR 1979 SC 1360.
[3] V.R. KRISHNA IYER, OUR COURTS ON TRIAL (1987).

picture of justice and observed that "[t]here is an urgent need to bring about judicial reforms with a view to speeding up the process of delivery of justice." It is amply clear that the available judicial resources are not sufficient to achieve this goal.

B. Alternate Dispute Resolution

Where the demand on judicial resources continues to outstrip the supply, efforts to increase the use of alternative dispute resolution techniques are necessary. The philosophy of Alternate Dispute Resolution (ADR) is well-stated by Abraham Lincoln- "discourage litigation, persuade your neighbour to compromise whenever you can". Alternate Dispute Resolution is a very important and stimulating theme of contemporary relevance. A dispute is a '*lis inter partes*'. It is a dispute between two or more parties, where a right is asserted by one or more parties against the specified persons and those persons deny that right or claim either totally or partially[4]. Litigation through courts and tribunals serves to adjudicate upon a dispute. On the other hand, alternate dispute resolution serves to resolve a dispute. Litigation leads to a win loss situation in the adversarial system where each party will be competing to get the decision in their favour. Associated with this win loss situation is the mind-set of the litigants who continue to be adversaries. It is expensive in terms of time and money. Thus, litigation does not always lead to a satisfactory result. Alternative Dispute Resolution systems enable the change in mental approach of the parties[5]. The ADR methods are — Negotiation, Mediation, Conciliation, Mini Trial and hybrid forms of these methods like Conciliation-cum-Arbitration, mediation settlements being converted to compromise decree etc.[6] If ADR method is successful, it brings about a satisfactory solution to the dispute and the parties will not only be satisfied, the ill will that would have existed between them would also end. ADR methods not only address the dispute but also the emotions underlying a dispute. Since ADR method is participatory, there is a scope for parties to participate in the solution finding process. Thus, they honour the solution with commitment. Also, it is cheaper and more expedient in terms of time.

Section 89 of the Code of Civil Procedure, 1908 as amended in 2002 has opened the door for introduction of conciliation, mediation and pre-trial settlement methodologies. In California, where the systems of mediation, conciliation and pre-trial settlement were introduced only two decades ago, it has been found that 94% of cases are referred for settlement through one or the other of the ADR systems and 46% of such cases are settled without contest[7].

While the techniques of Alternate Dispute Resolution have been widely used in civil and commercial context but efforts to prioritize the use of alternatives in criminal

[4] Hon'ble Mr. Justice Lakshmanan, Judge, Supreme Court of India, Alternate Dispute Resolution, Arbitration, *Lok Adalat* and Mediation, All India Seminar on Judicial Reforms, Supreme Court Bar Association, 2005.

[5] Hon'ble Justice R.C. Lahoti, at the Conference of the Chief Justices of High Courts and Chief Ministers of states.

[6] Hon'ble Mr. Justice Lakshmanan, *supra* note 4.

[7] *Id.*

[8] EDWIN L. BAKER, DECRIMINALIZATION OF NON SERIOUS OFFENSES: A PLAN OF ACTION (January 2005, Honolulu, HI: Legislative Reference Bureau).

cases is still less well known, and perhaps more controversial[8]. One of the reasons for the controversy as to whether alternatives to the formal criminal justice process should be permitted can be attributed to high degree of state control over the offenders where the voiceless victim or the offender has little role to play. It is an accepted fact that the courts are overloaded with minor matters and small claims for which elaborate legal procedures involve disproportionate costs, in financial terms, human resources and time. It is important to evaluate the performance of alternate dispute settlements before rejecting them as they have proved to be very efficient in sharing the burden of caseloads, disposing off the matters quickly, reducing the costs, reconciling the offender with the community and increasing victim satisfaction.

Following the success of ADR systems in civil and commercial matters, several Criminal Justice Systems have realized the potential of Mediation in Penal Law, and have initiated several Victim-Offender Mediation Programs. Most of these programs aim at settling private disputes which partake the character of minor criminal offences. Mediation entails the intervention of a third party who attempts to resolve disagreements between parties in dispute with one another. It has been defined as a process that 'gives people...a chance to get together with neutral individuals- trained volunteer mediators- to talk things out and try to reach an agreement. Mediators do not take decisions FOR people. Their job is to help people make their OWN decisions'[9]. Mediation is thus a form of non-coercive conciliation involving three or more participants. Therefore, so general a form can prove to be very flexible and applicable to almost any kind of conflict.

A large body of Mediation and reparation schemes has emerged in the United States, Canada, United Kingdom, Belgium and in many other parts of the world.

Country	Number of Victim-Offender Mediation Programs
Australia	5
Austria	17
Belgium	31
Canada	26
Denmark	5
England	43
Finland	130
France	73
Germany	348
Italy	4
New Zealand	Available in all jurisdictions
Norway	44
South Africa	1
Scotland	2
Sweden	10
United States	289[10]

[9] What is Mediation? (District of Columbia Mediation Service). *See* Foreword by Paul Rock in TONY F. MARSHALL, ALTERNATIVES TO CRIMINAL COURTS: THE POTENTIAL FOR NON-JUDICIAL DISPUTE SETTLEMENT, VIII (1986 ed. Gower).

[10] U.S. Department of Justice, National Survey: Victim-Offender Mediation Programs of in the United States, April 2000.

In recent years, the United Nations, particularly the Commission on Crime Prevention and Criminal Justice, has been turning its attention to the development and implementation of mediation and restorative justice measures in criminal justice. In 2000, at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, restorative justice issues took a prominent position in the workshop on offenders and victims which focused on accountability and fairness in the justice process. With the significant growth of restorative justice initiatives around the world, along with a report by a Group of Experts on Restorative Justice submitted to the United Nations in 2001, the momentum culminated in the development of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (the Basic Principles) in 2002.

It may also be relevant to note here that Mediation in Penal Law probably originated in India with its strong roots in community justice and is still extensively applied in the institutions of *Panchayats* and *Lok Adalats*. Thus, there is no harm in institutionalizing such a system. We shall now examine how we can develop this concept further to augment and facilitate the existing Criminal Justice System of India.

II. SCOPE

A. Feasibility

Although a criminal case is invariably seen as a dispute between the offender and the State, it would be naïve to assume that all offences actually concern the State. Quite a few IPC offences are of a civil nature[11], e.g. defamation. Even with respect to many *malum in se*[12] provisions of criminal law, many criminal complaints are a result of purely private disputes. For instance — in case of a breach of agreement to sell, it would be customary to also initiate criminal proceedings on grounds of cheating; divorce proceedings on grounds of cruelty may be complemented with criminal complaint for causing hurt; cheque bouncing cases can hardly be seen as a law and order problem etc. Very often the civil proceedings go hand in hand with the criminal complaints against one of the parties to the dispute, especially in the cases where there is a relief/remedy both under civil and criminal law. The State has no *prima facie locus standi* in such cases, although the importance of State control over such activities cannot be denied. Though it is better for the state to retain control over the most criminal justice matters, one exception might be where effective, cheap and fair methods of controlling some crime without recourse to prosecution are also available. Also the control need not always be by means of formal courts, where alternative mechanisms could prove valuable.

As indicated above, several criminal proceedings are initiated merely to bully the opposite party in a civil suit. Even though theoretically some of these offences are made compoundable[13], the courtroom hardly provides adequate environment for any

[11] Consultation Paper on Law Relating To Arrest, Law Commission of India.

[12] At common law, most criminal offenses involved conduct that was *malum in se*, that is, conduct that was immoral and essentially evil, without regard to whether any law expressly prohibited it. With development of more complex systems of government came the creation of offenses involving conduct that was *malum prohibitum*, that is, involving conduct that was not essentially immoral but wrong precisely because law expressly prohibited it.

[13] Code of Criminal Procedure, 1973, § 320.

such conciliation between adversaries. In such circumstances, either the criminal proceedings are pressed strictly with a view to settle scores or offence is compounded on meeting of unfair demands made by the "victim". In either case, a) it is an abuse of process of Court and b) the so called "solution" leaves *at least* one party dissatisfied. If we compare this with an amicable solution reached by mutual agreement between parties in presence of a trained mediator, the latter solution is not only more just and long-lasting, it is actually able to capture the essence of Section 320[14] of Code of Criminal Procedure, 1973, and reduce burden of the Courts.

It is not only the compoundable offences which are feasible for Mediation. Most offences of a less serious nature, whether compoundable or not, are non-cognizable and corresponding cases are usually initiated on private complaints. Role of complainant in such cases is highlighted by Section 257[15] (Withdrawal of complaint), Section 249[16] (Absence of complainant), and Section 256[17] (Non-appearance or death of complainant) of the Criminal Procedure Code. The Criminal Justice Machinery is set into motion when this dispute results in a complaint to the magistrate. A direct way to reduce the burden of the courts from minor offences would therefore be to resolve some of these disputes before a complaint may be filed, as there is a lot of scope to settle these private disputes out of the courts in an amicable fashion. Another useful mechanism would be diversion of suitable cases, whether expressly made compoundable or not, to the Mediation machinery after they are brought before the court. Both the methods which ultimately lead to mediation will empower the victim and/or the complainant to a certain extent which is lacking in the present system. If the victim is recompensed for the loss incurred by him/her either due to the breach of contract or the bounced cheque, there is no reason why he would go for a time consuming and arduous criminal litigation.

B. Identification of Offences

The object of identifying a comprehensive list of offences, that may be suitable for mediation, can not be achieved by merely looking at the Indian Penal Code, 1860. Whether an offence can be viewed as a minor breach of law partaking the nature of a private dispute or whether it can be viewed as a law and order issue over which State control in the form of formal courts is necessary, depends not only upon the nature of the offence but also upon the degree of the offence[18]. The formal criminal justice system

[14] Compounding of Offences.

[15] Code of Criminal Procedure, 1973, Section 257 — Withdrawal of complaint. — If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom the complaint is so withdrawn.

[16] Code of Criminal Procedure, 1973, Section 249 — Absence of complainant. — When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

[17] Code of Criminal Procedure, 1973, Section 256 — Non-appearance or death of complainant. — (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

has an impersonal way of looking at the crime. Most IPC crimes are defined irrespective of degree and while the punishment may vary, the procedure applied is uniform irrespective of degree of deviance. For example, robbery will include predominantly minor offences of bag snatching etc., and most involve very minor, if any, injury and small amounts of money. Nevertheless the category as a whole is viewed in terms of stereotyped ideas of mugging, violence and danger. Some advantage may therefore be obtained in defining and categorizing minor offences as different from serious offences, and using less formal ways to deal with minor offences which would result in reduction of case load in the courts. The courts would thus be able to concentrate on cases of more uniform seriousness, where sentences are more likely to correspond with the offence stereotype.[19] Broadly speaking, most minor offences causing little or no harm to one or few identifiable victims can be subject matter of mediation. This, of course, is a very broad generalization and whether a particular case is suitable for mediation would largely depend upon the facts and circumstances of that particular case.

Following guidelines may be helpful in making the determination:

1. *Degree of offence.* — In cases of grave offences, a compromise between the accused and victim ideally should not be enough to absolve the accused from criminal responsibility. In case of minor offences[20] on the other hand economy must be practised both in terms of courts' time and employment of sanctions. Such cases clog up the system and it should usually be sufficient if the victim is adequately compensated.

In China, a Peoples' Court may conduct Mediation in following cases:
(a.) cases to be handled only upon complaint; and
(b.) cases for which the victims have evidence to prove that those are minor criminal cases;[21]

However, where non judicial methods of settlement are applied, it is important to preserve the defendants' right of access or appeal to formal procedures, if basic individual rights are involved.[22]

A separate alternative treatment is called for the offences which constitute low level or quality of life crime. For example, years ago in Poland's 'petty offences boards' offences like poaching, petty theft, traffic and health violations etc. were tried by one criminal justice official and two lay persons[23]. Petty offences are now taken

[18] By degree of the offence, we mean the degree of deviance i.e. whether a minor theft or a big fraud and an important consideration in this regard is the harm caused to the victim.
[19] TONY F. MARSHALL, ALTERNATIVES TO CRIMINAL COURTS: THE POTENTIAL FOR NON-JUDICIAL DISPUTE SETTLEMENT (1986 ed. Gower).
[20] Essang Nyong & Others v. State (N.C.T. of Delhi), decided on 03.05.2001, 681 of 1999, (Minor offences are defined as (i) offences where gravity of the offence is less and the punishment is not going to be very severe: or (ii) the offences in which the prisoners are involved being first offenders and may be entitled to benefit of probation; or (iii) the offences in which the prisoners may be let off by the Courts on payment of fine only); Common Cause, a Registered Society through its Director v. U.O.I.and Others, I, JT 1996(4) SC 701, " It is a matter of common experience that in may cases where the persons are accused of minor offences punishable not more than three years— or even less— with or without fine, the proceedings are kept pending for years together".
[21] Criminal Procedure Law of The People's Republic of China, art. 172.
[22] *Supra* note 20.

care of by justices of peace.[24] They discharge the function of police magistrates and are called upon to decide on petty offences or a breach of law punishable by fines between 25 to 250 Euros. The Night Prosecutor's Programme in Columbus, Ohio, US emphasized on cases of interpersonal conflict and minor crime, e.g. bad cheques, assault, menaces, vandalism, telephone harassment, improper language and minor thefts.[25] The Crown Heights Community Mediation Center in US tackles civil as well as minor criminal complaints like breach of contract, consumer/merchant disputes, co worker disputes, multi cultural disputes, employer/employee conflicts, harassment, noise complaints etc. Some quality-of-life offences are also taken up by various community courts around the globe that are alternatives to the formal system. For example, assaults, manifestation of prostitution, possession of drug paraphernalia, illegal dumping, code violation[26], misdemeanor, public intoxication, disorderly conduct, aggressive panhandling[27], criminal trespass, larceny, threatening, illegal liquor possessed by a minor, illegal vending[28], driving license violations, drug and weapon violations[29], graffiti, farebeating[30], loitering, noise ordinance, open container, park curfew, littering[31], theft, property damage, domestic violence, neighbourhood disputes[32], etc.

2. *Whether the Dispute is between Private Parties.* — Usually in order to conduct mediation, an identifiable victim is necessary. Most programmes employing mediation in Criminal Law partake the character of victim-offender mediation programmes. This is also instrumental since mediation in Criminal Law is closely associated with Restorative Justice.

However, even victimless crimes that are either regulatory or economic in nature and to certain extent "hidden" can be resolved through mediation. For example, there are certain offences that are not really offences against the community at large and which in fact endanger one's own safety. These are regulated by the state. A threat of punishment is only for the more apparent property crimes and for a few more obvious regulatory ones. They do not evoke the public sentiments of 'fear, anger, etc.[33] Mostly, for such categories of offences there are prescribed fines and/or negligible punishments. These are apt for alternate resolution, for example, on the spot fines. To some extent, our country is already in line with this approach but there is more scope for improvement.

India has not been able to establish a clean, efficient and accountable bureaucracy yet. In such circumstances if mediation is likely to take place between the

[23] *Id. 23.*
[24] *Available at* http://europa.eu.int/comm/justice_home/ejn/org_justice/org_justice_lux_en.htm.
[25] *Supra* note 20.
[26] Dallas Community Court, *available at* http://www.dallascityattorney.com/02_5CommunityCourts.htm.
[27] Downtown Austin Community Court.
[28] Community Court in Hartford, *available at* http://www.jud.state.ct.us/external/super/spsess.htm#CommunityCourt.
[29] Frayser Community Criminal Court, *available at* http://www.scdag.com/commcrim.htm#top.
[30] *Midtown Community Court, available at* http://www.courtinnovation.org/index.cfm?fuseaction=Page.View Page&PageID=591&currentTopTier2=true.
[31] Syracuse Community Court, *available at* http://www.nycourts.gov/courts/5jd/onondaga/syracuse/community.shtml.
[32] Neighbourhood Justice Centre in Collingwood, Victoria, Australia, *available at* http://www.justice.vic.gov.au/.
[33] *Supra* note 20.

accused and a public officer, it is circumscribed with suspicion as to be tainted with corruption. If, however, mediation takes place under strict supervision and established guidelines, it may actually be instrumental in reducing the level of corruption.

3. *Compoundable Offences.*— All offences enlisted in Section 320(1) are *prima facie* and those listed in Section 320 (2) are with the permission of the court, suitable for mediation.

4. *Category of Offender.* — Whether a particular case is feasible for mediation also depends largely upon the category of offender. There is some risk in allowing such a system to operate in case of habitual offenders. It would be safe to allow it to operate in case of first time offenders, juveniles and second time offenders under certain situations.

There are two advantages of dealing with this category of offenders. Firstly, the anti social element in their behaviour is nipped in the bud by a more empathetic set up like mediation. Secondly, unlike the formal criminal justice system, it does not tag them as criminals. In many countries around the globe, mediation has been successfully used to deal with juveniles. In Norway, Mediation boards strive to combine the advantages of Mediation with those of a community forum to focus on juveniles. Also, the tendency to focus mainly on juveniles has been a prominent feature of Mediation programmes across Europe. Often, Mediation with juvenile offenders has paved the way for Mediation with adults.[34]

If ADR is to be employed to replace the formal criminal justice system, it is to be kept in mind that different categories of offenders call for a different treatment. Some victim -offender Mediation programmes apply to any type of offender, whereas others work only with juveniles or with adults, while a few work only with one type of offence, for instance shoplifting, robbery or violence offences. Some programmes are mainly aimed at minor offences or first-time offenders and yet others at more serious offences or even repeat offenders.

For example, the Family Group Conferences (FGC) in New Zealand is used in respect of juveniles for all medium serious and serious offending (except murder and manslaughter) and operates both as a barrier to court processing (for young people who have not been arrested) and as a mechanism for making recommendations to judges for pre-sentence (for young people who have been arrested). This means that a young person cannot be prosecuted in a Youth Court unless he or she has been arrested by police or has been referred to the family group conference and the conference recommends a prosecution. In practice, most conferences reach an agreement which avoids prosecution. It also means that judges cannot dispose of a case without taking into account the recommendation of the family group conference. In practice, most judges accept its recommendations. In contrast, most other jurisdictions which have introduced conferences have used them only selectively for non serious offending and solely as an alternative to court proceeding.[35]

[34] U.S. DEPARTMENT OF JUSTICE, NATIONAL SURVEY: VICTIM-OFFENDER MEDIATION PROGRAMS OF IN THE UNITED STATES (April 2000).

Similarly, Dakota Peer Court[36] is an alternative sentencing programme which is available to Dacota county's first time juvenile offenders and for second time property crime offenders. In this unique set up the offenders must admit their guilt, waive and give up their rights to privacy and anonymity, agree to be bound by the sentence which can be community service, drug/alcohol counselling, ethics and decision driving course, serving as juror in peer court etc. and waive their right to an attorney. If they decline to do so, they can be referred to juvenile court.

III. APPLICATION

As it has been pointed out earlier in this article, Mediation already forms a part of Indian Criminal Justice System in the institutions of *Panchayats* and *Lok Adalats*. The Mediation Cell at Tis Hazari, New Delhi which was recently demolished was handling cheque-bounce cases as well. We shall now elaborate upon how it can be more extensively incorporated in our existing legal and social structure.

As discussed above, a number of criminal complaints are a result of purely private disputes. It must also be acknowledged that reconciliation of disputes is not impossible. It can be accomplished by people with wisdom and inter-personal skills, who possess good understanding of local cultures and communities, even though they may not be legally trained. In a very inconspicuous way, such dispute resolution mechanism exists in every society. More so, it exists in the Indian society, where the feeling of community is more deeply rooted than in the West. In most small towns and villages, there exists a culture where everyone knows everyone. Respected members of such communities are usually sought for conflict resolution. What we lack is an adequate machinery to harness this immense resource for settling disputes. It is submitted that if adequate efforts are made, then without any expenditure, we can create a lowest level of dispute resolution mechanism based on restorative justice model.

One reason that every conflict resolution mechanism incurs expenditure is because we seek to regulate it. It requires regulation because power cannot be given without regulation, so that its misuse is prevented. One way to save expenditure would be to set up Community Conflict Resoluters without any punitive powers or legal status. These mediators could come from any section of society, provided they are educated and well respected. It may not be advisable to blindly follow foreign models in this respect. Being a social institution, such an informal mediation model would be unique to every society. School teachers or social workers are usually considered appropriate for such purpose, though any person who enjoys common trust of the disputing parties may be chosen on a case-to-case basis, by the parties themselves. Communities, in the nature of small towns throughout the country, could be guided to voluntarily select a panel of 1-5 people from the community itself. The process of selection would be significant. It should be so designed as to give preference to a teacher, doctor, social worker or any educated and respected member of the community, as opposed to simple elections. Disputes arising in the community can be referred to this panel which will

[35] ALLISON MORRIS & GABRIELLE MAXWELL, THE PRACTICE OF FAMILY GROUP CONFERENCES IN NEW ZEALAND: ASSESSING THE PLACE, POTENTIAL AND PITFALLS OF RESTORATIVE JUSTICE, (2000, Ashgate).

[36] *Available at* http://www.co.dakota.mn.us/Courts/Peer_court.htm.

try and seek an amicable solution to the conflict. The panel may have no punitive powers and no remuneration may be received from the government. There is no need to provide court rooms or lay down a formal procedure. It can take place in school premises or government offices when the working time is over. A small fee may be charged from the parties involved, in lieu of mediation services rendered. Funds in the nature of contribution from the community itself may be encouraged. These mediators may occasionally be provided with professional training in mediation skills and restorative justice techniques. Restoration may be in the form of non-derogatory community service. This is particularly useful when the offence is in the nature of public nuisance.

It is admitted that number of disputes settled this way may not be many, but since it is absolutely inexpensive machinery, both in terms of financial and judicial resources, there is only something to be gained from it. Once such a service becomes established one would expect the bulk of referrals from the parties themselves. The proposed institution would be different from *Panchayats* since the latter are dispute settling as opposed to dispute resolving bodies. The solution is usually punitive rather than restorative in nature. Proper training could go a long way in realizing this significant difference. Also, while *Panchayats* exist in respect of villages, the proposed institutions could be set up in any small town or even in individual localities in big cities. The model outlined above would be instrumental in reducing the number of disputes entering the criminal justice system. If the dispute is not settled at this stage, the natural recourse under the present criminal justice system would be a complaint to the magistrate.[37]

In addition to the Community Conflict Resolution, Mediation Cells can be hosted in court complexes, police stations, schools, other government bodies etc. In April, 2005, the Supreme Court had initiated the implementation of ADR law by establishing a Mediation and Conciliation Project Committee to oversee the implementation of ADR in its courts. The Delhi pilot project began in the lower courts in August 2005 and expanded to an additional lower court (Karkarduma) in December, 2005[38]. Mediation Cells were established within the Court complexes under this project. These Mediation Cells are also handling minor criminal compoundable cases. However, neither these Mediation Centers nor *Lok Adalats* can be approached directly by parties to a dispute involving a criminal offence. There must be a referral by the Court. Section 20[39] makes it clear that a *Lok Adalat* can and has to take cognizance of a case only when it is referred to it by the court on an application for reference made by either party or when the case is being referred to it by the concerned authority or committee organising the Lok Adalat, and in no other manner. It has no power to take cognizance of a case and decide it, at the instance of any party thereto, independently of the references under Section 20 (1) and (2).[40] Since the Mediators in the Mediation Centres would be trained both in Law and Dispute Resolution, it is submitted that they may be given jurisdiction to decide whether a particular case coming before them is suitable for mediation. In this way the disputing parties would be able to approach the mediators directly without taking recourse to formal courts.

[37] Most offenses of less serious nature are non-cognizable and there can be no investigation except by or on the order of a Magistrate. *See* Code of Criminal Procedure, 1973, § 155.
[38] Staff Reporter, *Alterative dispute resolution needed: Apex court judge*, HINDU, Dec. 19, 2005.
[39] Legal Services Authority Act. 1987.

After having discussed the possible alternatives which would help in sharing the burden of new disputes which are coming up, the other area of concern is the existing backlog of cases. Mediation can solve the purpose by being included as a 'diversion from court' mechanism. Here, the courts may divert the cases from the formal criminal justice system to the alternate mechanisms, as they think fit.

For example, the New York Dispute Resolution Centre[41] was unique as its agreements were legally binding under an enactment by the state of New York, and was also atypical in proceeding automatically to arbitration if mediation failed. The centre accepted direct requests for mediation from members of community or social service agencies. It was, however, limited by contract to take at least 95% of its referrals from the criminal justice system, reflecting the main emphasis on diversion form adjudication. Cases were screened from complaints received by the summons part of the Criminal Court and from police referrals. Cases involving serious violence, drug abuse or repeat offenders were not accepted, but nearly a third of all charges were found suitable for attempted mediation. Minor criminal offenses were accepted for mediation. The complaint was then issued with a 'request to appear' summons which must be served by him/her in person on the respondent. Failure to appear or keep the agreement resulted in re activation of the criminal charges.

According to the Belgian law on 'The Regulation of a Procedure for Mediation in Penal Matters' (1994), the public prosecutor may dismiss a case with a possible maximum penalty lower than two years' imprisonment, if the offender agrees to co-operate in reparation, treatment, training or community service or a combination of these. To put that disposition into operation, a mediation magistrate has been appointed in each of the twenty seven Belgian Courts of first instance, to select the cases, supervise the work and chair the final mediation session, together with one or more mediation assistance, to carry out the field work with the offenders and the victims. Here, the system has really opened the possibility for working with victims, and the mediation workers are fully integrated in the system[42].

Although reference to Mediation may be made at any stage, it would be ideal to provide guidelines to Judges and Magistrates to refer suitable complaints to Mediation while taking cognizance of an offence or after examination of complainant under Section 200[43] of Code of Criminal Procedure, 1973.

Following General Principles have been laid down in European Council Recommendation on 'Mediation in Penal Matters':[44]

1. Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.

[40] P.S. NARAYANA, LAW RELATING TO LOK ADALATS, 180 (2002, Asia Law House).
[41] *Supra* note 20.
[42] LODE WALGRAVE, EXTENDING THE VICTIM PERSPECTIVE TOWARDS A SYSTEMIC RESTORATIVE JUSTICE ALTERNATIVE (2000, Ashgate).
[43] Section 200 — Examination of complainant. — A Magistrate taking cognizance of an offence on com-

2. Discussions in mediation should be confidential and may not be used subsequently, even in a subsequent trial, except with the agreement of the parties. Confidentiality facilitates an environment where the parties can safely bring in such additional information as is often the basis for reaching an out-of-court settlement. Also it protects the interests of the parties, and encourages mediation. It is emphasized that participation in mediation should not be used against the accused if the case is referred back to the criminal justice authorities after mediation. Moreover, an acceptance of facts or even "confession of guilt" by the accused, in the context of mediation, should not be used as evidence in subsequent criminal proceedings on the same matter.

3. Mediation in penal matters should be a generally available service. This would, as a minimum, imply that mediation whether public or private programmes would be officially recognised by the states as a possibility, alternative or complementary to traditional criminal proceedings. Such programmes should normally have funding from a public budget (state and/or municipality) and there should normally be some kind of public accountability.

4. Mediation in penal matters should be available at all stages of the criminal justice process. This takes into account that the parties (particularly the victim) may not be ready to take advantage of mediation at an early stage.

5. Mediation services should be given sufficient autonomy within the criminal justice system. Of course, mediation services cannot operate as if they were totally detached from the criminal justice system. Criminal justice agencies should have sufficient authority to perform their "gate-keeping" role and their ultimate responsibility for the legality of the process. This involves the assessment of issues of public interest and procedural rights and safeguards of the parties when making decisions both before and after mediation.

6. It is crucial that parties, before agreeing to mediation, are fully aware of the "procedural situation", based on the facts of the case. They should also have the right to a comprehensive explanation of how the mediation procedure is going to be performed, by what service or by whom, and its possible consequences, in terms of criminal justice decisions, of the different outcome of mediation (e.g. success, failure or partial settlement). The burden of information lies with the criminal justice authorities. Each party should be informed separately, if need be. Such information is necessary for the parties to be able to exercise informed consent. Neither the victim nor the offender should be induced by unfair means to accept mediation.

7. Subject to national law, the victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian. Utmost care should be exercised while involving

plaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.

[44] Recommendation No. R (99) 19 adopted by the Committee of Ministers of the Council of Europe on September 15, 1999.

lawyers in the mediation process so as not to reduce it to an adversarial system. Participation of lawyers should be subject to mediator's approval.

8. The basic facts of a case should normally be acknowledged by both parties as a basis for mediation. Without such a common understanding, the possibility of reaching an agreement during mediation is limited, if not excluded. It is not necessary that the accused, in addition, accepts guilt, and the criminal justice authorities may not pre-judge the question of guilt in order not to infringe the principle of the presumption of innocence. It suffices that the accused admits some responsibility for what has happened.

9. Mediators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities.

10. Mediators should receive initial training before taking up mediation duties as well as inservice training. Their training should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders and basic knowledge of the criminal justice system.

The training should inculcate in them the skills of maintaining neutrality; appreciating diversity and working with diverse participants; dealing with difficult people; and handling conflict and expressions of intense emotions, particularly anger. It is important for them to work effectively with juveniles and cultivate empathy for the offender.

11. Responsibilities of the mediator include facilitating a dialogue between the parties, making them feel comfortable and safe, assisting them in negotiating a restitution plan, actively listening to them, keeping a low profile so that the parties can talk directly to each other, actively and efficiently moving them towards a written agreement, reframing the statements of the parties, providing leadership and actively paraphrasing the comments made by them.

12. Agreements should be arrived at voluntarily by the parties. They should contain only reasonable and proportionate obligations. The requirement of a reasonable obligation implies some relationship between the offence and the type of obligation on the offender. The proportionality requirement means that, within rather wide limits, there should be correspondence between the burden on the offender and the seriousness of the offence. Mediation should not be used as an platform to black mail the accused or to buy one's way out of a criminal charge. The requirement that agreements should be voluntary does not, therefore, exclude the mediator from playing an active role in reaching the agreement.

13. The mediator should report to the criminal justice authorities on the steps taken and on the outcome of the mediation. The mediator's report should not reveal the contents of mediation sessions, nor express any judgment on the parties' behaviour during mediation.

14. There should be mechanisms to ensure compliance with the agreement.

A. Restorative Justice

The object and nature of solution is one of the most significant aspects of Mediation in criminal law, which aims at restoring victim's interests to the condition they were in, before they were set back by the infraction/offence. A system that includes compensation (restoration) is better than one that does not[45]. Restorative Justice is often used as a synonym of mediation[46]. Central to the ideas underlying restorative justice are the involvement of victims in process that have the potential to repair the harm they have experienced, the involvement of offenders in making amends for that harm, and the restoration of some kind of balance between the two. In the modern revival, restorative justice has shown itself to be remarkably flexible. For example, restorative justice processes have been used pre-court as part of diversion, pre-sentence to inform sentencers, pre-release as part of prison programme and so on; they have also been used to determine how to deal with offenders, the placement of abused and neglected children and the placement of the children of women in prison. Restorative Justice is a process which drastically reduces the role of courts, the judiciary and other criminal justice professionals by returning the offence to those most affected by it and by encouraging them to determine appropriate responses to it.[47]

The possible restorative outcomes include a wide range of actions of restitution, compensation, reparation reconciliation or apologies. Different processes exist to aim at such restorative outcomes. The most important distinction between them is based on voluntariness. Generally accepted as restorative are the processes of voluntary negotiation and concertation, direct or indirect between the offender and his or her victim, as individuals or backed by their relatives, for example, victim offender mediation, restorative group conferences.[48] Restorative Justice models often include the 'community', and not the state, as a party in the restorative settlement of an offence. The mediator can be a representative of the community; family and other relatives of the victim and offender can play the role of 'reintegrative shaming'[49] community.

Restorative justice is not only about restoration, it is also about 'justice'. 'Justice' has two meanings here. On the one hand, it refers to a feeling of equity, of being dealt with in a just way, according to a subjective balance of rights and wrongs. Restorative justice then means that it aims at optimal satisfaction of all parties with a stake in the offence. Victims should feel that their victimisation has been taken seriously and that the compensation and community support were reasonable in balance with

[45] Allen Buchanan, *What's So Special about Rights*? 2(1) SOC. PHIL. & POL. 71-73 (1984, Autumn).
[46] *See* J. HUDSON & B. GALAWAY (1996). *See also* LODE WALGRAVE, EXTENDING THE VICTIM PERSPECTIVE TOWARDS A SYSTEMIC RESTORATIVE JUSTICE ALTERNATIVE (2000. Ashgate).
[47] *Supra* note 36.
[48] *Supra* note 43.
[49] Stigmatic shaming is a recognized part of the criminal justice system; many of its rituals serve to signify the separation and segregation of defendants. In 'reintegrative shaming', at least in theory, the offense rather than the offender is condemned and the offender is reintegrated with rather than rejected by society. *See* ALLISON MORRIS & GABRIELLE MAXWELL, Restorative Justice in New Zealand: Family Group Conferences as a Case Study (1998); *Western Criminology Review* 1 (1), *available at* http://wcr.sonoma.edu/v1n1/morris.html.

their sufferings and losses. Offenders should feel that they have transgressed the limits of social tolerance and that they are being given an opportunity to make amends for their mistake in a constructive way.[50]

Victim participation brings with it the notions of involvement and negotiation. Victim should be allowed to participate because, firstly, the crime has been committed against him or her, as well as against the wider community. This is not to say that crime is solely or chiefly against the direct victim, but that a significant wrong has been suffered by that person.[51] Secondly, allowing the victim to express her or his thoughts about the offence may assist 'reintegration' or the process of coming to terms with what has happened.[52] Thus, the key features of restorative justice are:

a. the goal of restoring the victim, by way of apology and/or compensation from, or reparation by, the offender;
b. the further goal of restoring the wider community; and
c. the participation of the victim in the process whereby the response to the offence is determined.[53]

It is also important to ensure that in any system which retains a conventional or punitive approach for serious crimes but which has restorative justice for less serious offences, the 'public interest' element in restorative disposals remains in line with those other sentences.[54]

Restorative Justice promotes the idea that with low-level offenses, the criminal justice system can better serve the community by using alternative sentencing options. For example, Community Service strengthens communities by reconnecting offenders with local residents through positive work projects and encourages smaller neighborhoods to organize and address crime problems by partnering with the criminal justice system. Additionally, as an alternative to incarceration, community service allows the Court to move low-level offenders out of the criminal justice system, freeing up costly jail space for more serious criminals. Restorative Justice applies the nontraditional approach of working to promote rehabilitation of offenders and address the underlying causes of criminality.

Community Service Restitution is designed to hold offenders accountable for their actions and instill the concept that public order offending does have consequences. It also provides a vehicle for offenders to restore the community for the harm they have done. Community Service may differ in its objective in various judicial settings:[55]

[50] *Supra* note 43.
[51] J. Dignan & M. Cavadino, Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from Victim's Perspective, 4 INT'L REV. VICTIMOLOGY 153-82 (1996).
[52] ANDREW ASHWORTH , VICTIMS' RIGHTS, DEFENDANTS' RIGHTS AND CRIMINAL PROCEDURE, (2000,Ashgate).
[53] *Id.*
[54] *Id.*
[55] *Supra* note 43.

	Punitive	Rehabilitative	Restorative
Objective	Deterrence	Adequate Treatment	Reasonable Restoration
Content	Painful for offenders	Adapted to the needs of offenders	Symbolic for the harm to the community
Duration depends on...	Seriousness of crime	Treatment needs	Seriousness of harm
Evaluation according to...	Just Desert	Conforming behaviour	Peace in community

B. Advantages of Mediation

1. Lack of formality allows both complainants and their opponents 'an opportunity to speak out fully about the whole situation and to play a significant role in shaping the resolution of their own problem' (Chinkin and Griffiths 1980). This feeling of control over what is happening is liable to increase the commitment of both parties to the result and, indeed, Thibaut and Walker's (1975) experimental research indicate a greater likelihood that parties will consider the outcome just in this situation. Unlike court proceedings, disputants can 'talk in a verbal style that is natural and comfortable' and that is 'mutually intelligible', for e.g. Use of local language instead of 'English'; this in turn may be 'therapeutic, in that it allows free ventilation of anger and frustration. (Witty 1980). Lack of bureaucracy may also increase the speed with which a case can be brought to a hearing and an effective resolution, of benefit both to the parties immediately involved and potentially to the society at large because of the saving in the resources. This, coupled with the avoidance of procedures employing costly legal personnel, may make the proceedings relatively inexpensive.[56]

2. The degree of choice allowed to disputants is also an advantage if they are free to choose between mediation and litigation or arbitration. Voluntariness is, of course, important to consideration of due process and protection of legal rights[57]

3. Alternative sanctions to imprisonment and containment are called for in offences where there is no such threat to the community as in serious crimes and for persistent offenders.

In case of petty offences, corporate crimes, quality of life offences and regulatory offences, where retaliation from victims is not much likely, in fact, recourse to compensatory techniques can offer more satisfaction.

[56] *Supra* note 20.
[57] *Id.*

4. Informal mediation or arbitration may save time and costs of the state. 'Trivial' cases are not worth a large expenditure. Minor offences are also generally not treated with enthusiasm by the authorities, although in some cases they may involve substantial distress to individual victims. In such cases, alternate methods to settle such disputes might be considered.

5. Alternatives to court in petty cases that involve victim in decision making are desirable.

Even though, some of the cases are initiated by private complaints by the parties and the victim is solely an individual, it is believed that the offence is committed against the society at large. In such cases involving minor crime against the community, instead of having out of court settlements between the parties through a mediator simply or giving the discretion to the prosecutor to mediate it, it would be better to involve community members as judges/mediators.

C. Mediation and Lok Adalats

Lok Adalats have been conferred jurisdiction to settle civil, criminal, matrimonial, Motor Accident Claims and revenue cases, at the pre-litigation level or when the disputes are pending in court. They employ ADR techniques to arrive at a settlement.

As per the rules of the Criminal Procedure in India, only compoundable offences can be settled outside the court. Once a criminal complaint is registered, in the case of non- compoundable offences, it cannot be withdrawn, even if a compromise is reached between the parties. If it fails to arrive at a settlement, it may advise the parties to seek remedy in an appropriate court.

The rationale behind this is that serious criminal offences are crimes against society and, not, merely, against individuals. However, Lok Adalats can be extremely helpful in case of compoundable offences as compensation can be awarded by the Lok Adalats, without resorting to long drawn out court procedures.

Experiences at the National Human Rights Commission's Pilot Project for Students Voluntary Prison Services at Tihar Jail, Delhi, show that thousands of inmates of the jail are implicated in petty offences, which are compoundable and are lingering in Jail, much beyond the period they would have been reasonably sentenced to, in case of conviction. The delay is caused either for want of resources to furnish bail or, for want of adequate legal aid. Lok Adalats can come in handy to afford relief to such victims of circumstances and to ensure that due process and the right to equal and fair justice are provided to them.

States may, on their own, initiate the setting-up of such local forums to recommend the dropping of charges and the release of those who are accused of petty criminal offences. Often, they have been in prison, undergoing trial for periods longer

[58] Mamta Bhatt, *Lok Adalats speed up administration of justice, available at* http://economictimes.indiatimes.com/articleshow/116518.cms.

than the sentence that their respective crimes carry.[58] The Legal aid system covers all the 3 stages: pending, pre-pending and post-pending litigation either by mediation or any other alternative. National Legal Service Authority has reported that more than 50000 cases have been settled at pre filing stage, out of which more than 18000 cases have been finally settled in Gujarat.[59]

Therefore, it can be said that Lok Adalats have accomplished admirable success by offering inexpensive and expeditious settlement of disputes. Still, much is left to be desired as Lok Adalats are, only, accorded a status of 'a mere ad-hoc arrangement, extraneous to the justice delivery system'. It is necessary to consider various modern ways and means for high order of Legal Aid and ADR, like use of Information Technology and also the concept of Plea Bargain which is in practice in U.S., U.K and many other countries and reported to be productive, at least to begin with certain petty offences and earmarked or defined minor offences, wherein, individual interest and not the public interest or Policy is involved and on experimental basis and that too within the monitoring and controlling supervision of courts.[60]

Apart from one shortcoming of 'a mere *ad hoc* arrangement', it also restricts the cases to come either by reference from courts or concerned authority. Therefore, even if parties want to bring their case directly to a Lok Adalat and resolve their problems/ disputes by ADR, they have to follow a formal procedure. There is a desperate and emerging need for a system where parties can directly settle the cases outside the formal procedures of the court. Using the structure and model of Lok Adalat in its less formal procedure when cognizance of an offence is taken and the nature of offences that it deals with, there is a scope for setting up many mini Lok Adalats on a permanent basis in the legal system and which are within proximate location of the courts, police stations and authorities that can refer the cases to such Lok Adalats. Also, these mini Lok Adalats may be conferred with a wider jurisdiction. There are many more offences, though non compoundable, but they do not still fit into the stereotypical definition of a particular 'crime' or 'offence' and such can be earmarked and be resolved through the Alternate Dispute Resolution techniques.

IV. CONCLUSION

The complexity of social issues is such that one can not make clear cut distinctions between occasions when one or another type of settlement process is preferable. It is, therefore, important to plan for a system of dispute settlement procedures that allows for variety of approaches, interchanges between agencies, and even for changes over time in the nature of dispute. Negotiation rejected at an earlier stage may become acceptable at a later stage. Rather than an alternative system to criminal justice system, one needs a system of alternatives which includes the judicial. Such a system requires a flexible arrangement of channels whereby the ultimate mode of disposition is not determined, more or less blindly, from the very beginning of intervention.[61]

[59] *Supra* note 41.
[60] *Id.*
[61] *Supra* note 20.

Such a system of alternatives would have a number of advantages. It would provide flexibility that the formal procedures at present lack. Encouraging the involvement of the parties themselves in the dispute settlement process, by giving them some influence over the form this takes, may also lead to greater commitment to the resulting parties.[62]

Such a system could be built upon the naturally evolved, but haphazardly developed, mix of informal mechanisms that already exist. In other words, a 'Multi-tier model'[63] of dispute settlement can be used which ranges from lowest tier of informal community mechanisms without external intervention, through use of individuals and agencies whose role is to facilitate solutions to conflicts left unsettled, and mediated settlement achieved by criminal justice officials, to the highest tier of formal adjudication.

[62] *Id.*
[63] Law Reform Commission of Canada, *see* TONY F. MARSHALL, ALTERNATIVES TO CRIMINAL COURTS: THE POTENTIAL FOR NON-JUDICIAL DISPUTE SETTLEMENT, 164 (1986 ed. Gower).

COMPULSORY JURISDICTION UNDER THE UN LAW OF THE SEA CONVENTION: A COMMENT IN LIGHT OF THE SOUTHERN BLUEFIN TUNA AND MOX PLANT CASES

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I. INTRODUCTION

The economic stakes involved in international disputes regarding the rights and duties of coastal or maritime states, the delineation of Exclusive Economic Zones (EEZs) and the sharing of natural resources make an effective dispute settlement mechanism essential for the international law of the sea to effectively govern relations between nations with respect to all matters maritime. The United Nations Convention on the Law of the Sea [1] (LOSC) because of its extensive dispute settlement procedure is the broadest commitment ever made by parties to a multilateral convention to compulsory dispute settlement.[2] The LOSC thus marks a growing acceptance of compulsory dispute settlement procedures by states. It is increasingly thought that apart from resolving disputes, such procedures also discourage unreasonable behaviour on the part of states.[3] This trend is clear from the fact that the LOSC is a widely ratified convention[4] and that states appear to be comfortable resorting to compulsory dispute settlement procedures in general.[5] That is not to say that the LOSC is therefore completely unprecedented, it has counterparts within the EU[6] and GATT/WTO[7] framework and number of other conventions.[8]

In this paper we propose to examine the dispute settlement procedure of the LOSC in the light of two cases that have great significance for the settlement of international disputes. The first, the decision of the arbitral tribunal constituted under Annex VII of the LOSC (hereinafter the arbitral tribunal) in the *Southern Bluefin Tuna Case*[9] has far-reaching consequences for the interpretation of jurisdictional clauses, the powers of such tribunals under LOSC to take provisional measures[10] and the way the principle of consent[11] operates when a judicial forum is faced with a 'compulsory jurisdiction' clause. However, it is our view that this case has created more questions than it has answered. Further, the second case, the order regarding provisional measures delivered by the International Tribunal for the Law of the Sea (ITLOS) in the *MOX Plant Case* seems to have subjected the basis of some of the conclusions reached by the *Southern Bluefin Tuna Case* to question. In this state of legal uncertainty, we propose to carefully study these issues bearing in mind the conclusions of these tribunals and the opinions of writers and publicists.

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[1] United Nations Convention on the Law of the Sea, concluded in Montego Bay on December 10, 1982, Vol. XXI, ILM (1982), 1261, UN Doc. A/CONF 62/122.

[2] ALAN E. BOYLE, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 Int'l & Comp. L.Q. 37 (1997); Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277 (2001).

[3] J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT, 106 (1984, Sweet & Maxwell).

[4] The Convention had 159 signatories originally. Twenty nine states have yet to ratify and among the thirty nine states that did not sign the LOSC or were not independent states at the time of its opening for signature, seventeen states have acceded or succeeded to it. (As on September 30, 2005).

[5] "During President Schwebel's triennium, 1997-2000, twenty one of the twenty four new cases in total were brought by unilateral applications, as followed in the 2000-2003 triennium by such eight new cases, including the Congo v. Belgium Arrest Warrant of April 11, 2000; Yugoslavia v. Bosnia and Herzegovina (Revision of 1996 Judgment); Liechtenstein v. Germany Certain Property; Nicaragua v. Colombia Territorial and Maritime Dispute; Congo v. Rwanda (New Application: 2002); El Salvador v. Honduras Gulf of Fonseca (Revision of 1992 Judgment); Congo v. France (forum prorogatum); and Mexico v. USA Avena and Other Mexican Nationals cases". *See* Barbara Kwiatkowska, *The Australia And New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction And Admissibility) Award Of The First LOSC Annex VII Arbitral Tribunal*, 16 Int'l J. Mar. & Coastal L., 239-294 (2001). In the *Radio Orient case*, UNRIAA, Vol. III, at 1873, between Egypt and the states of the Levant, arbitral proceedings were triggered unilaterally on the basis of a compromissory clause.

[6] Euratom Treaty of March 25, 1957, art.193, 51 AM. J. INT'L L. 955 (1957) (in force: January 1, 1958) and the Maastricht Treaty on the European Union (EU) of February 7, 1992 as amended by Treaty of Amsterdam of October 2, 1997, art.292; previously art.219, 31 ILM 247 (1992) and 37 ILM 56 (1998) (in force: May 1, 1999).

[7] On Understanding of Rules and Procedures Governing the Settlement of Disputes, constituting Annex 2 of the Marrakesh Agreement Establishing the WTO of April 15, 1994, 33 ILM 1144 (1994).

[8] Convention on the Protection of the Rhine Against Chemical Pollution of December 3, 1976, art.15 and Annex B, ILM 242 (1977) (in force: February 1, 1979); UNEP Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment of April 24, 1978, art. 25, and its related Protocols, 17 ILM 511 (1978); 1140 UNTS 133 (in force: June 30, 1979), 2065 UNTS 68; the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of December 20, 1988, art.32, 1582 UNTS 96; 28 ILM 493 (1989) (in force: November 11, 1990); and the UN Framework Convention on Climate Change of the same date, art.14 and its 1997 Kyoto Protocol, art.19, 31 ILM 809 (1992); 1771 UNTS 108 (in force: March 21, 1994); and 37 ILM 22 (1998), 96 AM. J. INT'L L. 487 (2002); *see also* Millennium Summit Multilateral Treaty Framework 80 (2000, UN); the Paris OSPAR Convention on the Protection of the Marine Environment of the North-East Atlantic of September 22, 1992, art.32, 32 ILM 1069 (1993) (in force: March 25, 1998); the London Protocol of November 8, 1996, art.16 to the 1972 IMO Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 36 ILM 1 (1997); Protocol Against the Smuggling of Migrants by Land, Sea and Air, art. 20, to the UN Convention Against Transnational Organized Crime of November 2, 2000, art. 35, 40 ILM 334 (2001); the IMO Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art.16, March 10, 1988, 27 ILM 668 (1988): 1678 UNTS 201 (in force: March 1, 1992); for a comprehensive list see Barbara Kwiatkowska, *The Australia And New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction And Admissibility) Award Of The First LOSC Annex VII Arbitral Tribunal*, 16 INT'L . J. MAR. & COASTAL L., 239-294 (2001).

[9] Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)(August 4, 2000), 39 INTERNATIONAL LEGAL MATERIALS 1359 (2000), (*hereinafter* 'Southern Bluefin Tuna Case').

[10] Art. 290(5), provides that a claimant can have recourse to the ITLOS pending the constitution of an arbitral tribunal for the purpose of prescribing provisional measures if ITLOS considers that *prima facie* the Annex VII tribunal once constituted would have jurisdiction and that the urgency of the situations so requires.

[11] For further elaboration of the principle of consent in International law, see ANNE PETERS, *International Dispute Settlement: A Network of Co-operational Duties*, EUR. J. INT'L L. 14 (2003).

[12] *See* remarks of the President of the Conference, Ambassador H. S. Amerasinghe, in 1976 A/CONF.62/WP.9/Add.1, March 31, 1976 ¶ 6; *See* statements by President Tommy Koh on December 6 & 11, 1982 at the final session of the Conference at Montego bay, published in THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, (1983, United Nations).

II. SCHEME OF UN LAW OF THE SEA CONVENTION AND ITS DISPUTE RESOLUTION PROCEDURE

The LOSC was intended to establish a comprehensive regime for the law of the sea. Its provisions for the peaceful settlement of disputes were considered indispensable in order to achieve its object and purpose.[12] United States delegation expressed this view in the United States Seabed Proposal, in which they included an explanatory note stating:

> Compulsory dispute settlement is the foundation of a new world order in ocean space. If nations cannot agree to settle their disputes peacefully (and be bound to do so) and to obey the decisions that are given, then all the standards of the rights and duties in the law of the sea convention will be of little practical value.[13]

The President of the Conference, Ambassador H. S. Amerasinghe, in 1976 prepared an informal single negotiating text on the Settlement of Disputes. He explained his initiative as follows:

> Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise [embodied in the whole LOSC text] will disintegrate rapidly and permanently. I should hope that it is the will of all concerned that the prospective convention should be fruitful and permanent. Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of a treaty will be interpreted both consistently and equitably.[14]

It was felt (i) that the settlement of disputes by effective legal means would be necessary in order to avoid political and economic pressures; (ii) that uniformity in the interpretation of the Convention should be sought; (iii) while the advantages of obligatory settlement of disputes are thus recognized, a few carefully defined exceptions should be allowed; (iv) that the system for the settlement of disputes must form an integral part and an essential element of the Convention, an optional protocol being totally inadequate; and (v) with well-defined legal recourse, small countries have powerful means available to prevent interference by large countries, and the latter in turn could save themselves trouble, both groups gaining by the principle of strict legality which implies the effective application of the agreed rules.[15]

Section 2 (Articles 286-296) of the LOSC which provides for compulsory dispute settlement entailing a binding decision, seems to cover every circumstance. For example, Article 287 leaves the choice of the means of dispute settlement to the parties, but they are deemed to have chosen arbitration unless another listed forum is selected. When the drafters wanted to exclude any provision of LOSC from the scope of compulsory dispute settlement under Part XV, they did so expressly, for example, in Articles 297 and 298. What emerges from a study of the structure of Part XV of the LOSC is that the intention was that unless state parties to the LOSC explicitly excluded compulsory dispute settlement procedures in their agreements with other state parties to the LOSC, they would be bound by the same.[16]

[13] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982-A COMMENTARY (University of Virginia).
[14] President Tommy Koh , *supra* note 12.
[15] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982-A COMMENTARY (University of Virginia) at XV.4) as cited in Southern Bluefin Tuna Case, *supra* note 9, separate opinion of Sir Kenneth Keith.
[16] Separate Opinion of Sir Kenneth Keith, Southern Bluefin Tuna Case, *supra* note 9 ¶ 22.

III. THE CONCLUSIONS OF THE SOUTHERN BLUEFIN TUNA CASE WITH RESPECT TO LAW OF THE SEA CONVENTION DISPUTE SETTLEMENT PROCEDURE

Nevertheless, in light of the decision of the arbitral tribunal in the *Southern Bluefin Tuna* case, which marked the first instance of application of compulsory arbitration under Part XV, Section 2 of the LOSC, the question arises as to whether the LOSC raises such arduous procedural barriers to the application of the compulsory dispute settlement mechanism as to make application of compulsory dispute settlement impossible. It is in relation to this question that it becomes necessary to examine the provisions of Part XV of the LOSC, with a special emphasis on Section 1, as well as the arbitral award in the *Southern Bluefin Tuna Case.*

A. The Facts and Issues

Before considering the arbitral award, it is important to recapitulate briefly the facts of the case. The conservation and management of the Southern Bluefin Tuna (a migratory species of pelagic fish) is regulated by the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) to which Japan, Australia and New Zealand are parties. Under the CCSBT, national allocations were established for each of the three countries. Japan fished within its allocation in the high seas, but also caught additional Southern Bluefin Tuna by way of a unilateral experimental fishing. Australia and New Zealand objected and decided to commence compulsory dispute resolution procedures under Part XV of LOSC. Pending the constitution of the arbitral tribunal to which the dispute was to be submitted under LOSC's Annex VII, Australia announced its intention to seek the prescription of provisional measures under Article 290(5) of LOSC[17], including the immediate cessation of unilateral experimental fishing by Japan. ITLOS found that it had prima facie jurisdiction to hear the dispute and granted the request for provisional measures.

Japan then filed a memorial in which it raised a preliminary objection to the jurisdiction of the tribunal to try the merits of the case. The arbitral tribunal held that it did not indeed have the jurisdiction to try the merits of the case. Certain provisions of the LOSC are extremely important in order to understand the issues involved in this case, they are therefore, reproduced here:

[17] Art. 290(5), *supra* note 10.

Article 280: Settlement of disputes by any peaceful means chosen by the parties —

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

Article 281: Procedure where no settlement has been reached by the parties —

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

Article 282: Obligations under general, regional or bilateral agreements—

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

Article 281(1) lays down that Part XV, Section 2 compulsory procedures will not apply if "the other agreement between the parties does not exclude further procedure." The tribunal was satisfied that the CCSBT constituted an agree ment seeking "settlement of the dispute by a peaceful means of their own choice" and that it did, in fact, exclude further procedure. We will critically examine the basis for this decision and its implications.

[18] MOHAMMED SHAHBUDEEN, PRECEDENT IN THE WORLD COURT, Hersch Lauterpacht Memorial Lectures, 35 (1996,Grotius Publications / Cambridge University Press)

[19] United Nations Convention on the Law of the Sea, 1982, art.296.

[20] Cesare Romano, *The Southern Bluefin Tuna Dispute: Hints of a World to Come Like it or Not*, 32 OCEAN DEV. & INT'L L. 334 (2001).

[21] Electricity Company of Sofia & Bulgaria (Preliminary Objections), (1939) PCIJ, Ser. A/B, No.77, 76.

[22] Southern Bluefin Tuna Case (Australia and New Zealand v. Japan) (August 4, 2000), *supra* note 9.

B. Some Conclusions of the Southern Bluefin Tuna Case which Strengthen the Dispute Settlement Procedure of Law of the Sea Convention

We would like to emphasize at the outset that the conclusions of the arbitral tribunal are not in any way binding on the ICJ,[18] or on any future tribunals constituted under the terms of LOSC.[19] Some writers have pointed out that this as it should be because "*ad hoc* tribunals can make *ad hoc* justice.[20]" This is not to say that these conclusions have no value whatsoever as precedent, for it is rare for an international judicial forum not to listen with respect to the findings of another international judicial forum on the same issue.

The tribunal reaffirmed the principle that the fact that a dispute is covered by more than one jurisdictional clause, under more than one treaty, does not necessarily entail a conflict between them.[21] There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes.[22] The treaties, taken in their ordinary meaning can be read harmoniously to give effect to the dispute settlement procedure in both. This conclusion is also consistent with the principle of good faith[23] which obliges the parties to strive to settle disputes and specifically to keep adopting new strategies, even if one fails.[24]

The decision in the *Southern Bluefin Tuna Case*, thus categorically rejected the submission made before it by Japan that the dispute settlement provision of a regional Convention, namely, the Convention on the Conservation of the Southern Bluefin Tuna (CCSBT) signed between Australia, New Zealand and Japan could or would over-ride or supplant the dispute settlement procedures of the LOSC despite the CCSBT being later in time than the LOSC and the tribunal having heard detailed arguments by Japan on it being *lex specialis* and *lex posterior*.[25] It instead affirmed that principle of parallelism of the jurisdictional clauses of both treaties.

C. Some Conclusions of the Southern Bluefin Tuna Case which Weaken the Dispute Settlement Procedure of Law of the Sea Convention

The arbitral tribunal at the same time pointed out that the dispute settlement mechanism was not a comprehensive regime and that parties could opt out of it.[26] Devine[27] notes:

[23] Nuclear Tests Case (Australia v. France), ICJ Reports 268 (1974), ¶ 46; UN Charter, art.2 ¶ 2; Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art.34 (1),4, ILM (1965), at 532; Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO Agreement, art.3(10), 33 ILM (1994), at 1124; 1997 Gabcikovo-Nagymaros Project Judgment; 1998 Cameroon v. Nigeria (Preliminary Objections) Judgment, ICJ Reports 1998, 314-315, at 296 ¶ 38.

[24] Anne Peters, *International Dispute Settlement: A Network of Co-operational Duties* EUR., J. INT'L L. 14 (2003).

[25] *Available at* www.worldbank.org/icsid/highlights/bluefintuna/qna_australia.pdf ¶ 116.

[26] Southern Bluefin Tuna Case, *supra* note 9, ¶ 62.

[27] D. J. Devine, *Compulsory Dispute Settlement in United Nations Convention on the Law of the Sea Undermined* ?, 25 SAYIL, 103-4 (2000).

> [T]he exceptions to the dispute settlement procedure were negotiated at LOSC III, are precisely defined by the law of the sea convention and one may even argue that they constitute a numerous clauses. Parties may therefore only opt out of dispute settlement procedure if they fall within one of these precisely defined exceptions. Parties have no general and unlimited right to opt out of dispute settlement procedure, something which the arbitral tribunal appears to suggest. Dispute settlement procedure is in fact part of the overall LOSC package deal which should not be eroded by the creation of further exceptions or by an interpretation which would expand the existing exceptions until little is left of the rule.

The arbitral tribunal thus failed to appreciate the compulsory nature of the dispute settlement procedure under the LOSC.

1. *Characterization of the Dispute: Is the Dispute under Law of the Sea Convention and Convention for Conservation of Southern Bluefin Tuna Same?* — Another problem has arisen because of the arbitral tribunal's decisions to regard the dispute under the CCSBT as a dispute under the LOSC as well, which would satisfy the requirements of Article 281. This approach may be problematic because even on the most cursory review of the dispute settlement provision of the CCSBT, one would find that Article 6 provides (as do the dispute settlement clauses of most treaties) that any dispute that may arise with respect to the interpretation or application of this Convention shall be subject to negotiation or mediation. There are elements of the dispute under the LOSC which could not have been equated to the dispute under the CCSBT. Any provision of the CCSBT for dispute settlement will deal with the settlement of the dispute as characterized by the CCSBT and not the LOSC. To say that the dispute is the same whether dealt with by this Convention or is perhaps an over-simplification of the issue. An agreement such as the CCSBT can therefore not supercede the dispute resolution procedure of the LOSC, as it deals with a different dispute altogether and would not satisfy the provisions of Articles 280-281 of LOSC. This view finds an echo in the separate opinion of Sir Kenneth Keith who questions if the CCSBT can indeed constitute an agreement to settle the dispute as required by Article 280-281. [28]

Therefore, a more nuanced view which could have been taken is that the dispute under the LOSC, and CCSBT were not the same and are, in fact, characterized differently and therefore the CCSBT would not constitute an agreement to settle the dispute

[28] Separate Opinion of Sir Kenneth Keith, Southern Bluefin Tuna Case, *supra* note 9, ¶¶ 15-19.

[29] David A. Colson & Peggy Hoyle, *Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?*, 34 OCEAN DEV. & INT'L L. 59 at 68 (2003); The MOX Plant Case (Ireland v. UK) (2002), 41 ILM 405; Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277 at 300 (2001).

[30] D J Devine, *Compulsory dispute settlement in UN Convention on Law of the Sea undermined? Southern Bluefin Tuna case: Australia and New Zealand v Japan, August 4, 2000*, 25 SAYIL 97-112.

under the LOSC in another manner at all.[29] This would, also mean that all regional and other agreements similar to the CCSBT, could not be used to oust the jurisdiction of Section 2, Part XV of the LOSC and consequently place the LOSC's dispute settlement procedure on less tenous ground. The characterization of disputes in this manner is also supported by the conclusions of the ITLOS in the *MOX Plant Case* discussed below.

2. *The Significance of the Time and Purpose of the Agreement vis-à-vis aParticular Dispute.* — Whether a pre-existing agreement of a management or regulatory nature would constitute "another peaceful means" of settling a dispute within the meaning of Article 281(1) is also questionable. It is arguable that Article 281 relates to a specific procedure, strategy or means that two or more states which are parties to a dispute agree to use to address a specific dispute and that it does not relate to general arrangements for dispute settlements which may arise in certain circumstances, such as the CCSBT. It could be argued that Article 280 refers to an agreement between parties to "a" dispute, after that dispute has arisen, to settle it by a peaceful means that they choose. This would mean that Article 280 refers only to a specific dispute that is already in existence when the agreement is concluded. One could therefore only have *ex post facto* consensual substitution of an alternative mechanism. The phrase 'a dispute between them' does perhaps suggest a dispute that actually exists.[30]

This view is, again, supported by the separate opinion of Sir Kenneth Keith in the Southern Bluefin Tuna Award. Sir Keith rejected Japan's submission that the CCSBT constituted an agreement for the "settlement of the dispute by a peaceful means of their own choice" but rather suggested that the parties did agree to settle their dispute but through negotiations evidenced by their diplomatic exchanges.[31]

[31] Separate Opinion of Sir Kenneth Keith, Southern Bluefin Tuna Case, *supra* note 9, ¶ 5.

[32] Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)(August 4, 2000), *supra* note 9.

[33] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982-A COMMENTARY (M. Nordquist et al. eds., University of Virginia) at 23 (281.5); G Eiriksson, *The International Tribunal for the Law of the Sea*, 24 (2000); Separate Opinion of Sir Kenneth, Southern Bluefin Tuna Case, *supra* note 9, ¶ 18.

[34] *See, for example*, North American Free Trade Agreement, Dec 17, 1992, Can-Mex.-U.S, art.1121, 32 ILM 605 (1993).

[35] J.R. Stevenson & B.H. Oxman, *The Law of the Sea Convention III 1974 Caracas Session*, 69 AM. J. INT'L L. 1, 29 (1975); REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 77 (M.N. Nordquist & Choon-ho Park eds. 1983), stating with respect to working paper on the Settlement of Law of the Sea Disputes, co-sponsored by the United States, UN Doc. A/CONF.62/L.7, 27, August 1974, in LOSC III Official Records, Vol. III, 85 (UN 1975), that it resulted from constructive meeting Chaired by Ambassadors Galindo Pohl (El Salvador) & Ralph Harry (Australia), Louis Sohn (USA) Rapporteur, which dealt with eleven points, including: "3. Clause relating to other obligations: The issue dealt with is whether, in the absence of express agreement to the contrary, precedence is given to the procedures in the Convention or other procedures accepted by the parties entailing a binding decision" (emphasis added).

[36] Message From the President of the United States of October 7, 1994 transmitting the United Nations Convention on the Law of the Sea to the U.S. Senate With Commentary, 103 Congress, 2d Sess., Treaty Doc.103-39, reprinted in 34 ILM 1393 (1995) at 51.

[37] DAVID A. COLSON & DR. PEGGY HOYLE, *Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?*, 34 OCEAN DEV. & INT'L L. 60 (2003).

3. *Whether an Agreement which Excluded Further Procedure Impliedly canPre-empt Section 2, Part XV Procedures under Law of the Sea Convention?* — The arbitral tribunal's decision implies that "...the compulsory dispute settlement under the LOSC may be defeated by consensual arrangem ents even where there is no clear manifestation that the Parties intended their consensual arrangement to trump the compulsory procedures of the LOSC."[32] But the opinion that the compulsory dispute settlement procedures of the LOSC can be excluded by implication is open to question.[33] It has been contended that if the parties to a treaty were to have such a clear and unambiguous intention as to exclude procedures for dispute settlement, other than those given in the convention itself, they could have very easily simply said so in a clear and unambiguous manner. It is true that when states have wanted to exclude certain procedures, they have often done so explicitly.[34] There is also evidence from the *travaux preparatoires*[35] and the interpretation of states[36] that the parties to LOSC intended and understood that only agreements expressly ousting further procedure would oust the Section 2 procedure of LOSC.

4. *Implication of the Decision for State Parties to Regional Agreements.* — All parties to the regional and other agreements that have provisions relating to the law of the sea would not be able to avail of the Compulsory Jurisdiction procedure of LOSC even though their very purpose in signing LOSC was to have such a Compulsory Jurisdiction procedure because the existing arrangements including these agreements were inefficient and not functional.[37] If the *Southern Bluefin Tuna Case*'s decision is treated as precedent on this point, it would mean that one of the most important intentions, i.e. to rework an inefficient system of regional conventions of the parties to the LOSC is not given effect. The *MOX Plant* Case, discussed below, sheds some light on how the decision is in fact viewed in other judicial fora.

IV. THE MOX PLANT CASE

The *MOX Plant Case*, like the *Southern Bluefin Tuna Case* discussed earlier, demonstrates the problem of overlapping of jurisdictional clauses of treaties and the procedural and substantive challenges that follow as a consequence. The *MOX Plant* proceedings were initiated before three dispute settlement bodies; an arbitration body under the OSPAR Convention, an arbitration body under the LOSC (preceded by provisional measures proceedings before the ITLOS) and before the ECJ (which is to make a decision relating to the lawfulness of the government of Ireland initiating proceedings against the United Kingdom before the LOSC dispute settlement bodies rather than before the competent EC bodies).

A brief review of the facts of the case is necessary to understand the predicament arising from the overlap of the treaties. This case involves the operation of the MOX plant run by British Nuclear Fuels Limited (BNFL). Since the plant borders the Irish Sea, Ireland objected to its operation, basing its complaint on the fact that the operation of the plant poses a serious threat to the marine environment of the Irish Sea.

[38] Art.290 (5), *supra* note 10.

Proceedings were initiated by Ireland under the Convention for the Protection of the Marine Environment of the North-East Atlantic 1992 ("the OSPAR Convention") based upon the claim that United Kingdom's refusal to publish two reports dealing with the economic justification of the MOX plant in full was inconsistent with its obligations under Article 9 of the OSPAR Convention. The arbitral award delivered under this convention is beyond the scope of this paper.

Thereafter Ireland instituted arbitral proceedings under LOSC on 25th October under Article 290 of LOSC,[38] the primary allegation being that in continued operation of the plant, the United Kingdom had failed to fulfill its obligations to prevent, reduce, or control pollution of the Irish sea from operational discharges from the MOX Plant or from accidental release from the MOX Plant and was therefore in breach of its obligations, primarily under Articles 192 and 193 of LOSC.

The United Kingdom, in its defense, invoked the bar to the jurisdiction of LOSC under Article 282, provides for exclusion to the compulsory jurisdiction of LOSC in case of existence of other treaties between the parties that entail binding decisions. The United Kingdom claimed that the dispute settlement procedures of the LOSC were ousted by the dispute settlement procedures of certain agreements to which Ireland and the United Kingdom were party.

The first of these was the OSPAR Convention, to which both Ireland and the United Kingdom are parties. Under Article 2 of OSPAR, the parties are obliged to protect the marine environment and to avoid marine pollution. The United Kingdom therefore contended that all issues of marine pollution arising from the *MOX Plant case* should be dealt with under the OSPAR convention. The United Kingdom referred to Article 32 of the OSPAR convention, which provides that all disputes concerning the application and interpretation of the OSPAR convention that cannot be settled by the parties are to be submitted to arbitration. This is a mandatory provision, as the failure to settle the dispute leads to binding arbitration at the request of one of the parties.

The United Kingdom further contended that matters relating to nuclear material were governed by EU directives and that the suitable forum for the resolution of disputes arising out of such matters was the European Court of Justice (ECJ), which was identified in the treaties establishing both the European Communities and Euratom as the exclusive medium for such disputes as both treaties provide that, "Member States undertake not to submit a dispute concerning the interpretation or implementation of the Treaty to any method of settlement other than those provided for therein."[39]

Ireland, on the other hand, resorted to the argument of cumulative application of treaties, that the rights conferred under the other treaties and under LOSC were cumulative and that Ireland was entitled to pick and choose as to which of them it relied on and to select the forum accordingly.

[39] EC Treaty, art. 292; Euratom Treaty, art. 193.

Rejecting the argument that the proceeding before it was barred under Article 282 of LOSC, ITLOS held that:

> The dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or application of those agreements, and not with disputes arising under [LOSC] . . . Even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in [LOSC], the rights and obligations under those agreements have a separate existence from those under [LOSC] . . . The application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux preparatoires.[40]

The ITLOS thus characterizes the disputes under the OSPAR Convention, the EC Treaty and the Euratom Treaty and the LOSC differently. A dispute settlement mechanism dealing with disputes arising with respect to the interpretation and application of one of these instruments, would not therefore qualify as a dispute settlement procedure to deal with disputes arising out of the interpretation and application of any of the other instruments although the substance of the dispute may be the same.

Such a decision may be criticized on that ground that it will increase the risk of conflicting decisions by international courts and tribunals with overlapping jurisdictions and of the practice of 'forum-shopping' among states. The decision on the MOX plant by the arbitral tribunal[41] on merits in June 2003 seems to recognize these concerns.

In the circumstances, and bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed the further with hearing Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.[42]

Therefore the LOSC arbitration tribunal, in direct contrast to the interim deci-

[40] MOX Plant, Order of Dec. 3, 2001, ITLOS, at ¶ 49-51 (emphasis added), *available at* http://www.itlos.org/case documents/2001/document en 197.pdf.
[41] The arbitral tribunal constituted under Annex VII of the LOSC.
[42] MOX Plant (LOSC arbitration), ¶ 28.

sion taken by ITLOS,[43] instead of deciding on the merits, keeping in mind the multiple jurisdictional issues that had arisen in the case the tribunal preferred to suspend its proceedings while the case under the ECJ was pending. This decision finds the support of many jurists as not only does it limit conflicting decisions by parallel courts but also is representative of a more effective system in coordinating disputes arising under parallel jurisdictions.[44]

V. CONCLUSION

Given the importance of resolving maritime disputes, the significance of the LOSC in general, and its compulsory dispute settlement procedures, in particular, is obvious. The decision of the LOSC arbitral tribunal in the MOX Plant case discussed above appears to have judiciously balanced this need to recognize the parallelism of jurisdictional clauses in order to give effect to compulsory dispute settlement mechanisms on one hand, with the need to prevent avoidable delays and costs arising out of litigation in multiple judicial fora, the practice of forum-shopping, complex question of jurisdiction and possible problems relating to priority of judicial decisions in case of a conflict. It is therefore a sagacious decision in the somewhat troubled waters of the law relating to compulsory jurisdiction clauses. The other issues of concern relating to the interpretation of Part XV of the LOSC such as whether the agreement to resolve the dispute can be a pre-existing one, whether an agreement which excluded further procedure impliedly can pre-empt Section 2, Part XV procedures under LOSC and how the dispute is to be characterized remain, however, problematic.

103 Congress, 2d Sess., Treaty Doc.103-39, reprinted in 34 ILM 1393 (1995) at 51.

[43] The International Tribunal for the Law of the Sea Order in the MOX Plant Case, Provisional Measures (Ireland v. United Kingdom).
[44] Yuval Shany, *The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures*, LEIDEN J. Int'l L., 17 (2004), 815-827, *see also* Malcolm J. C. Forster, *The MOX Plant Case-Provisional Measures in the International Tribunal for the Law of the Sea*, 16 LEIDEN J. INT'L L. 611-619(2003).

'SUNLIGHT IS THE BEST DISINFECTANT'• A REVIEW OF THE RIGHT TO INFORMATION ACT, 2005

*Shruti Rajagopalan**

I. PRELIMINARY

The Indian Constitution does not explicitly recognise the fundamental right to information and in the absence of enabling legislation, no statutory guarantee for this right has ever existed in India. Over the years, the Supreme Court has read the right to information into the fundamental rights part of the Constitution, under the right to free speech and expression[1] and right to life[2]. The Right to Information Act, 2005 (RTIA) is therefore a significant debut for a statutory guarantee to the right to access information[3]. It is evident that though constitutionally the right to know was recognised by the Supreme Court as early as 1950[4], it was never an enforceable right wherein citizens could seek information through the administration or the courts[5]. The first glimmer of hope was in the *Election case* in 2002 when the Supreme Court directed the Election Commission to secure to voters information pertaining to each candidate contesting election to Parliament and to the State legislatures[6].

An effective right to information regime needs to formulate three components: (a) an access to information policy, (b) a disclosure of information policy, and (c) an information regime. The RTIA provides suitable disclosure powers which the government may exercise *suo moto* and an access regime that may be utilised for information not already disclosed. It is the first real effort made by the government towards a comprehensive access policy. This legislation is the outcome of the weak Freedom of Information Act, 2002 (FOIA)[7], which was never implemented, and the impositions of the National Common Minimum Programme (CMP) of the United Progressive Alliance (UPA) government[8]. Previous attempts to provide a statutory

• A phrase used by Justice Louis Brandeis of the United States Supreme Court to emphasise the importance of transparency on governance. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1914).

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[1] S. P. Gupta v. Union of India, (1981) Supp. SCC 87, ¶ 67. The Supreme Court in this case read right to information as part of Article 19(1)(a) of the Constitution dealing with right to free speech and expression.

[2] Essar Oil Ltd. v. Halar Utkarsha Samiti, AIR 2004 SC 1834. In this case the court by further expanding the horizon of Article 21 of the Constitution read right to information as part of right to life.

[3] The Right to Information Act, 2005 received Presidential assent on June 16, 2005 and came into effect on October 12, 2005.

[4] Romesh Thappar v. State of Madras, AIR 1950 SC 124.

[5] State of Uttar Pradesh v. Raj Narain, (1975) 4 SCC 428, at 453; Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd., (1988) 4 SCC 592, at 612 ; S. P. Gupta v Union of India, (1981) Supp SCC 87.

[6] *See* Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294, at 302.

[7] The FOIA has been repealed by Section 31 of the RTIA.

[8] Government of India, *National Common Minimum Programme*, *available at* http://pmindia.nic.in/cmp.pdf.

guarantee either remained in the draft stage or were never operationalised due to a lack of political will, despite its universal demand from different civil society groups.

II. BACKGROUND: THE DEVELOPMENT OF ACCESS TO INFORMATION LAWS

A. Events Leading to Enactment of RTIA

There have been many proposals for an access to information law. The first proposal was made by the Janata Party in 1977, in reaction to the preceding Emergency, and promised an "open government" by looking at the existing access to information laws[9]. The step was not towards enacting an access to information law, but only to modify the Official Secrets Act, 1923. This issue gained importance again in 1989 as the National Front Government[10] headed by Mr. V. P. Singh announced[11] its commitment towards an open government, borrowing from the election manifesto of the Janata Party. The government appointed a Cabinet Committee which was, however, dissolved in August 1990 without any report or recommendations.

In 1993, a draft right to information law was proposed by the Consumer Education and Research Council, Ahmedabad (CERC). Despite the considerable internal confusion that the draft law faced within the ruling Congress party, the government made a small attempt at easing information laws by enacting the Public Records Act, 1993. This was followed in 1996 by a Press Council of India draft of a right to information legislation. It was the first time a clear model law had been drafted and lobbied for with the government.

The Press Council draft law was later revised by the National Institute of Rural Development and renamed the Freedom of Information Bill, 1997. Unfortunately, none of these draft laws were seriously considered by the government. After sustained civil society pressure, the Central Government appointed a Working Group under Mr. H. D. Shourie in 1997 to officially propose fresh legislation on freedom of information. The Shourie Committee's Report and draft Bill, which were prepared in 1997, eventually resulted in the Freedom of Information Bill, 2000 despite considerable dilution of its original provisions. The Bill was introduced in Parliament and passed in December 2002. It received Presidential assent in January 2003 and took effect as the Freedom of Information Act, 2002. However, the Act was weak and never notified. Important lessons were learned from the FOIA fiasco, chief among them was the necessity for political

[9] S. Maheshwari, *Secrecy in Government in India*, 1979, 25 IJPA 1101.

[10] Election Manifesto of the Janata Party-led National Front Government, 1989. *See* also, Jaytilak G Roy, *Right to Information: A Key to Accountable and Transparent Administration, available at* http://unpan1.un.org/intradoc/groups/public/documents/EROPA/UNPAN014329.pdf.

[11] Prime Minister V. P. Singh in his first broadcast to the nation in December 1989 said, "We will have to increase access to information. If the government functions in full public view, wrong doings will be minimised. To this end, Official Secrets Act will be amended and we will make the functioning more transparent. Right to information will be enshrined in our Constitution". *See* ROY, *id.*

will to liberalise an area of democratic governance, thence the exclusive preserve of the government's massive bureaucracy.
In comparison, Mr. Ram Jethmalani, Law Minister in the then National Democratic Alliance (NDA) government in 1998, ordered that photocopies of all the records and documents of his department would be made available to any citizen upon demand[12]. However, this move was opposed by the Cabinet Secretary and order was forced to be withdrawn[13].

The current RTIA was born out of the UPA government's CMP commitments that resulted, on December 23, 2004, in the introduction of a draft Bill in Parliament by the Minister of State for Personnel, Public Grievances and Pensions, Mr. Suresh Pachauri. The exercise was ostensibly aimed at redressing the ignominy of the FOIA and to improve upon its weak provisions. The Right to Information Bill, 2004 that was tabled in Parliament was based on the suggestions of the National Advisory Council (NAC) though it ignored many of the suggestions proposed by it. Members of the NAC and other individuals protested the dilution of their suggested draft law and the Bill was sent to a Parliamentary Standing Committee for clarifications and review. The Standing Committee reintroduced many of the propositions of the NAC. The Bill was finally passed by the Lok Sabha on May 11, 2005, by the Rajya Sabha on May 12, 2005 and received the assent of the President on June 15, 2005 to become the Right to Information Act, 2005. The Act was notified in the Official Gazette on June 21, 2005 and it came into force on the one hundredth and twentieth day of its enactment[14].

B. Freedom of Information in the tates

In the meanwhile, various states were also enacting their freedom of information laws. Tamil Nadu, Goa and Madhya Pradesh were the first states to enact a right to information legislation in 1997 despite a relative absence of civil society pressure within their states. In April 1998, the Madhya Pradesh Governor reserved the Bill for Presidential assent which was denied on the ground of legislative incompetence. However, Madhya Pradesh government drafted another Bill[15] which, in January 2003, was enacted as the *Madhya Pradesh Jankari Ki Swatantrata Adhiniyam*, 2002 and received the assent of the Governor. Chattisgarh applies the right to information law of Madhya Pradesh[16].

In 2000, following a campaign by the noted social activist Mr. Anna Hazare[17], Maharashtra enacted its own Right to Information Act, 2000. However, this enactment faced considerable criticism and was replaced with a Right to Information Ordinance, 2002 that lapsed in January 2003. In March 2003, the Maharashtra Government passed

[12] Rajeev Dhavan, *Mr. Jethmalani Springs a Surprise*, HINDU, Oct. 9, 1998.
[13] M. Kishwar, *Yes Minister*, MANUSHI, 108, Sep.-Oct. 1998.
[14] Right to Informaton Act, 2005, § 1(3).
[15] *See* Kalpana Sharma, *Digvijay Singh cornered on Right to Information*, HINDU, Apr. 6, 2001.
[16] Madhya Pradesh Reorganisation Act, 2000, §§ 78, 79.
[17] *See* Bharat Rawal, *The Second Freedom Struggle: An Interview with Anna Hazare on the State of RTI Laws, available at* http://www.indiatogether.org/2005/feb/rti-hazare.htm.
[18] *See* Manjiri Madhav Damle, *Hazare writes to Advani on Right to Information Bill*, TIMES OF INDIA, Aug. 3, 2003.

a new Maharashtra Right to Information Act which replicated the 2002 Ordinance and received Presidential assent on August 10, 2003[18].

Karnataka and Delhi enacted access to information laws in 2000 and 2001 respectively without much controversy. In Rajasthan, the *Mazdoor Kisan Shakti Sangathan* (MKSS) movement gathered enough momentum to force the Chief Minister into promising the enactment of legislation as early as 1997. Following various executive orders, a consolidated Rajasthan Right to Information Act was enacted in 2000.

While the north eastern states remained isolated from the right to information debate, Assam enacted its right to information law in 2002 without adequate consultation with civil society groups and other stakeholders[19]. Jammu and Kashmir, constitutionally shielded from the automatic application of national laws[20], enacted its own Right to Information Act, 2004[21]. Other States, including Orissa[22], Andhra Pradesh[23], Kerala[24], Jharkhand[25] and Uttar Pradesh[26] had also drafted their access to information laws.

III. LEGISLATIVE COMPETENCE AND CENTRAL AND STATE LAWS

An important component of India's federal structure is preserved in the Seventh Schedule of the Indian Constitution that delineates the various subjects upon which the Centre and the States can legislate upon. These subjects are listed in three legislative Lists — the Union List (List I), the State List (List II) and the Concurrent List (List III). The Centre is competent to enact laws on subjects entered in the Union List or the Concurrent List, or matters which are ancillary or incidental[27] to Entries in the Union or Concurrent List. Similarly, the State has competence to enact laws on entries in the State List or Concurrent List or matters incidental to entries in such Lists[28]. The right to information is not specifically covered under any of the three Lists in the Seventh Schedule of the Constitution.

A specific entry on freedom of information laws is not mentioned in any of the three lists. The enactment of the RTIA presents a situation where a parliamentary enactment, applicable throughout the territory of India, exists in parallel with several State legislations regarding freedom of information. Can these enactments co-exist?

An argument, which found support in the NDA government, was that since Right to Information is not mentioned in any of the three entries, only the Centre has the

[19] Barun Das Gupta, *Assam Plans Right to Information Bill*, HINDU, Aug. 29, 2001.
[20] INDIAN CONST., art. 370.
[21] Staff Reporter, *Jammu and Kashmir Passes Right to Information Bill*, HINDU, Dec. 19, 2003.
[22] Draft-Bill for Orissa Right to Information Act, 2002.
[23] Andhra Pradesh Right To Information Bill, 2001.
[24] Kerala Right to Information Bill, 2002 & Kerala Transparency in Public Purchase Bill, 2002.
[25] Jharkhand Right to Information Bill, 2001.
[26] Code of Practice on Access to Information, Government of Uttar Pradesh.
[27] Kesoram Industries Ltd., (2004) 10 SCC 201, ¶¶ 31, 74, 138.
[28] INDIAN CONST., art. 246.
[29] *See* Union of India v. H. S. Dhillon, AIR 1972 SC 1061.

competence due to its Residuary Power to enact laws not mentioned in any of the lists under Article 248 read with Entry 97 of List I of the Seventh Schedule of the Constitution[29]. This provision may come into play if the law pertains to good governance in general[30].

An alternate view[31] is that since there is no specific entry in the Union, State or Concurrent Lists dealing with the Right to Information, "It would be open to any legislative body to provide for access to information on any subject on which it has legislative competence", further that both central and state laws may coexist "the Central Act will override the State Acts, where there is a conflict between the two"[32]. This argument is essentially that providing information is an ancillary matter in the governance of the subjects under Centre and State. This means that the Right to Information laws are ancillary and important for the governance of the areas under state control and similarly right to information is ancillary to good governance at the central level. If this view is correct then the more important issue is: Can the Central law impose a duty on the State to provide access even in departments and matters which are only under the State List on which the Centre may not enact legislations? This question arises because the RTIA covers Public authorities under both the Central and the State Governments in Section 2 of the Act.

If the Union claims that its legislation is under its residuary power[33], enacting freedom of information legislation would fall exclusively within its sphere to the exclusion of the States. This is not a satisfactory situation. Thus, the only solution is coexistence so that the Union operates in its sphere and States in their spheres. One clear solution is that the RTIA and state laws fall under Entry 12 in the Concurrent List pertaining to matters on public acts and records. This would give both the Centre and the States the power to enact freedom of information laws. However the Central law would have predominance over the state laws in case of any inconsistency unless the state specially seeks presidential assent[34]. This interpretation makes most clauses of the state laws void as they are inconsistent with the central law. To address this issue, the NAC had suggested that, where there is a state law then the citizens can access information under the state law and the central law if the information pertains to a subject under the State List[35]. However this suggestion was not included in the RTIA and it is still unclear whether the centre or the states have competence.

IV. 'OFFICIAL SECRETS' AND THE CITIZENS' RIGHT TO INFORMATION: AN INCONSISTENT DICHOTOMY

While t he right to information movement has gained strength in the country, the Indian government continues to wield the Official Secrets Act, 1923 (OSA). The product of a

[30] R. Dhavan, *Freedom of Information Bill, 2000, An Appraisal*, 2000 (unpublished working paper) (on file with PILSARC, No. 22, 2000 series).
[31] This view has been forwarded by Mr. Prashant Bhushan, Advocate, Supreme Court of India.
[32] S.Vincent, *One step forward two steps back, available at* http://www.indiatogether.org.
[33] INDIAN CONST., Entry 97, List I, Seventh Schedule.
[34] *Id.* Article 254(1) & 254(2). *See also* Hoechst Pharmaceuticals v. State of Bihar, AIR 1983 SC 1019.
[35] National Advisory Council Draft for The Right to Information Bill, 2004, § 1(4).

colonial government's attempt to marshal information, the OSA's coexistence with modern right to information laws presents a puzzling contradiction. The first Official Secrets Act, 1889 applied to British India and almost replicated the British Official Secrets Act, 1882. This was amended once in 1904; and, later, the Official Secrets Act, 1911 was enacted by the British in India not as a permanent law, but specific to wartime. The Act of 1911 was strengthened in 1920 to make it as effective as is British counterpart. The stated object of the Official Secrets Act, 1923 was to consolidate all the laws relating to 'official secrecy' in India. Its more insidious purpose was to protect the colonial government from the large amount of information leaking out through its civil servants and also to protect executive secrets. Post-independence, the OSA was amended in the aftermath of the India-Pakistan War of 1965 post Indo-Pak war in 1967 to strengthen some aspects to deal effectively with the increasing number of spies.

The OSA was a regressive law, passed as a temporary measure in England in 1911 in one day and replicated in India in 1923. A Committee in England in 1972 suggested it be "pensioned off"[36]. But it took some time for England to get rid of this imperial relic and in 1977 Mrs. Thatcher declared the Crohan Memorandum following the recommendations of the Franks Committee[37]. In India, insistent suggestions that the OSA was not consistent with democratic ideal did not result in its repeal. Clearly the OSA and RTIA have differing and contradictory objectives. The former criminalises persons of any unauthorised information. The latter strives towards maximising information being made available. No doubt, technically the two can co-exist, since information made available under RTIA is authorised. But specific provisions are needed to keep the OSA in check so that it does not affront democracy.

The OSA's prime consideration is the countering of espionage. Section 3(1) of the OSA, which prescribes the penalties for spying, makes it an offence for a person with a "purpose prejudicial to the safety or interests of the State", and Section 3(2) qualifies the necessity of the prosecution to show a prejudicial interest to prove the guilt of the accused by allowing a conviction if from his conduct it appears that his purpose was prejudicial to the safety or interests of the State. Section 4 makes it unlawful to communicate with foreign agents or "any person reasonably suspected" of being a foreign agent.

However, the ability of the OSA to be used as a tool by the government to silence people who are not spies arises from Section 5. Dealing with the wrongful communication of information, Section 5 of the OSA corresponds to Section 2 of the British Official Secrets Act, 1889 that was described as a "catch all"[38] clause and "pensioned off" following the recommendations of the Franks Committee[39]. Section 5 makes it an offence, punishable with imprisonment for a term which may extend to

[36] The 1972 Report of the Franks Committee on Section 2 of the (British) Official Secrets Act, 1911 refers to the observation of Caulfields, J. that Section 2 should be pensioned off.
[37] Under the Crohan Memorandum, memos were sent from the Prime Minister's Office to all departments requiring them to publish all important information especially those concerning public interest.
[38] The 1972 Report of the Franks Committee on Section 2 of the (British) Official Secrets Act, 1911.
[39] Rajeev Dhavan, *Only the Good News: On the Law of Press in India* (1987, Manohar).

three years, or with fine, or both, for any person holding office under any government agency to wilfully communicate any official information to anyone other than an authorised person. It has since been amended even in Britain. Section 5 has been often employed to scare and punish whistleblowers within the government[40]. Not only does it punish current or retired government officers, it also leaves it up to the government to authorise information and each government can determine how secretive or open it chooses to be. With Section 5 the OSA's departs from the valid realm of counter-espionage and unnecessarily concerns itself with a whole range of policy matters that affect citizens and require public participation. Until recently, even the Annual Budget was deemed an official secret inviting criminal sanction under the OSA until it was actually presented[41]. An important question arises here: How will the OSA and the RTIA affect each other what will be its impact on the same bureaucracy that is expected to disclose information under the RTIA?

As a first step towards a credible Indian freedom of information regime, the RTIA must override the OSA on non-espionage matters and the OSA's omnibus Section 5 must be done away with. In the former regard of overriding the OSA, Section 22 of the RTIA states that RTIA will have effect notwithstanding anything inconsistent with the OSA. In regard of the latter, no repeal of Section 5 of OSA has taken place.

Therefore RTIA overrides the OSA where a provision is repugnant to the RTIA. But, this only means that if a Government official or a citizen in possession of information was to divulge information which fell under "catch all" provision of the OSA they would still be liable for prosecution under the OSA unless the information was received or passed on under the RTIA or otherwise officially divulged by the Government. The "catch all" provision must therefore be repealed.

The RTIA also makes provision for further disclosure under its proviso to Section 8 which states that notwithstanding anything in the OSA a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests. Under this provision for public interest override information may be disclosed under the RTIA even where the OSA and RTIA are not inconsistent with each other as required by Section 22 of the RTIA. But the provisions for public interest override are most often subject to interpretation and this provision may not disclose information in greater public interest if the OSA continues to exist and prejudice officials.

Therefore, although on the face of it the RTIA legally overrides the OSA, the continued existence of OSA presents an inconsistent dichotomy in India's freedom of information regime that will undermine the effectiveness of RTIA at the time of its implementation and hinder any participation between citizens and the bureaucracy.

[40] M. S. Siddhu, *The Workings of the Official Secrets Act*, MANUSHI, 108, Sep.-Oct. 1998.
[41] Nand Lal, 1965 (1) Cri LJ 393.
[42] National Common Minimum Programme, *supra* note 8.

V. JOURNEY FROM A 'FREEDOM' TO A 'RIGHT'

The FOIA was a weak law and was neither notified nor were any rules for its implementation formulated. In 2004, the UPA government responded to calls for an effective right to information regime by promising, in its CMP, that, "the Right to Information Act will be made more progressive, participatory and meaningful"[42]. Many civil society campaigners and experts were also not satisfied with the mere 'freedom' to access information, but wanted instead a 'right' and a statutory guarantee to enforce that right. As an endeavour to increase transparency and enable citizens' right to know, it would be fair to say that the RTIA has succeeded and come a long way from the FOIA.

The FOIA was very weak on many fronts that the RTIA has improved upon. The first and biggest flaw with the FOIA was that it came into force only on notification and not immediately[43]. The absence of a time-bound period for implementation resulted in the FOIA remaining in executive abeyance for over eighteen months under the pretext that the rules for its implementation were being formulated. The RTIA addresses this problem by ensuring that a few of its provisions come into effect immediately and the rest on the one hundredth and twentieth day of its enactment[44].

The second area where the FOIA was weak and inadequate was its *suo moto* disclosure policy which has been improved to some extent in the RTIA. Under the FOIA, only the particulars of an organisation; its functions, powers and the duties of its officers; norms; rules and regulations; list of records available to citizens; details of facilities to get information; facts related to any decision; reasons for its decisions, and, project schemes were to be disclosed *suo moto*[45]. The RTIA, on the other hand, contains powers to review the Act's disclosure policy that are vested with an Information Commission. The Commission has the authority to add to the list of information to be disclosed *suo moto*.

[43] Freedom of Information Act, 2002, § 1(3).
[44] Right to Information Act, 2005, § 1(3).
[45] Freedom of Information Act, 2002, § 4(2).
[46] Right to Information Act, 2005, § 4(1) (b).
[47] The following have been added in the RTIA as an improvement over the *suo moto* clause in FOIA:

a) the particulars of any arrangement that exists for consultation with the public in relation to the formulation of its policy or implementation;
b) statements of the boards, councils, committees and other bodies and whether the meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;
c) a directory of all officers and employees of every government department;
d) the monthly remuneration of such officers and employees, including the system of remuneration;
e) the budget allocated to each government agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
f) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
g) particulars of recipients of concessions, permits or authorisations granted by government departments or agencies;
h) details of all information available to such departments or agencies reduced into an electronic form;
i) the particulars of all facilities available to citizens for obtaining information; and,
j) the names, designations and other particulars of Public Information Officers and such other information as may be prescribed.

[48] Freedom of Information Act, 2002, § 4(2).

In addition, the RTIA enables the publishing of more routine and detailed information at regular intervals[46]. To the FOIA, the RTIA has added various other groups of information which are required to be published *suo moto*.[47]

The FOIA only required information to be maintained and indexed to meet operational requirements[48] but was weak on a uniform documentation policy. Other than maintaining and indexing records, the RTIA also requires public authorities to ensure that all records that are appropriate to be computerised and connected through a network all over the country so that access is facilitated[49]. This provision is a step towards the promise of the UPA in the CMP to enable 'electronic governance'.

The third area where the FOIA left much to improve on was the number of specific, general and blanket exclusions that blocked a citizen's access to information. The exclusions under the RTIA are fewer and more specific. The four general exemptions under Section 9 of FOIA[50] have been deleted in the RTIA.

While the blanket exclusion the FOIA provided to intelligence and security agencies[51] has been retained in the RTIA,[52] information relating to human rights violations and corruption charges in these agencies is not exempt following NAC recommendation to that effect. This is a major step towards making the exclusion to intelligence agencies compatible with the norms of transparency and good governance.

The specific exemptions of the FOIA[53] have been retained in the RTIA with two exclusions. These are: (a) the exemption provided to matters affecting Centre-State relations has been removed in the RTIA and the decision-making process for any policy is privy only during deliberation but must be disclosed after the decision is taken; and, (b) information received from foreign governments and information which would constitute contempt of court on disclosure has been excluded under the RTIA. Safeguards to protect privacy of individuals have been included in the RTIA[54]. Despite a greater number of exemptions in the RTIA, their brevity and preciseness serve it better than the FOIA. Incidentally, none of the exemptions of the FOIA were subject to the public interest override clause, which has been provided for in the RTIA. For the information

[49] Right to Information Act, 2005, § 4(1)(a).

[50] Section 9 – "A public information officer may reject a request for information also where such request-
(a) is too general in nature or is of such a nature that, having regard to the volume of information required to be retrieved or processed would involve unreasonable diversion of the resources a public authority or would adversely interfere with the functioning of such authority.
Provided that where such request is rejected on the ground that the request is too general, it would be the duty of the Public Information Officer to render help as far as possible to the person making request to reframe his request in such a manner as may facilitate compliance with it.
(b) relates to information that is required by law, rules, regulations or orders to be published at a particular time and such information is likely to be so published within thirty days of the receipt of such request.
(c) relates to information that is contained in published material available to public.
(d) relates to information which would cause unwarranted invasion of the privacy of any person."

[51] Freedom of Information Act, 2002, § 16.

[52] Right to Information Act, 2005, § 24(1).

[53] *Supra* note 51, 43 § 8(1).

[54] Right to Information Act, 2005, § 8(1)(j).

[55] *Id.* § 8(3).

excluded currently, the de-classification period has also been reduced from 25 years in the FOIA to 20 years in the RTIA[55].

The fourth area where the RTIA largely improves upon the FOIA is the provision for penalising officers who refuse information or give incorrect information. Interestingly, such a provision does not exist in many similar laws of other countries, but the experience of the states' right to information laws and the general mindset of the Indian bureaucracy have made it an important aspect of the RTIA.

On almost every aspect the RTIA has improved on the FOIA, but the most crucial is the creation of the Information Commissions at the Centre and States[56]. This ensures that there is an apex authority to form rules, review and implement the RTIA in India. This will also introduce a system of independent appeals to the Information Commission for each transaction under the RTIA.

VI. ANALYSING THE PROVISIONS OF RIGHT TO INFORMATION ACT, 2005

A. Preamble

The Preamble of the RTIA sets out to set up a practical regime of right to information to promote transparency and accountability. It is well settled that a Preamble can have important interpretative value for the law in question[57]. The Preamble of the RTIA clearly sets out the intention of the legislature to create an effective right to information regime. This is a marked improvement over previous right to information draft laws. By declaring the intent of the law to increase transparency and accountability in public authorities, the Preamble exceeds the limitations of previous proposed information regimes and opens the legislation to assessment on the yardstick of good governance. It also provides for the establishment of Central and State Information Commissions to facilitate access to information.

B. Extent

The extent and commencement clause applies the Act to the whole of India except Jammu and Kashmir (J & K). This is because of the special status the Indian Constitution accords to J & K[58]. In the State of J & K access to information law is already operational. It was passed by the Government of J & K in January 2004. However this legislation is not as progressive as the RTIA[59].

[56] *Id.* §§ 12, 15.

[57] A. Thangal Kunju Musaliar, AIR 1956 SC 246, ¶ 63; Burrakur Coal Co. Ltd., AIR 1961 SC 954, ¶ 17; Amit Das, (2000) 5 SCC 488, ¶ 22.

[58] INDIAN CONST., art. 370.

[59] Section 1(3) of the Jammu and Kashmir Right to Information Act, 2004 states that the Act will come into force by government notification. Rules under J & K RTIA have been published on June 20, 2005, after a lapse of almost eighteen months.

C. Commencement

The commencement of the RTIA is an important issue, one which has created controversy in the past. Ordinarily, legislations come into force "at once" after they are passed by both Houses of Parliament and receive Presidential assent. Some legislative enactments also specify the date on which they come into effect; such as, "it (the Act) shall come into force on the hundred and twentieth day of its enactment". However, some laws allow a further delay in the commencement clause by not specifying a time-bound period of implementation and leaving the matter up to the discretion of the Central Government. Typically, such provisions read thus: "it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint". This is a method to delay the commencement of a law and is referred to as a deferment clause. It is becoming more frequent in Indian legislations that the government finds difficult to implement and is an important indication of political will. If certain provisions of a law are not suitable to the government or require certain infrastructure before being operationalised, the legislation may provide for certain provisions of the Act to come into effect on different dates, or on notification which is another, more problematic deferment clause.

Deferment clauses that allow executive discretion *sans* any mandatory time-bound period for implementation are detrimental to governance. They also erode the confidence of citizens in the political will of their elected governments. For instance, the Freedom of Information Law in England was passed by the legislature in 2001 but came into effect only on 1 January 2005. This led the opposition to mount an uncomfortable campaign by claiming that there was a systematic shredding of documents which could embarrass the government in the four years while preparing for the law to take effect[60]. Although there has been no such accusation on the previous government, it certainly casts doubts on its political will. The more crucial issue which affects Indian citizens is that there is no judicial remedy when the Central Government chooses which clauses to bring into effect and which to defer. The Supreme Court cannot order the government to bring the Act into effect[61], and hence in such a situation, despite there being legislation, citizens are helpless.

The FOIA was to come into effect on notification, but was never notified for over a year and half. To ensure the government did not renege on its duty to provide access to information, a public interest petition was filed by Mr. Prashant Bhushan. The Supreme Court asked the government to take a decision on the notification of the Act for implementing it or giving interim orders to the administration by September 15, 2004[62]. By this time, the new UPA government had decided to improve on the weak FOIA with a new legislation and the case became infructuous. The commencement clause

[60] *Right to Information Becomes Law, available at* http://news.bbc.co.uk/1/hi/ uk_politics/4139087.htm.
[61] *See* A. K. Roy v. Union of India, AIR 1982 SC 710.
[62] Centre for Public Interest Litigation, WP(C) 637/1998, order dated July 20, 2004.
[63] Section 1(3) of the RTIA states – "The provisions of sub-section (1) of section 4, sub-sections (1) and (2) of section 5, sections 12, 13, 15,16, 24, 27 and 28 shall come into force at once, and the remaining provisions of this Act shall come into force on the one hundred and twentieth day of its enactment."

has been improved in the RTIA to make certain provisions take effect immediately and all other provisions after a certain period[63].

The provisions that come into effect immediately are those regarding the duties of public authorities; the designation of public information officers in each public authority; the constitution of Central and State Information Commissions; the appointment, terms and conditions of service of Central and State Chief Information Commissioners; the limited exclusion provided to intelligence agencies; and, the power to make rules by appropriate governments. The remaining sections of the Act came into effect on the one hundredth and twentieth day of enactment, on October 12, 2005.

D. Scope

The Act applies to both the Central and the State Governments for accessing information from public authorities established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly by the Central or State Governments[64]. The scope of 'public authorities' has been increased in the RTIA to include authorities constituted under the Constitution, by the Central or State Governments or by notification. This means that a range of new bodies have been brought within the purview of the Act including *Panchayati Raj* institutions, local bodies and all other bodies, including non-governmental organisations (NGOs), that are established, constituted, owned, controlled or substantially financed by both Governments[65]. However, the RTIA is lacking due to its exclusion of private bodies. Best practices in access to information laws provide for all private bodies or, in case of difficulty in implementation, at least private bodies in the public domain to disclose information[66]. In fact, the Promotion of Access to Information Act, 2001 of South Africa[67] allows both individuals and governments to access information from private bodies when necessary to enforce people's rights. In a time of increased public-private partnerships and especially international private bodies working in the public domain, it is necessary that they be made subject to an access to information regime to make the RTIA more effective.

E. Information

The right to information includes the right to inspect, take notes, extracts, or certified

[64] Right to Information Act, 2005, § 2(h).
[65] *Id.*
[66] Model Freedom of Information Law, § 6 (World Bank), *available at* http://www1.worldbank.org/publicsector/legal/freedom.htm.
[67] Promotion of Access to Information Act, 2000 (South Africa), § 50.
[68] Section 2(f) – Information means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force."
[69] Section 2(i) – Records means :
(a) any document, manuscript and file;
(b) any microfilm, microfiche and facsimile copy of a document;
(c) any reproduction of image or images embodied in such microfilm; and
(d) any other material produced by a computer or any other device.

copies and samples of materials. RTIA has an inclusive definition for 'information'[68] ranging from documents and memos to samples and models; and defines 'record' to include documents manuscripts, facsimile and images etc.[69].

Therefore, the scope of the right to information is fairly broad in the Act. However, difficulties arise because the definition of information and record only entails what it includes. What about information that is not recorded or stored? The government has no uniform policy on how much of the information generated by public authorities must be maintained and the period and manner in which is to be maintained. Hence, public authorities may shred documents they do not want to disclose while citizens only have access to the 'records' and 'information' already available with the authority. To put it simply, the government only has an 'access policy' but does not have an 'information policy'[70].

The only law contributing to our weak information policy is the Public Records Act, 1993 which was enacted for the creation, strengthening, maintenance, retirement of and access to public records of the Central Government. It was a feeble attempt towards the maintaining and developing of information systems to strengthen access to information. As its name suggests, it is used more to record and archive information than to maintain and update current information to ensure its accessibility. The Public Records Act has detailed provisions enumerating the powers of the government to create records and the duties of its officers to preserve them. The entire exercise is to keep documents secret even after thirty years, and only to record history as opposed to collecting information for access[71]. Even unclassified records can be made available only to a '*bona fide* research scholar' after a period of thirty years[72]. Therefore, the information regime that is so desperately required in a country with such a large government is not fulfilled by the RTIA and a new look needs to be taken towards strengthening an information regime before the government can successfully provide accessibility.

F. Suo Moto Disclosure

Suo moto disclosure or a proactive disclosure policy of the government is one of the most important aspects of an access to information law. It means the information which the government makes public *suo moto* or automatically without any requests. It puts the onus on the government to provide routine information so that citizens do not have to ferret it out. The *suo moto* provision in the RTIA is more detailed and wide when compared to the FOIA. Section 4(1)(a) of the RTIA makes it a duty of every public authority to maintain information. Section 4(2) of the RTIA lists the information that the government is bound to disclose *suo moto*.

[70] Dhavan, *supra* note 30.
[71] Rajeev Dhavan, *Public Records Act, A Critique*, (unpublished working paper) (on file with PILSARC, No. 20, 2000 Series).
[72] Public Records Act, 1993, § 12.
[73] Right to Information Act, 2005, §§ 4(2), 4(3), 4(4).

In addition, Section 4 also makes it mandatory for the government to publish "all relevant facts while formulating important policies or announcing the decisions which affect public" as well as its "reasons for its administrative or quasi-judicial decisions to affected persons". The duty to publish information includes the duty to do so regularly in a wide form and manner and after taking into local language and barriers into consideration[73].

The first part of this disclosure policy deals with maintaining and indexing, but the RTIA requires the public authorities to not only document but also computerise the information to be later connected to a network accessible all over the country. This is a major step in moving towards forming an information policy. Also as the documentation and networking progresses the government wants to move towards electronic governance as promised in the Common Minimum Programme.

The second part of this provision deals with publishing different kinds of information. One such group is routine information[74] which includes the particulars of any department or agency including the its budget and planned expenditure; powers and duties of its officers and employees; the procedure of work; the categories of documents held by it; all electronic information; its officers and employees and their salaries; the means and procedure whereby a citizen can access information; and, the names and other details of its Public Information Officers.

The other kind of the information to be published deals with specific programmes and policies for the public. This is governance-oriented information and includes the duty to publish any arrangement for public consultation in matters of policy; statements of all bodies constituted for the purpose of advice; details of the meetings of these bodies; details of subsidies; and, all facts relevant to the formulation of important policies and the reasons for administrative or quasi-judicial decisions. The provisions for the mandatory publishing of information relating to subsidies is important in the background of constant allegations of corruption in subsidy programmes and should aid better governance and transparency in the expenditure of public funds.

The third and most important of the *suo moto* disclosure provisions is the clause dealing with dissemination which is not spelled out as clearly as required[75]. The dissemination clause requires the government to provide information at regular intervals through various means, including the internet, so that the public have minimum resort to the use of the Act to obtain information. The dissemination of information must be wide and carried out in a manner easily accessible to the public after taking into consideration the cost, local language and the most effective method of communication in that local area and the information should be easily accessible and to the extent possible in an electronic format. Despite its potentially vast scope, this clause remains problematic because of its vagueness and must be supplemented by rules which the Governments and competent authorities must prescribe[76]. Hopefully, after reviewing the

[74] *Id.* § 4(1)(b).
[75] *Id.* §§ 4(3), 4(4).
[76] *Id.* §§ 27, 28.
[77] Harsh Mander & Abha Joshi, *The movement for right to information in India: People's power for the*

implementation of the Act, the Information Commissions at the Centre and the States will frame clearer rules regarding dissemination. Updating information is one of the most important aspects of a responsive disclosure policy and different types of information need to be updated at different intervals. In this regard, norms for the updating of information are desperately required for implementation and use. Without such a clear policy, more and more people will be forced to use the law to access information, which is clearly contrary to the intention of the government.

There are a few other areas where the disclosure policy is lacking. A further list of information to be published *suo moto* has been suggested[77] to minimise the number of requests and move towards system where all information is available without citizens having to go out of their way to access it.

G. *Exemption from Disclosure*

The best practices of access to information laws prove that minimal exclusions with maximum disclosures make for better governance. The exclusion provisions of the RTIA, while not as overreaching as those that were prescribed under the FOIA, damage the intent of the legislation due to their wideness and require closer interrogation. They

control of corruption, a paper presented at the Conference on Pan Commonwealth Advocacy held in Harare, Zimbabwe in January 1999, *available at* http://www.humanrightsinitiative.org/programs/ai/rti/india/articles/The%20Movement%20for%20RTI%20in%20India.pdf. They suggested a list of types of information which must be disclosed *suo moto*. The list includes:

a. Rules for the imposition of taxes, copies of tax returns and reasons for the imposition of a particular level of tax in any specific case;
b. Copies of all land records;
c. Statements of revenue, civil and criminal case work disposal;
d. Details of forestation works in areas to be disclosed including the expenditure incurred on such projects;
e. Lists of children enrolled and attending schools, and those availing of scholarships and other facilities;
f. Per capita food eligibility and allotments under nutrition supplementation programmes in hospitals, welfare and custodial institutions;
g. Allotments and purchase of drugs in hospitals;
h. Rules relating to the award of permits, licences, house allotments, gas, water and electricity connections, contracts and the like including the conditions of licence;
i. All estimates, sanctions, bills, vouchers, muster rolls and statements indicating attendance and wages paid to all daily wage workers for all public works.
j. Procedures for referral from employment exchanges and the details of demands from prospective employers;
k. Rules relating to the criteria for admissions to educational institutions including all lists of applicants selected persons;
l. Copies of monthly crime reports;
m. Details of registration and disposal of crimes against women, *adivasis*, *dalits* and other vulnerable groups subject to systemic discrimination, and also of crimes committed during communal riots and corruption cases;
n. Number and list of persons in police custody, including the period of and reasons for custody;
o. Number and list of persons in custodial institutions including jails, reasons for and length of custody, and the details of their productions before magistrates and courts;
p. Air and water emission levels with regard to industrial units, and the environmental standards declared safe by government authorities;
q. Government contracts and tenders and details relevant to them.

[78] Right to Information Act, 2005, §§ 8(1)(a), 8(1)(f).
[79] *Id.* § 8(3).

are contained in a *non obstante* clause in Section 8 of the RTIA.

The first type of exclusion relates to the State. Any disclosure which would prejudicially affect the sovereignty and integrity of India; the security, strategic, scientific or economic interests of the State; relations with foreign States; or information received in confidence from a foreign Government is exempt from access by the public[78]. This exemption is considered necessary in almost every freedom of information law and is not very controversial. However, the RTIA sustains the twenty-year period of de-classification necessary for sensitive documents to be made accessible to the public[79].

The second type of exclusion exempts information whose disclosure might constitute contempt of court or impede the process of an investigation or hinder the apprehension or prosecution of offenders or which might lead to the incitement of an offence. This is a law and order based exemption that is duplicated in many other jurisdictions and so escapes controversy[80].

The third type of exclusion protects privacy and trade secrets, commercial confidence and intellectual property, the disclosure of which would harm the competitive position of a third party, or where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State[81]. Also, information available to a person in a fiduciary relationship; personal information, the disclosure of which has no relation with any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual is also exempt[82]. This exclusion is accompanied by a limited public interest override, which means that the information may be accessed if there is a greater public interest in its disclosure. The public interest override is extremely important in exclusions relating to intellectual property especially in developing countries depending on foreign research for pharmaceuticals to provide the right to public health and affordable medicines.

The fourth type of and more controversial exclusion exempts the disclosure of information which would cause a breach of privilege of Parliament or State Legislatures and Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers[83]. However, the reasons for the decisions taken are not exempt. This provision can be easily misused by claiming that the controversial documents of a department are Cabinet papers with the help of the senior bureaucrats and hence exempt from public access. To make matters worse, this information is also exempt from de-classification after 20 years. This is nothing but a loophole in the law to bypass requests for information that would embarrass the government, and the provision should be removed.

The last type of exclusion exempts the disclosure of information which would endanger

[80] *Id.* §§ 8(1)(b), 8(1)(h).
[81] *Id.* § 8(1)(d).
[82] *Id.* § 8(1)(e).
[83] *Id.* §§ 8(1)(c), 8(1)(i).
[84] *Id.* § 8(1)(f).

the life or physical safety of any person or identify the source of assistance given in confidence for law enforcement or public security[84]. While this provision may have been made to protect whistleblowers, some commentators feel that this is just another provision to reduce access, as there are more effective ways of protecting the identity of individuals. Model laws prescribe a different legislation to protect whistleblowers and not merely make it an exemption clause in an access to information law. Merely excluding such information from public access does not correspond to pro-active measures to protect the identity of such sources. Therefore this clause does not really protect whistleblowers and could be easily misused to deny access.

All exclusions other than the ones regarding Cabinet papers and public safety and security are subject to declassification after twenty years[85]. This period is too long; legal norms prescribe a standard ten-year period of restriction, as followed in the British freedom of information law. The RTIA also allows information sources to be severed to restrict the access of parts of certain records and documents. Retaining the concept of severability[86] will result in access being provided to parts of information sources which do not contain any information.

One of the weakest aspects of the Act is the blanket exclusion from disclosure given to intelligence and security agencies.[87] There are currently eighteen organisations listed for exemption, but this number will increase as both the Central and State Governments start adding organisations to this list by way of notification. While on the face it, national intelligence agencies should be provided a limited cover from mandatory public access to their information, the RTIA's blanket exclusion is odd considering the first exclusion relating to the safety and security of the State which, *prima facie*, privileges strategic State secrets will operate to protect intelligence agencies[88]. However, other information about intelligence agencies and security organisations, especially that relating to corruption and human rights violations, will not be exempt from disclosure. But to access this information, a public request must first be approved by the Information Commissioner, a procedure which can take up to forty five days. This limitation makes it cumbersome to exercise the right to information and must be removed[89].

H. Third Party Information

The provision to obtain third party information is also weak, in fact much weaker than some State laws. Since third parties are involved with local bodies for projects and schemes on a contractual basis, this provision may be used to deny vital information concerning governance. Under the RTIA, if a request is made relating to a third party and has been treated as confidential by that third party, the Information Officer must

[85] *Id.* § 8(3).
[86] *Id.* § 10.
[87] *Id.* § 24
[88] *Id.* § 8(1)(a).
[89] *Id.* § 24(4).
[90] *Id.* § 11.

give a written notice to such third party of the request and invite the third party to make a submission in writing or orally, regarding whether or not the information should be disclosed[90]. This provision considerably weakens the RTIA. It is imperative that private bodies working with public authorities be made subject to public transparency. The RTIA has safeguards for the privacy of individuals and also for trade secrets; hence, there is no basis for weakening the provisions regarding third party information. Third party information has not been specifically excluded even in the State laws of Delhi, Karnataka and Maharashtra. However, this provision is subject to a limited public interest override only on the discretion of the Information Officer.

VII. PROVISIONS TO ACCESS INFORMATION

A. Designating Public Information Officers

To process the requests made for access to information every public authority has to designate some of its officers as Central and State Public Information Officers (PIOs) and also designate Assistant Central and State Public Information Officers (APIOs) at the sub-district level. These PIOs will deal with the requests for information and assist citizens in accessing information. They may seek assistance of other officers to fulfil the requests[91].

B. Request for Obtaining Information

Any person seeking information must make a written request to the concerned PIO of APIO and if the person is unable to make a request in writing the officer must entertain an oral request and reduce it to writing. No reasons need to be given for seeking information. If the information sought is not available with the authority, it must either transfer the request within five days or request information from the authority which may have it. Information sought must usually be made available in the form requested[92].

C. Time Limit

A PIO shall as expeditiously as possible after receiving a request for information, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Sections 8 and 9. When the request has been made to an APIO the time limit is thirty five days. Where a further fee is charged, the time taken for computing such fee must be excluded from the time period. But where the information sought for concerns the life or liberty of a person, the same shall be provided within forty eight hours of the receipt of the request. If no information or decision is given within the

[91] *Id.* §§ 5(1), 5(2).
[92] *Id.* § 6.
[93] *Id.* §§ 7(1), 7(2), 7(3).

specified time, it is a deemed refusal[93].

Thirty days is a very long and relaxed time period and should be reduced to twenty days. Most of the information sought is routine or very specific personal information and hence does not require much processing. And increasing the time limit by another five days in case of APIOs is just a way to delay access. Since a PIO has been created in every public authority with an APIO, the number of requests each PIO would have to deal with would not be large enough to justify such delay. The United Kingdom has prescribed a time limit of just twenty days. However, a progressive provision of the Act is the forty eight hours limit for information concerning life and liberty.

D. Fee

Where access to information is sought in a printed or any electronic format, the applicant shall pay a reasonable fee as may be prescribed. No such fee shall be charged from persons who are below the poverty line as may be determined by the appropriate Government[94]. The person making the request for the information shall be provided the information free of charge where a public authority fails to comply with the time limits specified.

A commendable proposition of the RTIA is to charge no fee for people below the poverty line. Ideally, no fee should be charged in the exercise of a fundamental right. The fee must not be a method of recovering the cost of the exercise of providing access, as large resources are bound to be spent. The fee must merely contribute towards the printing or making copies of information sought and not as a revenue measure. This is vital for the successful implementation of the RTIA especially in poor or rural areas.

E. Refusal

Where a request has been rejected the PIO shall communicate to the person making the request, the reasons for such rejection; the period within which an appeal against such rejection may be preferred; and, particulars of the appellate authority[95]. No response within the prescribed time period is a deemed refusal[96].

VIII. INFORMATION COMMISSIONS

With the constitution of State and Central Information Commissions, the RTIA has conformed to the best practices and prescriptions of various model laws in this regard. The demand for an independent body to implement and review the RTIA has been a longstanding demand of public advocacy groups in India. The establishment of Commissions is what makes the RTIA stronger than all State laws; it is one of the better features of the RTIA.

[94] *Id.* § 7(5).
[95] *Id.* § 7(8).
[96] *Id.* § 7(2).

Under the RTIA, the Central Government has to constitute a Central Information Commission consisting of a Chief Information Commissioner assisted by up to ten Information Commissioners. The Chief Information Commissioner and Information Commissioners must be persons of eminence in public life with a wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. They will be appointed by the President upon the recommendation of the Prime Minister, Leader of the Opposition and other Union Cabinet Ministers. While the NAC draft sought to inject a level of judicial stringency in this exercise by proposing that the recommendations of the Chief Justice of India also be sought, the RTIA has returned the recommendatory powers to the political establishment. This is a way for the government in power to influence the composition of the Commission. Ironically, the political establishment showed a rare unity in collectively removing the judicial element and, to some extent, diluting the apolitical credibility of the Commission. The general superintendence, direction and management of the Central Information Commission vests in the Chief Information Commissioner[97].

The Chief Information Commissioner will hold office for not more than five years but in no circumstance over the age of sixty five. The office will be parallel to the position of the Chief Election Commissioner. Similarly, Information Commissioners shall hold office for five years or until they are sixty five years old. Information Commissioners may become the Chief Information Commissioner. The Chief Information Commissioner or any Information Commissioner can be removed from his office only by order of the President[98].

In a similar manner, the State Information Commissions will be constituted by the State Governments to consist of a State Chief Information Commissioner assisted by up to ten Information Commissioners. The State Chief Information Commissioner and Information Commissioners must be persons of eminence in public life and will be appointed by the Governor upon the recommendations of the Chief Minister, Leader of the Opposition and another Cabinet Ministers of the Legislative Assembly. They shall hold office for five years and can be removed from office only by the Governor[99].

A request can be forwarded to the Central Information Commission on a disability to make a request to a PIO. Requests to the Central Information Commission may also lie if there is refusal to disclose information at the lower level, or if no response to a request is forthcoming or if the information provided is misleading or false. Both the Central and State Information Commissioners may initiate an inquiry into any matter pertaining to the disclosure or otherwise of information[100]. They may also inquire into any record held by any public authority even if it is exempt from disclosure. Most importantly, the Central and State Information Commissions have been vested with the

[97] *Id.* § 12.
[98] *Id.* §§ 13, 14.
[99] *Id.* §§ 15, 16, 17.
[100] *Id.* § 18(1).
[101] *Id.* § 18(3).

powers of a civil court trying a suit under the Code of Civil Procedure, 1908 in respect of their functions under the RTIA[101]

IX. APPEALS

For the functional implementation of any right to information law, there must be an independent appellate authority. The system of appeals prescribed in the RTIA is much better than the systems in the State laws. There are different kinds of appellate authorities in the various laws operating in India. The first type is an internal appeal system where the complaint is made to a superior officer in the same department. The second type of appeal is where a single appeal may be made to an independent authority or tribunal. The third type is a system of two appeals, one internal appeal to the superior officer and a second appeal to an independent authority.

The internal appeal system is followed in Tamil Nadu[102] and Madhya Pradesh[103] where the aggrieved person can appeal to a superior officer within the same department. A system of independent appeals is followed in Goa to be made to the State Administrative Tribunal,[104] and in Delhi to the Public Grievances Commission[105]. A system of two appeals is followed in Rajasthan, which allows for one internal appeal[106] and a second appeal to the District Vigilance Commission or the State Administrative Tribunal[107]. This has been replicated in the Karnataka Act, where the second appeal can be made to a special Appellate Tribunal[108]. In Maharashtra, the first is an internal appeal and a second appeal can be made to the *Lokayukta* whose decision is final[109]. Each of these systems has varied in their efficacy, but the general consensus is that an independent authority is required in an appellate system and the internal appeal does not work well in most government departments.

Under the RTIA, appeals may be preferred on the grounds of non-response within the specified time, refusal to disclose information or incomplete information, to an officer senior to the concerned PIO within thirty days. An appeal may also be made against the decision of the PIO regarding third party information. A second appeal can be made against the decision of the first appellate authority within ninety days of such decision or non-response. In all appeal proceedings, the burden of proving the denial of information was justified, lies on the PIO that denied the information. The appeal must be disposed of within thirty days of its receipt or an extended period not exceeding forty five days and must be accompanied by reasons to be recorded in writing. Such decisions of the Central Information Commission or State Information Commissions,

[102] Tamil Nadu Right to Information Act, § 4.
[103] Madhya Pradesh Right to Information Act, § 7(1).
[104] Goa Right to Information Act, § 6(1).
[105] Delhi Right to Information Act, § 7.
[106] Rajasthan Right to Information Act, § 6.
[107] *Id.* § 7.
[108] Karnataka Right to Information Act, § 6.
[109] Maharashtra Right to Information Act, § 11.
[110] *Id.* § 19.
[111] *Id.* § 19(8).

as the case may be, shall be binding. Hence, the Information Commissions are apex appellate authorities with the final word to decide appeals and issue appropriate orders to PIOs[110].

In deciding appeals, the Central or State Information Commissions have additional powers to:[111]

(a) require a public authority to take steps to ensure compliance with the RTIA, including
i) providing access to information, if so requested, in a particular form;
ii) appointing a Central Public Information Officer or State Public Information Officer;
iii) publishing certain information or categories of information;
iv) making necessary changes to its practices in relation to the maintenance, management and destruction of records;
v) enhancing the provisions for training its officials on the right to information;
vi) providing an annual report;
(b) compensate a complainant for any loss or other detriment suffered;
(c) impose any prescribed penalty; and
(d) reject applications for information.

The independence exercised by the Information Commissions will determine how functional the RTIA is at the implementation stage. The Commissions are empowered not just to review and monitor but also decide appeals and make rules. The Central Information Commission can order any PIO or State Commission to comply with certain rules or procedure and the State Information Commissions can similarly order PIOs and other officials in its State. Being a statutory authority, there is a lot the Commissions can do towards the realisation of the right to information in a meaningful and participatory manner. There are fears that mismanagement and scarce budgets allocated by the States will make these Commissions ineffective or just large unmanageable bureaucracies in charge of other bureaucracies. The fear at the Central level is that that the posts created in the Central Information Commission will serve merely to extend the service period of friendly retired bureaucrats already accustomed to the usual inefficiencies of the administration. For the effective working of these Commissions comparable, perhaps, with the Election Commissions, these fears must be avoided. The constitution and working of the Information Commissions will determine, to some extent, whether the law will be empowering only on paper or otherwise.

[112] *Id.* § 20(1).

X. PENALTIES

When a PIO has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified or denied a request for information *mala fide* or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed the furnishing of information, he may be penalised by the Central or State Information Commissions. The RTIA prescribes a fine of two hundred and fifty rupees per day on the concerned public authority till the application is received or the information is furnished. However, the fine cannot exceed twenty five thousand rupees. In addition, disciplinary action against the PIO may also be recommended by the relevant Commission[112].

The penalty mentioned above is imposed only when information sought is not furnished. But, there is no penalty if the PIO does fulfil the duty to publish information in compliance with the *suo moto* disclosure provision of the RTIA. The absence of such a penalty will severely hamper the operation of the *suo moto* disclosure provisions and allow errant PIOs to function with impunity. Similarly, there is no punishment prescribed for the failure to update and maintain information systems, electronic or otherwise. For any penal provision to be successful, it should be simple to implement and strong enough to deter. By and large, these objectives are met by the RTIA's penal clause, which imposes a monetary penalty on the public department that may work better as a deterrent. However, the absence of liability for *suo moto* requirements must be rectified.

XI. MONITORING AND REPORTING

The Central Information Commission and State Information Commissions shall, at the end of each year, prepare respective reports on the implementation of the provisions of the RTIA during that year and forward a copy to the appropriate Government. Each Ministry or Department is required to collect and provide necessary information in this regard, a duty that will be made possible by their compliance with the RTIA's requirements regarding the keeping of records for the purposes of this section. This report has to be laid before each House of Parliament or State Legislature, as the case may be[113]. Each report must state in respect of the year to which the report relates[114] and certain details must be included in the reports according to the law.

XII. PROMOTION AND TRAINING

Subject to resources, the appropriate government may develop and organise educational programmes to advance the understanding of the public, especially of disadvantaged communities, on how to exercise the rights contemplated under the RTIA and encourage public authorities to participate in these programmes. Under the RTIA it must also make the effort to train Central Public Information Officers or State Public Information Officers of public authorities and produce relevant training materials for use by the public authorities themselves. More importantly the government, within a certain time, has to compile a guide[115] containing easily comprehensible information for any person who wishes to exercise any right specified in this Act and it must update and publish guidelines.

[113] *Id.* § 25(1).
[114] *Id.* § 25(3).
[115] *Id.* § 26.

This promotional effort is essential for the success of RTIA. Often, the lack of knowledge of laws and their procedure prevent the exercise of rights by citizens. The promotion campaign must be sustained, sensitive to local language, and especially target marginalised and underprivileged communities and rural areas. To succeed in this venture, the appropriate governments must make available the resources to educate, promote and train its officers to make RTIA implemental. Public officers must also be made strictly aware of their obligations under the RTIA, especially those appointed to carry out functions under the RTIA. Unless an officer is trained to understand and implement the RTIA it would serve no purpose to impose penalties on the bureaucracy.

XIII. IN THE FUTURE

A. Whistleblower Protection

The RTIA lacks a provision to protect whistleblowers. Whistle blowing is a term used to refer to the process by which insiders make public claims of malpractice by, or within, organisations-usually after failing to remedy the matters from the inside, and often at great personal risk to them[116]. Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing. In some countries, protection for whistleblowers is conditional upon a requirement to release the information to certain individuals or oversight bodies[117].
The Model Law formulated by the World Bank prescribes provision to protect whistleblowers[118]. The United States has a Whistleblower Protection Act, 1989 and a False Claims Act, 1986 to protect whistleblowers. The United Kingdom's Public Interest Disclosure Act, 1998 provides similar protection in both public and private bodies. Even South Africa now has Disclosures Act, 2000 for the same purpose. It is essential that a separate provision for protecting whistleblowers is made either within the RTIA or as a separate legislation.

B. Rules

Rules for the implementation of the RTIA are to be prescribed by the 'appropriate government' or 'competent authority'. This means the Central or State Government department, as the case may be, may prescribe rules. The President, Governor or the Administrator of a Union Territory also has power to prescribe rules. This power also vests with the Speakers of the Lok Sabha and Legislative Assemblies and the Chief Justices of the Supreme Court and High Courts. Currently, the Central and State Governments are in the process of formulating rules that should, before their notification, be circulated for participatory debate and consultation. A large part of the success of

[116] Aditi Dutta, *Whistleblowers in East &West*, HINDU, Feb. 3, 2004 *available at* http://www.hindu.com/op/2004/02/03/stories/2004020300381500.htm.
[117] Principles on Freedom of Information Legislations, A Model Freedom of Information Law, Principle 9 (1999, Article 19), *available at* http://www.article19.org/pdfs/standards/modelfoilaw.pdf .

the RTIA will depend on how the rules are formulated and how simple and uniform they are across departments and states.

C. Implementation

The implementation of the Right to Information Act will require resources, infrastructure and, most importantly, political will. The government must be proactive and use its power to remove difficulties within the first year of the implementation of the Act on the basis of the annual report of the Information Commission. In the first two years of the enactment of the Act, Central Government must extend full support to states in their budget, infrastructure, training and promotion programmes. And as we look ahead, the government must formulate a clear information policy without which its access policy cannot be implemented very well.

To make the RTIA functional, a huge budget would have to be set aside by the Central and State Governments in the seminal years of its implementation. Once the system is in place, the costs would reduce. But never must a fee be charged with the intention of collecting revenue to finance the costs of implementation. This would make the RTIA an instrument only the rich can use, as the fee then charged would be high.

XIV. CONCLUSION

The RTIA may well be the first step in breaking out of the cycle of corrupt and bad governance India has become accustomed to. However, to achieve this objective, several changes must be made to the Act. These include strengthening the access to information regime by:

1. allowing citizens to access information affecting the public interest from private bodies;[119]
2. reinforcing the public interest override for the disclosure of information

[118] Section 47 of the Model Freedom of Information Law published by the World Bank, *available at* http://www1.worldbank.org/publicsector/legal/freedom.htm. Section 47 – "No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment."

[119] Right to Information Act, 2005, § 2(h).
[120] *Id.* § 8(10(d).
[121] *Id.* §§ 8(1)(a), 8(1)(c), 8(1)(i) read with § 8(3).
[122] *Id.* § 8(1)(c), 8(1)(i) read with § 8(3)
[123] *Id.* § 8(1)(g).
[124] *Id.*.§ 24 read with § 8(1)(a).
[125] *Id.* provisos to §§ 24(1), 24 (4).
[126] *Id.* § 11.
[127] *Id.* § 7(1).
[128] *Id.* § 6, 7(5).
[129] *Id.* 4(1).

relating to intellectual property for the purpose of public health;[120]
3. lessening the current twenty years period of secrecy before certain sensitive documents can be made public;[121]
4. preventing public authorities from evading the disclosure of controversial documents by misrepresenting them as Cabinet papers or breaches of privilege;[122]
5. removing the clause that apparently protects whistleblowers as it has no place in an access to information law;[123]
6. removing the blanket exemption that is provided to intelligence agencies since sensitive information of these agencies is already protected;[124]
7. removing the cumbersome procedure prescribed to access information relating to corruption and human rights from security organisations;[125]
8. strengthening and clarifying the provisions for accessing information from third parties;[126]
9. reducing the time limit given to a PIO to provide requested information from thirty days to twenty days;[127]
10. specifying that the fee charged on every information request is merely administrative and not for underwriting the working of the Act[128]

Expanding the disclosure of information regime by:

1. increasing the scope of the mandatory list of information to be disclosed *suo moto*;[129]
2. clarifying the duty of dissemination by specifying what information is to be disseminated, the mode of dissemination and fixing regular intervals for such dissemination;[130]
3. prescribing penalties for PIOs who do not comply with the *mandatory* suo moto disclosure requirements;[131]

Strengthening the information maintenance regime by:

1. minimising the possibility of political manipulation in the Information Commissions by seeking the recommendations of the concerned Chief Justice in the matter of appointments;[132]
2. prohibiting public and private authorities from destroying information before it can be disclosed *suo moto* or upon demand;[133]
3. prescribing penalties for public authorities for the failure to update and maintain information.[134]

[130] *Id.* § 4(2), 4 (3), 4 (4).
[131] *Id.* § 20.
[132] *Id.* §§ 12(3), 15(3).
[133] *Id.* § 4(1).
[134] *Id.* §§ 4(1)(a), 20.

The RTIA is a clear beginning towards bringing greater accountability and transparency in governance in India. If certain changes are undertaken and the implementation of the Act is constantly monitored India is not far from fulfilling Justice Brandeis's prophecy.

ANOMALIES AND REFORM IN THE LAW RELATING TO THE TORT OF DEFAMATION IN THE UNITED KINGDOM

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I. INTRODUCTION

Defining "tort reform" is indeed a nebulous endeavour. Although tort reform can generally be described as state legislative initiative to modify existing tort law,[1] no single definition can possibly encompass the myriad of permutations attendant to tort reform. Moreover, even the seemingly innocuous task of defining the movement engenders debate, and at its worst, fosters antagonism.[2]

Advocates of the reform movement in the United Kingdom argue on primarily two fronts. First, the expansion of tort liability theories and the increase in plaintiff's potential remedies over the last forty years has resulted in a greater number of law suits being filed.[3] Even when plaintiffs cannot prevail with all these advantages, tort reform proponents argue that the cost of defense is still astronomical. The second front assails the amount of damages awarded by juries. Perhaps no other dimension of tort reform generates as much debate and hyperbole in the public, legislatures and judiciary as damage caps (fixing limits for damages), particularly for non-economic damages for non-quantifiable injuries such as pain and emotional distress.[4] This will reduce the overall costs of health care, and provide some measure of predictability in the outcome, aiding in underwriting and settlement of suits.

No area of the law has traditionally excited more interest and controversy, than the law of defamation (i.e. the law of libel and slander). The unique combination of celebrity litigants, salacious allegations, and extensive media coverage ensures that defamation is seldom far from the public eye. And beneath this surface-level appeal lie matters of grave concern, relating to the appropriate balance to be struck between freedom of expression, (particularly in the news media) and individual; interests in reputation and privacy.[5]

In the above context, this paper outlines the anomalies and incongruencies in the present law in the sphere of tortuous Defamation in the jurisdiction of its origin, (the UK), the attempts at modification of the law, and the scope and desirability of further

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[1] GHaberkorn et al., *Tort Reform in the United States*, 4 INT. ILR 74, (1996).

[2] vociferously argue that the effort has not been to reform torts but to restrict the recovery of damages by the victim of a wrongdoer. *See* C.T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MLR 1-5 (1995).

[3] Governmental, familial and charitable immunities, once a bulwark for defendants, have been totally abolished. Contributory negligence as an absolute defence has been limited or abolished. Procedural and substantive changes to the laws of emotional distress, economic loss, non-economic loss, medical malpractice and products liability have made recovery more attainable for plaintiffs.

[4] S.P. Croley et al., *The Non Pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort law*, 108 HARV. L. REV. 1805, (1995).

[5] M. LUNNEY ET AL., TORT LAW: TEXT AND MATERIALS, 581, (2000, Oxford University Press).

reforms, in order to facilitate a keener comprehension of the nuances of the law, and inspire careful, well thought-out reforms in India as well.

II. MEANING OF DEFAMATION

The tort of defamation protects interests in reputation. It consists in the publication to a third person of a matter "containing an untrue imputation against the reputation of another".[6] Under long-established English common law principles, a plaintiff can establish a *prima facie* case of defamation merely by showing that the defendant voluntarily communicated to a third party ("published") a defamatory statement referring directly or indirectly to the plaintiff.[7] A defamatory statement is one that exposes the plaintiff to hatred, contempt, or ridicule, or tends to "lower the plaintiff in the estimation of right-thinking members of society generally."[8] There is a rebuttable presumption that a defamatory statement is false, relieving the plaintiff of any obligation to introduce evidence regarding the statement's accuracy.[9]

Hence, the basis of the wrong of defamation is the unassailable right of every person to maintain and preserve his 'reputation'. It is an inherent personal right — a *jus in rem*[10]. The supremacy of the civil liberty of speech and expression in any democratic society is also incontrovertible. The central problem in the law of defamation, thus, is the reconciliation of these fundamentally opposing concepts, constantly warring in their competing demands for precedence.[11] The law has created certain checks and balances in the form of certain defenses, which are its inadequate attempts to come to terms with this difficult dilemma.[12]

The law of defamation in the United Kingdom is largely the product of four hundred years of common law evolution. Maintaining the proper equilibrium between individual dignity and freedoms of speech and press has been particularly difficult when one generation's accommodation of them is subjected to the pressures of the next generation's social, economic, and technological transformations. Moreover, inflexible rules of *stare decisis*[13] severely limit common law adjustments to such pressures. Thus, the tort of defamation has had to periodically undergo legislative modifications at the

[6] GATLEY, LIBEL AND SLANDER, 235 (W.V.H. Rogers et al. eds., 10th ed. 2004, Sweet & Maxwell). Defamation has been defined as the publication of a statement that reflects on a person's reputation and tends to lower him in the estimation of any right thinking member of the society generally or tends to make him shun or avoid him. *See* WINFIELD AND JOLOWICZ ON TORT, 391(16th ed. 1998, Sweet & Maxwell).

[7] *See,* for example, Newstead v. London Express Newspaper Ltd. [1939] 4 All ER 319.

[8] *Per* Lord Atkin in, Sim v. Stretch, [1936] 2 All ER 1237 at 1240.

[9] R. Weaver et al., *Defamation Law and Free Speech: Reynolds v. Times Newspapers and the English media*, 37 Vand J. Transnat'l L 1255, (2004), *available at* http://international.westlaw.com.

[10] B. M. GANDHI, LAW OF TORT, 431, (1987, Eastern Book Company).

[11] As Iyer rightly points out, the aim of the law in modern conditions is not merely to prevent breaches of peace, but also to make people adhere to standards of speech and writing which will preserve social harmony and make public life and cooperative effort possible. *See* R. IYER, LAW OF TORT (9th ed. 2003, Law Book Pvt. Co.).

[12] *Id.*

[13] *See* E.C.S. WADE ET AL., CONSTITUTIONAL AND ADMINISTRATIVE LAW, 371 (11th ed. 1993, Sweet & Maxwell).

margins. Indeed, over the past two centuries, the British Parliament has enacted important reforms of defamation law about once every half-century.[14]

Much criticism has centred on the fact that the conventional common law defenses do not always respond to the realities of modern media activities. For example, the increasingly international character of media reports available within the UK has exposed shortcomings in legal principles developed with domestic news reporting in mind. The unique problems posed by new computer-based technologies, like the Internet, confound efforts to allocate responsibility for defamatory messages transmitted through them. [15]

More fundamentally, the past decade has seen a dramatic rise in the amounts of damages awarded by juries against media defendants in libel cases, with detrimental consequences for press freedom. Defamation law has been exempt from the general trend of removing civil actions from the province of juries.[16] Juries remain vested with the power to determine the level of compensatory and exemplary damages to be awarded to a successful plaintiff.[17] Furthermore, a defeated defendant is responsible for the plaintiff's costs and legal fees[18], which in libel cases often approach the size of the verdict itself.

Keeping the above trends in mind, the author has sought to systematically analyze the reforms carried out in various aspects of the law relating to defamation by delineating the problems posed by the extant law in respect of procedural rules, defences available etc., various legislative and judicial interventions designed to overcome them, and the scope for further reform.

III. ASSIMILATING THE DISTINCTION BETWEEN LIBEL AND SLANDER

In English law, libel and slander are the two modes through which defamation may be committed. In Pollock's words, libel is written defamation, and slander is spoken defamation.[19]

The Porter Committee's Report in 1948, forming the basis of the Defamation Act of 1952, was aware of the obvious absurdities of the distinction between libel and slander. Referring to a man as a drunkard may be actionable when written on a postcard

[14] These enactments include: Fox's Libel Act 1792, three measures between 1840 and 1845 (The Parliamentary Papers Act 1840, Libel Act 1843, & Libel Act 1845), Law of Libel Amendment Act 1888, Defamation Act 1952, and Defamation Act 1996).

[15] *See Note on Defamation Law-UK Reform*, 3 JILT 45, (1996), *available at* http://international.westlaw.com.

[16] Even with the changes brought by the Defamation Act 1996, juries will continue to decide most of the substantive issues relevant to the outcome of a libel case.

[17] Damage awards (and settlements) in defamation cases routinely surpass £50,000 ($75,000), and a few cases have topped £1,000,000 ($1,500,000).*See* B. Markesinis et al., *Concerns and Ideas about the developing English law of Privacy (and how Knowledge of foreign law might be of help)*, 52 AJCL 133 (2004), *available at* http://international.westlaw.com.

[18] *Id.*

[19] Gandhi, *supra* note 10, at 444.

read by a third party, but not actionable when openly stated to a crowd of thousands.[20] Such unrealistic niceties are crucial in litigation: if words are communicated orally, the plaintiff generally faces the difficult burden of proving special damages-identifiable pecuniary loss. Yet the Committee, unlike its predecessor a century ago[21], rejected the assimilation of libel and slander.

An analysis of the merits of such assimilation permeates legal discussion on defamation over the last hundred years. Supporters of assimilation emphasize the illogical state of the law of defamation and rely on evidence of such successful assimilation in other countries.[22] The major arguments for retaining the distinction include discouraging frivolous actions, the greater malignancy exhibited in libel, the faulty recollection of witnesses of oral statements, greater danger of permanence, etc. Yet there is no necessary correlation between degree of malice and form of publication. More important, if defamation seeks to protect interest in reputation, then malice is quite irrelevant. [23]

The Faulks Committee on Defamation[24], recommended that the distinction between the written and spoken word retained in Section 3 of the Defamation Act, 1952 be removed, and that proof of special damage be always unnecessary provided that the words are likely to cause pecuniary damage to the plaintiff. This would bring English law in line with the law in Scotland.[25]

It is regretfully submitted that the codification of the law of defamation in England has not removed this distinction between libel and slander. As noted by Winfield, [26] the distinction is purely historical and obviously antiquated in relation to modern innovations.

Back in 1667, it was held that a written statement was actionable without proof of special damage, the reason being that the fact of writing showed it to be especially malicious.[27] However, defamation need not take the form of words and it has become necessary to determine whether visual images and gestures constitute libel or slander. Furthermore, the development of modern methods of communication (in film, television, telephone and sound recording) further complicated the matter. In some areas, statutes have had to come to the common law's aid. Defamatory words, pictures, visual images, gestures etc. on radio and television or any other 'programme service' are to be treated as libels by Section 166 of the Broadcasting Act 1990. In addition, the publication of defamatory words in the course of a performance of a play, by virtue of Section 4(1) of the Theatres Act, 1968, is treated as libel.

[20] Williams, *Committee on the Law of Defamation: The Porter Report*, 12 MLR 222, 217 (1949).
[21] *Id* at 224.
[22] *Reform in the Law of Defamation: The English Defamation Act, 1952*, 66 HLR 481, 476 (1953).
[23] *Id.*
[24] Committee on Defamation, Chairman Lord Faulks Report, Cmnd 5909, 1975.
[25] In Scotland, the term libel and slander are also used loosely and without the defined connotations of the English law and are synonyms for the delict of defamation, itself a species of the genus 'verbal injury', *supra* note 11, at 444.
[26] WINFIELD & JOLOWICZ, *supra* note 7, at 399.
[27] King v. Lake, (1667) 1 Hadres 470. *See* J. FLEMING, LAW OF TORT, 570, (7th ed. 1987, Law Book Co. Pvt. Ltd.).

When it comes to other ways of communicating meaning, we turn back to the common law. Here, the test seems to have become one of permanence or transience of the 'statement'[28].

This libel-slander distinction has not been accepted in India either, and has been vociferously criticized as absolutely peremptory, unsatisfactory and inconsistent, even by Lord Macaulay who said, "[I]f defamation be punished on account of its tendency to cause breach of the peace, then spoken defamation ought to be punished even more severally than written defamation, having that tendency in a higher degree." [29]

The General Requirement of Proving "Special Damage" for Establishing Slander

Libel is actionable *per se*, while Slander generally requires proof of actual identifiable pecuniary loss, called 'special damage'. Mere loss of reputation is insufficient.[30] The purpose of this rule was to safeguard those who speak out from trivial litigation, yet it often caused much hardship and incongruity. Hence, the law in this respect has been reformed by introducing certain exceptions, by statute and judicial determination. These include:

1. *Imputation of Criminal Conduct.* [31]

2. *Imputation of Certain Contagious Diseases.*

3. *Imputation of Unchastity.* – A slanderous accusation of unchastity was not actionable *per se* at common law, because immoral conduct fell within the sphere of the spiritual courts. The plaintiff was put to proof of special damage, even if the words were intended to injure her in any trade in which she was engaged. The Slander of Women Act, 1891, removed this 'barbarous rule' in England.[32] Evidently, the statutory protection was deemed necessary only for women.[33]

4. *Imputation of Unfitness in Business.* – This controversial exception was added by Section 2 of the Defamation Act, 1952. Slandering a person in the way of his trade, profession, business or calling is actionable as it involves a temporal loss.[34] The Porter Committee took note of the injustice arising from the common law's absolute requirement that the words be spoken of the plaintiff in his calling, i.e., refer to a matter of particular importance in the performance of his profession or calling, rather than

[28] In Monsons v. Tussaud's Ltd., [1894] 1 QB 671 at 692, Lopes LJ stated — "Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue , a caricature, an effigy, signs etc.".
[29] Gandhi, *supra* note 10, at 447.
[30] Davies v. Solomon, [1870-73] All ER Rep. 112.
[31] Gray v. Jones, [1939] 1 All ER 795.
[32] Fleming, *supra* note 27, at 525.
[33] Kerr v. Kennedy, [1942] 1 K.B. 409. In Newfoundland, however, the rule protects everyone, irrespective of sex.
[34] J. Fleming, *supra* note 32, at 574.

matters of general significance. Thus, accusing a teacher of committing adultery with the wife of the school superintendent, is not actionable *per se*, but imputing to a teacher that his conduct with pupils is objectionable, is actionable.[35] Hence, Section 2 of the 1952 Act incorporated this recommendation and abolished this requirement.

IV. THE PROCEDURAL CONTEXT

Ever since Fox's Libel Act, 1792, it has been considered a staunch safeguard of democratic liberty that the issue of "libel or no libel" is within the exclusive province of a jury.[36] Indeed, so entrenched is this principle that the widespread scepticism regarding jury participation in civil litigation has not cast the slightest shadow on their function in defamation cases, and with but isolated exceptions, trial by jury in action for libel and slander has remained a matter of right in England and Australasia.[37] It has been necessary, therefore, to develop rules to divide responsibility for the determination of different issues by judge and jury, and this has led to a great deal of technicality, as Lord Denning said "technicalities beyond belief".

Such technicalities unnecessarily prolong proceedings and add significantly to the costs of an action, hence, defamation is commonly described as a sport (exclusively) for the rich. Legal aid has never been available for defamation actions.[38]

Further, the unconscionable level of damages awarded by juries in defamation cases has been generating valid criticism in legal circles. This is partly due to the intangible nature of the harm pertaining to the reputation. Also, juries are allowed to assess aggravated damages when they find the defendant's conduct particularly vexatious[39] and exemplary damages when they find the defendant has acted deliberately or recklessly with the object of profiting from the defamatory statements. Here, too, juries are asked to equate a vague conception of the defendant's just desserts with a concrete monetary figure.[40] It is hardly surprising that verdicts have been inconsistent and often excessive.

The "summary disposal of claim" procedure introduced by Sections 8-10 of the Defamation Act, 1996 contemplates early judicial evaluation of defamation claims-whether requested by the parties or not-and a judicial determination of the most straightforward claims without a jury.

[35] Jones v. Jones, [1916] 2 AC 481.
[36] The Act applied in terms only to criminal claims, but its principle was applied to civil claims.
[37] FLEMING, *supra* note 32, at 567.
[38] In a recent case brought by Mc Donald's corporation against two environmental protestors, the environmentalists were reduced to representing themselves, as they could not afford representation. *See supra* note 6, at 584.
[39] D.W. Vick et al., *An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law*, 49 FCLJ 630, 621 (1997), *available at* http://international.westlaw.com.
[40] *Id.* at 631.
[41] Defamation Act, 1996 § 8.

The Act of 1996 envisions the adoption of rules of court which will authorize either party to a defamation action to seek summary disposal at any point in the litigation, and permit the court to invoke the summary procedure on its own accord. If the court determines that the plaintiff's claim is meritless, it may summarily dismiss the case.[41] On the other hand, if it determines that the defendant has "no defense .... with a realistic prospect of success, and that there is no other reason why the claim should be tried", it may enter judgment for the plaintiff and grant summary relief in accordance with Section 9.[42] Controversially, when parties cannot agree on the content of the correction and apology or the manner of their publication, the court can direct the defendant to publish a summary of its judgment in the manner and at the time the court determines.[43]

In the Parliamentary debates preceding this provision, Lord Hoffman stressed that this proposal was intended to be a modest measure that would not affect most of the high profile cases. The Act provides that in determining whether to dispose of a claim without a jury trial, the court is to take account of the seriousness of the plaintiff's claim and "whether it is justifiable in the circumstances" to deny the plaintiff a full trial, even in cases in which the defendant waives all defenses to take advantage of the extremely low 10,000 pounds cap on damages. Moreover, the court is specifically instructed to consider whether the maximum award available under the procedure is adequate to compensate the plaintiff.[44]

Over the decades, numerous reforms have been proposed with the hope of bringing jury verdicts into line. In 1975 the Faulks Committee recommended that "juries should not assess damages directly, but rather only determine what category" of damages should be awarded (substantial, moderate, nominal, or contemptuous), with the final determination of the actual amount to be awarded being left to judges.[45] The Committee also proposed that exemplary damages in defamation cases should be eliminated. A decade earlier, it had been suggested that the judge should lay down minimum and maximum levels for an award, with the jury being free to assess damages within those limits.[46] But, despite the introduction of the new offer of amends[47] and summary disposal of claim procedures for minor claims, the Defamation Act 1996 will do nothing to dispel the threat of excessive damage awards that hangs over most English libel actions.

V. DEFENSES

A number of general defenses are available in a suit for defamation,[48] but here the author focuses on the problems inherent in those defences which are peculiar to the cause of action relating to defamation. These include:

[42] Section 9 gives the court the discretionary power to declare that the plaintiff was libelled and to restrain the defendant from any further dissemination of the defamatory statement; to award damages not exceeding £ 10,000; and to order the defendant to publish "a suitable correction and apology."
[43] Defamation Act, 1996 § 9(2).
[44] *Id.* § 8(3).
[45] Faulks Committee Report, *supra* note 24, at ¶¶ 512, 513. The Faulks Committee also questioned whether jury trials should be granted as often as they were in defamation cases. *Id.* ¶¶ 455-57.
[46] VICK ET AL, *supra* note 39.
[47] Defamation Act, 1996, § 2-4.
[48] For example, Consent, on which *see* Monsons v. Tussaud's Ltd. [1894] 1 QB 671.

A. Truth/ Justification

Truth is an absolute defense whatever may be the defendant's motive. Furthermore, in UK, the defendant need not show that the publication was in the public interest, for the law of defamation is not concerned with unwarranted invasions of privacy, but only with false imputations against a person's reputation. [49]

It is submitted that this is an uncomfortable position, for to admit truth alone as a complete defense condones embarrassing exposures of purely private matters, lacking any countervailing public interest. Thus a distinguished Select Committee of the House of Lords in as far back as 1843 recommended that truth should be a defense only if publication was for the public benefit.[50] This was embodied in Lord Campbell's Libel Act of 1845, but only for criminal proceedings.[51]

A defamatory statement is presumed to be false, and the burden of proving its truth lies on the defendant. This also runs counter to the general rule of law of placing on the person initiating proceedings, the burden of establishing the principal elements of the cause of action, and grants the claimant an unwarranted shield behind which to shelter, given that he may deny the defendant access to information about his affairs, and hence the means to substantiate the allegations in question. [52] This defect must be looked into.

1. *Allegations of Criminal Conduct.* — If the charge is that the claimant is guilty of a criminal offence then the defendant need only establish the fact of the claimant's conviction for that offence by way of justification.[53] Conviction is conclusive evidence that the claimant has in fact committed that offence, as per Section 13 of the Civil Evidence Act, 1968. However, the public interest in the rehabilitation of offenders is protected by the rule that one who maliciously publishes details of a 'spent' conviction[54] cannot rely upon the defense of justification (as per Section 8 of Rehabilitation of Offenders Act 1974.

2. *"Drawing the Sting of the Allegation".* — It is no longer the rule that the defendant must prove that his libellous statement is true in every incidental detail, but must justify the 'sting' of the allegation by proving that it is true in substance. In *Alexander v. North Eastern Railway Co.*[55], the plaintiff brought an action of libel based on a notice which the defendants had published, that he was convicted in the penalty of 9 pounds, including costs , or three weeks' imprisonment, for riding in a

[49] Gatley, *supra* note 6, at 289.
[50] FLEMING, *supra* note 32, at 508.
[51] *Id.* at 530.
[52] LUNNEY ET AL., *supra* note 6, at 607.
[53] GANDHI, *supra* note 11, at 434.
[54] A conviction becomes spent, except in the case of very serious criminal conduct, by the lapse of a period of time whose length is determined by the heaviness of the sentence imposed.
[55] [1865] 6 B&S 340; 122 ER 1221.
[56] HEPPLE ET AL., TORT: CASES AND MATERIALS, 962 (5th ed. 2000, Butterworths).

train for which his ticket was not available, and for refusing to pay the proper fare. In fact the plaintiff has been sentenced to fourteen days imprisonment in default of payment of fine and costs, and the defense of justification was held to succeed.

A statutory analogue to the common law rule of the 'sting doctrine' (which applies to only a single defamatory charge) has been introduced in this context.[56] Section 5 of the Defamation Act provides:

[I]n an action for libel or slander, in respect of words containing two or more distinct charges against the plaintiff, a defense of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of their remaining charges.

B. Fair Comment in the Public Interest

This defense is also a complete defense to an action for defamation. Of all the defences to an action for defamation, it has been described as the 'most useful to the media'.[57]

The publication must be comment rather than fact and must be on a matter of public interest. It must have a factual basis, with the facts being true or privileged. And the comment must be "fair" — that is, possible for a commentator to make — but even a fair comment will be defeated by a showing of malice.[58]

The question that arises now is to what extent must the defendant prove the veracity of the facts in order to establish the defense of fair comment? The position under the common law on this point was unclear. Prior to the passing of the Defamation Act, 1952 it was necessary to prove that all allegations of facts in the words complained of were true, and that the comment upon those facts was bona fide and fair comment on a matter of public interest.[59] At the trial it was accordingly incumbent on the defendant to prove that each and every statement of fact in the words complained of was true. If the defendant failed to prove the truth of any of the statements, he necessarily failed in his defence.[60]

This position has been substantially changed by Section 6 of the Defamation Act, 1952, which provides:

[I]n an action for libel or slander in respect of words containing partly of allegations of fact and partly of expression of opinion a defense of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved, if the expression of opinion is fair comment having regard to such of the facts alleged or

[57] LUNNEY ET AL., *supra* note 5, at 612.
[58] Newstead, [1939] 4 All ER at 289-90.
[59] Sutherland v. Stopes, (1924) All ER Rep. 19.
[60] Peter Walker v. Hodgson, (1909) 1 KB 239.

referred to in the words complained of as are proved.

Thus, the court is only concerned with the comment in the statement complained of: if that is fair in relation to such of the facts on which it is based as are proved, the defense of fair comment is made out, and it is in principle irrelevant whether the facts which are proved true are a substantial part of the facts relied upon, or whether the facts relied on are substantially true.[61]

C. Privilege

Absolute and qualified privilege, defenses in which truth need not be shown, traditionally have been narrow and have mainly allowed the media to reproduce official documentation, rather than encourage investigative reporting. The developments in qualified privilege in the late 1990s are some of the most significant legal changes in this sphere.

1. *Absolute Privilege.* — It classically applied to comments made in Parliament[62] and to statements by participants in court proceedings. It also applied to communications outside court that were part of the process of investigating malfeasance before a possible prosecution or regulatory hearing.[63] Section 14 of the Defamation Act 1996 extends absolute privilege to contemporaneous fair and accurate reports of judicial proceedings in U.K. courts as well as in some European and international bodies. In India, the Parliamentary privileges are protected by Articles 105 and 194 of the Indian Constitution.

2. *Waiving of Parliamentary Privilege.* — Section 13 of the Defamation Act, 1996 allows a Member of Parliament to waive Parliamentary privilege "so far as [it] concerns him" if necessary to pursue a civil claim. This waiver would allow evidence to be introduced in a civil trial concerning the Member's conduct within Parliament, even if such evidence would otherwise be forbidden by the privilege.

Parliament passed Section 13 after May, J.[64] ruled that in an action brought by an MP, that the rule based on Article 9 of the Bill of Rights 1688, i.e., absolute privilege accorded to Parliamentary proceedings, meant that "the claims and defences raised issues whose investigation would infringe parliamentary privilege to such an extent that they could not be fairly tried", and any such suit must be dismissed.

In *Hamilton v. Al Fayed*,[65] the House of Lords confirmed that parliamentary privilege would prevent evidence to be led about the 'veracity or propriety' of things

[61] GATLEY, *supra* note 6, at 299.
[62] The fountainhead of this right is Article 9 of the Bill of Rights, 1688 which provides that "[f]reedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."
[63] Mahon v. Rahn (No. 2), [2000] 4 All ER 41.
[64] Hamilton v. Al Fayed, [1999] 1 All ER 317 (Court of Appeal).
[65] [2000] 2 All ER 224.
[66] D. Hencke et al., *A Liar and a Cheat*, GUARDIAN (London) , Oct. 1, 1996, at 1.

done or said in parliamentary proceedings and so would justify a stay on the ground of preventing a fair trial. But the claimant in that case successfully invoked Section 13 to waive parliamentary privilege.

Of all the changes effected by the 1996 Act, this late amendment drew the maximum comments, both, within Parliament and in the press.[66] Many were concerned that insufficient consideration was being given to the potential constitutional implications of the measure. However interesting Section 13 may be to scholars of the British Constitution, it is unlikely to have much impact on defamation law. On the third reading in the Lords, Lord Hoffman pointed out that before the Hamilton case, there had been no cases in the 300 years since the English Bill of Rights was proclaimed in which an MP had attempted to bring a libel action, which raised a question about his own Parliamentary conduct.[67]

3. *Qualified Privilege.* — The common law also recognized various categories of qualified privilege, which were for the "common convenience and welfare of society."[68] Qualified privilege was available when publishers acted to protect an interest or were under a recognized legal, social, or moral duty and the recipients had a corresponding duty or interest in receiving the publication.[69] This shared duty or interest could exist when material was published to a small audience, but if publication was widespread, the defense would likely fail.[70]

Although the occasions of privilege were not definitively set by nineteenth century case law, the defense remained narrow during almost all of the twentieth century. Courts were reluctant to recognize new occasions on which society's "common convenience and welfare" required privilege to exist.[71] The law required allegations of malfeasance to be reported to relevant authorities rather than to be published generally. The defense did not allow suspicions of corruption, for example, to be publicized. And there was no defense for publishers who reasonably believed defamatory allegations to be true, or for those who published something in the public interest after making reasonable inquiries. Successive statutes extended qualified privilege to various fair and accurate reports of public proceedings in court and Parliament, including pubic inquiries, as well as some public meetings, notices, and official reports.[72]

Schedule 1 of the 1996 Defamation Act sets out the categories of reports protected in this way. For some reports, such as those of public meetings, the protection is lost if the defendant refuses a claimant's request for it to publish a reasonable

[67] *Id.* It may be that *Hamilton's* case is *sui generis*, and that Section 13 is no more than the British equivalent of pork barrel legislation intended to benefit a single individual, rather than a reform of more general importance.
[68] Toogood v. Spyring, [1834] 1 CM&R 181 at 193.
[69] Blackshaw v. Lord, [1984] QB 1.
[70] *Id.*
[71] GANDHI, *supra* note 10.
[72] Defamation Act, 1996, Schedule 1.
[73] *Id.* § 15(2).
[74] *Id.* § 15(4).

explanation in response to the report.[73] For all the reports protected under statute, the privilege is lost if publication is not of public concern or for the public benefit.[74]

In a recent significant decision, *McCartan Turkington Breen v. Times Newspapers*[75], the House of Lords made clear that media conferences are within the concept of public meetings so that media reports of the conferences receive this statutory protection. This meant that the public meeting provisions of the Defamation Act, 1996 offered a significant avenue for protecting media reporting.[76]

D. Offer of Amends

Reputation in England is so stringently protected that the liability, for publishing defamatory statements, attaches even without showing any fault. Liability does not depend on the defamer's intention, but on the fact of defamation.[77] In 1825, it was finally settled that absence of ill will and malice against the person defamed, and honest belief in the truth of the allegation did not excuse the defendant.[78] Not only does the law not consider the meaning intended by the publisher, it is equally irrelevant that he did not refer to the plaintiff at all. "The question is not who was aimed at, but who was hit."[79]

In *Hulton v. Jones*[80], this rule was applied even to fiction. The defendants published a libelous narrative, intended to refer to a fictitious person, one Artemus Jones. The plaintiff who had answered to this unlikely name, was allowed to recover, because the description was capable of being reasonably understood to refer to him, and was actually so read by several of his acquaintances.

Obviously, fiction must not become a shield for character assassination. The law is concerned with defamatory lies masquerading as the truth and not defamatory lies purporting to be fiction.[81] This imposition of liability regardless of fault has often been criticized as an unwarranted restriction on the freedom of speech and expression.

Thus, in the U.K., successive statutes have mitigated the harshness of these principles. Initially, Section 4 of the 1952 Act provided for a mechanism for a defendant who has innocently defamed another person to make an offer of amends, which, in certain circumstances, acts as a defense against defamation proceedings. These provisions were very rarely used, as they were unattractive to the defendants, being complex, limited in scope, and difficult to comply with, and to plaintiffs, to whom they gave no right to compensation. The Neill Committee, in whose *Report on the Practice and Procedure in Defamation, 1991*, the provisions of the 1996 Act originated, stated:

[75] [2000] 4 All ER 913.
[76] The defense, however, does not protect what was said at media conferences; it only protects subsequent media reports of what was said.
[77] Cassidy v. Daily Mirror Newspapers Ltd, [1929] All ER Rep 117 at 140.
[78] Bromage v. Prosser, (1825) 107 ER 1051. Malice is relevant today only for the purpose of defeating the defenses of fair comment and qualified privilege, and for awarding exemplary damages.
[79] Kerr [1942] 1 K.B. 409.
[80] [1910] AC 20.
[81] Kerr, *supra* note 79 at 515.

It is unsatisfactory that defendants should have a defense available, based on their reasonable behavior after publication, which would leave the plaintiff with no compensation at all, in respect of hurt feelings or injury to reputation, to take account of what was *ex hypothesi* a defamation.... We see no overriding public interest in depriving plaintiffs of all compensation merely because the defendants have seen the error of their own ways.

Damages for defamation may include general damages for harm to reputation, special damages for identifiable pecuniary loss, and punitive damages for particularly outrageous defamation.[82] Precluding the recovery of even special damage was going a bit too far.[83]

Sections 2-4 of the 1996 Act lay down the modified procedure. The effect of the provisions is (a) to create a formal mechanism for the consensual resolution of defamation disputes, with provisions for judicial determination of appropriate compensation etc., in default of agreement between parties, and (b) to allow a defense to an innocent defamer whose offer has been rejected.[84] Defamation claimants will lose the right to compensation if they reject a valid offer of amends, unless they are able to prove that the publication was culpable in the sense that the defendant knew or had reason to know that the statement either referred to the claimant or was both false and defamatory of the claimant. Once accepted, the offer commits the defendant to make a suitable correction and a sufficient apology, and to publish them in a suitable manner, and also commits him to pay compensation that is assessed by the Court on the same principles as damages in defamation proceedings, plus costs, unless the parties agree the relevant figures themselves. If the claimant is not satisfied with the correction/ apology or the manner of publication of the correction/apology, this can be taken in to account by the Court in assessing the amount of compensation.

In one key respect, the new provisions are of broader scope than the 1952 Act. The defense now seems to cover the case where the statement is known to refer to the claimant and to be defamatory to him, but is reasonably believed to be true e.g. where an investigative journalist researches a story to the best of his ability and has made every reasonable effort to verify his allegations.[85]

The Faulks Committee felt that the principle in *Hulton* should stand, whereas Lord Denning[86] commented "I would like to see the House of Lords take *Hulton* v. *Jones* by the scruff of the neck and throw it out of the Courts and start afresh": The author submits that the amends defense in the Defamation Act, 1996 tries to achieve a compromise between these conflicting views.

While the new procedure is a marked improvement over the 1952 Act, several

[82] *See supra* note 22.
[83] *Id.*
[84] Gatley, *supra* note 6, at 635.
[85] Gatley, *supra* note 6, at 635.
[86] LORD DENNING, WHAT NEXT IN THE LAW? 213 (1982, Butterworths).

shortcomings may diminish its effectiveness. For example, an offer must be made before a defense has been served in defamation proceedings brought against the offeror. Also, the requirement that the defendant must renounce all other defences to invoke the amends procedure is bound to be controversial.

E. Innocent Dissemination

Every person responsible for publication of a defamatory statement is at risk of liability, and hence in common law a defense of Innocent Dissemination developed, in respect of those who merely played a subsidiary part in the publication of defamatory material, provided that they did not know, and had no reason to believe at all, that the publication contained any defamatory matter. This has been codified in Section 1 of the 1996 Act.[87] The object of this provision is to allow a defense to the merely mechanical distributors of defamatory material, and applies to those other than the 'author, editor, or publisher' of the statement.

The recent case of *Godfrey v. Demon Internet Limited*[88] is illuminating in this regard. In this case, an unknown malefactor sent an obscene message to an Internet Usenet newsgroup, purporting to come from Dr Godfrey, thereby defaming him. The defendant was an Internet Service Provider, which carried the relevant newsgroup. Dr Godfrey faxed the defendants, telling them that the message was a forgery and asking them to remove it. The defendants failed to remove the message. Dr Godfrey claimed damages for libel from the defendant from the time he told it the notice was defamatory.

The defendants contended that they were not, at common law, the publishers of the Internet posting, and can also avail themselves of the defense provided by Section 1 of the Defamation Act of 1996, 'a modern equivalent of the common law defense of innocent dissemination.' Morland, J. held, "After 17 January 1997, after receipt of the plaintiff's fax, the defendant knew of the defamatory posting, and chose not to remove it from its Usenet servers. This places the defendant in an insuperable difficulty so that they cannot avail themselves of the defense provided by Section 1."

This decision was fortified by the contents of the consultation document issued by the Lord Chancellor's Department in July 1995 which stated — "The defense of innocent dissemination has never provided an absolute immunity for distributors, however, mechanical their contribution. It does not protect those who knew that the material they were handling was defamatory, or who ought to have known of its nature."[89]

[87] *See* Defamation Act, 1996, Section 1 — Responsibility for Publication: (1) In defamation proceedings a person has a defence if he shows that - (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

[88] [1999] 4 All ER 342.

[89] LUNNEY ET AL., *supra* note 6, at 958.

VI. DEFAMATION, FREE SPEECH AND THE PRESS

We shall now consider the sensitive question of whether the English law strikes the correct balance between concerns of free speech and the protection of reputations.

A relevant question here is the extent of the 'chilling effect' on the media, with the result that there is undue restriction on the media's freedom to publish material of real public interest.[90] While to an extent the chilling effect is justified, it has often been validly stated that the English law of defamation is too harsh in its operation, resulting in undue interference in the reporting of news by the media, and acting as a shield which can be manipulated by the rich and powerful to deflect attention away from shady business deals and intrigue. [91] The passage of the Human Rights Act, 1998, which requires that the Courts in appropriate cases should have regard to the right of free speech in the European Convention of Human Rights[92], may serve to redress the balance to some degree.

However, what is disturbing is the absence of any form of 'public figure' defense in the UK. Unlike in the UK, in the United States, it is generally necessary for the claimant to prove fault on the defendant's part. In *New York Times Co. v. Sullivan*[93], it was held that a requirement of 'actual malice' must be substituted for the normal requirement of default in all cases involving the conduct of public figures. Brennan , J held:

> Against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and some times unpleasantly sharp attacks on government and public officials...the Constitutional guarantees require that a public official be prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' with the knowledge that it was false, or with reckless disregard of whether it was false or not.

Both the Faulks and the Neill Committees on Defamation considered the question whether a rule similar to the *Sullivan* rule should be introduced in England.

[90] The most obvious manifestation, called the direct chilling effect, occurs when articles, books or programmes , are specifically changed, in the light of legal considerations, such as the omission of material the author believes to be true but cannot establish to the extent judged sufficient to avoid an unacceptable risk of legal action and award for damages. Another deeper and subtler way in which libel inhibits media publication is the structural or indirect chilling effect. It functions in a preventive manner: the prevention of creation of material. Particular organizations and individuals are treated as off-limits. Certain subjects are taboo etc. *See* E. BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT (1997, Clarendon Press).

[91] WEIR, A CASEBOOK ON TORT, 558 (10th ed. 2004, Sweet and Maxwell).

[92] Article 10 of the Convention reads — Freedom of Expression — (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
(2) The exercise of these freedoms, since it carries with it certain duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties, as are prescribed by the law, and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputations and rights of others..."

[93] 376 US 254 (1964).

On both occasions, such a reform was considered undesirable.The Neill Committee commented:

Standards of care and accuracy in the press are, in our view, not such as to give any confidence that a *Sullivan* defense would be treated responsibly. It would mean, in effect, that the newspapers, could publish more or less what they liked, provided they were honest, if their subject happened to be within the definition of 'public figure'. We think this would lead to great injustice. What matters is the subject matter of the publication, and how it is treated, rather than who happened to be the subject of the allegations.

As such, the Defamation Act, 1996 did not incorporate such a defence. It is pertinent to note that Indian law as well does not contemplate any requirement of a higher level of proof for establishing the defamation of a public figure, with ominous portends for accountability.

VII. AN OPPORTUNITY LOST ?

With the exception of Section 13, the Defamation Act 1996 offers well-considered reforms of defamation law. Nonetheless, those reforms fall far short of resolving the most compelling problems in English defamation law.

For middle-and lower-income individuals harmed by irresponsible conduct by the press, the libel laws will continue to be a privilege reserved for the rich. Legal aid remains unavailable to potential plaintiffs (and defendants) in libel actions, and the procedural reforms conceived by the Act do not go far enough in providing less expensive alternatives to litigation for potential complainants.[94] Thus, the Act does not remedy the fundamental problem of access to justice for all but continues to serve the wealthiest members of society.

Moreover, the Act does not address the deleterious effect of UK's defamation laws on the exercise of the freedoms of speech and press in the context where those freedoms matter most: when the conduct or character of public figures is at issue. Those individuals and organizations that have the resources and the inclination to pursue defamation claims with vigour are often those whose activities should be subject to the greatest public scrutiny. The defamation laws can deter the press from publishing truthful stories concerning such individuals and organizations, even when the stories concern "matters which it is very desirable to make public."[95] This is primarily the consequence

[94] WICK ET AL., *supra* note 40.

[95] *Per* Lord Keith of Kinkel in, Derbyshire County Council v. Times Newspapers Ltd., [1993] 1 All ER 1011 at 1025.

[96] The offer of amends procedure established by sections 2-4 of Defamation Act, 1996 comes into play only if the defendant decides to make an offer, something a party contemplating legal action cannot depend upon in weighing the costs and benefits of bringing suit. Similarly, the summary disposal of claim procedure established by sections 8-11 affords few guarantees for a potential claimant concerned about the costs of litigation, since a demonstration that there are genuine defenses will defeat an application seeking summary relief.

of three characteristics of English law: the practical effects of the allocation of evidential burdens on the defendant in defamation cases; the related problem that English law does not recognize a public figure defense; and the decisive role given to juries in defamation cases, which is the primary reason that exorbitant damage awards have become a commonplace feature of English libel litigation.[96]

The Defamation Act, 1996 is the first major piece of libel legislation in Britain since 1952. The British Parliament passed the Act in response to valid criticism directed against the ease with which libel plaintiffs could establish liability and the obscenely huge sums of money awarded as damages. In passing the Act, Parliament attempted to shift the balance of defamation law away from protecting the reputational interest of plaintiffs and towards protecting free discussion and open censure. However, the Act merely fine-tunes current law as regards procedures and limitation of suits, and fails to adequately reform English law to provide greater freedom of speech protection. For example, unlike other jurisdictions, English law does not recognize some form of "public figure" defense. By failing to substantively reduce the ease of defamation suits, the British Parliament lost the opportunity to provide greater protection to speech. In an age of global communication, the consequences of this failure will be felt far beyond the United Kingdom.

Conversely, the Courts have adopted a cautious stance towards international human rights agreements protecting the freedom of speech and press, to which the United Kingdom is a signatory. The recent enactment of the Human Rights Act, 1998 will however require the Courts to act in a way compatible with the provisions of the European Convention of Human Rights, and opinions of the European Court of Human Rights. It may be hoped that the incorporation of the European Convention in this manner opens the door to a thorough revision of the law of defamation reform.

In sum, tort reform cannot be analysed by reviewing legislative enactments alone. Unquestionably, the legislative manifestations of tort reform are abundant and diverse. The courts, however, will eventually define, or at least fine tune, tort reform in any sphere, and defamation, is clearly, no exception. The trends in the UK can serve at best, as a general model for us in India to emulate, and at the very least, offer insightful indication as to the direction in which defamation law ought to proceed.

JURISDICTION TO REGULATE BORDERLESS BORDERS

*Neha Nanchahal**

I. INTRODUCTION

"Liberty finds no refuge in a jurisprudence of doubt."[1]

Suppose from Delhi you make an online purchase of a pornographic CD from a web site owned by a Scandinavia based company but hosted in the United Kingdom or participate in an online gambling on a web site developed and hosted in the United States. You use a credit card issued by a bank in the United States for the online payment. At the time of payment, the website which *per se* exhibited to be a secure payment portal showed an error and asked for re-submission of your credit card details.

A dispute may run with respect to the validity of the contract, as a transaction of good or service may be legal in one country but illegal in another; relating to the faulty product that you purchase; pertaining to hacking of your bank accounts from which the payments were made; connected to taxation of the online transaction.

In the world market that is getting flatter by the second, e-commerce and internet[2] have grown to become the buzzwords. In the business world that transcends the boundaries, there is a surge in the number of disputes that may arise between unknown individuals. Where, against whom and what law would be applicable in search of the remedies? Do courts of every state or nation from where information on the web can be accessed have personal jurisdiction to hear and try the case?

In Latin "*juris*" means "law" and "*dicere*" means "to speak"[3] thus the literal meaning of jurisdiction is "the authority or power to speak the law". The issue of jurisdiction requires a determination at the very outset of any litigation. Without jurisdiction, a court's judgment is inefficient and impotent. This article attempts to highlight

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[1] *See* Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2803 (1992).

[2] [I]nternet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks...Small networks... are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network on the system. This global Web of linked networks and computers is referred to as the Internet. *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830-31 (E.D. Pa. 1996). *See* also J.H GRAHAM SMITH, INTERNET LAW AND REGULATION, (3rd ed. 2002, Sweet & Maxwell), for a general overview of the internet and its boundaries being blurred by "intranet" and "extranet".

[3] Jurisdiction has been defined as (a.) A court's power to decide a case or issue a decree; (b.) A geographical area within which political or judicial authority may be exercised. *See* BLACK'S LAW DICTIONARY, (7th ed. 1999).

the various jurisdictional challenges that arise out from the online communications and endeavours to bring out the various approaches adopted by nation states while keeping their sovereignty intact, to tackle the disputes arising within the arena of cyber space[4] - that is nowhere but everywhere.

II. CHALLENGES IN THE INTERNET AGE

Disputes in the offline world are resolved on a territorial basis, i.e., each country applies their local laws on the foundation of territorial nexus.[5] In the world of internet if the disputing parties belong to the same jurisdiction then the disputes can be resolved in the same manner as any other offline dispute. However, by the very nature of transactions on the internet transcending geographical boundaries the laws of all the countries involved in the transaction hold equal value. In many transactions, the laws of (i) the country of the seller's residence, (ii) the country of the buyer's residence, (iii) the country from where the website was hosted or has sufficient connection such as where the content was provided, (iv) the country in which the sale occurred, (v) any country through which the product was transmitted, (vi) the country in which the cause of the dispute arose, give rise to the concept of multiple jurisdiction.[6] Therefore the glaring

[4] Cyberspace is a "software world" where "code is Law." *See* Ethan Katsh, *Software Worlds and the first Amendment: Virtual Doorkeepers in Cyberspace*, University of Chicago Legal Forum 7 (1997), *available at* http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/content/2001112701.html

[5] Concept of territorial nexus requires an understanding of the concepts of:
1. *'Prescriptive jurisdiction'*. — When a sovereign State has jurisdiction to prescribe, it legitimately may apply its legal norms to conduct. Prescriptive jurisdiction proceeds from the concept of territoriality.
2. *'Enforcement jurisdiction'*. — When a State has jurisdiction to enforce, its police and customs authorities may restrict the flow of trade, detain individuals, and alter property interests. *See* Henry H. Perritt Jr, *Jurisdiction and the Internet: Basic Anglo/American Perspectives, available at* http:www.kentlaw.edu/perritt/montreal.rev.html. A State's prescriptive jurisdiction is unlimited and a State may legislate for any matter irrespective of where it occurs or the nationality of the persons involved. A State's ability to enforce those laws is necessarily dependent on the existence of prescriptive jurisdiction. However, the sovereign equality of States means that one State may not exercise its enforcement jurisdiction in a concrete sense over persons or events actually situated in another State's territory irrespective of the reach of its prescriptive jurisdiction. That is, a State's enforcement jurisdiction within its own territory is presumptively absolute over all matters and persons situated therein. *See* also VAKUL SHARMA, INFORMATION TECHNOLOGY LAW AND PRACTICE, CYBER LAW AND E-COMMERCE, (Universal). *See generally* David R. Jonhson & David Post, *Law and Borders-The Rise of Law in Cyberspace*, 48 STAN. L.REV. 1367 (1996).

[6] SHARON K. BLACK, TELECOMMUNICATIONS LAW IN THE INTERNET AGE, (2002, Morgan Kaufmann Publishers).

[7] *See* Minnesota v. Granite Gates Resorts, Inc., 568 N.W.2d (Minn. App. 1997), 576 N.W.2d 747 (Minn. 1998). [S]ome courts have upheld exercises of jurisdiction on the basis of the accessibility of a Web page. *Cf.* Weber v. Jolly Hotels, 977 F.Supp. 327 (D.N.J. 1997). A presence on the Web is not enough to support jurisdiction over non-resident defendants. *Cf.* Flowers Inc. v. Phonenames Ltd., (2000) FSR 697; (2000) E.T.M.R. 369, *aff'd in* appeal (2002) FSR 12. [M]ere fact that websites can be accessed anywhere in the world does not mean, for trademark purposes, that the law should regard them as being used everywhere in the world. It all depends upon the circumstances, particularly the intention of the website owner and what the reader will understand if he accesses the site. In other fields of law publication on a website may well amount to a universal publication, but I am not concerned with that. *Cf.* GTE New Media Services, Inc. v. Bell South Corporation, *et al.* 199 F.3d 1343. The District of Colombia Circuit held that simply having links on an Internet site was not enough to justify exerting personal jurisdiction. [P]ersonal jurisdiction surely cannot be based solely on the ability of District residents to access the defendant's web sites, for this does not by itself show any persistent course of conduct by the defendants in the District. *Cf.* Bensusan Restaurant Corporation v. King, 937 F.Supp 295 (S.D.N.Y. 1996). [C]reating a web site ... may be felt nationwide

challenge in the internet age today is that the global presence[7] of a website generates a worldwide jurisdiction.

Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.[8] is the first published international case addressing multi-jurisdictional issues in cyberspace. The court held that "The Internet is a world-wide phenomenon, accessible from every corner of the globe. [Defendant] cannot be prohibited from operating its Internet site merely because the site is accessible from within one country in which its product is banned. To hold otherwise "would tantamount to a declaration that this Court, and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web."

A. Private International Law

"International law sets little or no limit on the jurisdiction which a peculiar state may arrogate to itself."[9] Several established principles are more or less recognized by all. However, Internet, the borderless medium, challenges traditional views and necessitates, to revisit and to reinterpret the doctrines. No doubt, "a similar phenomenon occurs in many domestic as well as international conflicts contexts"[10] but one can hardly disagree that the Internet has raised it to qualitatively new levels. The court in *California Software Incorporated v. Reliability Research, Inc.*,[11] laid down that "While modem technology has made nationwide commercial transactions simpler and more feasible, even for small businesses, it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts."

Some internet controversies fit perfectly to the traditional principles; for example, State's right to exercise jurisdiction over their nationals wherever they are is a long established nationality principle[12] for exercising jurisdiction over the person. Similarly, the situation when material is put online on the server in the State's territory fits to the traditional territorial principle[13]. However, several particular problems remain, the most outraging among them is the extension of the effects principle[14] to assert jurisdiction over a foreign national for the material placed on the server abroad but made accessible to local users through the internet. As a result, a mere webpage may be enough to be subjected to jurisdiction over every state. However, the practical difficulty that arises is also with respect to the 'choice of law'. The dialogue of private international law being municipal law; neither being a code or an international common law, puts forth the dialectical debate — whether existing private international law principles can govern the Internet?

B. International Treaties to Deal with Cyberspace Issues

Nation states have entered into international conventions and agreements for the purpose of unification and harmonization of the rules relating to governance of cyberspace. One of the outcomes of international co-operation is the Hague Conference on Private International Law the purpose of which is "to work for the progressive unification of the rules of private international law."[15] The Hague Conference on Private International Law established a Special Commission to develop a new multilateral Convention on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (also known as the 'Judgments Project').[16] The purpose of the Convention is to provide an orderly international framework for recognition as well as enforcement of civil judgments. The advent of e-commerce has had an impact on the proposed Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters. [T]he draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters proposes that a jurisdiction agreement should be valid as to form if it is entered into in writing or "by any other means of communication which renders information accessible so as to be usable for subsequent reference". This formulation is drawn from the UNCITRAL Model Law on Electronic Commerce 1996.

The international momentum to tackle over the cyberspace issues resulted in the Council of Europe's Convention on Cyber Crime, formulated primarily by the Eu-

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or even worldwide, but without more, it is not an act purposefully directed toward the forum. *Cf.* Toys "R" US v. Step Two, 318 F. 3d 446 (3d Cir. 2003). [O]peration of commercial website accessible in forum state is not alone sufficient to establish personal jurisdiction. *Cf.* Revell v. Lidoff, 317 F. 3d 467 (5th Cir. 2002). [C]olumbia University website "directed at the entire world" does not subject operator to personal jurisdiction in Texas. *Cf.* R v. Governor of Brixton Prison and another, *ex parte Levin 2001*. One of the most crucial jurisdictional issues was the 'place of origin' of the cyber crime...The Court held that the real-time nature of the communication link between Levin and the Citibank computer meant that Levin's keystrokes were actually occurring on the Citibank computer.

[8] 939 F. Supp. 1032 (S.D.N.Y. 1996).

[9] J.G STARKE, INTRODUCTION TO INTERNATIONAL LAW, (10th ed. 1989, Butterworths).

[10] Jack L.Goldsmith, *Against Cyberanarchy*, 65 U. CHILL. L. REV. 1199, 1208 (1998).

[11] 631 F.Supp. 1356 (C.D. Cal 1986).

[12] Nationality (or personality) principle allows the state to exercise jurisdiction irrespective of the territory where the act was committed because of the nationality of the actor (active nationality principle) or because of the nationality of the victim (passive nationality principle). *See* Starke, *supra* note 9, at 210-11. Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase), ICJ Rep 1955 4. Nationality...to determine that the person upon whom it is conferred, enjoys the rights and is bound by the obligations, which the law of the State in question grants to or imposes upon its nationals; referred in Sharma, *supra* note 5, at 251. *See also*, for a discussion on the application of the "active" and "passive" nationality principles on the internet transactions, Yulia A. Timofeeva, *World Prescriptive Jurisdiction in Internet Content Controversies—A Comparative Analysis*, CONN. J. INT'L L., Vol. 20, 199 (2005); *also available* at http://papers.ssrn.com/so13/papers.cfm.

[13] [T]he territorial principle of jurisdiction is originally derived from an assumption about the absoluteness of boundaries and sovereign power within them. *See, Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW 1801, 1824 (2000). *SS Lotus Case* [France v. Turkey, PCIJ Ser A (1927), No. 9]. "The first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". The issue of jurisdiction under the territorial principle is double-sided. On the one hand, it seems that it does not give much power to the state for control of Internet activity, most of which occurs trans-nationally with participation of foreign actors without any tangible contact with a given forum. On the other hand, the territorial principle should not be underestimated. *See* Timofeeva, *supra* note 12, at 6-7.

[14] The effects principle allows the State to exercise jurisdiction on a person with no territorial or national connection, if the conduct has a substantial effect within the State's territory.

[15] S.K. VERMA & RAMAN MITTAL, LEGAL DIMENSIONS OF CYBERSPACE (2004, Indian Law Institute, New Delhi). Full text of the Draft Convention *available at* http://www.hcch.net.

[16] *Available at* http://www.law.unimelb.edu.au/ipria/developments_in_ip/intdev/hague.html.

ropean Union. By signing this treaty, member countries have agreed on a common platform for exchange of information relating to investigation, prosecution and the strategy to gear against cyber crimes, including exchange of cyber criminals. The objective of the Convention as set out in the preamble, is "to deter action directed against the confidentiality, integrity and availability of computer systems, networks and computer data as well as the misuse of such systems, networks and data by providing for the criminalization of such conduct, as described in this Convention; and the adoption of powers sufficient for effective combating of such criminal offences, by facilitating their detection, investigation and prosecution at both the domestic and international levels and by providing arrangements for fast and reliable international co-operation".[17] It particularly deals with offence related to infringement of copyright, computer-related fraud, child pornography and offences connected with network security. It also covers a series of procedural powers such as searches of and interception of material on computer network. It can be said that this Convention is an effort aimed at the protection of society against cyber crime, through the adoption of appropriate legislations and fostering international co-operation".[18]

C. Challenges to the Sovereignty of Nations

The court may determine its authority to adjudicate problem that a case concerns, referred to as 'subject matter jurisdiction' or jurisdiction over the participants in the suit, referred to as 'personal jurisdiction'.[19] In relation to the Internet transactions personal jurisdiction becomes a primary factor because of its inherent decentralized nature. The continuous convergence and globalization of the computer networks, has created roadblocks to the existing international law principles for their ability to adapt to the new situations such as, online crimes and contraventions. The access by sysops[20] to domain names and IP addresses brings forth the existence of differing venues on the net to meet the wide array of challenges depending on the nature of the dispute and under which branch of law it falls. Some of the challenges in the cyberspace are relating to:

1. *Contractual Disputes.* — E-Commerce is a new way of conducting and executing business transactions in a 24x7 accessible environment. When a dispute arises in relation to an e-commerce transaction, as to the quality of the product; or the consideration; or any other technical anomaly at the time of the transaction, then which law would be applicable and which forum would adjudicate to provide the remedy.

Each website has it own terms of service and privacy policies. They may or may not require the customer to subscribe to their choice of law or the forum selection clause as a precondition to allow them accessibility to the services that they render. Hence, the determination of jurisdiction needs to be resolved efficiently.

[17] Full text of the Convention *available at* http:www.conventions.coe.int/Treaty/en/Treaties/Html/ 185.htm.
[18] Sharma, *supra* note 5, at 256.
[19] The court's jurisdiction over each "person" is also termed as *jurisdiction in personam.*
[20] System operators who control ID issuance and the servers that hold files.

2. *International Taxation Disputes.* — Traditionally taxation of income is either resident based or source based; it could be a combination of the two and more specifically if the business maintains a permanent establishment (PE) in a particular jurisdiction. In digital transactions, who gets to collect a tax is difficult to resolve as a number of tax havens may be involved. Another, dilemma that arises in the internet age is whether software can be regarded as goods within the meaning of the Sales Tax Act.[21]

3. *Extraterritorial Regulation of Speech.* — In a defamatory suit arising in relation to a commercial website, the plaintiff is not the consumer but the person or entity that has been injured as a consequence of the defendant's publication in multiple jurisdictions. E-mails and chat rooms have taken over the tradition modes of correspondence. E-mails are easily retrievable and that their contents then cannot be disputed. E-mail can be forwarded to an indefinite number of recipients without the original author having any control over the transmission. As a defamatory allegation need only be disclosed to one person for publication to be proved, every time e-mail is forwarded to another person, it is published again giving rise to an additional cause of action for defamation. An injury can also occur through the information posted within the body of the website, in the Internet domain name address for the site if the address itself constitutes a defamatory statement, for example <www.Don_blackmails_adolescents_for_sexual_favours.com>.[22] Cyberspace creates the possibility (and perhaps even the likelihood) that content posted on-line by a person in one physical location will violate the law of some other physical location.

4. *International Copyright Disputes.* — The unique characteristics of Cyberspace severely challenge traditional territorially based national copyright concepts.[23] The authors can now, deliver copies of their creations instantaneously and at virtually no cost anywhere in the world, as was recently revealed by the controversy of Napster. An interesting example of copyright violation which looses the discussion of copyright lawyers or law professors is the concept of caching. In caching copies are made to improve the efficiency of the system and are probably, fair use under a copyright analysis. Another controversial area is the application of real-world principle of law to cases of inlining of material on the Web. Importantly, there is no copy made by the page creator, as the inlined material is taken from the original source each time it is used. Yet these copies through the technique of caching or inlining, impede the ability of the web page creator to earn revenue. There are several other softwares in the pipeline such as 'Gnutella', 'Freenet' and 'Kazaa'.

[21] Tata Consultancy Services v. State of Andhra Pradesh, (2001) 4 SCC 629.
[22] *See* Benjamin A. Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to analyze Network-Mediated Contact*, *available at* http://home.law.uiuc.edu/lrev/publications/2000s/2006/2006_1/Spencer.pdf.
[23] *See* JOHNSON ET EL., *supra* note 5. David G. Post, *New Wine, Old Bottles: The Evanescent Copy*, AM. LAW., 103 (May 1995) discussing the choices that legal authorities face in developing copyright law in Cyberspace.
[24] Domain name serves the same function as a trade mark and is not a mere address or like finding a number on the Internet and, therefore, it is entitled to the same protection as a trade mark. *See* Yahoo! Inc. v. Akash Arora, 1999 DLT 285; Rediff Communication Limited v. Cyberbooth, A.I.R 2000 Bom. 27.

5. *Domain Names as Trademarks.* — The domain names,[24] 'virtual real estate' upon registration generate a new type of property akin to the trademark rights with the owner, but without inherent ties to the trademark law of an individual country. The placement of a trademark on the World Wide Web page at times overlaps with a validly registered trademark of another country as there is no global registration scheme existing to protect a famous mark worldwide. Is a trademark owner required to master each country's trademark laws to avoid the suits arising from uses of confusingly similar marks validly registered in that country? The *in rem* provision proves to be controversial.

Although the domain name initially assigned to a given machine may be associated with an Internet Protocol address that corresponds to that machine's physical location (for example, an "in" domain name extension), the machine may be physically moved without affecting its domain name. Thus a server with "in" domain name may be anywhere, and users, generally speaking, are not even aware of the location of the server that stores the content that they read.

6. *International Cyber Crime.* — Computer networks can be used to facilitate online forms of traditional crimes, such as gambling, child pornography, fraud, and software piracy. Loss of privacy is another major worry where the network is concerned. In these circumstances national borders may be inconsequential both to the commission of the crime or the location of the relevant evidence.

III. LEGAL APPROACHES TO TACKLE THE CHALLENGES

With the exponential growth of e-commerce, the jurisdictional laws of the nation states act as new wine in the old bottles, as extraterritorial effect is given to them to adjudicate upon the exigencies arising from the transactions which recognize no borders.

A. The United States

The United States exercises its jurisdiction over foreign defendants based upon their Internet activity, as per the general principles governing jurisdiction under the United States Rules. In the United States, a state cannot claim jurisdiction over any party it chooses. It must first consider whether the state has certain 'minimum contact' with the party such that the maintenance of suit does not offend the notion of 'substantial justice'.[25] In such cases, the claimant is known as the forum state[26] and in deciding

[25] The 'due process of law' provided in the Fourteenth Amendment of the U.S. Constitution limits the powers of the courts to exercise traditional notions of fair play and substantial justice. It provides that ".... no state shall... deprive any person of life, liberty or property without due process of law".

[26] International Shoe Co. case, *infra* note 27.

[27] International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. The minimum contact test was modified in *Kulko v. Superior Court*, 436, U.S 84 (1978), to include individuals and not just Corporations. *Cf. Cybersell Inc. case* in which the court rejected the plaintiff's reliance on the "effects test" holding that the test does not apply with the same force to a corporation as it does to an individual "because a corporation does not suffer harm in a particular geographic location in the same sense that an individual does". *See infra* note 28.

what contacts are sufficient, elements such as (1) residence, (2) incorporation, or (3) property ownership in the state are considered. While physical presence of the defendant in the state is not required, lesser contact, such as business transactions by mail or wire communications can establish jurisdiction. In the year 1945, the U.S Supreme Court in *International Shoe Co.* v. *State of Washington*[27] laid down the test for determining the minimal contact between the out-of- state defendant and a particular jurisdiction. It held that a court's exercise of personal jurisdiction over a non-resident defendant is proper if that defendant has had certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. It enunciated three criteria for establishing minimum contact: (i) the defendant must 'purposefully avail'[28] himself of the privilege of doing business with the forum state; (ii)the cause of action arises from defendant's activities in the forum state; (iii)the exercise of jurisdiction would be fair and reasonable.The nation states have tried settling the diabolic debate whether the mere accessibility of a web page implies a valid jurisdiction[29], by enlarging the sphere of applicability of the territorial principles to the transactions which cross the boundaries. These criteria are known as the states' 'long-arm statutes'[30] which must also adhere to the Due Process Clause of the Fourteenth Amendment of the U.S Constitution. This principle allows the US states to exercise jurisdiction over those persons who do not belong to that state but who have some kind of transaction with that state in order to exercise jurisdiction over them. The Connecticut Federal court in *Inset Systems, Inc. v. Instruction Set, Inc.*[31] confirmed advertising via the Internet to be a solicitation of a sufficient repetitive nature to satisfy [Connecticut's long-arm statute]. Second, while "substantial, continuous, and systematic" contact establishes general jurisdiction, these are rare in Internet

[28] Hanson v. Denckla 57 U.S 235 (1958), stated that there must be "some act by which the defendant purposely avails [itself] of the privilege of conducting activities with the forum state". *See also* Asahi Metal Industry Co. v. Suprerior Court, *480* U.S 102, 112 (1987). The Supreme Court in *World-Wide Volkswagen v. Woodson*, 444 U.S 286, 297 (1980), held that personal jurisdiction is subject to a test of reasonableness. The court in *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984) held that a plaintiff must show "either that the defendant's contacts with the forum are continuous and systematic, or that the suit arises out of or is related to those contacts." In *Burger King Corp. v. Rudzewicz*, 471 U.S 462, 476 (1985) it was noted that "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" towards residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. In *Cody v. Ward*, 954 F.Supp. 43 (D. Conn. 1997, "purposeful availment" requirement was satisfied by the defendant's electronic contacts with the plaintiff. In *Cybersell, Inc. v. Cybersell, Inc*, 130, F. 3d 414 (9th Cir. 1997) it was observed that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the laws."

[29] Minnesota case, *supra* note 7.

[30] The long arm statutes went a step ahead of minimum contacts to analyze whether contacts were sufficient to establish purposeful availment. e.g. (a.) purposefully and successfully solicitation of business from forum state, (b.) establishment of contracts with the forum state residents, (c.) associated with other forum state related activity, (d.) substantial connection with the forum.

[31] 937 F. Supp. 161 (D.Conn. 1996).

[32] *See*, Jurisdictional *Aspects of Cybersecurities Working Group on Securities; Jurisdictional Project of the Committee on Law in Cyberspace, available at* http://www.calbar.ca.gov/ calbar /pdfs /sections/buslaw/cyberspace/cyberspacelibrary_1999-9_jurisdictional-aspects-cybersecurities.pdf for a discussion on the general and specific jurisdiction.

[33] 89 F. 3d 1257 (6th Cir. 1996). The defendant's 'contact' with the forum state was established on th

cases because online transactions typically are brief and predominantly one-time occurrences. Instead, nonsystematic contact results in specific jurisdiction, which is more common in Internet cases. On the other hand, a mere phone call, fax or other electronic communication to the forum state, is not, by itself, sufficient contact to establish personal jurisdiction.[32]

The Sixth Circuit dwelled on 'minimum contact principle with respect to the internet transactions' in *CompuServe Inc. v. Patterson*[33] and held that the defendants had "reached out" from Texas to Ohio, where the plaintiff was based and "originated and maintained" contracts with Ohio. In the case of *The League Against Racism and Antisemitism (LICRA) and the French Union of Jewish Students v. Yahoo! Inc., California and Yahoo! France Inc.* the Court held "France is within its rights as a sovereign nation to enact hate speech laws against the distribution of Nazi propaganda in response to its terrible experience with Nazi forces during World War II. Similarly, LICRA and UEJF are within their rights to bring suit in France against Yahoo! for violation of French speech law". "...[A]ny possible difficulties in executing our decision in the territory of the United States...cannot by themselves justify a plea of incompetence". The courts in *Intercon. Inc. v. Bell Atlantic Internet Solutions, Inc.*[34] went further to consider that personal jurisdiction existed for an Internet Company that does not properly route its electronic messages.

grounds that (a.) the defendant had 'purposefully availed' himself of the privilege of doing business in Ohio by subscribing to CompuServe and subsequently accepting online CompuServe's Shareware Registration Agreement (which contained an Ohio choice of law provision) in connection with his sale of shareware programmes on the service, as well as by repeatedly uploading shareware programmes to CompuServe's computers and using CompuServe's e-mail system to correspond with CompuServe regarding the subject matter of the lawsuit; (b.) CompuServe's system was located in Ohio; (c.) the cause of action arose from Patterson's activities in Ohio because he marketed his shareware through CompuServe; and (d.) he should have reasonably expected disputes with CompuServe to yield lawsuits in Ohio. Similarly in *EDIAS Software International v. BASIS International Ltd.* 947 F. Supp. 413 (1996), the court upheld the personal jurisdiction over the defendant, as the online activities had sufficiently been supported by offline activities, like sale of the goods and visits.

[34] 205 F.3d 1244 (10th Cir. 2000). The Court of Appeals found sufficient contacts to warrant exercising personal jurisdiction over the defendant. "After receiving notice of the routing error, defendant knew its conduct over the next four months was causing injury in Oklahoma, and it should reasonably have expected to be sued there."

[35] 456 U.S 783 (1984).

[36] In order to have personal jurisdiction, there must be — (a.) intentional actions (b.) expressly aimed at the forum state (c.) causing harm, the brunt of which the defendant knows is suffered or likely to be suffered in the forum state....What separates the "effects test" from other personal jurisdiction approaches is that the focus is on the "knowledge" or "likelihood" of causing harm in the forum state. *See* Sharma *supra* note 5.

[37] 938 F. Supp. 616 (C.D. Cal. 1996). It reasoned that "Toeppen allegedly registered Panavision's trademarks as domain names with the knowledge that the name belonged to Panavision and with the intent to interfere with Panavision's business. Toeppen expressly aimed his conduct at California", which is Panavision's principal place of business. In *PurCo Fleet Services, Inc. v. Towers*, 38 F.Supp.2d 1320 (D. Utah 1999), the court was satisfied that the effects test was satisfied. Defendant registered domain name corresponding to plaintiff's trademark, and set up website that forwarded mailing list with information about the defendant's products or services; (v) whether the website provides information about the defendant's specific commercial activities in the forum in which it is sought to be defendant will sell merchandise; (vi) the level sued; (vii) whether there have been interactions or sales through the website with residents of the forum in which the action is brought; (viii) the likely market for the products or services being sold; (ix) the

Another criterion that has been accepted by the courts to settle the jurisdictional issue has been the 'effects test'. Jurisdiction is grounded in the fact that there arises an injurious effect, although neither the act nor omission itself occurred in the territory of the State. The test originated in *Calder v. Jones.*[35] In the instant case the court reasoned that the defendants had engaged in "intentional, and allegedly tortuous, actions [that were] expressly aimed at California," and that "they knew that the brunt of the injury would be felt" by the plaintiff in California. The 'effects test'[36] takes into consideration the effect that "out-of-state" conduct has in the forum state. The California court in *Panavision Int'l, L.P. v. Toeppen*[37] held that jurisdiction was "proper because Toeppen's out-of-state conduct was intended to, and did, result in harmful effects in California." The Sixth Circuit in Tennessee's *United States v. Thomas*,[38] while determining their jurisdiction concluded that the defendants knew the jurisdiction in which their files were being accessed, and the downloading could not occur without their approval.

The U.S Courts have developed the 'sliding scale approach'[39] based on the different uses to which businesses put their websites and on the level of interactivity. According to the court that originally developed the scale in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[40] "The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." The sliding scale has become the standard by which courts determine if a business has minimum contacts or "does or transacts business within the state" where the court is located.

The courts use a "sliding scale" approach that divides Internet activities into three categories for the purpose of jurisdictional analysis:

1. *Active Internet Business.* — Where there are repeated and purposeful actions such as initiating and continuing contracting, marketing, and distribution activities over the Internet with a business based in a particular state, the combination of such contacts satisfies the "transacting business" requirement. Thus, a firm that advertises and sells products uses e-mail communications for sales orders, and provides an on-line news service into a state subjects the e-commerce business to jurisdiction there.[41]

market visitors to its own site).

[38] 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996).

[39] Factors that have been found to be relevant to the "sliding scale" analysis include the following: (i) whether the defendant makes sales in the jurisdiction; (ii) whether the defendant maintains a toll-free telephone number that is advertised on the website and is accessible from the jurisdiction; (iii) whether the website includes a disclaimer as to the areas in which the of interactivity permitted by the website; (iv) whether the website permits a visitor to the site to sign up for an interactive "which the website itself explicitly or implicitly indicates it is targeting; (x) whether the website permits orders to be placed on-line; and (xi) whether the defendant has otherwise marketed its services in the jurisdiction. Simon Johnson et al., *Internet Activity and Jurisdiction over Foreign Defendants, available at* http:www.dunn.com/papers/paper_3.shtml.

[40] 957 F.Supp. 1119 (W.D.Pa. 1997).

[41] CompuServe case, *supra* note 33.

[42] 2000 U.S Dist. LEXIS 383 (N.D.Ill. 2000). *See also* BAGBY & MCCARTY, THE LEGAL AND REGULATORY ENVIRONMENT OF E-BUSINESS: LAW FOR THE CONVERGING ECO-UNITED STATE, (2003, Thomson).

2. *Interactive Internet Business.* — If a firm provides for only an exchange of information with residents of a state, who are without the ability to contract, and the firm has no other contact with the state in question, then that state does not have the necessary minimum contacts to support jurisdiction. The court in *Ty. Inc. Clark*[42], an English defendant who had a beaniebabiesuk.com website, accessible in the state of Illinois, provided information about order for Beanie Babies he owned that were created by the plaintiff. However, the defendant did not take orders or enter into contracts over the website. When he was sued by the plaintiff, an Illinois-based firm, the court held that defendant could not be forced to respond to a trademark infringement suit in Illinois because that court lacked personal jurisdiction over the defendant. On the other hand, in *CoolSavings.Com Inc. v. IQ. Commerce Corp.*[43], the court held that if a firm sets up an interactive website directed at the entire country, sends some representatives into the state, hires people there to help promote its technology and obtains customers from that state, the state does have jurisdiction. In *Edberg v. Neogen Corp.*[44], the courts denied existence of jurisdiction for lack interactivity, where site included both a toll-free number and a link for sending of e-mail to the defendant.

3. *Passive Internet Business.* — The Western District of Pennsylvania in *Zippo Manufacturing case*[45] distinguished between active and passive web sites and held that remote passive web sites did not accord personal jurisdiction to the forum, the court demanded deliberate action by the defendant to the forum state. The mere fact that a person gained information on the infringing product was not considered equivalent to a person advertising, promoting, selling or otherwise making an effort to target its product in New York.[46] The court in *GTE New Media Services, Inc. v. Bellsouth Corp.*,[47] concluded that if a firm's only presence in the state is a passive website, one that allows only viewing of the site's contents, the site cannot be subjected to jurisdiction merely because the site can be accessed within the state. *3D Systems, Inc. v. Aarotech Laboratories*,[48] the court applied federal circuit law to the personal jurisdiction issue in a patent infringement case that included claims based on state law. The court upheld specific jurisdiction against one defendant but not against its corporate agent, whose website was "essentially passive" under the *Cybersell* approach.

In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.

[43] 53 F. Supp. 2d 1000 (N.D.Ill. 1999).
[44] 17 F.Supp.2d 104 (D.Conn.1998).
[45] Zippo case, *supra* note 40.
[46] Bensusan Restaurant Corp. case, *supra* note 7.
[47] 199 F.3rd 1343 (D.C.Cir. 2000). In *Hearst Corporation v. Gold Berger* 1997 WL 97097, 1997 US Dist. Lexis 2065) (SDNY Feb. 26, 1997) it was noted that "[N]ew York long arm statute did not permit a federal court to exercise personal jurisdiction over an out-of-state defendant solely because defendant's website is accessible to and has been electronically accessed by computer users in New York".
[48] 160 F.3d 1373 (Fed. Cir. 1998).
[49] 1990 O.J. (C 189) 2 (consolidated). This new regulation is an update of a 1968 treaty among European countries, known as the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. *See* Sharma, *supra* note 5.

B. The European Union

The European Approach to meet the jurisdictional challenges is far different from the American approach. The rules determining which country's courts have jurisdiction over a defendant are set out in a regulation issued by the Council of the European Union (EU), known as the Brussels Regulation.[49] The Brussels Convention (Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 16, 1968) on jurisdiction for intra-European disputes looks at various forms of contract between defendants and the state asserting jurisdiction. In the internet context, defendants have generally claimed that a remote forum is precluded from jurisdiction because the contacts are only established through a server that is not within the forum.

The Brussels Regulation has become the established law to resolve disputes concerning jurisdiction and enforcement of foreign court's judgments in civil and commercial matters. However, it neither extends to revenue, customs or administrative matters, nor to a variety of specifically excluded subject-matter. The general rule under Article 2 of the Brussels Convention, subject to various exceptions, provides that a defendant domiciled within a Contracting State, notwithstanding his nationality, shall be sued in the Courts of that State.[50] Article 5.1 and 5.1 provides that in matters relating to contract, a person domiciled in a Contracting State may be sued by another. In contractual relationships, a person may be sued in the courts of the country where the obligation should be performed. In the case of involvement of a branch, agency or other establishment, the courts of the place where such branch, etc. is situated have jurisdiction to adjudicate the matter. In consumer disputes, the complainant is entitled to bring proceedings against a supplier of goods or services or a creditor in the state where the consumer is domiciled. Finally, an entrepreneur can only bring proceedings against a consumer in the country where the consumer is domiciled. Article 23, provides that the parties to a contract are free to agree to depart from the above mentioned Article 5.

[50] This means that an individual (including a sole trader or a partner in a business sued on his own) can be sued where his principle residence is. Article 60 provides that the domicile of a company or other association (including a partnership) is where it has its statutory seat, its central administration or its principal place of business, *available at* http://www.dti.gov.uk/ccp/topics1/guide/jurisdiction_brussels.htm. [A]rticle 17 provides that if the parties, one or more of whom is domiciled in a Contracting State are to have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.... [T]he substantive provision of Article 17 does not apply to consumer contract proceedings, for which jurisdiction is determined by Articles 13-15 except to limited jurisdiction agreements that Article 15 does permit for consumer disputes, even though not expressly stated to do so. *See* Smith, *supra* note 2.
[51] [T]he trader "pursues commercial...activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State...". Article 13 of the Brussels Convention states that the consumer may bring proceedings in his own court against a trader if "in the state of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising". For a discussion on the concept of 'directed activities' and the proposed development by the UK Department of Trade and Industry (DTI). *See* Sharma, *supra* note 5, at 275.

As websites are generally accessible from anywhere, thus a trader with a website might be said to be directing its activities to all EU countries such as in case of a dispute. The scope of trader's liability has been broadened under Article 15[51] as the consumer has a right to take legal action in his or her home country. Any judgment given there would be enforceable in the trader's own country. Regarding commercial matters, the Brussels Convention can be said to provide ideal solutions for jurisdictional issues when it comes to electronic commerce, especially in cases when the products are delivered over the Internet i.e., digital product. If the website provides information in the 'countries specific language' and offers goods and services in such currency, then it may fulfill the criteria of "specific invitation". In such a case a website is to be seen as the one being 'directed' at that specific country and the consumer can bring proceedings against the trader in their specific (home) country. For example, a website giving information in French and quoting prices in francs, cannot be said to be 'directed' towards the UK consumers. As far as the applicable law is concerned, the courts within the EU apply the Rome Convention even where the applicable law is that of a third country or the parties are not resident or established in the European Union.[52]

In order to resolve cross border consumer contractual disputes, the determination as which state's substantive law shall be applicable the EU Member States are signatories to the Rome Convention (EC Convention on the Law Applicable to Contractual Obligations of June 19, 1980), 1980. It provides for party autonomy. The choice need not necessarily be in writing, but it must be expressed with reasonable certainty by the terms of the contract or the circumstances of the case. Thus, this requirement has to be interpreted in different Internet environments.[53] In the absence of choice of law, the Rome Convention expresses the principle that the law of the state with which the contract is most closely connected shall govern the contract.

C. India

In absence of specific laws, jurisdiction to govern Internet transactions is determined on the basis of (1.) Forum of Choice (2.) Code of Civil Procedure, 1908 (CPC), (3.) Choice of Law and (4.) The Information Technology Act, 2000.

1. *Jurisdiction based on the Forum of Choice.* — It is well settled that if the court has no inherent jurisdiction, neither acquiescence nor waiver nor estoppel can create it.[54] Where two or more courts have jurisdiction to try a particular suit, parties may by an agreement between them select one of such forum and exclude the other.[55]

[52]Sharma, *supra* note 5, at 276-277.

[53] Article 3 further states that "the 'mandatory rules' of the consumer's country of habitual residence will always apply whatever choice of law is made".

[54] A defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. *See* Chiranjilal v. Jasjit Singh, (1993) 2 SCC 507; Sushil Kumar v. Gobind Ram, (1990) 1 SCC 193 (205).

[55] [S]uch an agreement is not contrary to public policy...does not contravene Section 28 of the Contract Act. *See* Hakam Singh v. Gammon (India) Ltd. (1971) 1 SCC 286. Similar proposition was propounded in *New Moga Transport Co. v. United India Insurance Co. Ltd.*, (2004) 4 SCC 677.

[56] *See supra* note 32.

[57] *Infra* note 62, 63, 64.

[58] Code of Civil Procedure, 1908, § 9; *P.M.A Metropolitan v. M.M. Marthoma*, A.I.R 1995 SC 2001

Therefore, courts will ordinarily compel parties to abide by these agreements which are legal, valid and enforceable. The court in India can adjudicate upon a suit if it finds that the balance of convenience, interests of justice and the circumstances of the case warrant trial in India.[56] The foreign judgments, subject to certain exceptions, are given binding character under Section 13 of the Code of Civil Procedure, 1908.[57]

2. *Jurisdiction determined under the Code of Civil Procedure, 1908.* — In civil matters the courts have jurisdiction pursuant to the Code of Civil Procedure, 1908 to try a suit if two conditions are fulfilled (a.) the suit must be of a civil nature; and (b.) the cognizance of such a suit should not have been expressly or impliedly barred.[58]

Where only one court has a jurisdiction, it is said to have exclusive jurisdiction. Where more courts than one have jurisdiction over a subject matter, they are called courts of available or natural jurisdiction. To establish whether the jurisdiction of the courts is exclusive or non-exclusive, in the Internet setting, one must involve the jurisdictional principles as under the Code of Civil Procedue, 1908 (a.) pecuniary (b.) subject-matter (c.) territory and (d.) cause of action.[59] The suit shall be instituted in a court within the local limits of whose jurisdiction the 'cause of action', whether wholly or partly, arises.[60] It does not take into consideration 'due process' or 'minimum contact principles'. Therefore, a mere access to a website would suffice for a court to assume jurisdiction. However, the judicial pronouncements prove that legal approach is to look beyond mere access to a website and take into account the effect, the access would have, within the forum state. [61]

([T]he expansive nature of the Section is demonstrated by use of phraseology both positive and negative.); *Vankamamidi Venkata Subba Rao v. Chatlapalli Seetharamaratna Ranganayakamma*, (1997) 5 SCC 460 ([T]he rule of construction being that every presumption would be made in favour of the existence of right and remedy in a democratic set-up governed by rule of law and the jurisdiction of the civil courts is assumed.); *also in Sankaranarayana Potti v. K. Sreedevi* (1998) 3 SCC 751; *State of A.P. v. Manjeti Laxmi Kantha Rao*, (2000) 3 SCC 689 ([S]uch exclusion is not readily inferred and the presumption to be drawn must be in favour of the existence rather than exclusion of jurisdiction of civil courts to try the suit.); *Dhruv Green Field Ltd v. Hukam Singh*, (2002) 6 SCC 416 ([T]he jurisdiction of the courts to try all suits of civil nature is very expansive...because of the principle *ubi jus ibi remedium*. The general principle is that a statute excluding the jurisdiction of civil courts should be construed strictly.); *Sahebgouba v. Ogeppa* (2003) 6 SCC 151 ([O]nus lies on the party seeking to oust the jurisdiction to establish his right to do so.).

[59] For Jurisdiction of Civil Court *see generally* C.K THAKER, CIVIL PROCEDURE (5th ed., Eastern Book Company). *See also* M. P JAIN, THE CODE OF CIVIL PROCEDURE-SUPREME COURT REFERENCE BOOK (Wadhwa).

[60] Code of Civil Procedure, 1908, § 20.

[61] *Oil and Natural Gas Commission v. Utpal Kumar Basu and Other*, (1994) 4 SCC 711 ([M]erely because it read the advertisement at Calcutta and submitted the offer from Calcutta and made representations from Calcutta would not in our opinion, constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax messages from Calcutta and received a reply thereto at Calcutta, would not constitute an integral part of the cause of action).

[62] Code of Civil Procedure, 1908, Section 2(6) defines 'Foreign Judgment' as a judgment of a foreign court.

[63] (2001) 7 SCC 728; *Roshanlal v. Mohan Singh* (1975) 4 SCC 628 ([T]he court cannot go into the merits of the original claim and it shall be conclusive as to any matter thereby directly adjudicated upon between the same parties subject to the exception enumerated in clauses (a) of (f) of Section 13).

[64] A foreign judgment which is conclusive under Section 13 of the Code of Civil Procedure, 1908 can be enforced in India in the following ways: (a.) by instituting a suit on such foreign judgment, or (b.) by instituting execution proceedings.

[65] For a detailed discussion on Foreign Judgments *see generally* THAKER *supra* note 59 Narasimha Rao

Clause (a) to (f) of Section 13 of the Code of Civil Procedure, 1908 provide as to conclusiveness of a foreign judgment.[62] A foreign judgment operates as *res judicata* between the parties. The Supreme Court in *Smita Conductors Ltd. v. Euro Alloys Ltd.*[63], observed that a foreign award cannot be recognized or enforced[64] if it is contrary to (a.) fundamental policy of Indian law; or (b.) the interests of India; or (c.) justice or morality. Section 14 of the Code declares that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record, or is proved. However, if for admissibility of such copy any further condition is required to be fulfilled, it can be admitted in evidence only if that condition is satisfied.[65]

3. *Choice of Law.* — Courts apply the choice of law rules to determine 'what law should be applied'. Under private international law the characterization may be done either to apply the law of the forum (*lex fori*), or to apply the law of the site of the occurrence that gave rise to the litigation in the first place (*lex loci*).[66] The modern theory of conflict of laws recognizes the 'proper law of a contract'[67] and to the true intention of the parties to govern the contracts[68].

4. *The Information Technology Act, 2000.*[69] — In May 2000, at the height of the dot-com boom, India enacted the Information Technology Act, 2000 to regulate the activities in the cyberspace. This Act shall apply to the whole of India and to any offence or contravention committed outside India by any person.[70] It is further explained that such an act or conduct would constitute an offence or contravention if it involves a computer, computer system or computer network located in India.[71] Hence, as far as the criminal law is concerned, the Indian courts exercise jurisdiction, endorsing the 'effect theory'. The only international treaty on this subject is the Council of Europe's Convention on Cyber Crime[72] formulated primarily by the European Union. India is not yet a part of this group.

v. Venkata Lakshmi (1991) 3 SCC 451 (463-64). ([M]ere production of a Photostat copy of a decree of a foreign court is not sufficient. It is required to be certified by a representative of the Central Government in America..

[66] *See generally* PARAS DIWAN, PRIVATE INTERNATIONAL LAW-INDIA AND ENGLISH, (Deep & Deep Publications).

[67] National Thermal Power Corporation v. The Singer Company, A.I.R 1993 SC 998.

[68] British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries, (1990) 3 SCC 481 (True intention of the parties, in the absence of express selection, has to be discovered by applying "sound ideas of business, convenience and sense to the language of the contract itself".). The express choice of law made by parties obviates need for interpretation. The chosen court may be a court in the country of one or both parties, or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a particular country, or to a court identified by a formula in a printed standard form, such a bill of lading referring disputes to the courts of the carrier's principal place of business... If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.

[69] Information Technology Act, 2000

[70] *Id.* § 1(2).

[71] *Id.* § 72 (2)

[72] Convention on Cyber Crime, *supra* note 17.

[73] CHRISTOPHER HEALTH, INTELLECTUAL PROPERTY IN THE DIGITAL AGE: CHALLENGES FOR ASIA, IEEM CONFERENCE SERIES (2001, KL. L. INT'L).

IV. CONCLUSION

Individual electrons can easily, and without any realistic prospect of detection, "enter" into various sovereign territories. The belief that we stand on the threshold of a new stage of human existence, best described as an information society or the information age[73] is accompanied by the desire to meet the arising challenges in the most cordial and efficient way. The rapid growth of the group known as "cyberspace" users should simultaneously be accompanied by a growth of regulation.

Though David Johnson and David Post[74] argue that territorial regulation of online activities neither serves the legitimacy nor the notice justifications and that cyberspace requires a system of rules quite different from the laws that regulate geographically defined territories. They further contend that cyberspace challenges the law's traditional reliance on territorial borders as it is a "space" bounded by screens and passwords rather than physical markers. However, Dan Farber's[75] criticizes the view held by Professor Johnson and Post. Faber offered three perspectives on legislative jurisdiction — a localist, a globalist, and evolutionary. He believed in the link between the first two. According to him a localist looked for strong links with stuff that happens in local space before he claims an authority to regulate beyond the borders. However, a globalist insisted that regulations should reach anything that affects us. Hence, he staunchly believed that Professor Johnson and Post had mixed the two perspectives and that the picture of the cyberspace as presented to be both global and local was untrue. It seems existing concepts of jurisdiction may not always be a perfect fit for the online environment. Does that mean that there should be a separate jurisdiction for the Internet?

The answer at this stage of internet development would require a mix of existing concepts coupled with innovative, new technology solutions and self-regulatory initiatives. Any solution will have to meet the legitimate concerns of consumers and governments while being flexible enough so as not to hinder the continuing evolution of the Internet and electronic commerce. Alternate Dispute Resolution mechanisms may play a substantial role in resolving Internet-related disputes.

[74] JOHNSON ET AL., *supra* note 5. An analogy to the rise of a separate law of Cyberspace with the new legal system — *Lex Mercatoria* (Law of Merchant) has been drawn in the book..

[75] Daniel A. Faner, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48. STAN. L. REV. 1247, 1248 (1996).

RIGHT TO PRIVACY: AN INDIAN VIS-À-VIS OTHER LEGAL SYSTEMS PERSPECTIVE

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I. INTRODUCTION

Right to privacy is a person's right to be left alone by the government.... the right most valued by civilized men".[1] This statement defining privacy way back in 1890 recognised it as a right to be left alone by the government, but in today's world can 'right to privacy' be confined to such a narrow sphere? Answer is definitely no, the 'right to privacy' from its traditional aspect has grown to encompass whole new aspects, from a seed it has developed into a whole grown tree, on which every now and then new branches are stemming. Now privacy is defined as to mean the ability of a person to control the availability of information about exposure of himself. It is related to being able to function in society anonymously (including pseudonymous or confidential information). Seeing the growth of right to privacy, it would not be wrong to say that even being asked to define your privacy boundaries can be an invasion of your privacy. By naming areas of your life that you wish to have kept private, you are in essence calling attention to some areas over others and revealing something about yourself that you might prefer not to reveal. Even international instruments like Universal Declaration of Human Rights, 1946[2] and International Covenant on Civil and Political Rights, 1966[3] have explicitly recognised the 'right to privacy'. This article tries to highlight the growth of different facets of privacy in different legal systems all over the world and then analyzes where the Indian Law on privacy stands vis-à-vis other legal systems of the world.

II. ASPECTS OF PRIVACY

Right to privacy, other than the right to be left alone from interference by government agencies, also includes the right to financial privacy, privacy over internet, workplace privacy, medical privacy, marital and sexual privacy, data privacy, privacy from unsolicited calls, children's right to privacy, privacy in torts, privacy from press, etc., many of which may be considered to be offshoots of personal information privacy. Some of these aspects are discussed hereinafter.

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[1] Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[2] Article 12 provides, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

[3] Article 17 provides, "No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and everyone has the right to the protection of the law against such interference or attacks".

A new branch under right to privacy is the right to Financial Privacy. Many financial institutions collect information about their customers as a regular part of their business of providing products or services. For instance, when you apply for a loan, you provide your name, phone number, address, income and details about your assets. When the institution is considering your application, it may collect additional details from other sources, such as credit reports prepared by credit bureaus. And as you use a financial product – a credit card, for example, your institution will have a record of how much you buy and borrow, where you like to shop and whether you repay your balance in time.[4] Some financial institutions share this information with other entities – including completely unaffiliated companies such as retailers, telemarketers, airlines and non-profit organizations to help them target consumers who might be interested in their products or programmes. This gives rise to consumer's right to financial privacy.

Apropos Internet Privacy, it is submitted that advancement in technology at a supersonic speed and the advent of internet and World Wide Web has definitely revolutionized the way we gather information. Instead of sitting in libraries and collecting materials over several months, now just with a click of a button, whole information is at our command. No doubt internet and new technologies are a boon to us and our coming generations, but as the saying goes, howsoever beautiful a rose may be it is never without thorns or howsoever tall a tree may be it can never touch the skies. These two sayings clearly reveal the status of privacy rights in the world of internet and technology. There exists inexpensive and ready access to an ever growing pool of personal information on internet making it possible for even the smallest of business to collect and analyze detailed information about identifiable individuals almost anywhere in the world.[5] Websites collect much personal information both explicitly, through registration forms, survey forms, order forms and online contests, and by using software in ways that are not obvious to online consumers, that is, through cookies and hacking software. Website owners are also able to follow consumers' online activities and gather information about their personal preference and interests[6], thereby denying a person his basic human desire to secure identity. In order to maintain privacy of personal information, one must be informed about and control each of these three distinct protections[7] – privacy[8], confidentiality[9] and security[10], but courtesy internet and technology all these are at the risk of infringement any moment and that too by any person howsoever far or near the person concerned may be.

Workplace Privacy involves issues such as, does an employer have the right to search an employee's computer files or review the employee's electronic mail?[11] Does an employer have a right to refuse to hire or to discharge any individual, that is, terminate employment, or otherwise disadvantage any person because he or she uses alcohol and/or tobacco away from the job site on non-working time ? Alternatively, can it be

[4] *FDIC Consumers News-Winter* 2000/2001, *available at* www.fdic.gov/consumers/consumer/news/cnwin0001/newrights.html.

[5] Oishik Sircar, *Privacy on the Internet: A Legal Perspective*, *available at* www.asianlaws.org/projects/privacy_internet.htm.

[6] *Id.*

[7] Don Goldhamer, *Computer Professionals for Social Responsibility*, *available at* www.cpsr.org.

[8] When and with whom, you share your personal information?

[9] When and with whom, another person or organization shares your personal information?

[10] How well your information is protected from unauthorised access, alteration or destruction?

said that employees have no right to privacy at workplace as e-mail is monitored to keep tabs on employees' productivity or to prevent potential liability for the employer that employers are concerned with productivity and efficiency of the employees and would not welcome usage of company equipment and company time spent on non-productive activity. Moreover, the liability of employer becomes even more serious when emails contain racist, sexist or sexually explicit messages that can expose employers to potential liability from other employees based on 'holistic work environment' claims.[12]

Individual health care information, once entrusted only to one's physicians or close family members, has now become routinely available to a much broader audience with the arrival of digital age[13] and this brings in the question of Medical Privacy. Various electronic forms of medical records have existed in western countries, but mostly in an unintegrated fashion. This lack of integration has in a large part facilitated the violation of privacy.[14] Breaches or potential breaches of confidentiality in the context of therapy seriously jeopardize the quality of the information communicated between patient and doctor and also compromise the mutual trust and confidence necessary for effective therapy to occur.[15] On the other hand, a person's right to privacy is not absolute. Situations in which the patient has a specific incapacity, the patient has become a danger to himself or others, the public good is at stake, or a serious injustice might occur were relevant, significant information may not be withheld.[16]

III. PRIVACY IN OTHER LEGAL SYSTEMS

A. India

Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution of India relating to the Fundamental Rights read with the Directive Principles of State Policy. It was in this context that it was held by the Supreme Court in *Kharak Singh v. State of U.P.*[17] that police surveillance of a person by domiciliary visits would be violative of Article 21 of the Constitution. In *R. Rajagopal v. State of Tamil Nadu*[18], the right of privacy vis-à-vis the right of the press under Article 19 of the Constitution was considered and it was laid down, "the right to privacy is implicit in the right to life and liberty granted to the citizens of this country by Article 21. A citizen has a right to the privacy of his own, his family, marriage procreation, motherhood, childbearing and education among other matters. None can publish

[11] Lloyd L. Rich, *Right to Privacy in the Workplace in the Information Age, available at* www.publaw.com/privacy.com.
[12] *India: Look Out! You're Being Watched At Work-E-Mail Monitoring And The Law Of Privacy, available at,* www.wikipedia.com/privacy1.html.
[13] Philip Beck, *Privacy in the Digital Age*, CPA Bulletin 48 (1999).
[14] *Data Privacy, available at* www.wikipedia.com/privacy.
[15] Philip Beck, *The Confidentiality of Psychiatric Records and the Patient's Right to Privacy, available at* www.tortcpa-ape.org/publications/position_papers/records.asp.
[16] *See* H. KAPLAN & B. SADOCK, SYNOPSIS OF PSYCHIATRY (8th ed., Baltimore).
[17] AIR 1963 SC 1295.
[18] (1994) 6 SCC 632.

anything concerning the above matters without his consent – whether truthful or otherwise and whether laudatory or critical". Again, in *People's Union for Civil Liberties v. Union of India*[19], it was held that right to privacy would certainly include telephone conversation in the privacy of one's home or office and that telephone tapping infringed Article 21 of the Constitution unless it is permitted under the procedure established by law. In this case the court also recognized the employee's right to privacy by holding that 'technological eavesdropping' is a violation of the right to privacy.

However, right to privacy in terms of Article 21 is not an absolute right. In the landmark case of *Govind v. State of Madhya Pradesh*[20], the Supreme Court held, "Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest". In *X v. Z Hospital*[21], the court held that right to privacy is not absolute and may be lawfully restricted for the prevention of crimes, disorder or protection of health on morale or prediction of rights and freedom of others. The court agreed that in the doctor-patient relationship, the most important aspect is the doctor's duty of monitoring secrecy and that the doctor cannot disclose to a person any information regarding his patient which he has gathered in the course of treatment nor can the doctor disclose to anyone else the mode of treatment or the advice given by him to the patient but where the patient has been found to be HIV(+), its disclosure to the lady with whom the patient was likely to get married would not be violative of either the rule of confidentiality or the appellant's right of privacy as the above mentioned lady was saved in time by such disclosure, or else she too would have been infected with the dreadful disease if the marriage had taken place and consummated. In *M. Vijaya v. The Chairman, Singreni Collieries and Others*[22], the Supreme Court upon a detailed discussion of the competing rights of a private party and public right with reference to right to privacy of a person suspected of suffering from AIDS held, "there is an apparent conflict between the right of privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the state to identify HIV infected persons for the purposes of stopping further transmission of the virus. In the interest of the general public, it is necessary for the State to identify HIV positive cases and any action taken in that regard cannot be termed as unconstitutional". In *Sharda v. Dharmpal*[23], where the issue was would subjecting a person to a medical test be a violation of Article 21, court held that some limitations on the right to privacy have to be imposed and particularly where two competing interests clash. In *Association for Civil Liberties and Another v. Union of India*[24] while rejecting the respondent's contention that right to information made available to voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouses invades his/her right to privacy which

[19] AIR 1997 SC 84.
[20] (1975) 2 SCC 148.
[21] AIR 1999 SC 495.
[22] AIR 2001 AP 502.
[23] (2003) 1 SCW 1950.
[24] AIR 2003 SC 90.

is implied in Article 21, the court held, "By calling upon the candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/ citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest".

As regards Internet Privacy, there is no general data protection law in India. The National Task Force on IT and Software Development submitted an "IT Action Plan" calling for the creation of a "National Policy on Information Security, Privacy and Data Protection Act for handling of computerized data." It examined the United Kingdom Data Protection Act as a model and recommended several cyber laws including ones on privacy and encryption[25]. In May of 2000, the government passed the Information Technology Act, a set of laws intended to provide a comprehensive regulatory environment for electronic commerce[26]. The Act addresses computer crime, hacking, damage to computer source code, break of confidentiality and viewing of pornography. The legislation gives broad discretion to law enforcement authorities through several provisions. Section 69 allows for interception of any information transmitted through a computer resource and requires that users disclose encryption keys or face a jail sentence up to seven years. Following the enactment of the IT Act the Ministry of Information Technology adopted the Information Technology (Certifying Authorities) Rules in October 2000 to regulate the application of digital signatures and to provide guidelines for Certifying Authorities[27]. In February 2003, India convicted its first cyber-criminal when a Delhi High Court sentenced Arif Azim on the charges of online cheating. In the said case, Arif Azim, while working for a call centre near Delhi stole the credit card information that belonged to an American citizen and used it to order a color television and a cordless hand phone. This case has highlighted the security and privacy risks for companies to outsource some of their processing operations in India where there is a lack of a clear privacy legal framework. The Indian government is definitely considering the idea of enacting a detailed law on data protection under the initiative of the Ministry of Communication and Information Technology[28].

B. United States of America

Right to privacy is an intrinsic American value[29]. Although the United States Constitution does not explicitly refer to "privacy", the United States Supreme Court has nonetheless inferred a right to privacy from various portions of the Bill of Rights and the Common Law. An article[30] written in 1890 by Supreme Court Justices Warren and Brandeis and entitled "The Right to Privacy" is often cited as the first implicit declaration of a US right to privacy. In the 1891 case of *Union Pacific Railway Co. v. Botsford*[31],

[25] National Task Force on IT & SD, *Basic Background Report*, June 9, 1998, *available at* http://it-taskforce.nic.in/it-taskforce/bg.htm.
[26] Information Technology Act 2000, No. 21 of 2000, *available at* www.mit.gov.in/it-bill.htm.
[27] Information Technology (Certifying Authorities) Rules, 2000, *available at* http://www.mit.gov.in/rules/rulesfinal.htm.
[28] www.hindustantimes.com/news/181_156334.0008.htm.
[29] *Constitutional Origin of the Right to Privacy*, *available at* www.ala.org/ala/washoff/oitp.htm.
[30] WARREN ET AL., *supra* note 1.

the Supreme Court outlined the right to bodily integrity and linked it to the right to privacy. Subsequently, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*[32], the Supreme Court recognized a right to privacy and invalidated a law which required all children between the age of eight and sixteen to attend public schools calling it an interference with the liberty of parents and guardians to direct the upbringing and education of children under their control. These cases, stretching over a period of seventy years, set the stage for the landmark 1965 decision in *Griswold v. Connecticut*[33] which is the first Supreme Court decision to fully articulate the right to privacy. The court held that right to privacy included the right for married couples to use contraceptives and invalidated a Connecticut law criminalizing the use of contraceptives as violative of right to marital privacy. The Court inferred a right to privacy from the guarantees contained in the First, Third, Fourth, Ninth, Tenth and the Fourteenth Amendments. A later case, *Eisenstadt v. Baird*[34] established the right of unmarried people to contraception. Privacy arguments also arose in the later, much more controversial *Roe v. Wade*[35]. Roe v. Wade was the landmark Supreme Court decision which established that laws against abortion violate a constitutional right to privacy, overturning more than hundred years of judicial precedent. The decision in Roe v. Wade has been a cause of decades-long debate over legality of abortion and role of religious views in the political sphere among others. Resultantly Roe Iv. Wade has been challenged in various subsequent cases. In a 5:4 decision in *Webster v. Reproductive Health Services*[36], Supreme Court declined to explicitly overrule Roe *v.* Wade, but did uphold several abortion restrictions. The Supreme Court, however, in *Planned Parenthood v. Casey*[37] re-examined Roe and explicitly upheld its validity. More recently, in *Lawrence v. Texas*[38], the Supreme Court held that a Texas law prohibiting homosexual sodomy violated the liberty under the Fourteenth Amendment of adults to engage in private intimate conduct. Apart from the above mentioned cases which highlight the growth of the right to privacy primarily through the prism of reproductive rights of women, there have also been cases in other fields such as data privacy amongst others which have had a role to play in the development of right to privacy. Taking a queue from the judiciary, United States Legislature has also enacted various privacy legislations *inter alia*, Privacy Act 1974, Code of Information Practices 1973, Electronic Communication Privacy Act 1986.

As regards Financial Privacy, Gramm-Leach-Bliley Financial Services Modernization Act, 1999 contains the relevant provisions. It requires each financial institution to tell its customers about the kinds of information it collects and types of businesses that may be provided that information. This disclosure is called the privacy notice and is intended to help customers decide whether they are comfortable with that information-sharing arrangement. The Act provides that if the financial institution in-

[31] 141 US 250 (1891).
[32] 268 US 510 (1925).
[33] 381 US 479 (1965).
[34] 405 US 438 (1973).
[35] 410 US 113 (1973).
[36] 492 US 490 (1989).
[37] 505 US 833 (1992).
[38] 539 US 558 (2003).

tends to share your information with anyone outside its corporate family, it must give one the chance to "opt out" or say "no" to information sharing under certain circumstances. Even consumers who are not technically customers[39] of financial institutions will have the right to opt out of information sharing with outside companies. Further, the Act requires that financial institutions should describe how they will protect the confidentiality and security of one's information. On the question of what kind of information can one stop an institution from sharing, the Act provides that one cannot ban an institution from providing personal information to outside companies and organizations in certain circumstances[40], this is in accordance with an earlier US law called Fair Credit Reporting Act, which gives one limited rights to stop selected information-sharing with affiliates and also provides that an institution has a right to give an affiliate any information obtained from your transactions with that institution.[41] Pursuant to the enactment of Federal Law in financial privacy[42], in 2003 California enacted the California Financial Information Privacy Act, commonly known as 'SB1'. It provides the strongest financial privacy protection in the nation.[43]. This Act was challenged in the case of *ABA v. Lockyer*[44], questioning the constitutional validity of the "opt out" provision for affiliate sharing. The court, however, held otherwise, stating that the federal Gramm-Leach-Bliley Financial Services Modernization Act, 1999 allows states to erect strong financial privacy protection.

As regards Internet Privacy, as the information privacy of individuals became increasingly threatened by the heightened use of computers by the government, the Congress enacted statutes to provide individuals control of some amount of privacy with regard to the internet. The two federal statutes involved are the Freedom of Information Act and the Privacy Act, 1974. These two statutes give individuals the power to preclude government from invading their privacy through misusing personal information.[45] Under the Freedom of Information Act, every American has the right to look at any government records unless the disclosure of a record would warrant an "invasion of personal privacy."[46] Ironically, the Act simultaneously creates a tension between public's right to know and an individual's right to privacy[47] as the Act permits that files may be available to "any person". The Privacy Act of 1974 was implemented

[39] For instance, former customers or people who unsuccessfully applied for a loan or a credit card.

[40] That is to say, the information needed to help conduct normal business, information needed to protect against fraud or unauthorised transaction, or is provided in response to a court order, also if institution reasonably believes the information is 'publicly available' and lastly if information is used as a part of 'joint marketing agreement'.

[41] For instance, banks can give an affiliated insurance company details about one's deposit account, as this would be useful information if insurer wants to offer you an annuity as an investment when one of your CDs is about to mature.

[42] Gramm-Leach-Bliley Financial Services Modernization Act, 1999.

[43] It allows customer to 'opt-out' if information-sharing practice between affiliated institutions, companies that have common ownership, and also bars financial institutions from sharing information about consumers with non-affiliated third parties unless an individual gives his or her express "opt in" consent.

[44] Case No. S-04-0778 MCE KJM, United States Court of Appeals for the Ninth Circuit, *available at* www.epic.org/privacy/preemptions/lockyer_brief.html.

[45] James M. Alkinson, *Right to Privacy in the Age of Telecommunication, available at* www.tsem.com/full_text.html.

[46] FREEDMAN, THE RIGHT OF PRIVACY IN THE COMPUTER AGE, 18 (1987, Quorum Books).

[47] *Id.*

"to provide certain safeguards for an individual against an invasion of privacy."[48] The "Code of Fair Information Practice" was recommended by an advisory committee of the Secretary of the Department of Health, Education and Welfare in a report called Records, Computer, and the Rights of Citizens in 1973.[49] The code served as the model in constructing the Privacy Act giving five major principles. Notwithstanding the efforts by the Congress to protest privacy by enacting the Privacy Act, the Office of Technology Assessment in 1986 concluded that much of the protection from the Privacy Act of 1974 has been eroded by computer matching, front-end verification, and computer profiling.

With respect to Workplace Privacy, Electronic Communications Privacy Act, 1986 prohibits the "intentional or wilful interception, accession, disclosure or use of one's electronic communication". However, the Act is combined by three exceptions that limit its applicability to employee monitoring[50], they being, provider exception[51], ordinary course of business exception[52] and consent exception[53]. Statutory law have purported to protect a government employees workplace privacy, however, the reality of case law is that the protection afforded to public employees for work related search and seizure is minimal.[54] In case of *Smyth v. Pillsbury*[55], a Federal District Court in Pennsylvania upheld the employer's termination of an employee, based on a review of intercepted mail transmitted over the company system and held that the review was not a violation of the employee's right to privacy. In *O'Connor v. Ortega*[56], Court held that the reasonable standard applies to supervisory searches of public employees. Therefore, a public employee has a reasonable expectation of privacy, but it is a qualified one that is subject to the "operational realities" of the workplace. Further, in *Schowengerdt v. General Dynamics Corp.*[57], Court followed Ortega and further weakened and possibly practically eliminated, an employee's right to privacy in the computerized workplace.[58] In *Blakey v. Continental Airlines*[59], while rejecting the employee's right to privacy, court upheld the employer's contention that postings on a work-related electronic board could have serious ramifications on the employer's liability and thus allowed the interception of e-mails. Congress introduced legislation in 1993 named Privacy for Consumers and Workers Act to extend the applicability of Electronic Communications Privacy Act, 1986 to private employers. Further development in the field of workplace privacy is the enactment of Right to Privacy in the Workplace Act, Illinois[60] section 5 of which prohibits any employer to refuse to hire or to discharge any indi-

[48] Privacy Act , 1974, § 2(b).

[49] MICHAEL RUBIN, PRIVATE RIGHTS, PUBLIC WRONGS: THE COMPUTER AND PERSONAL PRIVACY (1988, Alex Publishing Corporation).

[50] *See supra* note 12.

[51] Where the employer provide their employees with e-mail through a company owned system.

[52] Where the employer is monitoring business-related correspondence or has a legitimate business justification for monitoring.

[53] Where the prior consent of the employee has been taken.

[54] Rich, *supra* note 11.

[55] 914 F. Supp. 97 (E.D. Pa. 1996).

[56] 480 US 709 (1987).

[57] 823 F.2d 1328 (9th Cir. 1987).

[58] Rich, *supra* note 11.

[59] 751 A.2d 538 (NJ 2000).

[60] 820 ILCS 55/1.

vidual, because the individual uses lawful products (alcohol, tobacco) in the premises of the employer during non-working hours. However, this section does not apply to the use of those lawful products which impairs an employee's ability to perform the employee's assigned duties.

As regards Medical Privacy, no comprehensive federal law currently exists to safeguard the confidentiality of personally identifiable health information. A consensus has long existed that federal health privacy law is needed. Numerous federal advisory commissions and agencies have recommended enactment of a federal health privacy law and a wide range of consumer, privacy and health care organization and providers agree[61] because personal medical information is far from private in the United States. Insurers use identifiable medical records for risk rating, employers use them for hiring and firing, health systems for quality assurance, pharmaceutical firms for marketing, banks for assessing loan risk and the government for the detection of fraud.[62] It is difficult to obtain health insurance without consenting to the release of the present and future medical data into an information market that is largely unregulated. This struggle between patients and commercial interests was reflected in the Medical-Privacy bill introduced in Congress in 1999 namely Medical Information Privacy and Security Act which provides individuals with access to health information of which they are subject, ensure personal privacy with respect to health-care related information, impose criminal and civil penalties for unauthorised use of protected health information, to provide for the strong enforcement of these rights and to protect State rights given under Section 3 of the Act.

C. United Kingdom

The incorporation of Article 8 of the European Convention on Human Rights in UK Law by the Human Rights Act, 1998 creates a general right to respect for privacy where none previously existed. Article 8 offers general protection for a person's private and family life, home and correspondence from arbitrary interference by the state. This right effects a large number of areas of life ranging from surveillance to sexual identity to issues of data privacy such as gathering information for the official census, recording fingerprints and photographs in a police register, collecting medical data or details of personal expenditures.[63] However, the right to respect for these aspects of privacy under Article 8 is qualified and any state interference with a person's privacy is acceptable only if three conditions are fulfilled: (1) the interference is in accordance with the law, (2) pursues a legitimate goal and (3) it is necessary in a democratic society[64]. On the question of telephone tapping affecting an individual's right to privacy, Regulation of Investigatory Powers Act, 2000 makes it an offence for

[61] *Setting Information-Age Parameters for Medical Privacy*, Press release, March 10, 1999, *available at* http://leahy.senate.gov/press.

[62] Charles A Welch, *Sacred Secrets-The Privacy of Medical Records*, N. ENGL. J. MED. 345 (2001).

[63] *Data Privacy*, *available at* www.wikipedia.com/privacy.html.

[64] *Id.*

[65] RIPA allows for the interception of telephone calls by appropriate authorities, for example, Security Services, Secret Intelligence Service, NCIS, GCHQ, Police or Customs, under authorisation of the Home Secretary. Such authorisation is provided by way of an interception warrant which must name or describe either

any person, intentionally and without lawful authority[65], to intercept any communication in the course of its transmission through a public telecommunication system and except in specified circumstances through a private telecommunication system. As regards bugging by Police, Police Act 1997 puts police bugging on a statutory footing. Under the Act, the use of bugs by the police in relation to homes, offices and hotel bedrooms require prior authorization by a Commissioner or a serving or retired High Court Judge. On the issue of breach of privacy by Unsolicited Calls, under the Telecommunication Act 1984, it is a criminal offence to make menacing telephone calls or calls which cause annoyance, inconvenience or needless anxiety. As regards Unsolicited Goods, the Goods & Services Consumer Protection (Distance Selling) Regulation 2000 addresses the issue of 'inertia selling'. The technique involved sending goods to customers who were then charged for them if they did not go to the trouble of returning them.[66] Under the Regulation, a recipient of unsolicited goods may keep them as gifts. The regulation also makes it an offence for a sender to try and obtain payment for such goods. The Unsolicited Goods and Services Act 1971 continues to make it an offence to send obscene or indecent books, magazines, leaflets or advertising material describing or illustrating human sexual acts.[67] As regards Internet Privacy, the issue of unwanted e-mails is addressed by the Privacy and Electronic Communications (EC Directive) Regulations 2003. The Regulations make e-mail marketing 'opt-in' in many cases (the recipient must have given prior consent) and provide greater privacy protection in cyber space. The provisions of Data Protection Act 1984 are also relevant with respect to internet privacy. As regard Medical Privacy, on the question of disclosure of confidential information by the doctor, the law in England is similar to that of India[68] and permits disclosure with the consent, or in the best interests of the patient, in compliance with a court order or other legally enforceable duty and, in a very limited circumstances, where the public interest so requires.

The discussion on privacy in the United Kingdom would remain incomplete without an analysis of the judicial response in this respect. In *Perry v. United Kingdom*[69], European Court of Human Rights held that a convicted armed robber's right to respect for private life under Article 8 of the European Convention on Human Rights were infringed when he was secretly videotaped by police after he refused to take part in any identity parade. In *Lady Archer v. Williams*[70], the claimant obtained a permanent injunction restraining the defendant, her former aide, from disclosing confidential information obtained during her employment. The defendant's right to freedom of expression under Article 10 of European Convention on Human Rights was held not to override the claimant's rights to privacy under Article 8. In *Mersey Care NHS Trust v. Robin Ackroyd*[71] the Court held that the principle of confidentiality of journalists' sources attracts a high level of protection under Article 10 of the European Convention on

one person as the interception subject, or a single set of premises where the interception is to take place.

[66] *Liberty Guide to Human Rights*, *available at* www.yourrights.org.uk.

[67] *Id.*

[68] Code of Professional Conduct, framed by Medical Council of India, under § 33(m) read with § 20A of Medical Council Act, 1956.

[69] Decision of European Court of Justice, July 17, 2003, *available at* http://cmiskp.echr.coe.int.

[70] [2003] EWHC 1670 (QB).

[71] [2003] EWCA Civ 663.

Human Rights and that although there is a clear public interest in preserving the confidentiality of medical records, that alone could not be automatically regarded as overriding the respondents rights under Article 10. In *D v. L*[72], the Court of Appeal held that an injunction will not necessarily be granted to prevent the use of tape recorded conversations between individuals about sexual matters, where the information is already in the public domain.

D. Other Legal Systems

Australian law on privacy is governed by the Privacy Act, 1988. The Act gives effect to Australia's agreement to implement guidelines adopted in 1980 by the Organisation for Economic Co-operation and Development (OECD) for the Protection of Privacy and Transborder Flows of Personal Data, as well as to its obligations under Article 17 of the International Covenant on Civil and Political Rights, 1966. The Act contains eleven Information Privacy Principles (IPPs) which set out strict safeguards for any personal information that is handled by federal government and ACT government agencies. It also has ten National Privacy Principles (NPPs) which set out how private sector organisations should collect, use and disclose, keep secure and provide access to personal information. The principles give individuals a right to know what information an organization holds about them and right to correct that information if it is wrong. Part III-A of the Privacy Act regulates credit providers and credit reporting agencies. The Federal Privacy Commissioner also has some regulatory functions under other enactments, including the Telecommunications Act 1997, National Health Act 1953 and Crimes Act 1914. The above discussed legislative provisions are supported by a plethora of case laws[73].

The South African Constitution of 1996 in Section 14 explicitly provides that everyone has the right to privacy, which includes the right not to have (a) their personal home searched (b) their property searched (c) their possessions seized (d) the privacy

[72] [2003] EWCA Civ 1169.

[73] B v. Private Health Insurer [2002] PrivCmrA 2; A v. Insurer [2002] PrivCmrA 1; C v. Commonwealth Agency [2003] PrivCmrA 1; D v. Private Health Service Provider [2003] PrivCmrA 2; E v. Financial Institution [2003] PrivCmrA 3; F v. Credit Provider [2003] PrivCmrA 4; G v. Credit Provider [2003] PrivCmrA 5; H v. Credit Provider [2003] PrivCmrA 6; I v. Major Wholesaler [2003] PrivCmrA 7; J v. Two Individuals [2003] PrivCmrA 8; K v. Major Financial Institution [2003] PrivCmrA 9; L v. Commonwealth Agency [2003] PrivCmrA 10; M v. Commonwealth Agency [2003] PrivCmrA 11; N v. Private Insurer [2004] PrivCmrA 1; O v. Large Retail Organisation [2004] PrivCmrA 2; H v. Financial Institution A and B [2004] PrivCmrA 1; O v. Large Retail Organisation [2004] PrivCmrA 2; H v. Financial Institution A and B [2004] PrivCmrA 3; X v. Commonwealth Agency [2004] PrivCmrA 4; O v. Credit Provider [2004] PrivCmrA 5; Q v. Real Estate Agency [2004] PrivCmrA 6; R v. Credit Provider [2004] PrivCmrA 7; S v. Various Commonwealth Agencies [2004] PrivCmrA 8; U v. Major Banking Institution [2004] PrivCmrA 9; N v. Internet Service Provider [2004] PrivCmrA 10; Y v. Real Estate Agent [2004] PrivCmrA 11; P v. Various Entities [2004] PrivCmrA 12; T v. Commonwealth Agency [2004] PrivCmrA 13; A v. Private Sector Health Service Provider [2004] PrivCmrA 14; B v. Credit Provider [2004] PrivCmrA 15; Z v. Credit Provider [2004] PrivCmrA 16; C v. Service Provider [2004] PrivCmrA 17; H v. Credit Provider [2004] PrivCmrA 18; E v. Motor Vehicle Retail Organisation [2004] PrivCmrA 19; A v. Insurer [2005] PrivCmrA 1; B v. Credit Provder [2005] PrivCmrA 2; C v. Commonwealth Agency [2005] PrivCmrA 3; D v. Health Service Provider; E v. Health Service Provider; F v. Health Service Provider; G v. Health Service [2005] PrivCmrA 4; H v. Commonwealth Agency [2005] PrivCmrA 5; I v. Commonwealth Agency [2005] PrivCmrA 6; J v. Superannuation Provider [2005] PrivCmrA 7.

of their communications infringed. Further, Section 32 of the Constitution gives everyone a "(1) ...right of access to (a) any information held by the State, and (b) any information that is held by another person and that is required for the exercise or protection of any rights..." The right to privacy under the South African Constitution is, however, not an unlimited right. Section 36 of the Constitution contains a "limitations clause" which provides that in-roads can be made into other rights contained in the Constitution where it would be reasonable and justifiable to do so. Therefore, the right to privacy under Section 14 of the Constitution is not an absolute right and has lawfully been limited by the Regulation of Interception of Communications and Provision of Communication Related Information Act, 2002. The right to access information under Section 32 is also not an absolute right and has been limited by the Promotion of Access to Information Act, 2000.

Among other countries, The Constitution of Argentina, in Article 18 provides that the domicile, written correspondence, and private papers may not be violated and that search and seizure should be conducted only in accordance with law. The French Constitution of 1958 has found that the right to privacy is a "fundamental principle" of constitutional status, pursuant to Paragraph 1 of the Preamble to the 1946 French Constitution. Finally, the Canadian Charter of Rights and Freedom, in Section 8 provides a right not to be subject to "unreasonable search or seizure" and a search is permitted only if authorised by a reasonable law and carried out in a reasonable manner[74]. However, an analysis of Chinese Laws depicts that there is no mention of a citizen's right to privacy highlighting a serious shortcoming in China's legal system.

IV. CONCLUSION

Invasion of one's privacy not only causes unwarranted interference in the life and affairs of another person but has the sordid potential of assailing human dignity as the countless recent incidents have unequivocally manifested. This has brought the Right to Privacy in sharp focus evoking interest of the entire society and not just the elite classes. Indisputably, this is one of the invaluable and cherished rights which people are vying for. On analysis of the law of privacy it is clearly revealed that though Indian Law is far ahead when compared to certain other countries such as People's Republic of China, which as of now has no law on privacy, but the other side of the coin depicts a picture that still much needs to be done in certain respects. In the field of internet privacy India needs to develop appropriate standards for cyber security as international trade can flourish only if built on a solid foundation of security. India may explore the possibilities of enacting a specific legislation which covers all the conceivable aspects of privacy on the lines of the Australian Privacy Act, 1988. As regards the issue of violation of privacy through the use of camera phones, it is suggested that India should take immediate action to counter this menace by making it mandatory for all new camera phones to incorporate a default flash. It is pointed out that Australian law has already banned camera phones around swimming pools; the

[74] Affirmed by the Court in R. v. Collins, [1987] 1 S.C.R. 265.

[75] Harsh Pathak v Union of India & Ors.

Unites States of America, United Kingdom and Canada have banned them in changing rooms, workplaces, and schools. Lastly, it is suggested that the problem of unsolicited calls, which has also been highlighted by the recent Public Interest Litigation filed before the Supreme Court[75], could be reasonable addressed by the incorporation of the concept of "opt-in" and "opt-out" within our legal system on the lines of the Gramm-Leach-Bliley Financial Services Modernization Act, 1999, which would require the cellular providers and financial institutions to explicitly receive the consent of the customers before passing on their personal information, whether for consideration or otherwise, to their affiliates and third persons.

EUTHANASIA, SUICIDE AND THEOLOGY

*Surantra Sinha**

I. INTRODUCTION

The contemporary technological developments date the re-conceptualization of human rights. The potentials for both good and evil, which flow from such developments, are to be interpreted by not only cultural norms and scientific traditions, but by religious values bioethical principles, moral judgments and economic policies. The human needs of the patient, the family and the physician establish a relational empathy to the conception of human rights and its application.[1] Time and again, these competing values force a balancing test between the extent of individual freedom[2] and behavioural restrictions imposed to maintain the health, safety and welfare of the public at large.[3] It is in this context that we deliberate and ruminate on the issues concerning life and death i.e. euthanasia and suicide.

The world euthanasia is derived from the Greek word 'euthanatos' meaning 'well death' and originally referred to intentional mercy killing. It is sometimes equated with the term right to die[4]. The term 'euthanasia', when used to refer to the withholding or withdrawal of life-sustaining medical treatment, is an accurate depiction of what the law permits under the banner of the right to die, despite the occasional discomfort of judges with the term.[5]

Some find it ironic that there is a need to establish a legal right to die, given that death is inevitable.[6] The law-making institution i.e. the courts and the legislature have had to walk a delicate line between recognizing the individuals right of autonomy in matters of health care and observing the traditional legal and moral prohibitions on suicide, homicide and related crimes.[7]

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[1] E.B. BRODY, BIOMEDICAL TECHNOLOGY AND HUMAN RIGHTS (1993).

[2] Winfried Brugger, *The Image of the person in Human Rights concept*, 3, HUM RIGHTS Q., 594-611, (1996).

[3] L.O. GOSTIN ET AL., HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC, (1997).

[4] Delio v. Westchester County Medical Ctr., 510 N.Y.S.2d 415 (Sup. Ct. 1986), *rev'd* 516 N.Y.S.2d 677 (App. Div. 1987).

[5] Kamisar, *When is there a Constitutional Right to Die? When is there no Constitutional Right to Live?*, 25, Ga.L.Rev., 1203-42, (1991).

[6] Cruzan v. Harmon, 760 S.W.2d 408, 428 (Mo. 1988) (Blackmar J. dissenting). However Justice Stevens observed in Cruzan v. Director, 497 U.S. 261, 339 (1990) that "Medical advances have altered the physiological conditions of death in ways that may be alarming: Highly invasive treatment may perpetuate human existence through a merger of body and body that some might reasonably regard as an insult to life rather than its continuation."

[7] As the New Jersey Supreme Court observed in *re* Quinlan, 355, A.2d 647, 659-660 (N.J. 1976) (Quoting Bishop Casey, a witness at trial): "It is both possible and necessary for society to have laws and ethical standards which provide freedom for decisions, in accord with the expressed or implied intentions of the patient, to terminate or withhold extraordinary treatment in cases which are judged to be hopeless by competent medical authorities, at the same time leaving an opening for euthanasia."

From an international law perspective, the extended administration of futile medical treatment also comes within the meaning of The United Nation's Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment where torture is defined as "any act, causing severe mental or physical pain or suffering, intentionally inflicted upon a person."[8] Such actions would violate the United Nation's Declaration of Human Rights as well, for they would rob the dying patient of the "inherent dignity" granted to "all members of the human family."[9]

II. EUTHANASIA OR ASSISTED SUICIDE?

It is cruel and unusual punishment to sustain patients who exist in a persistent vegetative state. This is equivalent to giving a life sentence to an innocent person. When the diagnosis is persistent vegetative state, there is consensus/ among the physicians that such a condition is not 'living' and that preservation of 'life' in that state is not a proper goal for medicine.[10] This is supported by the 'traditional and modern view that expert physicians should not prescribe therapies which cannot restore health to a dying person'[11] and all medical decision-making should have as its goal the benefit of the human person.[12] Clearly physicians have no duty to preserve mere biological 'existence' *per se.*[13]. The futile maintenance of 'life' under artificial conditions of this nature more often than not offends human dignity and 'transgresses civilized standards of humanity and decency.'[14]

The line between homicide and assisted suicide is particularly hazy when the patient is competent and the means by which death occurs is the forgoing of life sustaining treatment i.e. voluntary passive euthanasia.[15] If the patient is incompetent, it makes even less sense to conceptualise the resulting death as assisted death rather than homicide, unless it occurs pursuant to a patient's request through an advance directive.

Voluntary active interventions to end life take two forms. In the practice of both assisted suicide and active euthanasia, one person provides the person seeking to end his life with the instrumentality of death. This is ordinarily done because the patient is, by virtue of the illness or injury from which relief is sought, physically incapable of obtaining an instrumentality of death himself. The important difference between the two "arises from the administration of the lethal agent, not from its procurement."

[8] G. A. Res,. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

[9] GA., Res. 217, U.N. GAOR, 2d Sess., pt.1, at 71, U.N. Doc. A/810 (1948). *See* also Magee, *The United Nation's Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Bush Administration's Stance on Torture*, 25 Geo. WASH. J. INT'L L. & ECON. 807 (1992).

[10] Cranford et al., *Futility: A Concept in Search of a Definition*, 20 J. LAW, MED. & HEALTH CARE 307, 308 (1992).

[11] Stephen H. Miles, *Medical Futility*, 20 J. LAW, MED. & HEALTH CARE 310, 311 (1992).

[12] Grant, *Medical Futility: Legal and Ethical Aspects*, 20 J. LAW, MED. & HEALTH CARE 330, 331 (1992).

[13] Stell, *Stopping Treatment on the Grounds of Futility: A Role for Institutional Policy*, 11 ST. LOUIS PUB. L. REV., 481, 489 (1992).

[14] Estelle v. Gamble, 429 U.S. at 102.; Hutto v. Finney, 437 U.S. 678, 685 (1978).

[15] Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); State v. McAfee , 385 S.E 2d 651 (Ga. 1989); McKay v. Bergstedt, 801 P.2d 617 (Nev. 1990).

When the means by which death takes place involves an active intervention, providing the patient with the means of taking his own life, it is generally denominated assisted suicide, but when a third party administers the agent that produces the patient's death, this is generally construed to be active euthanasia. If the forgoing of life sustaining treatment is not viewed as suicide, then those health care professionals who withhold or withdraw treatment cannot be held liable for assisted suicide.[16] The voluntary and informed choice of a competent patient, implementing the individual's freedom from unwanted interferences with his person, legitimates the forgoing of life sustaining treatment.[17]

Under the causation rationale, a patient's death subsequent to forgoing treatment does not constitute suicide because it is not caused by forgoing treatment but by the patient's medical condition for which treatment has been forgone.[18] Suicide is self-inflicted death whereas under these circumstances death results from an illness or injury that is not self-inflicted.[19]

Moreover, a patient's refusal of treatment that is likely to cure in favour of one that is not as effective does not constitute suicide.[20] A decision to forgo life-sustaining treatment does not constitute suicide because the patient's wish is not to end life. The patient is said to have no specific intent to die[21] or to have as his intent the relief from suffering.[22]. Forgoing life-sustaining treatment is sometimes said to be permissible because it is passive euthanasia[23] rather than 'active killing' of the patient.

In assisted suicide, the patient retains complete and final control over whether he, in fact, will die from the administration of a lethal agent. The patient decides when and ultimately whether to end his life and the patient is the last human agent in bringing about death. The patient retains greater ability to change his mind and to ensure that death will not occur without his voluntary consent. Where as in active euthanasia, another person retains final control, is the last actor in the sequence of events, and retains ultimate control over when and whether the patient's life, in fact, would end.

[16] Rasmussen v. Fleming, 741 P. 2d 674, 685 n16 (Ariz.1987). *See also* Wanzer et al, *The Physician's Responsibility Toward Hopelessly Ill Patients*, 320 NEW ENG J. MED. 844, 848 (1989) ('Suicide differs from euthanasia in that the act of bringing on death is performed by the patient, not the physician').

[17] In Bouvia v. Superior Court (Glenchur), 225 Cal. Rptr. 297 (Ct. App. 1986), the California Court of Appeal upheld this approach. The case involved a competent, non-terminally ill woman suffering from severe cerebral palsy and her doctors had inserted a feeding tube in her body against her will.

[18] *See* Gray v. Romeo, 697 F Supp.580 (D.R.I. 1988); Bouvia v. New Eng. Sinai Hosp. Inc., 497 N.E. 2d 626, 638 (Mass. 1986); McKay v. Bergstedt, 801 P.2d 617, 627 (Nev. 1990).

[19] *See* Donaldson v. Van de Kamp, 4 Cal. Rptr. 2d 59, 62 (Ct. App. 1992); Bouvia v. Superior Court (Glenchur), 225 Cal. Rptr. 297, 306 (Ct. App. 1986), Bartling v. Superior Court, 209 Cal. Rptr. 220, 225 (Ct. App. 1984).

[20] In *re* Ingram, 689 P. 2d 1363, 1371 (Wash. 1984).

[21] *See* Fosmire v. Nicoleau, 551 N. E. 2d 77, 82 n.2 (N.Y. 1990), Leack v. Akron Gen. Medical Ctr., 426 N. E. 2d 809, 815 (C.P.P. Div. Summit County, Ohio 1980).

[22] Thor v. Superior Court, 855 P. 2d 375, 386 (Cal. 1993) (Where life must be sustained artificially and under circumstances of total dependence the adult's attitude or motive may be presumed not to be suicidal.') *See also* Foody v. Manchester Memorial Hosp. 482 A. 2d 713, 720 (Conn. Super. Ct. 1984); McKay v. Bergstedt, 801 P. 2d 617, 627 (Nev. 1990).

[23] *See* De Grella v. Elston, 858 S.W. 2d 698, 706 (Ky. 1993); In re Grant, 747 P. 2d at 461 (Goodloe, J. dissenting).

III. THEOLOGICAL PERSPECTIVES

Passive euthanasia allows for divine dominion in human life and rejects an immobilization rather than a deliberateness of will.[24] The response of some in the Church to human suffering in terminal illness has been to value the redemptive nature of suffering — that is, the positive role of suffering in 'soul making' — and appear to promote suffering.[25] Nevertheless it is true that many in the midst of suffering with chronic disease,[26] within a struggle with cancer and its pain[27], or in the grief process[28] describe valuable learning and development. But most of them will be willing to forego the learning if they could dispense with the suffering. Patients do not really wish to end their lives. Indeed, they often very much wish to live.[29] Their goal in refusing treatment is to maintain the integrity of their religious beliefs.

The most critical concern comes with the consideration and conceptualisation of the right to life. Human right activists, drawing inspiration from the religious institutions[30] do not fail to take up the stand that all human life is sacred, and no one has the right to take away that life. The moral argument against euthanasia is quite strong. The point of ethics, culture and well being of the individual raises a strong contention. One view is when life is a gift from God, what right do individuals have to take it away even though with the purpose of relieving someone from intolerable pain or suffering. When one cannot create, one should not destroy. The second reason is more pertinent to health care professionals. If physicians and nurses become associated with killing people, then the trust and respect of the patients will be eroded. This point is illustrated in Greek history as well.[31]

[24] Ronald Russell, *Redemptive Suffering and Paul's Thorn in the Flesh*, 39/4 JETS, 561, 559-570 (Dec. 1996), *available at*, http://www.etsjets.org/jets/journal/39/39-4/39-4-pp559-570_JETS.pdf.

[25] *See* for an illustration, J. V. SULLIVAN, THE IMMORALITY OF EUTHANASIA, BENEFICENT EUTHANASIA (M. Kohl et. al. eds. 1975). A similar kind of situation may be illustrated in C. S. LEWIS, THE PROBLEM OF PAIN, 36 (1962, Macmillan).

[26] S. Schmidt, *The Sufferer's Experience: A Journey through Illness*, 13 SECOND OPINION, 90-108 (1990).

[27] R. Mack, *Lessons From Living with Cancer*, 311 NEW ENG J. MED. 1640-1644 (1984); E. A. Vstyan, *Spiritual Aspects of the Care of Cancer Patients*, 36 CA 110-114 (1986).

[28] *See* V. Cronin, *In Loving Memory of My Sons*, READER'S DIGEST, 103-108 (July 1991); J. Claypool, *Tracks of the Fellow Struggler* (1982, Word).

[29] *See* e.g., Powell v. Columbian Presbyterian Medical Ctr., 267 N. Y. S. 2d, 450, 451 (Sup. Ct. 1965) Patient did not object to receiving the treatment involved — however, she would not direct its use.

[30] The fight against euthanasia has been led by the Church right from the very inception of the concept being materialized. The position was stated most recently in the Pope's letter, *Evangelism Vitae* (Latin for 'The Gospel of Life') of March 1995. The document takes as one of its starting points what it calls 'the incomparable value of every human person'. This means that every human life is to be valued from its very beginning (which the Church regards as the moment of conception) to the moment of natural death. Nobody has the right to take that life from another person, even if the person has appeared to give consent. Since it would be premeditated killing, it is the same as murder. *Available at*, www.catholic-ew.org.uk/faith/living/euthanasia.htm.

[31] Rejecting the notions of euthanasia, Hippocrates (460-370 BC), the ancient Greek physician, in his famous oath stated, "I will not prescribe a deadly drug to please someone, nor may give device that may cause his death." Clearly the oath places emphasis on the value of preserving life and in putting the good patients above the private interests of physicians.

In order to offer another ethical perspective to the question, we must consider the purpose of medicine. Medicine aims at preventing illness in order that a person may achieve optimal human functioning according to his or her capacities. In order to function humanly, there must be some capacity for cognitive-affective function. If the potential for cognitive-affective function is not there, for example, in the state of irreversible coma, then applying medical care does not have a purpose. Hence, medical care should be withdrawn once it is determined that it cannot achieve its purpose of improving physiological function.

Not everyone finds a 'salvific meaning' in suffering.[32] Indeed, even those who do subscribe to this interpretation recognize the responsibility of each individual to show not only sensitivity and compassion but render assistance to those in distress.[33] Pharmacologic hypnosis, morphine intoxication and terminal sedation provide their own type of medical 'salvation' to the terminally ill patient suffering unremitting pain.[34] The Hindu Jurisprudence of *Sanatana Dharma* also backs this viewpoint with the notion of immortal Atman.[35]

IV. LEGAL PERSPECTIVES

Die you must, but how to die and when to die, should this too be a matter of choice? The recent case of 25 year old *Venkatesh*[36] suffering from fatal illness involved serious legal and ethical questions about right to die, mercy killing and organ transplantation. India has no policy on mercy killing. Unfortunately, in this case, *Venkatesh* died a martyr with his death wish unfulfilled before Supreme Court could decide.

From the legal viewpoint, euthanasia is the intentional causing death of a human being for reasons of compassion, by unnatural means. The definition involves three things; intention, motive and causation. The intention is to kill. The motive is to eliminate suffering. And the cause of death is human intervention.

The removal of life-sustaining medical treatment is an act that brings about the patient's death and under general principles of criminal law there is a prima facie case of homicide. Furthermore, the omission to act when there is a duty to act can also be the basis for criminal liability.[37] Going strictly by Section 300 of the Indian Penal Code, euthanasia qualifies as consensual killing.[38]

[32] Pope John Paul II, Apostolic Letter, *Salvific Doloria*, On the Christian Meaning of Human Suffering, U.S. Cath. Conf., 1-40 (1996). *See* generally Mandziuk, *Easing Chronic Pain with Spiritual Resources*, 32 J. REL. & HEALTH, 47 (1993).

[33] *Id.*

[34] Stiefel et al., *Morphine Intoxication During Acute Reversible Renal Insufficiency*, 7 J. PALLIATIVE CARE, 45 (1991); Green et al., *Titrated Intravenous Barbiturates in the Control of Symptoms in Patients with Terminal Cancer*, 84 SO. Medical J. 332 (1991). *See* also Bernabei et al., *Management of Pain in Elderly Patients with Cancer*, 279 J.A.M.A., *1877 (1998)* (concluding pain management is all too frequently reported to be poor).

[35] Quoting verse 2.12 from the Holy Bhagavad Gita: *"Na tvevaham jatu nasam na tvam name janadhipah; Na caiva na bhavisyamah sarve vayamatah param"*. The philosophy tells that bodies come and go, the soul remains.

[36] Renu Deshpande, *Should Euthanasia be Legalised?*, *available at* http://timesofindia.indiatimes.com/articleshow/966936.cms, *see also* Geoff Thompson, *Indian Sparks Euthanasia Debate*, *available at* http://www.abc.net.au/worldtoday/content/2004/s1267763.htm.

[37] *See* Barber v. Superior Court, 195 Cal. Rptr. 484.

It would be unfair if we rest the matter without deciding as to what, actually, is the scope of Article 21[39] of the Constitution of India with respect to euthanasia? What is the meaning of life, as contemplated in Article 21 of the Constitution? We have to comprehend the term 'life' wide enough to contemplate and include the 'right to die' within its nomenclature. The activists argue that, if life includes all actions till death, then certainly the 'right to die' goes along with everything associated with Article 21 because the decision to die also comes within its purview (as the decision to die certainly comes before dying).

However, *Gian Kaur's* case[40] has held that "the right to live with human dignity cannot be construed to include within its ambit the right to terminate natural life at least before the commencement of the natural process of certain death."[41] In an interesting case[42], the High Court of Assam referred to the defence of diminished responsibility[43] which enables the Judge to reduce or extinguish the sentence on merciful grounds and does not leave the accused entirely to the discretion of the executive. In *Maruti Shripati Dubal's* case[44], the Bombay High Court held that "what is true for one fundamental right is also true of other fundamental rights. It is not and cannot be disputed that the fundamental rights have their positive as well as negative aspects." The Court also stated that the views that life is sacred, a gift of God, who alone has the right to take it, that premature end of life whether accidental or suicidal keeps the soul hovering in the sphere of ghosts, were only ideological or religio-moral objections which fail to appeal to reason and could not be sustained as a contention against not allowing the right to die to be read in Article 21.[45]

V. WHO DECIDES?

The physicians would have the primary responsibility for determining whether a given situation calls for withholding or withdrawing care on the grounds of medical futility.[46] One such a decision is made, the patient and/or his family would have the right to take a *de novo* appeal to the hospital ethics committee. If the patient and his family are not satisfied with the decision of the ethics committee, a limited appeal may be taken to the judiciary.

[38] It is to be noted that till today no case has ever been brought before the High Courts or the Supreme Court for consideration, on a matter directly dealing with the issue of mercy killing. There have only been three notable cases where the argument of mercy killing has been raised but by indirect reference. Gian Kaur v. State of Punjab; AIR 1996 SC 946; P. Rathinam v. Union of India, AIR 1994 SC 1844; Maruti Shripati Dubal v. State of Maharashtra, 1987 Cri. LJ 743 (Bom.).

[39] 'No person shall be deprived of his life or personal liberty except according to procedure established by Law.'

[40] Gian Kaur, AIR 1996 SC 946 (The points raised here formed the core of the reasons extended by the Hon'ble Judges, delivering the judgment on the issue of the right to die being beyond the ambit of Article 21).

[41] *See id.* ¶¶ 30.

[42] Suddheswari v. State of Assam, 1981 Cri. LJ 1005.

[43] Homicide Act, 1957 (Britain), § 3.

[44] 1987 Cri. LJ 743.

[45] *See id.* ¶¶ 14.

[46] Schneiderman & Jecker, *Futility in Practice*, 153 ARCH. INTERN. MED. 437 (1993).

Some argue that the patient or family should be able to decide when the treatment is futile.[47] But it is herein submitted that the physician is trained to make such decisions and is further insulated from emotional burdens of the patient or family which may make such a determination more difficult or impossible.[48]

While some argue that futility removes both the duty to treat and the duty to inform[49], preclusion of a duty to inform infringes too greatly on patient autonomy.[50] Informing the patient and the family about the decision for not administering treatment on the ground of futility helps patients and families cope with the inevitability of death.[51] Furthermore, by informing the patients that the physician has made a decision that the treatment is futile permits the patient and family to seek second opinion or alternative medical care.[52] Moreover, informing the patient and documenting the decision makes the physician accountable[53] for decisions negligently made and exposes the physician to liability.[54]

VI. A LEGISLATIVE APPROACH: FEARS AND FALLACIES

Before moving forward to legalize euthanasia, we must take into account the consequences as well. For instance, a doctor maybe waiting for an organ to conduct a transplant or for a bed to be vacated, and relatives may simply wish to be relieved of the burden of an ill member of the family. Also, if a person is in great pain or is suffering from mental problems, then he may is not be in a position to make a balanced decision. The elements of free consent also need to be incorporated because if any patient gives such consent, it could be argued that his consent was vitiated by undue influence.

However, the most noteworthy argument is that of slippery slope. In short, the essence of this argument is that permitting voluntary euthanasia would over the years lead to a slide down the slippery slope and eventually we would end up permitting even non-voluntary and involuntary euthanasia.[55]

[47] Massie. *Withdrawal of Treatments for Minors in a Persistent Vegetative State: Parents Should Decide*, 35 ARIZ. L. REV., 137 (1993).

[48] Grant, *Medical Futility: Legal and Ethical Aspects*, 20 J. LAW, MED. & HEALTH CARE, 331, (1992).

[49] Younger, *Futility in Context*, 264 J.A.M.A. 1295, (1990); Murphy, *Do Not Resuscitate Orders: Time For Reappraisal in Long-Term Care Institutions*, 260 J.A.M.A. 2098 (1998).

[50] Smith, *Stop, in the Name of Love!*, ANGLO-AMERICAN L. REV. 55, (1990).

[51] Younger, *supra* note 49, at 1295.

[52] Cranford et al., *supra* note 10, at 493.

[53] Younger, *supra* note 49, at 1296.

[54] Cranford et al., *supra* note 52.

[55] The opponents of euthanasia point out two relevant examples for demonstrating the mechanism of slippery slope (1) In England, the House of Lords in *Airedale NHS Trust v. Bland*, (1993) 1 All ER 821 permitted non-voluntary euthanasia in case of patients in a persistent vegetative state. Subsequently, the Supreme Court of Ireland, in *re* A *Ward of Court*, (1995) 2 ILRM 401, expanded the persistent vegetative state to include cases even where the patient possessed limited cognitive faculties. (2) In Netherlands, the Supreme Court in a 1984 ruling had held that euthanasia could be lawful only in cases of physical illness. However, a decade down the line, the Supreme Court in *Chabot's* case held that it could even extend to cases of mental illness. *See* John Keown, *Physician Assisted Suicide and the Dutch Supreme Court*, 111 LQR, 394, (1995).

VII. CONCLUSION AND ANALYSIS

The most pertinent question for supporters of euthanasia, who base their argument on the right to choose, is whether free choice for many should come at the expense of few depressed lonely lives. What about the administration of capital punishment — is it not defiant of a person' liberty to choose?[56]

The role of autonomy should also be considered by those supporting euthanasia as a compassionate law to alleviate suffering. Is a suffering patient really free to choose? Do they accept a doctor's decision that an individual's existence is worse than death, even when that individual is unable to request death? Should society pass judgment on which lives are worth living or should society seek to affirm and defend all life?

Many people may not think past the slogans that seem to make sense: "death with dignity", "compassion in dying", "deliverance" or "the right to choose". One has to agree that there is hardly a critical thought about what is meant by "dignity", "quality of life", "suffering", etc.

Reiterating the observation made in *Rex* v. *Cog*[57], it is submitted:

> [E]uthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the domestic will that, so fundamental a change should be made in our law, and can, if enacted, ensure that such legalized killing can only be carried out, if, subject to appropriate supervision and control.

Although a terminal illness may last for months or even years, but the actual dying process takes around a few days to a week or two to complete.[58] It is through the dying process that one may seek to learn that a good death should be but a complement to a life well lived.[59]

[56] John Locke (1632-1704) defended capital punishment, contending that a person forfeited his rights when committing even minor crimes. He said that punishment was called for to protect society by deterring crime through example. On the other hand Cesare Beccaria, *On Crimes and Punishment* (1764), contended that capital punishment was not necessary and that long-term imprisonment was a more powerful deterrent since execution was transient. He argued that people did not sacrifice their right to life when entering into a social contract.

[57] (December 18, 1992) (Unreported), *Cf. Gian Kaur, supra* note 40, A.I.R. 1996 SC 946.

[58] Trafford, *The Act of Dying, The Art of Living*, WASH POST HEALTH, July 1, 1997, at page 6. *See* also Lynn et al., *Defining the Terminally Ill: Insights from Support*, 35 DUESQUENE L. REV. 311 (1996); McGivney et al., *The Care of Patients With Severe Chronic Pain in Terminal Illness*, 251 J.A.M.A., 1182, (1984).

[59] *See* S. B. Nulad, *How We Die: Reflections on Life's Final Chapter*, (1994); Ardwig, *Is There A Duty to Die?*, 27 Hastings Center Rpt., 32 (1997).

Guidelines for a good patient care in end-of-life cases are indispensable to the whole educative process here. Initiating an educational dialogue between health care professionals and the public at large on this very topic would be pivotal. There is, both, a moral imperative and a political mandate for national health policies to provide more humane end-of-life care for the dying.[60] The process of public education needed to effect a significant change here is admittedly complex. Indeed, the society may not be equipped to grasp the full consequences of such an educative dialogue on this topic. It, therefore, remains the primary responsibility of the medical profession — supported by law — to provide the necessary leadership to re-think the standards of humane care for treatment at the end of life.[61]

[60] Sulmasy et al., *End of Life Care*, 277 J.A.M.A. 1854, (1997). *See also* Cassell, *The Nature of Suffering and the Goals of Medicine*, 306 NEW ENG J. MED. 639 (1982).

[61] *Quill, Death and Dignity-A Case of Individualized Decision Making*, 324 NEW ENG J. MED. 691 (1991).

EVALUATING THE DEVELOPMENT AND STRUCTURE OF CONSTITUTION OF PAKISTAN

*Syed Ali Raza**

I. INTRODUCTION

The study of the Constitution of Pakistan discloses struggle, aspiration and havoc the State suffered in its attempt to achieve its most important legal document. Pakistan has had the most unusual and turbulent constitutional experience in the era following the departure of the British from India.[1] A State with only sixty years of history and furnished with several pre-constitutional codes, at least three comprehensive legal codes and seventeen amendments, indeed shows constitutional chaos and social helter-skelter, but it also reflects the legal romanticism of the society to achieve a compromise between a State and its subjects. Pakistan has experienced democratic and military regimes, pseudo democracy and quasi dictatorship, and even a civilian Martial Law.[2]

This constitution may not be a hallmark for the modern and established democratic societies but it has to be extolled for its continuous struggle to adjust to the needs of more than 160 million people. Its study amounts to living perpetually in a laboratory wherein all kinds of constitutional experiments are being conducted by whosoever is in control of the State for the time being.[3]

The similarities between the Constitution of Pakistan and the Indian Constitution are to a great level. The overall structure, pattern, formulation grounds, governance systems, and areas of operation are almost identical in both of them. Obviously this tends to the Common Law background of both the states which still constitutes portion of laws available in both the countries. Apart from that under the provisions of the Indian Independence Act, 1947, the Government of India Act 1935 became, with certain adaptations, the working Constitution of Pakistan and India[4]. Thus it serves as basis on which the edifice of both the legal empires stand and the commonalties are quite evident. The present discourse will view "The Constitution of the Islamic Republic of Pakistan, 1973" in its brief historical context, will highlight its striking features and describe leading constitutional cases.

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[1] HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN, 23 (Samina Choonara ed., 3rd ed. 2004, Oxford University Press).

[2] *Id.*

[3] *Id.*

[4] Indian Independence Act, 1947, § 1. *See* Constitutional Documents (Pakistan), Vol. III (1964, Government of Pakistan).

I. HISTORICAL BACKDROP

The constitutional vision of Pakistan was envisaged just days before its emergence on August 14, 1947. *Quaid-i-Azam* Mohammad Ali Jinnah addressing the first Constitutional assembly of Pakistan on August 11, 1947 said:

> We should wholly and solely concentrate on the well-being of the people, and especially of the masses and the poor. If you will work in co-operation, forgetting the past, burying the hatchet, you are bound to succeed. If you change your past and work together in a spirit that every one of you, no matter to what community he belongs, no matter what relations he had with you in the past, no matter what is his color, caste or creed, is first, second and last, a citizen of this state with equal rights, privileges and obligations, there will be no end to the progress you will make. We should begin to work in that spirit and in course of time all those angularities of the majority and minority communities, the Hindu Community and the Muslim Community, because even as regards Muslims you have Pathans, Punjabis, Shias, Sunnis... You are free; you are free to go to your temples. You are free to go to your mosques or to any other place of worship in this state of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State.[5]

This was a re-affirmation of what Jinnah had told Doon Campbell, Reuter's correspondent in New Delhi in 1946[6]. It was envisioned that the new State would be a modern democratic State with sovereignty resting in the people and the members of the new nation having equal rights of citizenship regardless of their religion, caste, or creed.[7] It was thought that the Objectives Resolution would act as a benchmark for every later constitution to depict the vision varied to the one elaborated on August 11, 1947. However, it cannot be said to have deviated from the original spirit visualized by the founder. The preamble of all the constitutions — of 1956, 1962 and 1973 deal exclusively with it. The Objectives Resolution had three distinct components[8]:

1. What could be called its structural feature was that the sovereignty of God descending on the people of Pakistan constituting State of Pakistan was to be exercised through their chosen representatives.
2. Its qualitative feature was that the sovereignty shared or enjoyed is delegated, capable of further delegation, is by its very nature a sacred trust and has to be exercised within the limits prescribed by the Almighty.
3. Its normative feature was that the norms the goals, the ideals, mostly mundane in nature are spelt out with particularities which have to be achieved through the Constituent Assembly and by the process of framing a Constitution.

Jinnah visualized Pakistan as a modern, progressive, and democratic state whose energies would be harnessed towards the uplift of the people especially the masses and the poor.[9]

[5] AITZAZ AHSAN, INDUS SAGA AND THE MAKING OF PAKISTAN, 336,337 (2nd ed. 2001, Nehr Ghar).

[6] Khan, *supra* note 1, at 76.

[7] MOHAMMAD MUNIR, FROM JINNAH TO ZIA, 29 (1980, Vanguard Books Ltd Publications).

[8] TARIQ MEHMOOD KHAN, CONSTITUTION OF PAKISTAN, 9 (1st ed. Kausar Law Book Publishers).

However, soon after the creation of Pakistan the political events changed rapidly. The power wrestle became worse, leaders went astray for political authority and greed for the ruling seat involved more players from bureaucratic and military circles. The politician's unending nag continued incessantly. In this entire episode, constitutional process got wounded for a very long time. The ill famous, *Maulvi Tamiz-ud-Din* case[10] deflated the superior courts' ability to resist authoritarian rule. Military takeover of General Ayub was another major set back for the constitutional growth. This first *coup d'état* also resulted in the demise of the 1956 Constitution. At the other front, the exploited stretch between the two wings followed by Decca debacle in 1971 did certainly not create suitable conditions for the formation of the present document. An interim constitution was followed by the 1973 Constitution, affirmed and accepted by all.

The Constitution of 1973 embodied the best possible arrangement to accommodate the various political parties, political issues and demands, economic interests, parties' manifestos, and so on.[11] It was, thus, another historical proven reality that only the true voice of the people can solve most difficult problems of the State.

II. TEXTURES OF THE PRESENT CONSTITUTION OF PAKISTAN

Every constitution is a byproduct of the aspirations of the people in which the experiences of the past are taken care of. Factors like historical inspirations, geographical recognition, political formulations and people's expectations affect the changes in the *suprema lex* "which to the rigid theory would amount to unpardonable change but to a flexible theory it would be a natural result of" changing times. Pakistan, doubtlessly, owes its creation to ideological belief reflected in the Objectives Resolution. It has always remained the Preamble of almost all constitutions though not rigidly encircled by it, but always remaining within its horizon subject to all such changes which manifest different shades of the same colour.[12]

The overall structure of the Constitution of 1973 like the earlier ones remains lengthy and detailed. It contains 280 Articles divided into twelve parts and six schedules. Part I deals with the Republic and its territories and other introductory matters; Part II with fundamental rights and principles of policy; Part III with the federation; Part IV with the provinces; Part V with relations between the federation and the provinces; Part VI with property, contracts and suits; Part VII with judicature; Part VIII

[9] Khan, *supra* note 1, at 76.

[10] Maulvi Tamiz-ud-Din Khan v. Governor General of Pakistan, PLD 1955 FC 240. In the instant case Maulvi Tamiz-ud-Din Khan, President of the first dissolved Constituent Assembly on October 24, 1954, challenged the legality of the proclamation of the Governor-General in the Chief Court of Sind, by a Writ Petition under section 223-A of the Government of India Act, 1935, which empowered the High Courts to issue Writs of Mandamus, Certiorari, Quo warranto and Habeas Corpus. It was held that the assent of the Governor General was necessary to all legislations and that since section 223-A of the Government of India Act under which the Chief Court of Sind issued the writ had not received such assent, it was not yet law and therefore, that Court had no jurisdiction to issue the writs.

[11] Khan, *supra* note 1, at 486.

[12] M. MEHMOOD, CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973, 44, 53 (4th ed. 2004, Pakistan Law Times).

with elections; Part IX with the Islamic provisions; Part X with emergency provisions; Part XI with amendment of constitution; and Part XII with miscellaneous, temporary, and transitional provisions. The first schedule deals with laws that are constitutionally protected. The election of the President and oaths and affirmations are contained in the second and the third schedule respectively. The fourth schedule deals with legislative lists; the fifth with powers of the Supreme Court and remuneration of judges; and the sixth with the laws altered, repealed or amended without the previous sanction of the President.[13]

The Preamble is elaborative in nature and affirms the allegiance to Almighty Allah and ensures that His authority is to be exercised by the people of Pakistan. The later part of the Preamble focuses on as to what should be the characteristics of the State of Pakistan. It is to be kept in mind all the time that the religiosity of the constitution does not make it a theocratic or rigid religious state with non democratic or extremist ambitions. The Preamble is basically inspired from the reasons of its foundation and the religious sentiments of its people. Part I of the Constitution of Pakistan declares Islam to be its state religion in Article 2 but only after it calls Pakistan to be a Federal Republic in Article 1.

Articles 3, 4, 5 and 6 have great significance. These articles deal with the elimination of exploitation, right of individuals to be dealt with in accordance with law, obedience to law and the constitution and high treason respectively.

Part II of the constitution enshrines a detailed list of Fundamental Rights and the Principles of Policy. The list of fundamental rights is similar to Article 14-32 in the Constitution of India. Article 8 of the Constitution of Pakistan seeks to dismantle every law which is either inconsistent or in derogation to the fundamental rights. These rights are so vigorously dealt that constitutional explanation follows at the end of most. These rights transcend social, religious, ethnic and cultural boundaries. The Principles of Policy are embedded from Article 29 to 40.[14] The Principles of Policy holds each organ and authority of the State responsible, to provide for all citizens, within its available resources, facilities for work and adequate livelihood, with all reasonable rest and leisure. The state is also duty bound to provide basic necessities of life to its citizens who are disabled, permanently or temporarily to earn their livelihood. For reasons of accountability a report on the observance and implementation of the Principles of Policy is to be forwarded annually. This new provision has no parallel in the earlier two Constitutions.[15]

Part III of the Constitution prescribes the system of governance in Pakistan. According to Article 50 the Parliament is to comprise of the President, and two Houses to be respectively known as the National Assembly and the Senate. Article 41 calls the President to be the Head of State and shall represent the unity of the Republic. To ensure the Islamic image of the State, to be a Muslim becomes a qualification for the

[13] Khan, *supra* note 1, at 487.

[14] JUSTICE EHSAN-UL-HAQ CHAUDHARY, THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, 1973 (2004).

[15] Mehmood, *supra* note 12, at 240-241.

President. However no bar is placed on the basis of sex. Constitution does not anywhere place a bar on Muslim women to contest the presidential election and to be the head of the state. The three hundred forty two seated National Assembly is to be elected directly, and, like every form of parliamentary government, it is to elect the leader of the House. Here in the national assembly no provision appears to prohibit a non-Muslim to be the leader of the House and thus the Chief Executive. The details of elections, functions, and procedural matters of the house, Senate, bill formations and other peculiar points appear in this part. The formation of Cabinet, federal authorities, powers of both President and Chief Executive are also comprehensively discussed here. The balance of power between the two has been ensured by the Eighth Amendment which gives President the power to dissolve assembly restrictively. It should be noted that the Eighth Amendment Act, 1985 made drastic changes in the Constitution. However the basic structure, that of Parliamentary form of Government remained and was not altered.[16]

Part IV deals with the federating units. The four provinces have Governors who act as the Agent of the President in the provinces. "It has been held that the Governor would be bound by the advice of the Chief Minister in discharge of his functions." [17] It has also been held that "[i]t is the duty of the Governor before accepting his advice for dissolution of Provincial Assembly to ask him to obtain vote of confidence from the Assembly."[18] The four Provincial Assemblies have seats dispersed as the General seats, Women seats and seats for the non-Muslims. A Chief Minister is the Executive Head of the province and is elected by the provincial assembly.

Part V of the Constitution regulates the relation between the Federation and the provinces. The constitution follows a federal pattern according to which the Centre possesses certain specified powers and the rest vest in the Provinces. There are only two lists, Federal and Concurrent, with the Central legislature having exclusive powers to make laws with respect to the former and both the Central Legislature and the Provincial Legislature having power to legislate with respect to the latter. The Central Legislature has specifically been restrained to legislate upon any matter not enumerated in the two Lists, thus leaving the residuary powers with the Provinces, except for such areas as is not included in any province.[19]

On the distribution of powers between the centre and the unit, an interesting decision became part of the legal history of Pakistan. It was before the cessation of two units and the birth of the 1973 constitution. It was held:

> The distribution of power is qualified in favor of the Provinces in so many respects that as a matter of constitutional law and political science it can be described as the Constitution of Federation. The Central Legislature has not been made judge of its own jurisdiction and if it makes a law in respect to a matter which does not specifically falls within the sphere of the Central Legislature it can be questioned on the ground of want of jurisdiction.[20]

[16] Mehmood, *supra* note 12, at 263.
[17] Federation of Pakistan v. Aftab Sherpao, PLD 1991 SC 723.
[18] M. Anwar Durrani v. Province of Balochistan, PLD 1989 Quetta 25 .
[19] Mehmood, *supra* note 12, at 377.

The distribution of powers between the units and the centre is such that the centre still occupies greater chunk of legislative machinery. The Constitution, nevertheless, also states that the residuary powers are to vest in the provinces. The federal and concurrent lists in ascertaining the legislative limits of the two domains speak articulately and are flavored in such a manner that a strong centre emerges ultimately.

Part VI deals with the finance, property contracts and suits. It largely discusses the distribution of revenues between the federation and the provinces. "A Provincial Assembly has, by an Act, power to tax professions, trades, callings and employments; but it can do so only within the limits as fixed by an Act of Parliament. A tax so imposed is not to be considered as a tax on income." [21]

The most exhaustive domain of the Constitution is Part VII which deals with the Judicature. The Constitution states that "[t]here shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law." [22] It is well established that —

> The judiciary is entrusted with the responsibility for enforcement of Fundamental rights. The Judiciary in Pakistan is independent. It claims and has always claimed that it has the right to interpret the Constitution and any legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of the Supreme Court."[23]

On the issue of composition, the observations of the Apex court can be noted in *Khan Asfandyar Wali v. Federation of Pakistan*[24]

> Supreme Court is not a Federal Court, it is the apex Court and is a court for the whole of Pakistan and does not go by the principle of Federation in that fashion in which the allocations are made and distributions taken [sic] place. Supreme Court, in its wisdom, may decide how to manage its composition.

The Supreme Court of Pakistan generally acts as a court of Original Jurisdiction, as an appellate court, passes declaratory judgments and further hears the Public Interest Litigations. The Supreme Court also has an Advisory Jurisdiction.

[20] PLD 1963 Dacca 856.
[21] Mehmood, *supra* note 12, at 394.
[22] Art. 175(1), *See* Chaudhary, *supra* note 14, at 88.
[23] Wasim Sajjad & others v. Pakistan, PLD 2001 SC 233.
[24] PLD 2001 SC 607.

High Courts function at the province level. The four High Courts have been given enormous powers. Article 199 allows the High Court to become a guardian of the citizen's rights and protect them from any executive action that is either *ultra vires* or comes in clear contradiction with the law. The ability of courts to interpret the Constitution allows them to inspect any executive action and forecast its consequences thereof. Any citizen will be provided with a possible relief by the High Court, if he or she feels aggrieved by an executive action. In its mischief sense the Article ensures a major check on the public functionaries and regulates relation between them and the citizens.[25]

It has also been held that "where any Authority or a Tribunal passes an order by ignoring any admitted fact or material evidence or when there is a gross misreading or non-reading of any material document then High Court under Art.199 of the Constitution is competent to interfere with such order to correct such illegality."[26]

The Islamization period of Zia produced the Federal Shariat Court. Chapter 3A of the Constitution and Articles 203A to 203J deal with this new court. Chapter 3-A within the limits prescribed by Article 203-B(c) of the Constitution, confers jurisdiction on the Federal Shariat Court. The Constitution expressly falls outside the sphere of activity and pale of jurisdiction of Federal Shariat Court. Article 203-B(c) makes a clear distinction between 'law' and Constitution It further goes on to say that the law includes customs or usages having the force of law.[27]

Apart from these parts of the Judicature, Constitution of Pakistan also provides for other Administrative Courts and Tribunals, and Supreme Judicial Council which ensures a check on the Judges of the Higher Courts.

Election and its procedures are contained in Part VIII of the Constitution. This part deals with the Chief Election Commissioner and the Election Commission, Electoral Laws and Conduct of Elections.

Part IX of the Constitution of Pakistan deals with the Islamic Provisions. They range from Articles 227-231. According to Article 227(1), all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah and no law shall be enacted which is repugnant to such injunctions.[28] Also, nothing shall affect the personal laws of non-Muslim citizens or their status as citizens.[29] This Article substantiates itself through Council of Islamic Ideology. This council basically has a recommending and advisory capacity which to refer its report to the Parliament.

[25] Mehmood, *supra* note 12, at 485.
[26] Mst Kausar Parveen v. Abdul Khalid, 1999 YLR 615.
[27] Haji M Saifullah v. Federal Govt. PLD 1992 FSC 376.
[28] Chaudhary, *supra* note 14, at 122.
[29] Art. 227(3).

Part X lists out Emergency Provisions. Its sole purpose is to provide Constitutional safeguards to the Constitution itself when extreme circumstances prevail. However, at no place the constitution sheds its democratic mask.

Part XI is about the process of Amendment of Constitution, which demands a vigorous procedure.

> A bill requiring an amendment in the Constitution should originate in the National Assembly and is to be passed by not less than two-third votes of the total membership of the Assembly. The bill when passed is to be transmitted to the Senate and if it is passed by the Senate by a majority of the total membership it shall be presented to the President for assent. Thus it can be safely said that by rules and procedures the present Constitution is more rigid than flexible.[30]

The last Part XII is miscellaneous in nature and deals with the "Services", "Armed Forces", "Tribal Areas" and other viable rules necessarily available in most Constitutions. Seven Schedules follows the parts, which are then followed by fifty Appendixes.

IV. ROLE OF JUDICIARY IN INTERPRETTING THE CONSTITUTION AND ENVISAGING NEW AND MEANINGFUL INTERPRETATIONS

A. Doctrine of Necessity

The Military coups in Pakistan have, many a times, sought shelter under the banner of doctrine of necessity to justify their disobedience. According to this doctrine, an act transforms from illegal to become legal, if, done *bona fide* under stress of necessity with the intention to preserve the Constitution, the state or society and to prevent it from dissolution.[31]

Almost in all the military coups in Pakistan, the judicial safeguard to their legitimacy and takeover was justified by the doctrine of necessity, originally propagated by Kelson[32]. The doctrine of necessity was first of all applied in the notorious *The State v. Dosso and another.*[33] It was held in the *Dosso* case that a victorious revolution or successful coup is an internationally recognized legal method of changing a Constitution and after a change of that character had taken place the national legal order must, for its validity, depend upon the new law creating organ. Even Courts lose their

[30] Mehmood, *supra* note 12, at 725.
[31] Begum Nusrat Bhutto v. Chief of Army Staff & Pakistan, PLD 1977 SC 657.
[32] *See* Dosso and Others v. The State, PLD 1958 SC 533; Ms Asma Jilani v. Government of Pakistan, PLD 1972 SC 139.
[33] Dosso and Others v. The State, PLD 1958 SC 533 (The main issue before the Court was the annulment of Constitution of 1956 and legality of military take over by Chief Martial Law Administrator Ayub Khan).

existing jurisdictions and can function only to the extent and in the manner determined by the new Constitution. Thus the Apex court in this case applied the doctrine of necessity more than it was necessarily required.

However, in a later landmark decision, *Ms Asma Jilani* v. *Government of Pakistan*[34], it was pronounced by the Supreme Court that, *Dosso's* case "proceeded on farce presumptions". Kelsen's theory was neither the basic doctrine of the science of modern jurisprudence, nor did Kelsen ever attempt to formulate any theory which favored totalitarianism. An individual becomes the Head of a State through the municipal law of his own State and not through the recognition of other states. It is, therefore, not correct to say that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend.

The status of this doctrine was questioned again in another ill famous case, *Begum Nusrat Bhutto* v. *Chief of Army Staff*[35]. Ironically, it was held that:

> [T]he conditions culminating in the Proclamation of Martial Law were so grave that the very existence of the country was threatened, that chaos and bloodshed was apprehended and there was complete erosion of the constitutional authority of the Federal Government, leave alone that of the various Provincial governments. Thus, the situation demanded an extra-constitutional step.

Supreme Court of Pakistan, once again referred to this doctrine when the validity of another military takeover took place. In the case of *Zafar Ali Shah* v. *General Pervez Musharraf*[36], the court was of the opinion that the judicial review vested in the Superior Courts could not be taken away on the principle of necessity. The proclaimed state of emergency includes regimes of exception, which have overthrown and not merely suspended the previous constitutional order and have assumed legislative and executive powers analogous to those under a formal state of emergency. Government should take steps to ensure that the fundamental rights of citizens are not affected and derogation must be proportionate to the emergency, while adopting constitutional as well as extra-constitutional means. The Army take-over of October 12, 1999 was extra-constitutional and efforts are to be made to minimize emergencies and to induce the authorities concerned to respect the Fundamental Rights.

However, it should be noted that application of the doctrine of necessity waried by each subsequent case that invoked it. *Zafar Ali Shah* case restricted the military rule in a certain paradigm. Judicial review was thus strongly ensured. In *Wasim Sajjad and*

[34] Ms Asma Jilani, PLD 1972 SC 139.
[35] *Supra* note 31.
[36] PLD 2000 SC 869.
[37] PLD 2001 SC 233.

others v. *Federation of Pakistan*[37], a time frame was given to the Military Government of General Musharraf, for return to democracy by holding general elections in specified time. Furthermore, the right to amend the Constitution by the military regime was curtailed in *Watan Party* v. *Chief Executive/ President of Pakistan*[38]. This reflects the will of the Supreme Court to uphold the rule of law, although at an exceptionally slow pace.

B. On Freedom of Expression

The higher courts of Pakistan have interpreted the constitution in favour of freedom of expression and freedom of the press. In *Muzaffar Qadir* v. *District Magistrate*[39], the court held that the constitutional guarantee of liberty of the press is one of the strongest bulwarks of liberty and any order which violates the freedom of the press would be unconstitutional and void. Freedom of expression and freedom of press is the notion pressed close to the heart of almost all constitutions of the world[40].

It is the responsibility of state to act in a manner for the promotion of the fundamental rights, which pertains to freedom of press.[41] There are, however, limitations as imposed by law on the right to free speech and expression. That is to say that this right can be curbed or restricted in the interest of Islam or the integrity security or defence of Pakistan or relates to friendly relations with foreign states, public order, decency or morality or in relation to contempt of court or incitement of an offence. Since the security of Pakistan is foremost concern, the liberty of speech can not be used as endangering the existence of the State.[42]

For example, recently, in Pakistan, a newspaper published, narrating the speech of the person accused of contempt that "the High Court and Supreme Court Judges are on payroll of drug mafia." Even though the accused forwarded unconditional apology, but the courts pursued the case and held that freedom of speech has limitations and the independence of judiciary cannot be ensured if this institution is scandalized.[43]

[38] PLD 2003 SC. 74.
[39] PLD 1962 Lahore 1198. (The petitioner applied to the respondent seeking a declaration for the publication of a daily newspaper under the provisions of the press and Publications Ordinance 1960. The respondent did not respond to the application for two years and then imposed conditions to the authentication of the declaration. The question was whether these conditions violated the concept of the freedom of expression]. *See* also, CJ DR. NASIM HASAN SHAH, JUDGMENTS ON THE CONSTITUTION, RULE OF LAW, AND MARTIAL LAW IN PAKISTAN, 48 (1st ed. 1993, Oxford University Press).
[40] *See*, for example, Indian Constitution, 1950. Leading Indian cases on the right to free speech and expression are — Brij Bhushan v. State of Delhi, AIR 1950 SC 129; Romesh Thapar v. State of Madras, AIR 1950 SC 124; Sakal Papers Pvt. Ltd. v. Union of India, AIR 1962 SC 305; Express Newspapers Pvt. Ltd. v. Union of India, AIR 1958 SC 578; Benett & Coleman Co. v. Union of India, AIR 1973 SC 106; S.Rangarajan v. P. Jagjjivan Ram, (1989) 2 SCC 574; Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal, (1995) 2 SCC 161. *See* V.N. SHUKLA, CONSTITUTION OF INDIA, 106 (10th ed. 2001, Eastern Book Company).
[41] PLD 1989 Lahore 12.
[42] PLD 1957 Lahore 142.
[43] State v. Khalid Masood PLD 1996 SC 42.
[44] PLD 1977 Lahore 852.

C. On Fairness

In *M. Aslam Saleemi v. Pakistan Television Corporation and Another*[44], the two respondents had the sole monopoly of television and radio broadcasting which are the principal news media for the dissemination, *inter alia* of news to the people at large with regard to the activities relating to the election campaign of the various contesting parties and are run and controlled by the Government of Pakistan. Petitioner's main grievance was that they had not been acting impartially and fairly in projecting the news with regard to the election campaign of the alliance and had been evidently discriminatory and biased in favour of the ruling party. The courts were determined to uphold the fairness doctrine. The State television was clearly instructed, to give all parties participating in election equal coverage, and not to only promote the campaign of ruling party.

D. On Rights of Minority

Supreme Court, at no point of time, allowed the rights of minority to be infringed in any manner. In the case of *J. K Tajjak v. Government of Balochistan*[45], the Supreme Court held that a special exemption, made to safeguard the rights of non-Muslims in implementation of the constitutional mandate, cannot be nullified on the ground that it was in the national interest to do so.

Also, in *Darshan Masih v. State*[46], Supreme Court acted for the enforcement of fundamental rights of several Christians who were all working as bonded labourers in a brick kiln situated in the heart of Lahore and were subject to extreme hardships. The labourers were released from bondage. Notably the Court in the instant case accepted jurisdiction under Article 184(3) of the Constitution and decided to take up the issue based on a telegram received from petitioner Darshan Masih and twenty of his companions who included women and children.

E. Welfare and Safety of Citizens at Large

Right to unpolluted environment and preservation and protection of nature's gift was recognised in *Ms. Shela Zia and others* v. *WAPDA*[47]. In this case, citizens had apprehension against construction of a grid station in residential area. They sent a letter to the Supreme Court for consideration as a human rights case. It involved the welfare and safety of the citizens at large because the network of high tension wires spread throughout in energy production projects could have caused harm to the citizens. The court held, "The energy production is essential to all the developing countries however in a quest of economic development one has to adopt such measures which may not create hazards to life, destroy the environment and pollute the atmosphere."[48]

[45] Civil Appeals Nos. 45-Q/1990, 46-Q/1990 and 47-Q/1990, Decided on March 19, 1993. *See* Shah, *supra* note 39, at 378, 379.
[46] PLD 1990 SC 513.
[47] PLD 1994 SC 693.
[48] Khan, *supra* note 8, at 37-38.

F. Democracy to be Upheld

On the dissolution of an elected prime-minister, cabinet and an entire government by the President using his constitutional powers, a prime decision came from the Supreme Court. It was held that the order of dissolution by the President was contrary to law and of no legal effect. All steps taken pursuant to the order were declared invalid. For the first time in the judicial history, a government which had gone out of office and stood replaced by a *de facto* government, in full possession of the coercive powers of the state, had been dethroned by the order of a Court and the overthrown government restored to office.[49]

V. Conclusion and Analysis

The turmoil and exhaustion of the Constitution of 1973 in a span of more than three decades is inconceivable. The challenges of 21st Century, post cold war scenario provided new challenges. The advent of the war against terrorism has opened new adversarial fronts for this legal code. The modern day time, International environment, and global challenges requires a strong operating Constitution of Pakistan. The federating units must have more autonomy to ensure a strong federation. The Constitution of Pakistan must come up and meet the demands of contemporary legal environment of the world, but prior to that it must satisfy and bind the immense population it governs.

At this juncture, the Constitution must become a practical means to create harmony between Islam and the West. The pretentious Islamists must not be allowed to hijack this code and manoeuvre it for their own cause. The Constitution of Pakistan has a strong ability to perform and become example for the new democracies in the Middle-East. At the same time it can learn to achieve practical worthiness from more mature constitutions. The Constitution of India also provides a strong example of established democratic values. If Pakistan wants to achieve a place of firm recognition and honour in the comity of the world, the People of Pakistan should indubitably adhere to the supreme law of the land, which in the past they have been plainly ignorant of.

[49] M. Nawaz Sharif v. President of Pakistan and Others, PLD 1993 SC 473. See also, Shah, *supra* 39, at 392.

A JURISPRUDENTIAL AFFIRMATION OF JUDICIAL ACTIVISM

*Anirudh Rastogi**

> The great Judge is a bold Judge, not because he chances his arm, but because he so perceives the philosophy and history of the law that he can sweep aside the incidental and reach for the essential, and fashion and refashion the basic principles so that they serve the society of his time.
>
> Justice E.G. Brennon

I. INTRODUCTION

Judicial Activism is the bold Judge's key to constitutional and legal interpretation. The interpretation of law sometimes takes the form of law-making itself, an exclusive domain of the legislature, which in the eyes of many is a subversion of the law made by the elected and the accountable, by the law made by the appointed and the unaccountable. Is it, therefore, undemocratic, imperial, autocratic, dictatorial, or is it democratic and legitimate?

The debate on the democratic nature of judicial activism can be captured, and answered in the affirmative, on two grounds:

1. *Inevitability.* — That, judicial activism is the inevitable product in a triangular (legislature, executive, judiciary) set-up. A strict separation of powers is inconceivable.
2. *Legitimacy.* — That, even if judicial activism is not absolutely inevitable it has certainly gained legitimacy, by the people, for the people, and of the people, and is therefore democratic.

II. INEVITABILITY OF JUDICIAL ACTIVISM

Austin, a positivist, conceived law as a command of the sovereign backed by sanction. It was not necessary, however, in Austin's view that a command qualifying as a law must issue directly from a legislative body of the state. It may proceed from an official organ to which the sovereign has delegated lawmaking authority. Judge-made law, according to Austin, was positive law in the true sense of the term, since the rules that the Judges make derive their legal force from the authority given by the state. Such authority the state may have conferred expressly; ordinarily, however, it imparts it by way of acquiescence. For, since the state may reverse the rules which he [the judge] makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration. [1]

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[1] EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF LAW, 97 (4th ed. 2004, Universal).

This consensual but covert delegation of powers to the judiciary is at times a staged stratagem conspired by men in politics, to avoid taking politically harmful stands in controversial matters. For instance, in the *Ayodhya* issue, it was politically convenient not to take an extreme stand but instead to approach the courts for resolving the same, soliciting the judiciary to become partners in the legislative and executive process. In another instance, in the *Mandal Commission* impasse, the BJP and the Congress Party refrained from taking any stand over the recommendations and waited for the Supreme Court to give its verdict, clearly, to avoid rubbing their vote banks, in the upper as well as lower classes, the wrong way.

Thus, Austinian jurisprudence contemplates that the law making power flows to the judiciary from the legislature itself. On the other hand, contributors to analytical jurisprudence, John Chipman Gray, Wesley N. Hohfeld, and Albert Kocourek, modified the Austinian theory itself by shifting the seat of sovereignty in lawmaking from the legislative assemblies to the members of the judiciary. It was Gray's opinion that the body of rules the Judges lay down was not the expression of pre-existing law but the law itself, that the Judges were the creators rather than the discoverers of the law, and that the fact must be faced that they are constantly making law *ex post facto*. Even the statutory law laid down by the legislature gains meaning and precision, in his view, only after it has been interpreted by a court and applied in a concrete case[2] and the law becomes positive only in the pronouncements of the courts.

The realist school of jurisprudence further destroyed the myth that the Judges merely declared the pre-existing law or interpreted it and asserted that the Judges made the law. Jerome Frank, Justice Holmes and Cardozo and Karl N. Llewellyn were the chief exponents of the American realist school that asserted that the Judges made law, though interstitially. Llewellyn's work spanned the entire movement of realism from its beginning in 1930s until his death in 1962. He emphasized upon the insufficiency of existing legal rules and, thus, the need for judicial creation of law as a means to the ever changing social ends. He advocated that society changes faster than law, and so there is a constant need to examine how law meets contemporary social problems; all a clear case for judicial activism. Though, it must be understood that the influence of factors extraneous to legal rules on decision of cases is an inevitable consequence of the judicial process itself, and must not be misunderstood to be a deleterious by-product of judicial activism.

The American Realists, discussed above, were practicing lawyers or law teachers, who sought to approximate legal theory to legal practice. In Scandinavia the group of jurists known as realists approached their task on a more abstract plane and with the training of philosophers. Vilhelm Lundstedt might be regarded as the most extreme of the Scandinavians. He maintained that the idea of law as a means of achieving justice is chimerical. It is not founded on justice, but on social needs and pressures. Indeed, 'the feelings of justice are guided and directed by the laws as enforced, i.e., as maintained. In place of justice[3], Lundstedt substituted the method of 'social welfare', which

[2] "The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute." *Id.* at 101.

is 'a guiding motive for legal activities', namely, the encouragement in the best possible way of that... which people in general actually strive to attain. Judges should actually think in terms of social aims, not 'rights'. He insisted that these are not aims for which people ought to strive, but those that they are observed to be seeking. They include decent food, clothing, shelter, security of life, limb and property, freedom of action and protection of spiritual interest. And this is what our apex court has been observing when it upholds the right to food in *Kishen Pattanayak's*[4] case, or the right to livelihood in *Olga Tellis*'[5] case, or, panders to spiritual interests in the *Ayodhya*[6] case.

Thus, we see that in reality Judges do make law; laws that are functional, purposive, and aimed at social interests, not rights; and they do so with acquiescence of the other organs of the government. The watertight compartments envisaged by the doctrine of separation of powers exist nowhere and is impracticable as much as it is inevitable. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is an absolutely justifiable judicial function, the making of an entirely new law, which the Supreme Court has been doing through directions is also not supplanting but merely supplementing the legislature through such directions. The courts have legislated through directions only because no law existed to deal with situations such as inter-country adoption[7] or sexual harassment of working women[8] and that its direction could be replaced by legislation of the legislature.

III. LEGITIMACY OF JUDICIAL ACTIVISM

A. Conceptualization of 'Legitimacy'

H.L.A. Hart, a critic of analytical jurisprudence, conceptualized legitimacy. Analyzing the definition of law as conceived by Austin, he asks, whether an order of a gunman asking a bank teller to hand over his cash is law.[9] The order of a gunman is also backed by sanction, i.e. fear of death. Is a gunman a sovereign? Austin defines a sovereign as a person or authority who is subordinate to none and is obeyed by everyone. At the particular point of time when the gunman orders a teller to hand over the money, he is obeyed by everyone who is under his threat and he is not required to obey everyone. The difference between a gunman and a political sovereign is, however, that a gunman is not considered to be a lawful authority and his command is obeyed because of fear of death alone. According to Hart, the teller is 'obliged' to obey the gunman. He is not under an obligation to obey[10]. The difference between 'being obliged to obey' and 'having an obligation to obey' arises out of legitimacy. A sovereign is considered to be a legitimate authority.

[3] *Id.* at 136.
[4] Kishen Pattanayak v. State of Orissa, AIR 1989 SC 677.
[5] AIR 1986 SC 180.
[6] Dr. M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.
[7] Laxmi Kant Pandey v. Union of India, AIR 1987 SC 232.
[8] Vishaka v. State of Rajasthan, (1997) 6 SCC 241.
[9] H.L.A. HART, CONCEPT OF LAW, 19 (1970, ELBS & Oxford University Press).
[10] *Id.* at 80.

According to Max Weber the most common form of legitimacy is 'the belief in legality i.e. the acquiescence in enactments which are formally correct and which have been made in the accustomed manner'.

B. Judicial Activism Acquiring 'Legitimacy'

Judicial activism has acquired a certain legitimacy, because its subjects have developed an 'obligation to obey' it, as put by Hart or a 'belief in legality, as put by Weber. Judicial activism is not only welcomed by individuals and social activists who take recourse to it but also by governments, political parties, civil servants, constitutional authorities such as the President, the Election Commission, the National Human Rights Commission, statutory authorities including the tribunals, commissions or regulatory bodies, and other political players[11]. None among the political players have protested against judicial intrusion into matters that essentially belonged to the executive. On the other hand, we find that the political establishment shows unusual deference to the decisions of the court. They have considered themselves bound to function within the limits drawn by the Supreme Court, whether they are limitations of the basic structure doctrine on Parliament's constituent power under Article 368[12] or limitations upon the President's powers under Article 356[13]. Moreover, the people, in general, consider the government and other authorities bound to abide by the decisions of the courts, and consider the latter to be better arbiters in matters of conflicting interests, than their own representatives[14]. For instance, in the recent Jharkhand controversy, where the apex court was applauded more than it was criticized, for reprimanding the Governor on his convention-breaking stand over the formation of the government in the state.

People also recognize the judiciary as a more accessible institution; more so after the courts relaxed the requirements of *locus standi* and started entertaining public interest petitions against government lawlessness and inaction. During the regime of Mr. Narsimha Rao, the Court's activism flourished against corruption and abuse of power. Courts' stand on environmental matters is also exemplary. Surveys show that people have gone to the courts because there are no other means of grievance redressal[15]. The governments are no longer responsive to their protests.

Llewellyn, expounded that the several institutions like the legislature, the executive, the judiciary, bureaucracy, police, and the civil societies are manned by human beings; all of whom are not the same. Institutions manned by greater men usurp powers of the other institutions because of increased acceptance by the people of such a usurpation. When this happens, it is said that the institution is passing through a 'grand period'. In India, since the late 80s and early 90s the judiciary is enjoying a grand period at the expense of the legislature, the executive and the other institutions.

[11] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 251 (2002, Oxford University Press).
[12] INDIAN CONST.
[13] *Id.*
[14] SATHE, *supra* note 11 at 277.
[15] SATHE, *supra* note 11 at 278.

However, judicial activism does not have its legitimacy only because the other organs of government have failed. Even if the other organs function effectively, there will be a need for judicial activism for upholding and protecting the rights of powerless minorities. Judicial activism in the United States has been impressively counter-majoritarian and has protected three types of minorities, namely (1) political dissenters, (2) racial minorities[16] and (3) unpopular minorities such as accused criminals and homosexuals[17]; the major issues of American life sooner or later appear as questions for decisions by the courts[18]. In India too, social action groups have taken recourse to the public interest litigation channel for minority causes[19]. Although each of these groups is small and therefore incapable of making an impact on its own, the aggregate of such groups constitutes a large fragmented majority of the people. Judicial activism draws its support from them[20].

Accounting for credit to the above, it needs to be mentioned, that no other institution in the contemporary times has inspired greater trust in the pan-Indian subcontinent. The Supreme Court of India has thus become the only institution that is not considered parochial or sectarian and that can be approached against injustice.

We have to admit that Judges are human beings, as fallible as any other. Judges are bound to have the predilections, notwithstanding the shared perception that they are independent and apolitical; and those predilections are bound to affect their judgments. However, the courts, by avoiding absolutes, by testing general maxims against concrete particulars, by deciding only in the context of specific controversies, by holding itself open to the reconsideration of dogma, by imposing restraints upon their own powers, by following precedents, and, by subjecting their judgments to record and criticism, exhibit a rare fusion of idealism and pragmatism. It is this rare fusion that constitutes, in the end, the most notable characteristic of the judicial process as it is carried on in the Indian Supreme Court. It is this fusion that helps it sustain its legitimacy.

The legislature in a democracy also derives its legitimacy from the people. Judicial activism is, therefore, in the Hartian or Weberian paradigm, as democratic as anything else so long as it enjoys the peoples' 'belief in legality'.

It can be said in conclusion, that it is a mere myth that Judges do not make law. It is inevitable that they make law, and they do so with legitimacy. We may well recognize that a constitutional court is a political institution, not meaning that it is partisan or unprincipled, but political, because it limits and delimits the powers of the other organs of the government. Its activism is to be advocated on grounds of functionalism in today's era, wherein the context for a popular revolution against the all-pervasive state is missing. It is in this context that inevitable and legitimate activism attains its own significance.

[16] *See* Brown v. Board of Education, 347 US 483 (1954), that overruled the 'separate but equal' doctrine and disallowed desegregation on racial grounds.
[17] SATHE, *supra* note 11, at 279.
[18] *See* PAUL A. FREUND, TALKS ON AMERICAN LAW, 81 (1972, Harold J. Berman).
[19] Public interest petitions have been filed by social action groups or individuals on behalf of powerless groups such as women, children or people, displaced by big development projects.
[20] SATHE, *supra* note 11, at 280.

SPACE FAR AND BEYOND: OUTER SPACE AND INTELLECTUAL PROPERTY RIGHTS

*Ekta Sarin**
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I. INTRODUCTION

Intellectual Property[1] laws typically grant the author of the intellectual creation a set of exclusive rights for exploiting and benefiting from the creation, which are limited in scope, duration and geography. The policy behind the protection of Intellectual Property Right (IPR) has at least two aspects. Firstly, intellectual property protection is intended to encourage the creativity of the human mind for the benefit of the public, by ensuring that the advantages derived from the exploitation of the creation will, if possible, inure to the creator himself, in order to encourage the creative activity and to afford the investors in research and development a fair return on their investments. The second policy consideration is to encourage the publication, distribution and disclosure of the creation to the public, rather than keeping it secret. It also encourages commercial enterprises to seek out creative works for profitable exploitation.

At the beginning of Space Age, space activities were predominantly public activities or governmental space programs mainly devoted to exploratory and experimental as well as military space operations, but they were not commercial. However, in the last decade until now, the character of space activities have fundamentally changed from public purposes to commercial ones.[2] The current commercial uses of Outer Space[3] involve many nations, some acting alone, some in regional cooperative organizations, others in large International cooperative ventures.

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[1] Intellectual Property Rights, defined within the provisions of Article 2 of the Convention establishing the World Intellectual Property Organisation, include "the rights relating to: literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs ; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields".

An Intellectual Property Right is the right to forbid third party exploitation, or to allow the exploitation by license on terms dictated by the registered Intellectual Property Right owner or his/her designated successor. The filed instruments, such as the claims of a patent, define the scope of Intellectual Property Right protection. The geographical scope of the protection is that of the territory of the State, which has registered the Intellectual Property Right. Intellectual Property Rights have limited lifetime (e.g. twenty years after the filing date for patents) and posses the dual nature of being both national and international.
[2] The global policy for the free goods and service trade as well as fair competition have expanded and thus, create new patterns of relative investment (especially) in space activities. They range from government-government, government-private sector, to business enterprises themselves. Thus lies an area of exploration, usage and commercial exploitation of Outer Space.
[3] Outer Space is all the space surrounding the Earth. It is where objects can move without artificial propulsion systems, according to the laws of celestial mechanics. It exists without being prevented from doing so by frictional resistance of the Earth's atmosphere. It extends from an altitude above the earth of approximately 100 / 10 km. upward.

II. Outer Space and Intellectual Property Rights

Intellectual Property Rights are of ever growing importance as a competitive weapon, as a source of revenue and as a basis for, or a component of, collaborative activities in virtually every main industrial sector. However, the obtaining and use of IPRs in space-related fields is problematic because of the peculiarities of space activities and the applicable legal framework, especially as concerns nationally and territorially.

The space industry is unusual, compared to typical terrestrial activities, because of its research and development funding mechanisms on one hand, and a sort of fishbowl promiscuity on the other hand. Due to a limited number of programmes and players, competitors on one programme will be partners on another, customers or main contractors on another, subcontractors on still another.

Under International Space Law[4], no State can claim sovereignty in outer space, and outer space cannot be appropriated by any means. No State can claim the applicability of its National Laws in outer space, comprising the inapplicability of intellectual property laws and the principle of territoriality of patent laws. There is tension between the principle that the use and exploration of outer space by all states, as well as scientific investigation shall be free and that the activities shall be carried out "for the benefit of all mankind" and that outer space shall be "the province of all mankind". Furthermore, information on the nature, conduct, locations and results of such activities shall be shared with the public and scientific community. The acquisitions of exclusive rights such as IPRs, however, are not excluded by these provisions. The idea of IPR is not contrary to the principle of comprehensive information. The idea of protection of trade secrets is to keep certain information confidential, and as such this concept is contrary to the principle of comprehensive information. It is doubtful how the principle of information "to the greatest extent feasible and practicable" can be reconciled with the idea of trade secrets.

With regard to the protection of Intellectual Property through National Legislation, there has been certain reluctance by states to extend extraterritorial protection to its nationals who hold nationally granted patents, copyrights and trade marks. This has found theoretical support in the belief that if a State were to endeavour, on the basis of national legislation, to protect such rights in foreign countries, such endeavours would, in some manner, be offensive to the sovereignty of the State wherein such intellectual property was being exploited without the benefit of royalties to the foreign owner.

[4] Among the basic principles set forth in the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies was that of non-appropriation and non-sovereignty. Thus, Article 2 of the Agreement provided — "Outer Space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means". However, states engaging in space activities were not prevented from exercising jurisdiction over persons, property and events. The 1967 Principles Treaty had adopted the "freedom of high seas" principles applicable to the use of the ocean. This approach, allowing states to exercise extraterritorial jurisdiction on the high seas, was adopted for space activity. Pursuant to Article 8 of the 1967 Treaty, a state retains jurisdiction and control over the space object and any personnel on board.

International Space Station (ISS) Agreement, officially known as the Intergovernmental Agreement, 1998[5] (IGA) is generally eulogized as a quintessence of positives. It manifested at a time when space station was spreading wide elan and excitement, at the same while certain legal haziness were harrowing its realization.

IGA is the only International instrument having a direct clause on space applications of intellectual property. Article 21[6] of the Agreement tries to resolve problems relating to intellectual property developed or used on board the ISS. Based on the Principle of Registration[7] of particular elements of a Space Station, this Agreement has created a working framework for the determination of the territory where an invention has been made, and of the jurisdiction applicable to the activity on the station. According to Article 21 of IGA, "an activity occurring in or on board a space station flight element shall be deemed to have occurred only in the territory of the partner state of that element's registry"

III. Problems and Importance of Invention Protection in Relation to Outer Space Activities

Who owns the IPRs? Now chances are the two countries would broker some kind of agreement ahead of time. But that doesn't mean others couldn't copy the experiment in their module. Space is a free zone beyond the bounds of terrestrial copyright laws and the WTO.

[5] Agreement among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning co-operation on the Civil International Space Station, 1998, generally known as Intergovernmental Agreement, otherwise known as International Space Station Agreement is an International treaty signed on January 29, 1998 by the fifteen governments. Initially such an agreement was put forward on 29 September 1988. This was later on replaced by another one in 1998. This key instrument establishes a long-term international co-operative framework on the basis of genuine partnership, for the detailed development, operation, and utilization of a permanently inhabited civil Space Station for peaceful purposes in accordance with International law. This legal framework defines rights and obligations of each of the countries and their jurisdiction and control with respect to their space station elements.

[6] Article 21 – Intellectual Property – 1. "For the purpose of this Agreement, 'intellectual property' is understood to have the meaning of Article 2 of the convention establishing the World Intellectual Property Organization, done at Stockholm on July 1967.

2. Subject to the provisions of this Article, for the purpose of intellectual property law, an activity occurring in or on a space station flight element shall be deemed to have occurred only in the territory of the Partner State of that element's registry, except that for ESA registered element any European State Partner may deemed the activity to have occurred within its territory. For avoidance of doubt, participation by a Partner State, its Co-operating Agency, or its related entities in an activity occurring in or on any other Partner's Space Station flight element shall not in and of itself alter of affect the jurisdiction over such activity provided for in the previous sentence.

[7] In respect of an invention made in or on any space station flight element by a person who is not its national or resident, a partner state shall not apply its laws concerning secrecy of inventions so as to prevent the filing of a patent application (for example, by imposing a delay or requiring prior authorization) in any other Partner State that provides for the protection of the secrecy of the patent applications containing information that is classified or otherwise protected for national security purposes. This provision does not prejudice (a) the right of any Partner State in which a patent application is first filed to control the secrecy of such patent application or restrict its further filing; or (b) the right of any other Partner State in which an application is subsequently filed to restrict, pursuant to any International obligation, the dissemination of an application.

This research paper examines the issue of the extent of applicability of patent laws to space activities. Industrial property plays an essential role for an orderly development of space activities and through huge investments it has been made to carry out the Space Station project as well as other space programs. It is of utmost importance to assess the legal regime for protection of technology use and new inventions in outer space.[8] Taking into consideration the inventions in relevance to Outer Space activities, we perceive that space-related inventions can be made and can be used, either on earth or in outer space. Yet, there are some questions, such as:

1. Can various inventions made on earth resulting from space programmes be patented?
2. Or can various inventions made in outer space be patented?
3. If so, what law should be applicable?

Patent laws are developed in strong associations with territory and sovereignty of state, whereas outer space is outside any such State's territory. According to R. Oosterlinck[9], space-related invention can be divided into two main kinds:

1. Space related inventions resulting from job done on earth.
2. Space related inventions made in outer space.

A. Space Related Inventions Resulting from Job Done on Earth

Most of the legal inventions are generally developed under space programs made on earth. These inventions are the result of a space programme, which do not distinguish themselves from other inventions on earth. If an invention complies with the conditions of patentability, it is capable of being protected by a patent. There are, however, some exceptional cases, in which such an invention cannot be protected by patent because the patent application filed is still judging if or not, national interest should come before an individual's own interests. The judgment also extends to the degree, whether a space exploitation monopoly might be harmful to the state. This is especially true to the case of inventions, which are health, national security and energy related issues.[10]

In addition, with regard to inventions being patented on earth for applications in outer space, the patent should be applied for those countries which currently have in place, the legislation to protect the inventions for use in outer space.[11] In principle, the national laws are restricted to relevant territories of the State. In case of an extension of this, explicit provisions must be enacted.[12]

B. Space Related Inventions Made in Outer Space

[8] *See* INTELLECTUAL PROPERTY RIGHTS AND SPACE ACTIVITIES IN EUROPE, 1 (1997, European Space Agency).
[9] R. OOSTERLINCK, INTELLECTUAL PROPERTY AND SPACE ACTIVITIES, THE PROCEEDINGS OF THE 26TH COLLOQUIUM ON THE LAW OF OUTER SPACE, IISL, October 10-15, 1983.
[10] *Id.* at 162.
[11] *See supra* note 8, at 6.
[12] *Id.* at 29-30.

There have been no inventions made in outer space until now. Furthermore, if we analyze the kinds of space related inventions made in outer space for terrestrial or spatial applications, the key point of these categories will relate to jurisdictional aspects. It must also be concluded that jurisdiction[13] in outer space is rather an unclear situation. It will pose quite a number of problems for international community with respect to application of national law and/or the choice of law, since there is an absence of state practice and precedents.

In consideration to jurisdiction and space activities, outer space, the high seas and Antarctica alike, are considered as *res communis*[14], and are not subject to any national appropriation.[15] As far as International law is concerned, it does not normally fall under any national sovereignty. However, on the general principle of the Outer Space Treaty, a state party to the treaty, whose registry of an object was launched and carried into outer space, shall retain jurisdiction and control over the space object[16]. Thus, it seems that registration gives the solution, by which state's jurisdiction and control will be applicable, when dealing with a space object.

For the issue of protecting inventions in outer space, we have found out that the applicability of national patent regulations are, in principle, enforceable only within the territorial boundaries of a given country. Therefore, problems will occur when an invention is used or infringed in outer space. Some provision of the Outer Space Treaty can be defined as the main concept for exercising (extra-territorial) jurisdiction over space objects.[17] It is also for the patentability of invention in space, as the International Patent Treaties (namely, the Paris Convention, the Patent Cooperation Treaty, and the TRIPS Agreement, etc.) mainly address non-jurisdiction aspects of national patent systems similar to the validity and the entitlement of a patent. Therefore, it can be implied that these International Agreements can be applied to inventions made in outer space.

IV. HARMONIZATION AND INTELLECTUAL PROPERTY RIGHTS

Due to its importance for the overall success of the space station project, one of the most delicate matters dealt with the IGA is the protection of IPRs. The difficulties faced by the parties to the IGA partly result from the fact that IPRs can only be protected under national Laws. National intellectual property laws are territorial in nature and are confined to the territory where they are created. The nature of IPRs is that they are anti-competitive, giving monopoly rights and thus restricting what others can do. Competition laws and intellectual property laws are in constant state of tension. IPRs are an intangible form of property and have an *erga omnes* effect. The results of a research can be protected either by a patent or by secrecy.

[13] Jurisdiction is the term used to describe the power being exercised by a state over any persons, property, or events.
[14] A thing that belongs to a group of persons.
[15] Outer Space Treaty, 1967, art. 2.
[16] *Id.* art. 8.
[17] *Id.*

V. PATENTS[18]

With regard to space activities and activities in or on the ISS[19], the protection of inventions by means of patents will play the most important role. The three basic requirements are novelty, "non-obviousness" or "inventive step", and "intrinsic useful-

[18] The monopoly right is granted in exchange for a complete disclosure of the invention, and in return the inventor receives the benefit of a period of monopoly during which he is entitled to exclude others from using his invention except by his license. The need to protect intellectual property rights on international level and in foreign countries arises from the very nature of IPR, transcending national boundaries. This need gave rise to several international treaties in this field. The Paris Union Convention (PUC) of 1883 introduced the principle of national treatment.

The Patent Cooperation Treaty (PCT) organizes certain phases of a uniform procedure of deposit of patent applications, leading to the examination and the issuance of the patent by the national authorities. The grant of the patent involves an international phase administered by the WIPO, followed by a national phase in every State where protection is sought. The international phase consists of a compulsory procedure concerning the international application, the research and the international publication of applications, and a facultative procedure. The application has in every designated State the same effect as a normal national application, but does not oblige the contracting states to harmonize their provisions concerning patentability. National authorities grant the patent. The PCT system provides for a single application and search, and in some cases a single preliminary examination; but thereafter it transmits applications to national offices for them to decide upon the grant of a patent for their territories. It is administered by WIPO, Geneva. After the submission of a single international application designating the countries in which patents are wanted, chapter 1 creates an international search conducted by one of the International Search Authorities. Chapter 2 establishes an International Preliminary Examination. The PCT allows the applicant to institute applications in numerous countries by a single procedure and to delay his final decision to apply in a number of countries for a period of twenty months after his priority date.

Different from the PCT, the European Patent Convention (EPC) established a system of law, common to the contracting states, for the grant of patents for inventions. A "European patent" confers on its owner in each contracting State in respect of which it is granted, the same rights as would be conferred by a national patent granted in that State. The EPC unified and harmonized the rules relating to the patentability of inventions and the procedures leading to the grant of the patent. After the patent has been granted, enforcement procedures belong to the jurisdiction of the individual states. Of the European Partner States, only Norway is not party to the EPC, but has harmonized its national law at an early stage.

The Community Patent Convention is the most advanced system, creating a uniform and independent patent, not only regarding the grant, but also regarding the effect, and covering the whole territory of the European Community. This high ambition explains why it has not yet received the necessary number of ratifications to enter into force. The Agreement on Trade Related Aspects of Intellectual Property Protection (TRIPS) is of minor significance to states already belonging to the PUC.

[19] The legal framework of the ISS. – The legal framework for the international cooperation was established, in a hierarchical order, in the IGA, the more detailed provisions of the related Memoranda of Understanding between NASA and each cooperating agency and implementing arrangements. These agreements outline the specific rights and duties of the Partners in this "genuine partnership" and provide a list of each Partner's contributions. The cooperation will be carried out in accordance with International law, in particular the major international space treaties. Each Partner of the ISS registers the flight elements it provides in accordance with the provisions of the Registration Convention, and each Partner retains jurisdiction and control over the elements it registers and over its nationals in or on the ISS. Furthermore, the Partners retain the ownership of the elements they provide in accordance with the annexes of the IGA. The ISS thus is more a combination of national space objects than a truly international Space Station. The European Governments act collectively as one "European Partner". European Space Agency (ESA) registers the European flight elements in the name and on behalf of the "European Partner", which have delegated this responsibility to ESA. Each contracting party of the IGA, however, is a "Partner State", including each ESA member state individually. According to Article 8 of the Outer Space Treaty (OST), a State retains jurisdiction and control over a space object it has registered as launching State. The exercise of jurisdiction and control is the right of the State of registry, and the registration is the obligation of the launching State. The competent State thus can exercise full and independent jurisdiction over persons and objects and extent its national law to the registered space objects. In case there is more than one launching State, the states shall determine the State of registry. An international organization, such as ESA, can also act as State of registry.

ness" or "industrial application". However, it is possible that, while the basic research is being conducted on board the ISS, this research does not result in patentable subject matter, because scientific discoveries, findings and ideas as such might not be patentable. Further work on earth might be necessary to make actual invention, in which case the applicable patent law is easy to determine. This also emphasizes the importance of the protection of trade secrets on board the ISS.

VI. TRADE SECRETS[20]

Trade secret protection may be critical in certain circumstances to protect inventions stemming from outer space research or other un-patentable manufacturing processes employed in outer space. Trade secrecy laws can offer protection:

1. of a patentable invention during a patent application's pendency;
2. to protect information related to a patented invention but not cov ered by that patent;
3. to protect technical ideas that can be put to commercial use without at the same time becoming public, e.g. a process of manufacture;
4. to protect information or subject matter that is not or not yet patentable or which is only partially patentable, or where the party wants to continue to have rights in the subject matter beyond the term available through patenting.

The latter aspect is of specific relevance to the work on the ISS because scientific discoveries, findings and ideas which as such are not patentable, but which will lead to patentable inventions after the raw data is returned to earth and used for further research.

Trade secret protection may be the only practicable option to guard the invention, because many countries are yet to approve the patentability of life forms, or *ordre public* may require the disclosure of certain information. In other cases, the infringement of a patent may be difficult to detect, or one assumes that the invention will quickly be outdated by technological progress, so that it appears unnecessary to make the expenses connected to a patent application.

The maintenance of absolute secrecy on board the ISS or on board the European Space Agency module might not be feasible because space limitations are likely to restrict practical measures. If actual secrecy cannot be preserved, trade secrets can be protected by criminal law and through laws against corruption. Trade secrets are also

[20] Trade secrets or know-how include any transferable, technical information which is not generally known and not patented. It can encompass ideas, concepts, inventions, manufacturing processes and other confidential information. Technical information does not have to be novel or attain any level of inventiveness. Trade secrets do not have formal protection procedures, and the owner of a trade secret does not enjoy any exclusive rights. Because of their secret nature, national governments do not require submission of applications or any other form of official procedure. It is fundamental to the maintenance of a trade secret that it is protected and not disclosed to third parties except under circumstances that ensure the preservation of the holder's rights. Trade secrecy laws do not protect against independent discovery by a third party, against reverse engineering or analysis.

protected by civil liability, i.e. laws of delict or tort, unjustified enrichment, and unfair competition. Furthermore, contractual arrangements may be chosen to preserve the secrecy of valuable discoveries or processes. However, if nothing is agreed, the common or civil or criminal law of the State which governs the module shall apply. An obligation to maintain confidentiality also might arise as a fiduciary duty or be based on good faith.

The disadvantage of a contractual solution is that it can only cover the situations that the parties foresee, and it would only be binding for the contracting parties. The costs related to the negotiation and conclusion of appropriate contractual arrangements with the other users of the ISS also could discourage investors.

In contrast to other IPRs, the notion of breach of confidentiality is loosely defined. It may consist in any disclosure or use, which contravenes the limited purpose for which the information was revealed. The available remedies include injunctions and damages. The available means widely vary between different jurisdictions. The main protection of trade secrets will likely stem from contractual obligations. The applicable law can be determined by the rules of private international law. The rules of Article 21 are not designed to meet these requirements. Especially on board the ESA module, the applicability of different trade secret laws can lead to legal uncertainty. These types of protection are of some value in national context, but there is little guarantee of international reciprocity. Therefore, an overall trade secret scheme would be the preferable solution, e.g. incorporated into the IGA or as a separate agreement on European level. The likelihood of its implementation must be assessed in light of the IGA's current jurisdictional patchwork regarding the patent law. If the question of jurisdiction has only been partially resolved in any other area of law, agreement is unlikely to be reached on trade secret law. The harmonisation of trade secret laws would enhance legal certainty and would thus be desirable.

VII. OTHER AREAS OF INTELLECTUAL PROPERTY LAWS

Other areas of Intellectual Property laws, such as copyright law, trademark law, the protection of industrial design, etc. will play a lesser role in the field of space activities and of activities on board the ISS. These questions, however, can gain importance for the commercialisation of the ISS. In the area of copyright laws, for instance, the impetus for protection and harmonization is less pressing because so far this field has not been regarded as critical for a successful commercialisation of space activities, and areas protected by copyrights usually do not require a degree of financial commitment comparable to the subject matter covered by patent laws. This may, however, change in the long run if human beings begin to settle in outer space and produce works, which could be protected under copyright laws.

VIII. CRITICISM OF INTER-GOVERNMENTAL AGREEMENT

If the aura thrown around the Agreement is removed, the only unique thing is its clause on Intellectual Property, which is the only provision directly dealing with space related IPRs. But on a scrupulous analysis, it seems that Article 21 is poorly drafted and is inconsistent with the current intellectual property regime under TRIPS. [21]

Sreejith pointed out; firstly, Article 2 of IGA states that the utilization, development, and operation of International Space Station shall be in accordance with International Law. This indicates that the provisions of IGA should be consistent with International Law. Article 21 says, "for the purpose of Intellectual Property Law, an activity occurring in or on a space station flight element shall be deemed to have occurred only in the territory of the Partner State of that element's registry". Here Article 21 creates a micro territory on board the space station. And this as per Article 21 is for determining intellectual property rights, in particular patents. This clause is built-in in IGA mainly in the form of a cure for the existing patenting convolutions with regard to inventions made in outer space. It is submitted here that it somewhat is outspoken and brawls for solutions to an issue which is not existing. This is because under the current global IPR regime, all discrimination "as to the place of invention" for the grant of patents stands eliminated.[22] The thrust given by Article 21 of IGA to 'place of invention' as a factor for determining the granting of patents thus remains incompatible with TRIPS provisions and there by is inconsistent with International law.

Secondly, even assuming that the provisions of Article 21 are justifiable, it poses certain problems while practically executing it. The logic behind Article 21 stems from Article 8 of Outer Space Treaty and Article 2 of Registration Convention[23] both of which deal with jurisdictional aspects. The jurisdiction referred to in these Articles is quasi-territorial in character. It applies not only to the spacecrafts but also to personnel on board irrespective of their nationality.[24] Furthermore, the jurisdiction of the State of registry applies to these persons, not only when they are on board but also when they are outside their vehicle. Thus, those personnel will be subject to the quasi-territorial jurisdiction of the State of registry of their respective spacecraft, irrespective of their nationality. The drafters of IGA do not envision this jurisdictional clash. The *raison d'être* behind Article 8 of Outer Space Treaty and Article 2 of Registration Convention is to make states accountable and to determine liability.[25] There is nothing in these clauses, which is to be perceived as an enabling factor for determining patentability with regard

[21] S.G. Sreejith, *Intellectual Property Clause of the International Space Station Agreement: Damp Squib?*

[22] According to Article 27 of TRIPS ".... patents shall be available and patent rights enjoyable without discrimination as to the place of invention ....".

[23] This is explicitly provided in Article 5 of IGA, which states "In accordance with Article 2 of the Registration Convention, each Partner shall register as space objects the flight elements listed in the annex which it provides, the European Partner having delegated this responsibility to ESA, acting in its name and on its behalf.

Pursuant Article 8 of Outer Space Treaty and Article 2 of Registration Convention, each Partner shall retain jurisdiction and control over the elements it registers in accordance with paragraph 1 above and over personnel in or on Space Station who are its nationals. The existence of such jurisdiction and control shall be subject to any relevant provisions of this Agreement, the MoUs, and implementing arrangements, including relevant procedural mechanisms established there in".

[24] BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 231 (1997, Clarendon Press).

[25] As reflected in the preamble of the Convention on Registration of Objects Launched into Outer Space,

to inventions made in Outer Space. This is the point where the Drafters of IGA went wrong.

IX. RECOMMENDATIONS

B.L.Smith, in his article "An Industry Perspective on Space-Related Intellectual Property Rights" for the *Société de Services en Propriété Industrielle*, Paris stated that, as for protection of research and development investment, it should be noted that quite often, the research and development has been funded under contract by a governmental or intergovernmental agency, with clauses which are intended to protect or recover the industry investment, but which offer little protection for the accompanying industry investment. Worse, many agencies that fund contracts also reserve licensing rights, commonly with extensive sub-licensing rights. This often means that the agency can grant sub-licenses to the originating firm's competitors, effectively defeating the hope-for competitive advantages. In addition, there are considerable legal and practical uncertainties as concerns the possibilities of enforcement of IPRs. Applicable law is one major uncertainty because of its territorial nature. Another is how to discover potential infringements, and how to go about proving it to recover damages. Defense against third-party attacks is also uncertain, largely because of uncertainties of applicable law, and the resulting uncertainties of prediction of the outcome of infringement proceedings. Because of the huge sums which may be earned in a successful infringement suit, attempting an attack becomes attractive enough to raise venture capital to pay legal fees of the attacking party, even if the chances of success are objectively slim.

Smith stated that most importantly, we need legal certainty, arising from appropriate applicable, space-specific legislation, imperatively harmonised internationally for space use. Patchwork territoriality leads inevitably to inconsistent application and spawns legal uncertainty. Legal certainty is a necessity in order to attract private investors to finance space industry efforts in the commercial sector, and to enable industry to properly assess risks of infringement liability. In addition to legislation, we must also establish a workable enforcement policy and mechanisms. Currently, enforcement actions are almost always undertaken in a foreign country, under foreign laws. It seems that such unilateral extensions of territory are dangerous, tending to fill the legal void with space junk. Infringement is presently next to impossible to detect, let alone to prove, with the confidentiality which reigns in the industry. Most potential benefits of IPRs for space industry will remain illusory as long as such conditions prevail. Another major concern of the industry is the considerable IPRs which are under option, under license contracts signed with these entities when they were strictly non-commercial, public service and international cooperation's or national administrations. The problem

1975, its main objective is to make provisions for additional means to aid the identification of space objects. This Convention, which stemmed from Article 8 of Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including Moon and Other Celestial Bodies, 1967, will be of immense utility with regard to determining liability for damage caused by space debris. Its substantial value lies in making the 1972 Convention on Liability for Damage Caused by Space Objects more effective. For a detailed discussion on this, *See* MANUAL OF SPACE LAW, Vol. II 173-89 (N. Jasentuliana et al eds., 1979, Oceana Publications).

is that many of these entities are becoming privatised and are changing over to purely commercial operations, co-ownership, or assigned to agencies and/or treaty organisations. They may view these IPRs as a potential revenue source, and in any case, they will likely make different use of the IPRs than was foreseen by the industrial partners at the time of the signature of the contract. A potential industry backlash is building up against seeking patent protection for innovations resulting from agency contract funding. Some industry experts say when funded under such conditions, don't make inventions! Or if you want to make inventions, don't accept the agency funding!

X. RECOMMENDATIONS FOR SPACE-RELATED INTERLLECTUAL PROPERTY RIGHTS FROM AN INDUSTRY PRACTITIONER'S POINT OF VIEW

Industry would like to be able to use IPRs to protect its research and development investments, to gain competitive advantages, and to be able to continue industrial pursuits free from third-party aggressions on IPRs issues. A major necessary step towards these goals is to establish legal certainty for IPRs issues in space-related activities. Obtaining of IPRs must be clarified in view of disparate territorial principles. But even more important is to achieve harmonisation of the use of IPRs in space activities, free from territorial considerations of any sort. It seems that the only hope for such a situation would be some sort of International Legislation, with the concomitant creation of an international enforcement body, such as an International Board of Arbitration or an International Court. This may seem a gigantic undertaking, but it is surely more modest than attempting to harmonise the existing disparate national laws. Nationalist tendencies may take decades to overcome, but a uniform legislation must undoubtedly be proposed on a global level. As is already a long-standing tradition for terrestrial activities, it is becoming increasingly urgent to ensure that the space industry benefits from a workable IPRs legislative framework which can guarantee at least a minimum level of security for investments from the private sector and future commercial activities.

XI. CONCLUSION

The IGA and the other arrangements and agreements only provide for a patchwork of solutions. Article 21 introduces the applicability of national Intellectual Property laws on board the ISS, and offers some incomplete rules in the fields of the application of secrecy laws and infringement procedures in Europe. This analysis has shown that many questions are left unanswered, leading to practical problems, inconsistencies and obscurity in the legal framework. This is especially concerning because legal clarity is a prerequisite for the attraction of private investment in the ISS. Article 21 does not offer help in the application or harmonisation of trade secret laws.

In conclusion, the role of Intellectual Property in space activities is important in order to protect and promote the results of research and development, and to encour-

age industry to select creative works for exploitation. Space capabilities and activities have produced a shrinking world in which there is a need for wide-ranging international cooperation. This has resulted in new approaches to the protection of IPRs. This is allowing the product of creative and inventive persons to provide benefits to a wider society. The constant evolution of high technology and the ever-changing geopolitical situation underlines the need for the universal harmonisation of industrial and intellectual property laws.

CHILD SEX TOURISM: AN OVERVIEW OF THE DOMESTIC AND INTERNATIONAL RESPONSE

Sridevi Panikkar *

I. INTRODUCTION

The Declaration and Action for Agenda of World Congress against Commercial Sexual Exploitation of Children (1996) provided this definition of the practice of commercial sexual exploitation of children (CSEC) in general:

> The commercial sexual exploitation of children is a fundamental violation of children's rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery. [1]

It consists of practices that are demeaning, degrading and threatens the physical and psychosocial integrity of the child.

There are three primary and interrelated forms of commercial sexual exploitation of children: prostitution, pornography, and trafficking for sexual purposes. Other forms of sexual exploitation of children include child sex tourism and early marriages. Commercial sexual exploitation seriously compromises a child's right to enjoy childhood and to lead a productive, rewarding and dignified life. It can result in serious, lifelong, even life threatening consequences for the physical, psychological, moral and social development of children. The immediate danger exploited children face is physical violence from those who exploit them. Children are even more vulnerable to sexually transmitted diseases than adults, including HIV infection and AIDS. Not only do they lack access to education on sexually transmitted diseases and safe sex practices, typically children who are exploited are not in a position to negotiate safe sex practices. Psychological impacts of sexual exploitation are harder to measure, but no less painful for the child.

Commercial sexual exploitation presents substantial challenges to the justice and social-service systems charged with the responsibility of holding offenders' accountable and treating children's present harm, physical as well as psychological, while also preventing future exploitation.

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[1] Declaration and Agenda for Action from the World Congress against the Commercial Exploitation of Children, Stockholm, Sweden, August 27-31, 1996, *available at* http://www.ilo.org/public/english/comp/child/standards/resolution/stockholm.htm.

This paper focuses only on one of the many forms of CSEC; Child sex tourism. It is part of the global phenomenon of commercial sexual exploitation of children. It involves the sexual abuse exploitation of both male and female children, usually, but not always, in tourist destinations and has become a common term to describe different situations where children are abused and when the offender does not come from the location where the abuse takes place. It includes: the prostitution of children, paedophilia-related child abuse, and the production of pornography involving children.

It is difficult to precisely measure the exact number of children affected by sex tourism. The covert and criminal nature of child sex crimes and the vulnerability of children, especially children living in poverty, make data collection a difficult and sometimes dangerous task. Estimates by governments and non-governmental organizations (NGOs) vary widely, while unsubstantiated numbers are often recycled without attribution or confirmation.

The next section gives a brief background of the issue under consideration. Section III traces how the issue is dealt with under the present international legal framework and also takes a brief look at national laws enacted in this regard by some countries. This section also looks at the regional instruments that have been evolved in South Asia in this regard. Section IV focuses on the situation and the legal framework in India.

II. BACKGROUND

The United Nations defines child sex tourism as "tourism organized with the primary purpose of facilitating the effecting of a commercial-sexual relationship with a child."[2] Child-sex tourism, however, may also include the opportunistic use of prostitute children while traveling on business or for other purposes. Child sex tourist usually refers to: persons who travel from their own country to another to engage in sexual acts with children, or foreigners who engage in sexual activity with a child while overseas. It often involves a third party who procures a child from local communities.

Although the general pattern is that "tourists" from developed countries seek out the sexual services of children in developing countries, Child sex tourism is not just a problem brought in by western tourists. Offenders can also be, and infact in most cases are, local tourists or expatriates working in the community. The sexual abuse of children by foreign military personnel has also created a sub-group that could be labeled under child sex tourism, although this requires further investigation.[3]

[2] Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, United Nations Economic and Social Council, Commission on Human Rights, 52nd Session, Agenda Item 20,U.N. Doc. E/CN.4/1996/100 (1996), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.1996.100.En?Opendocument.

[3] *See* ECPAT, *Situational Analysis Studies on Child Sex Tourism in Tourist Destinations of India, Nepal and Sri Lanka*, 2003. *available at* http://www.ecpat.net/eng/Ecpat_inter/projects/sex_tourism/Executive%20Summary.Web1.pdf.

Child sex tourism was first investigated in South-east Asia in the late 1980's. Not long after, research was done in Sri Lanka that uncovered numerous cases of child sexual abuse along the tourist beaches. More cases emerged in Goa and later Kathmandu that confirmed fears that foreigners in tourist destinations were abusing children across South Asia.

However there is no hemisphere, continent, or region unaffected by the child sex trade. As countries develop their economies and tourism industries, child sex tourism seems to surface. Economic difficulties, civil unrest, poverty, and displacement of refugees all contribute to the growth of the child sex industry. In Africa many countries are faced with a rising child prostitution problem, partly due to poverty, migration from rural to urban areas, increase in the number of orphaned children due to the aids epidemic and the advent of tourism. Reports of children entering prostitution, being exploited by foreigners and aid workers, and trafficked to Western European brothels are coming from the Czech Republic, Poland, Romania, and Russia[4].

However Asia continues to be the primary destination for child sex tourists. The United Nations Children's Education Fund (UNICEF) released a report in 1997 estimating commercial-sex workers in Asia could number more than 2 million, with about half being children.[5]

A. Causes

Abject poverty often contributes to the vulnerability of children to commercial sexual exploitation. Many children entering child sex industries come from poor and/or migrant families or are homeless children living on the street. They may be sold by someone they know to a procurer, arrive in a city with false expectations and be forced into the sex industry, be misled about the nature of their work, or be abducted. Children and young people may also become involved to support their families, to supplement their income from other sources, to meet their survival and daily needs or are sexually exploited because they have no protection or shelter.

However, even though poverty may be a principal catalyst, it cannot adequately explain commercial sexual exploitation of children. Many children from poor families do not enter the sex trade, while many children whose families are not impoverished do enter the sex trade. The sexual exploitation of children takes place in both 'developing' and 'developed' countries. When considering what makes children vulnerable to commercial sexual exploitation other factors should be taken into account.

Many countries also focus on tourism as a means for economic development. The loss of land and traditional livelihood due to development can be very disruptive, resulting in breakdowns in traditional and community systems and creating new and highly mobile and migration-prone communities. These elements lead to the vulnerability.

[4] Eva J. Klain, *Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses*, 32-35 (1999), *available at* http://www.missingkids.com/en_US/publications/NC73.pdf.

[5] *See* Charlotte Bunch, *The intolerable status quo: Violence against women and girl, The Progress of Nations* (1997), *available* at http://www.unicef.org/pon97/women1.htm.

Inadequate national laws, lax law-enforcement measures, and limited sensitization of law-enforcement personnel to the harmful impact of CSEC on children are other contributing factors. Corruption among police and other law enforcement officials is often cited as a major obstacle in combating commercial sexual exploitation.

Furthermore, some travel agencies, Internet chat rooms and message boards, and organizations such as NAMBLA (North American Man Boy Love Association) not only encourage child sex tourism, but also give detailed instructions on how to partake in it. The existence and encouragement of such groups in addition to the marked *laissez-faire* attitude of a number of governments greatly frustrates attempts at eliminating the child-prostitution industry.

However, undoubtedly, there is great diversity in the circumstances and levels of exploitation locally, regionally and globally.

B. Sex Tourist

Popular usage of the term "paedophilia" classifies all persons engaging in sex with a child as a paedophile. Paedophilia, a sexual preference for prepubescent children, is not a crime in itself. It is the act of sex with a child that is a crime. Put simply, a paedophile is a person with a sexual love for children. However, a person who exploits or abuses a child sexually is not necessarily a paedophile, and a paedophile may not necessarily act out his fantasies by engaging in sexual activities with a child.

It is more accurate and useful to use the term "child sex offender" to describe a person engaging in sex with a child, a term which includes but is not limited to paedophiles .The situational child sex offender for instance, does not have a sexual preference for children, but engages in sex with children because he or she is morally and/or sexually indiscriminate and wishes to 'experiment' with young sex partners.

In general, child sex tourists' travel to poorer countries from economically developed ones. However Child sex tourism is not just a problem brought in by Western tourists. Offenders can also be local tourists or expatriates' working in the community. Child sex industries cater to both foreign and local offenders.

Child sex tourists are generally men, although women have been known to employ foreign prostituted children as well. Contrary to the myth that is generally perpetrated, they are both homosexual and heterosexual. Some sex tourists travel from their home country to another solely for the purpose of committing a sexual act with a child. Others travel for business or vacation, but then become tempted by the availability of prostituted children or attracted by offers from tour companies and local establishments. Child sex tourists generally choose locations that combine widespread poverty with a well-developed and highly commercialized sex industry. Racist and sexist stereotypes and a demand for virgins fuelled by myths of 'virgin cure' built around HIV/AIDS are also factors that are seen as causes for offending.

C. Impact on Children

The commercial-sexual exploitation of children through child sex tourism violates their fundamental rights and prevents them from leading the "productive, rewarding and dignified lives" to which they are entitled.[6] It causes damaging physical and psychological effects. Significant psychological effects associated with the prostitution of children include post-traumatic stress disorder, impairment of attachment, lowered self-esteem, and problems in interpersonal relationships.

Clearly, prostituted children are at a high risk for sexually transmitted diseases and related health concerns. There is also a high risk that young prostituted girls will become pregnant and give birth to premature newborns with low birth weights and other complications. In developing nations, access to pre-natal care is limited, especially for the population of sexually exploited girls who have little money and an unstable support system. Most girls, especially from developing countries, who are forced into or enter prostitution, are usually unable to escape it even in their adult lives.

D. Child Sex Tourism and Tourism as an Issue

A report from ILO, The Sex Sector: The Economic and Social Basis of Prostitution in Southeast Asia, examined commercial sex work in four countries—Indonesia, Malaysia, the Philippines, and Thailand. The report found that the sex sector accounts for anywhere from 2 to 14 percent of these countries' Gross Domestic Product (GDP), and government authorities collect substantial revenues in areas where prostitution thrives, either illegally from bribes and corruption or legally from licensing fees and taxes on hotels, bars, and restaurants.

Tourism itself is not responsible for child sex tourism but creates increased opportunities for commercial sexual exploitation of children to occur and provides easy access to vulnerable children. For many governments around the world, international tourism provides an answer to economic growth and development. The commercial sexual exploitation of children has paralleled the growth of tourism in many parts of the world. The marketing of certain destinations, particularly within Asia, portray images of women and children who are passive, submissive and exotic, reinforcing beliefs that child sexual abuse can be justified and legitimizing sexual fantasies. Tourism also brings consumerism to many parts of the world previously denied access to luxury commodities and services. The lure of easy money has caused many young people, including children, to trade their bodies in exchange for T-shirts, walkmans, bikes, etc. In other situations, children are trafficked into brothels on the margins of tourist areas and sold into sex slavery, very rarely earning the money to escape.

Hence, even though tourism isn't in itself responsible for child sex tourism, child sex tourism is certainly a tourism issue. The tourism industry is ideally placed to

[6] Declaration, *supra* note 1.

take action against it, especially by creating a greater awareness amongst tourism sector workers and by actively promoting more responsible and ethical behaviour while travelling. We shall briefly look at the initiatives taken by the international tourism industry later in the paper.

III. INTERNATIONAL LEGAL FRAMEWORK

The sex tourism industry has no territorial boundaries; therefore, in order to successfully combat this problem, it must be viewed from an international perspective. Numerous treaties, United Nations (UN) conventions and other international initiatives address the commercial sexual exploitation of children through prostitution and sex tourism. All attest to the importance placed on eradication of child prostitution by the international community. Unfortunately, the international instruments have varying degrees of enforceability and often rely entirely on the voluntary cooperation of nations. The most significant of all international instruments is the United Nations Convention on the Rights of the Child (CRC)[7]. The Convention reflects a global consensus and in a very short period of time it has become the most widely accepted human rights treaty ever. Currently 191 States are party to the CRC. Every UN member, with the exception of United States of America and Somalia, has ratified the treaty.

Under Article 1 of the CRC, a child is defined as every person who is younger than eighteen years of age unless majority is obtained earlier under national law. Article 19 protects children from all forms of abuse, neglect, and exploitation by parents and others, and obligates states to undertake prevention and treatment programs to this end. The Convention expressly condemns the sexual exploitation of minors in prostitution and illegal sexual practices. Article 34 specifically requires States to protect children from sexual exploitation and abuse including prostitution and involvement in pornography. The States are required to take appropriate national, bilateral and multilateral measures to prevent such exploitation and abuse. Article 35 obligates States to prevent the abduction, sale, and trafficking of children.

The CRC established a Committee on the Rights of the Child [8] for the purpose of monitoring the progress of the parties, in achieving the obligations under the Convention. Pursuant to Article 44, State parties must make periodic reports to the Committee on the measures they have adopted which gives effect to right contained therein and progress made towards enforcement of those rights. The Committee then considers these reports and publishes concluding observations and general recommendations as to how they can improve the condition of children in their countries.

However, the Committee lacks authority to receive petitions from States or individuals alleging violations of the Convention, and the Convention offers no remedies. Despite this limitation, the Committee is useful to NGOs working on children's rights as an international framework through which they can more effectively pursue their agenda, and the Convention helps establish a uniform international standard.

[7] Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989. It came into force on September 2, 1990, *available at* http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm.

[8] *Id.* Article 43(1).

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography is the first of two Optional Protocols to the CRC to enter into force[9]. The Protocol expressly prohibits the sale of children, child prostitution and child pornography and is the first international instrument to define these terms. Accordingly, the Protocol requires these offences to be treated as criminal acts. The Protocol requires States parties to: establish grounds for criminalizing these prohibited acts; ensure jurisdiction over the offences; provide for the extradition of offenders; encourage international cooperation between States to pursue offenders; and provide support to child victims of commercial sexual exploitation. An important feature of the Optional Protocol is that it requires States to enact extra territorial jurisdiction that ensures their national legislation extends to crimes of sexual exploitation of or trafficking in children committed in other states by their own nationals, residents, corporations, or associations[10].

ILO has several conventions addressing forced labor including prostitution of children. These include the Forced Labour Convention[11], later reinforced by the Abolition of Forced Labour Convention[12]. Worst Forms of Child Labour Convention[13] defines the worst forms of child labour as including all forms of slavery, trafficking, child prostitution, child pornography, use of children for illicit activities (such as for the production and trafficking of drugs), and use of children for any work that by its nature or the circumstances in which it is carried out is likely to harm the health, safety and morals of children.

A. Other International Initiatives

In 1996, the First World Congress against Commercial Sexual Exploitation of Children[14] was convened in Stockholm, Sweden, as a forum to develop strategies for an international response. The Congress was organized by ECPAT and hosted by the government of Sweden in collaboration with UNICEF and the Group for the Convention on the Rights of the Child, an NGO. The World Congress adopted a Declaration and, what is known as the Stockholm Agenda for Action that calls upon States to accord high priority to action against the commercial sexual exploitation of children and allocate adequate resources to the effort, promote stronger cooperation between States and all sectors of society and strengthen the role of families, criminalize the commercial-sexual exploitation of children by condemning and penalizing the offenders while ensuring the child victims are not penalized, review and revise laws, policies, programmes, and practices, enforce laws, policies, and programmes.

[9] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of May 25, 2000. It has been ratified by forty three countries, signed by one hundred and five countries, and entered into force in January 2002. India has not yet ratified this Optional Protocol, *available at* http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm.

[10] *Id.*, Article 4.

[11] The Forced Labour Convention, 1930 (No. 29). It came into force on May 1, 1932, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029.

[12] Abolition of Forced Labour Convention, 1957 (No. 105). It came into force on January 17, 1952, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105.

[13] Worst Forms of Child Labour Convention, 1999 (No. 183). It came into force on 19 November, 2000. India has not yet ratified this Convention, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182.

[14] Declaration & Agenda, *supra* note 1.

In December 2001 the Second World Congress on Commercial Sexual Exploitation of Children,[15] hosted by the Japanese Government took place in Yokohama. The objectives of the Second World Congress were to enhance political commitment to the implementation of the Agenda for Action adopted at the First World Congress; review progress in the implementation of this Agenda; share expertise and good practices; identify main problem areas and/or gaps in the fight against commercial sexual exploitation of children; strengthen the follow-up process of the World Congress.

B. Regional Instruments: South Asia

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution[16], 2002 aims to promote cooperation amongst member states to effectively deal with various aspects of prevention, interdiction and suppression of trafficking in women and children; repatriation and rehabilitation of victims of trafficking and preventing the use of women and children in international prostitution networks, particularly where the SAARC member countries (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka) are the countries of origin, transit and destination. The Convention is legally binding on its signatory parties and is the first regional anti-trafficking treaty to emerge from the Asian continent. As of March 2004, the convention has been ratified by all member countries except Nepal and Sri Lanka.

The SAARC Convention defines 'child', 'prostitution', 'trafficking', 'traffickers' and 'persons subjected to trafficking'. It also provides for the protection of victims, mutual legal assistance, training and sensitization of enforcement officials, rehabilitation of victims. Offences under the Convention are extraditable.[17]

The main criticism levied against the SAARC Convention is its narrow definition of trafficking, which is limited to prostitution; also that it makes no distinction between women and children.

In January 2002, the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia was signed by all seven SAARC member states with the purpose to fulfil promises member states have made to South Asian children under various national, international and regional world conferences and SAARC summits; and, to work together and develop regional arrangements to protect the rights of South Asian children.

C. National Legal Framework of Select Countries

International instruments only provide a basic uniform legal framework, the effectiveness of which undoubtedly depends on the initiative taken by the individual

[15] *See The Yokohama Global Commitment* 2001, *available at* http://www.unicef.org/events/yokohama/outcome.html.
[16] SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002, *available at* http://www.saarc-sec.org/old/freepubs/conv-traffiking.pdf.
[17] *Id.*, arts. 1, 5, 6, 7, 8, 9.

states to incorporate these elements into their national legal framework and to ensure enforceability. Infact, as highlighted by the First World Congress against Commercial Sexual Exploitation of Children, strong cooperation between states is essential to successfully combat this problem.

Many countries have passed new statutes or are considering amendments to their national laws to address the commercial sexual exploitation of children and hold offenders accountable. Several destination countries have recently strengthened their laws addressing the prostitution of children in an effort to stem the influx of sex tourists and protect their children from exploitation.

The Philippine government has increased attention on foreign child sex tourists and promoted the Special Protection of Children against Child Abuse, Exploitation and Discrimination Act. The Act creates criminal offenses aimed at patrons, procurers, advertisers, pimps, and brothel owners.[18] There has been a Tourism Department administrative order banning 'accommodation establishments' from even permitting 'to enter the premises', anyone whom they have at least 'have reason to believe' is a prostitute, child sex offender or of questionable character.[19]

In Taiwan, anyone placing 'indecent' advertisements for sexual services risks five years' jail and/or TWD 10,00,000 fine and the advertisement's publisher risks a fine of TWD 6,00,000 (USD 31,000 and 19,000 respectively); tourism workers are required to report any knowledge of prostitution of minors under eighteen years.[20]

The government of Thailand also recently increased its measure against child sex tourism. While the Prohibition of Prostitution Act prohibits all forms of prostitution in Thailand and holds those involved in the criminal sex trade liable, it exempts customers and suffers from inconsistent enforcement. Thailand's statutory-rape law, however, allows for prosecution of customers who have sexual intercourse with a girl fifteen years old or younger and subjects them to a seven to twenty year sentence and fine. If the victim is younger than thirteen years of age, the sentence is life imprisonment.[21]

Several other countries have also responded to the call for stricter national laws and increased penalties to fight sexual exploitation of children within their borders. The Czech Republic provides for prosecution of those who traffic in children, while the Portuguese government has moved to tighten laws that would make it a crime to profit from prostitution, either directly or indirectly, although prostitution itself has long been illegal[22].

However the responsibility for curbing sex tourism of children cannot rest solely with the destination countries. Sending countries must also act to punish those who travel to sexually exploit children. More recent efforts turned to holding these sex tourists accountable in their home countries. These statutes take several forms.

[18] Klain, *supra* note 4, 42-45.
[19] ECPAT, *International Child Sex Tourism Action Survey*, 37-38 (2001), *available at http*://www.ecpat.net/eng/Ecpat_inter/Publication/Other/English/Pdf_page/Child_sex_tourism_action.pdf.
[20] *Id.*
[21] Klain, *supra* note 4, 42-45.
[22] *Id.*

One statutory approach is to extend the reach of domestic laws through extra-territorial jurisdiction (i.e., to hold nationals accountable for actions committed abroad that would violate domestic laws if committed within the sending country).

The Criminal Code of Germany was amended in 1993 to allow prosecution of Germans who travel for child sex tourism. The German law allows prosecution of citizens for engaging in sexual activity with a child who is younger than fourteen years of age, regardless of where the act occurs, and may be applied to criminal acts abroad including "criminal acts against sexual self determination." While the severity of Germany's penalties compares to other sending countries, the statutes do not encompass those who organize sex tours or procure children for others.[23]

The Swedish Criminal Code allows for extraterritorial jurisdiction in criminal cases. Although the statute imposes a double criminality, the requirement does not apply to prosecutions of "grave crimes" punishable under Swedish law by a minimum of four years incarceration. Under Swedish law, aggravated rape, which applies to rape of a child who is younger than fifteen years of age, carries a punishment of four to ten years. Rape of a child who is younger than eighteen, however, does not carry a four year minimum sentence, and the extraterritoriality statute therefore does not protect children between fifteen and eighteen years of age from abuse by Swedish nationals abroad.

Another statutory approach is to directly outlaw travel to foreign countries to engage in sexual relations with children.

Australia's Crimes (Child-Sex Tourism) Amendment Act of 1994 criminalizes sexual intercourse with someone who is younger than sixteen years of age while outside of Australia and applies to Australian citizens or residents of Australia.

Under United States of America's law, proof of actual sexual acts is not required; only the proof of travel with the intent to engage in sexual acts with a minor. The intent, however, must be formed prior to travelling, and such intent may be difficult to prove without direct evidence such as travel arrangements booked through obvious child-sex-tour networks or operations. There is also some question whether the statute could be applied to offenders who engage in opportunistic child sex tourism.[24]

In addition to the above-mentioned countries, several other countries like France, UK, Japan etc., have adopted, or are moving towards adopting variations on child sex tourism legislation. The discussion in this section has been cursory at best, the purpose of which is merely to look at some of the approaches that have and can be adopted with regard to formulation of national legal framework for prevention child sex abuse and child sex tourism.

[23] Klain, *supra* note 4, 42-45.
[24] *Id.*

D. The World-Tourism Industry

The world-tourism industry has substantial influence and ability to discourage and act against child sex tourism. Training, distribution of information, posters, in-flight videos and codes of conduct are some of the travel industry initiatives taking place around the world to prevent the commercial sexual exploitation of children. At the international level, travel industry associations and peak bodies are joining forces to see how they can develop policies that they can call upon their members to implement. Declarations have already been agreed upon by some of the world's largest travel industry bodies-International Air Transport Association (IATA), International Hotel and Restaurant Association (IHRA), the Universal Federation of Travel Agents Associations (UFTAA).

Unfortunately, there are still numerous small travel companies throughout the world that promote sex tourism by identifying resorts where prostitution is widespread. Because these companies are so small, they rarely draw attention from law enforcement. The challenge for those who work in the travel industry is therefore to integrate these international initiatives into good work practices, to encourage the adoption of the declarations and to implement the codes of conduct and protocols. Education and training must continue and be reinforced by management policies that allow for open discussion of the issues that surround child sex tourism.[25]

IV. THE INDIAN SCENARIO

In public discourse, child sex tourism is not considered a major social issue in India, partly because of the perception that the problem is not as acute as in some countries of South-East Asia and partly because the problem is largely associated only with poverty conditions. The social acceptability of having sex with a 'minor' is largely ignored because large-scale child marriage still takes place. In addition, women from a number of social groups are considered 'inferior' and their sexual exploitation is not considered as 'something wrong' in a section of Indian society. The women and girls of *Dalit* and *Adivasi* communities are termed as ' loose' and therefore free for all to sexually exploit. The perception of the Indian society about commercial sexual exploitation of children is largely governed by 'poverty syndrome'.

With an untested estimate of 2,70,000 child prostitutes, the problem of child prostitution in India is widespread and quite visible. The form however varies in the different regions of India. In the major commercial centers of Mumbai, Chennai and Delhi, many child prostitutes are trafficked into the country from neighbouring Nepal and Bangladesh. Indigenous tribal women and children are trafficked to these centers and forced into sexual exploitation.

India is also a significant source and transit country. Many child prostitutes in the brothels of India's major cities come from rural villages and they are trafficked under the same guise as children from Bangladesh and Nepal. Female children are trafficked to the Middle East and Europe, often forced into sexual slavery. This is similar for the Bangladeshi and Nepalese children who pass through India en route to the Middle East and the West.

[25] Klain, *supra* note 4, 41-42.

The extent of child sex tourism in India is not yet known. In port towns like Vizakhapattnam, Kolkata, Mumbai, Margoa, Mangalore, Cochin, Chennai etc. adults can be seen with children .Yet it has not yet been possible to determine whether these clients are preferential or occasional abusers. The tourist cities of India report high levels of sex tourism consisting of sailors, port employees and local tourists. Although so far the popular image of pedophiles is mostly of a potbelly foreigner's but this kind of sexual exploitation is also made up of local nations from other parts of the country.

A. Legal Framework

In India, an important development has been the passing of the landmark Goa Child Act, 2003, against child sexual abuse. This addresses several child rights issues in an integrated manner. It is the only legislation so far in the country that deals with the issue of child sex tourism It is also the only legislation that defines trafficking[26] and comprehensively defines 'sexual assault', giving it a wider interpretation to include every type of sexual exploitation[27]. The legislation has specifically made tourism related child sexual abuse a non-bailable offence under section 2 (a) of the Criminal Procedure Code, 1973[28].The fines and jail terms are also severe-Rs. 1,00,000 with imprisonment between one to three years for sexual assault and incest and Rs. 2,00,000 with seven to ten years jail term in case of a grave sexual assault[29]. Under the new legislation the owner and manager of a hotel or other establishment will be held solely responsible for the safety of the child in the premises as well as all adjoining beaches, parks, and if any child is allowed to enter the room without registration[30]. Also, any persons who keep with them or reside wholly, party or in any form with one or more child or children who are not related to them by blood, shall inform this fact immediately to the Director of Women and Child Development[31]. The Act also prohibits the children from accessing objectionable material inside hotels and other establishments from Internet facilities that are not fitted with filters or through film or videos, disc-players, cable or any other medium[32]. It provides for strong action against making children available to the adults for commercial exploitation including posing obscenely, selling or abetting sale of children even under the garb of adoption and even dedicating a girl child as *devadasi* (servant)[33].

The Goa Children's Act, 2003 prohibits and defines trafficking in accordance with the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children. Though the practical worth of the Act remains to be seen, it is nevertheless important because it is the only legislation in the country that deals with the issue of child sex abuse in a holistic manner. With relation to child sex tourism and with regard to child sex abuse, commercial or otherwise, it could be a model for other states.

[26] Goa Children's Act, § 2 (z).
[27] *Id.* § 2 (y).
[28] *Id.* § 8(11).
[29] *Id.* § 8(2). *See also* Section 9 (4) on penalty for child trafficking.
[30] *Id.* § 8(10).
[31] *Id.* § 8(4).
[32] *Id.* § 8(10)(c).
[33] *Id.* §§ 8(12), 8(14), 9 (7).

However this Act being a state legislation is applicable only in the State of Goa. At the national level the Indian government is yet to take any legislative measures towards curbing child sex tourism, or for that matter even child sex abuse, commercial or otherwise.

The overwhelming understanding of sexual violence even today is that it occurs only when a stranger rapes an adult woman using great force. The legal definition of rape itself is extremely narrow, confining itself strictly to penile-vaginal penetration. This understanding does not recognize that women, children and men face substantial sexual violence outside this definition of rape.

The Indian Penal Code has no specific provisions with regard to child sexual abuse. The general provisions of Section 375[34] regarding rape cover child rape and sexual abuse of child. By Indian law, it is necessary to prove penetration, if one is alleging that rape has occurred. In cases of child sexual abuse, penetration may not always have taken place. This loophole allows the accused to plead that the case be treated as molestation and the punishment substantially reduced. Also as per this provision forced sexual intercourse by a man with a woman is essential to constitute rape The rape of a boy child or homosexual rape is not even considered by the Code.

Under Indian law, the rape of a boy child or adult male amounts to an "unnatural offence" under Section 377[35]. This section outlaws acts, such as acts of sodomy and buggery, which strictly forbidden regardless of the participants' age. It is a clear threat to the rights of sexual minorities in the country, manifesting itself in harassment, extortion and blackmail by the police, leaving them with no legal protection.

What is required is the inclusion of child sex abuse as an independent category of sexual offence and broadening of the definition of rape beyond the penile penetration of the vagina to include a wider understanding of sexual assault.

The Immoral Traffic (Prevention) Act, 1956 (ITPA) is the principle legislation regarding commercial sexual exploitation was enacted for the prevention of 'immoral trafficking'. All persons, whether male or female, who are exploited sexually for commercial purposes fall under the purview of ITPA. The Act however does not define trafficking.

The Act does not make any special provisions regarding the commercial sexual exploitation of children According to the ITPA, "prostitution means the sexual exploitation or abuse of persons for commercial purposes, and the expression 'prostitute' shall be construed accordingly"[36]. Since it does not define "persons", it is understood to include children. Throughout the Act there are references to offences against children and punishment where children are detained for prostitution. In addition, the law defines a child as a person who has not completed sixteen years of age; a minor as a person between sixteen-eighteen years of age, and a major as a person who has com-

[34] Indian Penal Code, 1860.
[35] *Id.*
[36] Immoral Traffic (Prevention) Act, 1956, § 2(f).

pleted eighteen years of age[37].

The Act lays does not lay down any procedures regarding the treatment that is to be given to children and minors in prostitution. It does not state whether such children and minors are victims or offenders under the provisions of ITPA. As per the Juvenile Justice Act, 2000, trafficked children are defined as 'children in need of care and protection' and are to be looked after by a 'Child Welfare Committee' and are not to be produced before a court of law. There are also a lot of flaws in the process of age assessment. Generally, the police officials do not go beyond what has been stated by the brothel keeper. This of course results in avoidance the harsher punishments prescribed in the Act for offences regarding children. On the whole, the status of children is under IPTA is not clear.

Though the Act does not directly state that prostitution is illegal, it penalizes the act of prostitution. An analysis of the data regarding crimes registered under ITPA during the period 1997-2001 reveals that it is Section 8 of the Act which deals with seducing or soliciting for the purpose of prostitution that is frequently invoked. Eighty-seven per cent of the arrested persons are females. Most of the women and girls who are 'picked up' under are the ones who had been trafficked into commercial sexual exploitation[38]. The tendency clearly is to harass/punish sex workers rather than traffickers. The crime of trafficking has remained suppressed under the alleged crime of soliciting.

It is high time that Indian lawmakers pay attention to the rising crisis of child sex exploitation, both commercial and otherwise, and formulate laws that are child friendly. Children engaged in prostitution must be treated as victims of sexual exploitation, violence, and forced labor, and not as criminals. There is a great need to draft a comprehensive legislation defining and prohibiting commercial sexual exploitation of children. Until then legislations such as ITPA need to be amended to define and prohibit child prostitution and child trafficking in accordance with international law.

Government and aid groups should support quality rehabilitation and reintegration programs for children who leave the sex trade, which include psychological counseling, health care, education and vocational training, and shelter, as appropriate.

V. CONCLUSION

Countries that have tightened their national laws against child sex tourism have taken different approaches. Combining these approaches can result in a comprehensive statute encompassing all potential activities supporting the sexual exploitation of children through prostitution.

Strengthening of national legislation addressing the sexual exploitation of minors within each country is an essential pre-requisite to achieving any sort of success

[37] *Id.*, §§ 2 (aa), 2 (cb), 2 (ca).

[38] *See* ACTION RESEARCH ON TRAFFICKING OF WOMEN AND CHILDREN 232-246 (2004, National Human Rights Commission, UNIFEM, & Institute of Social Sciences).

regarding child sex tourism internationally. All countries, however, should protect their own children from exploitation from abroad and at home through criminal penalties for child abuse, rape, sexual assault, and all forms of sexual exploitation. National legislation should be broad enough to encompass the activities of travel agents, sex-tour operators, advertisers, and pedophile networks.

The criminal justice system needs to devote greater resources to combating the child sex trade, provide friendly facilities, and train law-enforcement personnel on child development and related issues. The children who testify against their exploiters should be afforded the greatest protection and support possible. Their testimony should be facilitated with the least disruption to their lives and rehabilitation issues. Law enforcement should also look to innovative approaches that change some of the current practices regarding how prostituted children are treated — for instance, by treating prostituted children as victims of sex abuse rather than criminals and to target pimps and procurers instead.

In addition to improved national legislation and international agreements, child sex tourism can be attacked through innovative and comprehensive law-enforcement initiatives that effectively enforce laws already in place. Because collaboration is essential to a comprehensive response, mutual cooperation between countries can aid in such enforcement. Law-enforcement agencies with greater experience in child sexual exploitation can collaborate on investigations or provide expert training, especially on investigative techniques for sexual offenses against children and how to target foreigners.

Strong partnerships between governments, international organizations, and all sectors of society are essential. This collaborative effort must address prevention, rehabilitation through counseling, temporary housing and protection, and, finally, reintegration through education and employment training. Other prevention measures include improved access to education, health services, vocational training, and supportive environments for at-risk children and their families. Governments and social service agencies need to create safe havens for children, support recovery and reintegration programs, and promote alternative means of employment. They also need to tackle the cultural and traditional practices that predispose children to involvement in the sex trade.

The responsibility to eliminate the sexual exploitation of children rests with governments, parents, social and legal organizations, law enforcement, the criminal-justice system, and society as a whole. It is only with combined efforts that the goal of dignified, valued, and respected lives for all children, at home and abroad, can be achieved.

CURATIVE PETITION: THE LAST RESORT

Divyakant Lahoti[*]

I. MEANING

The word 'curative' means relating to or used in the cure of diseases or tending to cure something[1]; a means of improving a situation or course of remedial treatment[2]. The word 'petition' means, a formal written request presented to a court or other official body[3]; a request in writing and in legal language describes an application to a court in writing in contradistinction to a motion which may be made by a word of mouth. Additionally a petition is an application made in a summary way to the court, based upon a written statement of the facts leading up to the relief sought, and differing in that respect from a motion.[4]

Thus, from its very name it becomes clear that a curative petition means any legal written document presented to a court of law for curing or improving the erroneous or wrong judgment or decision given by any official body or by court of law. Such petition tends to heal the defects or errors in any earlier decision or judgment or order or decree that infringes any fundamental right or legal right of any person or group of persons.

II. ORIGIN OF CURATIVE PETITION

To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience.[5] The important question that arises is whether an aggrieved person is entitled to any relief against a final judgment/order of the Supreme Court, after dismissal of the review petition, either under Article 32 of the constitution or otherwise complaining of the gross abuse of the process of court and irremedial injustice? The court, in the case of *Rupa Ashok Hurra v. Ashok Hurra*[6] considered this significant question of constitutional law. This crucial concern is often shared by a large number of litigants, who, after losing the last legal battle, live with the knowledge that gross injustice has been done to them. With a view to offer another opportunity to such genuinely aggrieved litigants, the Court has offered a solution — a "curative petition".

This judgment is not retrograde and allows a real possibility of challenging the occasional judgments that have been rendered in violation of natural justice or without jurisdiction or which have led to a gross miscarriage of justice. The Supreme Court has ruled that a curative petition can be filed after the dismissal of a review petition to reconsider its judgment. Under Article 32 of the constitution, a final order of the apex court cannot be "assailed", but to cure a gross miscarriage of justice the apex court may reconsider its judgments in exercise of its inherent power.

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[1] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY.

[2] CHAMBER'S DICTIONARY (1987).

[3] BLACK'S LAW DICTIONARY (7th ed. 1999).

[4] LAW LEXICON (2nd ed. 2000).

[5] Hotel Balaji v. State of A.P., 1993 Supp. (4) SCC 536; *See also* M.S. Ahlawat v. State of Haryana, (2000) 1 SCC 278; Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388.

[6] Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388.

The curative power is a species of the review power and Articles 129[7], 137[8] of the Constitution of India, Order XL Rule 5[9] and Order XLVII Rules 1[10] and 6[11] of the Supreme Court Rules, 1966 indicate that the apex court has inherent power to set right its own judgment. The exercise of inherent power for correcting the manifest illegality and palpable injustice after dismissal of the review petition has to be much narrower than the power of review. Curative petition ought to be treated as a rarity rather than regularity.

There is no denying that the Supreme Court is the court of last resort — the final court on questions both of fact and of law including constitutional law[12]. The law declared by Supreme Court is the law of the land[13]; it is precedent for itself and for all the courts/tribunals and authorities in India[14]. However it is necessary to bear in mind that the principles in regard to the highest court departing from its binding precedent are different from the grounds on which a final judgment between the parties can be reconsidered. When reconsideration of a judgment of Supreme Court is sought, the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge.

In *Venkata Narasimha Appa Row v. Court of Wards*[15], Gwyer, C.J. observed:

> There is a salutary maxim which ought to be observed by all courts of last resort — *interest reipublicae ut sit finis litium*. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

[7] Article 129. — Supreme Court to be a court of record.—The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

[8] Article 137. — Review of judgments or orders by the Supreme Court.—Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

[9] Rule 5. — Where an application for review of any judgment and order has been made and disposed of, no further application for review shall be entertained in the same matter.

[10] Rule 1. — The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these rules, and may give such direction in matters of practice and procedure as it may consider just and expedient.

[11] Rule 6. — Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

[12] Hanumant Govind Nargundkar v. State of M.P., AIR 1952 SC 343; *See also* Sheonandan Paswan v. State of Bihar, (1987) 1 SCC 288; Devender Pal Singh v. State, NCT of Delhi, (2003) 2 SCC 501; Zahira Hibibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158, Bolin Chetia v. Jogadish Bhuyan, (2005) 6 SCC 81.

[13] Golak Nath v. Union of India, AIR 1967 SC 1643; *See also* Indira Nehru Gandhi v. Raj Narain, AIR 1979 SC 2299; Gujarat Steel Tubes Ltd. v. Gujarat Steel tubes Mazdoor Sabha, (1980) 2 SCC 593, Narinder Singh v. Surjit Singh, (1984) 2 SCC 402; Delhi Transportation Corporation v. D.T.C. Mazdoor Congress, 1991 Supp. (1) SCC 600, Krishna Swami v. Union of India, (1992) 4 SCC 605; Khedat Mazdoor Chetna Sangath v. State of M.P., (1994) 6 SCC 260; Ratan Kumar Tandon v. State of U.P., (1997) 2 SCC 161; Ashok Kumar Gupta v State of U.P., (1997) 5 SCC 201; K.G. Derasari v. Union of India, (2001) 10 SCC 496; State of Rajasthan v. Vatan Medical & General Store, (2001) 4 SCC 642; Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388; Kalyani Packaging Industry v. Union of India, (2004) 6 SCC 719.

[14] INDIAN CONST., art. 141. *See also* Behram Khurshid Pesikaka v. State of Bombay, AIR 1955 SC 123.

In *S. Nagaraj v. State of Karnataka*[16], Sahai, J. observed[17], "Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. Even the law bends before justice."

The law existing in other countries is aptly summarized by Aharon Barak[18] in his treatise thus:

> The authority to overrule exists in most countries, whether of civil law or common law tradition. Even the House of Lords in the United Kingdom is not bound any more by its precedents. The Supreme Court of the United States was never bound by its own decisions, and neither are those of Canada, Australia, and Israel.

In *Cauvery Water Disputes Tribunal case*[19], the Constitutional Bench of the Supreme Court observed:

> The decision of this Court on a question of law is binding on all courts and authorities. A decision given by this Court can be reviewed only under Article 137 read with Rule 1 of Order XL of the Supreme Court Rules, 1966 and on the conditions mentioned therein. When, further, this Court overrules the view of law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances such as when the earlier decision is *per incuriam* or is delivered in the absence of relevant or material facts or if it is manifestly wrong and productive of public mischief.

The provision of Order XL Rule 5 of the Supreme Court Rules bars further application for review in the same matter. In a State like India, governed by rule of law, certainty of law declared and the final decision rendered on merits by the highest court in the country is of paramount importance. The principle of finality is insisted upon not on the ground that a judgment given by the apex court is impeccable but on the maxim *interest reipublicae ut sit finis litium*[20].

[15] (1886) 11 AC 660,664: 2 TLR 828 (PC).
[16] (1993) Supp. 4 SCC 595.
[17] *Id.* at 618, ¶ 18.
[18] Aharon Barak's Treatise. Aharon Barak was born on September 16, 1936. He is a professor of law at the Hebrew University of Jerusalem and President of the Supreme Court of Israel since 1995. Barak is well-known for championing an activist judiciary that has interpreted Israel's basic law as its constitution and challenged Knesset laws on that basis. Under his term the Supreme Court has issued controversial decisions on the nature of the state and the ability of both the Knesset and the Prime Minister to implement their decisions. Barak announced his retirement at the end of May 2006 leaving the Israeli Supreme Court a far different place.
[19] 1993 Supp. (1) SCC 96 (II), 145, ¶ 85: AIR 1992 SC 522.
[20] It is in the interest of the State that there should be an end of lawsuits. *Supra* note 6 at 412.

It is a long-gone age concept that the role of the judiciary is merely interpret and declare the law. It is fairly settled that the courts can mould and mend the law formulating principles and guidelines as to adapt and adjust to the changing state of affairs of the society, the ultimate aim being to dispense justice.

The rational for curative petition was pithily summed up by the Court *in Rupa Ashok Hurra* case as:

> The concern of this court for rendering justice in a cause is not less important than the principle of finality of its judgment. We are faced with competing principles — ensuring certainty and finality of a judgment of the Court of last resort and dispensing justice on reconsideration of a judgment on the ground that it is vitiated being in violation of the principles of natural justice or giving scope for apprehension of bias due to a Judge who participated in the decision-making process not disclosing his links with a party to the case, or on account of abuse of the process of the court. Such a judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice — a concept that is not disputed but by a few. Yet there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and would cause perpetuation of irremediable injustice.[21]

In *Harbans Singh case*[22], A.N. Sen, J. in his concurring opinion observed:

> Very wide powers have been conferred on this Court for due and proper administration of justice. I am of the opinion that this Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice.

Another issue which has not been answered or left open is that under the guise of its 'inherent power', the Supreme Court should trammel/circumscribe a particular case to be re-filed by a litigant again. There should be a check by the Supreme Court on constitution of different forums for reviewing the same judgment repeatedly.

The Constitution of India assigned a pivotal role to the Supreme Court providing the supremacy of law with the rationale being justice is above all. The exercise

[21] *Supra* note 6 at 413.
[22] Harbans Singh v. State of U.P., (1982) 2 SCC 101,107, ¶ 20.
[23] A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602, 651.
[24] Amnon Rubinstein (born 1931) is an Israeli law scholar, politician, and columnist. A member of the Knesset since 1977, he founded Shinui (The Center Party) in 1974, and has served as the Minister for Communications and as Education Minister. He is currently dean of the inter disciplinery center (IDC) in Herzliya. In his columns for Haaretz and Maariv, Rubinstein has focused on countering anti-Semitism and anti-Zionism within the European radical left. In one of his best-known editorials, he criticized human-rights groups for attacking Israel while turning a blind eye to atrocities committed by Arabs, as well as to ethnic cleansing in Sudan.

of inherent power of the Court also stands recognised by Order XLVII Rule 6 of the Supreme Court Rules, 1966, which reads — "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

Mukharji, J (as he then was) in *A.R. Antulay*[23] case very lucidly and with utmost precision stated, "the superior court can always correct its own error brought to its notice either by way of petition or *ex debito justitiae*. (See Rubinstein's *Jurisdiction and Illegality*[24]."

When the Constitution was drafted the substantive power to rectify or reconsider the order passed by Supreme Court was expressly provided by Article 137 of the Constitution. The framers of our Constitution who had the practical wisdom to envisage the efficacy of such provision deliberately conferred the substantive power to review any judgment or order by Article 137 of the Constitution. Article 145(c)[25] allows Supreme Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering the Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code.

Apart from Order XL Rule 1 of the Supreme Court Rules the Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for the sake of justice.[26] It is desirous to be remembered that the powers conferred on the Court by Article 142[27] being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it.[28]

The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice between the parties in any cause or matter pending before it. The very nature of the power must lead

[25] 145. Rules of Court, etc.— (1) Subject to the provisions of any law made by Parliament the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including—
(c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III

[26] *Supra* note 6 at 422

[27] 142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.—(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

[28] *Supra* note 6 at 423.

the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by 'ironing out the creases' in a cause or matter before it. Indeed the Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that the Court has always been a lawmaker and its role travels beyond merely dispute-settling.[29] It is a 'problem-solver in the nebulous areas'.

III. PROCEDURE FOR FILING A CURATIVE PETITION

Curative petitions can be loaded with procedural tangles. Also, they are risky, as while considering a judgment afresh, the court can impose exemplary costs on the petitioner if it finds that the plea was vexatious and lacked merit. A petitioner is entitled to relief if he establishes violation of principles of natural justice in that he was not a party to the dispute, but the judgment adversely affected his interests or if he was a party to the dispute, but was not served with notice of the proceedings and the matter proceeded as if he had notice and where in the proceedings a learned judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

All the grounds stated in the review petition must be incorporated in the curative petition, which must be certified by a senior advocate. The curative petitioner would also have to bear the exorbitant fee of the senior advocate.

The curative petition would then be first circulated to a bench of the three senior-most judges and the judges who passed the earlier judgment, if available. Only when a majority of the judges on the combined bench conclude that the plea needs hearing, it should be listed before the "same bench" for appropriate order.

The bench may at any stage ask a senior advocate to assist it as *amicus curaie*. If at any stage the Bench finds that the curative petition lacks merit and is vexatious, it can impose exemplary cost on the curative petitioner.

The Supreme Court has incorporated strict conditions in the mechanism of curative writs to ensure that a floodgate was not opened for filing of second review petitions under its guise.

It is common ground that except when very strong reason exists, the court should not entertain an application seeking reconsideration of an order passed by apex court which has become final on dismissal of a review petition. It is neither desirable nor possible to catalog all the grounds on which such a petition may be entertained.

[29] *Id.*

Though Justices of the highest court perform their best, subject to the limitation of human imperfection, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. The duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment.

IV. CONCLUSION

No system of justice can rise above the ethics of those who administer it.[30] The Attainment of justice is the highest human endeavour. If we are to keep our democracy, there must be one commandment; Thou shalt not ration justice.[31]

Review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. The Privy Council in *Rajunder Narain Rae* v. *Bijai Govind Singh*[32] noted:

> [N]evertheless, if by misprision in embodying the judgments, errors have been introduced, these courts possess, by common law, the same power which the courts of record and statute have of rectifying the mistakes which have crept in.... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects, in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies.

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution.[33] The Court is not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice.

In the event of there being any manifest injustice would the doctrine of *ex debito justitiae* be said to be having a role to play in sheer passivity or to rise above the ordinary heights as it preaches that justice is above all. Manifest injustice is curable in nature rather than incurable and Supreme Court would lose its sanctity and thus would belie the expectations of the founding fathers that justice is above all.

[30] Report of the National (Wickersham) Commission on Law Observance and Law Enforcement, 1929

[31] Learned Hand, Address, Legal Aid Society of New York.

[32] (1836) 1 Moo PC 117.

[33] *Supra* note 6, at 422.

The oft-quoted statement of law of Lord Hewart, C.J. in *R.* v. *Sussex Justices*[34], that it is of fundamental importance that justice should not only be done, should manifestly and undoubtedly be seen to be done, had this doctrine underlined and administered therein. It is now time that procedural justice system should give way to the substantive justice system and efforts of the courts of justice ought to be so directed. Flexibility of the law courts presently is its greatest virtue and as such justice-oriented approach is the need of the day in this century.

According to Magna Carta[35] 1215, "to no one will we sell, to no one will we refuse or delay, right or justice." Today, the Supreme Court of India is playing a pivotal role in pursuance of the above said notion.

[34] (1924) 1 KB 256.

[35] Magna Carta, 1215.

NATIONAL RURAL EMPLOYMENT GUARANTEE ACT, 2005: VISION OR ILLUSION

*Nishi Kant Thakur**

I. INTRODUCTION

The National Rural Employment Guarantee Act (hereinafter referred as 'NREGA') 2005 has now become operative from February 2, 2006 in two hundred poorest districts throughout India. The Act guarantees to provide a minimum of hundred days of wage employment to at least one member from every rural household who volunteers to do unskilled manual work. The Act has been enacted to serve a very noble cause i.e. combating poverty and empowering the rural India that has been more or less neglected in today's era of globalization-privatization-liberalization.

The idea of employment guarantee is not new but in recent times it has been debated with some sincerity. It has become clear to the government that providing employment on a guarantee basis and revival of agriculture are more than a political necessity now. Towards this end the government has enacted the National Rural Employment Guarantee Bill which after being passed by both the houses and getting the assent of the President on September 5, 2005 became an Act of Parliament. In this paper an attempt will be made to evaluate that whether the idea to provide guaranteed wage employment is feasible in the Indian context or not.

II. NEED OF AN ACT

It has often been questioned that why it is not enough to initiate a massive employment scheme instead of enacting an Act for the same? The main answer to this is that an Act places an enforceable obligation on the State and gives bargaining power to the labourers. It creates accountability. By contrast, a scheme leaves the labourers at the mercy of the government officials. Another major difference between an Act and a scheme is that schemes come and go but laws are durable. A scheme can be trimmed or even cancelled by a bureaucrat but changing a law requires an amendment by the legislature[1]. Under the guarantee system the demand for work (by labourers) and not the supply of the work (by officials) determines the size of the programme. Moreover, the element of guarantee reduces distress migration as the workers are assured of the availability of work near their own place[2].

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[1] Jean Dreze, *Promise and Demise*, YOJNA, 4-8 (Apr. 2005).

[2] Indira Hirway, *Providing Employment Guarantee in India-Some critical issues*, EPW, 5117-5124 (Nov. 27-Dec. 8, 2004).

III. CONSTITUTIONAL BASIS OF THE ACT

The NREGA is seen by many, as an initiative to operationalise the concept of 'Right to Work' enshrined in Article 41 of the Constitution of India under the Directive Principles of State Policy. It was understood that the guarantee to be provided under the Act is not likely to be a full fledged realization of right to work but a measure of legally ensuring that those wanting but not getting the remunerative work would be provided with such work under certain conditions[3]. The right to work cannot be an absolute right. Even the relevant Article in the Constitution calls upon the state to make provisions and secure it within the limits of its economic capacity. Therefore, certain restrictions are expected to be laid down in the legal provisions guaranteeing employment but at the same time the conditions have to be reasonable for the guarantee to be meaningful[4].

IV. RATIONALE OF EMPLOYMENT GUARANTEE

The NREGA primarily addresses the issue of unemployment and especially underemployment, which is a phenomenon linked with rural India. The 10th Five-Year Plan observes that the growth rate of employment has slowed down in 1990s. Though the average annual growth rate of GDP was higher in 90s (6.7%) than in 80s (5.2%), the rate of employment growth has been much lower (1.07%) in 90s than in 80s (2.7%). It even worsened during the period of 1994-2000 to 0.98%. Consequently, if the present trend continues, it will not be possible to generate enough employment during the 10th plan even to absorb the addition made to the labour force during the plan period and the backlog (35mn) will remain as it is. With a higher growth rate of 8% and an alternative strategy for employment generation it may be possible to absorb the addition made to the labour force and reduce the backlog to half at the end of 10th Plan[5].

The unemployment rate in India is about 7.8% and it is rising. The situation is even worse in rural areas which according to the last census have 72 crore (720mn) people living in 6.27 lakh villages which exist off barely one-fourth of India's $ 600 bn GDP. Again, of the 26 crore people living below poverty line, a majority of 20 crore live in rural areas[6]. Underemployment in the working poor is another major problem in rural India, since in a country like India people cannot afford to be unemployed and hence they agree to work on very low wages and productivity[7].

All these unemployed and underemployed people need the attention of the policy makers to provide work with greater wages and productivity. There is an urgent need to support these people to enable them to come out of poverty and for this noble

[3] Smit Gupta, *Rallying for a Right*, FRONTLINE, 85-87 (Nov. 19, 2004).

[4] T.S. Papola, A *Universal Programme is Feasible*, EPW, 594-598 (Feb. 12-18, 2005).

[5] Hirway, *supra* note 2.

[6] Shanker Aiyer, *NREGS-Mother of All Sops*, INDIA TODAY, 46-49 (Sep. 12, 2005).

[7] A. Vaidyanathan, *Employment and Decentralization*, EPW, 1582-1587 (Apr. 16, 2005).

reason National Rural Employment Guarantee Act has been enacted by the parliament. This Act primarily addresses the issue of underemployment rather than unemployment. The Act only aims at providing a supplementary income to the existing income of a family, as the earning through the guaranteed employment will substantiate into only Rs. 500 per month to a family.

V. DIFFERENT APPROACHES TO COMBAT POVERTY

Four major approaches[8] are adopted by various states for providing minimum income to poor people.

1. *Communitarian Model.* — In this approach, workers are entitled to their minimum needs by belonging to a communal society. Under this approach, which was adopted by China in the pre-reform period, it is obligatory for the workers to work as per the needs of the community, and in return they are ensured minimum standard of living.

2. *Right to Income Model.* — The un/underemployed have a right to a minimum income (social welfare) from the state. In return, they have to work whenever the work is available to them. The Netherlands adopted this approach in 1930s.

3. *Right to Work Model.* — In this system workers have a legal right to demand work from the state for wage. This approach was adopted by the state of Maharashtra in India under its Employment Guarantee Act of 1977.

4. *Wage-Employment Model.* — Under such a system wage employment on public works is provided to the poor on a scale, without any kind of guarantee. The poor are expected to earn additional income through this employment. India has used this approach under its wage employment programs like *Jawahar Rojgar Yojna* (JRY), *Sampoorna Gramin Vikas Yojna* (SGRY), and Food for Work Programme (FFWP) etc.

All the four approaches basically aim at using surplus manpower to generate productive assets. The first approach is not feasible in India politically and the second one is not possible financially, as it is not affordable.

India has used the fourth approach for more than three decades and now it is trying to combine both the third and fourth approaches together to generate employment.

VI. COST OF NATIONAL RURAL EMPLOYMENT GUARANTEE ACT

There has been a wide range of variation in the cost estimate on the NREGA. This is not only due to the difference in the assumptions regarding the conditions but also because of their use as a basis to argue against or in favour[9]. The most common estimate was however based on the assumption that every poor rural house hold which

[8] Hirway, *supra* note 2.
[9] Papola, *supra* note 4.

is below poverty line will be guaranteed a maximum 100 days work at statutory minimum wage. For example, if the number of households below poverty line is 40 million and unit cost of employment per day is assumed to be Rs. 100 (Rs. 60 wage + Rs. 40 material cost), and each household is to be guaranteed work for 100 days, then the total cost of the programme comes to 40 million x 100 days x Rs. 100 = Rs. 40,000 crore. Jean Dreze, a Belgian economist who is said to be the mastermind behind this ambitious idea, prepared an estimate of this magnitude for the National Advisory Committee. But, since the NREGA now covers all the rural households which according to the last census were 13.7 crore, the cost of the programme will now reach Rs. 1,37,000 crore[10].

On paper this amount seems to be too much, but knowing that the Act will be implemented in phases and it will begin with two hundred poorest districts only and not every household is likely to avail the full guarantee of hundred days, and also the educated unemployed may not opt for the unskilled manual work, it may not be the same in practice. The experience of Maharashtra employment guarantee scheme (hereinafter referred as MEGS) suggests that a relatively small proportion of those un/underemployed actually report for the work provided under the scheme. For example in Maharashtra only 2.2% of rural workers participated in MEGS.

Keeping these considerations in view the actual cost of the programme may be much lower than the estimated cost[11].

VII. COMMON FEARS ABOUT NATIONAL RURAL EMPLOYMENT GUARANTEE ACT

There are two most common fears regarding NREGA. Firstly, that the money will be wasted due to widespread corruption. Former Prime Minister Rajiv Gandhi's statement that only 15 paise out of every rupee of anti-poverty programmes actually reach the poor is often quoted in this context. But while leakages are certainly rife in many cases, there are also examples of anti-poverty programs that have done relatively well. Recent experience in Rajasthan has demonstrated the possibility of eradicating corruption from public works using a combination of legal and social actions[12]. And also, if we oppose public interest laws on the ground of corruption then the police, education, hospitals etc. all have to be closed.[13]

Secondly, the NREGA will lead to financial bankruptcy. The cost of NREGA

[10] V. P. Singh, *Down to Earth*, TIMES OF INDIA (New Delhi), Aug. 8, 2005.
[11] Papola, *supra* note 4.
[12] Dreze, *supra* note 1.
[13] Chaturanan Mishra, *Job Guarantee Law Can Awaken Sleeping Lion*, MAINSTREAM, 6-7 (Sept. 3, 2005).

is anticipated to rise from 1% to 4% of GDP. These estimates are based on relatively optimistic scenario whereby the Employment Guarantee Scheme (hereinafter referred to as EGS) lives unto its promise. If it does, then 2-4% of GDP would seem to be a reasonable price to pay to protect most of rural households from extreme poverty[14].

VIII. Issue of Urban Exclusion[15]

The EGS envisaged under the Act will be operational in rural areas only. The rationale of this limitation is not adequately explained, but it can be argued that because of the nature of unemployment and scope of the work envisaged to be offered, it may have limited relevance in urban areas. The EGS is expected to primarily address the problem of underemployment, which is more a rural phenomenon than urban. MEGS also excludes urban areas presumably for the same reason. It therefore, seems logical to exclude urban areas from its scope.

IX. Advantages of National Rural Employment Guarantee Act[16]

The NREGA has far-reaching social, economical and political significance. Some of them are:

1. An EGS would go a long way towards protecting rural households from poverty and hunger. In fact, a full-fledged EGS would enable most poor households in rural India to cross the poverty line.

2. An EGS is an opportunity to create useful assets in rural areas, in particular, there is a massive potential for labour intensive public works in the field of environment, watershed development, land regeneration, prevention of soil erosion, restoration of tanks, protection of forests etc.

3. An EGS is a unique opportunity to activate and empower *panchayati raj* institutions like gram panchayats and gram sabhas. It will give them a new purpose backed with substantial financial resources.

4. It could lead to a dramatic reduction in urban-rural migration. This is because, if work is available in the village itself, many rural families will stop heading for the cities.

5. Guaranteed employment would be a major source for the empowerment of the women.

6. Guaranteed employment is likely to change power equation in the rural society, and foster a more equitable social order.

[14] Priyaranjan Das & Chandrika Mago, *Employment Bill May Prove Fiscal Nightmare*, TIMES OF INDIA (New Delhi), Aug. 6, 2005.
[15] Papola, *supra* note 4.
[16] Dreze, *supra* note 1.

X. The National Rural Employment Guarantee Act, 2005

The National Rural Employment Guarantee Bill became the National Rural Employment Guarantee Act on September 5, 2005. The inspiration for NREGA came from three-decade track record of the employment guarantee scheme in Maharashtra, which originated as a relief programme in the early 1970s and then converted into an Act by the state in 1977[17].

National Advisory Committee constituted by the central government undertook the official process of drafting the legislation in this regard. The Maharashtra Act of 1977 provided the basic frame of reference for the NREGA[17]. Before precipitating into current form of legislation the draft Bill went through several phases of modifications and re-modifications. Finally, after incorporating the recommendations of a cross party standing committee of Parliament headed by Mr. Kalyan Singh and a report presented by a Group of Ministers headed by Mr. Pranab Mukherjee, the Bill was passed by the Parliament and became an Act.

A. The Act

The Act states its objective[19] as — "An Act to provide for the enhancement of livelihood security of the households in rural areas of the country by providing at least 100 days of guaranteed wage employment in every financial year to every household whose adult member volunteer to do unskilled manual work and for matters connected therewith or incidental thereto."

B. Salient Features of the Act

The Act has thirty four sections and two schedules. Main features of the Act are as follows:

1. *Guarantee.*[20] — The Act makes it a duty of the state government to provide, to one person from every rural household 100 days of wage employment in a financial year.

2. *Unemployment Allowance.*[21] — If the work is not provided to anybody within

[17] *Id.*
[18] Amit Bhaduri, *Guarantee Employment and Right to Information*, EPW, 267-269 (Jan. 22, 2005).
[19] National Rural Employment Guarantee Act, 2005.
[20] *Id.* § 3(1).
[21] *Id.* § 7.

the given time, he will be paid an unemployment allowance which shall not be less than one fourth of the wage for the first thirty days and of half of the wage rate for the remaining period.

3. *Minimum Wage.*[22] — Central government will specify the wage rate but it shall not be less than Rs. 60 per day in any case. Until central government specifies such rate, the wage should be the minimum wage fixed by the state government for agriculture labourers.

4. *Implementing and Monitoring Authorities.* — There are detailed provisions regarding these authorities, about their constitution, work, duties etc in the Act. These authorities are as follows:

a) Central Employment Guarantee Council[23],

b) State Employment Guarantee Council[24],

c) Panchayat at district, intermediate and village level. Panchayats have been given the status of principal authorities for planning and implementation of the scheme[25],

d) District Programme Coordinator[26],

e) Programme Officer[27].

5. *National[28] and State[29] Employment Guarantee Funds.* — The Act has provided for specific funds for unhampered running of the programme both at central and state level.

6. *Transparency and Accountability.*[30] — For ensuring these elements, in the working of the scheme made under NREGA, the Act contains some special provisions. It makes District Programme Coordinator and all other implementing agencies in the district responsible for the proper utilization and management of funds, which is placed at their disposal for the purpose of successful implementation of the scheme.

7. *Audit of Accounts.*[31] — Central government is to prescribe appropriate arrangement of audit of accounts at all levels. This provision tries to put a check on corruption by mandating to keep and maintain the proper books of accounts.

8. *Social Audit.*[32] —This is a new kind of provision, which empowers the gram sabhas to undertake the social audit of the works done under the EGS.

9. *Penalty for Non-Compliance.*[33] — The Act lays down penalty, which may extend to Rs 1000 for anyone who contravenes the provisions of the Act.

10. *Minimum Features of NREGS.* — Schedule I of the Act prescribes some important features, which every EGS have to have in it. For instance the type of works the EGS is to focus, non-engagement of any contractor or machine, and most importantly people's right on the access of information regarding the scheme after payment of the specified fees.

11. *Conditions for the Guaranteed Rural Employment and Minimum Entitlement of the Labours.* — Schedule II of the Act prescribes the procedure and the conditions for the applications to be made to get the work under the scheme. Moreover it

[22] *Id.* § 6.
[23] *Id.* § 10.
[24] *Id.* § 12.
[25] *Id.* § 13.
[26] *Id.* § 14.
[27] *Id.* § 25.
[28] *Id.* § 20.
[29] *Id.* § 21.
[30] *Id.* § 23.
[31] *Id.* § 24.
[32] *Id.* § 17.
[33] *Id.* § 25.

gives certain entitlements to the labours. Few important ones of those are as follows:

a) Employment shall be provided within a radius of 5 km. from the applicant's village and in case it is not possible the labours shall be paid 10% extra of the wage rate.

b) Medical assistance facilities for injury happened in the course of employment.

c) Compensation of Rs 25,000 to be provided in case of death or disablement happened during the work.

d) Some basic amenities like safe drinking water, shade, period of rest, first aid etc. at the work places.

e) The work shall be provided within 15 days of application for it.

f) In case the payment of the wage is not made within the specified period, the labours shall be entitled to receive compensation.

C. Demerits of the Act

Instead of being a laudable piece of legislation the Act has a number of striking demerits. Some of them are mentioned below:

1. Unfortunately, the Act has been extensively reworked from the point of view of a bureaucrat who is anxious to minimize the responsibility of the state. All sorts of safeguards have been put in to ensure that the government can modify the rule of the game at any time it wishes to do so[34].

2. For unknown measures, the Act dispenses with the minimum wage requirement. In the Act until the central government specifies a wage rate, the wage rate shall be the wage rate fixed by the state for the agricultural labours. This would create certain discrimination among the states as the wage rate in the states varies from Rs. 45 in Maharashtra to Rs. 91 in Kerala[35].

3. The tendency to make the Act 'safe' for the state can also be seen in many other provisions of the Act. For instance, the transparency provisions have been severely diluted. In the draft bill, all the records were to be made available to public scrutiny, either free of cost or at cost price. By contrast, the Act states that any document shall be made available to the public on demand and after 'paying such fees as specified.' Thus nothing prevents embarrassing records from being priced out of the public view[36]. This provision too has not been provided in the Act itself but in the schedule, which can be amended by the will of the central government at any point of time[37].

4. The basic feature of an EGS and the entitlements of the labours have been shifted from the body of the Act to a pair of appended schedules, which can be, as said earlier, modified by the central government without amending the Act itself. This gives

[34] Dreze, *supra* note 1.
[35] MIHIR SHAH, *National Rural Employment Guarantee Act-A Historic Opportunity*, EPW , 8287-8290 (Dec. 11, 2004).
[36] Dreze, *supra* note 1.
[37] *Supra* note 19, § 29.

the central government sweeping power to derail the scheme, or to reduce the entitlements of the labours[38].

5. The definition of the household[39] in the Act is too wide, as it covers more than a family sharing the same roof and considers them as one household and thus eliminating many eligibles out of the purview of the Act.

6. The law could lead to friction within the family over selection of the member to be provided with the work under the EGS.

7. It is feared that in the process women and physically challenged could be left out.

8. The decision to provide Rs. 60 per day for a guaranteed hundred days of work translates to only Rs six thousand in a year or Rs. 500 in a month, which by any means is not sufficient to run a family.

9. The penalty for the contravention of the Act is only Rs. 1, 000 that is too low to actually deter any person.

10. The intention to empower the panchayats is barely reflected in the Act. While panchayats can prepare a list of projects that they would like to be taken up, the crucial decisions on which they are to be implemented will be decided by a programme officer appointed by the state government. And thus the state government will continue to play the dominant role that it now plays[40].

XI. SUGGESTIONS

If implemented properly the programme has the potential to rid India of the poverty. But for it to be implemented properly all the demerits discussed earlier should be made good. Certain suggestions to make the implementation of the programme really effective, are listed below:

1. Experience has shown that if wage employment on public works is to result in poverty reduction, it is necessary that —

a) Employment is made available on a scale that meets demand,

b) It is provided at a minimum wage rate for the adequate number of days to ensure minimum income,

c) There is a good public distribution system to ensure workers access to the foodgrains,

d) Distribution of the benefits from the assets is equitable,

e) The assets created are owned and maintained by the workers/community.

2. If the use of surplus labour under such employment programme has to result in capital formation, that is, generation of productive assets that create employment in the short and long term (by expanding the labour absorption capacity of the mainstream economy), it is necessary that selection and sequencing of the work is done systematically. The assets selected are labour intensive during their construction phase and they generate sustainable employment in the mainstream economy subsequently.

[38] *Id.*

[39] *Id.* § 2 (f).

[40] L. C. JAIN, *Putting Panchayats in Charge*, EPW, 3646-3648 (Aug. 13, 2005).

3. In order to ensure that the assets are used productively to generate employment in the mainstream economy it is necessary that —

a) Appropriate support measures are provided in terms of finance/credit, institutions and infrastructure etc, and,

b) Skill training and capacity building of workforce is undertaken, that will also improve labour productivity and wage income of workers.

It is important to ensure that the programme does not end up generating a large army of unskilled workers on a permanent basis, as it will create an unaffordable liability on the government exchequer[41].

4. If the works undertaken can cover socially useful services like health care, child nutrition, empowerment of women, creation of saving groups in villages, then there is a scope for utilizing the educated unemployed labour force in the programme, which has been neglected in the Act.

5. Effective monitoring system by the community over the government spending must be established. This could be a combination of an effective right to information and social audit.

XII. CONCLUSION

The NREGA represents a historic opportunity for socio-economic transformation of rural India. It is good to see that the government is making some efforts to empower the rural folk of India. This programme also has strong capacity to become a major instrument for galvanizing *panchayati raj* institutions in India, but how far this actually happens depends a great deal upon the mobilization of the disadvantaged in the society like women, dalits, tribes and poor. In most parts of India these sections have virtually no voice in the gram sabhas, which have been reduced to farce. Without their mobilization and empowerment, the full socio-economic and political potential of the Act will not be realized.

The benefits of an effective NREGA are many. It is a great opportunity to generate employment and create productive assets. In a country where we do not have unemployment insurance and social security, there is no better alternative than the public work programme for the unorganized sector workers[42]. NREGA is a new path — an Indian path of growth, with simultaneous growth of jobs and thereby reduction of poverty. It will introduce a new path under globalization of industry, commerce, and services to seriously think about agriculture, which combined with animal husbandry, fishery etc. can create so many jobs! Once the government pays full attention to agriculture and millions of youth are geared to production, 8-10% of GDP growth will become quite possible. This sort of programme would pay back the nation with increased efficiency. The return of investment on the EGS would be of a magnitude higher than any other conceivable project[43]. The EGS will empower the weakest sections of our society and further broadbase and deepen the foundations of our democracy.

[41] Hirway , *supra* note 2.

[42] S. DEV MAHENDRA, *Agriculture and Rural Employment in the Budget*, EPW, 1410-1413 (Apr. 2, 2005).

[43] Mishra, *supra* note 13.

RIGHTS OF THE CHILD

*Komal Raina**

"The principle of 'all children, all rights' is still much too far from being a reality."[1]

I. INTRODUCTION

The Convention on the Rights of the Child since its adoption in 1989 has been the most widely ratified human rights instrument in history (ratified by all States except Somalia and the US which have only signed it)[2]. Many of states have gone even further, enacting legislations and creating mechanisms for protecting and promoting the well being of children in society. But regardless of the existence of rights, children worldwide still suffer from poverty, homelessness, abuse, neglect, preventable diseases, long hours of work under hazardous conditions, unequal access to education and systems that do not recognize their special needs. Children due to their dependence on adults for survival are socially weak, making them prone to exploitation and neglect. In addition the abuse persists because children have few mechanisms for reporting violence and other human rights violations. They are particularly vulnerable being physically, psychologically and emotionally immature, creating a necessity for particular rights that recognize their special need for protection.

It was perhaps Eglantyne Jebb of England who first started an international movement for providing the child with a status.[3] The 1924 Geneva Declaration of the Rights of the Child[4] was one of the initial organized efforts in recognizing children's rights. However it only endorsed economic, psychological and social protection of the child, neither granting any legal rights nor imposing any obligations on the governments in this regard. The Declaration viewed children merely as an investment for the future, with a dividend of peace and harmony between nations. In 1945, the United Nations Charter urged nations to promote and encourage respect for human rights and fundamental freedoms 'for all'. The Universal Declaration of Human Rights further

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[1] As said by UN Secretary-General Kofi Annan,
available at http://www.crin.org/themes/ViewTheme.asp?id=2.

[2] As of December 2005, *available at* http://www.unicef.org/crc/index_30197.html.

[3] Jagannath Mohanty, *Children's Rights:Promises & Performance*, ,233 (2003, Human Rights Education).

[4] Adopted by the League of Nations on September 25, 1925.

stressed, "motherhood and childhood are entitled to special care and protection" and referred to the family as "the natural and fundamental group unit of society." After protracted debates, the Declaration of the Rights of the Child, 1959[5] came into force "recognizing that mankind owes to the child the best that it has to give", wherein ten basic principles were adopted:

1. Entitlement to the rights without distinction or discrimination
2. Provision of special protection, opportunities and facilities, by law and by other means, to enable the child to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity
3. Entitlement from birth to a name and a nationality
4. Enjoyment of benefits of social security, right to adequate nutrition, housing, recreation and medical services
5. Right to special treatment, education and care as required by the child's particular condition
6. Love and understanding for the full and harmonious development of the child's personality, right to grow up in the care and under the responsibility of his parents, in an atmosphere of affection and of moral and material security
7. Entitlement to free and compulsory elementary education
8. Right to be among the first to receive protection and relief
9. Protection against all forms of neglect, cruelty and exploitation
10. Protection from practices which may foster racial, religious and any other form of discrimination

The year 1979 was designated as International Year of the Child, and attempts were made to draft text for a proposed convention recognising the child as a legal person entitled to the protection of law. The text of the Convention on the Rights of the Child[6] adopted on November 20, 1989 drew heavily upon Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It was based on the basic premise that children too are born with fundamental freedoms and the inherent rights of all human beings.

II. THE CONVENTION ON THE RIGHTS OF THE CHILD, 1989

The Convention on the Rights of the Child defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[7] The Convention is the first international human rights treaty to bring together the universal set of standards concerning children into a unique and legally binding instrument incorporating the full range of human rights — civil, cultural, economic, political and social. The Convention sets out these rights in 54 Articles and two Optional Protocols. The four core principles of the Convention are

[5] General Assembly Resolution 1386 (XIV) of November 20, 1959.

[6] General Assembly Resolution 44/25, came into force on September 2, 1990 after ratification by twenty States.

[7] Convention on the Rights of the Child, art. 1.

non-discrimination[8]; devotion to the best interests of the child[9]; the right to life, survival and development [10]; and respect for the views of the child [11]. Every right spelt out in the Convention is inherent to the human dignity and harmonious development of the child. The Convention protects children's rights by setting standards in health care, education, legal, civil and social services. The rights under the Convention can be broadly categorised as:

A. *Right to Survival which also includes* —
1. Right to life[12]
2. Right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health[13]
3. Right to standard of living adequate for child's physical, mental, spiritual, moral and social development[14]

B. *Right to Protection which also includes* —
1. Protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse[15]
2. Protection from economic exploitation and from performing any work that is likely to be hazardous[16]
3.Protection from all forms of sexual exploitation and sexual abuse[17]
4. Prevention of abduction, sale or traffic[18]
5. Protection form all other forms of exploitation prejudicial to any aspects of the child's welfare[19]
6. Right to special protection in situations of emergency and armed conflicts[20]

C. *Right to Development which also includes* —
1. Right to education[21]
2. Right to benefit from social security, including social insurance[22]
3. Right to rest and leisure, to engage in play and recreational activities[23]

D. *Right to Participation which also includes* —
1. Right to form his or her own views, the right to express those views freely in all matters affecting the child[24]

[8] *Id.* art. 2.
[9] *Id.* art. 3.
[10] *Id.* art. 6.
[11] *Id.* art. 12-art.15.
[12] *Id.* art. 6 (1).
[13] *Id.* art. 24 (1).
[14] *Id.* art. 27 (1).
[15] *Id.* art. 19.
[16] *Id.* art. 32 (1).
[17] *Id.* art. 34.
[18] *Id.* art. 35.
[19] *Id.* art. 36.
[20] *Id.* art. 38.
[21] *Id.* art. 28 (1).
[22] *Id.* art. 26 (1).
[23] *Id.* art. 31 (1).
[24] *Id.* art. 12 (1).

2. Right to freedom of expression[25]
3. Right to freedom of thought, conscience and religion[26]
4. Right to freedom of association and to freedom of peaceful assembly[27]

To help stem the growing abuse and exploitation of children worldwide, the United Nations General Assembly in 2000 additionally adopted two Optional Protocols to the Convention. Children are often used by armed groups and in some cases by government forces as war soldiers because they prove easier than adults to condition into fearless killing and unthinking obedience.[28] However such involvement alters their lives in many ways directly and indirectly, leaving deep emotional scars and psychosocial trauma from exposure to violence, dislocation and poverty. In this regard the first Optional Protocol on the involvement of children in armed conflicts was adopted by the UN General Assembly on 25 May 2000[29], which increased the minimum age for compulsory recruitment into the forces from fifteen to eighteen years and required States to do everything they could, to prevent individuals under the age of eighteen from taking direct part in hostilities.

The other Optional Protocol adopted is on the sale of children, child prostitution and child pornography and it draws special attention to the criminalization of these serious violations of children's rights and emphasizes the importance of fostering increased public awareness and international cooperation in efforts to combat these gruesome acts.[30] The States must strive to provide legal and other support services to such child victims and wipe out evils like sex tourist trade.

Article 4 of the Convention makes it mandatory for the governments to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention". It places a pro-active obligation on governments to introduce the measures needed to turn the principles of the Convention into practical realities. The Convention also requires governments to provide regular reports to the Committee on the Rights of the Child, a body of independent experts that meets thrice a year in Geneva to monitor implementation of the Convention and the Optional Protocols by the States. The States are obliged to submit regular reports to the Committee on how the rights are being implemented, initially two years after acceding to the Convention and then every five years. The reporting process is a special occasion for nations to conduct a comprehensive review of the various measures they have adopted and presents an opportunity to evaluate the impact, identify problems, design new solutions, and set new targets. The Committee also

[25] *Id.* art. 13 (1).
[26] *Id.* art. 14 (1).
[27] *Id.* art. 15 (1).
[28] *The State of the World's Children 2005: Childhood Under Threat,* 44 (2004, UNICEF).
[29] Adoption and entry into force in 2002, ratified by 82 States as of September 2004.
[30] *Available at* http://www.unicef.org/crc/index_30202.html.

publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues and organizes days of general discussion. It ensures continuous action and progress in the realization of children's rights; however it cannot consider individual complaints.

The Convention is the first human rights treaty that grants a role in its implementation to a specialized United Nations agency—UNICEF. Under the Convention, UNICEF has a legal obligation to promote and protect child rights by supporting the work of the Committee on the Rights of the Child and to facilitate consultations within States to maximize the accuracy and impact of reports to the Committee.

The World Conference on Human Rights, (June 14-25, 1993), Vienna Declaration reiterated the principle of "First Call for Children", and underlined the importance of major national and international efforts, especially those of the United Nations Children's Fund, "for promoting respect for the rights of the child to survival, protection, development and participation". In addition the UN Commission on Human Rights adopted the Programme of Action for Elimination of Exploitation of Child Labour in 1993 that advocated measures like awareness campaigns, vocational training, stipulation and application of labor standards etc. for protection of child labourers. The 190 Governments that convened at the UN General Assembly Special Session on Children, May 2002, pledged to accelerate progress on child development. World leaders unanimously embraced a set of time-bound goals; promoting the best start and healthy lives for children, providing quality education, protecting children against abuse, exploitation and violence and combating HIV/AIDS.[31]

III. THE INDIAN PERSPECTIVE

There are 400 million children who are 18 years or less in India, which is around 40 % of the total population.[32]

As per age-old traditions, in India children are considered a gift of the God that must be nurtured with care and affection, within the family and the society. However, consequent to huge socio-economic and cultural changes, children today face neglect, abuse deprivation and poverty. The earliest initiatives towards care and protection of children were by voluntary organizations such as Indian Red Cross Society, All India Women's Conference, Kasturba Gandhi National Memorial Trust and Children's Aid Society way back in the mid 1920s. Balkanji Bari, set up in 1920, was the first children's organization with child membership.[33]

[31] *The State of the World's Children 2005: Childhood Under Threat*, 7 (2004, UNICEF).
[32] *The Indian Child: Profile*, 2002, (Department of Women & Child Development, Ministry of Human Resource Development).
[33] *Available at* http://www.education.nic.in/cd50years/r/6E/FE/6EFE0101.htm.

Independence brought about a new wave of child development. The Articles of the Constitution enshrine basic rights of the child. Article 14 gives a right to equality before law, that is equal treatment and protection of law, and if any child is discriminated against arbitrarily, it can be challenged. Article 15(3) permits the State to make special enactments for children and women. Article 21 provides the right to life, which has been interpreted to include right to food, clothing, adequate shelter and basic necessities. Article 22 ensures that a minor when arrested is presented before Competent Authority under Juvenile Justice (Care and Protection) Act, 2000, within 24 hours. Article 23 makes traffic of human beings and forced labour punishable under law. Article 24 prohibits employment of a child below 14 years of age in factories, mines and other hazardous employment. Article 39 (e) and (f) ensure protection of children of a tender age from abuse, and entering vocations unsuitable to their health and strength. The State is required to ensure that youth is protected against exploitation and moral & material abandonment. Article 41 provides for the State to take effective steps to secure the right to education. Article 44, which puts forward the concept of a uniform civil code, implies a uniform legal framework for adoption of children across all religions. Article 45 requires the State to provide for early childhood care and free education up to age of 14 years. The Supreme Court in *Unni Krishnan v. State of Andhra Pradesh*[34] emphasized the importance of education and included it as a fundamental right under Article 21. The Court observed 'education is a preparation for a living and for life'. Article 47 states it to be the duty of the State to raise level of nutrition and standard of living.

Additionally Section 83 of the India Penal Code, 1860 (IPC), holds nothing done by a child below seven years of age to be an offence because of lack of understanding the consequences of the act. The IPC does not have any special provision with regard to child pornography but sections 292 and 293 make selling, distribution, publishing or circulating obscene material a punishable offence. Section 317 makes it punishable if a child under twelve years of age is exposed and abandoned by parent or person having care of him. Section 361 defines the offence of kidnapping of a male under sixteen or a female under eighteen from lawful guardianship. Section 366A makes procuring a minor girl an offence punishable with up to ten years imprisonment. Section 363A makes kidnapping and maiming of a minor for begging an offence.

The Child Marriage Restraint Act, 1929, was enacted to restrain the solemnization of child marriages; however it does not render the marriage illegal or void. The Courts have the power to restrain an intended child marriage by an injunction.

The Immoral Traffic (Prevention) Act, 1956, makes punishment stringent for a person who is found with a child in a brothel or has procured or is attempting to procure children (person below sixteen years of age) for prostitution. The Government has launched a scheme called *Swadhar* in December 2001 for recovery and reintegration of trafficked victims.

[34] AIR 1993 SC 2178.

In absence of a uniform civil code there is no uniform law for adoptions. The Hindus, Buddhists, Jain and Sikhs are governed by the provisions of the Hindu Adoption and Maintenance Act, 1956. The Central Adoption Research Agency (CARA) is an autonomous body established under Ministry of Social Justice and Empowerment dealing with matters concerned with inter-country and in-country adoptions in India. It acts as a clearing house of information and also regulates and develops programmes for rehabilitation of children through adoptions. In the case of *Manuel Theodore D'Souza*[35] the Bombay High Court held that it was a fundamental right to life of an orphaned, abandoned, destitute or similarly situated child to be adopted by willing parents and to have a home, name and nationality.

One of the important developments of the 1950s was the establishment of the Central Social Welfare Board in 1953, which was set up to assist voluntary organizations and mobilize their support and cooperation in the development of social welfare services, especially for women and children. The Board launched the Welfare Extension Projects (WEP) in 1954 to provide maternal and child care services, preschool education, social education and craft training to women in rural areas. In 1974, the Government of India adopted a National Policy for Children, declaring the nation's children as 'supremely important assets'. Various measures like a comprehensive health programme, supplementary nutrition for mothers and children, nutrition education of mothers, non-formal pre-school education, prevention of exploitation of children etc were undertaken. Further The National Children's Fund was instituted by the Government to provide financial assistance to voluntary organizations for undertaking innovative child welfare programmes. In 1975 an Integrated Child Development Services (ICDS) programme covering children less than six years and nursing and expectant mothers was launched. The programme has benefited over eighteen million children and around five million pregnant and nursing mothers. Another landmark in 1975 was the setting up of the National Institute of Public Cooperation and Child Development (NIPCCD), an autonomous body, for training of workers in child welfare and providing the Government with technical assistance. The Department of Women and Child Development was set up in the Ministry of Human Resource Development, in 1985, to implement the policies and programmes like the National Plan of Action. At the summit meeting of the South Asian Association for Regional Cooperation (SAARC) in 1986, it was declared that children should be given the highest priority in national development planning. The SAARC member nations committed themselves to goals like universal child immunization, universal primary education, adequate maternal and child nutrition and safe drinking water. [36]

India ratified the Convention on Rights of the Child on January 11, 1993, with the following Declaration[37]:

[35] 2000(2) Bom C.R. 244.

[36] *Available at* http://www.education.nic.in/cd50years/r/6E/FE/6EFE0101.htm.

[37] United Nations Treaty Collection (As of October 9, 2001), Declarations and Reservations.

While fully subscribing to the objectives and purposes of the Convention, realizing that certain of the rights of child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognising that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India-the Government of India undertakes to take measures to progressively implement the provisions of Article 32, particularly paragraph 2 (a)[38], in accordance with its national legislation and relevant international instruments to which it is a State Party.

However India has only signed the Optional Protocols[39] to the Convention and is yet to ratify them.

Seventeen million children in India work as per official estimates[40]. Child labour is especially rampant in industries like bangle/glass industry, silk industry, lock industry, stone-quarries, brick kiln, diamond cutting, ship-breaking, construction-work, carpet-weaving to name a few. Indian law provides no blanket ban on child labour, the prohibition exists only for factories, mines and other hazardous employment. The Child Labour (Prohibition and Regualtion) Act, 1986, was enacted to prohibit engagement of children in certain employments and to regulate the conditions of work in others. The Court in *M.C.Mehta v. State of Tamil Nadu*[41] observed the various reasons for child labour being, poverty; low wages of adults; unemployment; absence of schemes of family allowance; migration to urban areas; large families; children being cheaply available; non existence of provisions of compulsory education; illiteracy and ignorance of parents and traditional attitudes. Substantial efforts are being made by the National Human Rights Commission which monitors the child labour situation in the country through its Special Rapporteurs, visits by members, sensitization programmes and workshops, launching projects, interaction with the industry, associations and other concerned agencies and coordination with the state Governments and NGOs[42]. While child labour is generally viewed as an economic resource in the short run, in practice it perpetuates poverty. Child labour is just not the result but also a cause of poverty since

[38] Article 32(2)(a) — States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment.

[39] On November 15, 2004.

[40] *Available at* http://www.cry.org/crypage.asp.

[41] AIR 1997 SC 699.

[42] *Available at* http://www.nhrc.nic.in.

it imposes many hidden costs, the most important being the deprivation of access to education. Children are prevented from developing intellectual and social skills that are linked to higher earning and job security in adulthood. By undermining participation and performance in education, child labour also impedes national economic development.[43]

The Juvenile Justice (Care and Protection of Children) Act, 2000, was enacted to consolidate and amend the provisions relating to juveniles in conflict with law and to bring them in conformity with the Convention on the Rights of the Child. The Act requires Child Welfare Committees to be constituted to deal with matters relating to a child in need of protection. Observation Homes, Special Homes, Children Homes are to provide facilities of care, treatment, education, training, development and rehabilitation. The Act envisages "Sponsorship Programmes" for providing support to families to meet medical, nutritional and educational needs of children so as to improve their standard of living. The Act makes punishable unnecessary mental or physical suffering caused to a child by a person having a charge or control over him by assault, abandon, exposure or neglect.

Despite all policy measures the ground realities leave much to be desired: 50% of Indian children aged six-eighteen do not go to school; two million children are commercial sex workers between the age of five and fifteen years and about three million between fifteen and eighteen years; Poor and bonded families often "sell" their children to contractors, who end up working in brothels, hotels and as domestic help;[44] eighty-seven of every hundred children born have the probability of dying between birth and exactly five years of age; one in every three malnourished children in the world lives in India; a child below sixteen years is raped every 155th minute, a child below ten every 13th hour, and one in every ten child is sexually abused at any point of time;[45] 50% of the children between the age of twelve-twenty three months are not fully immunized and it is estimated that there are one-two lakh HIV infected pregnancies annually and about thirty thousand infected babies are born.[46]

As suggested by Prof. Upendra Baxi, a few essentials in the right direction are, firstly widespread awareness about child rights should be ensured among policymakers, intellectuals, ideologues, opinion makers (media) etc.; root causes of exploitation and abuse of the children must be recognized and attempts should be made to tackle these and participation of children should be encouraged by creating forums empowering their opinion. [47]

[43] *Implementing the Convention on the Rights of the Child: Resource mobilization in Low Income Countries*, 29 (UNICEF).

[44] *Available at* http://www.cry.org/crypage.asp.

[45] *Status of India's Children in India*,
available at http://timesfoundation.indiatimes.com/articleshow/1350959.cms.

[46] *The Indian Child: Profile, 2002*, The Department of Women and Child Development, Ministry of HRD.

[47] Upendra Baxi, *Reclaiming our Common Future* in *The Child and Law*, Papers from International Conference on Shaping the Future by Law: Children, Environment and Human Health, 12-14 (1994).

IV. CONCLUSION

Unfortunately, the widespread endorsement of the human rights of children has rarely been matched by corresponding action in law, policy and practice. There still exists a gulf between the rights rhetoric and the realities of children's lives.

Here it would be pertinent to reiterate the following imperatives, put forth by UNICEF[48] for these should be the guiding force of all our endeavors:

1. Put children first. In all undertakings, the best interests of the child should always be the primary consideration.

2. Leave no child behind. Because every girl and boy is born free and equal in dignity and rights, all forms of discrimination based on sex, colour, race, religion, political or other opinion, national, ethnic and social origin, property, disability, birth or other status must end. Creating an environment where children are respected and cared for equally in early childhood is the first step towards breaking cycles of discrimination and disadvantage in the society.

3. Care for every child. The survival and development of children is the essential foundation of human development. No effort should be spared to ensure that children get the best possible start in life. Childhood diseases, malnutrition and starvation should be done away with completely.

4. Educate every child. All girls and boys must receive a compulsory, free basic education of good quality. Five key elements of the Education Revolution are —

a. Learning for life
b. Accessibility, quality and flexibility
c. Gender sensitivity and girl's education
d. The State as a key partner
e. Care for the young child[49]

5. Stop harming and exploiting children. Any acts of violence, exploitation and abuse against children should be met with strict action. Child abuse or maltreatment takes into account all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power. To check exploitation of children for labour, a minimum age should be provided for admission to employment;

[48] *The 10 Imperatives For Children*, UN Special Session on Children, UNICEF Newsletter, No. 1, 2 (April/May 2001), *available at* http://www.unicef.org/specialsession/documentation/documents/newsletter-no1.pdf.

the hours and conditions of work should be regulated and strictly adhered to.

6. Protect children from war. Children must be protected from the horrors of armed conflict. Two fold measures are required, one to prevent the recruitment and participation of children in armed forces and second to ensure the psychological recovery and social reintegration of child victims of armed conflict.

7. Combat HIV/AIDS. Children and their families must be protected from the devastating impact of HIV/AIDS. There must be attempts to raise public awareness about the disease and steps must be taken to remove the social stigma related with it.

8. Fight poverty: Invest in children and break the cycle of poverty with the conviction that poverty reduction must begin with children and the realization of their rights. The UN's concept of poverty is — "'a human condition, characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of adequate civil, cultural, economic, political and social rights." While it encompasses deprivation of basic goods and services, it also includes deficiencies in other vital elements of human rights, which expand people's choices and enable them to fulfill their potential. Poverty as an environment hampers the mental, physical, emotional and spiritual development of the child.[50] Hence it implies impoverishment of the person and his personality.

9. Listen to children. Children should be regarded as resourceful citizens capable of helping to build a better future for all. Their rights to express themselves and to participate in decisions that affect them must be respected. Participation is often defined as "the process of sharing decisions which affect one's life and the life of the community in which one lives. It is the means by which democracy is built and it is a standard against which democracies should be measured." Participation, in the context of the Convention entails the act of encouraging and enabling children to make their views known on the issues that affect them. Promoting meaningful and quality participation of children is essential to ensure their growth and development.[51]

10. Protect the Earth for children. We must preserve our planet in order to nurture our children; equally, we must nurture our children if we are to preserve our planet.

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[49] *The State of the World's Children 1999*, 3 (UNICEF).

[50] *The State of the World's Children 2005: Childhood under Threat,* 16 (2004, UNICEF).

[51] *The State of the World's Children 2003* (2002, UNICEF).

LIST OF ABBREVIATIONS USED

1. A.2D – ATLANTIC REPORTER, SECOND SERIES
2. AC – APPEAL CASES
3. AIR – ALL INDIA REPORTER
4. AJCL – AMERICAN JOURNAL OF COMPARATIVE LAW
5. ALL ER – ALL ENGLAND LAW REPORTS
6. AM. J. INT'L L. – AMERIAN JOURNAL OF INTERNATIONAL LAW
7. ANGLO AMERICAN L. REV. – ANGLO AMERICAN LAW REVIEW
8. ARCH. INTERN. MED. – ARCHIVES OF INTERNAL MEDICINE
9. ARIZ. L. REV. – ARIZONA LAW REVIEW
10. CA- CANCER JOURNAL FOR CLINICIANS
11. CAL. RPTR. – CALIFORNIA REPORTER
12. CM& R- CROMPTON, MEESON & ROSCOE'S EXCHEQUER REPORTS
13. CONN. J. INT'L L.– CONNECTICUT JOURNAL OF INTERNATIONAL LAW
14. DUESQUENE L. REV. – DUESQUENE LAW REVIEW
15. EPW – ECONOMIC AND POLITICAL WEEKLY
16. EUR. J. INT'L L. – EUROPEAN JOURNAL OF INTERNATIONAL LAW
17. F.C.– FEDERAL COURT
18. F. SUPP. – FEDERAL SUPPLEMENT
19. FCLJ - FEDERAL COMMUNICATIONS LAW JOURNAL
20. FSC – FEDERAL SHARIAT COURT
21. GA.L.REV.– GEORGIA LAW REVIEW
22. GEO. WASH. J. INT'L L. & ECON – GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS
23. HASTINGS CENTER RPT. – HASTINGS CENTER REPORT
24. HLR– HARVARD LAW REVIEW
25. HUM RIGHTS Q. – HUMAN RIGHTS QUARTERLY
26. INT'L. J. MAR. & COASTAL L. – INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW

27. INT. ILR- INTERNATIONAL INSURANCE LAW REVIEW
28. INT'L & COMP. L.Q. - INTERNATIONAL & COMPARATIVE LAW QUARTERLY
29. I.R.V. - INTERNATIONAL REVIEW OF VICTIMOLOGY
30. JETS - JOURNAL OF EVANGELICAL THEOLOGICAL SOCIETY
31. J. REL. & HEALTH – JOURNAL OF RELIGION AND HEALTH
32. J. PALLIATIVE CARE - JOURNAL OF PALLIATIVE CARE
33. J.A.M.A - JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
34. JILT- JOURNAL OF INFORMATION LAW AND TECHNOLOGY
35. LAW, MED. & HEALTH CARE - LAW, MEDICINE & HEALTH CARE (CONTINUED BY JOURNAL OF LAW, MEDICINE & ETHICS)
36. LEIDEN J. INT'L L. - LEIDEN JOURNAL OF INTERNATIONAL LAW
37. MLR- MODERN LAW REVIEW.
38. N.E. & N.E.2D - NORTHEASTERN REPORTER, FIRST SERIES AND SECOND SERIES
39. NEW ENG. J. MED - NEW ENGLAND JOURNAL OF MEDICINE
40. N.Y.S. 2D - NEW YORK SUPPLEMENT, SECOND SERIES
41. OCEAN DEV. & INT'L L. - OCEAN DEVELOPMENT AND INTERNATIONAL LAW
42. P.2D – PACIFIC REPORTER, SECOND SERIES
43. PLD – PAKISTAN LEGAL DECISIONS
44. S.E.2D – SOUTH EASTERN REPORTER, SECOND SERIES
45. S.W.2D – SOUTHWESTERN REPORTER, SECOND SERIES
46. SAYIL - SOUTH AFRICAN YEARBOOK OF INTERNATIONAL LAW
47. SCC – SUPREME COURT CASES
48. SO.2D – SOUTHERN REPORTER, SECOND SERIES
49. SOC. PHIL. & POL.- SOCIAL PHILOSOPHY AND POLICY
50. ST. LOUIS PUB. L. REV. - SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW
51. STAN. L.R. - STANFORD LAW REVIEW
52. VAND J. TRANSNAT'L L - VANDERBILT JOURNAL OF TRANSNATIONAL LAW
53. YLR - YEARLY LAW REVIEW

FORM IV

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