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INDUSTRIAL CORPORATE ENVIRONMENTAL RESPONSIBILITY
An Indian Perspective

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I Introduction

The subject of industrial corporate environmental responsibility has yet to attract a serious attention of law academics, industries, and public in general. Except a few industries, rest of them is concerned to get maximum profit, and appease the stakeholders who the corporates consider as their prime responsibility. Further in order to enjoy the fruits of industrial development, the government and people, in general, hardly respond to the enforcement of the responsibilities. This has given a lee-way to the industries and has caused irreparable damage to the Indian environment. Furthermore, the industrial environmental law has yet to be added as a separate subject in the law curriculum and the faculty expertise has to be developed in this area. The present subject therefore has yet to gain the ground. An attempt has been made in this paper so that the environmental law scholars may exploit this barren land.

There are conflicting claims and interests on the issue of industrial corporate environmental responsibility. On the one hand, the corporate houses, in order to maintain their credibility in the market, have to concentrate on the industrial process to get substantial return. Furthermore, India's effort to become a leading world power has geared up industrialization at the cost of environment. On the other hand, the industrial houses are saddled with three important responsibilities: (i) the international obligations; (ii) the constitutional fundamental obligation and duty; and (iii) the responsibilities imposed under different laws, rules and government orders and notifications. Thus the corporate houses remain in a confused situation. In order to know the real position, it becomes necessary to answer certain questions. What are the responsibilities of the industrial houses? How far these responsibilities secure industrial corporate environmental-friendly action? Have they internalized in their conduct the responsibilities so that a holistic approach is adopted? If not, what are the

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sanctions in case of non-fulfilment of the duties? What sanctions have been generally enforced? What more is needed in this regard? These are some of the questions which have been examined in the paper.

The corporate houses in many cases look to their financial status and in this goal they put the fulfilment of responsibilities as their last priority. Further, many big corporates, with their political clouts, pressurize the government to keep the responsibility in hibernation. This, in turn, has frustrated the intention of the constituent authority and law makers. In this negative approach, the judiciary has played an important role. However, there were times when the courts made the industrial corporates accountable on one hand and took a soft stand against their actions on the other hand. The present study will highlight the success and failure of the judiciary, and the course of actions required in the administration of industrial environmental justice. The discussion closes with a bird's eye view of the general scenario. An attempt is also made to find out as to what is needed now in the existing degraded environment.

II International Obligations: A Bird's Eye View

It is necessary to know the international obligations which are the binding force for the States to internalize them in their domestic laws and in turn to be followed by the corporates as well. India, being a party to the international decisions, is bound to implement them. The history of international environmental responsibility starts particularly with the Stockholm Declaration, 1972. Principle 1 begins for the first time with the right and duty relationship - right to quality environment and a solemn responsibility to protect and improve the environment for the present and future generation. Principle 8 envisages that the economic and social development is to be employed for improving the quality of life. The Conference has put an important emphasis on natural resources[1] requiring its use for the common good of mankind and the benefit of the present and future generations. The World Charter for Nature, 1982 for the first time provides for example: co-operation in conserving natural resources; establishment of standards and methodologies for the products and manufacturing processes compatible with nature; and implementation of international and national responsibilities in this regard.[2]

The Rio Declaration on Environment and Development, 1992 is another milestone in the development of international environmental law. It envisages creation of *new level of cooperation among, not only the States, but also key sectors of societies and people*. The right to environment has been explained to mean right to 'a healthy and productive life in harmony with nature'. However, a new right also finds a place in the Declaration - right to development. These rights have a corresponding duty of sustainable

1 Principles 2, 3, 5 and 6.

2 General Principles 21 and 23.

development which must meet the needs of present and future generations.[3] The authorities are required to see that the polluter pays for the cost of pollution. In the last Principle, i.e. Principle 27, a duty is imposed on people to cooperate in good faith and in a spirit of partnership to fulfil the objectives in the Principles embodied in the Rio Declaration. It may be pointed out that the Rio Declaration provides for two conflicting rights - right to environment and right to development. Once the right to development is recognized by the international community then it will put the right to environment at risk. The fact is that, under the umbrella of right to development, the multinationals and national corporates have adversely degraded the environment.[4]

In the twenty-first century, the industrial development has also brought in challenges, such as the ozone layer depletion and climate change. There are international conventions and protocols which try to ensure that the ozone layer is not further depleted and the climate change is controlled. The Convention for the Protection o f Ozone Layer, 1985, has identified five main substances which have potential to modify the properties of ozone layer and accordingly they are regulated or prohibited in the industrial process. The Framework Convention on Climate Change, 1992, for the first time brings to the day light the concern of the international community for the climate change. The Parties to the Convention are subjected to certain duties which include; combat climate change and adverse effects thereof; take precautionary measure to prevent or minimize the causes of climate change; promote relevant social economic and environmental policies and scientific, technological developments related to climate system; emission of greenhouse gases within the prescribed limit, etc. But these duties have been diluted by the concepts of 'common but differentiated responsibilities'; 'basis of equality'; 'respective capabilities'; 'subject to development priorities'; to the extent feasible'. Such lee-ways have brought in the North-South Conflicts, and has left Parties to implement their obligations according to their own convenience.

Furthermore, the international environmental law has also taken into cognizance the adverse effects of hazardous substances and wastes, resulting into conventions and protocols, regulating hazardous substances like chemicals and pesticides, nuclear energy, hazardous wastes, including radioactive wastes. The generators, carriers, exporters and importers of the hazardous waste are under international responsibility to handle and manage the process in an 'environmentally sound manner'.[5] In case any

3 Principles 1 and 3.

4 Convention for the Protection of Ozone Layer, 1985. The report on Seven Asian Countries reveals a low level of corporate responsibility, see Chappel & Jeremy Moon, *Corporate Social Responsibility in Asia : A Seven Country Study of Corporates Social Responsibility in Corporate Social Responsibility* 171, Vol. 3 (2007).

5 Convention on the Control of Trans-boundary Movement of Hazardous Waste and their Disposal, 1989 (The Basel Convention). See also Convention on the prior Informed consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade, 1998; Convention on Persistent

contd...

damage is caused in the process, the Protocol on Liability and Compensation for Damage Resulting from trans-boundary Movements of Hazardous Waste and their Disposal, 1995 provides a strict liability, no fault based liability, contributory liability and preventive measures. Any person, liable to compensate the loss, shall establish and maintain, during the prescribed time limit of liability, insurance, bonds or other financial guarantees covering their liabilities. In case of nuclear installations, the Convention[6] gives priority to nuclear safety. The radioactive waste has also attracted international concern resulting in the Code of Practice relating to its international movement which envisages safe management and disposal thereof and also to minimize the amount of radioactive wastes.

It may be pointed out that the industrial projects, in many cases, had adverse impact on environment and, therefore, it is necessary that there should be an on-going impact assessment procedure for the pre and post-project activities. The 1991 Convention[7] requires each State party to carry out environmental impact assessment and submit a report in that connection. In case of significant adverse impact, people participation is also required before any procedure is adopted. The Convention identifies 17 activities, having adverse impact on environment, requiring special treatment. The environmental impact assessment is further regulated by the Protocol of 2003[8] which provides for a detailed mechanism to assess the impact. It includes, careful screening of plans and projects, monitoring, submission of environmental report and public participation[9] in the procedure. The Protocol in Annex I and II provides a list of 107 plans and projects which require special treatment in assessing their impact of environment.

The industrial accidents have also attracted world's attention and in 1992, the family of nations took cognizance of the industrial accidents, and came out with a Convention on the Trans boundary Effects of Industrial Accidents, 1992. It enumerates the precautionary measures to be adopted, including emergency preparedness and implementation of on-and off site contingency plans. In case an accident takes place, the State involved is required to follow the industrial accident notification system provided therein. The Convention, instead of providing for responsibility and liability of the industrial installation in such a case, leaves the matter for the Member States to 'develop law in this area'. The international regime could have provided basic principles to be followed by the law of the concerned States instead of giving them liberty to operate as and when and how one likes.

Organic Pollutants, 2001.

6 The Convention on Nuclear Safety, 1994. See particularly articles 9, 10, 11 and 15.

7 Convention on Environmental Impact Assessment in Trans boundary Context, 1991.

8 Protocol on Strategic Environmental Impact, 2003.

9 See also for public participation and information, Convention on Access to Information, Public Participation in Decision - Making and Access to Justice in Environmental Matters, 1998 (Aarhus Convention).

Apart from the above international environmental law obligations, there are other Voluntary Compacts and Code of Conduct for a responsible environmental behaviour. In these documents the important one which broadly cares for the sustainable development is: the UN Global Compact, 2003 which has been endorsed by not less than 1700 business organization and countries. It highlights the adoption of precautionary principle; promotion of greater environmental responsibility and diffusion of environmental friendly technology. Those who are signatories to the Compact are required to report the follow up action. The International Chamber of Commerce Business Charter for Sustainable Development, 1991 adds some more principles which include, for example, making environmental management as the highest corporate priorities; making employees environmentally aware and to concentrate on environmentally sound operations and products. The Environmentally Responsible Business Conduct also find a place in the Organization for Economic Cooperation and Development - Guidelines for Multinational Enterprises, 2000. These guidelines are more explicit and concentrate on good environmental practices which can ensure economic cost; compliance with legal position[10]; improved energy and resource conservation; and finally, go for the sustainable development, bringing societal benefits. The coalition for Environmentally Responsible Economics Principles, 1989 further introduces new principles of transparency, accountability, reporting and impact assessment requirements.[11] It may be pointed out that the above Principles and Codes are voluntary and, therefore, the question is: How far shall they be a part of the industrial corporate function? They being the backbone of a healthy environment with sustainable development, it is time that the States and corporations must internalize them in their functioning. All these developments bring home the question: How far these responsibilities have been translated in action in India? The following discussions try to answer the above question.

III Constitutional Responsibility

The Constitution of India, from the very beginning, has taken notice of the welfare of the people of India and improvement of public health.[12] With this, it has also allowed sustainable development in business and industrial process.[13] However a specific concern for environmental pollution found a place in the Constitution (Forty-second Amendment) Act, 1976 and also through the judicial dynamism which require the

10 Similar provision about the conferment with law of the land also finds place in the UN Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, 2008.

11 This has also been advocated by Agenda 21, Strengthening the Role of Business and Industry, Ch. 30 (1992) and World Summit on Sustainable Development, Plan of Implementation, Chapter 1, 2, 2002.

12 See for example, articles 23, 24, 25, 39(e) and (f), 42, 47 and 48A.

13 See articles 19(6), 302and 304 (b).

environmental role players to abide by the constitutional environmental *Triveni Sangam*—right, duty and obligations.[14]

The constitutional law, being the basic and supreme law, is binding on not only the State and its functionaries but also all other persons, including, the corporations. There are corporations created by or under the statute - State corporations or private corporates. These entities have to abide by the constitutional mandates. There are, at the same time, certain fundamental rights which are guaranteed to 'any person' and 'citizens' as well. The Supreme Court of India has allowed the fundamental rights, guaranteed to persons or citizens to be enjoyed by natural as well as artificial persons.[15] There are authorities on corporate social responsibilities who have also been advocating the concept of 'corporate citizenship'.[16] The above discussion supports the stand that a corporation may also claim fundamental rights.

The above discussion raises two questions: The first one is—can the polluting industries, involved in illegal acts, claim the fundamental rights? There are industries in whose cases the Supreme Court named such industries' rouge industries.[17] In such cases a confusion has been created by the judiciary as to whether such activities, are included in the expression 'trade or business' and in turn can they claim the fundamental right to carry on any trade or business.[18] In this connection it may be pointed out that all industries cause pollution but the degree and quantum will differ in each case. For example, the chemical industries in the *Indian Council for Enviro legal Action* case were involved in causing hazardous pollution; whereas the Tata Groups

[14] See articles 48A, 51A(g) and also see article 21 wherein the judicial dynamism has given birth to fundamental right to environment.

[15] *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41; *Cooper* v. *Union of India*, AIR 1970 SC 1318; *Bennett Coleman and Co.* v. *Union of India*, AIR 1973 SC 106. See H.M.Seervai, *Constitutional Law of India*, 2006; particularly page 709 where he says that there is nothing incongruous in a corporation being a citizen.

[16] See, for example, Andrew Crane & Dirk Matten, *Corporate Social Responsibility* 57, 159, (2007); Jeamne M. Logsdon and Donna J Wood, "Business Citizenship: From Domestic to Global Level of Analysis" 155-163, 12(2) *Business Ethics Quarterly* (2002); A Mohan, "Corporate Citizenship : Perspective from India", 2 *Jour. of Corporate Citizenship* 107-11, 2001; Maintosh M., *et al.*, *Corporate Citizenship: Successful Strategies for Responsible Companies*, 1998; Tichey N.M., *et al* (Eds.), *Corporate Global Citizenship: Doing Business in the Public Eye*, 1997.

[17] *Indian Council for Enviro Legal Action* v. *Union of India*, AIR 1996 SC 1446, 1468. See also the case of Asbestos Industry where the industrial process causes health hazards including cancer *Consumer Edu. and Res. Centre* v. *Union of India*, AIR 1995 SC 922; *Burabazar Fire Works* v. *Commissioner of Police*, AIR 1998 Cal. 121.

[18] *Covarji* v. *Excise Commr.* AIR 1954 SC 220; *State of Bom.* v. *Chamarbaugwala*, AIR 1957 SC 699. See the contradictory view - *Krishna Kumar* v. *State of J & K*, AIR 1967 SC 1368; *Fatehchand* v. *State of Maharashtra.*, AIR 1977 SC 1825; However in subsequent cases the court tries to come down to the position that the State has the inherent right to impose total prohibition or reasonable restriction under article 19(6); *P.N. Kaushal* v. *State of Maharashtra*, AIR 1978 SC 1437; *State of Gujarat.* v. *Vora S. Kadharabhai*, AIR 1995 SC 2208.

have different story to tell of being a most environmental friendly corporations.[19] In both the cases it is the industrial activities initially permitted by the State authorities. In such cases the question is: How to allow or not to allow the application of articles 19(1)(g) and 301? Moreover, there will be another question: if such trade or business is not treated as such, the question is : How can Parliament and State Legislature enact law on this subject under the concerned items of the appropriate Lists in the Seventh Schedule to the Constitution of India? In such confusion the better course will be to allow the State to decide to take or not to take action under article 19(6) or 302 or 304(b). It is interesting to note that the courts have imposed total prohibition on nefarious business activities.[20]

The second question is whether the fundamental rights can be enforced against a corporation? The Supreme Court of India, in its concern to provide a wider protection to the fundamental rights has given a liberal meaning to the expression 'other authorities' provided under article 12 of the Constitution. This has resulted in allowing the enforcement of fundamental right even against a corporation, company or society.[21] The effect of such liberal treatment is that the right to environment, carved out of the provisions of article 21[22], will be safeguarded against even the polluting corporation[23], bringing in turn a corresponding corporate environmental discipline and responsibility. In catena of cases of the industries, a large number of environmental litigations have been attracted and the courts, in many cases, have enforced the said fundamental right and put a check on their industrial activities causing pollution.[24]

Apart from the above discussions on rights and responsibility, articles 48A and 51A(g), dealing with the environment, deserve special attention. These articles were

[19] See S. Elan Kumaran, *et al*, "Transcending Transformation : Enlighting Endeavour at Tata Steel", in Andrew Crane & Dirk Matten (Eds.), *Corporate Social Responsibility*, Vol. 3, 182, 2007; See also Runa Sarkar, "Corporate Environment Behaviour A Comparative Study of Firms in India Steel and Paper Industry" in Peter Utting and Jennifar Clapp (Eds), *Corporate Accountability and Sustainable Development* 174 (2008).

[20] *Sushila Saw Mills* v. *State of Orissa*, AIR 1995 SC 2484; *M.C. Mehta* v. *Union of India*, AIR 1988 SC 1037; See also AIR 1987 SC 965.

[21] *Ajay Hasia* v. *Khalid Mujib*, AIR 1981 SC 487; *Food Corporation. of India Worker's Union* v. *Food Corporation. of India*, AIR 1996 SC 2412; *All India Sanik School Employees' Association* v. *Sainik Schools* Society, AIR 1988 SC 88.; *Zee Telefilms Ltd* v. *Union of India*, (2005) 4 SCC 649 where a society was not given a cover of other authorities by a majority of 3:2 a restricted approach in the fundamental right jurisprudence. *Mysore Paper Mills Ltd* v. *Mysore Paper Mills Officers' Assoc.*, (2002) 2 SCC 167; *Rohtas Industries Ltd* v. *Bihar S.E.B.*, 1984 Suppl. SCC 161.

[22] *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, AIR 1985 SC 652. *Subash Kumar* v. *State of Bihar*, AIR 1991 SC 420; *Consumer Edu. and Res. Centre* v. *Union of India*, AIR 1955 SC 922.

[23] See, for example, *Indian Council for Enviro-legal Acton* v. *Union of India*, AIR 1996 SC 1446; *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2755; *Consumer Edu. and Res. Centre* v. *Union of India*, AIR 1955 SC 922.

[24] For detailed discussions on industries see C.M. Jariwala, *Environmental and Justice*, particularly, pp. 110-146 (2004).

inserted by the Constitution (Forty Second Amendment) Act, 1976[25] to honour the Indian commitments at the Stockholm Conference, 1972. Article 48A imposes an unenforceable fundamental obligation on the State to protect and improve the environment. In view of the expanded meaning of 'the State' the fundamental obligations shall also be the obligations of a corporation or company. It is noteworthy that the judiciary, by reading article 48A, has given birth to the right to environment without taking any help of the Fundamental Rights chapter in this matter, thus making the unenforceable part enforceable.[26] This, in turn, will bring responsiveness in the polluting industries. Furthermore, this fundamental obligation becomes meaningful in the light of enormous environmental responsibilities imposed on corporations under different environmental legislations, attracting sanction in case of non-compliance.[27]

There is also a duty, termed as 'primary duty'[28], to improve public health. The industrial pollution hazards not only cause harm to human body but also result in death of living beings and degrade the environment in general. Being the primary duty, the Supreme Court has taken a stand that it shall be performed regardless of financial constraints with the State.[29] Article 47, according to the Supreme Court, comprehends hygienic environment to live, a part of the right to life under article 21. Thus the State has to provide Medicare to the pollution victims at the time of occurrence of such activities and also aftermath[30] and it shall be later on reimbursed from the polluting agency.

The other important provision in the environmental responsibility is article 51A(g). It imposes a fundamental duty on every citizen of India to protect and improve the natural environment. The Fundamental Duties chapter, according to the Report of the Committee for Operationalizing of Fundamental Duties, 1999, basically codifies such values as have been 'a part of the Indian tradition, mythology, religions and practices'[31], and 'those have to be internalized in the conduct of every citizen'. The Report also deals with a 'respect for environment'.[32] It may be pointed out that environmental pollution is a serious threat to the very survival of the human race. In this crisis, the fundamental duty towards environment will bring environmental concern in all citizens, resulting in environment friendly actions. It may be pointed out that the expression 'every citizen' will mean, in the light of previous discussion, to

[25] See for detailed discussion, C.M. Jariwala, "The Constitution 42nd Amendment and the Environment", in S.L. Agarwal (Ed.) *Legal Control of Environmental Pollution* 1 (1980).

[26] *L.K. Koolwal* v. *State of Raj.*, AIR 1988 Raj. 2.

[27] *N.D. Jayal* v. *Union of India*, AIR 2004 SC 867. *See* also *Animal and Environment Legal Defence* v. *Union of India*, AIR 1997 SC 1071; *K.M. Chinnappa* v. *Union of India*, AIR 2003 SC 724.

[28] See article 47.

[29] *Ratlam Municipality* v. *Vardhi Chand*, AIR 1980 SC 1622.

[30] *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *M.C. Mehta* v. *Union of India*, AIR 1998 SC 2340.

[31] Report of the Committee for Operationalizing of Fundamental Duties, 1999 at 12.

[32] *Id.* at 16.

include even a corporation or company. In the light of such interpretation, it will be a fundamental duty of all corporations and companies to honour their fundamental commitments: not only to safeguard the environment but also to bring degraded environment to its 'natural' status.

It may be pointed out that article 51A(g) puts more emphasis on environment as compared to article 48A as the, fundamental duty is towards the 'natural environment' and not just 'environment' provided in article 48A. However, the question remains: Is there anything as natural environment in the present polluted world? Furthermore, in the light of the principle of intergeneration equity, it is a duty of every one to see that the future generation is not deprived of the fruits of environment which the present generation is enjoying. In today's world the fact is that we have hardly anything as natural environment, but it is a man-made polluted environment with some natural fragrance.[33] The duty is not limited to environment but it extends to protect and improve the forests, lakes, rivers and wild life and also to have compassion for living creatures. Though all these components are part of the environment, but it seems that the constituent authority wanted to put a special emphasis on them to attract an extra care in handling them.

The provisions of article 51A(g) are not enforceable, however, the Supreme Court, not toeing the aforesaid constitutional philosophy, has taken a stand to make the dormant and hibernating fundamental duty a responsive one. In this regard, the Supreme Court, time and again, has held that the courts must enforce fundamental duties and should not depend on policy makers[34] to activise them. The judiciary has further gone ahead and issued necessary directions.[35] Once the environmental responsibility becomes enforceable, the question will arise as to whether there is any constitutional or legal sanction for non-compliance of the responsibility. The answer is that, there is no constitutional sanction as such; however, the Indian environmental laws and other laws have provided sanctions and remedies for the non-fulfilment of environmental duties and obligations.

IV Legal Responsibility

In India there are many laws which directly or indirectly deal with environment. The Tiwari Committee estimated that there were about 200 legislations directly or indirectly dealing with environment.[36] These legislations, starting with the Indian Penal Code, the umbrella legislation -- the Environment Protection Act, 1986, down to the Green Tribunal Act, 2010 impose a duty on all natural and artificial persons not to

[33] *Virendra Gaur* v. *State of Harayana*, (1995) 2 SCC 577 580-1, wherein the court has taken into cognizance the two environments.

[34] See *Virendra Gaur* v. *State of Harayana*, (1995) 2 SCC 577, 580-1.

[35] *Sachidananda Pandey* v. *State of W.B.*, AIR 1987 SC 1109.

[36] Report of the Committee for Recommending Legislative Measures and Administrative Machinery for Ensuring Environmental Protection, 3.1 (1980).

put the environment and its components at risk. There are duties imposed in the environmental laws, under the directions of the appropriate authorities and also under the delegated legislations. The salient norms provided in the legislations include, duty to follow the prescribed standard for pollution; to supply information to the appropriate authorities as and when required; to establish and operate the industry with the consent of the required authorities; not to interfere with the authority at the time of inspection or taking sample so as to judge the standard of pollution so caused; to provide timely reports, to comply with procedural standards, etc. These duties are provided with criminal and monetary sanctions in case of their non-compliance. Taking the stock of only those laws directly dealing with environment,[37] the penal sanction ranges from three months to seven years imprisonment. The sanction of fine ranges from ₹10,000/- and ₹5,000/ per day of its continuance to Rupees One Lakh. However, the National Green Tribunal Act, 2010 enhances the fine to Rupees Ten Crores with an additional fine of ₹25,000/- per day in case of continuance of the offence. Will a small industry bear such a huge burden, is a question only time may answer. It may be pointed out that the industrial process will always have impact on environment. Some may adopt environment friendly approach and the other, may cause irreparable and irreversible damage. Once they have been given license legally or through corrupt practice to run the industries, and also the fundamental right, their claim cannot be denied to them as they have the fundamental right to move the court against any restriction on their activities. The result will be that till such time the industries are booked, they will have freedom to continue to operate at their sweet will. At present, a large number of industries, unexposed of any judicial sanction, are keeping the environment at ransom. It is time that the people of India must rise and nail their nefarious environmental activities.[38]

There are cases when industries handling hazardous substances met with an accident resulting in death or injury to the workmen or people in the nearby vicinity. In such cases the main sufferers were the economically weaker section of people who remained in great hardship due to long pending settlement process for relief and compensation. In this regard, the Public Liability Insurance Act, 1991 provides for mandatory public liability insurance for the installation and handling hazardous substances to give relief to the victims of an accident. The liability of the industry is on the principle of no fault, a strict liability. The Act makes it mandatory, on every owner handling such substances, to take out the insurance policy for an amount not less than the amount of the paid-up capital of the undertaking and not more than the amount exceeding fifty crore rupees, as may be prescribed. The liability does not end here; section 4(2c) further requires the owner to remit an amount not exceeding the amount

[37] The Water Act, 1974; The Air Act, 1981 and the Environment Act, 1986.

[38] Neil Gunnigham talks about positive role of the environmental community, Neil Gunnigham, *et al*, "Social License and Environmental Protection: Why Businesses Go beyond Compliance", 29 *Law & Society. Inqy*. 318 (2004).

of premium to be credited to the Environmental Relief Fund. Any non-compliance of such provisions also attracts maximum penalty of seven years imprisonment and a fine of Rupees one lakh.

The environmental accident is also regulated through the Disaster Management Act, 2005. The term 'disaster' means any catastrophe, mishap, calamity or grave occurrence due to natural or man-made causes and which is beyond the coping capacity of the people of the affected area. The Act also takes care of 'damages to, or degradation of, environment'. The Act provides for disaster management which will include: prevention of danger, reduction of risk, preparedness, arrangement for relief rehabilitation and reconstruction. Four tier authorities - national, state, district and local are provided with certain responsibilities to manage the disaster or likelihood of any disaster. The Act adopts a lenient approach against any offence - maximum two year imprisonment and undefined fine. It is too early to find its success; however, the provisions of the Act raise certain questions: Will the multi-window system be promptly responsive to handle any disaster? Will the different authorities get sufficient funds to meet the disaster? The Central Government has been given exclusive supervisory power in disaster management. How best it can look after the functioning of the district and local authorities? The Act envisages national and state plans which the industries, where the disaster has taken place or where there is likelihood of such disaster, has to comply with the management plans. And lastly, a national disaster response force is also provided in the Act for the purpose of specialist response to threatening disaster situation or disaster.

In all the above legislations there are interesting provisions which deserve special attention. Where a company has committed an offence then the penal provisions will not apply in its case if that company shows that the offence was committed without knowledge of the person directly in charge of, or was responsible to the company for the conduct of business; and further that he exercised all due diligence to prevent the commission of such offence. A similar exemption is provided in favour of the government department.[39] If one looks to the environmental case law and reports of the pollution boards, one will find that the corporates are the prime polluters of environment followed by the government. The aforesaid exemptions, it is submitted, will provide side lanes and by-lanes to them to go scot free, in spite of the fact that they committed the offence. This was held in relation to Mr Anderson in the case of *Union Carbide Corporation* but later on the Supreme Court,[40] set right its previous order. The question remains: Should they be allowed to walk out without any liability simply by saying, 'we had no knowledge what happened'? The very nature of industrial

[39] See for example, section 16, Act of 1991, section 16, Act of 1986; section 40, Act of 1981; section 47, Act of 1974.

[40] See *Union Carbide Corporation* v. *Union of India*, AIR 1992 SC 248. The multinational Corporations have their own story to tell. *See* United Nations Conference on Trade and Development; The World Investment Report 264-65 (2005).

processes is such that they are bound to affect the environment, as such the owner or user should not be allowed to take the plea of innocence. Further, the question is: Can we put well settled polluter pays principle and principal of 'no fault' or strict liability at ransom on such grounds?

Apart from the above criminal sanctions, the environmental laws also give power to the pollution boards to issue directions in case of non-compliance of the legislative duties, which may include, closure, prohibition or regulation of any industry or operation or process or stoppage or regulation of water or electric supply or any other services.[41] The reports of pollution board do not show any serious action undertaken under such provisions, a pity! But the question remains: Should the board be given such a power at its discretion or it may be left to be handled by the judiciary, a judicious act? Moreover such action, if taken, will always attract jurisdiction of the Court. Will it not be proper to say that the board must confine its power to move the court for restraining persons from causing pollution[42]?Apart from the above legislative corporate environmental responsibilities, there are rules made under the above legislations which also impose responsibilities and liabilities on the owner, occupier, exporter, importer, seller and buyer. For example, the Environment (Protection) Rules, 1986 impose responsibilities on industries and industrial processes to follow the prescribed standards for the discharge of environmental pollution.[43] In order to regulate the dealings in the hazardous waste, the Government of India framed the Hazardous Wastes (Management, Handling and Trans-boundary Movement) Rules, 2008. The handling of wastes may include, export and import of the wastes, and treatment, storage, disposal, packing, labelling; or transportation thereof. There is large number of responsibilities imposed on the occupier handling hazardous wastes.[44] The occupiers are responsible for safe and environmentally sound handling of hazardous wastes generated in their establishment. While handling the wastes, the occupiers are required to take all adequate steps to contain contaminates, and prevent any accident, and to provide training and required information to persons working on the site in the establishment. The occupier shall take firstly the authorization from the state pollution control board before starting any process. No occupier shall store the hazardous wastes for a period exceeding ninety days, and shall keep the record of the stored wastes. Those persons, who are dealing in recycling, reprocessing or reuse of the wastes, have to follow certain prescribed procedure as laid down under rule 8. The Rules, 2008 also regulate the import and export of hazardous wastes. For any trans-boundary movement of such goods, all persons have to take prior permission from the Ministry of Environment and Forests otherwise it shall be declared as illegal traffic. No import

41 See section 5, Act of 1986; section 31A, Act of 1981 and section 33A, Act of 1974.
42 See section 22A, Act of 1981; section 33, Act of 1974.
43 Schedule II to the Rules, 1986.
44 See rules 4, 5, 6 and 7.

shall be permitted except for recycling, recovery or reuse. Further, there are thirty wastes which are prohibited for import and export.[45]

The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 identify 684 industries, producing hazardous chemicals which come within the legal control of these Rules. Further Schedule 3, Part I, divides the hazardous chemicals in four groups for different treatments. The Rules provide for the general and specific responsibilities. The occupier, during the industrial activity, has to follow certain prescribed norms and take adequate steps to prevent accidents. No occupier shall undertake any industrial activity relating to hazardous chemicals unless it has been approved by the competent authority. The occupier is required to prepare and keep up to date an onsite emergency plan to cope up with any major accident.

The industrial activities have depleted the ozone layer. It is a serious matter which may, apart from other ill effects, bring climate change. In order to regulate the above activities, the Ozone Depleting Substances (Regulation and Control) Rules, 2000 identify substances which deplete the ozone layer. The sale, purchase, manufacture, consumption, export and import of such substances are subject to regulation under these Rules. Any person, dealing in production of ozone depleting substances, is required to get registered with the competent authority, and he shall not produce them beyond a prescribed quantity.[46] Further the Rules, in order to restrict its use in future, provided that no person shall expand or establish any manufacturing facility for any ozone depleting substances.[47] However, this restriction will not apply if it is used as a feedstock in manufacturing other chemicals, having negligible emissions, if any.[48] It is the duty of the occupier to maintain records about dealing with such substances and file reports as and when required to the appropriate authority.[49]

Other than the aforesaid Rules framed by the Government of India, the Act of 1974 and Act of 1981, dealing with water pollution and air pollution respectively, authorize the State governments to make rules to carry out the purpose of the relevant Acts.[50] In exercise of the power, the State governments of thirteen States have made rules in this regard. The States have adopted variant approach. This raises the question: Will the different approach do justice with the Indian environment?

Furthermore, from time to time the Central Government and state governments have issued notifications. Following are some of the select notifications issued by the Government of India.

45 Schedule VI to Rules, 2008.
46 Rule 3.
47 Rule 9.
48 Rule 9(2A).
49 Rule 14.
50 S. 54, Act of 1981; section 64, Act of 1974.

The Environment (Protection) Rules, 1986, require the Government of India, before giving clearance to any industry in certain sensitive environment zones, to invite objections against imposition of prohibition on the location of certain industries. The Central Government, by Notification, has been given power to prohibit location of industries in the Murud-janjira region and Doon Valley.[51] In order to protect these regions, certain boundaries are earmarked for the non-industrial process or operation. The Annexure to the Notification of Feb 1, 1989, categorizes the industries under three categories: Green, where a no objection may be issued for the above activities provided they come under the prescribed categories of industries and do not undertake any of the restricted processes; in the Orange, the industries, may be permitted with proper environmental control; and the Red industries cannot be permitted in the Doon Valley if they come within the three conditions laid down therein. There were also Notifications relating to the Eco-mark (1991) - to earmark the eco-friendly products; the Environment Impact Assessment (1994-97) - to assess the environmental viability of a proposed project; and the Environment Audit (1993) - to provide transparency in the environmental related activities. All these Notifications have one common aim to protect and improve the Indian environment.

V Judicial Contributions: A Resume

It was in the year 1980 that the atmospheric pollution, attracted a serious attention of the judiciary[52]; wherein the Supreme Court of India came down heavily on the inaction of the local authority. Thereafter the environmental case law started increasing the docket of the Supreme Court and high courts, and by 1998 the graph of disposal of such cases by the Supreme Court reached to the highest number.[53] This highest and moderate frequency continues till date. In this jungle of the case law, industries and industrial pollution have also attracted the attention of the judiciary time and again. The followings are some of the select areas worth discussing.

A Whose Responsibility?

It is the settled law that the personality of a corporation is different from those who are a part of the corporate process and also those who are looking after its day to day functioning. Further, there are beneficiaries of a corporation who enjoy certain benefits in view of their position with and in the corporation. In this multidimensional relationship with corporate houses, a question comes: Who should be accountable for the consequences of the industrial process of a corporation polluting the environment?

[51] The Gazette of India, No. 465, July 28, 1989 and No. 56, Feb 1, 1989.

[52] *Ratlam Municipality* v. *Vardhichand*, AIR 1980 SC 1622.

[53] See for detailed data and statistics, C.M. Jariwala, *Environment and Justice*, 2004, and also C.M. Jariwala, "The Directions of Environmental Justice : An Overview", in S.K. Verma and Kusum (Eds.), *Fifty years of the Supreme Court of India Its Grasp and Reach*, 470-71 (2000).

There are no two opinions about the responsibility of a corporation itself.[54] The Supreme Court discussed this question of responsibility at length in the *Oleum Leak* case.[55] In this case there was a leakage of *oleum* gas from one of the units of Sriram Foods and Fertilizers Industries. It was alleged that the leakage affected a large number of persons inside and outside the factory and also caused death of an advocate. There were reports of the expert committees wherein they unanimously pointed out that there was negligence on the part of the management of the industry and also pointed out some defects and drawbacks in its structure and design. So the question before the Supreme Court was: Who was personally responsible for all this? As regards the Chairman and the Managing Director, Sriram took the stand that they were not directly involved in the day to day functioning of the units of Sriram; as such they cannot be held personally responsible for it. A further plea was taken that if it is accepted otherwise then no qualified professional will accept the employment in its units. The Supreme Court did not accept the plea and made them personally responsible except that they prove that the leak was a result of an act of God, or *vis major* or sabotage or they exercised all due diligence to prevent such an escape.[56] If it was so, the Court ruled that in such a case, the victims would be entitled to be indemnified by Sriram.[57] Same plea was also taken for the operator and officer in charge of the units. The apex court also did not spare them except in the above exceptional situations.

It is reported that there were 263 persons working in various units as executives, supervisors, staff and workmen. Should they be made personally responsible? The Supreme Court, while fixing the responsibility in the present case, did not give any ruling in this regard. However, the Supreme Court[58] and the Punjab and Haryana High Court[59] have taken the stand that functionaries are not responsible for the conduct of the day to day business of a company, are not accountable for any act of the company. The courts have provided further norms to make them responsible if they 'knew really what is going on in his firm'.[60] It may be pointed out that mere fact that a person, who is employed by a corporation, cannot be accountable for any action in which he is not involved in any manner in its day to day functioning. In this connection it may be pointed out that a corporation may go scot free by adopting the aforesaid excuses,

[54] *M.C. Mehta* v. *Union of India* (*Sriram Gas Leak*), AIR 1987 SC 965; *M.C. Mehta* v. *Union of India* (*Kanpur Tanneries*), AIR 1988 SC 1037; *Union Carbide Corporation* v. *Union of India*, AIR 1990 SC 273; *Indian Council for Enviro Legal Action* v. *Union of India* (*Bichhri*), AIR 1996 SC 1446.

[55] *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965; AIR 1987 SC 982 and AIR 1987 SC 1086.

[56] Can this position stand in the light of the doctrine of absolute liability propounded in this very case?

[57] *Id.* at 985. See also *U.P. Pollution Control Board* v. *Mohan Neckins Ltd.*, AIR 2000 SC 1456; *Dwarka Cement Works* v. *State of Guj.*, 1992 (1) Guj. L. Her. 9.

[58] *U.P. Poll. Cont. Board* v. *Modi Distillery*, (1987) 3 SCC 684.

[59] *H.S. Board* v. *Bharat Carpets*, 1993 Cr. L.J. 283 (P & H).

[60] *G.L. Gutpa* v. *D.N. Gupta*, AIR 1971 SC 28, *Abdul Moid* v. *State*, 1977 Cr. L.J. 1325.

however, the corporates must remember that if they continue with their environmental irresponsive behaviour, they will have to pay heavy cost in future even resulting their closure.

B Quantum of Responsibility

Coming to the quantum of responsibility, the corporations in many cases were ordered to be closed down, resulting into a great loss to the corporations, employees and scarcity in the goods produced by them.[61] T.he Supreme Court also fixed certain amount of compensation[62] or damages[63], looking to the injuries caused to the human beings. The amount is generally determined on the basis of three broad criteria: death; major injury - making a person permanently disabled; and minor injury. In some cases[64] the amount of compensation was further enhanced to repair and regenerate the degraded environment, and also to provide medical facilities for the present and future victims.[65] This raises a question: Is monetary compensation a real answer to environmental pollution? Will not it allow the Corporation to pay and pollute? Furthermore, generally the quantum of compensation is based on the quantum prescribed in the traffic accident cases. But the question is: Has the traffic accident any comparison with the environmental accident? An environmental accident has far reaching consequences not only on the human being but also on plants, animals, soil and other components of environment and even on the future generation.

In the environmental litigations the courts at time also required the opposite party to pay the cost of the litigation to the petitioners[66] and also to pay pollution fine.[67] It is interesting to note that the courts, in their environmental judicial activism, have gone to the extent of even recovering the cost of pipelines and drainage to carry trade effluents to a distance of 28 km; thus shifting the municipal body's responsibility on the industries.[68] Apart from these charges the Gujarat High Court further required to pay a

61 *Consumer Education and Research Centre* v. *Union of India*, AIR 1995 SC 922; *M.C. Mehta* v. *Union of India*, AIR 1997 SC 734; *M.C. Mehta* v. *Union of India*, AIR 1988 SC 1037.

62 *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965; *Union Carbide Corporation* v. *Union of India*, AIR 1990 SC 273; *Indian Council for Enviro-legal Action* v. *Union of India*, AIR 1996 SC 1446.

63 *M.C. Mehta* v. *Kamal Nath*, AIR 2000 SC 1515; AIR 2000 SC 1997. See also *Re Bhavani Rivers-Sakhti Sugars Ltd.*, AIR 1998 SC 2578; *K. Muniswamy* v. *State of Kant*, AIR 1998 Kant. 287.

64 *Indian Council for Enviro-Legal* v. *Union of India*, AIR 1996 SC 1446; *M.C. Mehta* v. *Kamal Nath*, AIR 2000 SC 1997.

65 See particularly *Union Carbide Corpt.* v. *Union of India*, AIR 1992 SC 248, 309.

66 *Indian Council of Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1446; *Re: Bhavani River: Shakti Sugar Ltd*; AIR 1998 SC 2578; *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965.

67 *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715.

68 *Pravin Bhai Patel* v. *State of Guj.*, 1995 (2) Guj Rep. 1210. A stand further approved by the High Court in subsequent cases - *Deepak Nitrate Ltd.* v. *Ajit Padiwal*, 1997 (1) Guj & Her. 1062; *Taruben Gamit* v. *Central Pulp Mills*, 1997 (2) Guj. & Her 1007.

lump sum amount at the rate of 1 per cent of their one year's gross turnover for socio-economic uplift. Was such dynamism justified?

Furthermore, whenever the industrial houses transgressed the constitutional and legal responsibilities, the courts ordered for the closure of their industries and issued directions for their translocation[69] and also protected the interests of those who became unemployed.[70] Wherever, the industrial pollution affected the health of victims or the workers, the court ordered to set up a hospital at the expense of the corporation[71] and to take Medicare or health insurance coverage of the employees.[72] It may be pointed out that the Supreme Court, in view of the grave consequences of environmental pollution, has come down heavily on the polluting industries and it unsettled[73] a settled law which was in operation since 1868.[74] The Apex Court gave a go by to the theory of strict liability and brought in its place the concept of absolute liability. The Court laid down that if an industry is involved in any hazardous or inherently dangerous activity and such activity results in any harm, 'the enterprise must be absolutely liable to compensate for such harm, and it should be no answer to say that it had taken all reasonable care and the harm occurred without negligence on its part'.[75] The Apex Court, while fixing the quantum of responsibility, also observed that, 'The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it and then only such compensation must have a deterrent effect'.[76] The *M.C. Mehta's* ruling has been further simplified in the year 1996 on two grounds: one, the enterprise has enough resource to discover and guard against any environmental disaster; and two, it has foreseen the damage risk. The effect of the hard stand was that the multinational corporations, having worked under the *Ryland's* umbrella, ventilated their apprehension that such a stand would discourage them from trading on the Indian soil.

This brings us to the question of criminal corporate environmental responsibility. In the previous discussion, it has been pointed out that the development graph of criminal liability law has been from a minimum to highest peak. But the hard reality is that, it has yet to be effectively imposed.[77] It is because the victims primarily want

69 *M.C. Mehta* v. *Union of India*, (Kanpur Tanneries), AIR 1988 SC 1037; *Indian Council for Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1466; *Union Carbide Corporation* v. *Union of India*, AIR 1992 SC 248; *M.C. Mehta* v. *Union of India*, AIR 1996 SC 2231; *M.C. Mehta* v. *Union of India*, (*Taj Trapezium*), AIR 1997 SC 734.

70 *Consumer Edu & Res. Centre* v. *Union of India*, AIR 1995 SC 922.

71 *Union Carbide Corporation* v. *Union of India*, AIR 1992 SC 248, 309.

72 *Consumer Education and Res. Centre* v. *Union of India*; *Indian Council for Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1466.

73 *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965.

74 *Rylands* v. *Fletcher*, (1868) LR3 HC 330.

75 *Id.* at Para 58. *See* also *Union Carbide Corporation* v. *Union of India*, AIR 1992 SC 248.

76 *Indian Council for Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1446.

77 Even in European countries there are rare cases of corporate environmental criminal responsibility,

contd...

compensation; and secondly, the criminal proceedings are long drawn process with hardly any benefit to the victims. The fact is that the industries are one of the main culprits for degrading the environment. There were 'rogue industries'[78] which were involved in a 'chemical war'[79] causing irreversible damage to the environment and still the judiciary could not enforce and administer criminal sanction in their cases[80], frustrating the will of the elected representatives of the people. Thus expectation of the high pitch of punishments practically remained on the statute books. This shows that the corporate criminal environmental responsibility has become simply a part of corporate vocabulary which has yet to take serious roots. In such a said scenario the question is: Is not there a need for effective fast track environmental criminal courts? In this regard it is interesting to point out that the Rio Resolutions of the XV International Congress of Penal Law, 1994 under section 1, Recommendations Part II, Para 11, recommended that, 'Criminal sanction should be utilized only when civil and administrative sanctions and remedies are inappropriate'. Thus the Recommendations suggest the implementation of criminal sanction as a last resort[81] putting it in the list of last priority.

The corporate environmental responsibility has been made further effective by the Supreme Court through evolution of two principles which have become settled principles of the Indian environmental law.[82] The one is the 'polluters pay principle' wherein those industries, which pollute the environment, shall pay for the consequence of their polluting activities. The other is, 'the precautionary principle' which requires the controlling agencies to become functional and take action immediately without waiting for any scientific results if the industry is involved in an act of serious and irreversible damage to the environment. This is necessary because the scientific results are not only uncertain but also at time contradictory. In this case, the court further ruled that the onus of proof of environmentally begin action should lie on the polluting industry.

Apart from the above development in the corporate environment responsibility jurisprudence, there are other notable contributions of the judiciary, which, for example, include: the expansion of the right to environment,[83] extending it, for

see Michael Faure and Gunter Heina (Eds.), *Criminal Enforcement of Environmental Law in the European Union*, 43 (2005).

78 *Indian Council for Enviro-legal Action* v. *Union of India*, AIR 1996 SC 1446.

79 *Pravin Bhai Patel* v. *State of Guj.*, 1995 (2) Guj L. Rep. 1210.

80 *Union Carbide Corporation.* v. *Union of India*, AIR 1992 SC 248; *M.C. Mehta* v. *Kamal Nath*, AIR 2000 SC 1997 - wherein the court had to withdraw the criminal sanction imposed by it in the previous case in view of technical flaw.

81 Such an approach is not followed by the Council of Europe; See the Convention on the Protection of the Environment through Criminal Law, 1998.

82 *Indian Council for Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1446; *Vellore Citizens' Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *A.P. Poll. Con. Board* v. *Nayadu*, AIR 1999 SC 812.

83 See for details, S.P. Sathe and Sathya Narayan (Eds.), *The Changing Dimension of the Right to* contd...

example, to the rights to pure waters, quality of air, sustainable development, right to greenery, noise-free atmosphere - right to remain in peace. The other supplementary rights which were also evolved include the right to information, and right to know about the status of environment, and pollution and right to environmental education.[84] Thus the judiciary has developed a full-fledged environmental right jurisprudence and saddled the industrial houses with large number of corresponding duties. Furthermore, the courts have exposed the unexposed eco-rapers and brought to the day light their nefarious activities.[85]

VI What Comes Out?

At the international level, the international environmental law deserves appreciations as it has taken into consideration meaningful exercises in the industrial corporate environmental responsibility - a cradle to grave approach. However, the question, as to what extent the Member States and the corporate world have effectively followed or will follow them, remain still unanswered in a positive manner. The North-South fight, the lee way of 'common but differentiated responsibility', 'to the extent feasible' and many more vague concepts and principles, the shifting of venues of the trans boundary corporations, and over and above all these, the lack of international accountability and sanction have not allowed the international efforts to reach to their desired goals. The exercise of the world community in this regard, it may be pointed out, has, instead of providing a binding law, been used as parties convenience law. Unless the liberalised approach is reformed, nothing much can be effectively achieved. In this situation a welcome approach is adopted by the corporates themselves in forming an international platform and adopting some principles and environmentally safe code of conduct.

The Constitution (Forty Second Amendment) Act, 1976 has brought a complete *triveni sangam* of the environmental right, duty and obligation. But the pity is that these additions were non-enforceable. However under articles 19(6), 302 and 304(b), the State is authorised to impose reasonable restrictions and even total prohibition on the environmental-unfriendly activities. But the fact remains that the government has yet to play its due role in this matter. In this situation, the judiciary deserves appreciation for providing teeth to the non-enforceable provisions of articles 48A and 51(A)(g).

There are large number of environmental laws including rules taking care of environment right from the installation of industry down to the disposal of its products and wastes and management of any disaster. These provisions are backed by criminal sanction which has diluted it by exceptions in favour of defaulting company and government department, a way to escape for the eco-rapers. The monetary fine, though gradually increased, has to be yet to be enforced. Further, the governmental

Environment in India, in Liberty, Equality and Justice Struggle for a New Social Order, 267-280 (2003).

84 C.M. Jariwala, *Environment and Justice*, (APH Publishing Corporation, 2004).

85 *Id.* at 75-76.

notifications have provided meaningful mechanism to combat pollution menace. But no serious study is undertaken to point out as to how effectively they have been implemented. However, looking to the existing state of affairs of the Indian environment, can it not be said that not much fruitful result is coming out. In this sad scenario, the government must come forward and enforce the legislative intent in a right spirit. On the side of corporate houses, they must come together to build a common environment caring approach.

The environmental pollution has attracted a large number of litigations and the judiciary has made positive contributions in enforcing the constitutional and legal environmental responsibilities of the industrial corporates. The courts, while fixing the responsibilities, have made responsible all those who were i nvolved in handling, supervising and taking policy decision with respect to the industrial process causing pollution beyond the prescribed standard and further they were required to make good—the degraded environment. The judiciary not only ordered the rogue industries to be closed down but also took into the account the injury caused to human health, and ordered for preventive action to be taken for any future polluting activities. Further, the judiciary, in its concern for the protection of environment went to evolve environment - friendly principles and even gave a go by to a long established principle. Thus the courts have developed a full-fledged industrial corporate environmental jurisprudence resulting in corresponding responsibilities on the industrial corporations and have made them responsive in this regard. But how many, who were or are not dragged to the court, will come out of their hibernation of profit earning world—still remains a question.

So from here where do we now go? The financers, bankers, government, stake holders, consumers, employees and, the public, in general, must rise and make them responsive else the corporate houses will have to face public revolt in years to come to close down their industries, a sad day for all of them. With this, a literacy campaign must start to educate all the role players about the industrial corporate environmental responsibilities and the law schools, in particular, cannot lag behind in this social responsibility. The corporate houses also must rise to the occasion and resolve: Let everyone live in a healthy liveable environment.

THE WTO, TUNA AND DOLPHINS
Has the environment Lost Another Battle?

Surya P. Subedi[*]
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'Environmental interests have lost some battles,
but have won the war in the WTO.' — *John H. Jackson*[1]
'The environmental interests lost important battles
that leave the war far from won.' — *Sanford E. Gaines*[2]

I Introduction

On 13 June 2012 the World Trade Organisation (WTO) adopted a report issued by its Appellate Body ruling that United States rules regarding the labelling of tuna products needed to be brought into compliance with global trade rules.[3] It marked the conclusion of another phase in a dispute that had been raised under the GATT and one that has been simmering for more than 20 years. However, the case is also interesting in that arguments were raised directly relating to privileges under the GATT 1994 and under the Technical Barriers to Trade (TBT) Agreement. This made the case a test in relation to the handling of trade and environment concerns through a dispute process in the WTO relating to the TBT Agreement.

The case originates in Mexico's long held belief that the USA has been deliberately discriminating against its tuna products, previously prohibiting them from gaining dolphin friendly labelling and impacting their sales on the US market illegitimately. At issue was the USA's dolphin safe labelling requirements for tuna products, these were

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1 M.W. Weinstein, "Greens and Globalisation: Declaring Defeat in the Face of Victory", *NY Times*, 22 April 2001, S4, p.18.

2 S. Gaines, "The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures", 739 22 *Journal of International Economic Law* 2001.

3 WTO, United States - Measures concerning the importation, marketing and sale of tuna and tuna products, WT/DS381/AB/R, Appellate Body Report, 16 May 2012.

designed to protect dolphin communities and provide consumers information on the products they purchased.[4] They were also applied to tuna products coming into the market from Mexico and other countries, under the Dolphin Protection Consumer Information Act (DPCIA). Crucially the DPCIA applied a general standard for access to the labelling scheme – that it can be applied to tuna only if it is fished without using the techniques of setting on dolphins or driftnet fishing on the high seas. Whereas, for tuna caught in the Eastern Tropical Pacific region (ETP), access to the label requires this same certification as above, but also importantly the extra standard—that no dolphins were killed or seriously injured in the fishing process. For tuna caught outside the ETP, the latter requirement is not made.[5] As such where the Mexican imports from the ETP did not meet the requirements of the labelling scheme they were not given a dolphin safe label under the DPCIA. This meant that consumers were less likely to buy such products. Therefore, the Mexicans viewed these labelling requirements as discriminatory and unnecessary.

The WTO complaint was filed in October 2008 and nearly four years later in May 2012 the final decision on the legitimacy of the DPCIA labelling requirements was delivered by the WTO's Appellate Body.[6] At a first glance the case appears to have dealt another blow to the protection of the environment, ruling that the labelling requirements are too restrictive and discriminatory. There has indeed been much criticism of the decision from Non-Governmental Organisations (NGOs) for the failure of the WTO to recognise the necessity to protect dolphin populations at all costs.[7] The facts of the case and the outcome are examined in this article and the overall impact of the case is assessed to determine what the ruling actually means in practice for the protection of dolphins and more broadly the environment. The wider implications on the trade and environment debate will also be considered and ultimately the question of whether environmental protection has been adequately addressed through the WTO in this instance.

II The Relationship between Trade Liberalisation and the Environment

In the last few decades, international environmental law and international trade law have developed and interacted to bring these two distinct spheres to a focus for global attention in terms of international rule making.[8] It has been the WTO where these

4 United States Code, Title 16, section 1385, The "Dolphin Protection Consumer Information Act" and the United States Code of Federal Regulations, Title 50, section 216.91 and section 216.92.

5 *Op cit.* 3, 2.3-2.16; and Elizabeth Trujillo, "The Tuna-Dolphin Encore: WTO Rules on Environmental Labeling", ASIL Insights (Mar. 7, 2012), *available at* http://www.asil.org/insights120307.cfm 16-09-12.

6 *Op cit* 3.

7 See, for example, B. Waren, "The Death of Dolphins: Will the U.S. Comply with the World Trade Organization Ruling?", Friends of the Earth Website, 17 July 2012, last accessed 11 August 2012, http://www.foe.org/news/archives/2012-07-the-death-of-dolphins-will-the-us-comply-with-the-wo.

8 J. Cameron & K. Campbell, "A Reluctant Global Policy Maker", in O Perez, *Ecological Sensitivity and contd...*

interactions have been placed clearly in the public eye and from where controversy has sprung.

The broader question of whether the WTO is a suitable organisation to assess these types of cases is also an important consideration. Indeed this case has a long history, which is briefly considered in this article, going back to the GATT and at that time the issue of compatibility between trade liberalisation and the environment was a key concern of many interested parties.[9] It has only grown in interest even though there have been only a limited number of formal disputes addressed at the WTO dispute resolution body since its inception in 1995.[10] This suggests that whilst some environmentalists have raised concerns about the WTO in its dealings with the environment, there have been few actual interactions to date. The current US Tuna II case is an exception rather than a regular event. Nevertheless, the possibility of WTO interaction with the environment is the main cause of anxiety among some environmentalists. A key question has been to ask whether such cases should be heard by the WTO, does it have the competence to deal with environmental protection measures?

The key question to answer in this regard is whether there is any legitimacy for the WTO to entertain cases that relate to the environment. To do this, it is useful to look at the legal principles upon which the WTO is founded. It is true that the treaty creating the WTO does not mention the environment *per se*, however, in the Preamble to the Marrakech Agreement forming the WTO, the need for sustainable development to be upheld is clearly recognised and the signatories undertake to work with this principle in mind.[11] In the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) under the WTO, the environment is referred to in terms of exemptions relating to protection of the environment.[12] Therefore, there is a certain competence in the WTO

Global Legal Pluralism: Rethinking the Trade and Environment Debate 23(Hart, 2003).

9 See D.C. Esty, *Greening the GATT Trade, Environment, and the Future, Institute for International Economics*, (Washington DC, 1994).

10 The WTO website lists just three cases: European Communities — Measures affecting asbestos and asbestos-containing products. WTO case No. 135. Ruling adopted on 5 April 2001; United States — Import Prohibition of Certain Shrimp and Shrimp Products, the "shrimp-turtle" case. WTO case Nos. 58 and 61. Ruling adopted on 6 November 1998. Recourse to Article 21.5 of the DSU. Ruling adopted on 21 November 2001; and United States — Standards for Reformulated and Conventional Gasoline, WTO case Nos. 2 and 4. Ruling adopted on 20 May 1996. http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm l ast accessed 16 September 2012. To this we can also add Brazil – Measures affecting imports of re-treaded tyres of August 2009 and the US Tuna II case.

11 WTO, "Marrakech Agreement", in *The Legal Texts: The Result of the Uruguay Round of Multilateral Trade Negotiations* iii (Cambridge University Press, Cambridge, 1999).

12 Article 27 of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) makes a specific exemption of patent rights on the grounds of environmental protection. See *The Legal Texts: The Result of the Uruguay Round of Multilateral Trade Negotiations* 333 (Cambridge University Press, Cambridge, 1999).

to deal with environmental related matters. It should also not be forgotten that the WTO also has a Committee on Trade and Environment (CTE) which was given permanent status under the Doha Round.[13] These facts highlight that there has been some attempt to bring environmental awareness into the WTO, and the words of the Director General reinforce this notion:

While the World Trade Organization does not have rules that are specific to the environment, to energy or to Climate Change *per se*, there is no doubt that the rules of the multilateral trading system—as a whole (i.e. the WTO "rule book")—are indeed relevant to Climate Change. In fact the Preamble to the WTO Agreement explicitly mentions "sustainable development" as one of its fundamental objectives. Moreover the WTO rule book authorises its Members to give priority to environmental concerns, provided this is done in a non-protectionist manner. It is therefore not a case of trade "trumping" the environment.[14]

This speech recognised the need to try to assuage the fears that many environmentalists hold over WTO actions in relation to the environment. It does however reaffirm the principle that a key objective of the WTO is to prohibit discriminatory measures being taken by members acting in a protectionist way. This again leaves the door open to query if the WTO could do more to accommodate the needs of environmental protection into its fabric.

It is important to consider this aspect of competence of the WTO in environmental matters as it leads to a determination as to whether it can play a constructive role in balancing trade and environment concerns – particularly through the dispute resolution process. There are some stakeholders who believe that given the strong focus on trade in the WTO, it can never be unbiased in its interaction with environmental protection measures and will always rule in favour of trade interests.[15] At a basic legal level the WTO has a strong commitment to the requirements of sustainable development, which principally relates to environmental conservation and protection. This is explicitly mentioned in the text of the Preamble to the 1995 Marrakech Protocol which founded the WTO:

[T]he optimal use of the worlds [sic] resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to

[13] See the Marrakech Agreement and the Doha Round Negotiations on Trade and Environment, *op cit.* 11; and http://www.wto.org/english/tratop_E/envir_e/envir_negotiations_e.htm.

[14] Pascal Lamy, "A Consensual International Accord on Climate Change is Needed", speech to Climate Change Committee of the European Parliament, 29 May 2008, WTO website http://www.wto.org/english/news_e/sppl_e/sppl91_e.htm.

[15] The major critics of the WTO and its trade bias are a number of environmental NGOs and organisations such as Greenpeace, Friends of the Earth, the World Wildlife Fund, etc. For an example see http://www.greenpeace.org/international/campaigns/trade-and-the-environment.

enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.'[16]

It can be argued that this text gives the WTO a basis for providing considerable respect of principles relating to the environment and sustainable development. The founding members certainly intended that there would a commitment to the environment in the principles founding the WTO. This implies that the intention is that the WTO should operate in a way that does not champion trade liberalisation over environmental protection concerns. Nevertheless, arguments have been made that suggest the Preamble is only scant evidence of a commitment in the WTO to balancing trade and environmental protection considerations.[17] This could be taken at face value, and indeed the preamble has no legal standing *per se*, but through the Vienna Convention on the Law of Treaties (under article 31), which suggests that the words of treaties should be given their natural meaning, it can be argued that the undertaking is a real commitment.[18]

The Vienna Convention is applicable to the Preamble of the WTO and one can assume that WTO members have therefore undertaken a formal commitment to the principles of sustainable development and environmental protectionism – not that they are secondary to international trade. So the Preamble language has value and supports the contention that environmental matters and sustainable development hold some relevance in WTO dispute resolution body decisions. It is perhaps also arguable that sustainable development is a fundamental principle of the WTO. The comments made by Pascal Lamy in his speech to the European Parliament back in May 2008 echo this sentiment.[19]

III Background and Context to the 2012 US Tuna Case

A Tuna/Dolphin I Case

The case has a long history dating back to the consideration of the US tuna import policy under the GATT in 1991. Mexico launched a GATT dispute over a ban on imports of tuna products by the USA justified by the Marine Mammal Protection Act of 1972.[20] The aim was to protect species including dolphins from being unlawfully killed by fisherman. The USA alleged that the Mexicans were doing so. Mexico turned to the GATT and argued that the USA was violating its GATT obligations. In

[16] WTO Agreement 1995, first recital in the preamble, *Op cit.* 11.

[17] C.A.R. Robb *et al.*, *Trade and Environment, International Environmental Law Reports* 285, Vol. 2, University of Cambridge, Cambridge, 2001.

[18] United Nations, Vienna Convention on the Law of Treaties 1969, United Nations Treaty Series, Vol. 1155, 2005, p. 331.

[19] Pascal Lamy, *op cit.* 14.

[20] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155.

September 1991, the GATT panel issued its judgement and agreed that the USA had indeed been the transgressor. The reasons for the GATT panel's decisions are listed below:

(i) Article III of GATT had been breached as discrimination cannot be based on production practices;

Article XX (b) and (g), which provide for exemptions if actions are taken to protect human, animal and plant life and for the conservation of exhaustible natural resources respectively, could not be relied upon and could also not be applied unilaterally or extra-jurisdictionally.[21]

The interesting aspect of that case was that the panel did not rule against the dolphin safe labelling programme in the USA, rather the panel found that the USA was justified in using such a system as it had no discriminatory effects.[22] This can be seen in contrast to the current *WTO Tuna Dolphin* case where specific mention was made of the fact that the Appellate Body decided that the dolphin labelling requirements were discriminatory against Mexico.[23] This is a reversal of opinion by the WTO dispute resolution body; especially given the fact that the Panel in the current *US Tuna* case found that the labelling measure was not discriminatory. These aspects will be examined later in more detail.

The decision of the GATT panel to rule against the US ban led to numerous campaigns and articles condemning the GATT for placing trade concerns above the welfare of marine life and ultimately the environment.[24] This decision above all others drove attention to the trade – environment debate and the potential impact of global trade rules on national environmental policy.

The final point on the former GATT 1991 case of relevance is that the report was never adopted and so it is a reference point of limited scope. However, it can be said that an un-adopted report would contribute to the jurisprudence of the WTO, so the value of the decision is still important and should be considered fully by the WTO Appellate Body when making decisions. The reason for the non-adoption of the decision under GATT relates to the fact that the former dispute system required consensus to adopt a dispute outcome—and hence easily obstructed by a 'losing' party. This no longer remains the case under the strengthened WTO dispute resolution proceedings, where adoption of reports and decisions are made through positive consensus i.e. unless all members object, the report is adopted.

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[21] *Ibid.* and see D.C. Esty, *Greening the GATT Trade, Environment, and the Future* 268 (Institute for International Economics, Washington DC, 1994).

[22] *Ibid.*

[23] *Op cit* 3, para 299.

[24] See T. Goplerud, "The Struggle to "Green" the GATT: Free Trade and Environmental Responsibility in the Wake of the United States – Mexico Tuna-Dolphin Dispute", Vol. 17 Issue 2 *William & Mary Environmental Law and Policy Review* 215, 1993.

B *Tuna/Dolphin II Case*

The outcome of the first dispute did not please all contracting parties of the GATT, especially as the report was not adopted. In 1994, the European Community (EC) brought forward its own concerns regarding the Marine Mammal Protection Act (MMPA) of the USA.[25] This case specifically centred on the secondary embargo provision of the Act. This required that the embargo on Mexican tuna was extended to countries that bought tuna from Mexico—including members of the EC. The onus was placed on third countries to prove that they had not imported tuna from Mexico 6 months prior to exporting to the USA. This was very difficult for EC member countries to achieve and thus the EC launched this action in the GATT dispute resolution process.

The EC referred to articles III and XI of the GATT 1947 to argue that they had been subject to discrimination due to the nature of the MMPA in relation to third country embargos, and that the measure was a quantitative restriction.[26] The US relied on article XX(g) and (b) once again to defend the Act. In this case the GATT panel made an important ruling that article XX(g) and (b) are not subject to territorial limitations i.e. they could be used to defend policy that applies extra-jurisdictionally.[27] However, once again the Panel ruled in favour of the EC and stated that indeed the MMPA was GATT incompatible as it was restrictive and was based on process rather than product character.[28] The Panel also did not believe that the tuna import prohibition would stop the death of dolphins rather that a policy change would be needed at an international level.[29]

The Panel report once again was not adopted, but some important implications came out of these two rulings:

(i) product labelling was then considered non-discriminatory by the GATT;

(ii) that article XX (b) and (g) can apply extra-territorially; and

(iii) that the US should have engaged in international negotiations rather than simply banning tuna imports, which did not conform to its own production and processing methods.

While the rulings did not please the environmental NGO community, the logic of the decisions maintains integrity based on the GATT rules.[30] This is important for policy decisions based on international commitments such as those undertaken in the

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[25] GATT, United States — Restrictions on Imports of Tuna, not adopted, circulated on 16 June 1994, DS29/R

[26] *Op cit*. 21. p. 269.

[27] *Op cit* 25. Para 5.15.

[28] *Op cit* 25. para 6.1.

[29] *Op cit* 25. para 5.42.

[30] See The Dolphin Institute, Conservation, http://www.dolphin-institute.org/resource_guide/conservation.htm

GATT. The two cases also offered an insight into the thinking of the GATT Panellists in relation to environmental protection policy needs and placed an emphasis on the need to have international agreements rather than unilateral actions.

The decisions certainly encouraged the US to act more multilaterally and the resulting 1997 International. Dolphin Conservation Program Act (IDCPA) was implemented following agreement with Mexico and 10 other parties.[31] This created a regime to protect dolphins while creating a potentially sustainable yellow fin tuna catching programme – allowing the use of purse seine nets where dolphin mortalities were not observed. Tuna caught in accordance with these measures would be awarded the dolphin safe labels. The IDCPA eventually became a major part of the challenge placed on the USA by Mexico in the current *WTO US Tuna* case.

C *Shrimps Case*

Before finally considering the current *WTO US Tuna* case, it is important to briefly reflect on the jurisprudence of the WTO on an issue of similar nature to the case in question. In 1997 India, Malaysia, Pakistan and Thailand brought a case against the US relating to the US requirements relating to shrimp fishing and access to the US market.[32] To protect sea turtle populations, the US had imposed a ban on shrimps caught without using turtle excluder devices (TEDs), based on national legislation aimed at protecting populations of five endangered sea turtle species. When the legislation was brought to the WTO dispute resolution system, the USA sought to defend its actions under article XX (g) regarding the conservation of exhaustible natural resources.

In determining the case, the WTO Appellate Body used a methodology first used in the *US Reformulated Gasoline* case of 1997. This was to test the application against the specific content of article XX (g) and then test the measure under scrutiny against the chapeau of article XX.[33] This suggested that the WTO Appellate Body had developed a methodology to assess cases involving environmental issues. Thus in this case the Appellate Body was able to determine that the measure must 'reasonably relate' to the intended outcomes – which appeared to give a relatively wide scope for application of environmental measures also in an extra-juridical way.[34] The caveat is that there must also be restrictions on domestic consumption, which was also the case here. The US measures passed this test and the Appellate Body did not find the Act in contravention of article XX (g).[35]

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31 *Ibid.*

32 WTO, United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998.

33 WTO, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996.

34 *Op cit* 32. para 141.

35 *Op cit* 32. para 145.

It was the final test against the chapeau of article XX which finally determined the outcome of the case. The Appellate Body assessed the USA regulation against the following issues:

(i) whether the measure is arbitrary discrimination,

(ii) whether the measure is unjustifiable discrimination, and

(iii) whether the measure is a disguised restriction on international trade.

It was against these tests that the US measure was deemed to be WTO incompatible. In the *US Shrimp* case, the Appellate Body suggested that had the US undertaken good faith international negotiations on the issue it would have been sufficient to overcome the charge of being a discriminatory measure. As no such negotiations had taken place, the Appellate Body ruled that the measure was indeed discriminatory – especially as the US had provided support and longer transition times for shrimp fisheries in the Caribbean to be deemed compatible.

Although the US seemed to have lost the case in 2001, the Malaysians took recourse to the article 21.5 DSU compliance mechanism because they did not believe the measures enacted by the US were suitable to the requirements of the Appellate Body ruling.[36] This tested whether the USA's post ruling actions complied with the ruling of the Appellate Body. In the interim period, the US had introduced and undertaken the following actions:

(i) allowed imports of shrimp using fishing practices that did not harm turtles other than TEDs,

(ii) entered into negotiations with the other countries on the preservation of marine turtles,

(iii) offered technical and financial support to those countries to maintain turtle conservation.

Under the article 21.5 ruling, the Appellate Body found that the USA was satisfying the original ruling and that the enacted measures were commensurate with what had been expected.[37] No longer was the measure an arbitrary or unjustifiable restriction on trade.

The facts of the previous cases are important to understand ahead of the analysis of the *US Tuna* case, as they demonstrate a growing trend and methodological approach to the WTO addressing trade and environment concerns.

It is against these standards that we can truly judge the actions of the WTO Appellate Body in the current *US Tuna* case. Given that a certain degree of consistency is expected in rulemaking it will be important to determine whether the WTO Panel

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36 WTO, United States – Import Prohibition of Certain Shrimp and Shrimp products Recourse to article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, 22 October 2001.

37 *Id.* at paras 153 and 154.

and Appellate Body have acted in accordance with their practice in previous cases. Such an analysis gives a true reflection on the debate regarding trade and environment in the WTO, beyond the emotive concerns often attached to the issues. In fact even the WTO themselves claim on their website that the *shrimp turtle* case is a landmark ruling and in the face of continued hostility from environmental groups the following statement has been made: *'Many have missed the importance of the Appellate Body's ruling on this case.'*[38]

This in itself suggests that the WTO attaches value to its decisions and the importance they can have on policy options relating to the environment. The quotes at the beginning of this article relate to the debate the *US Shrimps* case created, due to the rulings of the Appellate Body. The positions represented by Gaines and Jackson outline some of the general perceptions of those commentators who are concerned about trade and environment decisions in the WTO.

D US Tuna 2012 Case

Considering the substantial jurisprudence that the WTO has in relation to marine conservation issues and trade barriers, the *US Tuna 2012* case should have represented a relatively straight forward case for the WTO dispute settlement system. This however, was not the case as the Mexicans came with a new angle – the TBT Agreement. The previous cases had been based purely on violations of rights under the GATT and not relating to the other Agreements of the WTO. The discussion of a breach of the TBT Agreement in relation to an environmental policy had not been subject to the creation of a dispute methodology.

(i) Panel Reasoning

The case was initiated by Mexico in 2008 with a formal panel being requested in early 2009.[39] The Mexican government believed that the US had violated its rights under article I(1) and III(4) of the GATT and articles 2.1, 2.2 and 2.4 of the TBT Agreement. This dispute was based on the measures the US government had introduced to protect dolphin populations and inform consumer choices through the dolphin safe labelling scheme based on the AIDCP provisions. Specifically the case assessed the following US provisions:

(i) the *United States Code*, Title 16, section 1385 ("Dolphin Protection Consumer Information Act");

[38] WTO website, "Environment: Disputes" 8, http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm

[39] WTO, "United States – Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products", WT/DS381/1, 28 October 2008.

(ii) the *Code of Federal Regulations*, Title 50, section 216.91 ("Dolphin-safe labelling standards") and section 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels"); and

(iii) the US court ruling in *Earth Island Institute* v. *Hogarth*, 494 F.3d 757 (9th Cir. 2007).

It was alleged that the US measures required through the above legal instruments, which determined whether a tuna product would attain a US Department of Commerce official dolphin safe label on the US market, were inconsistent with the GATT and the TBT Agreement and therefore were discriminatory and unnecessary.[40]

The issue for Mexico related to the US policy of refusing to award labels for tuna caught using purse-seine nets in the eastern Pacific Ocean, which only affected Mexican fisheries. The US stated that such a fishing method caused the unnecessary deaths of dolphins, which swim with tuna – only in this area of the world.[41] For the Mexicans using purse-seine nets was considered acceptable as the practice is compliant with the Agreement on the International Dolphin Conservation Program (AIDCP).[42] As mentioned earlier the AIDCP had been negotiated and agreed as an outcome of the earlier GATT US-Mexico cases relating to import prohibitions of tuna in the US.

The measures in question also required documentary evidence to be supplied by the fishers regarding the geographical area where the tuna was harvested and the fishing method used. The US argued that the measures applied to all tuna products for sale in the US market, regardless of catch origin and the measures were therefore non-discriminatory.[43]

Of relevance under the TBT Mexico also claimed that the labelling measures were mandatory and not voluntary, based on the fact that the US refused to recognise any standards other than their own for setting what was dolphin safe.[44] This was a major issue for Mexico as their fishing methods were AIDCP consistent.

The Panel in considering the case decided to first assess the TBT Agreement and only after determining the US measures against the TBT would the Panel go on to review the claims under the GATT 1994. It is therefore useful to consider the three clauses of the TBT that the Mexicans claimed the labelling requirement violated.

Article 2.1 relates specifically to the issue of discrimination, whereas article 2.2 relates to the necessity of a technical regulation against legitimate objectives relating to a number of issues – but specifically mentioning the environment as a ground for

[40] *Ibid.*

[41] WTO, "United States – Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products", WT/DS381/R, Report of the Panel, 25 September 2011, Para 4.6 and 4.71

[42] *Id.* at para 7.253.

[43] *Id.* at para 7.258.

[44] *Op cit.* 39.

exception to the rule. Article 2.4 requires members to consider international standards relating to technical regulations where appropriate.[45]

(ii) Technical Regulation

Firstly, the Panel determined whether the labelling requirement really was a technical regulation and therefore subject to the TBT Agreement. To apply the TBT Agreement it is necessary to determine whether a measure is a technical regulation, without this the TBT Agreement is not applicable and would therefore have meant that the case could only be considered under GATT 1994. This would also have meant that methodologies applied in previous trade-environment cases would have been applicable.

The Panel examined the issue and decided that the labelling requirement was indeed a technical regulation and, that the US measures were in fact mandatory.[46] This was based on their assessment of the measure against the requirements of Annex 1.1 of the TBT Agreement which provides a definition of 'technical regulation': 'a document which lays down product characteristics or their related processes and production methods...with which compliance is mandatory.'[47]

This definition puts a premium on the nature of compliance and if a measure can be deemed to be mandatory then it surely will be a technical regulation. The Panel believed that the US law and regulations on labelling for tuna regarding dolphins were legally required and contained enforceable conditions. Only by meeting certain

[45] Article 2 of the TBT Preparation, Adoption and Application of Technical Regulations by Central Government Bodies With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems. See WTO, article 2 TBT Agreement in The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge University Press, 2004.

[46] *Op cit*. 41 para. 7.140.

[47] WTO, Annex 1.1 TBT Agreement in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, 2004).

demanded conditions can producers gain access to the dolphin safe label.[48] Hence they made the decision that the labelling requirements were mandatory and therefore a technical regulation.

Importantly, one of the Panellists dissented in this aspect of the decision, believing that the labelling requirements were voluntary. Of interest the dissenting panellist gave the following statement:

> The measures do not impose a general requirement to label or not to label tuna products as "dolphin-safe". It remains a voluntary and discretionary decision of operators on the market to fulfil or not fulfil the conditions that give access to the label, and whether to make any claim in relation to the dolphin-safe status of the tuna contained in the product.[49]

Despite disagreeing with their fellow Panel members on this aspect, the panellist did however agree with the Mexicans overall. However, importantly if the Panel had decided that the measures were not technical regulations then the TBT Agreement would not have been accessible to the Mexicans for their argumentation and the main arguments would have been made under the GATT 1994 following the methodology that is now established in such cases.

The Panel then examined the claims under article 2.1 of the TBT and found that the labelling requirements were not discriminatory and that the Mexican products were 'like products' within the meaning of the article 2.1.[50] Therefore, the Panel decided that the products were not discriminated against and were treated the same as tuna products created in the USA or other countries. The issue of being 'like' products is key to determine whether the labelling requirements would be discriminatory. The Panel found that the products were 'like' and that Mexican tuna products were not afforded less favourable treatment than US tuna or tuna from other countries. In doing so, the Panel referred to the ruling in the *EC-Asbestos* case demonstrating that the Panel was aware of general principles relating to determining the likeness of a product – even if that case had not been applied to the TBT Agreement but to the GATT 1994.[51]

The Panel then examined article 2.2 TBT and found that the measures were more trade restrictive than necessary to achieve the objectives of the labelling.[52] The objectives of the labelling against which the decision was made are as follows: (i) ensuring that consumers are not misled about practices used for catching tuna and (ii) contributing to the protection of dolphins. This decision was reasoned due to the fact

[48] See E. Trujillo, "The WTO Appellate Body Knocks Down U.S. "Dolphin-Safe" Tuna Labels But Leaves a Crack for PPMs", ASIL Insights, Vol. 16 Issue 25, http://www.asil.org/insights120726.cfm#_edn9.

[49] *Op cit*. 41 para. 7.153.

[50] *Op cit*. 41 para. 7.227.

[51] *Op cit*. 41 para. 7.223.

[52] *Op cit*. 41 para. 7.620.

that the labelling requirements did not address the danger and mortality to dolphins outside of the eastern Pacific Ocean caused by other fishing methods.[53] Therefore the labelling requirements were too narrow in their application and perhaps applying the rules to a wider geographical region may have given the Panel more room for considering them to be legitimate. It is therefore, clear that when considering technical regulations the Panel believed that having a standard for one particular geographical area is not a consistent approach with the requirements of the TBT Agreement. This could be seen to be logical even if it is not upholding specific environmental requirements, a shortcoming in the decision making process of the Panel – as it would be folly to suggest that a one size fits all approach will be suitable when dealing with environmental issues.

In relation to article 2.4 of the TBT the Panel held that the AIDCP was not an effective and efficient means for the US to achieve its dolphin protection requirements.[54] This was contrary to the claims of Mexico. The Panel determined that the AIDCP would not deliver the standards of dolphin protection pursued by the US. It stated:

> 'We therefore conclude that the AIDCP standard, applied alone, would not be an effective or appropriate means of fulfilling the US objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.'[55]

Therefore, the labelling measures were not TBT inconsistent under article 2.4 according to the Panel. The Panel then went on to decide that it would not consider the case under the GATT 1994 as requested by Mexico, due to the fact that they believed all necessary arguments had been addressed and thus exercised judicial economy.[56] This is perhaps a missed opportunity, as it would have been interesting to see how the application of methodologies laid down in previous similar cases would have been handled in this instance.

The Panel concluded with calling on the US to bring its measures into line with article 2.2 of the TBT Agreement. This decision appeared to be fairly balanced if not entirely satisfying the parties and many third party observers – particularly animal welfare and consumer groups.[57]

[53] *Op cit*. 41 para. 7.621.
[54] *Op cit*. 41 para. 7.731.
[55] *Ibid*.
[56] *Op cit* 41 para 7.748.
[57] M. Nandini Mitra, "WTO Rules US Dolphin Safe Tuna Label 'Unfair' to Mexico, Decision a Big Blow to Dolphin Protection", Say Environmentalists, Earth Island Institute, 17 May 2012.

(iii) WTO Appellate Body Reasoning and Environmental Protection

Both Mexico and the USA responded to the ruling of the Panel by appealing the decision, the Mexicans, though having a technical victory, did not agree with the rulings on TBT article 2.1 and 2.4 and the US also had reservations around the decision in article 2.2. The Appellate Body was formed in late 2011, bringing forward its decision in May 2012.[58]

The interesting thing about the Appellate Body decision is that it appears to have reversed numerous aspects of the Panel's findings. The ruling of the Appellate Body is outlined below:

(i) the Panel was right to conclude that the labelling requirement was a technical regulation;

(ii) under article 2.1 TBT Agreement, the US measures were inconsistent with its requirements overruling the Panel decision and therefore, discriminatory;

(iii) the measure is not inconsistent with article 2.2, as it is not more trade restrictive than necessary, and thus overturns the Panel decision;

(iv) measures contributing to the protection of dolphins are a legitimate objective under article 2.2 TBT, upholding the Panel reasoning;

(v) supported the Panel decision on article 2.4 and reaffirmed that it was not inconsistent with the TBT;

(vi) the Panel had no right to employ judicial economy and should have considered the case under the GATT 1994.

On the face of this decision it seems that the Appellate Body has found much that was wrong with the reasoning of the Panel and indeed subsequently over-turned decisions that had been made seemingly on facts and WTO practice in previous cases.

One aspect however, has been reinforced – that the labelling scheme is a technical regulation, and despite being voluntary under the US regulations the Appellate Body also agrees with the Panel that the labelling measure can be considered to be mandatory for market access.[59] This again was based on the fact that the Appellate Body viewed the regulations on dolphin safe labelling to be legally enforceable and therefore conditions regulating accessing to the labels.[60]

This decision suggests that any voluntary labelling scheme could be considered to be a technical regulation under the TBT Agreement and therefore the definition of mandatory labelling seems to be broadened beyond its natural meaning. This aspect of the case has created quick responses from international lawyers and opens confusion

[58] *Op cit*. 3.
[59] *Op cit*. 3 para. 407 (a).
[60] Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (May 16, 2012) 194-195.

as to what is a mandatory technical regulation and what can be deemed a voluntary standard.[61] The reasoning apparently shows that where market access is impacted by a regulatory measure it is therefore a technical regulation. This seems a relatively broad interpretation of 'technical regulation'.

This may have further repercussions for labelling schemes relating to genetically modified organisms (GMOs), organic and fair trade labels.[62] It is possible that the decision opens a new Pandora's Box for challenges on labelling relating to production methods.

The Appellate Body decision raises many questions as to how the WTO consistently decides cases, taking for example the first controversial point – that the measure is discriminatory as per article 2.1 of the TBT Agreement. In this aspect the Appellate Body made the decision that the Panel had applied an approach that was flawed and proceeded to reverse the decisions made by the Panel.[63] The Appellate Body did not review the 'like product' aspect of the Panel decision, as this was not appealed and thus it can still be argued that the interpretation of *EC Asbestos* could still be considered as the definitive approach in the WTO for the time being.

The Appellate Body decided that as the requirements for dolphin safe labelling were being interpreted to reject any tuna caught using purse-seine netting fishing methods, this was discriminatory and impacted Mexico's competitiveness in the US market.[64] The Appellate Body also rejected that this was accepted so that a legitimate regulatory objective could be pursued by the US.[65] The Appellate Body examined whether less favourable treatment was being given to Mexican imports, based on US government action. This was based on whether the measure modified the competitive conditions for Mexican tuna in the US market compared to other third parties and if so whether any detrimental impact was discrimination.

In relation to the first point, the Appellate Body determined that the Mexican tuna products were being made less competitive in the US market due to the labelling – and pointed out that irrespective of private decisions the US has an obligation to make sure that all products are treated fairly.[66] The Appellate Body also referred to the Panels methodology and reflected that in its opinion the Panel had erred in finding that regulatory variances based on the fishing methods and not the national origin are

61 See E. Trujillo, "The WTO Appellate Body Knocks Down U.S. "Dolphin-Safe" Tuna Labels But Leaves a Crack for PPMs", ASIL Insights", Vol. 16 Issue 25, July 26 2012, http://www.asil.org/insights120726.cfm#_edn9.

62 ICTSD, "WTO Appellate Body Rules Against US in "Dolphin-Safe" Label Case", http://ictsd.org/i/news/biores/133744/

63 *Op cit*. 3 para 227.

64 *Op cit*. 3 paras 298 and 299.

65 *Ibid*.

66 *Op cit*. 3 paras 239 and 240.

consistent with article 2.1. Rather the Appellate Body stated that such distinctions can indeed impact the competitive environment in a country – in this case the USA.[67]

The Appellate Body went on to find that the labelling also impacts Mexico detrimentally, and that the US failed to demonstrate that this negative impact is due to any legitimate regulatory distinction.[68] Again this was due to the fact that the measure focuses solely on the Eastern Pacific but did not take into account fishing methods in other areas that could also be harmful to dolphins. Therefore, the Appellate Body determined that the labelling was discriminatory under the meaning of article 2.1 of the TBT Agreement:

> The US dolphin-safe provisions do not address observed mortality, and any resulting adverse effects on dolphin populations, for tuna not caught by setting on dolphins or high seas driftnet fishing outside the ETP.[69] Thus, in our view, the United States has not justified as non-discriminatory under article 2.1 the different requirements that it applies to tuna caught by setting on dolphins inside the ETP and tuna caught by other fishing methods outside the ETP for access to the US "dolphin-safe" label.[70]

Thus, it is a question of the application of the labelling requirements in a geographical sense that appears to have driven the decision of the Appellate Body. This interpretation of article 2.1 of the TBT Agreement can be considered to be in line with other cases determined under article III of the GATT 1994, in the sense that the decision applies to discrimination through national regulations which appear to be origin neutral but that impact specific countries practices disproportionately.[71]

On article 2.2 the Appellate Body declared that they found the Panel's reasoning flawed and were particularly concerned that the Panel believed that the alternative measure put forward by Mexico would have the same result as the labelling measures used in the USA.[72] Rather the Appellate Body reversed the decision finding that the measure was not more trade restrictive than necessary:

> Since under the proposed alternative measure tuna caught in the ETP by setting on dolphins would be eligible for the "dolphin-safe" label, it would appear, therefore, that the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions

67 *Op cit*. 3 para 225.

68 *Op cit*. 3 para 297.

69 *Op cit*. 41 para 7.621.

70 *Op cit*. 3 para 298.

71 See most recently the Appellate Body Report, *United States—Clove Cigarettes Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 4, 2012).

72 *Op cit*. 3 para 330.

that adversely affect dolphins to be labelled "dolphin-safe".[73] We disagree therefore with the Panel's findings that the proposed alternative measure would achieve the United States' objectives "to the same extent" as the existing US "dolphin-safe" labelling provisions, and that the extent to which consumers would be misled as to the implications of the manner in which tuna was caught "would not be greater" under the alternative measure proposed by Mexico.[74]

This decision follows the principles laid down in the *US Gambling* case and reaffirms the need to have a meticulous analysis of the necessity of any measure under consideration.[75] The Panel would need to have effectively balanced the trade restrictiveness of the labelling scheme, its contribution to a legitimate legislative objective and the danger of not achieving the intended objective of the legislation.[76] The burden was indeed on Mexico to show that the measure was more trade restrictive than necessary and the Appellate Body did not believe that this had been achieved in this case.

This was in part due to the fact that an outcome of the *GATT Tuna/Dolphin* case had been for the US to set up the AIDCP with Mexico which included a less stringent labelling system. The Panel believed that the US should use the AIDCP and the domestic labelling scheme together and considered the effect of this in a context beyond the Eastern Pacific. The Appellate Body did not agree that using AIDCP and the US scheme together would provide an alternative less trade restrictive approach to meet to the same extent the required objectives of the US labelling scheme. The Appellate Body also believed that only the tuna caught in the Eastern Pacific should be considered and that extended the scope outside of this area, as the Panel had done, was an error. Therefore the Panel decision was reversed by the Appellate Body.

Thus, the labelling measure can indeed be considered legitimate in terms of informing consumers and protecting animal life according to the Appellate Body. The objectives were considered to be legitimate and not more trade restrictive than necessary. This is important as it suggests that the Appellate Body recognises the importance of these goals in terms of achieving legitimate policy objectives in areas beyond trade, such as conservation and environmental protection.

On article 2.4 overall the Appellate Body agreed with the Panel and found that the dolphin labelling measures were not inconsistent with the TBT Agreement.[77] Article 2.4 of the TBT Agreement requires that Members use relevant international standards as the basis for their technical regulations, unless they are not suitable to meet legitimate

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73 *Ibid.*

74 *Ibid.*

75 Appellate Body Report, *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 7 April 2005, para 307.

76 *Op cit.* 3 paras 318 and 322.

77 *Op cit.* 3 para. 407 (f).

objectives.[78] The Appellate Body, did however, disagree with the Panel on whether AIDCP could be considered as such an international standard. They found that the AIDCP was not an international standards setting organisation as held by the Panel and reversed this decision. The Appellate Body decided that, as the TBT Annex 1 requires that international standards are set by an international standards body, it was therefore necessary to determine if AIDCP could be considered as such.[79] To do so the Appellate Body had to determine whether the AIDCP was recognised for its activities in standardisation and that it must be open for membership to all members.[80]

To determine this issue the Appellate Body referred to a TBT Committee Decision in order to interpret the meaning of 'open' and 'recognised activities in standardisation', this they argued was appropriate as the Committee Decision could be considered as a subsequent agreement within the meaning of article 31.3 (a) of the Vienna Convention on the Law of Treaties.[81]

In the Appellate Body's view, relying on the TBT Committee Decision, the AIDCP is not open to all Members as only few members are involved and it is limited on an invitation only basis. They therefore, considered that the AIDCP standards were not relevant international standards under the TBT Agreement. They thus rejected Mexico's claims that they could be relied on for access to the US labelling scheme. Article 2.4 was therefore decided for different reasons in accordance with the Panel decision.

This can be seen as a unique development in the Appellate Body's practice, as this is the first time that the WTO Committee Decisions have been given legal force in dispute resolution proceedings. As far as precedent can be extended in an international legal system, the use of the Committee Decision in this way opens the door for important Committee Decisions to now be given legal standing. In relation to the environment, the Committee on Trade and Environment (CTE) could now have its decisions relied on in cases at the WTO. This is important for future trade and environment cases where relevant discussions have been held in the CTE.

Finally, the Appellate Body chastised the Panel for the use of judicial economy, stating that it was not an option open to them and that they had erred in their application of WTO rules.[82] The Appellate Body believed that the most important

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78 TBT Agreement, article 2.4 in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, 2004).

79 *Op cit.* 3 para. 356.

80 *Op cit.* 3 para. 359.

81 TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to articles 2, 5, and Annex 3 to the TBT Agreement, G/TBT/1/Rev.10 (Jan.1, 1995) (revised June 9, 2011); and the Vienna Convention on the Law of Treaties article 31.3(a), 23 May 1969, 1155 U.N.T.S. 331.

82 *Op cit.* 3 para. 407 (g).

failure was to assume that any appeal body would also agree that the labelling measure was a technical regulation – had the Appellate Body not agreed then only GATT 1994 would have been applicable. This would then have put the whole case in a difficult situation as there would have been no Panel view on the GATT 1994 aspects. As stated earlier it is indeed a shame that the GATT 1994 had not been considered, as a whole methodology that has been set up for similar trade-environment cases was not put to the test.

(iv) Potential Impact of the Case

There has been some concern voiced over the outcome of the case, specifically that the use of voluntary labelling schemes will now be subject to the denomination of mandatory technical regulation under the TBT Agreement. This has created fears that other types of consumer oriented labelling will be ruled to be inconsistent with the WTO rules.[83] This however, is not necessarily an accurate assessment of the situation.

The Appellate Body has been clear in stating that the labelling scheme is entirely consistent with the TBT Agreement – in that it supported legitimate policy objectives (protecting dolphins) and that it provided important information for consumers. Therefore, the Appellate Body, on the contrary to the claims made about its reasoning in relation to the environment, recognises the importance of policy decisions based on the need to protect environmental concerns. However, the question will always be what is 'legitimate' and what States should do to be sure their voluntary schemes are legitimate. It appears that the Appellate Body determined the discussion under article 2.2 in favour of the USA as otherwise the impact on consumer information and dolphin protection would have been reduced if Mexico was able to have purse-seine net caught tuna qualifying for the label. Thus there was recognition of the importance of the need to keep consumers informed when making their purchases. Therefore, legitimate voluntary schemes should have little concern from the decision, unless they are truly more trade restrictive than necessary.

The larger issue is that the WTO remains convinced of the need that labelling practices need to be similar across all areas, irrespective of local differences. For example, the US labelling excluding purse-seine net caught tuna from the Eastern Pacific has been described as a discriminatory measure. However, the method of fishing is only employed in this area of the globe due to the nature and habits of the tuna and the local dolphin populations.[84] The ruling, therefore that labelling standards have to be applied in the same way across all areas is not necessarily the most environmentally effective, very rarely does one-size-fit-all. This is because different techniques will be used in different areas and a less nuanced approach to

[83] *Op cit.* 61.

[84] *Op cit.* 3 footnote 355 p. 69.

environmental protection could lead to unintended consequences in the long run, an outcome which is not in the interests of any Member.

The Mexican tuna fishing method was recognised as being harmful to dolphins under the ruling on article 2.2, but the US labelling discriminatory under article 2.1. To some extent the Appellate Body seems to be calling for application of rules under AIDCP beyond the Eastern Pacific to take account of harmful practices elsewhere in the world – this is something that could be seen as positive in terms of encouraging multilateral engagement and the spread of harmonised global rules. Nevertheless, the outcome is one that probably leaves both parties frustrated. The US had implemented AIDCP after Tuna Dolphin I and II from the GATT era and had put in place a voluntary labelling standard and Mexico will be frustrated that the articles 2.2 and 2.4 decisions have gone against them, particularly in the sense that PPMs could remain as a barrier to market access if properly justified.

Having used the TBT to address this case, there has also been a loss of some of a chance to further enhance the methodology used under the GATT 1994 as developed through cases including the *US Shrimp* case. This would have been a great opportunity to determine how a precedential practice could have impacted the outcome of the case. Instead the Panel chose to ignore the issue and chose to solely rely on the TBT Agreement – a folly recognised by the Appellate Body. In the future it would be hoped that the Panel would fail to make such an error of judgement and properly consider the case facts in light of the jurisprudence of the WTO when dealing with environmental issues. It can appear to some constituents that by ignoring this jurisprudence, the Panel has once again found a way to set back environmental causes through the dispute resolution system – even if this is not the case.

The other major point is that decisions of WTO Committees have been given legal standing through the Appellate Body's reliance on the outcome of the TBT Committee Decision in determining the correct outcome in its deliberations under article 2.4. It could be argued that now the opportunity could be taken for more progress to be made on trade and environment issues in the CTE. This could allow Members to refer to such CTE Decisions in times of conflict between trade and environmental concerns. It may also suggest to commentators that the CTE could become a more important forum for progressing matters relating to international trade and the environment. Therefore, this aspect of the case is one which may yet have a positive impact on the way the WTO deals with trade related environmental matters – although this depends on Panels and Appellate Bodies to use the precedent set and also on the Members to require such action.

IV Suggestions for Improving Environmental Decision Making in the WTO

The present case is one of huge significance in the trade and environment debate and finally sets out the WTO Appellate Body's view on the issue of labelling on dolphin safe regulations and more generally on labelling requirements of all kinds. Overall,

when considering the case outcome it can be argued that a logical outcome has been achieved, even if there may seem to be some conflict between the ruling on articles 2.2 and 2.1 of the TBT. Having found the regulation to be contrary to article 2.1 this suggests that the Appellate Body has determined that a measure based on non-product related PPMs as a discriminatory technical regulation. On the other hand the ruling under article 2.2 suggests that the applicability of the TBT Agreement to PPM based regulations is far from clear cut – which can still cause some confusion in relation to what can be done and the impact of such regulations on market access for third parties.

The case has also not necessarily negatively impacted the protection of dolphins, the actual issue at stake – the response of the USA to the outcome and the measures enacted now will determine that. The USA has been able to address such rulings and maintain protection of the environment after similar decisions under the GATT. This of course will be closely watched and the idea of a referral to article 21.5 DSU Compliance Procedure should not be entirely ruled out from the Mexican perspective.

Nevertheless, the perception of the WTO as a body that only cares about trade at the expense of all other disciplines has once again been extolled by numerous organisations. Clearly, the WTO members should consider how they can better improve the operation of the dispute resolution system when dealing with environmental matters – not just for the outcome of Panels, but also for the perception of improved decision making. Simple solutions exist within the WTO, there are practices adopted in the WTO that already offer potential means to improve trade-environment decision making.

One such practice is the inclusion of a representative from a developing country when their interests are being considered in the dispute resolution system.[85] It would not be difficult for the WTO to also enact a clause that would require an environmental expert to also sit on the Panel and Appellate Body during consideration of a case where environment c oncerns are considered. This would enhance the fact that scientific resources are made available, by actually giving a voice to environmental interests in the decision making process.[86]

The WTO dispute resolution system remains one of the most effective and influential international dispute resolution systems, therefore improving its functioning when dealing with the environment is critical to escaping the 'trade at all costs tag'.

[85] See article 8.10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 361 (Cambridge University Press, 2004).

[86] For further discussion on this see J.K.R. Watson, *The WTO and the Environment: Development of Competence beyond Trade* (Routledge, London 2012).

So is this case one more round to trade in the 'war'? Perhaps not, but neither is it a victory for the environment. Without a reform of the dispute resolution system however, commentators will continue to see the WTO as a platform for a trade versus environment conflict – something that is not helpful, as policy in each discipline should have mutually supportive objectives.

STATE PRACTICE ON IMPLEMENTATION OF INTERNATIONAL LAW IN INDIA
An Analytical Study of Constitutional Provisions and Case Laws

V.K. Ahuja[*]

I Introduction

The importance of international law has increased manifold in the contemporary period in view of social, political and economic development worldwide. The technological developments have posed enormous challenges to the international community and forced nations to adopt new laws to meet those challenges. As the world has become a global village and technology knows no barriers, States are adopting multilateral law making treaties to keep pace with technological developments. In addition, States have adopted and still adopting multilateral treaties in various areas such as international trade, intellectual property rights, nuclear warfare, environment, State responsibility, human rights, etc. These treaties may confer certain rights on the States and also impose certain duties on them. Certain rights may also be conferred on individuals by these treaties and corresponding duties on the States. Similarly, customary international law may also confer certain rights for States and individuals and impose corresponding duties on them. To attain these rights or to enforce these duties, it is essential that international law should be implemented by States in their municipal spheres.

It is not out of place to mention that States are obligated to give effect to their treaty obligations. The principle '*pacta sunt servanda*' provides that States must fulfil their treaty obligations in good faith. It happens many a times that the courts of a State do not give effect to international law (customary as well as conventional) unless the international law is incorporated into its municipal law. This may result in the non-fulfilment of treaty obligation by that Member State. Consequently, the affected Member States may bring a claim against that State.

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The issue how international law is implemented in the States becomes extremely important. The decisions of the courts vary from State to State. The constitutional provisions of States for the implementation of international law are also not uniform. It may be possible for the municipal courts of a State to ignore international law until the same has been incorporated into the municipal law. But it is not possible for the State to ignore its obligations under international law before the international tribunals. The international tribunals give effect to international law even if the international law is in conflict with the municipal laws of the parties to the case. Even the Constitution of the parties will not be considered if the same is in conflict with their treaty obligations.

The Encyclopaedia Britannica,[1] provides under the heading 'Relationship with the Internal Law of States' that 'to understand international law it is necessary to appreciate its close relationship to the ... municipal laws of states, for it is increasingly penetrating that sphere. Even traditional international law, at a time when it was supposed to be a law only between states, had many rules which required the co-operation of municipal courts for their realisation; ... But a very large part of modern international law is directly concerned with the activities of individuals which come before municipal courts. So that it is in the municipal courts that a large and increasing part of international law is enforced.'

The present study makes a critical study of State practice on implementation of international law in India. The study will also make an in depth study of constitutional provisions. It will also examine a plethora of judgments delivered by Supreme Court and various High Courts. The focus of the study will be on the implementation of customary international law and conventional law in India.

II Relationship between International Law and Municipal Law: Theories

There are two principal theories of relationship between international law and municipal law. Monism theory recognizes one system only – law in general. According to monism, international law and municipal law are concomitant aspects of one system i.e. law in general. Monism regards all law as a single unity composed of binding legal rules, irrespective of the fact whether those rules are obligatory on states, on individuals, or on entities other than states. The followers of this theory are of the view that international law and municipal law are both part of a universal body of legal rules binding all human beings collectively or singly. In other words, it is the individual who really lies at the root of the unity of all law.

According to dualism theory, international law and municipal law represent two entirely distinct legal systems. International law has an intrinsically different character from that of municipal law. The dualists are of the view that customary international law cannot directly and *ex proprio vigore* be applied within the municipal sphere by

[1] Vol. 12, p. 424.

state courts or otherwise. In order to apply customary international law within the municipal sphere, it is necessary that such law must undergo a process of specific adoption by, or specific incorporation into municipal law. As far as international law consisting of treaties is concerned, there must be a transformation of the treaty provisions into municipal law. The transformation of treaty provisions into municipal law is not merely a formal requirement. It is a substantive requirement. The municipal law may be amended to incorporate the treaty provisions or the legislature of the member states may enact enabling statute to give effect to treaty within their municipal spheres. It is only after the transformation of treaty law into municipal law that the provisions of the treaty may be extended to individuals in a state and not otherwise. Most of the developing countries adopt dualist approach to implement international law by giving primacy to municipal law over international law as they are usually keen on emphasizing their sovereignty.[2]

III Indian Practice on Implementation of International Law

The Indian practice of implementing international law was similar to the British practice prior to January 26, 1950, the date on which the Constitution of India came into force. Since then, the Indian practice on relationship of international law and Indian law has been governed by the constitutional provisions. Article 51 of the Constitution which is the most relevant and guiding provision on the subject reads as follows:

> The State shall endeavour to – (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) *foster respect for international law and treaty obligations in the dealings of organized peoples with one another*; and (d) encourage settlement of international disputes by arbitration.

Article 51 is contained in Part IV of the Constitution which lays down the 'Directive Principles of State Policy'. The provisions contained in Part IV are not enforceable by any court. The principles laid down in that Part are nevertheless fundamental in the governance of the country. It shall be the duty of the State to apply these principles in making laws.[3]

Directive principles are therefore, in the nature of guidelines, instructions or directives to State authorities. In case of non-compliance or disregard of the directives by the State, a citizen cannot seek remedy through the courts, and (b) judiciary cannot compel the State to implement a directive. It is, however, noteworthy that directive principles are not mere pious wishes or platitudes but are meant to be 'fundamental' in the governance of the country. It is obligatory for the State to implement these directives through executive action, legislation and judicial interpretation.[4] Though

2 Antonio Cassese, "Modern Constitutions and International Law", 192 *Rec.des Cours* 331 (1985-ffl).

3 Article 37, Constitution of India.

4 See also Subhash C. Kashyap, *Constitutional Law of India*, Vol. 1, 2008, pp. 850-51.

article 51, being a directive principle and non-justiciable provision, has been given due recognition by the judiciary.

A *Implementation of International Customs*

As far as the implementation of international customs in India is concerned, it is necessary to look into article 372(1) of the Constitution, which provides that 'all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.'

The expressions 'laws in force in the territory of India immediately before the commencement of this Constitution' include, *inter alia*, the rules of the English common law, e.g. customary law. This means that the law including the common law or customary law which was applicable in India prior to the adoption of Constitution would continue to be so applicable unless altered, repealed or amended. The enforceability of international customary law in India is also evident from various judgments of the courts.

In *Annakumaru Pillai* v. *Muthupayal*,[5] a lessee of the Chank fisheries from the Rajah of Ramanathapuram complained that the accused had fished chanks in the area leased to him and had thereby committed theft. The point for decision was whether the Rajah could lay any claim to fisheries beyond the territorial waters. Subrahmania Ayyar Offg. C. J. after remarking that the limits of territorial waters were not settled in International Law, referred to the principle enunciated in (1877) 2 AC 394 (U) that the occupation of a bay for a long time by one State and the acquiescence therein by other States, were sufficient to support the title of that State to the Bay.

After referring to the continuous occupation of the pearl fisheries and chank fisheries by successive sovereigns of the country from the earliest times, the learned Judge concluded by observing that the parts of the sea falling between the respective coasts and the lines opposite each connecting the extreme points seawards of the limits of the fisheries in question, were British territorial waters.

Russell J. differed and the matter was heard by another Bench which agreeing with Subrahmania Ayyar Offg. C.J. observed that 'we do not think that Palk's Bay can be regarded as being in any sense the open sea and therefore outside the territorial jurisdiction of His Majesty. We regard it rather as an integral part of His Majesty's dominions, the portions adjacent to India being within the jurisdiction of the authorities of that place. 'The chanks which were the subject of theft 'were taken, not from the bed of the high seas, but from an arm of the sea which is part of the territory of British India which has been in possession of the Crown from, time immemorial.'

5 27 Mad 551 (V).

In *A.M.S.S.V.M. & Co.* v. *The State of Madras*,[6] the lease of chank fisheries off the coast of Ramanathapuram granted by the Rajah of Ramanathapuram to A.M.S.S.V.M. & Co. was cancelled by State of Madras. The Court after referring to the law of territorial waters and fisheries and various authorities and supporting the judgment of *Annakumaru Pillai* v. *Muthupayal*[7] held that the fishing areas involved in that petition were within the territorial waters of the State.

In *Vellore Citizens' Welfare Forum* v. *Union of India*,[8] after referring to various constitutional and statutory provisions, the Supreme Court held that 'the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country. Even otherwise once these principles are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law.'

The Court has observed in very clear terms that once the precautionary principle and polluter pays principle are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. Further, the customary international law which is not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts in India.

On human rights issues, the courts in India are frequently referring to international instruments while adjudicating such issues. Human rights jurisprudence based on the Universal Declaration of Human Rights, 1948, has the international recognition as the 'Moral Code of Conduct'. In *Chairman, Rly. Board* v. *Chandrima Das*,[9] the Supreme Court held that the International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and the principles thereof may have to be read, if need be, into the domestic jurisprudence.

The Court referred to *Salomon* v. *Commr. of Customs and Excise*,[10] where Lord Diplock said that there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. The Court also stated that the domestic application of international human rights and norms was

6 (1953) II MLJ 587.
7 27 Mad 551 (V).
8 (1996) 5 SCC 647.
9 (2000) 2 SCC 465.
10 (1996) 3 All ER 871.

considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national Constitutions in the light of those principles.

The Court observed that since 'LIFE' is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to article 21 of the Constitution.[11] The aforesaid judgments show the positive attitude of judiciary in applying international customary law in India, provided they are not contrary to municipal law.

B Making of International Treaties: Constitutional Approach

It is one of the attributes of State sovereignty to enter into treaties and agreements with foreign States. It is just not possible for a State to isolate itself from the rest of the world whether it is in the matter of foreign relations, trade, commerce, economy, communications, environment or ecology. The advances made in the areas of information technology and communications have blurred the national boundaries. The world has become global village and the independent States have become more inter-dependent.

In India, article 53 of the Constitution vests the executive powers of the Union in the President of India.[12] By article 73, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The Constitution envisaged the enactment of a parliamentary law to regulate the executive power of entering into treaties and their implementation in India.[13] The subject-matter covered under Entry 13 of the Union List (List I) is 'participation in international conferences, associations and other bodies and implementing of decisions made thereat.' Entry 14 empowers the Parliament to enact a law on the following subject matter: 'Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.'

Article 253 of the Constitution is a very important provision on the subject. It reads as under:

> Legislation for giving effect to international agreements.— *Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or*

11 Article 21 of the Constitution of India reads: Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.
12 Article 53(1) reads: 'The Executive power of the union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
13 Article 253 read with entry 14 of List I of Schedule VII of the Constitution.

convention with any other country or countries or any decision made at any international conference, association or other body.

According to Entry 14 of the Union List (List I) of the Constitution, it is in the competence of the Parliament to enact a law on 'entering into treaties and agreements with foreign countries'. But no law has been made by the Parliament for entering into treaties and agreements with foreign countries. This will not affect the powers of the Executive to enter into a treaty with foreign countries. Thus, until the Parliament makes a law on the subject, the President's power to enter into treaties remains unfettered by any internal constitutional restrictions.

However, for implementing a treaty in India, an enabling statute may be required, without which the courts in India may not give effect to such treaty provisions. But the treaty is complete without the legislation. The Calcutta High Court in *Union of India* v. *Manmull Jain and Ors*, held:

Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty. Thus if a treaty, say, provides for payment of a sum of money to a foreign power, legislation may be necessary before the money can be spent; but the treaty is complete without the legislation.[14]

The Court further held that undoubtedly, this provides for all legislation in connection with entering into treaties. This cannot, however, justify the conclusion that the makers of the Constitution intended that no treaty should be entered into unless the Parliament has legislated on the matter. The power of legislation on this matter of entering into treaties leaves untouched the executive power of entering into treaties. There is no justification in principle or authority for the view that making a treaty requires legislation for its validity. The President makes a treaty in exercise of his executive power and no Court of law in India can question its validity. Thus, when the President, in whom article 53 of the Constitution vests all the executive power of the Union, has entered into a treaty, the municipal Courts cannot question the validity of the treaty.

The power of entering into a treaty is an inherent part of the sovereign power of the State. By article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. The Constitution has no provision making legislation a condition for the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is competent to represent the State in all international

[14] AIR 1954 Cal 615. See also *Civil Rights Vigilance Committee, S.L.S.R.C. College of Law, Bangalore* v. *Union of India and Others*, AIR 1983 Kant 85, where the court held that article 245(1) read with Entry 14 in List I of Schedule VII to the Constitution and article 253 empower the Parliament to make laws for implementing treaties entered into by the Government of India with foreign countries.

matters and may by agreement, convention or treaty incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.

A treaty really concerns the political rather than the judicial wing of the State. When a treaty or an award after arbitration comes into existence, it has to be implemented and this can be done only if all the three branches of Government, i.e. the Legislature, the Executive and the Judiciary, or any of them, possess the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power. In some jurisdictions, the treaty or the compromise read with the award acquires full effect automatically in the municipal law, the other body of municipal law notwithstanding. Such treaties and awards are 'self-executing'. Legislation may nevertheless be passed in aid of implementation but is usually not necessary.[15]

Article 253 is in conformity with the directive principles laid down in article 51 of the Constitution which lays down that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another and encourage settlement of international dispute by arbitration.[16]

Article 51 is not enforceable by any court and if Parliament does not enact any law for implementing the obligations under a treaty entered into by the Government of India with foreign countries, courts cannot compel Parliament to make such law. In the absence of such law, court cannot enforce obedience of the Government of India to its treaty obligations with foreign countries.[17]

The Supreme Court in *People's Union for Civil Liberties* v. *Union of India and Another*[18] held that the ratification of international conventions and covenants is done by the Executive acting alone and the prerogative of making the law is that of the Parliament alone. Unless the Parliament legislates, no law can come into existence. It is not clear whether the Parliament has approved the action of the Government of India ratifying the 1966 Covenant of Civil and Political rights. Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the covenant

[15] *Maganbhai Ishwarbhai Patel* v. *Union of India*, AIR 1969 SC 783.

[16] *Nirmal Bose* v. *Union of India*, AIR 1959 Cal 506.

[17] *Civil Rights Vigilance Committee, S.L.S.R.C. College of Law, Bangalore* v. *Union of India and Others*, AIR 1983 Kant 85.

[18] AIR 1997 SC 1203.

with the sanctity of a law made by Parliament. As pointed out by Supreme Court in *S.R. Bommai* v . *Union of India*[19], every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of the Parliament but it also performs many other functions all of which do not amount to legislation. It would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such.

On treaty making, the National Commission to Review the Working of the Constitution which was constituted by the Government of India in 2000, stated that article 246(1)[20] read with Entry 14 of List I of the Seventh Schedule of the Constitution empowered Parliament to make laws with respect to 'entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries'. As per the provisions contained in article 253, Parliament has, notwithstanding anything contained in articles 245 to 252, power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Article 253, therefore, overrides the distribution of legislative powers provided for by article 246 read with Lists in the Seventh Schedule.

It was recommended by the Commission that for reducing tension or friction between States and the Union and for expeditious decision-making on important issues involving States, the desirability of prior consultation by the Union Government with the Inter-State Council may be considered before signing any treaty vitally affecting the interests of the States regarding matters in the State List.

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19 (1994) 3 SCC 1.

20 Article 246 of the Constitution reads as under:
Subject-matter of laws made by Parliament and by the Legislatures of States. –
(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').
(2) Notwithstanding anything contained in clause (3), Parliament and, subject to clause (1) the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List').
(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').
(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

C *Implementation of Treaties: Judicial Approach*

As far as the implementation of treaties is concerned, the judgments of the courts have been put into different categories.

(i) Treaties Concerning Transfer of Territory

The Supreme Court was of the view that the agreement amounted to cession or alienation of a part of Indian Territory and was not a mere ascertainment or determination of the boundary. To implement the aforesaid agreement, the Court held that the Agreement amounted to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content of and the consequent amendment of article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment could be made under article 368.

Where on the occasion of partition, a part of Pakistani's territory was not delivered to it as per the Radcliff Award due to some mistake, transferring it back to Pakistan by India did not require any amendment in the Constitution as it was not a cession of Indian territory in favour of Pakistan.[21]

Further, no amendment in the constitution is required where a part of Indian Territory is transferred on the lease to a foreign country, as it does not amount to abandonment of sovereignty. In *Union of India* v. *Sukumar Sengupta*,[22] the Government of India leased 'Teen Bigha' land in perpetuity to Bangladesh to connect Dahagram with Mouza Panbari for the purpose of exercising her sovereignty over those areas. As per the Agreement, sovereignty over the leased area would continue to vest in India. The rent for the leased area was Bangladesh Re 1 per annum which was also waived. Bangladesh was to have undisturbed possession and use of the area. On that area, there would be free movement of Bangladesh citizens including police, para-military and military with their arms, ammunition equipments. There would also be free movement of Indian citizens including police, para-military and military with their arms, ammunition equipments. Both India and Bangladesh had to exercise various rights on the leased territory. On the issue whether Constitution was required to be amended, the Supreme Court held that since there was no abandonment of sovereignty, therefore, no constitutional amendment was required.

An adjustment of boundaries might involve either cession of territory or acquisition thereof. Such an adjustment will require the sanction of Parliament. On the other hand, if the adjustment of boundaries be a mere determination of what was given under the 'Radcliffe Award' and in terms thereof, then it is an adjustment simpliciter,

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21 *Ram Kishore Sen* v. *Union of India* (1966) 1 SCR 430.

22 (1990) Supp SCC 545.

and no question of either cession or acquisition of territory arises. In such a case, no sanction is necessary.[23]

In *Shiv Kumar Sharma* v. *Union of India and Ors.*,[24] the Delhi High Court held that in India treaties do not have the force of law and consequently obligations arising there from will not be enforceable in Municipal Courts unless backed by legislation. The Court, however, made it clear that implementation of every treaty does not require legislative aid. The Court further held that if a treaty either requires alteration of or addition to existing law, or affects the rights of the subjects, or are treaties on the basis of which obligations between the treaty-making State and its subjects have to be made enforceable in municipal Courts, or which, involves raising or expending of money or conferring new powers on the Government recognizable by the municipal Courts, a legislation will be necessary. Of course, if it involves cession of territory then so far as India is concerned constitutional amendment may also be necessary. It is not possible to prepare an exhaustive list as to which treaties can be implemented by legislation.

(ii) Extradition Treaties

To have a binding effect upon the citizens of India, the extradition treaties need to be transformed into the municipal law. In *Birma* v. *State*,[25] the court held that the treaties which are part of the international law do not form part of the law of the land unless expressly made so by the legislative authority. In the present case, the treaty remained a treaty only and no action was taken to incorporate it into a law. That treaty cannot, therefore, be regarded as a part of the municipal law of the then Dholpur State, and the practice of surrendering fugitive criminals, which was being followed by the former Dholpur State cannot be deemed to be a law that could be continued. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. When the extradition treaty of the Dholpur State is held not to possess the force of law, the liberty of a citizen of India cannot be taken away under it. The detention of the petitioner under the provisions of this treaty cannot, therefore, be held valid, because it cannot be said to be according to procedure established by law.

In another case, *Nanka* v. *Govt. of Rajasthan*,[26] the court held that entering into an extradition treaty by Maharaja Rana of Dholpur with British India was an executive act. To have a binding effect upon a subject, the treaty had to be incorporated into a municipal law. Of course, the Maharaja Rana could have himself done it, but he never did so. As no person can be deprived of his personal liberty except according to procedure established by law, the court held that in absence of a municipal law, the appellant was not to be extradited and he was entitled to be released unconditionally.

23 *Nirmal Bose* v. *Union of India*, AIR 1959 Cal 506.
24 AIR 1969 Delhi 64.
25 AIR 1951 Raj 127.
26 AIR 1951 Raj 153.

(iii) Double Taxation Avoidance Agreements

Implementation of a treaty may not require fresh legislative or executive action if existing administrative regulations or statutory or constitutional provisions permit the implementation in question. The statutory or constitutional provisions that pre-exist a treaty obligation may be construed in order to render them consistent with such a treaty obligation. For example, in case of Double Taxation Avoidance Agreements (DTAA), no fresh legislative action is required to give effect to the provisions of DTAA as the provisions of sections 4 (Charge of income tax) and 5 (Scope of total income) of the Income Tax Act, 1961 are expressly made 'subject to the provisions of the Act' which means that they are subject to the provisions of section 90 (Agreement with foreign countries). By necessary implication, they are subject to the terms of the DTAA, if any, entered into by the Government of India. Therefore, the total income specified in sections 4 and 5 chargeable to income tax is also subject to the provisions of the Agreement to the contrary, if any.[27]

In *CIT* v. *Davy Ashmore India Ltd.*,[28] it was held that in case of inconsistency between the terms of the Agreement and the taxation statute, the Agreement alone would prevail. The Calcutta High Court provided that the correct legal position was that where a specific provision was made in the Double Taxation Avoidance Agreement, that provision would prevail over the general provisions contained in the Income Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which had been entered into by the Central Government under section 90 of the Income Tax Act, 1961, also provided that the laws in force in either country would continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary had been made in the Agreement. Thus, where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income Tax Act. Where there was no specific provision in the Agreement, it was the basic law i.e. the Income Tax Act that would govern the taxation of income.

The Calcutta High Court held that the circular reflected the correct legal position inasmuch as the Convention or Agreement is arrived at by the two Contracting States 'in deviation from the general principles of taxation applicable to the Contracting States'. Otherwise, the Double Taxation Avoidance Agreement will have no meaning at all.[29]

In *CIT* v. *R.M. Muthaiah*,[30] the Karnataka High Court was concerned with Double Taxation Avoidance Agreement between the Government of India and the Government of Malaysia. The Court held that under the terms of the Agreement, if

27 *CIT* v. *Visakhapatnam Port Trust* (1983) 144 ITR 146 (AP).
28 (1991) 190 ITR 626 (Cal).
29 See also in this connection *Leonhardt Andra Und Partner, GmbH* v. *CIT* (2001) 249 ITR 418 (Cal).
30 (1993) 202 ITR 508 (Kant).

there was recognition of the power of taxation with the Malaysian Government, by implication it takes away the corresponding power of the Indian Government. The Agreement was thus held to operate as a bar on the power of the Indian Government to tax and that the bar would operate on sections 4 and 5 of the Income Tax Act, 1961, and take away the power of the Indian Government to levy tax on the income in respect of certain categories as referred to in certain articles of the Agreement. The Court summed up the situation by observing that in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement would prevail over the provisions of this Act and could be enforced by the appellate authorities and the court.[31]

In *CIT* v. *P.V.A.L. Kulandagan Chettiar*,[32] the question before Supreme Court for adjudication was whether the Malaysian income cannot be subjected to tax in India on the basis of the Agreement of Avoidance of Double Taxation entered into between the Government of India and the Government of Malaysia?

The Supreme Court held that liability to income tax arises under the local enactment, i.e. Income Tax Act, 1961 (provisions of sections 4 and 5). The Act provides that taxation of global income of an assessee chargeable to tax there under is subject to the provisions of an Agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation as envisaged under section 90. The Court held that such an Agreement will act as an exception to or modification of sections 4 and 5 of the Income Tax Act. Where tax liability is imposed by the Act, the Agreement may be resorted to either for reducing the tax liability or altogether avoiding the tax liability. In case of any conflict between the provisions of the Agreement and the Act, the provisions of the Agreement would prevail over the provisions of the Act, as is clear from the provisions of section 90(2) of the Act. Section 90(2) makes it clear that 'where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or for avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.' This means that the Act gets modified in regard to the assessee insofar as the Agreement is concerned, if it falls within the category stated therein. The Court further held that 'reading the Treaty in question as a whole when it is intended that even though it is possible for a resident in India to be taxed in terms of sections 4 and 5, if he is deemed to be a resident of a contracting State where his personal and economic relations are closer, then his residence in India will become irrelevant. The Treaty will have to be interpreted as such and prevails over sections 4 and 5 of the Act.'

31 *Id.* at 512-13.

32 (2004) 6 SCC 235.

In *Union of India* v. *Azadi Bachao Andolan*,[33] the Supreme Court held that since in India a fiscal treaty dealing with double taxation avoidance would have to be translated into an Act of Parliament, a procedure which would be time-consuming and cumbersome, a special procedure was evolved by enacting section 90 of the Act.[34] The Court held that that 'the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act'.

(iv) Treaties concerning Human Rights

At the time of drafting Constitution of India, the Constituent Assembly had before it the Universal Declaration of Human Rights, 1948. The treaty obligations under the International Covenant on Economic, Social and Cultural Rights, 1966 enjoined the State Parties to ensure these rights without discrimination and 'to take steps' to promote them 'to the maximum of its available resources', with a view to achieving 'progressively' the full realization of these rights. The Directive Principles of State Policy in Part IV of the Constitution of India are indeed the precursor to economic, social and cultural rights specified in the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). Several provisions laid down in the Directive Principles of State Policy[35] are consistent with the provisions of ICESCR.

The Supreme Court has by judicial interpretation expanded the scope of the fundamental rights, particularly in relation to article 21 (Protection of life and liberty), and this has included more civil and political rights which were not explicit in Part III (Fundamental Rights). The Court has also held that the scope of certain fundamental rights could be adjudged by reading into them or reading them not only in the light of the Directive Principles of State Policy but also international covenants or conventions which were in harmony with the fundamental rights.

In *Jolly George Varghese* v. *Bank of Cochin*,[36] the question was whether the personal freedom of the judgment-debtors can be held in ransom until repayment of the debt, and if section 51 read with order 21 rule 37 of the Civil Procedure Code (CPC) does warrant such a step, whether the provision of law is constitutional, tested on the

33 (2004) 10 SCC 1 at p. 17.

34 S. 90 empowers the Central Government to enter into an agreement with the Government of any other country outside India for the purposes enumerated in clauses (*a*) to (*d*) of sub-section (1). While clause (*a*) talks of granting relief in respect of income on which income tax has been paid in India as well as in the foreign country, clause (*b*) is wider and deals with 'avoidance of double taxation of income' under the Act and under the corresponding law in force in the foreign country.

35 For example, articles 39, 41, 42, 43, 45, 47 and 51 of the Constitution of India.

36 (1980) 2 SCC 360.

touchstone of fair procedure under article 21 and in conformity with the inherent dignity of the human person in the light of article 11 of the International Covenant on Civil and Political Rights. The Supreme Court in this case concurred with the Law Commission of India in its construction of section 51 of the CPC and observed that 'if he once had the means but now has not, or if he has money now on which there are other pressing claims, it is violative *of the spirit of article 11* to arrest and confine him in jail so as to coerce him into payment.'

The Court stated that quondam affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with article 11 of the Covenant, because then no detention is permissible under section 51 CPC. The Court further stated that to be poor is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of article 21 of the Constitution unless there is proof of the minimal fairness of his willful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness.

In *Xavier* v. *Canara Bank Ltd.*,[37] a judgment-debtor was sought to be detained under order 21 rule 37 CPC although he was seventy and had spent away on his illness the means he once had to pay off the decree. The court examined whether there was any conflict between section 51 CPC and article 11 of the International Covenant on Civil and Political Rights. It was of the opinion that the latter provision only interdicted imprisonment if that was sought solely on the ground of inability to fulfill the obligation. 'Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under section 51 of the Code, but this does not violate the mandate of article 11. However, if he once had the means but now has not or if he has money now on which there are other pressing claims, it is violative of the spirit of article 11 to arrest and confine him in jail so as to coerce him into payment.'

The *Xavier* dealt with the effect of international law and the enforceability of such law at the instance of individuals within the State, and observed that the remedy for breaches of international law in general was not to be found in the law courts of the State because international law per se or *proprio vigore* had not the force or authority of civil law, till under its inspirational impact actual legislation was undertaken. According to Court the Universal Declaration of Human Rights merely set a common standard of achievement for all peoples and all nations but could not create a binding set of rules. 'Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated; but individual citizens cannot complain about their breach in the municipal courts even if the country concerned has adopted the covenants and ratified the optional protocol. The individual cannot come to Court but

[37] (1969) KLT 927.

may complain to the Human Rights Committee, which, in turn, will set in motion other procedures.' The basic human rights enshrined in the international covenants could at best inform judicial institutions and inspire legislative action within Member States; but apart from such deep reverence, remedial action at the instance of an aggrieved individual was beyond the area of judicial authority.

Justice Beg while delivering concurrent judgment in *ADM* v. *Shivakant Shukla*[38], observed that the argument that the provisions of Universal Declaration of Human Rights should be kept in mind while interpreting the Constitution observed that 'these submissions appear to me to amount to nothing more than appeals to weave certain ethical rules and principles into the fabric of our Constitution which is the paramount law of this country and provides the final test of validity and enforceability of rules and rights through courts. To advance such arguments is to forget that our Constitution itself embodies those rules and rights. It also governs the conditions of their operation and suspension. Nothing which conflicts with the provisions of the Constitution could be enforced here under any disguise.'

A more rational approach was adopted by Justice Khanna in his dissenting opinion who stated that 'if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations. Every statute, according to this rule, is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations, or the established rules of international law and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. But if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal and international law.'

The Supreme Court in *Apparel Export Promotion Council* v. *A.K. Chopra*,[39] gave due respect to the international agreements and conventions while interpreting the domestic law. The Court reiterated the obligations of the Government under the international conventions and stated that the message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Woman, 1979 ('CEDAW') and the Beijing Declaration which directs all State Parties to take appropriate measures to prevent discrimination of all forms against women beside taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for woman. Article 7 recognises her right to fair

[38] (1976) 2 SCC 521 at p. 755.

[39] AIR 1999 SC 625.

conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment.

These international instruments cast an obligation on the Indian State to gender sensitive its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. The Supreme Court has in numerous cases emphasized that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law. In cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.

In *Kubic Darusz* v. *Union of India (UOI) and Ors.*,[40] the Supreme Court held that when an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognised principle in national legal system that in the event of doubt the national rule is to be interpreted in accordance with the State's international obligations as was pointed out by Krishna Iyer, J. in *Jolly George Varghese* v. *Bank of Cochin*.[41] There is need for harmonization whenever possible bearing in mind the spirit of the Covenants. In this context it may not be out of place to bear in mind that the fundamental rights guaranteed under our Constitution are in conforming line with those in the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights to which India has become a party by ratifying them.

On the issue of sexual harassment of working women at work places, the Supreme Court in *Vishaka* v. *State of Rajasthan*[42] stated that international conventions and norms having relevance in this field have assumed significance in application and judicial interpretation. The Court observed that in the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms were significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be

40 (1990) 1 SCC 568.
41 (1980) 2 SCC 360.
42 (1997) 6 SCC 241.

read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This was implicit from article 51(c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution.

The Court further stated that gender equality included protection from sexual harassment and right to work with dignity, which was a universally recognized basic human right. The common minimum requirement of this right had received global acceptance. The international conventions and norms were, therefore, of great significance in the formulation of the guidelines to achieve this purpose. The Court observed that the international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

Considering the issue of grant of compensation for contravention of human rights and fundamental freedoms, the Supreme Court in *Nilabati Behera* v. *State of Orissa and Others*,[43] referred to article 9(5) of the International Covenant on Civil and Political Rights, 1966. The Court was of the opinion that article 9(5) indicated that an enforceable right to compensation was not alien to the concept of enforcement of a guaranteed right.[44]

The Supreme Court in *D.K. Basu* v. *State of West Bengal*,[45] stated that 'custodial violence' and abuse of police power was not only peculiar to this country but also widespread. It has been the concern of international community because the problem was universal and the challenge was almost global. The Universal Declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in article 5 that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' Despite the pious declaration, the crime continues unabated, though every civilized nation shows its concern and takes steps for its eradication.

Rejecting the reservation made by the Government of India to the International Covenant on Civil and Political Rights, 1966, the Supreme Court held that 'the Government of India at the time of its ratification (of ICCPR) in 1979 had made a

43 AIR 1993 SC 1960.
44 Article 9(5) reads: Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
45 AIR 1997 SC 610. See also *Prem Shankar Shukla* v. *Delhi Administration*, AIR 1980 SC 1535, in which the court referred to article 5 of the Universal Declaration of Human Rights, 1948 and article 10 of the International Covenant on Civil and Political Rights, 1966 on the issue of handcuffing the prisoners.

specific reservation to the effect that the Indian Legal system does not recognise a right to compensation for victims of unlawful arrest or detention ... . That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen.'

In *Mackinnon Mackenzie & Co. Ltd.* v. *Audrey D'Costa*[46], the Supreme Court, while construing the Equal Remuneration Act, 1976 referred to the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value adopted by the International Labour Organisation in 1951, and held that payment of lower remuneration on the basis of sex for the same work was violative of the Act. In *J.P. Ravidas* v. *Navyuvak Harijan Utthapan Multi Unit Industrial Cooperative Society Ltd.*,[47] the Supreme Court, while holding that the state was under an obligation to provide adequate means of livelihood to all citizens distributing the material resources of the community for common welfare, referred to article 25(1) of the Universal Declaration of Human Rights and article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966. In deciding various issues relating to labour laws, the Supreme Court had referred to various international instruments.[48]

The National Commission to Review the Working of the Constitution recommended that article 21 of the Constitution should be amended to include a clause on torture and inhuman treatment, which should conform to the provisions of article 5 of the Universal Declaration of Human Rights 1948 and article 7 of the International Covenant on Civil and Political Rights, 1966. The Commission also recommended the amendment in article 21 of the Constitution in the light of article 9(5) of the Covenant. The Commission recommended an enforceable right to compensation in case a person has been illegally deprived of his right to life or liberty.

After referring to article 13(2) of the Universal Declaration of Human Rights, 1948 as well as articles 12(2), (3) and (4) of the Covenant, the Commission recommended that every citizen should have right to leave the territory of India and also a right to return to India subject to reasonable restrictions.

Further, the Commission noted that the right to sustainable development has been declared by the United Nations General Assembly as an inalienable human right. The Rio Conference of 1992 declared human beings as centre of concern for sustainable development. The 1997 Earth Summit meeting of 100 nations also agreed with the provisions of Rio Conference. The Commission recommended the right of every

[46] (1987) 2 SCC 469 at p. 475.

[47] (1996) 9 SCC 300 at p. 304.

[48] See *Kapila Hingorani* v. *State of Bihar* (2003) 6 SCC 1; *People's Union for Democratic Rights* v. *Union of India* (1982) 3 SCC 235; and *M.C. Mehta (Child Labour matter)* v. *State of T.N.*, (1996) 6 SCC 756, where the Supreme Court while addressing various issues of labour law referred to various international instruments.

person to safe drinking water, prevention of pollution, conservation of ecology and sustainable development.

The judiciary is not suited to enforce some of the rights provided under International Covenant on Economic, Social and Cultural Rights. Where the resources of the nation are involved and a question of priority arises, the remedy cannot be judicial. However, the concept here is not 'justiciability' at the instance of individuals in courts of law, but the concept is one of 'enforceability' which means that the State must 'recognize', and 'take steps', by adopting 'legislative' or other measures for the 'full realization' and 'to the maximum of the State's available resources', both 'individually and through international assistance and co-operation'. These are the words actually used by the Covenant. These rights are described as 'entitlements' of the people and give rise to 'obligations' on the part of the State Parties. The enforcement must first be of the 'minimum core obligations' as stated in para 10 of the General Comment No. 3 of 1990 of the U.N. Committee on Economic, Social and Cultural Rights.

The Commission was of the opinion that an appropriate mechanism must be devised to oblige the State to take action step by step and progressively for the realization of these rights to the maximum within the resources of the State.

The inclusion of fundamental duties in the Constitution of India brings it in line with article 29(1) of the Universal Declaration of Human Rights, 1948.

The recommendations made by the Commission, though very valuable, were not considered and the Constitution of India was not amended on the lines of those recommendations.

(v) Other Treaties

In *Civil Rights Vigilance Committee, S.L.S.R.C. College of Law, Bangalore* v. *Union of India and Others*,[49] the issue was whether the Government of India should allow the English Cricket Team which included Boycott and Cook to visit India and to play cricket matches, despite their links with South Africa which was practicing policy of apartheid.

The Government of India was a party to the Gleneagles Accord of June 12, 1977, entered into by the member countries of the Commonwealth, wherein they reaffirmed their full support for the international campaign against apartheid and welcomed the efforts of the United Nations to reach universally accepted approaches to the question of sporting contacts with South Africa within the framework of that campaign. Boycott and Cook, were among the sportsmen blacklisted by the United Nations for having participated in sports events in South Africa between the 1st December, 1980, and the 31st March, 1981. When the Gleneagles Accord reaffirmed the full support of the member countries of the Commonwealth for the international campaign against

[49] AIR 1983 Kant 85.

apartheid and welcomed the efforts of the United Nations to reach universally accepted approaches to the question of sporting contacts with South Africa within the framework of that campaign, the Government of India being one of such member countries, was under an obligation not to allow Boycott and Cook who had sporting contacts with South Africa, to come to India as members of the English cricket team and to play cricket matches in this country. The Government of India should have prevented the entry of those two players into this country by invoking its authority under para 2 of the Exemption Order. The Government of India, however, allowed that English cricket team including those two players to come to the country and to play matches as scheduled.

The court held that the Government of India's obligations under the Gleneagles Accord and obligations attached to its membership of United Nations, cannot be enforced at the instance of citizens of this country or associations of such citizens of this country or associations of such citizens, by courts in India, unless such obligations are made part of the law of this country by means of appropriate legislation.

D Resolution of Conflict between International Law and Municipal Law

In case of conflict between international law and municipal law, the approach of the judiciary is to apply the rule of harmonious construction. Where the conflict is so apparent that it cannot be resolved, the courts prefer municipal law over international law. Sikri, C.J. observed in the case of *Kesavananda Bharati* v. *State of Kerala*[50] that in view of article 51 of the Constitution, the court must interpret language of the Constitution, if not intractable, which was after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India.

In *Gramophone Co. of India Ltd.* v. *Birendra Bahadur Pandey,*[51] the Supreme Court examined two questions: first, whether international law is, of its own force, drawn into the law of the land without the aid of municipal statute and, second, whether, so drawn, it overrides municipal law in case of conflict.

The Supreme Court held that there can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national

[50] (1973) 4 SCC 225 at p. 333.
[51] (1984) 2 SCC 534.

law and considered to be part of the national law, *unless they are in conflict with an Act of Parliament.* Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law. But if conflict is inevitable, the latter must yield.

There is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided, that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of international law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or international law.[52]

In *Indian Performing Right Society Ltd.* v. *Aditya Pandey & Others*[53], the Division Bench of Delhi High Court observed that it is settled law that unless an international convention finds itself legislated in municipal law it would be impermissible to import the principle deducted from an international convention. The court elaborated this preposition by stating that if the legislature has legislated, the intention has to be gathered from the statute, and while so doing guidance may be had from international conventions, on the presumption that the legislature had kept the international convention in mind. The statute, if unambiguous, is to be preferred.[54]

In *Chairman, Rly. Board* v. *Chandrima Das,*[55] the Supreme Court referred to *Brind* v. *Secy. of State for the Home Deptt.,*[56] where Lord Bridge observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conformed to or conflicted with the international convention, the courts would presume that Parliament intended to legislate in conformity with the convention and not in conflict with it.

[52] See *Tractoroexport, Moscow* v. *Tarapore & Co.*, AIR 1971 SC 1.
[53] 2012 (50) PTC 460 (Del.) (DB).
[54] *Id.* at 485.
[55] (2000) 2 SCC 465.
[56] (1991) 1 All ER 720 (HL).

IV Bangalore Principles, 1988 on the Domestic Application of International Human Rights Norms in Commonwealth Nations

In 1988, a Judicial Colloquium on 'The Domestic Application of International Human Rights Norms' was organized in Bangalore, where judges of various Commonwealth nations participated. The 'Bangalore Principles' concerning the increasing judicial resort to principles of international law were formulated at the Colloquium.

Principle 4 of the Bangalore Principles provided that in most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete. This tendency respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.[57]

Principle 7 states that it is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of the national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.[58]

V Conclusion

The modern international law, though primarily concerned with States and international organizations, is very much concerned with individuals. The individuals enjoy rights under modern international law and perform duties which have been imposed on them. The doctrinaire rigidity of the procedural convention precluding an individual from prosecuting a claim under international law except through the State, of which he is a national, has been relaxed. The interests of individuals, their fundamental rights and freedoms, etc., have become a primary concern of international law.

[57] Principle 5, Bangalore Principles, 1988.
[58] *Id.*, Principle 8

The rights conferred on individuals by international law or duties imposed on them under international law or the right to access international machinery will have no meaning if the municipal laws are not amended to that extent as most of the States follow dualist approach. The municipal law of States should immediately be amended at the time of entering into a treaty. The principle *pacta sunt servanda* needs to be given due respect as it is a fundamental norm of the international law. If a State does not bring its municipal law in conformity with international law and treaty provisions, the international law will have no meaning. There may be a breach of *pacta sunt servanda* and the States parties may bring claim before international tribunal against those States parties which did not respect the treaties. The claims brought before international tribunals have to be decided in accordance with international law. The municipal laws of a State, as well as its Constitution will not be taken into account and the matter will be decided strictly on the basis of international law.

In India, the judiciary has been playing a pro-active role towards the implementation of international law in India. The courts are now referring to international law very frequently while pronouncing judgments. Where there is a void in a municipal law, courts have no hesitation in invoking international law. Further, where there is no conflict between municipal law and international law, the courts interpret the municipal law favouring international law. Where there exists a conflict between international law and municipal law, and the municipal law is vague and unclear, the courts interpret the municipal law in such a way as to avoid any conflict with international law. Where, however, there is a conflict between international law and municipal law, and the municipal law is clear, the courts apply municipal law only.

As far as treaties are concerned, making a treaty in India is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty. Constitutional amendment is required for the implementation of a treaty which involves cession of Indian Territory in favour of a foreign country. Further legislation is required for the implementation of a treaty if it requires alteration of or addition to existing law, or if it affects the rights of citizens, or if it involves raising or expending of money, or if it confers new powers on the Government. Legislation, however, is not required where the implementation of a treaty merely involves the ascertainment of the disputed boundaries with a foreign state, or where a part of Indian Territory is transferred to a foreign country on lease in perpetuity for exercising certain rights jointly.

It is submitted that India should give due respect to her obligations arising out of bilateral or multilateral treaties. Sometimes, it takes a lot of time for Indian Parliament to enact a law to give effect to treaty obligations. This kind of situation should be avoided. It is, therefore, necessary that a law should be made on the subject at the time of entering into treaty. The subject matter of all treaties, before those treaties are entered into by the Executive, should be referred to Parliament for threadbare discussion. The

Parliament may constitute a committee of the law experts and other persons who are experts on the subject matter of the treaty. The Committee should analyse the provisions of the treaty and find out its impact on India. After the Committee's report is tabled in the Parliament and a decision has been taken to enter into such treaty, the treaty should be so entered into. Where an enabling statute is required, the Parliament should immediately enact such a law or pass an ordinance, as the case may be. This will help India to give effect to its treaty obligations immediately. By performing treaty obligations in good faith only we will be able to abide by the fundamental norm of international law, *pacta sunt servanda*.

TRIPLE TALAQ
An Anti-Islamic Practice In India

Manju Arora Relen

Abstract: The law of divorce, whatever it's utility in the past, was so interpreted at least in the Hanafi School that it had become a one-sided engine of oppression in the hands of the husband and almost everywhere Muslims are making efforts to bring the law in accord with modern ideas of social justice.

Issue of triple *talaq* is a highly sensitive and controversial. Triple divorce (*talaq*) is a recognized but disapproved form of divorce and is considered by the Islamic Jurists as an innovation within the fold of *Shariat*. It commands neither the sanction of Holy Quran nor the approval of the Holy Prophet (PBUH). It was a mere administrative measure of Caliph Umar to meet emergency situation and not to make it a law permanently. At present much inconvenience is being felt by the Muslim community, so far as this law of 'Triple *talaq*' is applied in India. Despite clear *Quranic* injunctions to the contrary, triple *talaq* in one sitting is approved resulting into destruction of marital life in one breath. This act cannot be Islamic; it is the source of the greatest injustice for women. Now the Muslim women have become more conscious of their Islamic rights and are demanding changes in their personal law.

The article deals with the issue of *triple talaq* and suggested different measures to eradicate this anti-Islamic practice.

I Introduction

Triple *Talaq* is a very sensitive issue and a source of injustice, especially for women. Recently Muslim scholars and activists participated in a meet organized by Centre for study of Society and Secularism along with Bhartiya Muslim Mahila Andolan and Institute of Islamic Studies in Delhi and got closer to codification of Muslim Personal Law. The national consultation on the codification has prepared a revolutionary draft which among other things, ban triple *talaq* and restrict polygamy. After codification of personal law it is proposed to be sent to Parliament for amendments into the law to spread awareness among Muslim masses. Qutub Jehan Kidwai of the Mumbai based Institute of Islamic Studies said that there is no place for triple *talaq* in one sitting. It

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must be abolished.[1] Reformist scholar Asghar Ali Engineer said that Codification of the personal law is the need of the hour.[2] The draft document also makes certain other proposals like making the registration of all Muslim marriages with the State Government mandatory, appoint *Nikah* registrars to maintain *nikahnamas*, consent of bride being mandatory, minimum age of the bride should be 18 and that of groom should be 21.

The Muslim law relating to divorce is the most misunderstood and most misused aspect of Muslim law. The original divorce rules in the Quran and *Hadith*, pre-eminently just and remarkably women-friendly, have unfortunately been badly misinterpreted by men in a bid to keep an upper hand in this matter. Introduction of Islam was basically a social reform movement brought about to teach the Arabs the laws of humanity and to create a society where weak and vulnerable are treated with respect. The Prophet of Islam was indeed a social reformer, thinking far ahead of his time. The emancipation of women was a project dear to prophet's (PBUH) heart.

Prophet of Islam disliked the practices of Arabs of treating women as goods and chattels. He looked upon those customs with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. He brought path-breaking reform in the laws of marriage, divorce and inheritance and gave women their earned position. Quran gave women, rights of inheritance and divorce centuries before western women were accorded such status. He was disgusted by the arbitrary divorce practices prevailing in the Arabs. He set out to reform this practice and laid down procedure to be adopted in case of divorce between the couple. He told to his people: "Now onwards, only twice in the whole life can a husband pronounce a *talaq* and revoke it; whenever he does so for the third time the marriage would be instantly dissolved, leaving no room for remarriage between the divorced couple."[3] This simple reform of the Prophet got corrupted in the course of time and this pre-Islamic custom of arbitrary *talaq*, which was abhorred by the prophet, once again, became prevalent. Hundreds of Muslim women have suffered because of this pre-Islamic practice which came back into Hanafi and Shafi Islamic law for reasons not to be gone into here.

The Muslims who indulge in triple *talaq*, in polygamy, in dodging *mehr* and maintenance ascribe their actions to their religious sanctions and continuously harp on their religious code. They blatantly violate the injunctions of Islam. They pronounce triple *talaq* without following the commands pertaining to it. They marry again and again without adhering to the commands pertaining to second and subsequent marriage. Qur'an is the only unanimous divine source for Muslims and interpretation given to it is not progressive in respect of women's rights. Ideally it grants equality between man and woman and should be the main source of legislation about women's

1 "Muslims Scholars Seek Triple Talaq Ban, Tab on Polygamy", *The Times of India* (5th Feb, 2012).
2 *Ibid.*
3 Furqan Ahmad, "Understanding the Islamic Law of Divorce", 43 *JILI* 484(2003).

rights. There are some local customs such as *Halala* that allows a man to divorce his wife at the spur of the moment, such as in a state of anger or drunkenness. After that the same husband forces her into marriage and sexual intercourse with a Mullah or his friend and get him to divorce her to marry her back the next day, thus it is shameful that this practice disregards the three month time for his and that of his friend divorce to take effect. These practices that remain part of the Classical Islamic Law have reduced Islam to a medieval misogynist cult in the eyes of a section of Western people. It is time for the Islamic doctors of law to treat the Classical Islamic Law as a closed corpus - and draw a Modern Law of Islam based on its divine *Sharia* (the Qur'an) and not the Classical Islamic Law, which is not a word of God and contradicts the *Qur'anic* paradigms on many counts.

Islamic law is so progressive that it can become basis for a Uniform Civil Code. However, conservative Muslim society dragged the *Quranic* pronouncements to its own level, and introduced, through human reasoning many measures, which curbed women's rights. Despite reforms in other Muslim countries women have not got full measure of equality, which the ulama theoretically concede.[4] The triple *talaq* issue has been totally controversial since the Shah Bano decision in 1986.

II Divorce in Islam

Among the pre- Islamic Arab the power of divorce possessed by the husband was unlimited and was frequently exercised without any regard to the marital obligations. They could divorce their wives at any time, for any reason or even without any reason. They could give divorce and also revoke the same as many times as they preferred. They could, moreover, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance.[5]

In pre-Islamic Arabia, divorce was used as an instrument of torture. These social and moral ills and injustices engaged the attention of the prophet of Islam. Fully conscious of the evils flowing from divorce, he framed the laws of marriage and divorce in order to remove these evils. The Prophet of Islam was indeed social reformer thinking far ahead of his time. He found arbitrary divorce-practices prevailing among the Arabs disgusted.[6] It was impossible, however, under the existing condition of the society to abolish the custom entirely. The prophet had to mould the mind of an

4 Asghar Ali Engineer, "Abolishing Triple *Talaq*: What Next?", 3093 *EPW* (July 10, 2004).
5 Furqan Ahmad, *Triple Talaq: An Analytical Study with Emphasis on Socio-legal Aspect* (Regency Publication, New Delhi, 1994).
6 Tahir Mahmood, "No More Talaq, Talaq, Talaq: Juristice Restoration of True Islamic Law of Divorce", 12 *Islamic and Law Quarterly Review* 1 (1992).

uncultured and semi-barbarous community to a higher development. Accordingly he allowed the exercise of power of divorce under certain conditions. It is imperative to understand the forms through which a marriage can be dissolved. Divorce under Muslim law has four incidence, firstly when dissolution proceeds from the husband it is called *Talaq* and secondly when it takes place at the instance of the wife, it is called *Khula*, thirdly when it is by mutual consent, it is called *Mubara' at* and fourthly it is by judicial decree under Dissolution of Muslim Marriage Act,1939. The confusion about the institution of *Khula* is more serious than about *talaq*. It is absolutely wrong to describe *Khula* as a form of divorce by mutual consent; it is in fact divorce at the instance of wife. The husband cannot refuse it if the wife is firm about it; and if he does, she can seek intervention of an outside agency including the court. The final word in *Khula* is of the wife, not of the husband. It is *Mubara' at* that is divorce by mutual consent; *Khula* must not be confused with it.[7] *Lian* and *Faskh* also happen with the intervention of *qazi* and court. Under *Faskh* both husband and wife come to the conclusion that they cannot live as husband and wife, they can refer the matter to *qazi* who after careful examination, terminate the marriage. In *Lian* husband charges the wife of adultery. Then wife can file a suit for divorce against the husband and obtain a decree for divorce on the ground that husband has falsely charged her with adultery.

Prophet in his reformative spirit permitted the husband to give talaq to wife at three distinct and separate time periods within which they might endeavour to become reconciled; but should all attempt to reconcile prove unsuccessful; then in the third period the final separation becomes effective.[8] *Talaq* is permissible in the Quran only on condition that there is a complete breakdown of marriage. Parting of ways must be graceful, and utmost care is taken to inflict no suffering on the woman. The common practice of uttering *talaq* thrice in one go, or writing *talaq* thrice on a postcard, or hiring a qazi to affix his signature on a scrap of paper, is totally anti-islamic.

The Muslim law of divorce is the logical consequence of the status of marriage. As it regards marriage as a contract, it confers on both the parties to the contract the power of dissolving the tie or relationship under certain specified conditions. The Islamic law did not take away the customary right of the husband to give *talaq* to his wife unilaterally, but it imposed numerous restrictions, on the exercise of this right. A Muslim man cannot give *talaq* to his wife and take her back as he pleases.[9]

Though permissible in law, divorce is not favoured in Islam as it prevents conjugal happiness and interfered with the proper up-bringing of the children. Prophet told his people:

7 Asaf A. A. Fyzee, *Outlines of Muhammadan Law* 148 (Oxford University Press, New Delhi, 2008).

8 Ameer Ali, "*The Spirit of Islam*", as cited in Khalid Rashid, *Muslim Law*, 47 (Eastern Book Company, Lucknow, 2004).

9 *Supra* note 5 at 14.

"Divorce is most detestable in the sight of God; abstain from it."[10]

III Talaq in Islam

Talaq as defined in law *"is a release from the marriage tie, either immediately or eventually, by the use of special words."*[11] It is used by Muslim jurists to denote release of women from marital tie. A Muslim husband under all schools of Muslim law can divorce his wife by unilateral action and without the intervention of the court. It is not necessary to provide for such power in the Marriage-Contract; the husband derives this power from the law itself. This power is known as the power to pronounce *talaq*.

The husband though given the unilateral power to pronounce *Talaq* has to be very judicious in its exercise. The Quran has laid down certain rules which have to be followed strictly. He has been given this power with expectation that firstly he will not ordinarily exercise it and avoid it as much possible. Secondly that if he finds it unavoidable then he shall do it with a sense of justice and rationality. There is nothing in Islamic law which gives husband the power to give *talaq* to his wife arbitrarily, irrationally and in unreasonable manner. Further, it has been laid in Quran that before the procedure for *talaq* is to be started the spouses should try to reconcile with each other by appointing arbitrators, one from the side of wife and the other from the side of husband.

According to Tahir Mahmood there is a simple procedure of *talaq* in Islam which is, unfortunately, misunderstood by majority of Muslims themselves. They erroneously believe that they are allowed different "modes" or "forms" of *talaq* and also have absolute freedom of action. According to him, there are not many modes of *talaq* like *ahsan*, *hasan* or *biddat*. The law of Islam says to husband:[12]

> "(i) *Talaq* is "worst of all permitted things"; better avoid it: but if you find necessary to have recourse to *talaq*, then:
>
> (a) Wait till the wife enters the period of *tuhr* (Tuhr is a period when a woman is not in her menstrual period and is pure. This is basically to assure that husband is not acting in haste. And the husband resolve to be separate from his wife, is not a passing whim, but is a result of self-determination).
>
> (b) During that period pronounce *talaq* and do not make it irrevocable by your words;
>
> (c) Revoke the *talaq*, if possible, before the expiry of the wife's *iddat*

10 "Al-Talaqu indallah-i-abghad al-mubahat", This Hadith is found in many authentic collection of tradition.

11 Faiz Badrudin Tyabji, *Muslim Law* 205 (N.M. Tripathi Ltd., Bombay.1968).

12 Tahir Mahmood, *The Muslim Law of India* 117 (Lexis Nexis Butterworth, New Delhi, 1980).

(d) If you do not revoke it by that time, at the expiry of wife's *Iddat* the marriage will stand dissolved;

(e) If you have exercised your power of *talaq* in this way, your behavior has been "best" (*ahsan*);

(f) Now you cannot revoke the *talaq* at your pleasure; but after expiry of the wife's *iddat* you can marry the same woman with her consent.

(ii) If you have revoked the *talaq* pronounced by you for the first time, never pronounce it again. However, in case you find it necessary to pronounce to *talaq* once again then,

(a) wait till the wife enters the *tuhr* period;

(b) pronounce *talaq* in *tuhr*;

(c) do not by your words make, this second *talaq* irrevocable;

(d) try to revoke this second *talaq* before the expiry of wife's *iddat*;

(e) if you do not revoke it then, at the expiry of wife 's *iddat* the marriage will once again stand dissolved;

(f) as before now, you cannot revoke the *talaq* at your pleasure, but after the expiry of her *iddat* you can re-marry the same women with her consent.

(iii) If you have succeeded in preparing yourself to revoke the *talaq* (which you pronounced for a second time), never pronounce a *talaq* again, but if, again, you really find it unavoidable to pronounce a *talaq*, then:

(a) wait for her being once more free from her menstrual periods; (this will give you last chance for a cool consideration);

(b) know that if you now pronounce a *talaq* (for the third time) you cannot revoke it anymore; also you will not be able even to re-marry your divorced wife right away; if you so wish you will have to pay a penalty, which, due to human nature, you will never like-the penalty of finding your wife becoming somebody else wife and remarrying her only if and when she is lawfully free of the second marital bond (the penalty is known as *halala);*

(c) if, knowing all this, you still find it impossible to withhold yourself, pronounce a *talaq* for the third time;

(d) the moment you do so the marriage will stand dissolved;

(e) if you have exercised your power of *talaq* in this way, your behavior is still "good" (*hasan*)."[13]

This is the one and only form of divorce which has been given in the Quran. Further there is one more confusion that *hasan talaq* must be given in three "consecutive" or "successive" *tuhr*. This is submitted as wrong. The correct position is that if the husband has given *talaq* once he should not pronounce the next *talaq* before the second *tuhr* but he can give the same at any time during the subsistence of marriage and that *talaq* will be counted as one. The same is the situation when he pronounces the second *talaq*. Thus it should be understood that the condition for next "*tuhr*" for the second or the third *talaq* is that there should be minimum time of one month for the husband to think and it is not to be taken as maximum limitation.

III Triple Talaq—An Overview

Triple Talaq is a form of *talaq-ul-biddat* in which, the husband may pronounce the three formulae at one time, and it is irrelevant that whether the wife is in state of *tuhr* or not. It is denoted in Arabic as *Mugallazah*, which means very hard-divorce which is most disapproved and which does not conform to *Talak-ul-sunnat*. The separation then effects definitely after the woman has fulfilled her *iddat* or period of probation.

A Historical Genesis of Triple-Talaq

"Triple divorce was not allowed during the Prophet's lifetime, during the first Caliph Abu Bakr's reign and also for more than two years during the second Caliph Umar's time. Later on Hazrat Umar (RA) permitted it on account of a peculiar situation. When the Arabs conquered Syria, Egypt, Persia, etc, they found women there much more better in appearance as compared to Arbian women and hence they wanted to marry them. But Egyptian and Syrian women insisted that in order to marry them, they should divorce their existing wives instantaneously by pronouncing three divorce in one sitting. The condition was readily accepted to Arabs because they knew that in Islam divorce is permissible only twice in two separate periods of *tuhr* and its repetition at one sitting is unislamic, void and shall not be effective. In this way, they could not only marry these women but also retain their earlier wives. When the Egyptian and Syrian women discovered that they had been cheated, they complained to Umar, the Caliph, to enforce triple divorce again in order to prevent its misuse by the Arabs. The Caliph Umar then in order to prevent the misuse of the religion by the unscrupulous husbands decreed that even repetition of the word *talaq, talaq, talaq* he at one sitting would dissolve the marriage irrevocably. It was, however a mere administrative measure of Caliph Umar to meet an emergency situation and not to make it a law permanently. But unfortunately the Hanafi jurists later on at the strength

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13 *Ibid.*

of this instant administrative order of second Caliph declared this form of divorce valid and also gave religious sanction to it."[14]

Such *talaq* is lawful, although sinful in *Hanafi* law; but in *Ithna, Ashari* and *Fatimi* law it is not permissible. According to Tyabji, by a deplorable development of the Hanafi law the sinful and the most abominable forms have become the most common for men who have always moulded the law of marriage so as to be most agreeable to them.[15]

B *Nature of Triple-Talaq*

There is a great controversy regarding the effect of triple pronouncement of the *talaq* at one and the same time. The difference in the opinion of jurists is due to the difference in their interpretation and application of the law. One class of the jurists is of the opinion that no leniency is to be shown in the application of laws so that people should not take undue advantage on that account. Abu Hanifa and Malik, therefore, hold the three repetitions of *talaq* to be final. The other jurists explained that *Allah* wants to treat people leniently so that they may not be put to hardship, and also to minimize the chances of separation. Hence, they hold three repetitions to amount to one only.

Under the most of the classical schools of *Sunni* Islamic Jurisprudence there is no material difference regarding the effect of Triple *talaq* in substance, however, there is some slight difference only in respect of procedure. According to *Hanafi* jurists, this results in a *Mughallaza talaq* though they call it an innovation. Whereas the *Shafii* holds that if a husband repeats three pronouncements of *talaq* but without intending, only for the emphasis it will result in a single divorce but if he pronounces the three divorces intending or without any intention, it shall result in three *talaqs*. More or less same view is held by the *Hambali* School, *Maliki* differ in their view in the sense that they make a distinction between various expression used in the pronouncement of divorce. The only progressive group is the *Ahl-e-hadis* sect who accepts three divorces at a single sitting as one only.

Whereas in *Shia* law there is general consensus of opinion that the *talaq* in single sitting should be counted as one and the *Imamia* Sect go so far as to say that such a *talaq* is no divorce at all.

C *Triple-Talaq in Holy Quran*

In the Holy Quran there is nowhere been ordained the three *talaq* pronounced in a single breath would amount to three separate *talaq*.

In short, there is no Quranic basis to establish that three *talaqs* on a single occasion should amount to an irrevocable *talaq*. In Quran there is no trace that the three talaq

[14] Aqil Ahmad, *Mohammedan Law* 174 (Central Law Agency, Allahbad, 2010) .
[15] Faiz Badrudin Tyabji, *Muslim Law* 163 (N.M. Tripathi Ltd., Bombay, 1968).

pronounced at one occasion would be treated as three *talaq* on irrevocable footing. Thus one *talaq* in effect results from the three pronouncements at one occasion.

D *Position of Triple-Talaq in the Traditions of Prophet*

We see that there is no express direction in the tradition of the Prophet (PBUH) regarding the validity of three divorces together at one time.

There are different traditions of Prophet quoted by scholars regarding whether three *talaqs* at same time should be treated as one or three distinct *talaqs*. Those scholars who accept *triple-talaq* on a single occasion as one said that the notion of three divorces as one is not altogether baseless and invalid, but there is a ground for it which has always been accepted by a group of (the followers of *Ahl-e-Sunnat Wal Jammat* the tradition of the Prophet and of the decision of the collective body of Muslims). Here are the some of the saying of the Prophet (PBUH) in brief:[16]

> "Abu Sahba said to Ibn-i-Abbas "do you know whether the three divorces were treated as one in the days of the Prophet and of Abu Bakr and early years of Umar Caliphate?" Ibn-i-Abbas replied, "Yes, it is known to me."[17] In another saying it is stated that Rakana gave to his wife three divorces at a time and the Prophet (PBUH) allowed him to retain his wife."[18]

Thus on review of all the religious literature it can be authoritatively said that there is no clear commandment in the Holy Quran on the question of effectiveness of *triple talaq*

E *Fatwa on Triple- Talaq*

This distortion of true Islamic law of *talaq* has new Fatwa (Juristic Verdict) from some Indian theologians.

> "If a man who has pronounced triple *talaq* says he did it either in ignorance of law or merely to put emphasis on his words, his marriage remain intact until the expiry of his wife's *iddat*. During this period he can unilaterally revoke the *talaq*. If he has not done so within that time, later he can remarry her with her consent. This interpretation of the law in fact restores the reforms affected by the holy Prophet."[19]

Maulana Mujahidul Islam Qasimi of Bihar was first to adopt it. Now it has been accepted by Mufti Zafeernddin of Darul Uloom of Deoband.

[16] *Supra* note 5.
[17] Muslim: al-Sahih (1) *kitab-al-Talaqs* as cited in *supra* note 5 at 30.
[18] Ahmad ibn-i-Hambal, Musnad(1) 265 as cited in *supra* note 5 at 30.
[19] *Supra* note 7.

Moreover, following is the text of the resolution adopted in a seminar held in Ahmedabad from 4-6 November, 1973 under the Presidentship of Mutf Ateequr Rehman:

> (i) Three pronouncements of divorce in one and same sitting resulting in Mughallazah *talaq* is not based on Ijma (consensus) and therefore is not final.
>
> (ii) If a person says to his wife *"talaq, talaq, talaq"* and thereafter says that his intention was to pronounce only one *talaq* and he says that he had used the word *talaq* three times for merely emphasising it, then this will not be taken Mughallazah, (irrevocable)...
>
> (iii) If any person says to his wife, I divorce (*talaq*) you thrice but he states on oath that his intention was not to pronounce three divorces (*talaq*), he thought that without three pronouncements divorce (*talaq*) will not be effective, so he made three pronouncements. In such a situation, this statement will' be accepted and the divorce will not be considered as Mughallazah.

The resolution has further stated that there is an urgent need to educate the Muslim masses about correct procedure of divorce (*talaq*) and tell them that three pronouncements in one sitting is an innovation (*biddat*) and oppression against women and Muslim should avoid wrong procedure of divorce.[20]

F *Reforms in Pakistan on Triple Talaq*

In Pakistan the Courts have done their best to control all forms of divorce by meticulously enforcing the Muslim Family Law Ordinance 1961, which sets an obligatory procedure to be followed for the purpose of divorce.[21] It is gratifying that the courts in all parts of the subcontinent are now trying to apply the Islamic law of divorce in the true spirit. Further in Pakistan, section 7 of Muslim Family Law Ordinance, 1961 provides that the traditional form of divorce (*talaq*) is not in force in its original form. A divorce (*talaq)* in triple pronouncement is no longer considered *Mughllazah* or final and it is open to spouses to continue the marriage if reconciliation is brought about between them within the prescribed period. In a recent case in Pakistan a man divorced his wife and three days later married her sister. Since a divorce does not become immediately effective under the provisions of the Pakistan Muslim Family Law Ordinance, 1961, the court held that the second marriage could not be legalized-especially since the husband had not approached the court with clean hands.[22] It has been firmly established by the apex court of Pakistan that khula is not a divorce by mutual consent but divorce at the instance of wife to which her right is unconditional.[23]

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20 Aqil Ahmad, *Mohammedan Law* 183 (Central Law Agency, Allahbad, 2010).

21 *Supra* note 6 at 150.

22 *Ibid.*

23 *Ibid.*

The reservation made by Islam both in the Quran and the Hadith on the unilateral right of the husband, in particular the disapproval of the *biddat* form of divorce (*talaq*), and the introduction of dower and the *Iddat* period provides only limited checks on the husband's power. In all Muslim countries there has been pressure to introduce reform which will safeguard the wife's right, and enable a proper opportunity to be made to attempt a reconciliation.[24]

G *Role of All- India Muslim Personal Law Board on Triple Talaq*

In the year 2004 All- India Muslim Personal Law decided to ban the practice of simply reciting *talaq, talaq, talaq*. Some Muslim women had devised a standard nikahnama (marriage contract) strictly within the Shari'ah framework and handed it to the Muslim Personal Law Board (MPLB) a couple of years ago. Since marriage in Islam is a contract, such a nikahnama was perfectly valid and was approved by a great scholar like Maulana Ashraf Thanavi. Under new *Talaqnama*, the separating couples would be given minimum of three months to reconcile, instead of husband just firing talaqs to separate without giving any chance to his Begum. But the MPLB is hesitant to implement even this very modest reform that could give great relief to Muslim women.[25] The MPLB has always refused to make substantive changes in Muslim Personal Law. Recently MPLB has also raised an objection against registration of Muslim marriages.

H *Right to Marital Property Act*

The Planning Commission's working group on Women's Agency and Empowerment proposed a comprehensive legislation, The Right to Marital Property Act, which would be applicable to all communities. The Planning Commission has suggested that all properties whether movable or immovable acquired by a married couple or by live-in partners be classified as joint property, to be divided equitably in case of separation or desertion. It is immaterial who has bought the property. The commission said that law must recognize a woman as an equal partner with the husband and her contribution to the household should be appreciated. This suggestion tackles many serious issues e.g. woman facing break-ups experience deep fears, including having few assets to fall back on, especially worrying for those unable to develop strong careers of their own. Hence, many linger on even in unpleasant circumstances. Such law providing for equitable distribution of assets will help woman whose partner consider divorce (*talaq*) a cheap way of cutting ties. Such law will help to tackle situations like as happened in the *Shah Bano* case of 1986, where a poor woman abandoned by her husband and left bereft of maintenance. Amending the law along the lines suggested by the Planning Commission will help many women who are abandoned by their families and left as

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24 David Pearl and Werner Menski, *Muslim Family Law* 93 (Brite Books, Pakistan, 2000).

25 Asghar Ali Engineer, "Islam vs Modernity: Ban Triple Talaq, It's a Sin" available at: http://www.irfi.org/articles/articles_201_250/Islam_vs_modernity.htm.

destitute. Proposal also demands review of archaic laws linking a woman's conduct with the maintenance given to her.[26]

I *Judicial Trend on Triple-Talaq*

The view of judiciary on the subject of triple divorce (*talaq*) has to be analyzed critically so as to determine how the judiciary has examined the controversy of *triple-talaq* prevalent in the Muslim world. As far as Judiciary in India is concerned, it has so far, barring few exceptions, tolerated the triple *talaq*. In British India, as well as in independent India all the courts are declaring triple pronouncements of *talaq* in one sitting as lawful and effective. The common phrase used by courts is that the *talaq-e-biddat* or triple pronouncement of *talaq* is good in law though bad in theology. The basic reason for this attitude of the judiciary could be due to the fact that judiciary in British India believed that the Muslims in India have faith that their law is of divine origin, therefore is infallible, immutable and unchallengeable. There was reluctance among the judiciary on the account that a decision should not hurt the feeling of the general Muslim. In spite of realizing the deficiency they could not contribute meaningfully.

But later on a change in trend can be seen in the attitude of the judiciary. Through the study of true Islamic law and writing of many authors like Ameer Ali, Yusuf Ali, it was contradicted that the law of divorce in Islam gave arbitrary and whimsical power to husband to divorce his wife. It has been already mentioned that the true Islamic philosophy, as enunciated in Quran reveals that there is no scope for arbitrary and easy divorce in Islam. Triple *talaq* is recognized and enforced by Indian Judiciary from inception, as early as in 1905, in the case of *Sara Bai* v. *Rabia Bai*[27] the Bombay High Court recognized *triple talaq* on irrevocable footing. In the instant case, one Haji Adam Siddique with two witnesses approached *Qazi* and before him he pronounced *talaq* in absence of his wife. *Talaqnama* was prepared by *Qazi* and same was duly signed by all, concerned steps were taken to handover her *iddat* allowance with the communication of *talaq*. Haji Adam died very soon. His divorced wife filed a suit assuming herself as wife of Haji Adam for maintenance and residence, but the Bombay High Court refused to accept her contention and held above referred *talaq* on irrevocable footing.

In *Saiyid Rashid Ahmad* v. *Mst. Aneesa Khatoon*[28], the Privy Council recognised *triple talaq* pronounced at one time as validly effective, in the instant case, Ghiyasuddin divorced his wife Aneesa Khatoon by the formula of *triple talaq* in absence of her but in presence of witnesses. After four days, he executed *talaqnama* stating that he had divorced (*talaq*) his wife in abominable form. Later on they started living as husband and wife and there was no 'proof for the compliance of doctrine of *Halala*. Five children were born to the couple and Ghiyasuddin treated them as legitimate. The Privy

26 "An equal half", *Times of India* (8th Feb, 2012).
27 I.L.R. (1905) 30 Bom 537.
28 AIR 1932 PC 25.

Council agreed with the observation of the lower court that by pronouncement of *triple talaq* at one occasion became effective in breaking the marriage tie, then and there. The Calcutta High Court in *Fulchand* v. *Namal Ali*[29] held that presence or absence of wife makes no difference so far as effectiveness of *triple talaq* is concerned.

The Court speaking through Justice Venkta Subba Rao observed:

> "We, therefore, hold that it is not necessary for the wife to be present when the talaq is pronounced. *Triple talaq* to be effective, it is imperative that it should be addressed to the wife in particular sense."

Whether the presence of the wife is essential at the time of divorce was answered by the Madras High Court in *Aisha Bibi* v. *Qadir Ibrahim*,[30] held to this effect that the words of divorce addressed to the wife, though, she was not present, were repeated three times as "I divorce forever and render Haram for me" which clearly showed an intention to dissolve the marriage, and followed it by executing a deed of divorce which stated that three divorces were given in the abominable form, i.e., *biddat*, the *talaq* being addressed to the wife by the name and in the *biddat* form, the presence of wife is unnecessary.

The triple *talaq* p ronounced at one time was condemned by the Jammu and Kashmir High Court, nevertheless treated it effective and expressed helplessness regarding the bringing of any change by judicial interpretation. In *Ahmad Giri* v. *Mst. Begha*[31] the Jammu and Kashmir court for the first time counted the role of intention as very important factor in determining the effectiveness of the divorce. However, the court refused to bring about any change in existing form of *talaq ul biddat*. The Court observed:

> The *talaq ul-Biddat* is the most prevalent form of obtaining divorce in India. Any change in this respect cannot be brought about by judicial interpretation. If there is a general desire among the Muslim to revert to the pristine purity of Islam, how such changes in the present state of Muslim Law can be brought out, in the words of late Syed Amir Ali, "Whether by general synod of Muslim doctors or by the direct action of the legislatures, it is impossible to say."

In *Yusuf* v. *Sowramma*,[32] Justice Krishna Iyer made a significant observation regarding divorce. He observed that it is popular fallacy that a Muslim-male enjoys, under Quranic law, unbridled authority to liquidate the marriage. The holy Quran expressly forbids a man to seek pretext for divorcing his wife so long as she remains faithful and obedient. He further observed about the state of affairs in India, that

29 (1909) 36 Cal. 184.
30 (1910) 3 Mad 22.
31 AIR 1955 J&K 1.
32 AIR 1971 Ker. 261.

"Muslim law as applied in: India has taken a course contrary to the spirit of what the holy Prophet (PBUH) or the holy Quran laid down and the same misconception vitiates the law dealing with the wife's right to divorce."

In *Rahmdtullah* v. *State of U.P. and others,*[33] Justice H.N. Tilhari of Allahabad High Court (Lucknow Bench) observed:

> *Talaq-ul-Biddat* or *Talaq-i-Bidai,* that is, giving an irrevocable *talaq* at once or at one sitting or by pronouncing it in a *tuhr* once in an irrevocable manner without allowing the period of waiting for reconciliation or without allowing the will of Allah to bring about reunion by removing differences or cause of differences and helping the two in solving their differences, runs counter to the mandate of holy Quran and has been regarded as, by all under *Islam-Suhnat,* to be sinful.

The Learned Judge further observed that this mode of *talaq* giving unbridled power to the husband cannot be deemed operative as same has the effect of perpetuating discrimination on the ground of sex that is male authoritarianism.

The need of the time is that codified law of Muslim marriage and divorce should be enacted keeping pace with the aspiration of the Constitution.

Justice Tilhari cited with approval the following passage of honourable Justice Krishna Iyer:

> Reform of law of marriage and divorce for Muslims as for others must be guided by right principles. In any matter of family law reform there are, I think three clear competing issues, all of which have to be weighed. First and foremost there is the strong interest of the society generally that everything to be done to encourage and maintain stability and permanency of family unity not only for the sake of couples but also for the sake of children. Secondly, there is public interest in allowing which have hopelessly broken down decently and rationally dissolved. Thirdly, there is public interest that in any matrimonial disputes justice should be seen to be done so that clearly guilty party should not be permitted to profit from a situation which he and he alone had been instrumental in creating.

Although the instant case does not deal with the question of divorce directly as the case related to the U.P. Imposition of Ceiling of Land Holding Act. It was case relating to landed property where husband and wife claimed that their union had come to an end by triple pronouncements. It is simply an *'obiter dicta'* of the judgment and it helps in mobilising public opinion and if it is for a public purpose it must be given some weight.

The Allahabad High Court upheld divorce by a Muslim husband by citing *talaq* thrice and that too when his wife was not present there. The husband had arranged for

33 1994 (12) Lucknow Civil Decision, p. 463.

witnesses and communicated to his wife through a letter that she had been divorced after he cited *"talaq, talaq, talaq"* for her.[34]

From, the above discussion it is clear that although Judiciary in British India as well as Independent India has declared *triple talaq* as effective and valid but they have held it on the basis of binding precedent because of the Privy Council judgment in *Aga Mohammad* v. *Koolsoom Bi*[35], wherein the Court held that "it would be wrong for courts on a point of this kind to put their own construction on the Quran in opposition to express ruling of commentators of such great antiquity and high authority."

But as we have seen that in majority of the cases the Court has either regretted its action or found it to be helpless to pronounce verdict in opposition to the earlier rulings. In some cases, the Court felt the need to reform but did not give verdict against the established law on triple *talaq* that it is good in law but bad in theology.

The Supreme Court in is landmark judgment in *Shamim Ara* v. *State of U.P*[36] has tried to clarify the-Islamic law of divorce as applied in India.

In the present case, one Shamim Ara, the appellant, was married to Abrar Ahmad, the respondent, in 1968 according to Muslim Shariat law. Four sons were born out of the wedlock. In 1979, the appellant, on behalf of herself and for her two minor children, filed an application for maintenance under section 125, Cr.P.C. complaining of desertion and cruelty on the part of the husband.

The learned Judge of the Family Court at Allahabad refused to grant any maintenance to the wife on the ground that she was already divorced by her husband and hence not entitled to any maintenance. However, maintenance at the rate of ₹150/- per month was allowed for one son of the appellant for the period during which he remained a minor, the other one having become major during the pendency of the proceedings.

On the other hand, the respondent (husband) denied all averments made by the wife. He pleaded that he had divorced (*talaq*) her by *triple talaq* in 1987 before 4-5 witnesses and since then the parties had ceased to be spouses. He also claimed the protection of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and also submitted that he had purchased a house and delivered the same to the wife in lieu of dower and therefore the wife was not entitled to any maintenance.

The High Court, on revision, held that the *talaq* which is alleged to have been given by the husband to the wife was not given in the presence of wife and it is not the case of the husband that the same was communicated to her. But the Communication would stand completed on 5th December 1990 with the filing of the written statement

34 *The Times of India,* New Delhi (August 24, 1998).
35 (1897) 24 IA 196.
36 JT 2002(7) SC 520.

by the husband. Therefore, the High Court concluded that the wife was entitled for maintenance from 1.1.1988 to 5.12.1990.

Allowing the Special Appeal of the wife the Apex Court held that *talaq*, to be effective has to be pronounced. In the instant case there was no proof of *talaq* having taken place on 11.7.1987. A mere plea taken in the written statement of a *talaq* having been pronounced sometime in the past cannot by itself be treated as effectuating *talaq* on the date of delivery of the copy of written statement to the wife. A plea of previous *talaq* taken in the written statement cannot at all be treated as pronouncement of *talaq* by the husband nor does the affidavit filed in some previous case in which wife was not a party be treated as-evidence of any value. Marriage between appellant and respondent not having been dissolved and the husband should continue to be liable for payment of maintenance until the obligation comes to an end in accordance with law.

The Court further observed that the correct law of *talaq* as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the husband's side; if the attempt fails *talaq* may be effected.

In *Mst. Rukia Khatun* v. *Abdul Khalique Laskar*,[37] the division bench stated that the correct law of *talaq* as ordained by Holy Quran is (i) that, *talaq* must be for reasonable cause; and (ii) that, it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters. *Talaq* to be effective must be pronounced. The term 'pronounced' means to proclaim, to utter formally, to utter rhetorically, to declare, to articulate.

Thus the Supreme Court has tacitly disapproved the formula of triple divorce as being applied and followed in India.

The Karnataka High Court in *Mohd. Ibrahim* v. *Mehrunnisa Begum*[38] has once again reiterated the judgment of the Apex Court delivered in *Shamim Ara* v. *State of U.P.*[39] In the instant case the court has held that according to the Shariat Law, the correct law for *talaq* as ordered by the holy Quran is that, the *talaq* must be for a reasonable cause and preceded by attempt for reconciliation between the husband and wife by two elders, one by the wife's family and the other from the husband's family. If the attempts fail, *talaq* may be effected. The husband alleging that he divorced his wife must lead satisfactory evidence to prove the pronouncement of *talaq*. When the husband failed to prove the pronouncement of *talaq*, order of Family Court negativing plea of *talaq* would be proper.

37 (1981) 1 Gau Law Report 375.
38 AIR 2004 Kant. 261.
39 *Supra* note 36.

One more ticklish problem came before the Supreme Court on 15 May, 2006 in *Sher Mohammed* v. *Nazma Biwi* In this case, a couple from Orissa forcibly separated by the community after local clerics issued a *fatwa* that they were divorced even as they wanted to live together. Nazma Bibi's husband Sher Mohammed had pronounced triple *talaq* in an inebriated condition in 2003 but later realizing his mistake, decided to live with his wife and three children. They contended before the Supreme Court that the police had not provided them protection, despite the court's order. The Supreme Court on April 21, 2006 directed the Orissa government to provide police protection to Muslim couple. A bench of Justice Ruma Pal, Justice C. K. Thakkar and Justice M. Katju observed "No one can force them to live separately. This is a secular country. All communities-Hindus or Muslims should behave in civilized manner".

In *Iqbal Bano* v. *State of U.P.*,[40] the Supreme Court held that a mere plea taken in the written statement of a divorce having been pronounced sometimes in the past cannot by itself be treated as effectuating *talaq* on the date of delivery of the copy of the written statement to the wife. The husband ought to have adduced evidence and proved the pronouncement of *talaq* at the claimed earlier date and if he failed in proving the plea rose in the written statement, the plea ought to have been treated as failed.

Mr Justice Baharul Islam[41] has given an eye-opening judgment, and through the paramount source of Islamic Authority has given a right meaning to law of divorce under Islam. In this case wife (Anwara Begum) filed the petition for maintenance, Jiauddin alleged in his written statement before the Magistrate that he had pronounced *talaq* earlier and Anwara Begum was no longer his wife. No evidence of the pronouncement of *talaq* was produced. Well aware of his limitations imposed by the precedent of the Privy Council, Judge attempted a bold break-through to reveal the true meaning and connotation of *talaq* as envisaged in Quran. Finally, he projected the true concept of *talaq* as enjoined by the great light that:

(1) *Talaq* must be for reasonable cause;

(2) It must be preceded by "attempts at reconciliation"; and

(3) It "may be effected" if the attempts at reconciliation fails.

Logical conclusion of original sources of Islam relating to *talaq* reveals that neither the husband nor the wife has the unbridled and arbitrary power to divorce. In view of these facts unintentional *triple-talaq* pronounced at single occasions, are in total negation to *Sharia*.[42] In *Ahmadabad Women Action Group* v. *Union of India*[43] a writ petition was filed to declare Muslim Personal Law which enables a Muslim male to

40 (2007) 6 SCC 785.
41 He was Chief Justice of *Gauhati* High Court and tried to give correct meaning to law of divorce among Muslims in India in *Jiauddin* v. *Mrs Anwara Begum* (1981) 1 Gau LR 358.
42 *Ibid.*
43 (1997) 3 SCC 573.

pronounce unilateral *talaq* to his wife without her consent and without resort to judicial process of courts as violating articles 13, 14 and 15 of the Constitution. However, court refused to entertain the writ petition, because the issue involved state policies.

But in early August 2004, the Lucknow bench of Allahabad High Court reiterated the condition for a *talaq* according to *shariat* emphasizing the fact that it should be pronounced over three sitting, since the *talaq* had apparently been sent by registered post. Further in the case of *Riaz Fatima* v. *Mohammad Sharif*[44] the Delhi High Court held *triple-talaq* to be invalid in the eyes of law.

Recently in the case of *Masroor Ahmad* v. *State (N.C.T. of Delhi) & Another*,[45] Badar Durrez Ahmad, J., gave a decision totally in consonance of Quran and the *Sharia* law. The question before the court was about the validity of *triple-talaq* under the Muslim law. The Court held that *triple-talaq* (*Talaq-ul-biddat*) ought to be regarded as one *talaq* revocable during the period of *Iddat*. It further laid down that if a *Talaq* is pronounced in extreme anger where the husband has lost control of himself it would not be effective or valid. It has also laid down that if the pronouncement of *Talaq* is communicated to wife, the *talaq* shall take effect on the date it is so communicated. However, if it is not communicated at all, the *talaq* would not take effect. Further he laid emphasis on the importance of reconciliation before the procedure for *talaq* is to be started and also the husband has to duly establish that he has properly followed the procedure of divorce as laid down in the Quran.

Thus we see that there has been sea change in the attitude of judiciary. The *triple talaq* is now neither enforced nor considered valid by the judiciary. But still there is need for a decision from the Apex Court in this regard. While *triple talaq* continued be criticized by large number of Islamic countries, but they have periodically reformed or modernized their personal law to solve this problem.

IV Conclusion and Suggestions

While orthodox are against abolishing the procedure of *triple talaq* in one sitting on the ground that it is based on *Shariat* or the Divine laws, liberals push for a more contemporary understanding of the genesis of these Divine laws. The original message in the Quran was in its intent radical and humanitarian. The corpus of rules articulated centuries after the death of Prophet Mohammad by the Muslim establishment in the light of the dominant patriarchal ethos of the emerging society were incorporated as the Shariat. Liberals point out that rules characterized by the ulemas as Sharia, even though entirely the creation of a human agency, became vested with the sanctity of being either revealed or divine. In India, the Anglo-Mohammedan law evolved by the courts in their efforts to apply the laws of the Quran also began to be construed as a

44 135(2006) DLT 205.

45 2008(103) DRJ 137 (Del.).

part of the Shariat. These laws, the handiwork of those who were not even nominally Muslims, were justified through the legal fiction that the courts were not interpreting the Shariat but merely applying it.

There are four key words in the Quran: adl, ihsan, rahmah and hikmah (justice, benevolence, compassion and wisdom). Triple talaq is against all these principles. It is not just, nor benevolent, nor compassionate, nor an act of wisdom[46]. *Talaq* is permissible in Koran only on condition that there is complete breakdown of marriage. Parting of ways must be graceful, and utmost care is taken to inflict no suffering on the woman.[47] The common practice of impulsively uttering *talaq* thrice in a go, or writing *talaq* thrice on a postcard, or hiring a *qazi* to affix his signature on a scrap of paper, is totally anti-Islamic. No cleric, regardless from which school of *Fiqah*, can ever condone this form of *talaq*. Islam is a religion with a very practical outlook. It not only realizes the importance of institution of marriage but also regards that there can be certain situations and circumstances in which relations between the parties to marriage becomes so strained that, it is not possible for them to continue with such relationship. In Islam though divorce is permissible, it is detestable, and should be resorted to only in extreme circumstances which is permitted by the irretrievable breakdown theory of the modern world.

Under Islam the relationship between the husband and wife is pious and private and it is not conducive to bring it outside the home, this is the reason that Holy Quran ordains that before the proceeding for divorce (*talaq*) can be started, there should be steps taken by members of both the families to have reconciliation between the spouses and when all these efforts fail then only *talaq* should be pronounced. Further, the Quran has in detail laid down the rules and condition to be followed by the husband while pronouncing *talaq* on his wife. It has been wrongly interpreted by many authors, jurists, as well as courts that Islam gives arbitrary, unilateral and unbridled power to the husband to divorce his wife. A Muslim husband cannot divorce his wife at any time or for any reason or for no reason. This was the practice which prevailed in the Pre-Islamic Arabia, and was criticized by Prophet of Islam (PBUH) as against justice, and demeaning to the women, therefore to eradicate this, the Prophet (PBUH) introduced reform in the divorce laws, but today the Muslims have reverted to same practice which was abhorred by the Prophet (PBUH). The true law of *talaq* is not as easy as it has been practiced by majority of Muslim. It has been well argued that this form of unilateral triple *talaq* has no *Quranic* injunction, further it cannot be traced in the traditions of Prophet as most of the traditions quoted in the favor of *triple-talaq* are either weak or are not authentic, moreover even if triple pronouncement is there it has been interpreted as one. By going into the historical background it has become amply

46 *Supra* note 25.

47 Syeda Saiyidain Hameed, "The Case of Triple Talaq: Going Against the Spirit of Islam", available at: http://www.timesofindia.com/151100/15 edit 4.htm.

clear that this form of divorce only came into the practice after the death of Prophet (PBUH), during Umayyad reigns to meet certain exigencies and was for that period only.

The Prophet (PBUH) also gave the best declaration for women's right in his farewell speech on the occasion of his last *hajj*. He demanded that husbands should treat their wives with kindness and gentleness. Men are to know that their women are their partners. Islam recognizes the duties and responsibilities of both partners and, hence, emphasizes that man is the "Head", while the woman is the "Heart" of the family. Both are needed and both are complementary to one another. The Muslim of today have totally forgotten the teachings of the Holy Prophet (PBUH) as well as true spirit of the Islamic law which gave women equal status as men and rights in all the domain of human life social, political, economical as well as in the family.

So, to eradicate this practice it is suggested that firstly the legislature should take a step forward and make laws in consonance with the true Islamic law of divorce and to follow the precedent of other Muslim countries who have reformed the *triple-talaq* in one form or the other. This can be done by mass education through the medium of press and media. To encourage legislation the MPLB has to prepare a draft law and get it enacted. Such a precedent already exists and the Dissolution of Muslim Marriage Act was drafted by the ulama led by Maulana Ashraf Thanvi and others and enacted in 1939. But if such an exercise is undertaken by the MPLB it has to be quite comprehensive. There is great need for codification of Muslim Personal Law today. It should be done as early as possible. Sixty four years after independence Muslim women are in the forefront of many social movements. They are far more conscious today than they were during the colonial period. It was after a great deal of effort that the MPLB had agreed to abolish *triple talaq* in 2004. There is crying need for a comprehensive legislation to be drafted under the guidance of MPLB by the ulama and Muslim intellectuals and lawyers. The past interpretations of the Quran were constrained by socio-economic conditions and should not be binding on the present and future generations of Muslims. All great Islamic thinkers have repeatedly made this point and have accepted the central role of *'ijtihad'* (creative interpretation). It is only our social conservatism, not lack of theological sanction, which prevents our ulama from exercising it. After Prophet Mohammed no one has taken any steps to reform the Muslim law to keep it updated according to demands of the society. The MPLB and concerned Muslim intellectuals have to initiate measures for drafting a comprehensive law duly codified which will embody the *Qur'anic* spirit. *Triple talaq* and unregulated polygamy has often been the cause of attacks on otherwise quite progressive Islamic personal law. Polygamy may not be abolished completely but strictly regulated as directed by the Quran.

Thus there is crying need for a new draft law which, if properly drafted, will become a model law for others to follow as in Islamic law, women enjoy all the rights which modern laws have given to women like widow remarriage, compulsory arbitration before divorce, inheritance, right to property, right to earn and so on. All

these rights are unconditional and a wife also has right to lay down conditions at the time of marriage.

Secondly, it is very important that the Muslim community in general should be acquainted with the proper method of divorce, and also to be made aware, that resorting to this method of *triple-talaq* is a sin. The three *talaqs* have to be spaced out over a period of three months so that the couple gets enough time for reconciliation through the intervention of relatives and friends. Islam was the first religion in the world to empower women and give them equal legal status. Commenting on verse 2:228, Maulana Azad in his Tarjuman al-Qur'an, says that it is a revolutionary declaration of equality of the sexes made 1,300 years ago. But Muslim society, under the influence of a feudal ethos, never realised this revolutionary potential.[48]

Thirdly, *mehr* can be fixed very high to discourage husband from giving *triple talaq*. But the most important thing for the evaluation of law is that law should be assessed in a society where it is grown and developed; only then the utility of law can be understood. J. Abdur Rahim and many other jurists have formulated this opinion. It should also see to it that the amount of *'mehr'* paid is substantially high (part of which can be deferred) to discourage easy resort to *'talaq'*. The Quran itself encourages high amount of *mehr*. *Mehr* is woman's right and in the case of divorce it can provide her with a measure of economic security. It is regrettable that in some Muslim communities *mehr* is only nominal and as low as ₹41 or ₹51.

Thus, this need not be mentioned that the Muslims are required to follow the teachings of Holy *Quran* and *Hadith* rather than the rule imposed by a Caliph over people for a certain period of time to prevent them from deceiving the women and making mockery of law of *Allah*. The rule or the law was for people of that time whereas the *Quran* and *Hadith* are applicable for all times and all people. Almost all the Islamic Scholars whether belonging to *Ahlehadis*, *Shia*, *Hanafi* or any other school of thought agree that practice is either *haram* or *biddat*, so Muslims must not allow this to corrupt their society. It is also important to note that unless the abolition takes the form of legislation it may not be effective if challenged in the court of law. The members of the MPLB should make efforts to abolish this form of divorce, and also launch an awareness movement on the issue and educate Muslim men on the need to desist from adopting this sinful form of *talaq*. As early as 1939, Maulana Ashraf Thanvi and others, took the bold step to draft the Dissolution of Muslim Marriage Act, which gave great relief to the Muslim women. The MPLB has to show such wisdom and draft a comprehensive law codifying Muslim Personal Law on the lines of the 1939 Act. And even as the MPLB takes up this concern, progressive and practicing Muslims should also come forward and support this movement for reform.

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48 *Supra* note 25.

This will be not only in keeping with the true spirit of Islam but will also go a long way in improving the image of Islam in India. It is because of such un-Qur'anic practices that the image of Islam has suffered and the demand for a Uniform Civil Code periodically raised.

Unless a Muslim woman gets a due participation in the affairs of the community as for example getting due share in the administration of mosques, the issues relating to women will only be decided by men. Muslim Law of divorce has to be drafted in such a manner as to be based on equity and justice.

LEGAL REGIME OF MINERAL RESOURCES AND THE PRESIDENTIAL REFERENCE
An Analysis

*Meena Panickar**

I Introduction

India has one of the largest global reserves of mineral resources like barite, bauxite, coal, chromite, limestone, and manganese. It is a leading producer of chromite, coal, iron ore, manganese, bauxite, and zinc. The Planning Commission of India sponsored study[1] estimates the total value of mineral production (excluding atomic minerals) during 2010-11 at ₹2,00,609.38 crores. This is 11.83 per cent more than that of the previous year.

Indian mineral industry consists of public and private sectors. An informal sector operates in the extraction of minor minerals. In the private sector, there are a few public limited companies while the rest are individuals, partnership firms, and private limited companies. More than 90 per cent of bulk minerals like bauxite and limestone and 20 per cent of iron ore cater to the raw material needs of the mineral processing industries. Among the leading ten mineral producing States, Odisha takes the lead followed by Andhra Pradesh, Rajasthan, Chhattisgarh, and Jharkhand.[2]

In the area-wise distribution of mining leases in India, large leases constitute nine per cent of the total leases. Large leases refer to those with more than 100 hectares each in their possession. This means that more than 70 per cent of the mining area is leased to them. About 51per cent of the total leases are with tiny lessees with less than 5 hectares each.[3] This suggests that these lessees contribute to the large number of mining operations in different parts of the country.

Mineral resources and their mining are currently in the limelight discussions in India. The various stakeholders are discussing forcefully whether the allocation of

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1 ISID, *Sustainable Development: Emerging Issues in India's Mining Sector* 36 (Sponsored by Planning Commission of India, Delhi, May 2012).

2 Ministry of Mines, *Annual Report 2010-11* (Government of India, Delhi, 2011).

3 *Supra* note 1 at 44.

these resources, should be based on competitive bidding. In recent years, we have witnessed the proactive efforts of Central and State Governments to create investment opportunity in the mining sector. Opposing this move, social activists and tribal people do engage in a consistent resistance strategy. They argue that the expanding mineral exploration and exploitation activities often overlook environmental and social responsibilities.

A discussion on the topic is pertinent and contemporary for the following reasons:

(i) The development of the country is in direct relation to the mineral industry's contributions.

(ii) India is abundantly rich in many mineral resources.

(iii) Exploration and exploitation of these resources need technology know-how, investments and regulations.

(iv) Currently most of the exploitation activities are surface bound. We need to expand them further for deeper exploitation.

(v) Some of the States contributing to the national economy with rich mineral resources are the most backward ones in India. This anomaly compels them to demand more say in revenue generation from this sector.

(vi) Many mineral locations fall within scheduled areas wherein the Constitution mandates respect for the customary rules of the population.

(vii) Development of the mining sector quite often flouts environmental considerations and compromises intergenerational equity.

In the background of conflicting claims and counter-claims, the objectives of this paper are - to examine the legal regime governing mineral resources and their allocation; to examine the Opinion given by the Supreme Court in the Presidential Reference; and to assess the impact, if any, of the Presidential Reference on allocation of mineral resources.

II Legal Regime of Mineral Resources

A discussion on the legal regime governing the mineral resource sector invites our attention to the different stakeholders involved, the location of these resources, and the temporal dimensions associated with the sector.[4] The stakeholders are the Union and the States, panchayats, scheduled areas, local populations and the industry as a whole. Location may refer to the areas which could be forests, rivers, mountains etc. Temporality refers to intergenerational equity issues arising out of the long term projects. The governing laws, therefore, include the Constitution, MMRDA, Forest Dwellers Act, PESA and the regulations with respect to environment.

[4] Ligia Noronha, Nidhi Srivastava, *et. al.*, "Resource Federalism in India: the Case of Minerals", 44 *EPW* 51 (2009).

A Constitutional Scheme

The Indian Constitution locates power between the Union and the States through enumerated lists in the Seventh Schedule. The Union wields the power with respect to offshore minerals, in the maritime jurisdiction of India. For onshore minerals, the state concerned holds the proprietary title. However, this title is subject to the power of the Central Government to regulation and control by the MMRDA. As per entry 54 of List I, the Parliament can regulate minerals by law on grounds of expediency in public interest. MMRDA is enacted under this entry. On the other hand, the state's power to regulate and control minerals and mining, recognised under entry 23 of List II, is subject to List I. As per the legislative power sharing in between Union and States discussed in article 246, the *non-obstante* clause confers power of supremacy with the Union.

The Union is responsible for ensuring safety in mines. It also has the power to impose taxes on production. The state's powers are limited to minor minerals, taxes on land, mineral rights, and on sales. Both the Union and the States have powers to collect fees on respective subjects. Under Entries 55, 58 and 68 of List I, the Union has the power to regulate and develop oil fields, mineral oil reserves, petroleum and petroleum products and the responsibility for safety of mines and oil fields.[5]

The Constitution of India has a specific scheme for the protection of Schedule V and VI areas which mainly comprise tribal population.[6] This scheme aims at protecting their status and ensuring their dignity. We follow the pattern evolved by the Government of India Act of 1935 in this regard. The rich biological diversity and heavy presence of minerals in the scheduled areas make them vulnerable to exploitation. Under the constitutional scheme, the Governor has the power to make regulations, repeal or amend the law that the Parliament enacts to prohibit or restrict the transfer of land by or among the members of scheduled tribe or regulate the allotment of land to them. The Supreme Court in the landmark *Samatha* judgment[7] clearly barred the transfer of land in these areas on a lease basis to non-tribals or private companies for mining or industrial operations.

The Constitution recognises the significance of protection of the environment. If the mineral rich areas are exploited at large, the articles of the Constitution will have to be implemented including the one of protection of right to life to ensure safe livelihood and habitat for the inhabitants of those regions. The Supreme Court judgments on use of derivative rights may be of immense value in this context.

[5] The Geological Survey of India is the premier agency for undertaking geological surveys in the country.

[6] Articles 244 and 244 A, Part X read with Schedules V and VI of the Constitution.

[7] *Samatha* v. *State of Andhra Pradesh* (1997) 8 SCC 191.

Decentralisation became the key word with the passing of the 73rd and 74th constitutional amendments. It envisaged the setting up of local self-Governments. By this insertion, the Constitution states that the *gram sabha* or village assembly may exercise such powers and perform such functions as the legislature of the State may provide for by law. Till 1996, this power devolution on the local level was limited to non-scheduled areas. After the enactment of PESA in 1996, the scheduled areas came within the ambit of local self-governance.

B MMRDA

Under this Act, the State governments can grant licence and lease for exploitation of minerals subject to the provisions of the Act and regulations there under. The power of the State is subject to the mandatory prior approval of the Central Government in the case of Schedule I minerals. The States have limited powers of possession, of receiving royalty and a few other payments with respect to major minerals. The Central Government prescribes the rates of royalty and rents in accordance with the provisions of MMRDA. The States have rights to fix rates only with respect to minor minerals.

The initial amendments to MMDRA were the efforts to strengthen Government control over mining. Subsequent to the amendments in 1994 and 1999, there were efforts to liberalise the sector for private players and bring in foreign investments.

Under the MMRDA, mining permits, licences and leases can be for prospecting, reconnaissance and exploitation. The concerned State Government grants these concessions with respect to its territory. Section 5 of the Act stipulates that the prior approval of the Central Government is mandatory for Schedule I minerals. For the development of mineral deposits in the state, the Central Government must approve the mining plan before the State Government can grant the mining lease. Sections 6-8 lay down the maximum area for which reconnaissance permits, prospecting licenses, and mining leases can be granted. The area is subject to relaxation by the Central Government if it is necessary for mineral development. The State Government may renew mining leases. However, in the case of coal, lignite and atomic minerals, renewal is subject to the mandatory prior approval by the Central Government. Section 11 makes provision for preferential treatment for persons having reconnaissance permit or prospecting licence for a prospecting licence or mining lease.

A number of rules have supplemented the MMRDA. The Mineral Concession Rules, 1960, stipulate the procedure and conditions subject to which the permit, licence or lease can be granted. The Mineral Conservation and Development Rules, 1988, regulate mining on a scientific basis and for conserving the environment. These rules do not apply to coal, atomic minerals, petroleum and gas. Other rules are Granite Conservation and Development Rules, 1999, Marble Development and Conservation Rules 2002, Colliery Control Rules 2004, and Minor Minerals Concession Rules formulated by the States. Coal mining is subject to Coal (Conservation and Development) Act of 1974.

C Other Applicable Laws

Revenue generation from the mining industry is a contentious issue. Under various laws, income tax, capital gains tax, excise duty, sales tax and customs duties are collected. The lessee is subject to reconnaissance permit fee, prospecting licence fee and royalties and dead rent for all three forms of concessions. Surface rent and water cess for the surface area not exceeding the land revenue are to be paid by the lessee.

Land is an essential component in the discussion of mineral resources. When the land is in the hands of a private owner, the lessee has to enter into an agreement with the private owner. In *Pallava Granite Industries Private Ltd.* v. State *of Andhra Pradesh*,[8] the Supreme Court made it clear that the land owner's consent is absolutely necessary for conducting mining operations. However, the State Government can acquire land and give to operators for conducting mining.

Mining activities are to be in conformity with the Environment Protection Act, the Environment Impact Assessment Notification, and the Forest Conservation Act. Under the Forest Conservation Act, 1980, use of forest land for non-forest purposes is prohibited except with the prior approval of the Central Government. While extending the provisions of Part IX of the Constitution on Panchayats to scheduled areas through PESA in 1996, it is required that such extension shall be in conformity with the customary law, social and religious practices and traditional management practices of community resources. The recommendation of the *gram Sabha* or Panchayat at the appropriate level is mandatory for grant of exploration and exploitation of minor minerals in this area.

Practices of large scale illegal mining are being reported from various States. There are court interventions and reports by government agencies. The lack of coordination among government agencies and the nexus between politicians and local mining mafia create complex scenarios wherein the country suffers apart from other infirmities like huge revenue loss.[9]

It is worth noting that under the Coal Mines (Nationalisation) Act of 1973, coal mining was reserved exclusively for the public sector. After the amendment in 1976, captive mining was allowed for private parties engaged in the production of iron and steel. Sub lease was permitted for those private parties in small pockets who do not require rail transport. Another amendment in 1993 opened the sector to power and other end use producers to be notified by the Government from time to time. Till 1993, there were no specific criteria for allocation of coal blocks. Allotments were based on letters of recommendation from State Governments stating that these parties intend to set up an end use plant of specified capacity. The efforts to bring in transparency and objectivity in the allocation from 2004 were delayed. Therefore, the Comptroller and

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[8] AIR 1997 SC 2098.

[9] *Supra* note 1 at 61-4.

Auditor General (CAG) recommended to the Ministry of Coal (MOC) to bring in transparency and objectivity, and to enable tapping a part of the benefit accruing to the allottees. The CAG also suggested competitive bidding.[10] The financial impact of benefits to the private allottees is to the tune of 1,85,591.34 crores as on 31 March 2011.

III Presidential Reference, 2012

In the Special Reference No.1 of 2012[11], the President of India made references on the following questions:

1. Whether the only permissible method for disposal of natural resources across all sectors and in all circumstances is the conduct of auctions?
2. Whether a broad proposition of law that only auctions are suitable for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of larger benches?
3. Whether the enunciation of a broad principle even though expressed as a matter of constitutional law, does not really amount to formulation of a policy? Does it cause successive governments to formulate unsettling policy decisions and approaches over the years for valid considerations? These considerations include lack of public resources and the need to resort to innovative and different approaches for the development of various sectors of the economy.
4. What is the permissible scope for interference by courts in the Government's policy making in methods for disposal of natural resources?
5. Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the Court not obliged to take into account investments made under the said policy including investments made by foreign investors under multilateral/bilateral agreements?

The remaining questions were related to the 2G decision of the Court.

A Applicability of Article 14 of the Constitution

According to the Court, the legislature and executive are answerable to the Constitution; the judiciary as the guardian of the Constitution must find the contours for the disposal of natural resources, particularly articles 14 and 39(b). The Court stated that article 14 is couched in negative language. There are no restrictions imposed on it. However, the Court has evolved certain tests to detect violations of article 1 4. It recognised reasonable classification based on intelligible differentia having rational nexus with the object as not defeating the purpose of the article. It condemned discrimination not only by substantive law but also by a law of procedure. The journey went further and discovered arbitrariness as antithetical to equality and the principle of

[10] Comptroller and Auditor General of India, *7th Report on Performance Audit on Allocation of Coal Blocks and Augmentation of Coal Production* (2012) at 43-4, available at http://saiindia.org.in.

[11] *In Re Special Reference No. 1 of 2012*, available *at* www.indiankanoon.org.

reasonableness as having brooding omnipresence in article14. Every state action needs to be in compliance with the principle of reasonableness and non-arbitrariness. Court referred to *R.D. Shetty* case[12] wherein it was observed thus:

> ...where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant.

The Court held that *McDowell* case[13] sets out the limitations in the arbitrary use of the arbitrariness doctrine and cautioned the judiciary to confine to the constitutional limitations while declaring a statute as unconstitutional. The Court concluded the discussion about article 14 in the following words[14]:

> ...the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of article 14 of the Constitution.

A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell's case has said. Therefore, a State action has to be tested for constitutional infirmities qua article 14 of the Constitution. The action has to be fair, reasonable and non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable and treatment. It should conform to the norms which are rational, informed with reasons, guided by public interest, etc.

Therefore, the Court hesitates to declare auctions as methods for disposing natural resources to be a constitutional mandate within article14. It laid down the reasons for holding as follows:

1. As far as States are concerned, article 14 is used in a negative language. It restrains them from taking some actions. Thus the plain language of this article bars reading auction into its scheme.
2. A constitutional mandate is an absolute principle that must be applied in all situations. By this the Court meant to convey that equality does not mean auctions without testing them in each case. The Court apprehended that auction as a constitutional mandate would declare every other action deviating from it as void which would then lead many welfare measures as a nullity. Centre for Public Interest Litigation (CPIL) asked the Court to declare auction as mandatory only in

[12] *R D Shetty* v. *International Airport Authority & Ors.*, AIR 1979 SC 1628.

[13] *State of A.P. & Ors.* v. *McDowell & Co. & Ors.* (1996) 3 SCC 709.

[14] *Supra* note 11 at 32.

the case of scarce natural resources. It cannot be applied to limited situations within the fabric of article 14.

3. The Court found that accommodating auction as a constitutional mandate would be contrary to the obligation of the State to distribute natural resources for common good as set out in article 39 (b). CPIL argued that auction promotes revenue maximisation and the revenue so collected could be utilised for the common good. The Court however felt that while auctions may be good for revenue maximisation, the latter may not always be the best way to serve the common good. To explain it further, the Court held that revenue considerations are secondary to developmental considerations. The methodology of distribution under article 39 (b) is not fixed.

B *Legitimate Deviations from Auctions*

The Court discussed its own previous decisions to justify non-auction methods to allocate natural resources. For instance, it referred to *M/S KasturiLal Lakshmi Reddy* v. *State of Jammu & Kashmir*[15], wherein the Court held that auction is not necessarily a process to be followed in every case. In cases like the State allocating resources such as water, power, raw materials etc, for the purpose of encouraging setting up industries in the state and if a private party is interested in doing so, there is no constitutional or legal obligation violated if the state invites that party, negotiates with and agrees to provide resources and other facilities. The State action is protected as long as the State acts *bona fide*, reasonably and in public interest.

In the *Sachidanand Pandey* case[16], the Court held that the ordinary rule of public auction is not an invariable one that must be followed when there is compelling reason to deviate from it. The reasons for departure shall be rational and not discriminatory. In the *Haji T M Hasan Rawther* case[17], the Court referred to these previous decisions and held that auction is suggested and promoted as the method for disposal of resources to ensure transparency and accountability in the dealings of the Government. Bias, favouritism, or nepotism would be absent in public auction or sale by tenders. However, departure from the ordinary rule must be justified by compulsions and not just for the sake of convenience.

In *Netai Bag*[18], the Court held that auction is a method of ensuring compliance with article 14 of the Constitution. Exceptions could be made by the State executive with sufficient justifications. Constitutional courts cannot presume alleged irregularities or substitute their opinion for the *bona fide* opinion of the executive.

15 (1980) 4 SCC 1.
16 *Sachidanand Pandey & Anr.* v. *State of West Bengal & Ors.* (1987) 2 SCC 295.
17 *Haji T. M. Hassan Rawther* v. *Kerala Financial Corporation* (1988) 1 SCC 166.
18 *Netai Bag & Ors.* v. *State of W.B. & Ors.* (2000) 8 SCC 262.

After perusing the above cases as an illustrative list, the Court held that it upheld state actions in cases of deviation f rom auction by testing it under article 14 for arbitrariness and fairness. Apart from the legal logic, an economic logic for non-auction methods is explained by the Court. Quite often exploration and exploitation contracts are bundled together. Applying the logic behind patents in terms of R & D and on inventions being made of exclusive access to the investor, the Court in this case finds sufficient reason in support of business ventures that they be given access not only to explore but to exploit the resources, not necessarily through auction.

C *Potential Abuse*

In response to the arguments about the scope for potential abuse in cases other than auction, the Court referred to the relevant paragraphs of *R.K. Garg* in the following words[19]:

> ...Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not being capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities, inequities or possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of the pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

In the *D K Trivedi* case[20], while discussing the constitutional validity of section 15 (1) of MMRDA, the Court held that the validity or constitutionality of discretionary power conferred on the executive or authority by the statute cannot be judged on the premise that the concerned will act in an arbitrary manner while exercising such discretionary power. Possibility of abuse cannot be a reason for striking down the section. The Court went further and observed that even auctions could be a subject matter of abuse, but it is the most preferred method when the objective is revenue maximisation. Scope for abuse cannot be a reason for holding any method as *ultra vires* the Constitution. Only actual abuse can be tested on the anvil of constitutional provisions.

D *Scope for Judicial Review*

Whether dictating a method for disposal of resources violates the age old principle of non-interference with policy matters? To substantiate its position, the Court discussed the relevant portions of *R.C. Cooper* case[21] that it will not sit in appeal over a policy of

19 *R. K. Garg* v. *Union of India & Ors.* (1981) 4 SCC 675.
20 *D.K. Trivedi & Sons & Ors.* v. *State of Gujarat & Ors.* (1986) Supp SCC 20.
21 *R.C. Cooper* v. *Union of India* (1970) 1 SCC 248.

Parliament while enacting a law. The Court can strike down a law for want of constitutional authority. *Delhi Science Forum* case[22] is also discussed in which the Court observed that the merits and demerits of a policy could be discussed in the Parliament, which is the forum for the purpose. It reiterated this position in the *Balco Employees* case[23] and held that it is not just the jurisdictional limitation that prevents the Court from discussing the pros and cons of a policy, but also want of expertise in the subject matter.

While discussing *Narmada Bachao Andolan* case[24], the Court held that the wisdom and advisability of executive policies are not subject to judicial review unless these policies are contrary to statutory and constitutional provisions or arbitrary and irrational exercise of power. The Court held that it is not within its function to compare methods and come up with a most appropriate one for the disposal of natural resources. It was better left to the wisdom of the executive. However, if any method applied by the Government is arbitrary, then the Court could intervene under its constitutional mandate.

Rather than proscribing or prescribing a method, judicial scrutiny of methods and disposal of natural resources shall be based on the facts and circumstances of each case. Accordingly the Court answered the first set of five questions that auction cannot be the only permissible method for disposal of all natural resources across all sectors and in all circumstances.

E Separate Opinion of Justice Khehar

Endorsing the Main Opinion, Justice Khehar wrote an opinion expressing his agreement with them, but in more explanatory way. According to him natural resources constitute the collective wealth of the nation. In this context, how can individual rights be balanced vis-à-vis societal interests? Lack of transparency in the disposal of resources is the key issue. He referred to the *Rashbihari Panda* case[25] which illustrates that the Government should act as a prudent business man and gains from business should be utilised for the public good. The State has the right to engage in trade and enter into contracts, but subject to constitutional provisions. It shall be based on reasonableness, rationality, and non-arbitrariness. He discussed some of the landmark decisions of the Court to justify his reasons accurately as mentioned below.

In the *Kasturilal* case[26], the State stopped the supply of resin to external buyers and allotted it to those industries set up within the State for promoting industrialisation. Here the argument that the State is acting arbitrarily by selling resin at a price lower

22 *Delhi Science Forum & Ors.* v. *Union of India & Anr.* (1996) 2 SCC 405.
23 *BALCO Employees' Union (Regd.)* v. *Union of India & Ors.* (2002) 2 SCC 333.
24 *State of Madhya Pradesh* v. *Narmada Bachao Andolan & Anr.* (2011) 7 SCC 639.
25 *Rashbihari Panda* v. *State of Orissa* (1969) 1 SCC 414.
26 *Supra* note 15.

than that available in the open market, does not hold. The objective of the State in such a case is not to earn revenue. It was serving the common good as mentioned in article 39 (b) by creating more employment opportunities for its population through the supply of material resources to the industry. Referring to the *Kumari Shrilekha Vidyarthi* case[27], the Court held that the exclusion of article 14 on contractual matters where the State is involved would be alien to the constitutional scheme. The Preamble and DPSP explains constitutional philosophy in terms of public good complementing the freedoms in Part III. The requirement of article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.

In the *Lucknow Development Authority* case[28], the court ordered the public functionaries, instead of the State, to pay compensation. The court shifted the burden because of the capricious actions of those holding public power, which resulted in deficiency in services to the consumer. In normal circumstances, the State is bound to pay compensation. However, the court was cautious to observe that the State payment of compensation is from the taxpayers' money. Therefore, it decided to fix responsibility directly on the public officials. Those who hold public office discharge public power, which is meant to be in the public interest.

In the *Common Cause* case[29], the court held that while article 14 permits reasonable classification, it does not permit "pick and choose" arbitrarily out of the many persons in that category. Transparent, objective criteria and/or procedures needs to be followed for choosing some over others in the same category. Lack of transparency in the system promotes nepotism and arbitrariness. The court did not wish to impose any procedure on the government.

In the *Meerut Development Authority* case[30], the Court made it clear that all renderer's have the right to fair and equal treatment. The evaluation of tenders must be transparent. However, the State is entitled to get full value for its resources, and failing this would mean cheating the country.

In the *Reliance* case[31], the Court observed that natural resources belong to the people, which the State holds in trust. The Government holds the resources to develop the interests of the people. For example, the Government holds the natural gas till it reaches the consumer. The Government cannot be divested of its supervisory powers to regulate the supply and distribution of gas. The Product Sharing Contract (PSC) between the Government and Reliance shall override any other contractual obligation

27 *Kumari Shrilekha Vidyarthi & Ors.* v. *State of U.P. & Ors.* (1991) 1 SCC 212.
28 *Lucknow Development Authority* v. *M. K. Gupta* (1994) 1 SCC 243.
29 *Common Cause, A Registered Society* v. *Union of India & Ors.* (1996) 6 SCC 530.
30 *Meerut Development Authority* v. *Association of Management Studies & Anr.* (2009) 6 SCC 171.
31 *Reliance Natural Resources Ltd.* v. *Reliance Industries Ltd.* (2010) 7 SCC 1.

between the contractor and any other party. The ownership and distribution of material resources of the country shall be distributed for common good in order to promote national development and unity of the nation. Accordingly, article 39 (b) shall be interpreted in the light of article 38 to mean an affirmative obligation upon the state to ensure that the distribution of resources will not result in heightened inequality between people and the regions.

In the *Akhil Bhartiya Upbhokt Congress* case[32], the Court ruled that if the land allotment is to institutions or organisations engaged in educational, social, cultural, or philanthropic activities, the state may allot by means other than that of auctions. But the actual exercise of allotment shall be in conformity with article 14. This means the competent authority must place advertisements incorporating eligibility conditions, enabling all similarly situated persons to participate in the process of allotment.

In the *2G Spectrum* case[33] the Court followed the argument to comply with article 14. In that context, it stated that while disposing of natural resources like spectrum, perhaps a duly publicised, fair and impartial auction could be the best method. If the State wants to earn maximum revenue, then auctioning shall be the indisputable method for disposal of natural resources. Would loss of revenue mean loss to the nation? Explaining the position of the Main Opinion that the Court will not suggest one policy over another, Justice Khehar takes the support of a hypothetical situation.

F Hypothetical Case

Justice Khehar referred to MMRDA and discussed allocation of mineral concessions in a hypothetical context thus: Suppose the Government decides to allocate coal for private commercial exploitation. The legal framework is as per section 11 A of the MMRDA, which is inserted only on 13 February 2012. The essential portions of the section are:

(i) It focuses upon granting reconnaissance permit, prospecting licence or mining lease

(ii) It targets only coal or lignite areas

(iii) The Central Government will select the companies by auction through competitive bidding.

(iv)Companies engaged in the production of iron and steel, generation of power, washing of coal obtained from a mine or such other end use, as the Government notified Gazette specifies, will be falling within the scope of selection.

Exception to this paragraph is in the proviso. Competitive bidding will not be followed where the area containing coal or lignite is considered for allocation to a Government Company or corporation for mining or such other end use and such area

[32] *Bhartiya Upbhokta Congress* v. *State of Madhya Pradesh & Ors.* (2011) 5 SCC 29.

[33] *Centre for Public Interest Litigation & Ors.* v. *Union of India & Ors.* (2012) 3 SCC 1.

is considered for allocation to a company or corporation that has been awarded a power project based on competitive bidding for tariffs.

The legislative policy limiting the zone of consideration may be subject to judicial review. The legislative policy would be legitimate if the objective is to subserve the common good. If the legislation has no nexus with legitimate objectives, or transgresses the mandate of distribution of material resources, it may be considered as discriminatory and unfair.

A reading of the proviso makes it clear that a company/private player, which got a power project through competitive bidding, may be selected for allocation of coal without auction. It may be legitimate even if the material resources are given free of cost. This is so because it is in consideration of providing electricity at low tariff. Would such a grant of resources qualify the test of article14?

If the competitive bidding for the power project has taken place without the knowledge of coalmining lease to the successful bidder, the grant of such lease would be invalid for the reason that sufficient numbers of other vying contenders are missing in the tariff bidding. Then it would be a windfall gain to the successful bidder.

If the contenders for power project before bidding knew about the mining lease provisions, they may reduce their tariff rates. This would make it in conformity with article 14. He observed[34]:

> Accordingly, no part of the natural resources can be dissipated as a matter of largesse, charity, donation, or endowment for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to best sub serve common good. It may well be an amalgam of the two.

IV Analysis of Presidential Reference

The Supreme Court's opinion is notable for various reasons. First, it was sought at a time when the Government was confused with the 2G verdict. Second, it is an appropriate time to evaluate the allocation measures with respect to various natural resources. Third, India is going through a development phase where the very meaning of development is contested every now and then. Last, a reminder of constitutional philosophy under article 39 (b) is relevant and crucial for a third world country like India with abundant resources and inadequate governance strategies. Therefore, this part examines whether the Supreme Court's opinion addresses all or any of these factors.

The Court, as Part III mentions, refers extensively to the equality discussion in the context of article 14 of the Constitution. The Court discusses equality in terms of

[34] *Supra* note 11 at 72.

reasonable classification and non-arbitrariness with the help of cases that it had decided. This discussion is to bring the point home that the State while allocating natural resources is performing a public function and not simply business and therefore the action of the State is to be tested under article 14.

The discussion communicates at one place that auction cannot amount to a constitutional principle. The reasons are that (a) article 14 prohibits the state from denying equality to anyone (b) a constitutional principle is to be tested in all situations. However, it fails to establish the difference between method and principle. Auction is only one of the methods for securing equality. It cannot be discussed as a principle in any context. The method of auction is better explained in the Separate Opinion of Justice Khehar. He explains how, in a given situation, if all eligible contenders are not participating in an auction, it may amount to denial of equality in terms of opportunity.

It is an established fact that the Government can enter into contracts. The Court, however, emphasised the importance of government contracts to mean that the public body is performing public function for public good and therefore the Government is bound not only by ordinary contractual obligations, but also by the constitutional philosophy. The Court clarified time and again and in this Opinion too that separation of powers is the essence of our Constitution. Policy making and choosing one policy over another are executive prerogatives. Referring to cases like that of the *Delhi Science Forum*[35], the Court stated that approval or disapproval of such policies should be discussed within the Parliament. However, if the implementation of a policy results in violation of constitutional limitations, the Court can interfere.

Although the Court is not concerned with policy making and it does not have the necessary expertise to do so, some of the policies may result in flagrant violation of fundamental rights wherein the Court will have to step in. While the Court gave sufficient flexibility to adopt methods other than auction, a rider in the form of judicial review is attached. Both the Main Opinion and the Separate Opinion discussed public good at length. As per the Court, auction method could be resorted to only when revenue maximisation is the objective of the state. If there are other considerations to sub serve common good, it is important to resort to other appropriate methods. Justice Khehar explained in detail what could be there for public good with the support of a hypothetical situation emerging out of section 11A of MMRDA.

All throughout, the Court mentions the non-viability of the method of auction in natural resources as the sole mode of allocation. It would have been prompt on the part of the Court to elaborate the reason for non-viability. At one point it compared mining concessions with patents. This requires more elaboration. Here, it is worth noting ISID Study[36] that outlines the problems that may occur in the allocation of mineral resources

[35] *Supra* note 22.

[36] *Supra* note 1 at 66.

by auction. As per the study, a fundamental division between bulk or surface minerals and non-bulk minerals is to be made. In the case of the former, most of the reconnaissance is done by the Geological Survey of India (GSI) and other agencies. Reconnaissance is important in the mining activity because of inherent uncertainties associated with the activity. The discovery and exploitation of mineral deposits and the very low success ratio of a profitable mine-making discovery are factors against auctioning this activity. The Study points out that the Hoda Committee recommended auction for only proven-ore bodies to ensure revenue and transparency in dealings.

The Draft Mining Bill, 2011[37], also explains this point. The Draft Bill mentions four types of mineral concessions: Non-exclusive reconnaissance licence, high technology reconnaissance-cum-exploration licence (HTREL)/prospecting licence (PL) and mining lease. Competitive bidding will take place in areas notified by the state government. Prospecting licence and mining lease can be given in those areas where reconnaissance is complete. HTREL can be given on first-in-time basis in areas where the presence of minerals is unknown and the area in question is not notified for bidding. Direct mining lease can be given only to the holders of HTREL or PL in the relevant area. Transfer of mineral concessions is permitted subject to intervention by the state government when the consideration is inadequate.

Possibly, the Court succeeded in convincing every party by bringing in the public good debate. Justice Khehar explained the public good through the non-revenue model in much explicit terms by reference to the *Kasturilal* case[38] and the *Meerut Development Authority* case.[39] The discussion about the low tariff for electricity in a hypothetical situation brought more clarity.

V Conclusion

Contemporary discussions about the mining sector and claims of stakeholders are examined in the paper from a legal perspective. The legal regime operating in the sector for core minerals is controlled by the Central Government. Although onshore minerals are within the state territory, ownership over these resources is subject to regulation by the Centre. A number of laws spanning subjects like, local self-Government, environment, sustainable development, rights of indigenous people, taxation and the like are part of the regulatory framework. There are a number of laws, regulations and authorities operating in the sector which raises issues of coordination among them. A flourishing illegal mining is the fallout of this defective governance.

The Presidential Reference is in the context of natural resources and the paper is limited to one among the many such resources, namely, minerals. The Supreme

[37] Draft Mines and Minerals (Development and Regulation) Bill, 2011 was approved by the Cabinet on 30th September 2011.

[38] *Supra* note 15.

[39] *Supra* note 30.

Court's Opinion benefits mineral allocation by keeping it in the centre stage at a time of intense debate and scrutiny of the same by different claimants. Generation of informed public opinion is essential in a parliamentary democracy. The sum and substance of the opinion of the Court is that the State can utilize natural resources for the development of the country. While doing so, the State is bound by the constitutional philosophy of public good or collective welfare. The same constitutional philosophy therefore mandates every action of the State to be tested against article 14 of the Constitution. The Court has developed and expanded the scope of equality clause through constitutional interpretation. Taking advantage of this interpretation, the Court dismissed the maximum revenue claims through auction and opened the field for allocation of natural resources by non-auction methods also. However, the Court cautioned the Union Executive about the scope of judicial review to examine the validity of State actions on a case by case basis.

It may be true to an extent that the Court gave an affirmative answer to the first series of questions posed by the Presidential Reference. The Court made it clear that it is not within the province of the Court to make a comparative analysis and then prefer one policy over another. It also did not want to hinder the economic policies of the State which is any way within the domain of the executive. However, the Court emphasised the power of judicial review to judge the validity of State actions.

Discussion on judicial review of State action is important as a reminder to the State that natural resources are held by the State as a trustee on behalf of the people. People's sovereignty is understood in accordance with the spirit of the Constitution. Sovereignty over natural resources was discussed in the United Nations General Assembly wherein the newly independent developing countries advocated for sovereignty to be vested with the people. The term 'People' meant Government representing the people of the country. Subsequently, it was adopted as a principle of international environmental law too. Gradually, questions were posed as to the way natural resources were dispensed in the developing countries. Global debates tried to clarify that the focus shall be on sovereign rights as well as responsibilities with respect to the conservation and management of natural resources. The Opinion of the Court upholds the economic sovereignty arguments with a rider in the form of articles 14 and 39(b).

THE ROLE OF LAW IN SOCIAL TRANSFORMATION

A.P. Singh[*]

I Introduction

Everything changes except the rule of change. And the life of a nation or a socio-political system is not an exception to this rule. They are essentially dynamic, living and organic systems. The political, social and economic conditions change continuously. Social mores and ideals change from time to time creating new problems and altering the complexion of the old ones. This change is not essentially always in positive directions, there could always be changes which are not desirable and are essentially negative in character. The vicissitude of life process moves in strangest of ways. But does that mean that human agency just does not have a part to play in this process of change? Does the change happen independent of the will of human agent? The way law and state have been organized during last two hundred odd years does not give that indication. The law in the broad sense and the whole legal system with its institutions, rules, procedures, remedies, is society's attempt through state to control this change process and give it a desired direction. This logic puts legal institutions and the state at the core of all social discipline. In theory the sovereign power, the ultimate, legal authority in a polity can legislate on any matter and can exercise control over any change process within the state. Indeed in a highly centralized political system, with advanced technology and communication apparatus, it is taken for granted that legal innovation can effect social change.[1] Roscoe Pound perceived the law as a tool for social engineering. Underlying this view is the assumption that social processes are susceptible to conscious human control and the instrument by means of which this controls is to be achieved is law.

In such a formulation, law is a short term measure for a very complex aggregation of principles, norms ideas, rules, practices and agencies of legislation, administration, adjudication and enforcement, backed by political power and legitimacy. The complex law thus condensed into one term is abstracted from social context in which it exists

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1 Sally Falk Moore, *Law as a Process: An Anthropological Approach*, (Routeledge and Kegal Paul, London, 1993).

and is spoken of as if it were an entity capable of controlling that context. Pospisil remarks that "the law of western society traditionally is analysed as an autonomous logically consistent legal system in which various rules are derived from more abstract norms."[2] These norms are arranged in a sort of pyramid derived from a basic norm or sovereign will such an analysis presents a legal system as a logically consistent whole, devoid of internal contradictions whose individual norms gain validity from their logical relationship to the more abstract legal principles implied ultimately in the sovereign's will and in a basic norm. Needless to say that the legal systems in most Afro-Asian countries, which were colonies of the western systems until very recently, have been designed on these western paradigms with an understanding that whatever undesirable that they have in their systems in terms of out-dated traditions, orthodoxies or social conventions that run against the western notions of rationalism, can be changed by way of the instrumentality of law. This paper is an attempt to understand the limitations of this legal mechanism in handling the change process of dynamic institutional systems like socio-legal or politico-cultural systems. What the paper seeks to aim at is an exposition of social phenomenon which has its own dynamic and any law that seeks to affect certain changes into it without taking into consideration the fundamental realities around is bound to result in failure.

II Understanding the Legal Mechanism

A very important point we have to understand is the role of politico-legal structures in the life of a nation. I would figuratively put it in a different format. Law, broadly understood can be talked of in two ways, 'lead law' and 'lag law'. Lead law is one where law determines the nature and direction of the goal towards which the system is to move. Lag law on the other hand would follow the social mechanism and would develop a rule to handle the emerging problem. We at the time of independence proceeded with an understanding that the indigenous model due to variety of reasons has become in-appropriate and is ridden with so much of social rot and therefore has to be given a new direction, the direction determined by the project of modernity. The project of modernity, the product of the western thinking has already maligned the indigenous thinking so much that the generation of political leaders proceeded on the assumptions of ushering into an era of modernity determined by western paradigm. A typical western thinking was typified by Henry Maine's dismissive remark that much of Ancient India's wisdom consisted of 'dotages of Brahmanical superstitions'.[3] This kind of an attitude towards ancient Indian traditions in law and justice represents the attempts made by the colonial administration to discredit the ideological foundations of Hindu hegemony of ideas. It would be interesting to learn how the so called disadvantaged groups in Indian society willingly accepted their position as part of the

2 Quoted by Norbert Rouland, in *Legal Anthropology*, (Athlone Press, London, 1994).

3 S. S. Dhavan, *Indian Jurisprudence and the Theory of State in Ancient India*, (National Academy of Administration, Mussorie, Printed Lectures, 1962).

Dharmic order of things. India's genius for accommodation can only be understood against the backdrop of this *Dharmic* order which holistically encompassed all of the society. This social system was not certainly the rigidified hierarchical structure as it has been presented to be, on the contrary, it was comparatively a dynamic order unparalleled in the contemporary societies and I proceed with an assumption that it still retains a lot of socio-political validity.

A Lead Law: The Instrumentalist Vision

Turning to the 'lead law' ' lag law' debate for the purpose of understanding the transforming social organism, one has to understand that 'lead law' approach proceeds on the instrumentalist vision of law treats law as an agency of power, an instrument of government, in so far as government is centralised in the state. It is seen as an independent agency of social control and social direction, autonomous and separate from the society it regulates. In this sense law acts upon society rather than is an aspect of society. It is considered to derive its effectiveness from its congruence with popular moves but from the concentration of political power, which the state represents. "Major ages of social change and mobility almost always involve great use of law and litigation",[4] writes Nisbet, but in modern societies law's capabilities have been seen as vastly greater than appeared to be in earlier eras. Putting of law into written form might be considered historically one of the first steps towards developing its potential as a precise instrument of government. Apart from this, accumulation of state power available for enforcement, professionalization of interpretation and application of legal doctrine, instrumentalisation of elaborate adjudicative processes, have helped in consolidating the instrumentalist role of law.

This instrumentalist vision, considers that sovereign power, the ultimate authority in a polity can legislate on any matter and can exercise control over behaviour within the state. Indeed in a highly centralised political system with advanced technology and communication apparatus, it is taken for granted that legal innovation can effect social change.[5] Roscoe Pound, perceived law as an instrument of social engineering. Underlying this vision is the assumption that social processes are susceptible to conscious human control and the instrument by which this control is to be achieved is law. In such a formulation law is a short-term form of a very complex aggregation of principles, norms, ideals, rules practices and agencies of legislation, administration, adjudication and enforcement backed up by political power and legitimacy.[6]

B Lag Law: The Sociological Vision

'Lag law' on the other hand relies on sociological vision of law, and looks at the capacity of law as an instrument of social control, as severely limited by emphasizing

4 As quoted in Roger Cottrell's *Sociology of Law: An Introduction* (Butterworths, 1992).

5 Sally Falk Moore, *Law as a Process*, (Routeledge and Kegan Paul, London, 1993).

6 *Supra* note 1.

upon the fact that if the legal rules are not in congruence with social mores they are not only in-effective, but are doomed to stultification almost at birth, doomed by the over ambitions of the legislator. "Law is vital", writes Nisbet, "but when every relationship in society becomes potentially legal relationship expressed in adversarial fashion the very juice of social bond dries up, and the social impulse atrophies.[7] For Habermass law is a support, protection and stabilizing structure of life world, within which values motivations and initiatives of individuals are born and nurtured. But as a directing instrument or medium it threatens to crush through violent abstraction the moral subtleties, local meanings and diversity of individual life.[8]

Legal consciousness studies with the declared opposition to the predominant position of prevalence of institutional viewpoint and public policy bias in law, emphasizes at the constitutive theory of social action, pointing its attack on the instrumentalist vision of law, what Mc Cann says countering the lead law approach with a bottom up jurisprudence[9]. According to Evick and Silby, the ways in which the law is experienced and understood by ordinary citizens as they choose to invoke law, to avoid it, or to resist it, is an essential part of Law. The attention of the investigator is directed towards these every day concrete social practices in which legal rules are perceived as constitutive elements of the reality. This emphasis on the routine instead of exceptional, on the social in place of institutional, on mental representations in place of coercive legal system is the common elements in this change of optic[10] from 'lead law' to 'lag law'.

III Understanding Indian Paradigm

We know India is a huge country, with huger complexities. A thousand million plus population, spread over 3.28 million sq km of landmass, with every kind of an imaginable weather pattern from minus 40 degree Celsius in the greater Himalayan region to 50 plus degree Celsius temperature in the deserts of Rajasthan, 16 well demarcated agro-climatic zones, 18 official languages written in 15 different scripts, around 2000 dialects and almost all religions of the world well and adequately represented. The variety of India is mind-boggling. Jawaharlal Nehru called India the museum of world religions.[11] India has a hoary past and a very vibrant and continuous culture of more than 5000 years of recorded history. But this is only one side of the picture. It has its bleak side as well. 1000 years of colonialism broke India's economy and its socio-legal structure as well. Queen Elizabeth's charter of 1600, authorizing East India Company to trade in the countries of the east and consequent colonization of the

7 *Supra* note 4.

8 Jurgen Habermas, *Legitimation Crisis* (Heinemann, London, 1976).

9 As quoted in Maurice Garcia, Villegas, "Symbolic Power without symbolic violence? Critical comments on Legal consciousness studies in USA", *Droit a Societe*, no-53/2003.

10 *Ibid.*

11 Jawaharlal Nehru, *Discovery of India* (Oxford university Press, 1976).

land called India (Bharat) marked a complete break with the past in terms of socio-legal structures. A new kind of a system was sought to be introduced and adjustments carried on for 350 years. In mid-20th century India finally broke off the shackles of the colonialism launching itself on the path of Republicanism, liberal democracy and secular state system.

Medieval India under Muslim domination witnessed its social institutions getting distorted and British colonialism broke it economically. In the mid-19th century when freedom struggle in the wake of what may be called the Indian renaissance started, it sought to not only stop the economic exploitation of the country by seeking political reforms but also sought to reform the social structure of the country from within. Indian social system, at this point of time was beset with a number of social evils. Caste system, untouchability, child marriages, widow burning, veil system discrimination against women were some of the most visible problems distorting the face of Indian social system. Caste system was the outgrowth of the Varna system or what may be called the classificatory principles which were scientifically designed principles of social organization. Without going into the polemical aspects of Varna system, I rely on Prof PV Kane,[12] in stating that Varna System was based on occupation rather than on birth and that there was both horizontal and vertical mobility available within this system. Widow burning and child marriages had their history in medieval wars, when the men-folk used to die fighting in the battlefield, the widows used to burn themselves for the purpose of saving themselves from falling into the hands of the enemy and get violated. In the later years these practices assumed the form of an orthodoxy and social evil.

Facing the Post-Independence Challenges

In 1947, when India finally broke off the shackles of colonialism, the challenges facing the country were enormous. For a legal professional it was a maze of imponderables, a mix of customary law, case law, and some assorted enactments. The social system was equally confused, beset with intractable social evils like caste system, unsociability, discrimination against women, child marriages and dowry system etc. The partition of the country and a senseless violence in its wake had left deep scars on the social psyche and deep suspicions amongst the people banking on divisions were so evident. Thus the challenges for those who were at the helm of affairs were enormous. Modern law, which has come to be recognized a technical instrument of rational governance, freed from its traditional roots in culture and communal values and moral contents was the option. It served a modern urge to remake the world grounded in the discovery of that world's contingent and changeable character. This law appeared morally and intellectually autonomous both in the sense of its distinctiveness as a governmental tool and its superiority over and independence from other competing normative systems. It also seemed comprehensive as it could be used to cover all contingencies

12 P.V. Kane, *History of Dharmashastras* (Bhandarkar Research Institute, Pune, 1968).

and provide man made solutions to all problems of order; unified and systematic as a body of doctrines linked by its formal rational qualities; a structure of human reason, subduing chaos and contingency and principled as a consistent expression of essential conditions of human life.[13]

IV Lead Law: The Ideal Option

With the above ideal view of law in mind the founding fathers of India's new destiny went on framing a constitution, which was to be the embodiment of all that is rational and modern. Justice, liberty, equality were given the pride of place as the basic organizing principles of the new constitution, caste system and untouchability which were considered the main stumbling blocks in the achievement of social solidarity were now intended to be done away with. Preamble of the Constitution provided the blueprint of the ideals, "We the People of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic, republic and to provide to all justice, social, economic and political, equality of status and opportunity, liberty of thought, expression, faith, belief and worship ... Enact and give to ourselves this Constitution."[14] Article 14 of the Constitution, guarantees equality as, "The state shall not deny to any person, the equality before law, or equal protection of laws within the territories of India.[15] This article provides two different types of rights, first, equality before law irrespective of one's caste, creed, race, religion, sex, place of birth etc and second equal protection of laws, meaning thereby that if there are inequalities existing in the socio-legal system, the law, shall take care of them and shall try to change circumstances by way of protective discrimination in such a way that everybody is treated equally and has the guarantee of a right to equality of respect and concern in the design of political institutions.[16] The underlying idea of article 14 is that there is nothing as unequal as the equal treatment of unequals.[17] And therefore to treat every citizen equally, who are found to be circumstanced unequally the state can resort to equalising means to protective discrimination. Article 15 provided a further guarantee against discrimination only on the basis of caste, class, religion, sex, place of birth or any of them. However it also provided that special provision could be made in favour of women and children and socially and educationally backward classes. Thus the members of scheduled caste and scheduled tribes could be provided with protective umbrella in various sectors of social life, including admissions in educational institutions. Article 16 went a step ahead and provided another guarantee of equality of opportunity in matters of public services or offices under the government. It further

13 *Supra* note 4.

14 Preamble to Indian Constitution, 1950 (The Constitution of India, was adopted on 26 Nov 1949 and came in to force, on 26 Jan, 1950.

15 Constitution of India, 1950.

16 V.N. Shukla, *Constitutional Law of India* (Eastern Book Company, Lucknow, 2000).

17 H.M. Sheervai, *Indian Constitution* (N.M. Tripathi, Bombay, 1993).

provided that special provisions in government and public services could be provided to scheduled caste and scheduled tribe's candidates. Article 16 (4) provided, "nothing in this article shall prevent the state from making any provisions for reservation for appointments or posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state. Article 17 of the constitution abolished untouchability and made it an offence to treat anybody as untouchables.[18]

A brief overview of equality provisions under Indian constitution would make it clear that the social evil of caste system and resulting deprivation of whole class of people weighed heavily in the minds of the framers of the Indian constitution and they sought to introduce not only the measures that would remove the caste disabilities from the Indian social scene, but also sought to provide compensatory measures for these deprived and less privileged sections of society, so that they could compete with the rest of the world on an equal footing. Under these provisions special provisions were made for peoples belonging to scheduled caste and scheduled tribes under which they are nowadays provided 22 percent reservations under government services. In fact in some states in India like Tamil Nadu, and Karnataka, the ratio of reservations of jobs in government services is as high as 69 percent.

Another kind of a protective measure provided to scheduled caste and scheduled tribes is the special representations in Parliament and state legislatures under article 334 of the constitution. Initially this particular provision was supposed to be a kind of transitory provision, to remain in force for 10 years. But this has been successively extended by way of constitutional amendments decade after decade. The last such amendment was made in the year 2000, extending it up-to 2010.[19] Another extension of the same up-to 2020 has recently been approved by the Cabinet.

V 'Lag Law' Reality of Social Order: Meeting the Contradictions

Now this system of legal instrumentalism by way of providing lead law rules, was expected to wipe out not only the caste system from the face of Indian social system but also to uplift the deprived sections of the society from the morass of underdevelopment, putting them on the equal footing with other sections of Indian socio-political system. This equality and solidarity amongst citizens was to be the fundamental conception of the political order in India. But the lead law model did not work the way, it was expected to. The reasons are not difficult to find.

18 Civil Rights Protection Act of 1956 was passed to reinforce the declaration made in article 17 of Indian Constitution, which made untouchability a penal offence. Glanville Austin in his celebrated work "Indian Constitution, the cornerstone of Nation" has written in this context, that Indian constitution is more of a social than political document.

19 The Constitution (Eighty Second Amendment) Act, 2000.

There were certain fundamental contradictions in the very approach. First of all, the very idea of law working as an instrument of social reform has its own limitations. Social phenomenon has its own dynamic and any law that seeks to affect certain changes into it without taking into consideration the fundamental realities around is bound to result in failure. Sumner,[20] talks about the folkways and mores of life, which change gradually as the conditions of life change. There is little scope for changing them fundamentally through any conscious act of legislation. Legislation has to seek standing ground on the existing mores and legislation to be strong must be consistent with the mores. Any law that deliberately separates itself from the mores and values weakens its social base and authority to the similar extent. Law, philosophy, religions and morality have no independent existence, but are various reflections of social dynamic. They are deeply rooted in the process of social development, yet virtually powerless to alter them. Philosophy and ethics too are products of mores and philosophy attempts the impossible when it tries to construe absolutes from the accidents of experience, which shape the mores[21].

For Savigny[22] too, law is an expression, one of the most important expressions together with language is the spirit of the people (*Volksgeist*). This mystical idea of law implies that law is much more than a collection of rules or judicial precedents. It reflects and expressed a whole cultural outlook. This does not mean that Savigny did not recognize the importance of legislation. Legislation is important, first to remove doubts and uncertainties in evolving law and secondly to enact settled customary law, but not in the manner of code which denies the evolutionary nature of law by setting out fixed final and comprehensive principles. Law loses its base and authority as it moves away, becomes detached and remote, loosing roots in the community life, ceasing to be a part of common consciousness of the people. But the question is what to do with the inhuman practices of the community life, which not only do not fit in any way with the modern liberal ideas of democratic life, but are also degrading of human life? Should such practices be tolerated in the name of common consciousness of the people? It has been noted above that Indian renaissance had witnessed a whole array of social reform movements. They were basically two streams of reformers. People like Mr Sharda, Jyotiba Phule, and Agarkar, were in favour of using the instrument of law for affecting social change and as they not only attempted to reform the system from within but also lobbied British colonial administration to enact legislations for affecting social reforms. [23]Thus they had enactments like Widow Remarriages Act, Sati Abolition act etc. This tradition of using law for affecting social reform continued even in the post-independence period and Civil Rights Protection Act 1955 (prohibiting practice of untouchability) Dowry prohibition Act, 1960, Child Marriage Prohibition Act 1961, and

20 *Supra* note 4.
21 *Ibid.*
22 *Supra* note 4.
23 Bipan Chandra, *Freedom Struggle* (Oxford university Press, 1990).

another Sati Prohibition Act in 1987. But what was the impact of it. Any impartial observer of Indian social scene would testify that this lead law approach of affecting social reform by using the instrumentality of law has not succeeded. Dowry by and large has spread more than it was in pre-1960 period and has turned out to be some kind of status symbol. Child marriages are still performed in plenty within the full knowledge and view of state machinery,[24] traces of caste system still seen and practiced in many parts of the country and Roop Kanwar Sati act is not a matter of too distant past. This clearly shows that the lead law approach of law has not really worked in India. What has, however happened is that either the legislation has been observed in its complete violation in full view of the administration or it has made the practices at which the legislation aims more covert and harder to detect.

It may be noted that right since 19th century, there was seen another stream of social reformers which wanted the things to be done other way round i.e. by way of following the lag law approach. Bal Gangadhar Tilak, Gopal Krishan Gokhale, and Mahatma Gandhi, were some of the more prominent figures who represented this stream.[25] They were conscious of the fact that political reforms without social reform were not going to be of any avail, however they wanted those reforms to come from within and not be thrust from outside upon the people. They therefore made it a mission of their lives to rouse the people from slumber and awaken them to the past glory of India. Bal Gangadhar Tilak, who was the political guru of Mahatma Gandhi, was convinced that education could play an important role in this regard and therefore with the cooperation of Agarkar and Chiplunkar he started some English schools in Poona and also had a long stunt with the press publishing Kesari and Maratha to educate the people.[26] But somehow the traditions of these leaders could not be continued in post independence period, a kind of naïve belief prospered that social change could be brought about by enacting laws from the top and no account was taken off the ground realities.

VI Challenges of Social Reforms and the Limitations of Law

The question still remain unanswered, what to do with the social evils like caste? Madhu Kishwar,[27] is of the opinion that even though, survival of kinship and community loyalties has some negative fallout, the existence of strong community ties provide for relatively greater stability and dignity to the individual, than they have as atomized individuals. This in part explains why the Indian poor, retains a strong sense of self-respect. It is that self-respect which the thoughtless insistence of egalitarianism

24 There is an auspicious day, called 'Akha-teej' which is the third day of Vaisakh month according to Hindu calendar, (Vikram samvat). On this particular day many child marriages are celebrated in full knowledge of the administration.
25 Bipan Chandra, *Freedom Struggle* (Oxford University Press, 1990).
26 *Supra* note 22.
27 Madhu Kishwar, Seminar, 1989.

destroys. The support system provided by kinship ties still provide greater social security than combined effect of all schemes that successive socialist governments have introduced to help the poor. Mark Tully[28] writes, "one way to discredit a system is to highlight its excesses and caste system has many, what continuous denigration of caste system has done is to add to the sense of inferiority that many Indians feel about their own culture. It could lead to greater respect for India's culture and even better understanding of it, if it were to be recognized that caste system has not been totally static, that it is adapting itself to today's circumstances and that this has positive as well as negative aspects. Caste system provides security and community to millions of Indians. It gives them an identity that neither western science nor western thought has provided, because caste system is not merely a matter of being Brahman or *Harijan*. It is also a kinship system. The system provides a wider support group than family.

This brief account shows that legislatures in India, in their enthuse of using lead law approach to affect reform in India has not worked well. There can be no gainsaying of the fact that social evils like caste system have got to be wiped out, at least humanized if possible, but that is possible if the behavioural patterns of the people, deeply embedded in customs and traditions is properly understood and proper help provided to them so that they may cop up with the modern realities of life, rather than changes thrust down from above. Roscoe pound put it this way, "for many reasons, including problems of proof, law cannot attempt to control attitudes and beliefs but only observable behaviour".[29] For Teubner, the primary problem in laws pathological effects is bureaucratising social relations and moral environment and misinterpreting and so creating disruption in contexts previously regulated by extra legal norms. ... Law can be effective but they must take into consideration the context which was previously regulated by extra legal norms. "Law can be effective but this effect may be to create uncertainty, chaos, distrust or hostility rather than to regulate properly."[30] And this is precisely what has been done by the lead law approach of law-making in India's Social environment. A High Court judgment[31] has put it beautifully, albeit in a different context, "bringing constitutional law and legal norms into such matters, is like bringing a bull into the china shop". What is necessary therefore is to quote Teubner again, "To find appropriate relationship between law and other normative orders to prevent this".

There has been substantial number of studies about the main factors that make social control through law effective. For example Yehzkel Dror distinguishes between direct and indirect uses of law in promoting change, Dror accepts that seeking social change through lead law approach is fraught with danger, but he emphasizes that law can and does play an important, albeit indirect role in fostering social change in many

28 Mark Tully, *There are no Full Stops in India* (Penguin Books, 1992).

29 Roscoe Pound, as quoted in Roger Cotterrel, *supra* note 4.

30 G.Teubner, as quoted in Roger Cotterrel, *supra* note 4.

31 *Harvindar Kaur* v. *Harminder Kaur*, AIR 1984, Del 66.

ways. First it can shape various social institutions, which in turn have a direct influence on the rate or character of social change. For example law structuring a national education system and providing for a national curriculum for schools influence the scope and character of educational institutions, which may help in affecting social change. Secondly law provides institutional framework for agencies specifically set up to exert influence change. Thus for example setting up boards, agencies of various kinds may be resorted to charged with promoting particular policy goals and finally creation of legal duties to establish situations in which change is fostered.

American sociologist, William M. Evans[32] while writing in the light of American experiences, shortlists some basic conditions, which may provide a framework of such a system of rules that may lead to social change. First source of new law must be authoritative and prestigious. Secondly the rationale of the new law must be expressed in terms of compatible and continuity with established cultural and legal principles. Law in fact can be powerful force for change, when the change derives from a principle deeply embedded in our heritage. Thirdly pragmatic models of compliance must be identified. The underlying idea of this condition is that law must not appear utopian but practical in its aims. Another important condition that Evans talks of is the element of time in legislative action. But this condition appears to be rather unenlightening answer to a complex question. The appropriate timing and strategy depends on the extent and complexity of change that law seeks to bring about.

VII Conclusion

The above analysis of an Indian paradigm case of trying to affect social change by a way of lead law should make it clear that in the final analysis the law cannot be seen abstracted from the social reality. Effectiveness of law in the ultimate sense must derive from the law as an instrument of social change working in tandem with social and cultural life of the people. This is what has wanted throughout the post-independence phase in India. There is no gainsaying of the fact that transformation of social system according to the need of the times and in accordance with the modes and mores of the people is a matter of necessity. However, this would require coordination of variety of efforts being made by researchers all across the country for providing an alternative policy frame. At the same time one has to keep on experimenting with the supposedly indigenous models, for which, I have put earlier, enough of scope is available at the grass-root level.

We must lay our site at the vibrant civil society that exists in India, and also the structures in terms of *Panchayati Raj* Institutions which can be used by social entrepreneurs and civil society organizations to make effective interventions and meaningful contributions in the process of governance. We have a very encouraging social terrain, with vigilant public opinion, vigorous press and vibrant non-

32 G.S. Sharma, *Law and Social Change* (Indian Social Science Research, New Delhi, 1971).

governmental organization sector, which can be used for making new experiments of laws in the governance process at the grass-root level. We also have unutilized and underutilised potential of millions of youth which can be used for making effective improvements in the developmental administration. However, what we lack is the political will to make use of opportunities available. What is needed is a kind of new dynamic of developmental politics to grow in the country and there we have the challenge well chalked out for willing social entrepreneurs to make use of and conduct experiment in the supposed models of indigenous law. What would be the shape of such experimentation is something which would require another full-fledged research paper. The only thing that can be kept in mind is there is a scope available and there is also a need for conducting experiments at the grass-root level of our political process in trying to balance the 'lead law' and 'lag law' approaches in the process of transformation of the social organism. This balancing between instrumentality of law and the folk ways and mores of the people or between lead law and lag law would really pave the way for real justice in action preparing the fundamental conception of a long lasting political order in India.

MATRIMONIAL LEGAL ENTITLEMENTS IN BANGLADESH
From Patriarchy to Gender Equity

*Jamila A. Chowdhur**

I Introduction

Women in Bangladesh are transitioning through a passage of change where the predominant traditional mind-set is undergoing a gradual transformation of knowledge in the society, from patriarchy to gender equality. One such change in knowledge can be achieved by making laws.[1]These adjustments are not just about knowledge – they are about a gradual attitudinal and social change. Society's attitude towards gender equality in Bangladesh is also progressing.[2] However, gendered power disparity and family violence remains in the society.[3] Thus social practices, whilst improving gradually, still embody considerable inequality yet legal practices are constantly redressing such inequality. The legal changes protecting women's rights are more forward-looking than attitudinal and social changes in the society. Therefore, the knowledge of a society towards right or wrong may change through law prior to a change in social attitude. Further a change in social knowledge through law can also provoke changes in the life of people in a society over time.[4]

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1 Dale Bagshaw, "The Three M's-Mediation, Postmodernism, and the New Millennium", 18(3) *Mediation Quarterly* 205-209 (2001).

2 Asian Development Bank, Country Gender Assessment: Bangladesh, Gender, Poverty and the MGDs (2004).

3 Roushan Jahan, *Hidden Danger: Women and Family Violence in Bangladesh* (1994); see also, Jahanara Haq, *Empowerment of Women in Bangladesh: From Nairobi to Beijing* (1995); Taslima Mansoor, *From Patriarchy to Gender Equity: Family Law and its Impact on Women in Bangladesh* (1999); Salma Sobhan, "Violence Women: Laws, Implementation and Reforms", in Waliur Rahman & Mohammad Shahabuddin (Eds.), *Judicial Training in New Millennium : An anatomy of BILIA Judicial Training with Difference* (2005); Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements and Challenges: Experiences from Bangladesh* (2008).

4 *Supra* note 1.

Sometimes, it is argued that changes in law cannot bring about effective change in society, and that legal changes cannot progress without social change. Further, there is a view that where legal principles and widely accepted social norms collide, changes in law might not work smoothly.[5] This paper, nevertheless, argues that even if social norms accept gender disparity, women can be empowered through gender equalising legal changes in the society. A change in social attitude is not a pre-condition for such a change in the power structure in a society. Gender-equalising legal changes can empower women by giving them a sense of entitlement[6] even when considerable gendered power disparity exists in the society. In other words different laws protecting women's rights may precede social changes and can create the possibility of fair outcomes for women if women can access such law.

Sometimes it is argued that significant structural barriers including barriers at an ideological level[7] hinder changes in law. Religion is sometimes claimed to be an ideological barrier for the development of law.[8] In Bangladesh, the family law for married women is highly guided by religion and it is sometimes interpreted that some of the pro-women decisions by the High Court Division (HCD) of the Supreme Court have been rejected by the Appellate Division (AD) of the Supreme Court on the ground of religious limits (as discussed later in this Paper). But a careful evaluation reveals that such rejections were made because the decisions of the HCD of the Supreme Court were not based on Muslim personal law or on any precedence from other Islamic countries. In most of the cases like *Nelly Zaman* v. *Giasuddin Khan*[9], *Md. Abu Bakar Siddique* v. *S.M.A. Bakar and Others*[10], *Md. Abdul Khaleque* v. *Selina Begum*[11] and *Md. Serajul Islam* v. *Maksuda Akhter*,[12] progressive decisions made in the HCD of the Supreme Court are approved by the AD of the Supreme Court. It can be said that though social practices still embody considerable gender inequality, gradual but steady change in the power structure of the society is strengthened by progressive laws created by the first instance courts and approved by both divisions of the Supreme Court.

5 Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* (Federation Press, Sydney, 1990).

6 Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (Jossey-Bass, San Francisco, 2000).

7 Graycar & Morgan, *supra* note 5.

8 Pasquale Ammicchino, "Beyond Article 9. Law and Religion in the Culture Wars before the European Court of Human Rights", (paper presented at Cardiff Centre for Law and Religion LARSN Meeting, Cardiff, 11 May, 2010), *available at:* http://www.slideshare.net/annicchino/cardiff-4024270.

9 (1982) 34 D.L.R. 221 (A.D.).

10 (1986) 38 D.L.R. 106 (A.D.).

11 (1990) 42 D.L.R. 450 (A.D.).

12 (2000) 20 B.L.D. 84 (A.D.).

II Significance of Marriage (Nikah) – A Conceptual Analysis

As matrimonial entitlements to women flow from marriage, it is imperative to throw light upon the concept of marriage as viewed under Muslim personal law and by the society in Bangladesh.

A Marriage (Nikah) under Muslim Law

As a religion, Islam urges every able man and woman to get married and have a lawful conjugal life. While describing the importance of marriage, the Holy *Quran* says:

> O mankind! Revere your Guardian-Lord, who created you from a single soul, created, of like nature, its mate, and from the two, scattered (like seeds) countless men and women; revere God, through whom ye demand your mutual (rights), and (revere) the wombs (that bore you): for God ever watches over you. (Al Quran 4:1).

In the ultimate Wisdom of Allah (the only one God in Islam), men and women are created from the same soul signifying their equality as human beings. The Holy Quran declares, *'and women shall have rights similar to the rights against them, according to what is equitable'* (Al Quran 2:118). Prophet Mohammod (Peace Be upon Him) (PBUH) has stated that: *'men and women are twin halves of each other' (Bukhari)* and underlined the reciprocal and interdependent nature of men and women relationship. *The Holy Quran* further depicts the foundation of marriage as based on love and tranquillity: *That he created for you mates from among yourselves, that you may dwell in peace and tranquillity with them, and He has put love and mercy between your (hearts): (Al Quran 30: 21).*

B Marriage in the Social Context of Bangladesh

In Bangladesh, society treats a marriage more like a ceremony to mark a social tie between a man and a woman than a religious event between couples.[13] Society observes a marriage ceremony for a consecutive four day period, while the religious part to solemnise marriage does not take more than an hour. Men usually marry around the age 25 to 30 while most of the women marry before 20. 'Under increasing economic hardship, the family preference is for slightly older girls who can undertake household duties'.[14] According to Islam, marriage creates a new, equal relationship between men and women. However, in social practice it is not so. One explanation for this is that 'as Islam spread beyond the Arab peninsula, many of the customary laws of the converted population found expression in the body of Muslim law as practised in

13 Rashida A. Khanum, "Feminism, Status of Women and Islam", 15 *Empowerment* 67 (2008).

14 Formanul Islam, "The Madaripur Model of Mediation: A New Dimension in the Field of Dispute Resolution in Rural Bangladesh" (unpublished manuscript, on file with author, 2002).

that area'[15] and clash of *Quranic* reforms with the strong social customs of new converts brought about new cultural adjustments that eventually lowered women's status in the society'.[16] Thus, marriage in Bangladeshi society is a blend of both socio-cultural norms and religion. Girls are considered as guests in their fathers' house and unable to fetch any long-term economic benefit for their family.[17] From their childhood, they are trained to acquire the skills needed to be a good wife, and a good mother. In traditional society, there is a saying that a modest wife enters her husband's house wearing red *shari* (traditional red dress for bride in a marriage ceremony of Bangladesh) and comes out wearing white *shari* (white dress to attend a funeral).[18] Therefore, under traditional norms and values of the society, marriage is considered as an everlasting but unequal bondage for women.

III Legal System in Bangladesh – A Bird's Eye View

In Bangladesh, the legal system may be said to be pluralistic in the sense that there exists a uniform and non-religious system of law, applicable to all Bangladeshis, e.g., criminal laws, land laws etc., on the other hand personal and private family matters such as marriage, its dissolution, custody of children and so forth fall within the ambit of the personal law of each religious community.[19] According to Muslim Personal Law (Shariat) Application Act 1937[20] parties who are Muslims shall be treated with Muslim personal law in family matters including marriage, divorce, dower, maintenance, guardianship, inheritance etc.

Muslim personal law is synonymous with the Arabic word *munakahat*, which means rules and regulations of family life, or the rules that regulate the day to day family life of a Muslim. *Munakahat* is a part of Islamic principles or *Shariat*[21] that evolves from four different sources: (a) *Al Quran*—the first source of *Shariat* that were revealed as will of God (*Allah*) transmitted through angel Gabriel and expressed to the Prophet (PBUH) during the particular moments of inspiration (*Wahi*); (b) the *Sunnah*—the second source that is also referred to as *Hadith*, developed as a compilation of sayings, deeds and approval of Prophet *Mohammod* (PUBH); (c) *Ijma*—the third source that is developed through consensus of interpretation by Islamic scholars on a juridical rule in any particular age where the literal meaning of the direction given through

15 Mansoor, *supra* note 3, at 28.
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 Shahnaz Huda, "Personal Laws in Bangladesh: The Need for Substantive Reforms", 15 *Dhaka University Studies*, Part F 103, 103 (2004).
20 Act XXVI of 1937, under section 2.
21 Shariat is divided into 4 categories (a) Ibadat to deals with rituals (b) Muamalat to deal with commercial matters (c) Jinayat to deal with offences, crimes and punishments (d) Munakahat to deal with matters relating to marriage and family life of Muslim.

Quran and *Sunnah* is ambiguous[22]; and (d) *Qias*—the fourth source that is application or extension of *Shariat* through analogical deductions established by a binding authority to a particular case[23] where the other three sources do not have any direct or indirect indication regarding any matter concerned.

Since the Muslim personal law based on the above mentioned sources are sometimes subject to different interpretations, in 1961 the then martial law government of Pakistan promulgated the *Muslim Family Laws Ordinance 1961* (MFLO) to unify the Code of Islamic *Shariat* on succession, polygamy, dissolution of marriage, maintenance and dower. The MFLO—'the only major family law reform in Pakistan' was made following the report of the Marriage and Family Laws Commission (MFLC).[24] 'The primary object of the Commission was to revive in a slightly modified form the rights granted to women by Islam'.[25] To express the liberal approach taken by the Commission while recommending reform, the MFLC report asserts[26]:

> What is not categorically and unconditionally prohibited by a clear and unambiguous injunction [in Quran] is permissible, if the welfare of the individual or of society in general demands it.

Thus, the power of the courts to apply Muslim personal law in dealing with Muslim family matters is derived from Muslim Personal Law (Shariat) Application Act 1937 which has been extended by MFLO and further developed through case law and subsequent statutes based on Islamic *Shariat*. Courts are guided by the statutory laws and other case laws developed based on *shariat* while dealing with family matters. However, if any family issue arises that is not dealt with by the statutory laws based on *shariat*, the interpretation of *Al Quran* and *Sunnah* is taken into consideration by the courts to fill the vacuum.

This is why provisions in Islam have a profound influence on the interpretation and development of family laws governing the marital life and divorce of Muslim women in Bangladesh. It is also the reason that religious rather than social norms are considered with more importance in this paper when explaining the context of matrimonial rights of women in Bangladesh.

22 Since *ijma* is a consensus of Islamic jurists, once a question is determined by *ijma*, it cannot be reopened by an individual jurist. However one *ijma* may be reversed by a subsequent *ijma*; see also, Afsar Ali Asghar, Fyzee, *Outlines of Muhammadan Law*, (4th ed. 1974).
23 With the expansion of Islam, even after centuries of Prophet *Mohammod* (PUBH), Islamic jurists were encountered by new cases which were not provided in the Quran, the *Sunnah* or any *Ijma* made earlier. Therefore, jurists had to make analogy on those cases.
24 Mansoor, *supra* note 3 at 107-8.
25 MFLO 1956, p. 1203 cited in *id.* at 95.
26 *Ibid.*

IV Evolution of Matrimonial Rights Through Statutory Laws and Case Laws

Matrimonial legal rights of Muslin women are evolved through statutory laws and case laws that are based on Muslim personal law which is referred to as *shariat* and the *Constitution of Bangladesh*—the Supreme law of the land[27] guides the enactment of all such legislations and case laws.

A Women's Rights under Constitutional Law

The protection of women as equal citizens of Bangladesh has been recognised in Part III of the Constitution of the People's Republic of Bangladesh. Equal rights are recognised for all citizens as their fundamental rights irrespective of religion, race, caste, sex or place of birth.[28] Not only is sex discrimination forbidden,[29] the Constitution goes one step further by categorically providing that 'women shall have equal rights with men in all spheres of the State and of public life'[30]. While article 28(2) of the Constitution provides for women's legal equality, article 28(4) further recognises the principle of positive discrimination by declaring that:

> Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.[31]

By placing these rights as fundamental, the violation of which can be enforced by law, the Constitution asserts a constitutional guarantee of these rights.[32]Article 26 of the Constitution reconfirms that any part of law made contrary to any fundamental right granted under the Constitution will be void from the commencement of the Constitution. The fundamental principles of state policy under Part II of the Constitution are not legally enforceable, but act as a guide to government. It is stated in the Constitution of Bangladesh:

> The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens...[33]

27 Article 7(2) of the Constitution states: 'This Constitution is, as the solemn expression of the will of the Republic, the Supreme law of Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.'

28 Bangladesh Constitution, articles 2, 28, 28(1).

29 *Id.*, article 28 (1).

30 *Id.*, article 28 (2).

31 *Id.*, article 28 (4).

32 *Id.*, article 44(1).

33 *Id.*, article 8(2).

The fundamental state policy under article 10 of the Constitution states that '*steps shall be taken to ensure participation of women in all spheres of national life*'.[34] Moreover, article 10 implies that women belong to a disadvantaged section of the society having limited access to different spheres of national life and should be promoted through positive actions. All these provisions are reflected in different legislations and subsequently developed case laws in Bangladesh.

B Development of Rights under Statutory Enactments and Case Laws

The most robust and pioneering law protecting the rights of Muslim women in Bangladesh is MFLO 1961 that was promulgated during the Pakistan era and later adopted after the independence of Bangladesh.[35] The Dissolution of Muslim Marriage Act, 1939 is another important law governing the matrimonial right of divorce by Muslim women in Bangladesh. The Family Courts Ordinance 1985 (FCO) is an umbrella law that extends the legal jurisdiction of family courts to try cases under MFLO 1961 and the Dissolution of Muslim Marriage Act 1939.

Muslim Family Laws Ordinance 1961

Following the liberal interpretation of different Islamic principles, the MFLO was promulgated in Pakistan to provide specific matrimonial rights relating to succession (S.4), polygamy (S.6), dissolution of marriage by husbands (S.7), dower (S.8), and maintenance (S.9) to Muslim women against their husbands. Among them, dissolution of marriage by husbands, maintenance and dower are dealt with in the family courts under the FCO and the issues of succession and polygamy are excluded from the jurisdiction of the FCO and tried separately under different civil jurisdictions.

(1) Right to Succession

Prior to the advent of Islam, women's right to inheritance was not recognised; they could not inherit any property from the death of their male relatives, i.e. father, husband and brother. By declaring the right to inheritance, Islam changed the status of women in an unprecedented fashion. The *Quran* declares, '*Men shall have a share in what parents and kinsfolk leave behind, and women shall have a share in what parents and kinsfolk leave behind.*' (*Al Quran* 2:7). Particularly, Islam gives inheritance right to wives who would get 1/8th of the total property[36] value left by her deceased husband (*Al Quran* 4 :11). The remaining 7/8th is divided between sons and daughters according to Islamic principles of inheritance.[37]

34 *Ibid.*

35 Mansoor, *supra* note 3 at 107.

36 A widow gets 1/4th instead of 1/8th of the total property left by her deceased husband, if they do not have any children (Al Quran 4 :11).

37 Jamila Ahmed Chowdury, "Women's access to justice in Bangladesh through ADR in family disputes", 3(2) *Studies in Islam and the Middle East* (2006).

Before the enactment of the MFLO, according to the Hanafi School of Islamic Jurisprudence followed in Bangladesh[38], minor children did not get any share of their deceased father's estate if the father died before the grandfather[39] and this caused the deceased person's wife and children to become vulnerable to the vagaries of the grandparent and uncles who become successors of their deceased father. Under such social reality, section 4 of the MFLO provided rights for the children to become valid successors of their deceased father's property. This also helps widows to maintain their family and bring up their children by getting income from or selling the inherited property of her children for cash.

Further court decisions also reaffirmed this right of a widow. For example, in *Mst. Fatima Begum* v. *Habib Ahmed*[40], the court decided that since it does not contradict with any specific *Quranic* verse mentioned in this regard, it would be permissible to depart from the usual Muslim custom about succession when adherence to fundamental provisions may go against the welfare of the children concerned.

(2) Right against Polygamy

Although Islam permitted polygamy, it also imposed stringent conditions for a polygamous husband to maintain equity among his wives. Regarding polygamy, *Al Quran* asserts:

> Marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess; that will be more suitable, to prevent you from doing injustice... (Al Quran 4:3).

Emphasising the need to maintain equity among wives the Prophet (PBUH) states:

> If a man has two wives and has not treated them equally and justly then he will emerge on the Day of Judgment in such a way that half his body will have fallen off.

When Prophet *Mohammod* (PBUH) got married with *Hadrath Umma Salme* and visited her, she caught hold of his cloth at the time of his departure. Then the Holy Prophet (PBUH) said: "If you desire, I can extend the time of my stay with you, but then I shall have to calculate the time of my stay with you and shall have to spend an equal time with each of the other wives".

[38] The various schools of Islamic law *(mazhab)* which prevail in the Muslim world are (a) the *Hanafi* school (b) the *Maliki* school (c) the *Shafii* school (d) the *Hanbali* school (e) the *Imamiya* school (f) the *Zaidiyah* school and (g) the *Ismailiya* school. Among these seven schools, the school followed in Bangladesh is *Hanafi* School of Islamic law.

[39] *Supra* note 37.

[40] (1968) 20 D.L.R. 254 (W.P.).

Describing the equal treatment of wives by the Holy Prophet (PBUH), *Hadrath Aisha* said that the Prophet (PBUH) used to distribute all his love equally among his wives, and then used to pray God to forgive him if any excess had been done unintentionally with any of them (*Tirmidhi, Ibne Maja & Nisai*). Since polygamy is permitted in Islam under certain strict conditions, the MFLO does not ban it, but rather it makes it more complicated and difficult to attain. It makes provision for imprisonment, a fine or both, when a husband fails to follow the regulations in the Act. According to section 6 of the MFLO, any person who wishes to marry again despite the presence of his current wife/wives, has to take written permission from his existing wife/wives and submit a copy of such permission to the Arbitration Council[41] (AC) with the objective of getting the permission from the AC. Getting remarried without getting permission from the AC may result in imprisonment of that person but keeps the marriage intact. Moreover, a marriage without getting such permission cannot be registered under the Muslim Marriage and Divorce (Registration) Act 1974 (LII of 1974) (S.6 (1)). The MFLO also imposes an obligation on a polygamous husband who married without the permission from the AC to pay immediately any amount of unpaid dower to his existing wife/wives and any arrears of this payment will be recoverable as arrears in land revenue (MFLO section 6(5)). Therefore, the MFLO has provided a mechanism by which the number of polygamous marriages in society may reduce.

Family Courts Ordinance 1985

The Family Courts Ordinance (FCO) 1985 is another significant law governing family disputes in Bangladesh. Before its enactment, people with family cases had to apply to civil courts to get decrees on different matrimonial rights, incurring huge financial cost.[42] The advent of the FCO enabled women to get judgments regarding almost all of their matrimonial rights by going to family courts only. The evolution of family court jurisdiction through case law is discussed here to highlight the pro-women changes reflected in the judgments of higher courts in many contemporary cases settled under the FCO.

(1) Right to Dower (Mehr)

A key feature of all Muslim marriage contracts that differs from a standard Western civil marriage is a provision regarding dower *(Mehr)*, a sum of money or any other valuables that the husband gives, or undertakes to give, to the bride upon marriage. In Islam, dower is a dignified receipt by wives as a token of love and respect rather than their price.[43] Although a Muslim husband is obliged to bear every expense necessary to

[41] A local body formed under MFLO to oversee marriage and dissolution of marriage in a community.

[42] Begum Asma Siddiqua, *The Family Courts of Bangladesh: An Appraisal of Rajshahi Sadar Family Court and the Gender Issues* (2005).

[43] *Supra* note 37.

keep his wife, dower is a first provision made by a Muslim man in this regard.[44] The Holy *Quran* says, *'You shall give the women their due dowers, equitably'* (*Al Quran* 4:4). It further dictates, *'O Prophet (Muhammad)! Verily we have made lawful to you your wives, to whom you have paid their mehr (dower)...'* (*Al Quran* 33: 50).

The religious right of Muslim married women to get a dower has been established as a legal right by the promulgation of MFLO and subsequently by other case law. As the amount and mode of payment of dower is kept flexible in Islam, to be determined by the couples themselves during marriage, the MFLO has not made any specification in this regard. By doing so, the MFLO has left the issue to be determined by the parties themselves in the marriage contract. However, if it is not determined in the marriage contract, the MFLO has enhanced women's rights to get dower by specifying that 'when there is no mention in the marriage contract about which part is prompt and which part is deferred, a wife can demand the entire amount due as prompt dower' (MFLO S.10). Moreover, to protect women's rights against their polygamous husbands who may have a second marriage and remain delinquent to pay proper maintenance to their first married wife/wives, the MFLO makes a provision that a wife can claim the entire amount of dower, whether prompt or deferred, if her husband remarries without her consent (MFLO S.5a). In *Atiqul Huque Chowdhury* v. *Shahana Rahim*,[45] it was held that if there is any breach by way of non-payment of dower fixed in a *kabinnama* (Marriage contract) registered by a *Nikah* (marriage) Registrar, it will amount to a breach of registered contract.

Although dower is considered as an inalienable right for Muslim women, in Bangladesh, women may be deprived of receiving their proper share of dower because of two customs of the society. Waiver of dower at the wedding night is a customary practice that might deprive women of their right to dower. On the wedding night, many husbands urge wives to waive the amount of dower.[46] Under Islamic law, a wife can forgo her dower but it should be a *free and voluntary* act. The Holy *Quran* directs:

> And give the women (on marriage) their dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer (*Al Quran* 4:4).

In the social context of Bangladesh where society teaches women to be submissive and less demanding of their husbands, it is very unlikely that newly married women could deny such a waiver proposal made on the first night of their marriage. As observed by Monsoor[47] "It is significant to point out that this imposed tradition to waive dower on the wedding night is another customary practice forced on women to

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44 Sheik Abrar Husain, *Marriage Customs among Muslims in India: A Sociological Study of Shia Marriage Customs* 119 (Sterling Publishers, 1976).

45 (1995) 47 D.L.R. 301 (H.C.D.).

46 *Id.* at 202.

47 *Ibid.*

deprive them of their right of dower". However, this customary practice is not accepted in case law. In the case of *Shah Banu* v. *Iftekhar Md*, (1956) P.L.D. 363 (Kar.), it was held that if a wife remits her dower just to retain the affection of her husband, the waiver is not valid.

Further case laws strengthened women's right to get unpaid dower. In *Sugra Bibi* v. *Masuma Bibi*[48], it was held by the court that unless otherwise provided in any legislation, the court shall award the entire amount claimed under a marriage contract as dower. However, while accepting the court's decree to pay dower, sometimes husbands seek to pay the unpaid dower by instalments but default after paying one or two instalments. If a husband breaches the terms of a marriage contract by not paying periodic maintenance, a case to recover dower can be filed within 6 years from the date of the breach of contract.[49] If a husband fails to repay even after the filing of the execution suit, the court may decree three months jail for his delinquency.[50] Ambiguity remains, however, on whether a three month imprisonment relieves the husband from further repayment. Following this social reality, in *Md. Serajul Islam* v. *Maksuda Akter*[51], it was held by the AD of the Supreme Court that if one instalment is enforced, there is no legal bar to proceeding with the subsequent executions. Therefore, the right of women to get dower is not only prioritised in religion and statutory laws, but is continually evolving through judicial pronouncements.

(2) Right to Maintenance (Nafaqa)

Under Islamic law, a lawfully married wife has a right to get proper maintenance *(nafaqa)* from her husband during her conjugal life. The husband's obligation to maintain his wife continues until he divorces her.[52] The Holy *Quran* directs:

> *'The duty of feeding and clothing nursing mothers according to decent custom is upon the father of the child'* (Al Quran 2: 233).

In His last Sermon, the Prophet Mohammod (PBUH) preached:

> *Show piety to women, you have taken them in trust of God and have had them made lawful for you to enjoy by the word of God, and it is your duty to provide for them and clothe according to decent custom.*

Moreover, Islamic law grants a Muslim wife the right to maintenance from her husband not only during the subsistence of the marriage but also after the dissolution of marriage during the *iddat* (waiting period)[53]. The Holy *Quran* asserts:

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48 (1877) 2 I.L.R. 573 (All).

49 Taslima Mansoor, *Judiciary and Gender on Trial: Reported and Unreported Decisions of Family Courts* (2006); see also, *Md Alamgir* v. *Habea Begum*, (2000) 52 D.L.R. 157 (H.C.D.).

50 *Md. Serajul Islam* v. *Maksuda Akter*, (2000) 20 B.L.D. 84 (A.D.).

51 (2000) 20 B.L.D. 84 (A.D.).

52 Mansoor, *supra* note 3.

> Let the women live (in Iddah) in the same style as you live according to your means: annoy them not so as to restrict them. And if they carry life in their wombs, then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring) give them their recompense: and take mutual counsel together according to what is just and reasonable (Al Quran 65:6).

Therefore, under Islamic law, if the wife happened to be pregnant during divorce, the husband is obliged to pay maintenance until delivery. In case of non-payment of maintenance, a woman is eligible to seek a legal remedy and can also apply to the local government body to issue a certificate specifying the amount that a delinquent husband will have to pay to his wife and children (MFLO section 9(1)). To ensure women's rights to maintenance from their delinquent husbands, the MFLO asserts that unpaid maintenance shall be recoverable from husbands as arrears of land revenue (MFLO section 9(3)). In *Rustom Ali* v. *Jamila Khatun*[54], the HCD of the Supreme Court did not grant past maintenance passed by the first instance court, on the grounds that the wife was not residing with her husband. However, when *Jamila* sought an appeal against the decision of the HCD, the AD of the Supreme Court reversed the decision of the HCD and upheld the decision of the first instance court by declaring that the wife will get past maintenance even though she did not stay with her husband.[55] Subsequently, similar judgments relating to past maintenance were also granted in other family cases placed before the HCD including *Hosne Ara Begum* v. *Md Rezaul Karim*[56] and *Sirajul Islam* v. *Helana Begum and Others*.[57] Nowadays, a husband cannot use the grounds that his wife refuses to live with him as a defence for not paying maintenance. Under a liberal interpretation of the case law, the right of a woman to leave an oppressive conjugal life without losing her right to maintenance has been established. Also, a wife can enjoy the right to maintenance even if she leaves her husband on the grounds that her husband is not paying her prompt dower upon demand.[58]

Going one step further, in *Md. Hefzur Rahman* v. *Shamsun Nahar*[59], the judge at the HCD of the Supreme Court observed "Considering all the aspects, we finally hold that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period that is to say, till the status of a divorcee is

[53] *Iddat* means a waiting period of three months before remarriage of a divorced wife to identify the paternity of the child, if any, in the womb of the divorced wife at the time of divorce. The Holy Quran states: 'Divorced women shall wait concerning themselves for *iddat* period (three monthly periods) nor is it lawful for them to hide what *Allah* hath created in their wombs if they have faith in *Allah* and the Last Day...' (Al Quran 2:228).

[54] (1991) 43 D.L.R. 301 (H.C.D.).

[55] *Rustom Ali* v. *Jamila Khatun*, (1996) 16 B.L.D. 61 (A.D.).

[56] (1991) 43 D.L.R. 543 (H.C.D.).

[57] (1996) 48 D.L.R. 48 (H.C.D.).

[58] Mansoor, *supra note* 3, at 207.

[59] (1995) 47 D.L.R. 54 (H.C.D.).

changed by remarrying another person". Four years later, however, with reference to the same case, the AD of the Supreme Court observed 'the judgement is based on no sound reasoning and it is against the principles set up by Muslim jurists of the last fourteen hundred years'.[60] As observed by the Chief Justice in the said case "the respondent and her supporters could only show that in different Muslim countries legislative provision has been made in accordance with which Mata'a or recompense has been provided to divorced women under certain circumstances even after the period of iddat. They have, however, not been able to show one instance from any jurisdiction where Ayat (verse of Quran) 241 has been interpreted to mean that maintenance is to be provided till remarriage".[61]

It indicates that, though in few instances the AD rejects the liberal case law passed by the HCD, such instances may happen only when case law passed by the HCD are not supported by the analogy made by Islamic scholars or case law form other Muslim countries. In *Jamila Khatun* v. *Rustom Ali*[62], it was held that a mother can claim not only for her own maintenance but also for the maintenance for her child. Moreover, a woman is not required to claim maintenance for her child through a separate suit; she can claim maintenance jointly with her own maintenance.[63] Furthermore, family court judges can include child maintenance in a decree, even when child maintenance was not originally claimed by a plaintiff.[64] In *Abdul Aziz* v. *Sonia Parvin Liza*[65], it was held by the HCD of the Supreme Court that it is not only the wife who can file suit in the family court for her own past maintenance but the children also can claim past maintenance if they are not maintained by the father.

(3) Right to Dissolution of Marriage

Islam has discouraged the continuation of bitter conjugal relationships marked by cruelty or inhumane behaviour towards wives. The Holy *Quran* says, '*Either retain them [wives] with humanity or dismiss them with kindness*' (*Al Quran* 2:23).

According to Muslim law, the contract of marriage may be dissolved in any one of the following ways[66]:

(a) through a decision by the husband at his will by pronouncing three times the word '*talaq*' and without the intervention of the court, called *talak-ul-bain*

(b) by the proposal of the wife and mutually agreed by the husband and wife, without the intervention of the court, called *khula* or *mubarat*

[60] *Md. Hefzur Rahman* v. *Shamsun Nahar*, (1999) 51 D.L.R. 172 (A.D.).

[61] *Id.* at 49.

[62] (1996) 16 B.L.D. 105 (A.D.).

[63] *Saleha Begum* v. *Kamal Hossain*, (1998) 50 D.L.R. 180 (H.C.D.).

[64] *Jamila Khatun* v. *Rustom Ali*, (1996) 4 B.L.D. 105 (A.D.).

[65] (2006) 58 D.L.R. 583 (H.C.D.).

[66] Husain, *supra* note 44 at 139.

(c) by the wife at any time without assigning any reason and without the intervention of the court, if right to divorce is delegated to a wife by the husband in the marriage contract, called *talaq-e-tafweed* (S.18 of the marriage contract)[67]

(i) by a judicial decree following a suit filed by a wife to get a divorce.

(d) The fourth type is dealt with by the family courts. S.2 of the Dissolution of Muslim Marriage Act 1939 (Act VIII of 1939) sets out grounds under which a Muslim woman can apply to a court to get a divorce from her husband.

(i) The whereabouts of the husband has not been known for a period of four years.

(ii) The husband neglected or failed to provide for his wife's maintenance for a period of two years.

(iii) The husband took an additional wife in contravention of the provisions of case law 1961.

(iv) The husband has been sentenced to imprisonment for a period of 7 years or more.

(v) The husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.

(vi) The husband was impotent at the time of marriage and continues to be so.

(vii)The husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.

(viii) The husband treats the wife with cruelty, that is to say—(a) habitually assaults her; (b) associates with women of evil repute or leads an infamous life; (c) forces her to live an immoral life; (d) disposes of her property or prevents her exercising her legal rights over it; (e) obstructs her in observing her religious practices; (f) if he has more wives than one, does not treat her equitably in accordance with the provision of *Al Quran*; or (g) makes her life miserable by cruelty of conduct, even if such conduct does not amount to physical ill treatment.

The form of divorce by the husbands (*talaq)* in which Muslim women are most vulnerable to the vagary of their husbands is *talaq-ul-bain*, which is executed just by the pronouncement of the word '*talaq*' three times by a husband. It was held by the court that no particular word is prescribed for affecting a *talaq* and no proof of intention is required.[68] It was not necessary for the *talaq* to be pronounced in the presence of the wife or to be addressed to her.[69] However, the MFLO has strengthened women's rights

[67] The problem of such divorce is that women in Bangladesh are still not aware of the need to bargain for this right and to include it in the marriage contract; thus, they fail to enjoy the right after marriage.

[68] *Ma Mi* v. *Kallandar Ammal*, (1927) 54 I.A. 61.

[69] *Ahmad Kasim* v. *Khatoon Bibi*, (1932) 59 I.L.R. 803 (Cal.).

against such sudden pronouncement of *talaq* by complicating and stretching the period of pronouncing *talaq* by husbands. According to section 7 of the MFLO, when a husband pronounces *talaq* to his wife, he should serve a written notice denoting such *talaq* to the chairman of the Union Council[70]. After receiving such notice, the chairman should form an arbitration council and try reconciliation within 30 days of the serving of the notice. The marriage dissolves automatically within 90 days of serving the notice unless there is a resolution or revocation of *talaq* during this period.

Following the enactment of the MFLO, the pronouncement of court decrees regarding *talaq* is developing for women. In *Kazi Rashed Akhter Shahid* v. *Most. Rokshana Chowdhury*[71], it was held that *talaq* will not be effective and the marriage will subsist if proper notice of such *talaq* is not served to the chairman of the Union Council according to section 7(1) of the MFLO.

(4) Right to Guardianship and Custody of Children (Hizanat)

Under the *Hanafi* School of Islamic Jurisprudence, a mother can retain custody of her daughter until puberty and a male child until the age of 7 years. Over the years, these Islamic principles were practised in different courts to determine the guardianship of minor children. For example, in *Imambandi* v. *Mutsaddi*[72], it was held by the court that it is perfectly clear that under the Muslim law, the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. In *Besant* v. *Narayaniah,*[73] it was held that the court has no power to appoint a guardian of the person of a minor whose father is living. Nevertheless, instead of using a fixed age-yardstick, the 'best interest principle' became operative after the enactment of the FCO that emphasised the Guardianship and Wards Act 1890 in determining custody of children. Section 24 of the FCO granted a right to women in getting lawful custody of their children even after the stipulated age in Muslim *Hanafi* law by accepting the provisions of the Guardianship and Wards Act 1890 which states that in appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor (section 17).

In *Rafiq* v. *Smt. Bashiran*[74], it was held that where the provisions of Muslim personal law are in conflict with the provisions of the Guardianship and Wards Act 1890, the latter takes precedence over the former. A similar decision was given in *Ayesha Khanam* v. *Major Sabbir Ahmed.*[75]

[70] Union council is the lowest tier of the local government in Bangladesh. This local body represents a union or cluster of few villages.

[71] (2006) 26 B.L.D. 613 (H.C.D).

[72] (1918) 45 I.A. 73.

[73] (1914) 41 I.A. 314.

[74] (1963) AIR 239 (Raj.).

[75] (1994) 46 DLR 399 (H.C.D.).

Presently the judiciary in Bangladesh focuses on the paramount consideration of welfare of the minor while determining the custody issue. In *Md. Abu Bakar Siddique* v. *S.M.A. Bakar and Others*[76], the AD of the Supreme Court observed that it is true that, according to Hanafi School, the father is entitled to the *hizanat* or custody of the son over 7 years of age. Indisputably, this rule is the recognition of the prima facie claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the *Quran* nor *Sunnah* would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure.

In *Rehanuddin* v. *Azizun Nahar*[77], the HCD of the Supreme Court agreed with the decision of the court of District Judge when it held that although the appellant was the natural guardian under the Muslim law, the mother in facts and circumstances of the case was entitled to be appointed as the guardian.

Therefore, although according to the Muslim *Hanafi* law, a boy should remain in the custody of his mother until his seventh year and a girl until her puberty, family court judges in case of determining custody, place prime emphasis on the welfare of the child – not their age.[78] The right of a mother to get custody of a daughter until she becomes 16 was further ascertained by the AD of the Supreme Court in *Abdur Razzaq* v. *Mst. Jahanara Begum*.[79] In *Romana Afrin* v. *Fakir Ashrafuddin Ahmed*[80], it was held that a Muslim mother has absolute right against the father to get the guardianship of minor child until she remarries. The FCO institutionalises such change by categorically mentioning that following the provisions of the Guardianship and Wards Act 1890 (Act VIII of 1890), custody of children is determined on the basis of the welfare of children, irrespective of personal laws. Therefore at present, the family court determines guardianship and custody based on the Guardianship and Wards Act 1890 which emphasises the welfare of children.[81]

(5) Right against Involuntary Restitution under Court Decree

Though the term 'restitution of conjugal life' is used under section 5 of the FCO as one of the jurisdictions of the family court, it does not provide any definition in the Ordinance. The earlier approach of the courts was towards the involuntary restitution of conjugal rights sought by the husbands to get their wives back, despite the wives' unwillingness to go back to live together.[82] Though non-payment of prompt dower is one of the defences by which a wife can refuse the involuntary restitution of her

[76] (1986) 38 DLR 106 (A.D.).

[77] (1981) 33 DLR 139 (H.C.D.).

[78] *Md. Abu Baker Siddique* v. *SMA Baker and others*, (1986) 38 DLR 114 (A.D.); see also, *Bhakti Bhusan Shaha* v. *Moulana Ruhul Amin*, (1986) 38 DLR 396 (H.C.D.).

[79] (1996) 16 B.L.D. 163 (A.D.).

[80] (1996) 16 B.L.D. 487.

[81] Siddiqua, *supra* note 42 at 21.

[82] Chowdury, *supra* note 37 at 287.

conjugal life, the courts, before the independence of Bangladesh in 1971, seemed not to be very appreciative of this defence.

The shift in the attitude of the judiciary can be understood if the cases reported after the emergence of Bangladesh are considered. After the independence of Bangladesh in 1971, judges have advanced *social* welfare arguments towards women. As observed by Justice S. M. Hussain in *Hasina Ahmed* v. *Syed Abul Fazal*[83]the courts, while adjudicating on family dispute and administering personal law, shall take into account not only the factual and the legal position and questions involved in a particular case but also consider the social dynamics when the concept of law is change in a changing society. Previously decades before where a wife's claim for a divorce could be resisted for well-established reasons it cannot be resisted for the self-same reasons because of the very basic fact that with the changing society women are coming of their own and their independence of mind and will must be respected while considering the legal and contractual obligation in marriage between man and woman as such.

The judicial activism[84] to adapt social changes protecting women rights is also reflected in the leading case, *Nelly Zaman* v. *Giasuddin Khan*,[85] where the court held that it may be specially mentioned that by lapse of time and social development, the very concept of husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband has become outmoded and does not fit in with the accepted State and public principle and policy of equality of all men and women being citizens equal before law entitled to equal protection of law and to be treated only in accordance with law as guaranteed in article 27 and 31 of the Constitution of Bangladesh.

In a subsequent case, *Hosne Ara Begum* v. *Alhaj Md. Rezaul Karim*[86], it was upheld that 'cruelty of conduct of the husband is a valid ground to refuse the restitution of conjugal rights by the husband'. Though in Bangladesh, a majority of women perform their household chores voluntarily by themselves, by giving a liberal interpretation of the term *cruelty*, the HCD of the Supreme Court asserts that in a well-off family, even compelling a wife to do domestic work can be treated as cruelty of conduct on the grounds of which a wife may refuse restitution.

However, if any party wants to reconcile with his/her partner and the other spouse accepts such proposal voluntarily to live together again and continue their conjugal life such reconciliation is possible under in-court mediation. The Holy *Quran* has

[83] (1980) 32 D.L.R. 297.

[84] Judicial activism refers to judicial creativity through which judges provide their views to expand individual rights departing from established precedents or in opposition to supposed legislative intent.

[85] (1982) 34 DLR 221.

[86] (1991) 43 DLR 543 (H.C.D.).

commented on harmonious reconciliation and dictates *'if you fear a breach between the two, appoint arbitrator each from the family of husband and wife. If they both desire agreement, Allah will effect harmony between them'* (*Al Quran* 2: 35). Reconciliation is emphasised in Islam because according to the Holy Prophet (PBUH), *'The most detestable of lawful things near Allah is divorce'*.[87]

Although the FCO had the jurisdiction to try cases for restitution of conjugal rights, family courts in Bangladesh do not currently exercise such provisions in litigation. The reason is that if restitution were exercised through litigation where everything depends on evidence, and if husband proves his evidence, the wife had been ordered forcefully by the court to go with her husband 'without her consent', and any court order making such compulsion violates the fundamental rights incorporated in articles 27[88] and 31[89] of the Constitution of Bangladesh.[90] Therefore, after a progressive start with the MFLO in 1961, developments in case law over the years have made family laws in Bangladesh friendlier and more protective of women's rights.

V Change in Social Knowledge through NGO Awareness Programs

As argued earlier, even when gendered power disparity exists in a society, women can be empowered to claim and receive their legal entitlement by gender equalising laws and progressive case law that ensure equal rights for women. It is essential to enhance women's access to such laws. A gradual change in the social outlook is also improving women's awareness about their rights and improving their status in the society. Different NGOs in Bangladesh, including Bangladesh Legal Aid and Services Trust, *Ain-o-Shalish Kendro*, Bangladesh National Women's Lawyers Association and *Madaripur* Legal Aid Association are playing a major role by providing legal education and counselling to enhance people's, especially women's, general understanding of law. Legal education can generate long-term legal awareness, but it cannot reduce the cost of in-court representation for which legal aid plays an important role. Thus, NGOs are providing legal aid for access to litigation and making poor women more capable of getting the benefits of gender equalising legal changes in law. Thus NGOs may change the knowledge of a society in two different ways: firstly, they change the notion of women's legal rights through legal awareness programs at the grass-roots level and secondly, they give messages to the patriarchal society that even poor women are capable of exercising their legal rights by using NGO legal aid available to poor clients free of charge. Thus, increased social awareness and a gradual change in social knowledge about the notion of women's rights, together with a legal aid program

87 Alhaj Maulana Fazlul Karim, *Al-Hadis* 702 (1988).

88 'All citizens are equal before law and are entitled to equal protection of law' (article 27).

89 According to article 31 of the Constitution, 'to enjoy the protection of the law is the inalienable right of every citizen, wherever he may be, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law'.

90 Siddiqua, *supra* note 42 at 53.

provided by the government and NGOs enables women to participate more effectively in a dispute resolution process, especially in mediation.[91]

VI Conclusion

Under current social and economic conditions, women in Bangladesh remain in a subjugated position when compared to their male counterparts. As demonstrated in this paper, the condition of women in terms of their legal entitlements on different matrimonial issues is progressing gradually. Islam advocates for women's rights in society, and family laws promulgated on the basis of such Islamic principles also reflect these women's rights. Moreover, enactments of gender equalising legislations and liberal interpretation of case laws as discussed throughout this paper have strengthened women's legal rights in the society. If women can access these laws and if they have the means to enforce such laws, it might be possible to enhance their rights in society despite the existence of gendered power disparities and family violence. On the other hand, the improved legal rights may have little practical effect if they are inaccessible to ordinary women. Often the problem is not the law itself, but that women cannot access law to fight against social inequality.[92] For example, due to women's limited access to court, discriminatory and suppressive marital relationship may persist in the society. Furthermore, improvement in law matters little for women if they do not have adequate knowledge of their legal rights.[93] But women who have funding and knowledge of the available legal protections against violence may be able to access laws against illegal oppression or other associated violence. The perpetrator would face punishments which would otherwise not be possible in the absence of such law. Therefore, law is necessary if not sufficient to uphold women rights in a society.

91 Choudury, *supra* note 37 at 118.

92 The Asia Foundation, *In Search of Justice: Women's encounters with Alternative Dispute Resolution* (2002).

93 Mauro Cappelletti, "Alternative Dispute resolution Processes within the Framework of World-Wide Access- to-Justice Movement", 56 *Modern Law Review* 282 (1993); see also. The Asia Foundation, *The Democracy Partnership* (2002).

HAZARDOUS WASTE AND ENVIRONMENTAL JUSTICE FROM THE DEVELOPING COUNTRIES PERSPECTIVE

Stellina Jolly

I Introduction

The world is becoming increasingly urban. Historically, urbanization has coincided with, and has been accompanied by, increased consumption and ecological degradation across the globe.[1] The ecological impact of urbanization has not been very positive. Some of the obvious consequences include the problem of depletion of resources, the all-pervading pollution, climate change and mismanagement of waste. As disposal facilities for hazardous waste become scarcer and more costly in industrialised countries, lesser developed countries are being increasingly targeted as dumping grounds. This places a disproportionate burden on countries that lack the capacity to deal with the wastes in an environmentally sound manner. The practice of exporting hazardous wastes for disposal in developing countries has been described as environmental injustice or environmental racism.[2] This negative fallout has become a major justification for a new development paradigm: that of sustainable development a development strategy which meets the needs of the present generations without compromising the needs of the future generations. The focus of this paper will be on the efficacy of the Basel Convention to promote environmental justice for developing countries by eliminating hazardous waste exports from industrialised developed countries to developing countries.

II Environmental Justice and Hazardous Waste

Environmental justice is a term that covers a wide range of issues and has many meanings to environmental groups, activists, and academicians. The environmental justice movement emerged in the American context as a combination of environmental

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1 Darshini Mahadevia, "Sustainable Urban Development in India: An Inclusive Perspective", *Development in Practice*. 11(2-3):242-59 (2001).

2 H R Marbury "Global Environmental Racism" 28 *Vanderbilt Journal of Transnational Law*, 1995 at 251, 293.

activism and civil rights advocacy, which links environment, race, class, gender, and social justice concerns in an explicit framework. [3] The movement first received national attention in 1982 when more than 500 protesters were jailed following the sitting of a landfill in Warren County, North Carolina.[4] The demonstration resulted from a decision to include approximately 330,000 cubic yards of polychlorinated biphenyl (PCB) contaminated soil in landfill.[5] A claim for justice made by environmental justice activists includes the equitable distribution of environmental goods and services, as well as procedural equity, democratic participation.[6] Generally the term environmental justice was not used in the context of transfer and disposal of waste. But with the new paradigm development shift in the form of sustainable development with its intergenerational and intra generational equity component, environmental justice was extended to include transboundary waste disposal. The concept of intergenerational equity divided in two sub-concepts, intergenerational equity and intra-generational equity.[7] Intergenerational equity emphasizes the temporal aspect of the concept, meaning that it relies on the rights and obligations that each generation has toward the others.[8] The principle of intergenerational equity is based on the recognition that human life results from the earth's natural resource base, and its very survival is dependent on that resources base, whilst recognizing that humans have the unique capacity to alter the environment upon which its existence depends.[9] This places the obligation on the present generation to conserve and maintain the present resources by minimizing long-term and irreversible damage to the environment through conservation, and the conservation of the past and present natural and cultural heritage for future generations.[10] The intra-generational aspect can be addressed as a more spatial matter, because it prevents the rights and obligations deriving from the intergenerational aspect from being allocated to only one portion of the international community. One can easily read this principle to waste disposal from developed countries to developing nations which places undue burden and causes grave injustice to them by exposing them to various health and environmental hazardous. Environmental justice thus becomes a component of sustainable development. In fact Agenda 21, blue print to achieve sustainable development emphasises the paramount importance of ensuring effective control of the generation, storage, treatment, recycling, transport and disposal of hazardous wastes for proper health, environmental

3 Dorceta E. Taylor, "The Rise of the Environmental Justice Paradigm Injustice Framing and the Social Construction of Environmental Discourses," *American Behavioral Scientist*, vol. 43 no. 4 at 506, 508-580 (2000).

4 Marbury, *supra* note 2 at 253.

5 *Ibid.*

6 *Ibid.*

7 Patricia Birnie, Alan Boyle, *International Law and the Environment*, at 86-95 (2002).

8 *Id.* at 89.

9 Alexandre Kiss Dinah Shelton, *Guide to International Environmental Law* 106 (2007).

10 *Id. at* 109.

protection, natural resource management, and sustainable development.[11] Further ratification of the Basel Convention was listed in Agenda 21 as one of the overall targets to achieve sustainable development.[12]

A *The Problems with Hazardous Wastes*

Hazardous wastes, as by-products of industrial or commercial, exist in solid, liquid, and gaseous forms. Hazardous wastes can range from materials contaminated with dioxins and heavy metals, such as mercury, cadmium, or lead, to organic wastes.[13] Whatever may be the type and composition hazardous waste poses several major problems. These include:

(i) health and environmental hazards from uncollected waste;

(ii) health and environmental hazards from collected but poorly disposed of waste;

(iii) The economic burden of waste disposal on towns and cities.[14]

Further improper handling and disposal of hazardous wastes can affect human health and the environment through leakage of toxins into groundwater, soil, waterways, and the atmosphere.[15] Uncollected and dumped waste from industries and the community are a serious health hazard and lead to the spread of infectious diseases. Secondly scavengers operating on landfill sites, without proper facilities and equipment, are typically exposed to a range of public health and environmental hazards associated with open landfill sites.[16] The group typically at risk from the open and unscientific dumping of waste include – the population in areas where there is no appropriate waste disposal method, especially the pre-school children; waste workers; and workers in facilities producing toxic and infectious material.[17] Other high-risk group include population living close to a waste dump and those, whose water supply has become contaminated either due to waste dumping or leakage from landfill sites.[18]

11 *Agenda 21: Programme of Action for Sustainable Development*, Rio Declaration on Environmental Development, UN Conference on Environmental Development UN Doc A/C.151/26 (1992), Ch 20.1. Agenda 21 is a program of action for sustainable development agreed to by all governments at the UN Conference in Rio de Janeiro in 1992.

12 *Ibid.*

13 Jonathan Krueger, *The Basel Convention and the International Trade in Hazardous Wastes* 43-51 (2001), Olav Schram Stokke and Oystein B. Thommessen (Eds.), *Yearbook of International Co-operation on Environment and Development* (2002).

14 David pearce, "Economics and Solid Waste Management in the Developing World", CSERGE working paper 94-05 (2000).

15 U.S. Environmental Protection Agency, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 1997, April 1999 [EPA 236-R-99-003].

16 *Ibid.*

17 Margaret N. Maxey, "Hazards of Solid Waste Management: Bioethical Problems, Principles, and Priorities", 27 *Environmental Health Perspectives* 223-230 (1978).

18 *Ibid.*

While exact figures regarding the amounts of hazardous waste generated internationally are quite difficult to specify, some information does exist. Trans-boudary transportation of hazardous waste is a potentially salient area for debate. The volume of hazardous waste generated annually worldwide has increased from roughly five million metric tons in 1947 to in excess of 300 million metric tons in 1988 before the BASEL initiative.[19] The hazardous waste trade is likely to increase substantially in the future because of an increase in electronic waste.[20] The overwhelming majority of the amount of waste is generated by the United States, with another from Western European countries.[21] Though most of the wastes are generated in developed world, dumping and disposal of waste take place mostly in developing nations. The main causes of the international, and especially the north–south, waste trade are cheaper disposal costs in the south and opposition in the north to new hazardous waste disposal facilities. For instance, the average disposal cost for one tonne of hazardous waste in Africa was between $US2.50 and $US50, while in the OECD it ranges from $US100 to $US2000.[22] The rationale for this statement was that any 'health-impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages.'[23] For example, Guinea Bissau entered into several contracts to receive American and European wastes over a five year period for $600 million, which roughly matches its annual gross national product.[24] The contract was never enforced because of public concern within Guinea-Bissa.[25] A nother reason for international transfers of hazardous waste is their potential value as secondary raw materials to be recovered, reused, or recycled.[26] Export of hazardous waste to developing countries has created problems for several reasons. First, a number of exporters have misinformed or deceived the recipient country of the true contents of the waste.[27] Second, many countries do not possess the necessary technology or expertise to properly dispose of hazardous wastes.[28] Due to these events, environmental groups

19 David P. Hackett, "An Assessment of the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal", 5 *Am. U.J. Intl L. & Poly* 291 (2001).

20 Sejal Choksi, "The Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation", 28 *Ecology Law Quarterly* (2001).

21 "Who Gets the Garbage?" *TIME*, July 4, 1988, at 52.

22 Kruger, *supra* note 13 at 45.

23 D Henwood, "Toxic Banking; World Bank's Environmental and Global Policies", 250 *Nation*, 257 (1992).

24 Anderson, Dickey, Marshall, Meyer, Obe, & Stanger, "The Global Poison Trade", *Newsweek* Nov. 7, 1988, at 66-68, "EC Rules on Waste Exports Often Ignored; Ministers Disagree on Tightening Standards", 1 *Int'l Env't Rep. (BNA)* 375 (July 13, 1988).

25 A Vir "Toxic Trade with Africa", 23(1) *Environment, Science & Technology Journal* 24 at 25 (1989).

26 *Ibid.*

27 *Ibid.*

28 Hackett, *supra* note 19 at 295.

such as Greenpeace and the Natural Resources Defence Council have called for a ban on all exports of hazardous waste.[29]

III BASEL Convention and Environmental Justice

In 1987, UNEP adopted the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes (Cairo Guidelines), which set forth recommendations regarding the export of hazardous waste.[30] The Cairo Guidelines call for notification to receiving and transit nations of any export and consent by those nations prior to export. The exporter is to ensure that the disposal site is adequate to handle the hazardous waste and that disposal complies with requirements at least as stringent as those in the exporting nation.[31]

The growing environmental awareness culminated in the conclusion of the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal (Basel Convention or Convention) under the United Nations Environment Programme (UNEP) in 1989.[32] The overarching objective of the Basel Convention is to protect human health and the environment against the adverse effects of hazardous wastes.[33] The most important achievement of the convention lies in the fact that UNEP was able to forge an agreement between nations that had been quarrelling over major provisions for several years.[34] Significantly, that dispute had pitted developed against developing countries, with the developing countries pressing for more stringent restrictions.[35] While some environmental groups have criticized the outcome as too lenient, without question, the Basel Convention represents a substantial attempt to control the global movement of hazardous waste.[36]

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29 "Greenpeace Calls for World Ban on International Traffic in Waste", 11 *Int'l Env't Rep. (BNA)* 433 (Aug. 10, 1988) [hereinafter *Greenpeace Calls for World Ban*]; *Developed, Developing Countries*.

30 Cairo Guidelines and Principles for the Environmentally Sound Management and Disposal of Hazardous Wastes, UNEP/WG. 122/3 (Dec. 1985) [hereinafter *Cairo Guidelines*].

31 *Ibid.*

32 The Convention was endorsed by the 116 attending countries as the Final Act of the Conference of Plenipotentiaries on the Global Convention on the Control of Trans-boundary Movements of Hazardous Wastes. The Conference, held in Basel, Switzerland from March 20-22, 1989, was convened by the Executive Director of UNEP pursuant to decision 14/30, adopted by the Governing Counsel of UNEP on June 17, 1987. See Basel Convention on the Control on Trans-boundary Movements of Hazardous Wastes and Their Disposal, adopted and opened for signature Mar. 22, 1989, reprinted in *United Nations Environmental Program*, Basel Convention on the control of Trans-boundary Moments of Hazardous Wastes and their Disposal: Final Act (hereinafter Basel Convention).

33 *Id., Preamble.*

34 "Western, African Nations Fail to Agree on Trans-boundary Movement of Toxic Wastes", 12 *Int'l Env't Rep. (BNA)* 49 (Feb. 8, 1989).

35 Hackett, *supra* note 19 at 252.

36 Ibrahim J. Wani, "Poverty, Governance, The Rule of Law and International Environmentalism, A Critique of the Basel Convention on Hazardous Wastes", 1 *Kan.J.L. & Pub.Pol'y* 37(1991).

In general, many developing countries advocated a North–South ban on hazardous-waste transfers, while some OECD countries preferred a regulatory system based on notification and consent. The Convention chose regulation over prohibition when it was signed in March 1989.[37] The Basel Convention regulates the trans-boundary movements of hazardous and other wastes and obliges its Parties to ensure that such wastes are managed and disposed of in an environmentally sound manner. The Convention covers toxic, poisonous, explosive, corrosive, flammable, ecotoxic and infectious wastes.[38] The provisions of the Convention centre around the following principal aims: (i) the reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal; (ii) the restriction of trans-boundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management; and (iii) a regulatory system applying to cases where trans-boundary movements are permissible.[39]

The Basel Convention applies to the export of "hazardous wastes" and "other wastes."[40] Hazardous wastes are defined to include certain listed wastes and waste streams.[41] Annexes I, II and III to the Basel Convention define which wastes are hazardous. Annexes I and III deal with this issue in very general and ambiguous terms. This has led to controversy as to the question of exactly which 'wastes' are hazardous and thus subject to the Convention. Annex 1 set out two categories of wastes to be controlled. The first category deals with waste streams and includes hospital and pharmaceutical waste, wastes from organic solvents, polychlorinated biphenyls, adhesives and so forth. The second category classifies wastes according to their constituents. Listed are substances such as lead, mercury and asbestos. Such a listed waste is not a hazardous waste, however, unless it displays one of the "hazardous characteristics" delineated in an Annex III to the Convention.[42] The hazardous characteristics listed in Annex III include explosives, flammable liquids and solids, substances liable to spontaneous combustion, toxic and ecotoxic wastes. The onus is then on a person who claims that the wastes are not hazardous to show that they do not have any of the characteristics of Annex III. A waste, therefore, must be both a listed waste and have some hazardous characteristic to be defined as a hazardous waste. Furthermore, wastes are also classified as hazardous if they are defined as

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37 A. Kellow, *International Toxic Risk Management: Ideals, Interests and Implementation* (1999).

38 Katharina Kummer Peiry, see http://untreaty.un.org/cod/avl/ha/bcctmhwd/bcctmhwd.html.

39 *Ibid.*

40 Basel Convention, *supra* note 32, article 1, para. 1, 2.

41 *Id.* at Annex I (defining waste streams-such as medical wastes, pharmaceutical wastes, mining wastes, chemical wastes- and specific wastes--such as lead, asbestos, inorganic cyanides).

42 *Id.* at Annex III (listing a variety of "hazardous characteristics"-such as flammability and toxicity).

hazardous in the national and domestic legislation of the exporting, importing or transit party.[43]

The Convention places a complete prohibition on trade in hazardous waste between Parties to the Convention and non-parties[44] and reinforces the sovereign right of any Party to prohibit the import of hazardous waste.[45] In order to achieve the Convention's objective of minimising the trans-boundary movements of hazardous waste, the Convention requires that such movements only be allowed where the state of export does not have the technical capacity and suitable disposal sites, or where the wastes are required by the importing state as raw materials for recycling or recovery industries.[46]

The Convention places a system of prior informed consent and notification in case of export and import of hazardous trade.[47] The Convention places an obligation on both the importing and exporting country parties to ensure that hazardous wastes that are exported are managed in accordance with environmentally sound management (ESM).[48] '"Environmentally sound management" is defined in the Convention as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes". The generality of this definition provides very little guidance to states. The Convention also establishes a procedure to deal with instances of illegal traffic of hazardous waste. Illegal traffic is defined fairly widely to include movements that take place without prior notification and consent (PIC) or where consent is obtained through fraud or misrepresentation or where the waste does not conform in a material way with the documents.[49]

Since its adoption, the Convention has seen a number of significant developments. The Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("The Ban Amendment") was adopted by the third meeting of the Conference of the Parties (COP) in 1995.[50] The Ban Amendment provides for the prohibition of exports of all hazardous wastes covered by the Convention that are intended for final disposal, reuse, recycling and recovery from countries listed in annex VII to the Convention (Parties and other States which are members of the OECD, EC, Liechtenstein) to all other countries. As of 1 January 2012, the Ban Amendment has not yet entered into force. While environmental groups have welcomed the ban, there has been considerable reluctance by developed countries to

[43] *Id.*, article 4.
[44] *Id.*, article 4(5).
[45] *Id.*, article 4.
[46] *Id.*, article 4(9).
[47] *Id.*, article 6.
[48] *Id.*, article 4(8).
[49] *Id.*, article 9.
[50] *Id.*, article 10.

ratify the ban amendment. The main reason for opposition relates to the economic impact of a total ban on exports of hazardous waste to developing countries for recycling. The Basel Protocol on Liability and Compensation for Damage resulting from Trans-boundary Movements of Hazardous Wastes and their Disposal was adopted by COP 5 in 1999. The Basel Protocol regulates civil liability for damage resulting from the trans-boundary movement of hazardous wastes and other wastes, including incidents occurring as a result of illegal traffic. As at 1 January 2012, the Basel Protocol has not yet entered into force. Protocol imposes strict liability against the state of export or generator for any loss of life or personal injury, loss of or damage to property, loss of income and costs of reinstatement of the impaired environment caused by the trans-boundary movement of hazardous waste. It also imposes fault based liability against any other person who causes or contributes to such damage through lack of compliance with the Convention or by 'wrongful, intentional, reckless acts or omissions'.[51] The Bali Declaration on Waste Management for Human Health and Livelihood, adopted by COP 9 in 2008, has affirmed at the political level that waste, if not managed in a safe and environmentally sound manner, may have serious consequences for the environment, human health and sustainable livelihood.[52]

With regard to India the hazardous waste generated in the country per annum currently is estimated to be around 8 million tonnes out of which 70 per cent is being generated by five states, namely Gujarat, Maharashtra, Tamil Nadu, Karnataka and Andhra Pradesh.[53] To regulate the issues of wastes the Hazardous Wastes (Management and Handling) Rules were issued in the year 1989 under the Environment Protection Act 1986.[54] These rules required each industry generating hazardous waste to obtain authorization from its state pollution control board. Boards, in turn, could issue authorization only after verifying that the industry had the facilities, technical capability, and equipment to safely handle hazardous waste. Industries were to deposit their hazardous waste in disposal sites set up by State Governments and specifically designed to receive different kinds of waste. Likewise, although India joined the Basel Convention in 1992, the nation's hazardous waste rules were brought into compliance with convention stipulations only in 2000. Further amendments took place in the year 2003 and 2007. The rules prohibit import of the hazardous wastes from any country to India for disposal but permits for the recycling

[51] Protocol on Liability and Compensation for Damage Resulting from Trans-boundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999 (hereafter 'Liability Protocol'), available at http:// www.basel.int/pub/protocol.html.
[52] Alan Andrews, "Beyond the Ban – Can the Basel Convention Adequately Safeguard the Interests of the World's Poor in the International Trade of Hazardous Waste", 5/2 *Law, Environment and Development Journal* at 167, (2009) available at http://www.lead-journal.org/content/09167.pdf.
[53] Syed S. Kazi, Divya Menon & Ashok Karna, *ICTs and Environmental Sustainability: Mapping National Policy Contexts – India Baseline Study*, Association for Progressive Communications (APC) and Digital Empowerment Foundation 57 (2011).
[54] Hazardous Wastes (Management and Handling) Rules, 1989.

or recovery or reuse. But lack of proper infrastructure and strict enforcement mechanism has led to hazardous waste still remaining a grave problem.[55]

A Basel Convention: An Answer to Environmental Justice

The success and efficacy of any convention is to be gathered by the regularity of compliance and evidences which proves that the object with which the legal mechanism has come into existence has been fulfilled. But various incidents of toxic fallout suggest that convention either has not been implemented successfully or there are inherent drawbacks engrained in the system. In August 2006, some 600 tons of caustic soda and petroleum residues were dumped at 18 open-air public waste sites in Abidjan, the main city of the western African nation of Ivory Coast.[56] This incident clearly points to a general trend towards a growing trade in dangerous trade in hazardous waste between the developed and developing world.[57]

The Convention had its main objective in reducing trans-boundary movements of hazardous waste to a minimum, consistent with their environmentally sound management; to dispose hazardous wastes as close as possible to their source of generation; and to minimize the generation of hazardous waste in terms of quantity and hazardousness. One can read elements and principle of environmental justice like substantive equity which requires waste disposal close to the source of generation and fairness which places restriction on the waste disposal in consistent with environmentally sound management.

To begin with, the definition of hazardous waste, which is the subject matter in focus, itself, is flawed. "Hazardous waste" includes any waste that falls within a list provided in Annex I to the Convention, unless that waste does not possess any of the characteristics described in Annex III.[58] A "hazardous waste" also means any waste considered hazardous by law in the country of export, import, or transit. What is a hazardous waste in one country is often not a hazardous waste for its neighbour.[59] Another critical weakness of the Convention is that the definition of waste is limited to 'substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law'.[60] The Basel Action Network, a vociferous critic of what it describes as the 'recycling loophole', argues that

55 Priti Mahesh "Proposed Hazardous Waste Management Rule: A Real Hazard to the Environment", *Toxics Dispatch* (24 July 2008).

56 Rob White, "Toxic Cities: Globalizing the Problem of Waste", available at http://findarticles.com/p/articles/mi_hb3427/is_3_35/ai_n32149142/.

57 Semenoff, "Foreign Trade in Trash? Exporting Hazardous Waste," 4 *Nat. Resources & Envt* 14-17 (1989).

58 Basel Convention, *supra* note 32, article 1, para. 1.

59 Prabhu, "Toxic Chemicals and Hazardous Wastes: An Overview of National and International Regulatory Programs", 11 *Int'l Env't Rep.* 692 (1988).

60 *Ibid.*

most waste trade to developing countries that is claimed to be destined for reuse or recycling is either 'sham' recycling, where it is not really for recycling at all but will be dumped or burned by the importer, or 'dirty' recycling, where the recycling process itself will involve pollution of the environment and risk to the health of workers.[61]

A crucial weakness of the Convention is that the PIC procedure fails to ensure that the exporting country properly verifies that adequate waste management facilities are available in the importing country.[62] In the context of a developed country exporting to a developing country, this has a number of problems. First, developing countries often lack the technical and administrative capacity to conduct an accurate assessment of the level of risk to human health and the environment posed by a particular shipment of waste and assess whether their facilities are suitable. As a result they may give consent to the importation of a shipment of waste based on a genuine but mistaken belief that they possess adequate facilities for its disposal. Second, by placing responsibility on the authorities within the developing country to verify the adequacy of disposal facilities, the PIC procedure is vulnerable to abuse by corrupt officials.[63]

Further the compliance committee established by the convention does not have a mandate to enforce the Convention or to impose punitive measures against noncompliant Parties. The Committee's objectives are to provide assistance to Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with the Convention.[64] Further the decisions of the committee are in the form of non-binding recommendations.

The Basel Convention sidestepped the question of liability for hazardous waste exports. The Convention provides that the parties are to cooperate to develop a protocol to establish rules and procedures for liability and damages arising from the trans-boundary movement of hazardous wastes.[65] Though the protocol on Liability and Compensation for Damage resulting from Trans-boundary Movements of Hazardous Wastes and their Disposal was adopted it has yet to come into effect. Additionally the real environmental justice would have been achieved had the Basel ban amendment been enforced. This may be perhaps the only method to overcome the

61 Basel Action Network (BAN), "Hazardous Waste Recycling: No Justification for Toxic Trade, Basel Action Network", Briefing Paper 7, (2007).

62 L. Widawsky, "In My Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention's Ability to Achieve Environmental Justice", 38/ 2 *Environmental Law* 577, 604 (2008).

63 Semenoff, *supra* note 57 at 16.

64 Report of the Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention and proposed work programme for the Committee for the period 2009–2010, UN Doc. UNEP/ CHW. 9/3 (2008), available at http://www.basel.int/meetings/cop/cop9/docs/03e.pdf.

65 Basel Convention, *supra* note 32, article 12.

not- in- my- backyard (NIMBY) syndrome. Without a realistic ban on transfer of waste we cannot possibly think of reducing the trans-boundary transfer and movement of hazardous wastes which ultimately places an irreparable burden and damage on the developing nations. One aspect of the political deadlock over the ratification of the Ban that is often annotated particularly by its proponents is that it has not been ratified by a number of developing countries such as India, Pakistan and Brazil, which are major actors in the field of international hazardous waste trade.[66] This is largely because for these countries, trade in hazardous waste is an important source of both revenue and, where waste is imported for recovery and reuse, raw materials.

Promoting environmental justice requires measures to strengthen and reform the convention. Reforming the convention needs to be based on an understanding that Prior Informed Consent is an inadequate procedure in the context of north-south trade in hazardous waste. Widawsky proposes that the solution to this problem would be the establishment of an independent body, which would be responsible for inspecting disposal or recovery facilities prior to any trans-boundary movement and having power to grant or deny permits for international trade based on the adequacy of these facilities to comply with ESM requirements.[67] This mechanism may help convention achieve its first two objective of reducing trans-boundary movements of hazardous waste to a minimum consistent with their environmentally sound management and to dispose hazardous wastes as close as possible to their source of generation. Secondly the compliance committee needs to rewinded. The Committee needs to be given adequate financial resources for it to carry out its facilitative and consultative approach. This demands that the current financial model based on voluntary contributions is replaced by a compulsory system whereby Parties contribute fixed amounts based on a number of factors such as their ability to pay and the proportion of the international trade in hazardous waste attributable to them. This will allow the Committee to properly assist non-compliant parties to properly implement the Convention.[68]

An integral part of implementing the Basel Convention is building the capability to manage and dispose of hazardous waste. Through training and technology transfer, developing countries and countries with economies in transition gain the skills and tools necessary to properly manage their hazardous wastes. To this end, the Basel Convention has established regional centres for training and technology transfer in the following countries.[69] The role of the centres is to help countries implement the Basel Convention. There is an urgent need to technically and financially equip the centres to

[66] Full list of Basel ratifications available at http://www.basel.int/ ratif/ban-alpha.htm (last accessed on 4-03-2012).

[67] Widawsky, *supra* note 62 at 588.

[68] Zada Lipman, "Trade in Hazardous Waste: Environmental Justice Versus Economic Growth Environmental Justice and Legal Process" available at http://ban.org/library/lipman.html.

[69] Andrews, *supra* note 52.

encourage the introduction of cleaner production technologies and the use of environmentally sound waste management practices.[70]

IV Conclusion

Environmental justice requires that benefits and burden arising out of an activity is shared in a fair manner. In the context of hazardous waste it requires that the nations who generate waste for their development and growth owns up the responsibility to dispose of the waste in an environmentally sound manner and in the source of origin as far as possible. Only for certain pressing social, health or environmental concern the waste should be allowed to transport to developing nations. The export of hazardous waste from developed nations for disposal in developing countries represents a complete legal and ethical failure of justice and fairness on a global scale. It not only places a disproportionate burden on poor countries and threatens human health and the environment. It exposes even the future generations to these health and environmental hazards. The Basel Convention represents a substantial a ttempt to control the global movement of hazardous waste. How fast Basel convention can assist in the promotion of environmental justice would depend on the effective enforcement of Basel ban amendment which is the only mechanism to reduce these toxic colonialism where the superior economic clout has been used to buy the will and consent of the nation, community and people.

[70] *Id.*, at 16.

HONOUR KILLINGS
The Hegemonic Paradigm

Vageshwari Deswal[*]

I The Misnomer 'Honor Killing'

The term 'honor killing' literally means killing for honor. Honor killings are typical examples of vengeful killings by relatives of those family members especially women who have disgraced them. Honor killings may be defined as homicide of a member of a family or social group by other members of the family or social group, due to the belief of the perpetrators that the victim has brought dishonor upon the family or community. In majority of the cases these are disguised as suicides or accidents. Honor killings are akin to domestic terrorism. The usage of the term 'honor' has a tendency to rationalize and legitimize the motive of the crime by creating a false notion that the crime has been committed to save the honor of the family. This implies that it is the responsibility of the society to prevent any violation of its tradition. In *Lata Singh* v. *State of U.P.*[1] the Supreme Court stated that, "There is nothing honorable in honor killings and they are wholly illegal". Thus the usage of the term 'honor' along with killings is a misnomer and misleading. Honor killing is an inaccurate description of this crime.

II Honor Killings: Non Gender Neutral

Honor killings are chiefly characterized by violence against women and are not gender neutral. Traditional, patriarchal and archaic views that subordinate women to men contribute to gender based violence. The ideology of honor stems from the patriarchal and genderised societal norms which expect women to confirm to their traditional roles and any deviation from the same is censured. These socially constructed gender based stereotypes legitimize and justify gender-based violence as a form of protection or control of women. Rape, beatings, forced separation, issuance of fatwas and honour killings are all crimes committed in the garb of honour that are specifically and disproportionately targeted towards woman, and justified as means to control women.

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1 (2006) 5 SCC 475.

Honor crimes exist in all patriarchal cultures but are more prevalent in Arab countries, Turkey, Pakistan, Bangladesh and India. Loosely the term 'honor killing' applies to killing of both men and women in cultures where it is practiced. Sometimes men are also made the victims of honor killings by the family members of a woman with whom he is perceived to have an inappropriate relationship. Sometimes men are deemed unacceptable due to their lower class or caste. But all over the world, the majority of the victims of honor killings are women. Woman in all her roles whether as a mother, daughter, sister or wife is always supposed to be subservient to man. They are expected to be obedient, compliant, non-demanding, non-interfering, dutiful and altruistic. A woman's honor is related to her conformity with the traditional roles ascribed to her and any attempt to break from these circumscriptions is considered a dishonorable act. Such a loss of honor is deemed irreversible and is to be restored by punishing the rebel with death. Conceptions of family honor endorse honor killings. The community plays a very important role in traditional honor killings. Ultimately it is the community which decides what acts are honorable or dishonorable. The killings are highly unlikely unless the transgression becomes known in the community. This leads to the murder of the woman who shames the family in her perceived interactions with other men. Woman is traditionally viewed as the bearer of family reputation. Honor killings exemplify the most horrific influence of such traditions. Whenever a woman indulges in acts perceived as dishonorable such as marrying against the family wishes, marrying someone from the lower caste, eloping with someone, becoming victim of a stigmatized offence such as rape, molestations or sexual harassment, refusing arranged marriage, asking for divorce, having pre-marital or extra marital relationships, adultery etc, she has to pay for it with her life.

III Honor Killing: A Worldwide Problem

Every year thousands of women across the world are shot, burnt, poisoned, beheaded, stabbed or subjected to death in some other way in the name of honor. The debate over issue of state responsibility for acts committed in private sphere continues without any effective results. The argument that violence against women within the family is placed in the domestic sphere thus out of state's control is still put forth. All this is happening despite the state's responsibility to uphold women's rights and protect them from any kind of discrimination. Gender inequalities remain deeply entrenched in the societal norms. Legal systems of many countries have discriminatory laws which provide for partial or total exemption from criminal liability for people involved in honor killings.

Pakistan is a country where there are glaring inequalities against the women in law as well as in practice. In 1979, the then ruler, General Zia-ul-haq enacted the Hudood Ordinances in conformity with their religious laws. These laws made sex outside marriage punishable with stoning or public lashing for women. Even victims of rape were treated as having committed this crime and unless they could produce four male witnesses to testify against her voluntary involvement she was to be held guilty. In rape cases there seldom is a witness except the victim herself and this law made it

impossible for women to complain against instances of Rape. The Protection *of* Women (Criminal Laws Amendment) Act, 2006 has removed the requirement of four male witnesses to prove accusations of rape. In 2004, Pakistan made honor killings punishable under law with imprisonment up to seven years but their Islamic laws provide for settlement by payment of compensation to the victim's relatives. In majority of cases of honor killings the crime is committed by victim's family members and relatives. This adversely impacts the effective implementation of the law.

Egypt makes honor killings a punishable crime but article 17 of the Egyptian Penal Code is an often used provision in cases of honor killings where judges exercise their discretion to reduce punishment in certain circumstances. Similarly articles 62 and 133 of the Italian Penal Code also offer the provision for reduction in punishment to offenders guilty of crimes that occur within their cultural norms. In Haiti, article 269 of their Code *pénal de Haïti* pardons the act of wife killing by husband if he discovers her in *Flagrante delicto*[2] in their conjugal home. Jordan[3] and Syria[4] are two more nations which exempt a person from criminal liability for killings of female family members for their presumable illicit sexual encounters. In Syria (article 192), Libya (article 375 of the Libyan Penal Code), Morocco (article 418 of their Code pénal), Yemen (article 232 of the Yemeni Penal Code), UAE (article 334 of the Federal Penal Code), Oman (article 252 of the Omani Penal Code), Algeria (article 279 of the Code pÃcnale), Iraq (article 409 of the Iraqi Penal Code), Kuwait (article 153 of the Kuwaiti Penal Code) and Lebanon (article 562 of the Lebanese Penal Code) killings done with honorable intent are entitled to reduced punishments. Colombian laws were amended in 1980 and Brazil followed suit in 1991 to make killing of wife in the name of honor a punishable act. Turkey is a country where despite stringent legal provisions the incidences of honor killings have continued unabated.

The United Nations Organization has also been working for curbing honor killings. General Recommendation No. 195 of the Convention on the Elimination of All Forms of Discrimination against Women (1981) explains that "discrimination" includes "gender based violence ... that is directed against a woman because she is a woman or that affects women disproportionately." Gender based violence includes "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." Post the Beijing Declaration and Platform for Action and the CEDAW, the United nations has, as a part of its reform agenda created 'UN Women' in 2010. This is the UN entity for Gender Equality and the Empowerment of Women. This body is an initiative to help member states and support the inter-

[2] 'Flagrante delicto' is a Latin term used in law to indicate a criminal being caught red handed in the act of committing a crime. It is particularly used for someone being caught for doing something they should not be doing such as having illicit sexual intercourse.

[3] Articles 98 and 340 of Jordanian Penal Code.

[4] Articles 242 and 548 of the Syrian Penal Code.

governmental bodies such as women's commissions to fulfill the commitment on gender equality.

IV Women in the Indian Society

Indian society is patriarchal and gender insensitive. Patriarchy in its wider definition manifests itself in institutionalization of male dominance over women in society. It implies that men hold and enjoy power in all the important institutions of society and that women are deprived of access to such power.[5] In our tradition bound society, women have always been subjected to social, economic, physical, psychological as well as sexual exploitation. In fact the institutions of family and marriage, where she is considered to be safe have become the major cause of her oppression. The forms of oppression may vary but the content is same, excruciating overpowering, emaciating and agonizing. The dominant familial ideology in India has shaped and constructed the family as private and beyond state intervention thereby immunizing the oppression of women within this domestic sphere and also obscuring the extent to which this private sphere can be created and protected by State regulation.[6] Even the efforts of social reformers to prohibit violent and oppressive practices within the family have time and again been resisted as an undue intervention into the 'private' sphere of the family. Thus for women the Right to Life and Personal Liberty granted under article 21 of our Constitution is contingent on their acting in conformity with the social norms and traditions.

V Reasons for Honor Killings

"Honor is generally seen as residing in the bodies of women. Frameworks of 'honor', and its corollary 'shame', operate to control, direct and regulate women's sexuality and freedom of movement by male members of the family. Women who fall in love, engage in extramarital relationships, seek a divorce, choose their own husbands are seen to transgress the boundaries of 'appropriate' (that is, socially sanctioned) sexual behavior. 'Regulation' of such behavior may in extreme cases involve horrific direct violence including 'honor' killing. In these contexts, the rights of women (and girls) to control their own lives, to liberty and freedom of expression, association, movement and bodily integrity mean very little."[7] There are three main reasons for honor killings, which have been discussed below.

[5] Indu Prakash Singh, *Indian Women- The Captured Beings* (Intellectual Publishing House, Delhi, 1990).

[6] *R.K.Dalmia* v. *Justice S.R.Tendolkar*, AIR 1958 SC 538.

[7] Radhika Coomaraswamy, "Report on Violence against Women, Its Causes and Consequences", submitted to UN Commission on Human Rights in accordance with Commission on Human Right resolution 2001/49.

A Religion and Caste System

Every religion and caste has its own peculiar notions and practices. Different religions have different sets of personal laws which regulate them in affairs of marriage, divorce, maintenance, adoption, guardianship, succession and inheritance. Caste is a source of both identities as well as animosities. Generally people have a tendency to regard and respect only their own customs and practices as correct and valid. Each caste has its own consciousness and a special distinguishing set of cultural identities. For the caste members their group identity supersedes their individual identity and the position of an individual in society cannot be separated from the position of the group to which he belongs. People support caste system as it provides them a basis to fight collectively against oppression and exploitation. Caste system perpetuates structural hierarchy based on old customary practices. With the socio political changes and economic advancements, there is increasing caste mobility leading the society towards a progressive, non-hierarchical, non-stratified, equal and open environment. Whenever subordinate castes resist the structure and ideology of dominance and the dominant castes counter the resistance from below, then conflict situations arise. Such conflicts are multidimensional based on social inequalities and injustices.

In India the caste system is very rigid and despite our 65 years of independence and several constitutional as well as legislative measures, discrimination on caste basis continues. Caste remains one of the most important factors governing the lives of people especially in rural areas and inter-caste marriages are looked down upon with contempt and disgust. Relations based on caste are asymmetric and are upheld mainly by the institution of marriage. It is the best and most suitable measure to preserve caste purity and segregation from other castes. People go to any extent to safeguard the same. Thus if any girl dares to go against the wishes of her family, caste or religion by choosing a partner from a different caste or religion or within the prohibited gotras she is considered to have dishonored the family and the family's esteem takes a beating in the society. The family members fearing expulsion from the caste or social boycott are forced to punish the girl in order to restore the family honor. As repositories of community honor, women are subjected to brutal killings as a punishment and as a deterrent example for other girls. Caste system perpetrates the patriarchal values and ideologies. The dominant, hegemonic and hierarchical concepts of patriarchy and patrilineal succession have always justified the subordination and subjugation of women to male authority. *Madhu Priya Singh* v. *State of UP* the court observed that "Whatever may have been the utility of the caste system at a certain stage of our historical and social development; there can be no manner of doubt that it is today a great evil and a curse on our society. In fact it is an obstacle to our nation's progress, and if we wish to progress it must be destroyed as quickly as possible, so that we really become Indians rather than remain as Pundits, Thakurs, Yadavs, Jatavs, Harijans, Sheikhs etc. This is a free, democratic and secular country. Our national aim must be to become a modern, powerful industrial State"[8].

B Warped Notions of Traditions

Honor killings represent the most overt and brutal method of subjecting women to male control and subordination. The genesis of this problem can be traced back to incidences of voluntary killing of unmarried daughters and wives during turbulent times such as war, partition, etc., to save them from being sexually exploited by enemies. Since childhood girls are subjected to restrictions in matters of dressing, movement and behaviour. All this is done to inculcate in them a sense of subservience to the other gender and submit to male dominance. It is a common experience that if the sister or daughter commits something unusual and socially unacceptable such as having a love affair or eloping with a boy of her choice, the society holds the father or brother responsible for not reining in the girl and allowing such a social wrong to occur. Such men caught in a social warp feel the pressure of being the upholders or custodians of traditions and the feeling is that the dishonor once brought upon the family cannot be undone unless the source of dishonor is destroyed which means killing of one's own sister or daughter and sometimes the boy with whom she was involved.

C Property Issues

Another issue underlying these gruesome killings is property. The people want their daughters to be educated and independent yet submit to male dominance within the familial sphere. Educated women have acquired more mobility in the society. This allows them to meet and interact with more men with whom they sometimes strike a friendship. When an educated and liberated female, driven by a new found confidence and ambition chooses her partner in defiance of the social norms, she is giving a subtle yet clear message that she has an equal status in the society and has autonomy over her body and life. This declaration on independence is perceived as a potential threat that she may either herself or with support from her partner asks for an equal share in the family's property which the law entitles her to but which she is rarely accorded. Even after the 2005 amendments in the Hindu Succession Act, which gives equal share to girls in the ancestral property women seldom stake a claim to their share. Traditionally when marriage takes place within an intimate circle, property rights are usually foregone. The lurking threat that the woman may stake a claim to the property is aggravated especially among poor and uneducated youth who are over dependent on land. This eventually leads to an overriding sentiment that the evil is to nipped in the bud itself and this manifests in the form of killing of such women.

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8 II (2004) DMC 294.

VI Role of 'Khap' Panchayats

The term 'Khap' refers to a socio-political group. Khap panchayats are informal institutions for conflict resolution engaged in dispensing social justice based on customary practices and old traditions. Earlier disputes were resolved within the village or group of villages by the village elders known as panches. The traditional role of such groups was to affect compromises and settlements among people and to maintain the sanctity and honor of the rural societies which they regulated. Those guilty of illegal or immoral acts were reprimanded, asked to compensate the other party or leave the village. Sometimes the guilty person or his family unit would be isolated from the rest of the community. This served to settle petty disputes over trivial issues which otherwise would snowball into major controversies and both the parties would be subjected to unnecessary wastage of time and money in the judicial process. Some Khaps have reinforced caste based hierarchies by ordering illegal punishments for those declared as culprits by these panchayats or their family members. Khaps were never known to have been vindictive or vengeful. The allegations levelled against these panchayats in recent times are due to the support which they have displayed for preserving the old gotra system and preserving exogamy within members of the same gotra. The Hindu Marriage Act, 1955 declares marriages among people who are 'Sapindas' and people who fall within 'degrees of prohibited relationship' as illegal and void. Sagotra marriages which do not violate the conditions laid down under the Hindu Marriages Act are deemed legal. This has led certain Khap panchayats and leaders to seek amendments to the aforesaid legislation. But, the involvement of khap members in premeditated murders is a matter of doubt and much speculation shrouds the mystery in absence of direct proof. The acts of hunting down couples, killing them in name of honor, setting their houses on fire, raping or insulting their womenfolk are unpardonable and barbaric incidences of vengeful acts by individual's family members and the khaps have neither the jurisdiction nor the competence to order such illegal punishments.

VII The Legislative Response

Honor Killings are nothing but culpable homicides and murders. They go against the spirit of Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Such killings are violative of our constitutional provisions regarding equality and protective provisions for women empowerment enshrined in articles 14, and 15(1) and (3). Such killings curtail a woman's freedom of movement (article 19) and violate her right to life and personal liberty (article 21). The UN Commission on Human Rights has expressed concern at the large number of killings committed in the name of passion or in the name of honour in its resolution 2000/31 on extrajudicial, summary or arbitrary executions, reported by the Special Rapporteur[9], and called upon Governments to investigate such killings promptly and thoroughly; to

[9] *Supra* note 7.

bring those responsible to justice; and to ensure that such killings are neither condoned nor sanctioned by government officials or personnel. The Commission adopted similar resolutions in 2001 (resolution 2001/45) and 2002 (resolution 2002/36). In its resolution 2000/45 on the elimination of violence against women, the Commission defined the term "violence against women" as any act of gender-based violence that resulted in or is likely to result in physical, sexual or psychological harm or suffering to women, including crimes committed in the name of honour and crimes committed in the name of passion, and called upon States to condemn violence against women and not to invoke custom, tradition or practices in the name of religion to avoid their obligations to eliminate such violence. Article 16 of the CEDAW lays down inter alia that all States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, for all men and women the same right to enter into marriage and the same right to freely choose a spouse and to enter into marriage only with their free and full consent. India being a party to the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is bound to give effect to its provisions and take steps for eradication of all discriminatory practices such as honor killings against women.

In response to a public interest litigation filed by Shakti Vahini[10], the Supreme Court of India on 22nd June 2010 issued notice to the Central Government and nine states in the face of rising honor killings across the country. The Court wanted to know what steps if any were being taken to curb such violence. This caused the Prime Minister to constitute a Group of Ministers (GoM) to look into the matter. In August 2010 the GoM met and discussed the feasibility of amending the Indian Penal Code and the Indian Evidence Act to tackle such killings. After much deliberation the issue was referred to the Law commission of India. In 2011 the Commission headed by Justice P.V. Reddi submitted a draft bill with the objective of controlling the growing spate of honor killings in our country. The Commission recommended that every individual has the freedom to marry and reside with a partner of his or her own choice. The views of village elders or family elders cannot be forced on the willing couple and no one has the right to use force or impose far reaching sanctions in the name of vindicating community honor or family honor. Rejecting the suggestions to introduce a provision in section 300 IPC in order to include the so called 'honor killings' within the ambit of this provision the Commission said, "The Commission is prima facie of the view that the existing provisions in IPC are adequate enough to take care of situations leading to overt acts of killings". Many feminist groups were demanding that rules of evidence need to be relaxed in cases of honor killings and the burden of proving the innocence of accused must lie on the defence. Rejecting the same the Commission said

[10] Shakti Vahini is a Non-Governmental organization working actively in the field of Human Rights, Women and Child issues, Anti Trafficking, Health, HIV/AIDS, Education, Legal Aid and training, Research & Documentation, Volunteerism, Community development etc.

that shifting the onus on to the accused facing accusations of involvement in serious offences such as murder or abetment of murder is 'not desirable'. Such a move would be against the cardinal principles of jurisprudence accepted and absorbed into our criminal justice system. If burden of proof is shifted in such a case, logically, it would have to be done in a large number of other heinous crimes too. The consultation paper of the Bill makes it clear that, whatever may have been the view in ancient times, 'sagotra marriages' are not prohibited by the law. The Hindu Marriage Act, 1955 does not prohibit sagotra or inter caste marriages. The Bill asserts that caste councils or khap panchayats cannot be allowed to adopt moral vigilantism to enforce their diktats by assuming the role of social or community guardians. Such groups take the law in their own hands and this is a violation of the rule of law deserving of punishment under the law.

A The Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Bill, 2011

The Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Bill, 2011 has been drafted with the objective of punishing every person who participates in an unlawful assembly to socially boycott or inflict bodily harm on any boy or girl marrying or wanting to marry and the families of that boy and girl. Any participation in such an assembly shall be considered as abetment or commission of a crime punishable under the provisions of the Bill as well as the Indian Penal Code. The Bill lays down that no person or group shall gather, assemble or congregate with the intention to deliberate upon or condemn any marriage not prohibited by law. The term 'marriage' also includes a proposed or intended marriage. Such gatherings are to be treated as unlawful and punishable with imprisonment up to six months and fine of rupees ten thousand. The Bill also proposes to punish persons guilty of creating an environment of hostility, pressurizing the parties or criminally intimidating them or their relatives or supporters with minimum imprisonment for a term of one year. Given the gravity of these crimes, the acts classified as offences under the provisions of the Bill have been declared as cognizable, non-bail able and non-compoundable. The maximum punishment proposed under The Bill is imprisonment up to a period of seven years and fine of rupees thirty thousand. The provisions of the IPC will remain unaffected by this Bill and will continue to apply in relevant cases. The bill empowers the Sub-divisional Magistrates and the District Magistrates to prohibit persons from forming any assembly for raising objections against lawful marriages as such assemblies can be a threat to the liberty of couples. Offences under this bill are to be tried by special courts. These special courts are to set up in states in consultation with their respective High Courts and are to be presided over by a Sessions Judge or an Additional Sessions Judge. Upon receiving a complaint of facts or upon a police report of such facts the Special Courts will be at liberty to take cognizance of any offence even where the accused persons have not been committed to such Courts for trial.

VIII The Judicial Response

A fair, transparent and impartial judicial system is the backbone of a democratic country like India. The role of judiciary is extremely significant as the judiciary not only administers justice according to law but also promotes social and economic justice through its judgments. More importantly when new situations arise which are not covered by existing laws then the judges are required to call for a judicial legislation. Article 141 of the Indian Constitution provides that the laws declared by the Supreme Court shall be binding on all courts within the territory of India

Taking cognizance of the rising incidences of honor killings, the Supreme Court of India termed such killings as acts of barbarism. It ordered the police across the country to take stern action against those resorting to violence against young men and women of marriageable age who opted for inter-caste and inter-religions marriages. In *Lata Singh* v. *State of Uttar Pradesh and others*[11] the Apex Court directed "The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or interreligious marriage." The court recommended severe punishment for those who commit such acts of violence, threats or harassment and issued directions to the administration and police authorities throughout the country to see that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence. Persons found threatening, harassing or committing acts of violence either on their own or at someone's instigation, are to be taken to task by instituting criminal proceedings against them and further stern action is to be taken against such persons as provided by law. The court further observed that, "There is nothing honorable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment."[12]

Taking note of the fact that despite our claims of being a secular and liberal country "honor killings" have been taking place from time to time, and the police and other authorities do not seem to be taking steps to check these disgraceful and barbaric acts the Supreme Court in *Sujit Kumar and Ors.* v. *State of U.P. & Ors*[13], declared that "in fact

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11 2006 (5) SCC 475.

12 *Ibid.*

13 AIR 2002 All 265.

such, 'honor killings', far from being honorable, are nothing but pre-meditated murder and must be treated accordingly. India being a free, democratic and secular country, the Court would not permit practices like honor killings or harassment to couples marrying by choice to prevail in the country". The court also issued directions to the police to prevent any 'honor killings' or harassment of people who love each other and want to get married; as such practices are a blot on our society. The court also observed that it is the responsibility of the police to ensure that the persons entering into inter-caste or inter-community marriages are not harassed by their relatives or any others and are free to live at any place and with whomever they like. The court suggested taking of strong measures against those who commit such 'honor killings' and harassment in order to stop this feudal, backward and barbaric practice.

In *State of UP* v. *Krishna Master*[14] the Supreme Court awarded life sentence to three persons accused of honor killing. They had murdered six persons of a family. The Bench observed that "wiping out almost the whole family on the flimsy ground of saving the honor of the family would fall within the rarest of rare cases evolved by this court..." While passing an order in the case of *Arumugam Servai* v. *State of Tamil Nadu*[15] on the honor killings being reported across India the Supreme Court stated that, "In recent years 'Khap Panchayats' (known as katta panchayats in Tamil Nadu) often decree or encourage honor killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. Atrocities in respect of personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal". The Court issued directions to the administrative and police officials to take strong measures to prevent such atrocious acts. The Court said that in the event of such an incident taking place, the State should immediately institute criminal proceedings against those responsible for such atrocities and also suspend the District Magistrate, Collector, Police Superintendent and the Senior Superintendent of Police of the district as well as other officials concerned and charge sheet them and proceed against them departmentally if they are proven to have not taken appropriate steps to prevent the incident if they had prior information regarding the same or if they failed to apprehend the guilty persons promptly and institute criminal proceedings against them. In such cases the concerned officials would be presumed to be directly or indirectly accountable in this connection.

In *Bhagwan Dass* v . *State (NCT of Delhi)*[16] Justice Markandey Katju expressed disgust that "honor killings have become commonplace in many parts of the country,

[14] AIR 2010 SC 3071.
[15] (2011) 6 SCC 405.
[16] (2011) 6 SCC 396.

particularly in Haryana, western U.P., and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. In our opinion honor killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behavior. All persons who are planning to perpetrate 'honor' killings should know that the gallows await them". Thus the Apex Court has made it very clear that such cases are to be dealt with strictly and nothing but the extreme penalty should be awarded to those who commit such barbaric and horrendous murders in the name of honor.

IX Conclusion and Suggestions

1 *Inter caste marriages being legal, one who stops such marriages should be held guilty of an illegal act*

The law on this subject is clear. According to provisions of the Child Marriage Restraint Act, 1929 a boy below the age of 21 years and a girl below the age of 18 years are included within the definition of child for the purpose of marriage and cannot marry. Beyond this age there is no limitation on either of them to marry and they are free to choose their life partner irrespective of their caste, creed or community. Thus if a person who is a major wants to get married to a person of another caste or community, the parents cannot legally stop him/her.

2 *Law to ensure protection for couples marrying inter-caste*

The Administration must ensure that nobody harasses, ill-treats or kills people for marrying outside his or her caste, community or class. In *Sujit Kumar and Others* v. *State of U.P. & Others* the court remarked, "The caste system is a great evil and a curse in our society which is hindering our national progress. Inter-caste love marriages are, therefore, in the interest of the nation, and at any event, they are not illegal. Such marriages will also put an end to the great evil of dowry."[17] The Registrars under the Special Marriage Act, 1954, should be given powers similar to that of the Protection Officers under the Domestic Violence Act, 2005. They should have the power to ensure that the threatened couples are provided with legal aid, police protection and safe shelters.

3 *Reliance to be placed on testimony of related witnesses in absence of independent witnesses*

Like dowry deaths, honor killings are also generally committed in complete secrecy or inside the four walls of a house which makes it very difficult for the prosecution to lead evidence. When any incident happens in a dwelling house, the most natural witnesses

[17] AIR 2002 All 265.

would be the inmates of that house and ignoring their testimony would mean losing out on vital and crucial information. Drawing parallels with dowry deaths in the case of *Trimukh Maroti Kirkan* v. *State of Maharashtra*[18], the Supreme Court said "the parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculpate the real accused. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished." The over-insistence on witnesses having no relation with the victims often results in criminal justice going awry. In most of the cases it is very difficult to trace independent or neutral witness so statements made by witnesses related to the accused or the victim, should be taken into consideration in order to ascertain the truth and such statements if not contradictory in nature and corroborated by material particulars should be relied upon by the courts.

4 *Reliance to be placed upon the dependable part of evidence of a hostile witness*

The evidence of a hostile witness should not be totally rejected if spoken in favor of the prosecution or the accused, but must be subjected to close scrutiny and the portion of the evidence which is consistent with the case of the prosecution or defense may be accepted. Sometimes during trial witnesses turn hostile but that by itself would not prevent a court from finding an accused guilty if there is otherwise acceptable evidence in support of the conviction. In *Himanshu alias Chintu* v. *State (NCT of Delhi)*[19], the Supreme Court said that, "It is the duty of the Court to separate the grain from the chaff, and the maxim *falsus in uno falsus in omnibus*[20] has no application in India."

5 *Reliance to be placed on circumstantial evidence in absence of direct evidence and the burden of proof must be shifted on to the accused persons*

In honor crimes it is very difficult to adduce direct evidence so the courts must rely on circumstantial evidence which is corroborated in material particulars. Instead of the usual practice where the prosecution is supposed to prove the guilt of the accused beyond reasonable doubt, the onus of proving their innocence must lie on the accused persons. In *Bhagwan Dass* v. *State (NCT of Delhi)*[21] although there was no direct evidence, the Supreme Court placed reliance on overwhelming circumstantial evidences to convict the accused.

[18] (2006) 1 SCC 681.

[19] (2011) 2 SCC 36.

[20] This means 'false in one, false in all'. Our courts do not believe in this and sometimes the reliable part of a hostile witness's testimony is accepted by the courts.

[21] (2011) 6 SCC 396.

6 *Extra judicial confession of the accused person is not to be necessarily treated as a weak piece of evidence*

An extra-judicial confession, if made voluntarily and in a fit state of mind, can be relied upon by the court but the confession will have to be proved like any other fact. Its value will depend upon the veracity, credibility and truthfulness of the witness to whom it has been made. In *State of Rajasthan* v. *Raja Ram*[22], the Supreme Court said that "after subjecting the evidence of the witness to a rigorous test on the touch- stone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility." Thus, if it is made to a reliable person the courts cannot disregard it as a weak type of evidence but the courts should consider factors such as the language used, clarity of meaning conveyed by the usage of unambiguous words, the time, place, circumstances and the person to whom it was made and also if it was made before a neutral person i.e. one who has no previous enmity or bias towards the accused person.

[22] (2003) 8 SCC 180.

A CRITICAL APPRAISAL OF 'INDIAN SECULARISM AND RELIGIOUS SUBSIDIES'

Ravinder Kumar

I Introduction

The founding fathers of the Constitution gave unto themselves, 'We the people of India,' the fundamental rights and directive principles of state policy to establish an egalitarian social order for all sections of the society in the supreme law of the land.[1] The principle of 'equality of religion' being an essential facet of egalitarianism has, thus, found a place in the Constitution of India. Religious tolerance and equal treatment of all religious groups are essential parts of secularism. The Indian Constitution has been built, inter-alia, on such an edifice. Though the term 'secularism' has not found expression in the original Constitution as adopted in 1950[2], the principles of secularism were embedded in various parts of our Constitution, in particular, the preamble, fundamental rights and directive principles of state policy. More particularly articles 25, 26, 27 and 28 provide guarantee to various facets of right to freedom of religion with inbuilt restrictions and limitations thereof.

The scope of this article is to analyse the unique concept of Indian secularism and legality of religious subsidies/concessions etc. The second part of the discussion highlights the nature of secularism in India with the help of judicial interpretation. Thereafter, third part of the article discusses the constitutional provisions that help in promoting the secular credential of Indian state in general and article 27 in specific.[3] Article 27 of the Constitution is the main provision of this area and discussed in detail to highlight its scope and limitations. As we know, by operation of this provision the Constitution not only prohibits the imposition of a tax but also prohibits the utilisation of public funds for the promotion or maintenance of a particular religion or religious

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S.R. Bommai v. *Union of India*, AIR 1994 SC 1918 at paras 178, 183.

The term 'secular' was inserted to the preamble of the Constitution by the Constitution (Forty Second Amendment) Act, 1976.

Article 27 lays down that "no person shall be compelled to any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

denomination. The next part of the paper analyses the policy of Indian state and judicial approach in dealing with the cases relating to religious subsidies/concessions etc.

II Indian Concept of Secularism

As we know, constitutionally, India is a secular country and therefore has no state religion. However, with the time it has developed its own unique concept of secularism that is fundamentally different from the American concept of secularism requiring complete separation of Church and state, as well as from the French ideal of *laicite*.[4] In fact, the Indian subcontinent, whether before or under the Moguls, or under the British, was aware of its various religious leaders and their political rulers as distinct from the religious authority. Before independence, therefore, there already existed a secular consciousness in India.[5]

However, despite the incorporation of all the basic principles of secularism into various provisions of the Constitution, originally, its preamble did not include the word secular, in the short description of the country, which it called a "Sovereign Democratic Republic". It was, of course, not an inadvertent omission but a well-calculated decision meant to avoid any misgiving that India was to adopt any of the western notions of a secular state.[6] Twenty-five years later when India's peculiar concept of secularism had been fully established through its own judicial decisions and state practice, the preamble to the Constitution was amended to include the word "Secular" (along with "Socialist") to declare India to be a "Sovereign Socialist Secular Democratic Republic".[7]

The Supreme Court of India has explained the secular character of the Indian Constitution stating:

> There is no mysticism in the secular character of the State. Secularism is neither anti-God nor pro-God, it treats alike the devout the antagonistic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion.[8]

4 The French concept of *laicite* has been described "as an essential compromise whereby religion is relegated entirely to the private sphere and has no place in public life whatsoever". Rachael F. Goldfarbs, "Taking the 'Pulpit' out of the 'Bully Pulpit': The Establishment Clause and Presidential Appeals to Divine Authority", 24 *Penn State International Law Review* 209 at 216 (2005).

5 Seval Yildirim, "Expanding Secularism's Scope: An Indian Case Study", 52 *American Journal of Comparative Law* 901 at 917(Fall, 2004).

6 Tahir Mahmood, "Religion, Law and Judiciary in Modern India", *Brigham Young University Law Review* 755-776 at 756 (2006).

7 Preamble of Indian Constitution was amended by the Constitution (Forty –Second Amendment) Act, 1976 (enforced since January 3, 1977).

8 *St. Xavier's College* v. *State of Gujarat*, AIR 1974 SC 1389 at 1414.

In the famous *S.R. Bommai* case[9], the Supreme Court held that secularism is a basic feature of the Constitution. Earlier in *Kesavananda*[10], the amending power to convert India from a 'secular' state to a theocratic one was denied to the Parliament as being violative of the basic structure of the Constitution. Justice Sawant, in the *Bommai* case echoed the common view that in India secularism does not involve a complete separation of religion and the state, but rather the notion of treating all religions equally.[11] In his words:

> The ideal of a secular state in the sense of a state which treats all religions alike and displays benevolence towards them is in a way more suited to the Indian environment and climate than that of a truly secular state by which is meant a state which creates complete separation between religion and the state.[12]

According to Justice Sawant this concept of secularism as religious tolerance and equal treatment of all religious groups includes an assurance of the protection of life, property, and places of worship to all religious groups.[13]

Dr B.R. Ambedkar, Chairman of Drafting Committee explained the concept of secularism while participating in the debate on the Hindu Code Bill in Parliament in 1951:

> It (secular state) does not mean that we shall not take into consideration the religious sentiments of the people. All that a secular state means that, this Parliament shall not be competent to impose any particular religion upon the rest of the people. That is the only limitation that the Constitution recognises.[14]

Further, before the constitutional amendment of 1976, the Supreme Court in *St. Xavier College* v. *State of Gujarat*,[15] has stated that although the words 'secular state' is not expressly mentioned in the Constitution but there can be no doubt that Constitution makers wanted to establish such a state and accordingly articles 25 to 28 have been included in the Constitution.

Thus, the nature of secularism in India is liberal and positive. According to our Constitution makers, the positive secularism meant *Sarva Dharma Samabhava* which does not connote an irreligious state. This discourse is based on a particular vision of equal respect of all religions: that is, formally equal treatments. Within this view, the equality of all religions requires that all religious communities be treated the same in

9 *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918; (1994) 3 SCC 1 at 232, 397.

10 AIR 1937 SC 464; see also Upendra Baxi, "The Constitutional Discourse on Secularism", in Upendra Baxi, Alice Jacob and Tarlok Singh (Eds.), *Reconstructing the Republic* 211-233 (New Delhi: Indian Association of Social Science Institutions, 1999).

11 (1994) 3 SCC 1 at 145.

12 *Id.*, at 146.

13 *Id.*, at 149.

14 PARLIAMENTARY DEBATES, Vol. 1, Part II (1951) 2466.

15 AIR 1974 SC 1389.

law.[16] It is neither a-religious nor indifference to religion but equal respect for all religions: not mere tolerance but positive respect. The Constitution of India through its various provisions seeks to establish and maintain a new democratic policy founded on secular foundations as the most powerful sustainers of the Indian variant of secularism. The different constitutional provisions ensure that there shall not be any state religion and assure every citizen of the fundamental right to profess, practice and propagate his or her religion. Moreover, every religion is assured of the right to manage its own affairs, establish its own affairs, and establish its religious as well as educational institutions of choice (articles 26 and 30). As an additional secular safeguard, article 28 prohibits imparting of religious instructions in any educational institution maintained out of state funds. Thus, various fundamental rights enshrined in these Articles are strong bastions of our secular credo.

A *Position in Indian Constitution*

The Indian Constitution in article 25(1) guarantees freedom of conscience as well as the right freely to profess, practice and propagate religion; subject to state control in the interest of public order, morality and health.'[17] In addition to this, collective freedom of religion is spelled out in article 26, by providing every religious denomination and section thereof with certain freedoms.[18]

Articles 27 and 28 are incorporated under the Indian Constitution to reinforce the individual freedom of religion. Article 27, which guarantees the freedom as to payment

16 For detail discussion see, Brenda Cossman and Ratna Kapur, "Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy", 38 *Harvard International Law Journal* 113 at 146 (Winter, 1997).

17 *Freedom of conscience and free profession, practice and propagation of religion-*
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
(2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law-
(a) Regulating on restricting any economic, financial, political or other secular activity which may be associated with religious practices;
(a) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
Explanation-I. The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.
Explanation-II. In sub clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

18 *Freedom to Manage Religious Affairs*—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-- (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law. These rights are subject to public order, morality and health

of taxes for promotion of any particular religion, declares "no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination." Article 27 prohibits the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Being a secular state, the freedom of religion is guaranteed by the Constitution both to individuals and to groups. Thus, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination.[19] A provision in a state law levying what in effect is a tax, would be, beyond the legislative competence of the state legislature. The levy however, would not violate article 27 of the Constitution, as the purpose is to see that religious trusts and institutions wherever they exist are properly administered and no question of favouring any particular religion or religious denomination would arise.[20] This would mean it is the secular administration of the religious institution that the legislature seeks to control to ensure that the endowments attached to the religious institutions are properly administered and their income is duly appropriated for purposes for which they were founded or for which they exist.[21]

The reason underlying this provision is obvious. India, being a secular State, it is against the constitutional policy to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination.[22]

A seven judge-bench of the Supreme Court in *The Commr. HRE* v. *L.T. Swamiar*,[23] considered the scope of article 27 and observed that what was forbidden by the article was the specific appropriation of the proceeds of any tax in the payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The reason underlying this provision was obvious. Ours being a secular state and there being freedom of religion guaranteed by the Constitution both the individuals and to groups, it was against the public policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination.

In *K. Raghunath* v. *State*,[24] a writ petition was filed before the Kerala High Court to forbear the state from spending amount from the public funds to reconstruct the places of worship destroyed during the disturbances at *Tellicherry* and the nearby villages. The Hindus and Muslims were involved in the disturbances and their places of worship were destroyed. Since houses, schools and places of worship of both were

19 *The Commr. HRE* v. *LT Swamiar*, AIR 1954 SC 282.
20 AIR 1974 SC 1389.
21 *Jagnnath Ramanuj Das* v. *State of Orissa*, AIR 1954 SC 400.
22 *Ibid.* See also *Motidas* v. *S.P. Sahi*, AIR 1959 SC 942.
23 AIR 1954 SC 282.
24 AIR 1974 Ker 48 (per Raghavan C.J.).

damaged the court justified the government action and held that there was no violation of article 27. The Court observed:

> ...it is not because the buildings belonged to a particular religious denomination that they are restored; but because they were damaged in the incidents. Even otherwise, we mean, if places of worship belonging to one religious denomination alone were damaged and they alone are to be reconstructed even then there is no question of promotion or maintenance of that particular religious denomination.[25]

Therefore, if the places of worship are destroyed due to communal riot and the state grants money so as to restore these places to the pre-riot condition, it cannot be said that the state is making payment for the promotion of a particular religion or religious denomination and consequently such grant by the state will not be violative of article 27.[26] Likewise, the acquisition of land for construction of temple meant for the use of public in general had also been upheld as not violative of article 27.[27]

Recently, the Gujarat High Court in 2002 riots case[28] examined the question whether public money can be lawfully spent for repair of religious places including those of worship, which were destructed by inaction or inadequate action on the part of the state administration.

The court observed that the "Rule of Law" is the basic feature of our Constitution and it enjoins obligation upon the state to see that all citizens are extended equal protection and equality before law. The rule of law also casts obligation upon the state to protect the life and property of all citizens. In case the state either deliberately fails or connives at or itself becomes an instrument of oppression, it is required to compensate the citizens and see that the rule of law is established. Unless religious places of worship, which have been destroyed, are repaired or restored and the concerned citizens are fully compensated, the state cannot be said to have fulfilled its constitutional obligation. The court further stated:

> Article 21 of the Constitution of India guarantees to all its citizens the right to life. The honourable Supreme Court has interpreted this right to mean not only the protection of physical body of the citizens, but according to it, the same is required to be interpreted in meaningful manner, so as to give content to the life. The religious places of worship for citizens are like their day-to-day breathing. For poor and illiterate people, the religious places are like their inner soul of existence. If the

25 *Id.* at 51. See also, *Bira Kishore* v. *State*, AIR 1975 Ori 8 at 11, where the government grant for preservation of water tanks belonging to Hindu deity was upheld since the tanks were open for the use of general public and it was necessary for the sanitation of the town.
26 *Ibid.*
27 *Papanna* v. *State of Karnataka*, AIR 1983 Kar.94.
28 *IRCG* v. *State of Gujarat*, MANU/GJ/0053/2012.

religious places of worship are damaged and destroyed, such fact tantamount to taking away their life itself.[29]

Article 25 of the Constitution of India guarantees the freedom to practice and propagate of religion and the state, as the guardians of all citizens and particularly, that of minority community, is under the constitutional obligation to see that the religious sentiment of any section of the society is not hurt by organised violence or in any other manner. During the period of riots, the fundamental rights of minority community of freedom of conscience and religion as well as freedom to manage their religious affairs (article 26) have been violated. Whatever may be the reason; the state could not or did not protect these fundamental rights.

A conjoined reading of articles 14,15, 16, 21, 25 and 26 of the Constitution of India leaves no doubt that a citizen has, subject to the restrictions contained therein, a right to lead a meaningful life based upon his faith on any religion and right to profess, practise and propagate any religion. He has also the freedom to manage religious affairs and maintain places of worship of his choice. Those articles have found places in Chapter III of the Constitution enumerating the fundamental rights of a citizen.

Thus, the state has a duty to protect those fundamental rights of the citizens conferred by the above mentioned articles and if by inaction or inadequate action, which is nothing but inaction, a person suffers for no fault on his part injury to his life and property, he can approach the court for appropriate remedy.[30]

It is submitted that the decision of the courts in the above cited cases could be justified on the ground that the state is primarily responsible for protection of life and property. Where property is damaged due to failure of the state to discharge its functions, it follows that the state is bound to compensate the affected parties for the loss suffered by them. In *Suresh Chandra* v. *Union of India*,[31] the question was whether the cultural programme by the Central Government involving an expenditure of about rupees fifty lakhs for the celebration of the 2500th anniversary of Bhagwan Mahavir's *Nirvana*, was violative of article 27. Answering it negatively, V.S. Deshpande, J. observed:

> While religion is an essential element in the Indian culture, cultural activity is distinguished from religious activity by its dominating purpose and objective. While the Jains may have the exclusive right to profess and practice Jainism and to perform the ceremonies prescribed for the observance of the Nirvana of Bhagwan Mahavir, the state and others cannot be shut out from expressing their respect and administration for the contribution of Bhagwan Mahavir to Indian culture... A secular way of remembering Bhagwan Mahavir is devised by the Government to

[29] *Ibid.*

[30] *Ibid.*

[31] AIR 1975 Del 168.

> suit all the people irrespective of the religion to which they may belong. It is the essence of a common cultural activity that everyone should be able to participate in it. It is not meant to be an imitation of religious practice.[32]

The court continued that a perusal of article 27 made it clear that "unlike the first amendment to the Constitution of the United States, what this article prohibits is the payment of taxes for promotion of any particular religion. Under the first amendment to the Constitution of the United States, the Congress cannot make appropriations in aid of religious bodies at all, but under article 27 of Indian Constitution what is prohibited is payment of taxes for any particular religion and not for the promotion of all religions generally. This article thus brings out the fact that the secularism contemplated by the Indian Constitution is not anti-god or anti-religion".[33]

The court further said that the grant of money by the state for cultural programme on the occasion of 2500th Salvation Anniversary of Lord Mahavir is not against article 27 because in such condition it cannot be said that the state has paid money for the promotion of Jain religion.[34] Grant of money by the state for secular activities (e.g. cultural activities) are not prohibited by article 27 because the word 'religion' does not include the secular activities (e.g. cultural activities).

Though the decision of the court rests on the ground that grant of money by the state for secular activities like cultural programmes is not prohibited by article 27, it is submitted that the celebration of the 2500th anniversary of Bhagwan Mahavir's *Nirvana* is more a religious function than a cultural one. State patronage of such functions, which amounted to religious patronage, was sought to be justified by the court on the ground of promotion of all religions. But the logic in *Suresh Chandra* case[35] that article 27 only prohibits payment of tax for the promotion of particular religion and not state patronage of all religions generally is against the true concept of secular state.

In *Sri Jagannath* v. *State of Orissa*,[36] the Supreme Court held that article 27 prohibits the levy of 'tax' and not the imposition of a 'fee'. Thus, on the basis of distinction between 'tax' and 'fee', the Supreme Court upheld a levy, which was demanded for the purpose of meeting the expenses of the commissioner and his office, which was the machinery set up for the due administration of the affairs of the religious institution concerned. The court observed that the annual contribution was in the nature of fee and that its object was not the fostering and preservation of the Hindu religion or of any denomination within it, rather it was to see that religious trusts and institutions wherever they existed were properly administered.

[32] *Id.* at 174.

[33] *Id.*, at 15; See also, Gajendragadkar, *Secularism and the Constitution of India* 58 (Bombay: Bombay University Press, 1971).

[34] AIR 1975 Del 168.

[35] *Ibid.* See also *B.K.Mohanty* v. *State of Orrisa*, AIR 1975 Ori. 8.

[36] AIR 1954 SC 400.

Article 27 prohibits the imposition of tax, the proceeds of which are appropriated in payment of expenses on the promotion or maintenance of any particular religion or religious denomination. Where the state granted money for the renovation of water tank belonging to Lord Jagannath but used by the general public for bathing and drinking purposes, the court held that it was not violative of article 27 because in such circumstances the state could not be taken to have promoted or maintained the Hindu religion as the tank was used for general public, and its renovation was necessary to maintain the hygienic condition.[37]

But it is submitted that collection of money, in the name of tax or fee for the administration or promotion of a religious trust is against the spirit embodied in article 27. Though the state has the duty to see that a religious trust is carried on as per its objects under the legislation governing the trust, which is a secular law, any endeavour beyond such duty to oversee the proper administration of such religious trust is incompatible with secularism.

Another area of controversy on this aspect is giving subsidies/concession to religious pilgrimage. Recently in 2006, the Lucknow Division Bench of the Allahabad High Court has barred Central and State Government from funding or providing financial subsidy for the Hajj pilgrimage.[38] The High Court ruled that such subsidy not be granted with regard to any pilgrimage of any community. However, the Bench clarified that government may continue to provide facilities required for safety of people going on or assembling for pilgrimage. This would include security measures for yatra like the annual Amaranath pilgrimage. Meanwhile the Centre decided to approach the Allahabad High Court to seek review of its order restraining the Union and State Government from providing funds or financial subsidies to Hajj pilgrims and pilgrimages of any other community.[39] In pursuing the philosophy of *Sarva Dharma Sambhava*, the Indian government has been investing resources on supporting the religious practices of all communities i.e. Hajj pilgrimage, Amarnath and Mansarover Yatra, Kumbh Mela etc. But the fact is, the government only looks after the administrative arrangement, which it does for all festivals irrespective of religion, for the purpose of imparting its duty to maintain law and order. It is not subsidies. However, it is important to note that even Islamic countries do not give subsidies for Hajj.[40]

However, the Allahabad High Court order has been stayed by the Supreme Court in appeal from year to year on different grounds[41] and very recently been decided.[42]

37 *B.K. Deb* v. *State of Orissa*, AIR 1975 Ori. 8.

38 The bench comprises Justice A.K. Yog and Justice O.N. Khendelwal. "Indian Secularism and Subsidy for Religious Populism", available at www.legalserviceindia.com/article/117.

39 *Ibid.*

40 http:// news.outlookindia.com/items.aspx?article=434178.

41 "Supreme Court Clears Hajj Subsidy for 2006", THE HINDU, September 19, 2006; "SC extends stay on Allahabad High Court order on Hajj subsidy", January 22, 2008 available at www. *contd...*

The Supreme Court through Justice Markandey Katju and Justice Gyan Sudha Misra decided that if only a relatively small part of any tax collected is utilized for providing some conveniences or facilities or concessions to any religious denomination that would not be violative of article 27 of the Constitution. It is only when a substantial part of the tax is utilized for any particular religion that article 27 would be violated.[43] We must not be too rigid in these matters and must give some free play to the joints of the state machinery. A balanced view has to be taken care, and we cannot say that even if one paisa of Government money is spent for a particular religion there will be violation of article 27. As observed by Mr. Justice Holmes, the celebrated Judge of the U.S. Supreme Court in *Bain Peanut Co.* v. *Pinson*.[44]

> The interpretation of constitutional principles must not to be too literal. We must remember that the machinery of the government would not work if it were not allowed a little play in its joints.

The court further said that there is no violation of articles 14 and 15, because facilities are also given, and expenditures incurred, by the Central and State Governments in India for other religion. The Supreme Court in *Transport and Dock Workers Union v. Mumbai Port Trust*[45] observed that article 14 couldn't be interpreted in a doctrinaire or dogmatic manner. It is not prudent or pragmatic for the court to insist on absolute equality, where there are diverse situations and contingencies.[46]

The Supreme Court recently examines the Hajj policy of the Government in all its aspects and directed the Central Government to gradually reduce the amount of subsidies being given to religious pilgrims so that within 10 years it is completely eliminated, and money is used for the "uplift of the community in education and other indices of social development."[47]

However by analysing provisions of Holy Qur'an and Islamic jurisprudence it is to be noticed that Hajj is obligatory when one has control over the expense of travelling and mode of transport whether as owner or on hire. Borrowing or using the means owned by someone else is impermissible. If someone offers gift for going for hajj one is within rights to accept or reject the offer. The expenses of travelling and mode of transport means that one should have, besides a house for residence, clothes, household articles, sufficient money for travelling to Makkah and for coming back; if

indianexpress.com/news/sc-extends; "Hajj Pilgrims to Get Subsidy for Another Year", *The Times of India*, January 22, 2008 available at www.timesofindia.indiatimes.com/article/117.

42 *Prafull Goradia* v. *Union of India*, decided on January 28, 2011, Writ Petition (civil) No. 1 of 2007 available at http://www.indiankanoon.org/doc/709044/.

43 *Ibid.*

44 282 U.S.499, 501(1931), see also *Missourie, Kansas and Tennessee Railroad* v. *May*, 194 U.S. 267 (1904).

45 2010(12) Scale 217.

46 Paras 39 and 43.

47 *Union of India* v. *Rafique Shaikh Bhikan & Anr.* (2012) 6 SCC 265.

there are any loans, to repay them and to leave behind sufficient money for expenses on those dependent upon him.[48]

> The Supreme Court, on the basis of the Holy Qur'an (Verse 97, Surah 3) observed:
>
> We have no doubt that a very large majority of Muslims applying to the Hajj Committee for going to Hajj would not be aware of the economics of their pilgrimage and if all the facts are made known a good many of the pilgrims would not be very comfortable in the knowledge that their Hajj is funded to a substantial extent by the Government.[49]

The Court further said that the Hajj subsidies had been rising every year, with the increase in air fare and pilgrims therefore, "we are of the view that Hajj subsidy is something that is best done away with."[50]

The Court agreed that the subsidy was constitutionally valid but it was very firm that there was no justification for charging the pilgrims a much lower price than even the normal air fares usually charged for a return ticket to Jeddah. Due to financial implication the court also ordered an end to the practice of sending a goodwill Hajj delegation.

However, it is to be remembered that 'India is a country of tremendous diversity, which is due to the fact that it is broadly a country of immigrants.'[51] The honourable Supreme Court observed that since India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and equal respect for all communities and sects.[52]

It is due to the wisdom of our founding fathers that we have a Constitution which is secular in character and which caters to the tremendous diversity in our country.[53]

III Concluding Remarks

Therefore, it is to be noted that to maintain the secular character of the Indian polity, the Constitution guarantee freedom of religion to individuals and to groups, and it is also against the general policy of the Constitution that money be paid out of public funds for the promotion or maintenance of any particular religion or religious denomination. It is against the constitutional spirit of article 27. Apart from this article, articles 14, 15 and 17 of the Constitution provide equal status to all Indians. These articles also restrict the government from giving benefits to a particular faith at the cost of others. If India is to remain a secular country, the state must refrain from privileging

[48] Fatawa-e-alamgiri edited and corrected by Abdul Latif Hasan Abdul Darul Kutubul Ilmiya Beirut, Vol. 1 *Lebnon* 240 (2000).

[49] (2012) 6 SCC 265.

[50] *Ibid.*

[51] *Kailas and Ors.* v. *State of Maharastra*, JT 2011(1) 19.

[52] Para 32.

[53] *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kureshi Jamaat*, AIR 2008 SC 1892, paras 41 to 60.

any religion over another, it has to treat all religion with equal measures. Very recently it is reported that centre is having "second thought" on continuing the Hajj subsidy.[54] A newspaper reported through Foreign Minister, SM Krishna "Well, there are second thoughts with reference to Hajj. Hajj reforms are taking place and we are evaluating this question of subsidy constantly and a large number of Muslim organizations have approached the Centre to abolish this subsidy concept."

[54] *The Times of India*, April 3, 2012.

CIVIL LIABILITY OF THE OPERATOR FOR NUCLEAR DAMAGE
National and International Legal Regime

Jay Prakash Dubey[*]

I Introduction

The industries involving ultra-hazardous risk such as nuclear activity cannot be considered as "normal industries". They are inherently dangerous with potential environmental and health risks. The nuclear incident in such industry badly affects the environment and the health of the country in which it occurs and sometimes affects the other countries also. Sometimes the consequences of incident are so grave that we feel it up to many generations. Such nuclear activities require a special mechanism for their regulation. The Civil Liability for Nuclear Damage Act, 2010 is an attempt by the Parliament in this regard to address the liability of operators in case of nuclear damage.

Domestic laws on protection against nuclear risks differ from traditional law. They are based upon several new principles. The responsibility is channelled to one person i.e. of operator. The number of exemptions from strict liability of the operator is very few. The liability is limited to a fixed amount irrespective of the existence of fault on the part of the responsible person and there is introduced a compulsory financial security against nuclear risk. The law on nuclear liability is characterized by the fact that it had to be created without former experience, and the law makers could not have any precise calculations at their disposal about the amount of damage which might possibly be caused by a nuclear hazard.

II International Conventional Law on Nuclear Damage

In wake of rapid growth of the nuclear industry, a special international regime for nuclear third party liability was necessary since ordinary common law is not well suited to deal with the particular problems in this field. Many of the new principles of domestic law have been adopted by conventions, such as the Brussels Convention on

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the Liability of Operators of Nuclear Ships[1] and the Vienna Convention on Civil Liability for Nuclear Damage[2].

The Brussels Nuclear Ships Convention was adopted on May 25, 1962. The Convention was signed by twenty-eight States, ten States voted against the Convention, and four States remains abstained. The United States and U.S.S.R., which were the most powerful States in the field of nuclear energy and particularly with regard to propulsion by nuclear energy, voted against the Convention because it imposes liability for damage not only by civil vessels but also by warships[3]. The U.S.S.R. voted against the Convention because of the amount of financial security required by the Convention[4]. Therefore international community had to come up with an international instrument to provide for a uniform system for the liability arising out of nuclear accidents. Hence first of these was the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960.

A Paris Convention on Nuclear Third Party Liability, 1960

The drafters of the Paris Convention[5] set out to provide adequate compensation to the public for damage resulting from a nuclear accident and to ensure that the growth of the nuclear industry would not be hindered by bearing an intolerable burden of liability. With this in mind the Paris Convention limited the liability of the operators and the limitation period was kept as low as possible[6].

The main highlight of the Convention is that the liability of the operator is *"strict"*, as opposed to general tort law which is based on fault or negligence[7]. Thus the nuclear installation operators were held liable, regardless of whether fault could be established. The Convention kept the maximum liability of a nuclear installation operator at SDR[8] 15 million and the minimum liability at SDR 5 million[9]. This low level of liability is worth criticism and most of the States have not adhered to this. The Convention made it mandatory for the operators to have insurance for an amount equal to that of their liability[10].

1 Hereafter named the "Nuclear Ships Convention." For text see *Development in the Law of the Sea, 1958-1964* (British Institute of International and Comparative Law, Special Publication No. 6, 1965), p. 196

2 Vienna convention on Civil Liability on Nuclear Damage, 1963

3 Claire Legendre, "La conference diplomatique de Bruxelles de 1962", 14 *Le droit maritime francait* 577 (1962).

4 Ligendre, *supra* note 4 at 577.

5 Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960, linked by the joint Protocol adopted in 1988.

6 A limitation period of 10 years for all claims arising out of the nuclear accident. (Article 8 of Paris Convention on Third Party Liability).

7 *Ibid.*

8 Special Drawing Rights.

9 Article 7 of Paris Convention on Third Party Liability.

10 Article 10 of Paris Convention on Third Party Liability.

B *Vienna Convention on Civil Liability for Nuclear Damage, 1963*

The Vienna Convention on Civil Liability for Nuclear Damage was prepared by the International Atomic Energy Agency. The Convention and the Protocol[11] were adopted on May 19, 1968. It is in essence the predecessor of Convention on Supplementary Compensation. Its article IV(1) provides for absolute liability of the operator while article V(1) provides that liability of the operator shall not be less than US$ 5 million[12]. But the Convention was amended by the Protocol to Vienna Convention on Civil Liability for Nuclear Damage, 1997 and the amended document provides that the Installation State may limit the liability of the operator to not less than 300 million SDRs or to not less than 150 million SDRs if the State is willing to pay the difference[13]. Thereby the Convention seeks to impose absolute liability on the operator for all damage caused by the nuclear incident. Article VA further provides that interest and costs shall be awarded in addition to the aforesaid amount. Article VI(1)(a) provides for limitation period. The period has been prescribed as 30 years for loss of life and personal injury and 10 years for any other damage. Article VI(1)(b) provides that if the insurance agreement of the operator covers a longer period then that period shall constitute the limitation.

The third Convention is a regional agreement on nuclear risks arising from fixed nuclear installations, prepared by the Organization for European Economic Co-operation (OEEC). The Convention on Third Party Liability in the field of Nuclear Energy was signed on July 29, 1960, by all members of the OEEC, except Ireland and Iceland. The member States of The Euratom Convention[14] agreed upon an additional financial protection, completing the protection provided for by the OEEC Convention.

C *Convention on Supplementary Compensation, 1997 (CSC)*

Article III of the CSC provides that the contracting party shall ensure availability of at least 300 million SDRs or a greater amount prior to any nuclear incident. The CSC

11 Protocol to amend the 1963 Vienna Convention on Civil Liability on Nuclear Damage.

12 Article V(3). The United States dollar referred to in this Convention is a unit of account equivalent to the value of the United States dollar in terms of gold on 29 April 1963, that is to say US $35 per one troy ounce of fine gold.

13 International Atomic Energy Agency, (2007, Vienna), "The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage- Explanatory Texts", *IAEA International Law Series No. 3*, [STI/PUB/1279] (2007) [hereinafter explanatory texts].

14 "The Euratom Convention" is a commonly used term. The official title is, Convention of January 31, 1963, Supplementary to the Paris Convention of July 29, 1960, on Third Party Liability in the Field of Nuclear Energy. It was signed in Brussels on January 81, 1963, by Austria, Belgium, Denmark, France, Germany, Italy, Luxemburg, Netherlands, Norway, Spain, Sweden, Switzerland, and United Kingdom. The work leading to this treaty was based on article 98 of the Treaty of Rome (signed on March 25, 1957) regarding the insurance of atomic risks; (1963) *International Legal Material* (No. 4) 686.

provides for absolute liability of the operator[15] and also that the installation State may provide for liability of the operator in case damage is caused by a grave natural disaster of exceptional character[16]. Therefore the CSC does not limit the liability of the operator. As regards the period of limitation, the CSC provides that it shall be 10 years but if the law of the installation state prescribes a longer duration that shall be valid[17]. Article XX of the CSC provides that the Convention shall come into force on the ninetieth day following the date on which at least 5 contracting states with a minimum of 400,000 units of installed nuclear capacity have submitted their relevant documents with the depository. Hence this clause makes this Convention ineffective as of now.

III National Laws

A *The Constitution of India*

Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 47 imposes a positive duty on the State to raise the level of nutrition, the standard of living and to improve public health. Article 48A imposes a duty on the State to protect and improve the environment and safeguard forests and wildlife. A mere perusal of these provisions of the Constitution leads us to the conclusion that environment and human life hold great importance in the Constitution. A conjoint reading of these provisions shows that the State is under obligation to protect human life and the environment as they are inseparable for a dignified and complete life. Such duty of the State is not only limited to protect the environment but also to improve it as a clean and healthy environment is necessary for the proper, meaningful and dignified existence of man. Any derogation from the required norms would result in violation of article 21 which is included in the Part III of the Constitution. Therefore, our Constitution makes it primary duty upon the State to take appropriate measure to protect and enrich the environment to secure living being to live with full dignity.

B *Environment Protection Act, 1986*

The Stockholm Conference in 1972 occasioned the birth of law on environment protection and the Environment Protection Act, 1986 in this regard was brought into force with aims and objectives to implement the decisions taken therein. The aim of this law is to fill the gaps in the existing laws and to provide control mechanisms against slow, insidious build-up of hazardous substances.

Section 2(a) of the Act provides that 'environment' includes water, air and land, and the inter-relationship that exists among them and between them and human beings, other living creatures, plants, micro-organisms and property. This definition

15 Article 3(3), Convention on Supplementary Compensation, 1997.

16 *Id.*, article 3(5) (b).

17 *Id.*, article 9(1).

makes it very clear that everything around us constitutes our environment and thereby in the light of this definition, the provisions of the Act seek to protect the environment. The definition of 'hazardous substances' a s given in section 2(e) means that any substance which due its chemical or physio-chemical properties is liable to cause harm to human beings or other components of the environment. It included all substances which may cause harm in the ambit of hazardous substances. Section 8 of the Act says that no person shall handle or cause to be handled any hazardous substance without complying with all the safeguards and the procedure which is prescribed. The Act seeks to prevent any damage being caused to the environment, especially by hazardous substances. It has widened the scope of the term 'environment'. In *M. C. Mehta* v. *Union of India*[18] (*Oleum Gas Leakage* case) Justice *P.N. Bhagawati* propounded the concept of absolute liability principle which is applicable in such situation. This shows the concern of the legislature and judiciary as well to protect the environment completely.

C Atomic Energy Act, 1962

The Atomic Energy Act and the Rules, as of now, permit only the Central Government to do certain acts relating to the use of radioactive substances and the production of atomic energy[19]. The sub-rule (2) of rule 1 of the Atomic Energy (Factories) Rules, 1996, specifically provides that the Rules shall apply only to all factories owned by the Central Government and engaged in carrying out the purposes of the Atomic Energy Act, 1962.

The Atomic Energy Act, 1962 and the rules in its clear terms lay down that only the Central Government has the power to use radioactive substances in industries for the purposes of mining or power generation. Private companies had been intentionally

[18] AIR 1987 SC 965.

[19] Section 3(a), Atomic Energy Act 1962 reads:
Subject to the provisions of this Act, Central Government shall have power –
(a) to produce, develop, use and dispose of atomic energy either by itself or through any authority or Corporation established by it or a Government company and carry out research into any matters connected therewith;
(b) to manufacture or otherwise produce any prescribed or radioactive substance and any articles which in its opinion are, or are likely to be, required for, or in connection with, the production, development or use of atomic energy or such research as aforesaid and to dispose of such described or radioactive substance or any articles manufactured or otherwise produced.
(bb) (i) to buy or otherwise acquire, store and transport any prescribed or radioactive substance and any articles which in its opinion are, or are likely to be, required for, or in connection with, the production, development or use of atomic energy; and
(ii) to dispose of such prescribed or radioactive substance or any articles bought or otherwise acquired by it either by itself or through any authority or corporation established by it, or by a Government company;...
(f) to provide for the production and supply of electricity from atomic energy and for taking measures conducive to such production and supply and for all matters incidental thereto either by itself or through any authority or corporation established by it or a Government Company.

excluded by the legislature. This had been done due to two reasons. Firstly, placing a sensitive substance like radioactive substance in the hands of private persons could lead to dangerous consequences if such persons are negligent. Secondly, for security reasons it is important that the Government, who is directly responsible to the people of the country, should bear the responsibility of protecting the radioactive substances from falling into wrong hands and should take appropriate measure for the generation of atomic power. Also the information which may sometimes be vital for country's defence should not be leaked to private parties and hence this legislation was in the interest of the country and its people as well.

D Civil Liability for Nuclear Damage Act, 2010

The Act of 2010 in its objective expressly clear that for the nuclear incident the liability of the operator[20] shall be absolute. Chapter II, which deals the liability for nuclear damage imposes the primary duty over Regulatory Board[21], (hereinafter referred to as Board), to notify such nuclear incident within fifteen days from the date of occurrence of a nuclear incident. The legislature by referring to the words *"shall ... notify such nuclear incident"* under section 3(1) of the Act made its intention very clear that such duty of the Board shall be mandatory subject to its satisfaction that the gravity of threat and risk involved in a nuclear incident is insignificant[22]. Immediately after such notification section 3(2) further puts the Board under obligation to cause wide publicity to be given to the occurrence of such nuclear incident, in such manner as it may deem fit.

Therefore the Act imposes a duty on the Board (AERB) constituted under the Atomic Energy Act, 1962 to make the notification about the occurrence of nuclear incident within the time prescribed and cause wide publicity to the occurrence of such nuclear incident in such manner as the Board may deem fit. But the proviso of section 3(1) freed the Board from the duties, if the Board satisfied that the gravity of threat and risk involved in a nuclear incident is not significant.

The Act of 2010 under section 4 imposes liability over operator for nuclear damage except in certain exceptional circumstances as stated under section 5. Such liability shall be strict and be based on the principle of no fault liability,[23] but is limited to the extent of amount specified under section 6(2). This section states the circumstances and the events to which the operator of the nuclear installation shall be liable. According to this section the operator of the nuclear installation shall be liable for nuclear damage caused by a nuclear incident –

(a) in that nuclear installation; or

[20] Section 2(m) "operator", in relation to a nuclear installation, means the Central Government or any authority or corporation established by it or a Government company who has been granted a license pursuant to the Atomic Energy Act, 1962 for the operation of that installation.

[21] Atomic Energy Regulatory Board (AERB) constituted under the Atomic Energy Act, 1962.

[22] *Proviso*, section 3(1).

[23] Section 4(4).

(b) involving nuclear material coming from, or originating in, that nuclear installation and occurring before –

(i) the liability for nuclear incident involving such nuclear material has been assumed, pursuant to a written agreement, by another operator; or

(ii) another operator has taken charge of such nuclear material; or

(iii) the person duly authorized to operate a nuclear reactor has taken charge of the nuclear material intended to be used in that reactor with which means of transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; or

(iv) such nuclear material has been unloaded from the means of transport by which it was sent to a person within the territory of a foreign State; or

(c) involving nuclear material sent to that nuclear installation and occurring after-

(i) the liability for nuclear incident involving such nuclear material has been transferred to that operator, pursuant to a written agreement, by the operator of another nuclear installation; or

(ii) that operator has taken charge of such nuclear material; or

(iii) that operator has taken charge of such nuclear material from a person operating a nuclear reactor with which a means of transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; or

(iv) such nuclear material has been loaded, with the written consent of that operator, on the means of transport by which it is to be carried from the territory of a foreign State[24].

But, where more than one operator is liable for nuclear damage, the liability of the operators so involved shall, in so far as the damage attributable to each operator is not separable, be joint and several but the total liability of such operators shall not exceed the extent of liability specified under section 6(2)[25]. Where several nuclear installations of one and the same operator involved in a nuclear incident, such operator shall be liable to the extent of liability specified under section 6(2) separately in respect of each such nuclear installation[26].

For the purposes of above stated circumstances (i.e. section 4), following person shall be deemed to be the operator[27]:

(a) the person responsible for transit of such material, where nuclear damage is caused by a nuclear incident occurring in a nuclear installation on account of temporary storage of material-in-transit in such installation,

[24] Section 4(1).
[25] Section 4(2).
[26] Section 4(3).
[27] Explanation (a), (b) and (c) under section 4.

(b) the consignor, where a nuclear damage is caused as a result of nuclear incident during the transportation of nuclear material,

(c) the person liable for any nuclear damage under agreement, where any written agreement has been entered into between the consignor and the consignee or, as the case may be, the consignor and the carrier of nuclear material.

Further, where both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences, such other damage shall be deemed to be a nuclear damage caused by such nuclear incident to the extent it is not separable from the nuclear damage[28].

Hence it is clear from above that the liability for nuclear incident is limited to certain circumstances only and caps the operator except some person who are deemed to be operator (though actually not operator) by virtue of explanation under section 4 in circumstances given therein. The liability under this Act is strict and is based on the principle of 'no-fault liability' but is subject to certain exceptional circumstances mentioned under section 5 which immune the operator from any liability for nuclear incident. These exceptional circumstances in which an operator shall not be liable for any nuclear damage are:

(1) Where such damage is caused by a nuclear incident directly due to—(i) a grave natural disaster of an exceptional character; or (ii) an act of armed conflict, hostility, civil war, insurrection or terrorism.

(2) Where such damage is caused to—(i) the nuclear installation itself and any other nuclear installation including a nuclear installation under construction, on the site where such installation is located; or (ii) to any property on the same site which is used or to be used in connection with any such installation; or (iii) to the means of transport upon which the nuclear material involved was carried at the time of nuclear incident being under proviso that any compensation liable to be paid by an operator for a nuclear damage shall not have the effect of reducing the amount of his liability in respect of any other claim for damage under any other law for the time being in force.

(3) Where any nuclear damage is suffered by a person on account of his own negligence or from his own acts of commission or omission.

The other considerable character of the Act of 2010 is the limited liability that has been incorporated under section 6. According to section 6, the maximum amount of liability in respect of each nuclear incident shall be the rupee equivalent of three hundred million Special Drawing Rights or such higher amount as the Central Government may specify by notification but where the compensation to be awarded under this Act exceeds the specified amount, the Central Government is empowered to take additional measures if it thinks necessary.

[28] Explanation (d) under section 4.

The liability of an operator for each nuclear incident shall be—(i) rupees one thousand five hundred crores where nuclear reactors having thermal power equal to or above ten MW, (ii) rupees three hundred crores, in respect of spent fuel reprocessing plants, (iii) rupees one hundred crores, in respect of the research reactors having thermal power below ten MW, fuel cycle facilities other than spent fuel reprocessing plants and transportation of nuclear materials.

However, the Central Government may review the amount of operator's liability from time to time and by notification may specify a higher amount. Further such amount of liability shall not include any interest or cost of proceedings.

The legislature was aware about the possible grave consequences of nuclear incidence in future, therefore, provisions have been made for financial securities. The Act of 2010 puts the mandatory obligation on operator to obtain insurance policy or other financial securities or both before he begins the operation of nuclear installation. It has also made mandatory to them to maintain/renew the policy before its expiry and review the same from time to time[29]. Though on one hand such liability has been made limited to certain person and up to a certain amount but on the other hand the Legislature expressed its intention to protect and indemnify the victim of nuclear incident completely by incorporating section 7. The Central Government is also under obligation to indemnify such aggrieved persons for the damages caused to them in following situations:

(a) where the liability exceeds the amount of liability of an operator specified under this Act, but only to the extent of the liability exceeds to such liability of the operator;

(b) occurring in a nuclear installation owned by Central Government; and

(c) occurring on account of a grave natural disaster of an exceptional character or an act of armed conflict, hostility, civil war, insurrection or terrorism.

But where the Central Government thinks that it is necessary in public interest to take full liability for a nuclear installation not operated by it, it may do so by issuing notification for the same. Further, for the purpose of meeting part of its above mentioned liability the Central Government is also empowered to establish a fund to be called the Nuclear Liability Fund by charging such amount of levy from the operators, in such manner, as may be prescribed.

Therefore, the Act seeks to limit the maximum liability to the minimum amount specified in the Convention[30]. The Central Government has been empowered to enhance the amount which it thinks necessary to meet the circumstances and to satisfy the aggrieved persons. The Act also imposes duty on operator to maintain insurance or

29 Section 8 of the Act.

30 Vienna Convention on Civil Liability for Nuclear Damage, 1963.

other financial securities before he begins operation of his nuclear installation. The Act made provisions to establish institution[31] and to appoint officers[32] for the proper and effective enforcement of its provisions/ principles and to provide effective relief to the victims of nuclear incident.

IV Conclusion

It is obvious that the Parliament by enacting the Act of 2010 permits installation of nuclear institutions though they are very dangerous. It appears that this is due to huge requirement of and our absolute dependency upon the energy (especially electricity). In the present scenario the nuclear energy has been proved to be an ultimate resource of it. Thus on the basis of sustainable development and need, the Parliament has found oút a middle path to provide permission for nuclear installation keeping under the control of the Civil Liability for Nuclear Damage Act, 2010. The Act permits the installation of nuclear institutions but made some strict provisions for safety measure and that cannot be ignored by anyone at any cast.

The Act is not complete and has certain drawbacks. It only provides liability for operator up to fixed amount that is the rupees equal to three hundred million SDR[33] or such higher amount as Central Government may specify by notification[34]. The residuary liability is of Central Government as a result of which the burden is transferred on Indian taxpayers. It also does not lay down any responsibilities of the foreign suppliers or the operators regarding the maintenance of safety mechanisms. Hence, the private operators would be free to adopt their own measures and mechanisms, which would definitely be in their interest and to maximise their profit and not keeping in mind the interest of the people of India.

It also does not lay down any penalty whatsoever in case of violation of any norms (which apply to the Government Companies as provided under section 24 of the Atomic Energy Act, 1962). Hence, in these circumstances it would be dangerous to allow private companies from other countries to come and operate nuclear plants in India. The Act also does not provide any method to calculate the compensation and damages in case of a nuclear accident and only fixes the limit of maximum amount of liability of the operators to the amount as above discussed and prevent the victims from getting full compensation for the damage caused to them.

31 Nuclear Damage Claims Commission, Chapter-V, Sections 19-38.

32 Claims Commissioner, Chapter-III, Sections 9-12.

33 "Special Drawing Rights" means Special Drawing Rights as determined by the International Monetary Fund. section 2(q) of the Act

34 Section 6 of the Act.

RHETORIC OF LAW RELATING TO THE PERSON WITH DISABILITY IN INDIA

Arun Kumar Singh[*]

I Introduction

Human rights are rights available to every person assuring him/her of equal treatment without any discrimination on the basis of caste, creed and sex. We, as human beings, irrespective of our status, are entitled to some basic rights known as human rights without which we cannot lead our life in a dignified manner. We need to respect and uphold the human rights of each other. The core principle of the Universal Declaration of Human Rights is that "all human beings are born free and equal in dignity and rights".[1] The human dignity means self-determination, self-respect and integrity. The principle of equality of rights is the basic concept of human rights and expressly embodied in all the instruments on human rights. These instruments confer on disabled persons the same rights as on other persons in general. As far as the protection of the human rights of disabled persons is concerned, it has two dimensions. On the one hand, there is the problem of lack of legal provision guaranteeing the protection of the disabled and on the other hand, there is problem of lack of specific effective resources. In the whole world, about 10 per cent of the world's total population suffers from some type of disability such as physical, mental or sensory impairment. The disabled require proper legal safeguards for the protection of their human rights. The issue that has been discussed here is related with basic legal controversies of the disabled. The first controversy is over terminology because some of the activists working for the protection of disabled raise the point that the term disabled is derogatory. Apart from these, there are some other issues which have been highlighted in the paper. These are, *inter alia*, do disabled persons enjoy the same rights as others? Do they have specific human rights? If they do have such rights, where are those rights mentioned? Do they have legal protections? Does the right to equal opportunity to the disabled is reality or is just an aspiration? In order to answer the above questions, an attempt has been made in this paper to consider international as well as national laws available in this regard. Simultaneously, the judicial decisions are also taken into

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1 Article 1, the Universal Declaration of Human Rights, 1948.

consideration regarding these issues. Some of the suggestions have also been made which can be incorporated for the betterment of the disabled.

II Meaning and Concept of Disability

The concept of human rights implies that they are common to all human beings and must therefore be universally applicable. According to the Vedic understanding, the basic human right is the desire of happiness, pleasure and free from illness. The basic theme of human rights is *"sarvey bhavantu sukhinah, sarvey santu niramayah"*. T he context of the human rights has been further explained by Nelson Mandela, one of the greatest leaders of the world. According to him, "all countries today need to apply affirmative action to ensure that the women and the disabled are equal to all of us".[2]

The meaning of disability has to be made very clear. A *disability* is an inability to execute some class of movements, or pick up sensory information of some sort, or perform some cognitive function that typical unimpaired humans are able to execute or pick up or perform.[3] An *inability* is anything a person cannot do.[4] *Impairment* is a physiological disorder or injury.[5] A *handicap* is an inability to accomplish something one might want to do, that most others around one are able to accomplish.[6] Thus, the ingredients of the concept of disability have always been changing as per socio-cultural environment of a society. Earlier the term "handicapped" was used for "disability" which was derogatory as because it was popularly believed to have derived from the phrase "cap in hand" referring to the medieval custom where beggars would extend their caps to receive the handouts.[7]

The World Health Organization defines the terms "impairment", "disability" and "handicap" in the World Programme of Action:[8]

Impairment: Any loss or abnormality of psychological, physiological, or anatomical structure or function.

Disability: Any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

Handicap: A disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfillment of a role that is normal, depending on age, sex, social and cultural factors, for that individual.

2 Justice S.B. Sinha, "Disability Law vis-à-Vis Human Rights" (2005) 3 SCC (J) at 1.

3 Brayan A. Garner (ed.), *Black's Law Dictionary*, 494 (West and Thomsen business Texas, 2004).

4 P. Ramnathan Aiyar's, *The Law Lexicon* 818 (Wadhawa and Co. Nagpur, 2001).

5 *Id.*, at 878.

6 *Id.*, at 912.

7 Anuradha Mohit (*et. al.*), *Right of the Disabled* 9 (New Delhi: National Human Rights Commission, 2006).

8 See http://en.wikipedia.org/wiki/Disability.

According to the definition contained in the Declaration on the Rights of Disabled Persons, 1975, the term "disabled person" means "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities".[9] The Convention on Rights of Persons with Disability, 2007 defines that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers, may hinder their full and effective participation in society on equal basis with others."[10] Thus, the Convention provides the definition of disability which is very broad and inclusive. The Government of India has also initiated some moves in regard to the identification of disabled persons and for the protection of their rights. The Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participations) Act, 1995 (hereinafter called as PWD Act) was enacted by the Parliament for the welfare of disabled persons. It defines persons with disabilities as "anyone having 40 per cent or more in seven specific categories which are: locomotors disability, blindness, low vision, hearing impairment, leprosy affected, mental illness and mental retardation"[11] In this regard further development in the move of the Indian Government can be observed from clause 2(25) of the Right of Person with Disability Bill, 2011. It proposed to define 'person with disabilities' as "person with any developmental, intellectual, mental, physical or sensory impairments including those mentioned in Schedule 1 of the Act, which are not of temporary nature and which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others."

III Causes of Disability

There may be various causes of disability. It may be hereditary, birth defects, lack of care during pregnancy or childbirth or because of lack of clothing or ignorance. Sometimes unwholesome housing, natural disasters, illiteracy and lack of information regarding health, poor sanitation and hygiene, congenital diseases, or malnutrition may be the cause of disability. The traffic accidents, work-related accidents and/ or illnesses, sports accidents are also very common factors of disability. Despite these, there are some diseases such as cardiovascular disease, mental and nervous disorders and diseases resulting from the use of certain chemicals which may also be one of the reasons of disability.

9 Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975.

10 Article 1, The Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participations) Act, 1995.

11 *Id.*, sections 2(i) and 2(t).

IV International Legal Regime

Disability is a global human rights problem, and it has always been a matter of grave concern for United Nations and its agencies. The Purposes and Principles of the Charter of the United Nations talk about equality for all. The Charter obliges all the member States to promote higher standard of living and developments.[12] The Universal Declaration of Human Rights, 1948 emphasizes equal rights for all. All are entitled to equal protection against any discrimination.[13] Apart from that, article 25 of Universal Declaration of Human Rights states that everyone has the right to a standard of living, adequate for the health and well-being of himself and of his family as well as the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. The two Covenants, the International Covenant on Economic, Social and Cultural Rights, 1966 and the International Covenant on Civil and Political Rights, 1966 develop and supplement the provisions of the Universal Declaration of Human Rights, and these Covenants together with Universal Declaration of Human Rights constitute the International Bill of Human Rights. Besides the efforts of the UNO, as mentioned, some other important attempts have also been made in this regard. The International Labour Organization's Recommendation No. 99 of 1955 concerning Vocational Rehabilitation of the disabled is a landmark in the promotion of the rights of the disabled to participate fully in opportunities for training and employment. The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, which is commonly known as the Convention against Torture provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[14] The above provisions are equally applicable to all human beings including the disabled.

In 1969, the UN General Assembly adopted a Declaration on Social Progress and Development. In 1971, the General Assembly adopted the Declaration on the Rights of Mentally Retarded Persons, which stipulated that mentally challenged persons should be accorded the same rights as other human beings and some special rights corresponding to their needs in medical, educational and social fields.[15] In 1975, the General Assembly adopted the Declaration on the Rights of Persons with Disabilities,

12 Articles 55 and 56, the Charter of the United Nations provide that all Member States have undertaken to promote "higher standards of living, full employment, and conditions of economic and social progress and development."

13 Article 1 stipulates that "all human beings are born free and equal in dignity and rights". Article 2 states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion". Articles 3 and 6 in turn use the expression "Everyone has the right to". Article 7 states that "all are equal before the law and are entitled without any discrimination to equal protection of the law.

14 Article 4, the Convention against Torture, 1984.

15 General Assembly Resolution 2856 (XXVI) of 20 December 1971.

which proclaimed the civil and political rights of persons with disabilities.[16] In 1976, the General Assembly declared that the year 1981 would be the International Year of Disabled Persons. In this context, a plan of action at all levels was drawn. The result of this plan was the formulation of the World Programme of Action concerning persons with disabilities adopted by the General Assembly in December 1982. For implementing the activities recommended in the World Programme of Action, the General Assembly proclaimed 1983 to 1992 as the United Nations Decade of Disabled Persons. On the basis of experiences gained during the Decade of Disabled Persons (1983-92), the General Assembly adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on 20th December 1993. The objective of the Rules was to impose responsibilities on States to remove those obstacles that prevent persons with disabilities from exercising their rights and freedoms. Similarly, the Convention on the Rights of the Child, 1989, ensures protection of mentally and physically disabled child.[17]

These, however, are soft instruments and have no binding force on States. Ultimately, the Convention on Rights of Person with Disability was adopted in 2007 to protect the rights of person with disability. There was no international treaty specifically dealing with human rights issues of the person with disability before the Convention of 2007. The Convention is really the first international human rights treaty that has made strong case for the individuality of rights.[18] It advocates for non-discrimination and imposes obligation on States to provide reasonable accommodations. It also imposes obligations on States to promote equality and eliminate discriminations.[19] Similar obligations are also imposed regarding work and employment.[20]

V Indian Laws

The Constitution of India does not specifically prescribe the provisions for the disabled people, but it contains non-discriminatory provisions that guarantee equality and equal opportunities for all citizens.[21] It not only guarantees right to life and personal liberty, but also directs the State through article 41 to make it effective. India being signatory to

16 Articles 5, 6, 7, 8, 9, 10, 11 of the Declaration of 1975.

17 Article 2 of the Convention on Rights of Child, 1989 provides: "States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community".

18 Jayna Kothari, "The U. N. Convention on Rights of Person with Disabilities: An Engine for Law Reform in India", *Vol. XLV* (18) *Economic and Political Weekly*, 66 (May, 2010).

19 Article 5(3), the Convention on Rights of Person with Disability came into existence in 2007 states "in order to promote equality and eliminate discrimination, State parties shall take all appropriate steps to ensure that reasonable accommodation is provided."

20 Article 27, the Convention on Rights of Person with Disability, 2007.

21 Article 14, the Constitution of India provides about right to equality as fundamental rights.

the various international documents, enacted the law for the protection and welfare of disabled persons. Besides the constitutional provisions of general nature on human rights, four more legislations are in existence in India relating mainly to the disabled. These are - the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (the PWD Act); Mental Health Act, 1987; the Rehabilitation Council of India (RCI) Act, 1992 and the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (National Trust Act, 1999). Among all these, the PWD Act is the main Act dealing with the person with disabilities which was enacted by the Government of India mainly due to international pressure and to earn significant goodwill.[22] The object of the Act is to ensure equal opportunities to the person with disabilities and to protect their rights and enable them to have full participation in life. But with the coming into force of the Convention on Rights of Person with Disabilities of 2007, a strong demand is being made for the amendment of PWD Act.

In addition to above, the Juvenile Justice (Care and Protection of Children) Act, 2000 also facilitates amongst other things the integration of persons with disabilities into mainstream society. There are various labour laws, such as the Workmen's Compensation Act, 1923 (now the Employees Compensation Act, 1923), the Employees' State Insurance Act, 1948 and the Public Liability Insurance Act, 1991, which also provide protection and promote the rights of persons who are disabled during the course of employment.

VI Issues Regarding Disability in India

A Inappropriate Definition of Disability

The Person with Disability Act, 1995 defines a disabled person as one who is "suffering from 40 per cent or more disability".[23] This definition contains only seven different categories of disabilities. The definition becomes narrower than the definition given in the Convention on the Person with Disability, 2007. Another anomaly is, after imposing the limit of 40 per cent, the individuals who are suffering from impairments of less than 40 per cent cannot avail the protection. This quantification is more problematic to decide the case of persons with mental disability, where there is no universal scale to measure the same.[24] Although mental illness has been included as one of the seven disabilities in the definition of disability in the PWD Act, yet as a whole it shows very little understanding of the nature of the disability. It appears that the recognition is more by default rather than intent. From the very definition of

22 *Supra* note18 at 67.

23 Sections 2(i) and 2(t), the PWD Act, 1995.

24 Nirmala Srinivasan, "Flawed Law-Critiques the Person Disability Act, 1995", *India Together*, *http://www.indiatogether.org/*health/pwd95crit.htm.

mentally ill person, it is clear that mental illness is other than mental retardation.[25] But a question comes again, whether all mental disorders such as epilepsy or dyslexia can be covered in the purview of mentally ill person. This ambiguity in the definition of mentally ill person needs further answer and explanation.

B Issue Regarding Representation in Coordinating Committee

The PWD Act recognizes seven disabilities, but the representation allowed in the coordinating committee and executive committee at the central and state levels are restricted only up to five members.[26] These selected five members are supposed to have full and practical knowledge of all or most of the disabilities; so that justice can be done to all categories of disability. But due to the restriction in the number, practically it is not possible to get representation from all categories of disabilities. So, unless each disability is represented individually, the chances of injustice may always be there, especially for the categories which remain unrepresented.

C Medical Termination of Pregnancy Act, 1971 and Disability

After the enactment of the Medical Termination of Pregnancy Act, 1971 (MTP Act), the strict provision of the section 312 of the Indian Penal Code, 1860 dealing with abortion became softened. This is because some grounds are available in this Act to abort the child and that is not an offence.[27] As far as child's right is concerned, nothing is more valuable than right to life. An unborn child will avail every opportunity which a normal human being has. A child in mother's womb is deemed to be legal person and has certain rights. Under Hindu law, he is a person for all the purposes and entitled to inherit the property. Under the Transfer of Property Act, 1882, he is entitled to be the competent transferee and has the rights in the property. However, he will get only contingent interest in the property as long as he remains in the mother's womb. The moment he is born alive, he gets vested interest in the property.[28] Does anyone have right to deprive another's life on the grounds that life in mother womb is not worth

[25] Section 2(l) of the Mental Health Act, 1987 provides "mentally ill person is the person who in need of treatment by reason of any mental disorder other than mental retardation".

[26] Section 3(2)(l) of the PWD Act, 1995.

[27] Section 3, the MTP Act, 1971 envisage that the termination of pregnancy by a registered medical practitioner is not an offence if pregnancy involves:
(a) A risk of the life of the pregnant woman. or
(b) A risk of injury to her physical or mental health. or
(c) If the pregnancy is caused by rape or
(d) There exists substantial risk that, if the child were it would suffer from some physical or mental abnormalities so as to seriously handicap. or
(e) Failure of any device or method used by the married couple for the purpose of limiting the number of children. or
(f) Risk of health of pregnant woman by reason of her actual or reasonable forcible environment.

[28] Section 13, the Transfer of Property Act, 1882.

living because of being disabled? This is not justifiable because many people with disabilities lead fulfilling lives. What amount of disabilities would be regarded as the water-shed between life and its termination is not clear. Aborting foetus, because of disability, sends an implicit message of rejection to the rights of the people with disabilities. It is complete violation of the provisions of various international human rights documents as well as of the PWD Act. These documents provide equal opportunity and non-discrimination to all including person with disability. However, the MTP Act permits it on certain grounds.[29] So there is contradiction between the above laws. Euthanasia is still not legalized in India except passive euthanasia, howsoever vegetative disease it may be.[30] Even if doctors are unanimous in their opinion that the surviving of the patient is more painful than death, but they cannot give any injection or medicine to facilitate the death of such patient. This is due to the reason that this act makes them liable for the culpable homicide not amounting to murder under the Indian Penal Code, 1860.[31]

D Lack of Co-ordination

The PWD Act, 1995 deals with both benefits and rights of the disabled under three main heads. These are: prevention, rehabilitation and integration. In the case of mentally ill persons, treatment and rehabilitation is crucial. But the problem is that the treatment aspect is related to the Ministry of Health, while rehabilitation falls under the purview of the Ministry of Social Justice and Empowerment. Sometimes, because of lack of co-ordination between these two ministries, disabled people become ultimate sufferer. Therefore, the composition of the committees should be made in such a way that the members in the Committee should be from both ministries to avoid this problem.

E Delay in Adoption of Social Model of Disability

Another issue is regarding adoption of suitable system. At earlier stage, the whole world was following the medical model of disability that focused on inability or impairment. But after the coming into force of the Convention on the Rights of Person with Disability, 2007 focus is shifted throughout the world from a medical problem to a social model of disability which focuses on capability, individual dignity and personal autonomy of the persons. However, the Indian legislature has not yet accepted this change and disability as defined in section 2(i) of the PWD Act, 1995 still accepts the problem only as a medical disability. Therefore, it is suggested to amend the provisions

[29] *Supra* note 27.

[30] See *Aruna Ramchandra Shanbag* v. *Union of India*, Writ petition (Crl) No. 115 of 2009.

[31] Exception V of section 300 of the Indian Penal Code, 1860 provides, "culpable homicide is not murder when the person whose death is caused being above the age of eighteen years, suffers death or takes the risk of death with his own consent".

of the PWD Act to bring it in conformity with the related provision of the Convention on the Rights of the Person with Disability, 2007.

F *Lack of Dedication Regarding Implementation*

In India, the authorities concerned are yet to prescribe and ensure implementation of accessibility. Even after 16 years of enactment of PWD Act, we have failed to take any concrete steps towards its implementation. The words 'within the limits of their economic capacity and development' are used as a defence and to dilute the rights granted by the statute.[32] A proactive approach within the limits of economic development can provide some accessibility to the disabled in India.[33]

VII Judiciary's Initiatives

Although India has been party to many treaties, but it is not very sincere to implement their provisions. The general requirement in India is that the treaty must first be incorporated into domestic law before they may be invoked directly before the court for the cause of action. It gets validity from articles 51[34] and 253[35] of the Constitution of India. Despite these provisions, international conventions are not being incorporated in the municipal laws in India. However, the Indian courts realized the value of such Conventions, especially those related to human rights. The Supreme Court held that due regard must be given to the International Conventions, especially those related to human rights, if they were not inconsistent with the domestic laws.[36] The court in *Vishakha's* case[37] relied upon the provisions of article 11 of the Convention on All Forms of Discriminations Against Women, 1979 (CEDAW) and framed guidelines for the sexual harassment at work place on the basis of it. Some of the rulings of the Supreme Court of India are important enough to be mentioned below. In another case the Supreme Court held that it was mandatory for the government to consider international obligations and also acted on them unless some compulsion to depart from them was there.[38] In *Javed Abidi* v. *Union of India*[39], the Court directed Indian Airlines to provide concessions for passengers suffering from locomotors disability.

32 Section 44, the PWD Act, 1995.

33 Lalita T. Ollapall, "Failure to Implement the Disability Act" *India Together*, retrieved from http://www.indiatogether.org/health/disability/dact.htm.

34 Article 51 provides: "State shall endeavour to… (c) foster respect for international law and treaty obligations in dealing of organized people with one another".

35 Article 253 provides "Notwithstanding anything in the forgoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body;.

36 *Vishakha* v. *State of Rajasthan* (1997) 6 SCC 241.

37 *Ibid*, see also *Apparel Export Promotion Council* v. *A. K. Chopra* (1999) 1 SCC 759.

38 *T.N. Godavarman Thirumalpad* v. *Union of India* (2002) 10 SCC 606.

39 (1999) 1 SCC 467.

The Supreme Court held that the true spirit and object of the Person with Disability Act, 1995 was to create a barrier-free environment for persons with disabilities. Again in *Indian Banks' Assn.* v. *Devkala Consultancy Service*,[40] the Supreme Court directed that the amount allotted for the welfare of the disabled should be transferred to a trust under the Chairmanship of the Comptroller and Auditor General of India so that the moneys could be utilized for various programmes for the welfare of persons with disabilities. In *re Union of India*,[41] the Supreme Court, on being informed about the death of 25 chained inmates in an asylum fire in Tamilnadu, took *suo motu* action by directing the Cabinet Secretary to frame a national policy to address issues faced by the PWDs under section 8(2) (*b*) of the PWD Act. In *Ranjit Kumar Rajak's* case,[42] the petitioner went for renal transplant. He was declared unfit for the job by the bank. The ground taken by the bank was that if he was allowed to continue, the whole cost of treatment would be borne by the bank which would be too high to bear. But Bombay High Court refused such plea and ordered the bank to reinstate him on duty. Supreme Court in case of *Union of India* v. *Devendar Kumar*[43] held that a person with disability can be denied promotion if the disability comes in the way of performing higher duties and function of promotional post.

The Supreme Court in a landmark case of *Syed Basiruddin Quadri and Ors.* v. *Nazir Ahmed Shah and Ors.*[44] upheld the rights of person with cerebral palsy. The Court in this case held that a person suffering from cerebral palsy appointed as teaching guide on the post reserved for the person with disability and performing effectively could not be discontinued only because he could not write. The Supreme Court observed in this case was not one of the normal cases relating to a person's claim for employment but it involved a beneficial piece of legislation to enable person with certain forms of disability to live a life of purpose and human dignity. This was a case which had to be handled with sensitivity and not with bureaucratic apathy.

VIII Conclusion and Suggestions

From the above discussion, it appears that the laws are available for the benefits of the disabled. Despite all efforts, however, persons with disabilities are still generally denied equal opportunities and remain isolated in our society. They are deaf and dumb and blind but society is deaf, dumb and blind to them.[45] Disabled persons are retarded mentally and mentally retarded society is indifferent to them.[46] When a person is

40 (2004) 11 SCC 1.

41 (2002) 3 SCC 31.

42 *Ranjit Kumar Rajak* v. *Union of India*, MANU/MAH/0452/2009.

43 2010 AIR SCW 561.

44 2010 AIR SCW 1795.

45 V.R. Krishna Iyer, "Social Justice and Handicapped humans" in K. D. Gaur (ed.), *Criminal Law an Criminology* 498 (Deep and Deep Publication Pvt. Ltd, 2003).

46 *Ibid.*

subnormal or abnormal he is not to be viewed with hostility as a menace or nuisance but he is required to be paid more attention for his rehabilitation. The given laws are having serious flaws. The PWD Act has specifically earmarked job reservation of 3 per cent for the physically disabled in government educational institutions and institutions receiving aid from the Government.[47] The time has come for appropriate amendments in the PWD Act. The PWD Act can be effective statute if it is implemented effectively. India is also required to switch over from medical model to social model of disability and in this context the equal opportunity should be given to the disabled in same institution rather than establishing separate institutions for them. Therefore, following suggestions can be incorporated for better results:

1. The educational institutions are not always accessible to disabled persons and in many cases; such persons are not admitted to the same schools as other people. This problem should be avoided. Efforts should be made to promote, expand and protect the rights of persons with disabilities through the provision of information, training, advocacy and legal representation.
2. Many work places are not disabled friendly and are not physically accessible to severely disabled persons. It should be made disabled friendly and freely accessible. In the regular educational curricula at school, college and university level, a compulsory course dealing with the persons with disabilities should be introduced.
3. New educational and training institutions should be established purposely for persons with disabilities to make them technically sound. It should also be ascertained that the persons with disabilities have equal opportunities in education and vocational training by providing for reservation of seats for them. The Government needs to make many provisions in educational policies for children with multiple disabilities. Children should b e motivated by their peers. If all children, disabled or others are allowed to be together they will not only understand and be comfortable with each other, but also be a contributing citizen of the nation.[48]
4. Indian society, particularly in poorer and rural areas, needs to be educated about disability and also about the cure and alleviation of disability.
5. Percentage of reservation for persons with disabilities in both formal and non-formal workplaces should be increased.
6. Travel concessions, incentives, awards, and scholarships should be made easily available to them. The Ministry of Social Justice and Empowerment has started the scheme of scholarship for the disabled students in 2011. It needs to be implemented more vigorously. Not as a simple ritual to hang the letter on the notice boards.

[47] Section 39, the PWD Act, 1995.

[48] Malini Chib, "Right to Exclusion?", *The Indian Express*, New Delhi, 11th May, 2012, p.10.

7. Calling the disabled with some derogatory nicknames, which shows their disability, should be avoided. One who uses such statements or proverbs should be held criminally liable as in the Protection of Civil Rights Act, 1955.
8. It is found that there is conflict in laws for the same provisions in different Acts. For example assessment of locomotors disability is different under the Manual of ALIMCO, 1980, the Workmen (now Employee) Compensation Act, 1923, the Government of India Gazette, 1986 etc. So there is a need of coordination between Central and State Co-ordination Committee to examine it properly and bring uniformity in law.
9. Lastly, the institutions and organizations who are working for the welfare of the persons with disabilities should be awarded appropriately.

THE EARTH CHARTER
Blueprint for a Truly Equitable World

Manju Chellani[*]

I Introduction

The period after the World War II witnessed momentous changes in the entire world. These changes included decolonization, socio-economic restructuring, shifting of international boundaries, leaps in scientific and technological knowledge, globalization etc. While causing upheavals in millions of lives, these changes also led to unprecedented development and progress in many spheres of human life. Lifestyles and consumption-patterns changed at an accelerated pace. Simultaneously, the value and practice of many essential traditions and belief-systems were also eroded. Even though these had been held sacrosanct from time immemorial, they were now found to be "impractical" because they advocated the communal over individual, long-term benefits over short-term gratifications, biocentrism over human primacy. Slow evolution became trite. Hurtling forward towards development – faster the better – became the global mantra. The "developed" (mainly the western) world automatically became the ideal *mode de vie* towards which, it was taken for granted, the "developing" countries would aspire to. However, by the middle of the last century, this frenetic activity was beginning to be coloured by misgivings.

Many realities came to the fore which humans had to grapple with. One of these was that fast-track development and progress are double-edged swords. They exact heavy social, environmental and psychological prices. One of these prices relates to the resources of this earth which are not infinite; many are irreplaceable. Furthermore, the biodiversity of this planet is fragile and interlinked in ways undiscovered by human knowledge, no matter how advanced. Yet, this fragile web of life is imperative for the survival of earth and its ecosystem which includes all the human and non-human communities. It also began to be understood that the human activity of the recent decades is degrading and destroying these to an unimaginable and maybe irreversible extent. Hence, the need for environmental regulation, at both the national and international levels, was acknowledged. The United Nations Conference on the Human Environment (UNCHE) of 1972 brought about the amalgamation of traditional

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principles of international law with environmental protection. Environmental ethical thought and international environmental law started blossoming. The World Charter of Nature, 1982[1] and *Our Common Future*[2] consolidated the developments in international environmental law. In 1992, the United Nations Conference on Environment and Development (UNCED), 1992 (popularly known as the Earth Summit, 1992) was welcomed as being the harbinger of an environmental resurrection and indeed, produced some very important instruments of international environmental law[3]. However, they did not bring about the desired results.

Today, international environmental law has assumed importance for all countries at par with their domestic environmental regulation, given the global implications of most human activity anywhere on the earth. One of the hallmarks of human and non-human environmental activity is the porousness of man-made borders. Elements, flora and fauna know no boundaries, nor do emissions and degradations. Besides this, commercial and social interests have made inroads in the even hitherto unapproachable areas of the planet, making international regulation almost as significant for the ordinary citizen as her domestic regime. The international environmental law has responded by developing into a sophisticated and intricate legal framework. It has highly-developed underpinnings of various inter-disciplinary areas of science, ecology, economics, trade etc. Apart from the UNCED instruments, there are a large number of international and regional conventions and agreements catering to various facets of environmental regulation, protection and compliance. The efficacy of all of these has been variable despite strong provisions, laudable aspirations and political will. Environmental issues and problems continue to plague the world with compounding challenges. The rising concern over climate change, environmental refugees and genetically modified food are just some of the examples.

There are many reasons for this. One of these relates to our approach, till recently, to environmental challenges and problems. Ignoring the simple and ancient adage of "prevention is better than cure", humans have created multi-layered environmental, social and economic evils and then tried to put a lid on them in knee-jerk reactions. On the way, we have also lost sight that we humans are only parts of the ecological chain. If we start breaking links, our turn comes too, sooner or later. Though some winds of changes have blown, especially in the last decade, the anthropocentric and palliative

1 http://www.un.org/documents/ga/res/37/937r007.htm-28/10/82.

2 World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987). Its popular name: *Brundtland Report* derives from the name of the chairperson.

3 Namely: Agenda 21; Rio Declaration on Environment and Development (Rio Declaration); Convention on Biological Diversity (CBD); Framework Convention on Climate Change (UNFCCC); Non-Legally Binding Statement of Principles for Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles).

spirit of yesteryears is still within us. It was "codified" in the Rio Declaration[4], produced by the UNCED in 1992, and continues to inform all our socio-legal structures. This does happen even though the Rio Declaration is about 20 years old and criticized in many forums. Nevertheless, it is still echoed in the way we view environmental issues – both from theoretical and practical standpoints. In order to bring about their real resolution, many perspectives have to be revamped completely. When we do this, we would not only reach the solutions to our current problems, we would also be moving towards the attainment of justice which is one of the implicit objectives of any environment law – domestic or international. It is only by keeping the goals of justice and reality as central to the environmental debates, that we can actually effect what we desire. This justice, of course, includes environmental justice in the utilization, enjoyment, paying for degradation and disposal of all resources, among all peoples, groups and communities at the national and international levels[5]. But the logical endpoint of this is ecological justice. While environmental justice deals with environmental equity and justice for humans only, ecological justice goes further and seeks justice for non-human species and indeed, all nature.

However, we do not seem to getting any nearer to environmental justice, ecological justice or any solutions to our environmental roadblocks even though international environmental law is getting increasingly sensitive to alternative pathways and strategies. This is where the Earth Charter (hereinafter "the Charter") comes in[6]. The Charter is widely considered to be the full-fledged representation of the holistic, ecosystemic approach to the environment and all its manifestations, characterizing the evolving environment discourse of recent years. This article attempts to examine the Charter and its relevance to the contemporary international environmental law; analyzing its potential for resolution of latter's conundrums. The objective is to demonstrate that the principles and underlying value-system of the Charter, if and when put into actual practice, may prove to be the ultimate panacea for the environmental and many other tribulations the world has been facing in the past few decades.

II Earth Charter: Relevance to Contemporary Environmental Discourse

The Charter has an interesting history. The Charter project began as a United Nations initiative. The formulation of the United Nations Earth Charter was part of the process leading up to the UNCED. During the summit, however, it was felt that the time was

4 *Supra* note 3: Rio Declaration. See especially the Principle 1 which says: "Human beings are at the centre for concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

5 The Brundtland Commission Report also advocated environmental justice as a pre-requisite for SD. This is fully discussed in M. C. Segger, A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* 131-132 (Oxford University Press, New York, 2004).

6 http://earthcharterinaction.org/coontent/pages/What-is-the-Earth-Charter%3F.html.

not right for such a document. Hence it was substituted by the Rio Declaration about which there were more consensuses. But Rio Declaration was also comparatively more anthropocentric and limited in nature. In response to this changeover, the Charter was negotiated by many hundreds of civil society groups representing the world's culture, ethnic and religious diversity, since 1994. Though it deals primarily with sustainable development (SD), its ethical and moral principles touch many other aspects of life on this earth and provide a framework for sustainable life, as a whole. They touch social, economic and psychological components as well. The drafting and consultation process of the Charter drew on hundreds of international documents. In 1997, an independent Earth Charter Commission, an independent international entity, was formed to oversee the development of the text, consultation process and come to an agreement on the global document. Through the various Earth Charter Community Summits, individuals and NGOs worked towards an agreement on a comprehensive ethical framework for SD. This was meant to be unlike any document offered by existing formal treaty regime.

In 2000, the Earth Charter Commission came to a consensus at a meeting held at the United Nations Educational, Scientific and Cultural Organization (UNESCO) headquarters in Paris. The Charter was formally adopted in The Hague and has since been endorsed by a number of international organizations representing millions of people, including UNESCO, over 200 universities around the world, the World Conservation Union (WCU) of International Union for Conservation of Nature (IUCN), the Indian National Capital Territory of Delhi and many others[7]. The Charter came very close to being formally recognized at the World Summit for Sustainable Development (WSSD)[8], with public statements of support from world leaders and heads of States. However, this did not actually happen. Notwithstanding this, today the Charter is recognized as the global consensus statement on SD. It is also used for peace negotiations, development of global standards and code of ethics, governance and legislative process, community development tool, educational framework for SD etc.[9] Apart from these, the Charter illustrates the role and potential of the NGO actors to formulate soft law and international/environmental norms. The Charter's legitimacy derives from its highly participatory drafting-process. It is a framework document and inspirational in nature, on the lines of the RD rather than a draft agreement or convention. It has acquired the status of soft law, forming the basis for the formulation of hard law.

The major and central concept and objective of Charter is SD, just like the UNCED instruments. SD is a hot-button topic right now, and one of the foremost concerns of

7 See http://en.wikipedia.org/wiki/Earth_Charter for a comprehensive look at the endorsement of the Charter (last accessed on 15 April 2012).

8 Also known as the Johannesburg Summit.

9 See http://www.earthcharterinaction.org/content/pages/history.html.

the past few decades. Today, with the clock ticking towards the United Nations Conference on Sustainable Development, 2012 (popularly known as Rio + 20), the world is again geared towards the achieved and non-achieved goals of the international efforts towards SD. Although as a concept, it was in the realm of (international) environmental law that SD had first appeared in international discourse[10] which is generally regarded as its most important facet, SD is not limited to it. It is not just about environmental protection, especially in the context of developing countries. It reinforces, by implication, the interrelatedness of its three pillars namely: environmental protection, economic growth and social justice (including political stability). SD promotes that all should consume only their fair share and low-consumption life-styles and is supposed to minimize inequality. Implying limits to growth and balance between humans and nature, it also means the creation of sustainable communities and protecting global common goods such as climate, water, soils and biodiversity.[11]

Like UNCED and so many other instruments, the Charter also recognizes the interdependence of three pillars of sustainable development. It also assumes the Brundtland definition of SD[12] but clearly expands the parameters which define it and gives them a more equitable and urgent tone. This is especially true of the parameter of environmental/ecological sustainability. While enlarging this, it draws on the most evolved philosophy of environmental ethics (EE). As for all other components and paradigms of SD, the Charter does the same: it draws them to their highest selves and sets them forth as ideals to be achieved by those of us on this earth. However, these ideals are no utopia. They are simple moral and ethical principles which form the basis of most religions and philosophies of the world – past and present. They represent the simplicity which we have forgotten or ignored, but they do not represent the unattainable or the unrealistic. Let us see in the following how the Charter can buttress the whole system of SD with its underlying crux of justice and equity, by examining some of its most central and imperative mechanisms.

A discussion of SD brings us logically to the principle of inter-generational equity (IGE) which is one of the key components of the larger principle of equity, and also one of the most important principles of international environmental law. In broad terms, the principle suggests that just as all resources have been inherited by the present generation from the past generations on this earth, the present generation has an obligation to pass them to the next generation at least in the same or even better

10 *Supra* note 2.

11 See http://en.wikipedia.org/wiki/sustainable_development for more details.

12 *Supra* note 2 at p. ix. Very famously, it defines SD as the development that "meets the need of the present without compromising the ability of future generations to meet their own needs". This definition has been criticized over years variously as being too vague, inadequate, anthropocentric etc. However, it is still the most commonly used one and forms the basis of many documents on SD, for want of a better definition.

condition. No country, people or generation has an exclusive right to the natural resources of this earth. The present generation has no right to intervene irreversibly and exhaustively so as to deprive future generations of environmental, social and economic opportunities of well-being, especially since the latter is not in a position to speak for itself. IGE also implies that while the future generations may benefit from our economic progress, they will suffer much more from the environmental degradation which we have caused. In fact, IGE is also one of the most important components of SD[13]. While numerous instruments of soft and hard law have acknowledged IGE as one of their most important principles and aspirations, it has been mainly in social, environmental and economic terms. It is noteworthy that IGE finds full bloom in the principle 4 of the Charter which affirms we have to secure earth's bounty and beauty for present and future generations.

Furthermore, the Charter has carried our responsibility for IGE even further. It also exhorts that we also have to transmit to future generations the values, traditions and institutions that support the long-term flourishing of human and ecological communities. Thus, it is evident that the Charter's perception of human responsibility towards IGE thus goes even further than as progressively defined in *Minors Oposa* v. *Secretary of the Department of Environment and Natural Resources (DENR)*[14] which has become a benchmark of what is progressive in the jurisprudence of international environmental law. In that case, the petitioners had contended that they represented other of their generation as well as generations as yet unborn. The Court decided that the petitioners were able to file a class suit both for others of their generation and for succeeding generations. The minors' assertion to their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come. This was a highly significant case as the country's (Philippines) highest court had addressed the issue of IGE to reach a decision and also recognized it explicitly. This was in the 1990s. The reason that the Charter has been able to extend IGE to the level of ecological justice is because it concentrates not just on human communities but also the non-human ones – representing quintessential IGE and ecological justice. This is at a much more evolved level than taken up in the RD which says that the right to development must be fulfilled so as the meet the developmental and environmental needs of present and future generations[15]; and that in order to achieve SD, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[16] Of course, IGE is one of the prominent features of the Convention on

13 But some thinkers feel that, in fact, the concepts of IGE and SD may be incompatible with each other. The former leans towards balancing the *needs* and the latter towards the *demands* of humans, with what may be prudently and sustainably obtained from the environment around us.

14 33 *International Legal Materials* 173 (1994).

15 Principle 3, Earth Charter.

16 *Id.*, principle 4.

Biological Diversity (CBD)[17] also, which says that the conservation of biodiversity is a common concern of humankind[18].

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998[19] also acknowledges IGE. But none of these progressive, topical and transparent instruments have treated IGE in the same evolved manner as the Charter does, developing it to the echelons of ecological justice, in keeping with the most evolved EE philosophy. And yet, informing IGE by ecological justice is essential. It is only this road which will lead us to the same conclusions as wrote by Prof. Christopher Stone forty years back in his seminal article: *Should Trees Have Standing?-Toward Legal Rights for Natural Objects,*[20] where he envisaged that a society that asks for the "legal rights of the environment" would be inclined to legislate on more rules of environment protection and the courts will also contribute to this popular movement and interpret the law accordingly-in the favour of environment.[21] The focus of his argument was that society should give legal rights to forests, oceans, rivers and other so-called natural objects in the environment and that they should be removed from the category of "things" and given protection from unconditional human exploitation. He clarified that this does not mean that all human use of nature has to stop. But it should be akin to the human society, where humans use each other without denying their rights. Nature having legal rights would strengthen its protection in the traditional human systems of justice. Humans cannot then help giving them the due consideration. Achievement of IGE and consequently, SD becomes easier in this ambience.

An off-shoot of IGE and ecological justice is the inter-species justice (ISJ), well-known in the arenas both of environmental law and animal rights activism. Here also, the Charter is relevant as it advances living with reverence for the mystery of being, gratitude for the gift of life and humility regarding the human place in nature, bringing in the importance of interspecies justice and biodiversity. These concepts are also the cornerstone of its Preamble which says that "...we are one human family and one Earth community with a common destiny...it is imperative that we, the peoples of Earth, declare our responsibility to one another, to the greater community of life, and to the future generations". The principle I(1) talks about all the beings being interdependent and that every form of life has value regardless of its worth to human

17 *Id.*, Preamble.

18 *Ibid.*

19 Popularly known as the Aarhus Convention, http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

20 C. Stone, "Do Trees Have Standing?-Towards Legal Rights for Natural Objects", 45 (2) *Southern California Law Review* 450 (Spring 1972).

21 *Supra* note 20 generally, but especially at 464, 474-480 and 489.

beings.[22] This reflects the core of ecological justice which is reinforced by principles II (5) to (8) on "ecological integrity" whose value is getting increasingly recognized in the developing jurisprudence on the interspecies justice. Principle I also talks clearly about rights, duties, and increased responsibilities, guaranteeing human rights and fundamental freedoms. This kind of perspective is quite different from that initiated by the Rio Declaration which says: "human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature"[23], thereby emphasizing on humans and their healthy and productive lives. The Charter's acknowledgement of ISJ is very important for the improvement and maintenance of environmental integrity. In the same vein, the Charter's preamble can be inferred to mean respect and concern for the environment, as having intrinsic worth. This would help in shaping our thinking about the environment and nature as entities to which we owe duties. This is opposed to them being viewed as mere resources which have to be kept at a sustainably exploitable level. This non-anthropocentric position, which is further reinforced by the Charter, is more in keeping with the urgent need to respect the inter-relationship between all human and non-human species and consider their protection as equally important, to maintain the ecological health of our planet. This thinking is not entirely radical.

At various points of time, courts in different countries and thinkers have given such a consideration to non-human species. For instance, the idea of "widening of circle" was the theme of an article written in 1991 and entitled: "Whales: Their Emerging Right to Life"[24], tracing how the rights of infants, convicted felons, married women, racial minorities etc. have witnessed a widening of the circle of rights-holders. From having practically no rights, the laws of most countries have seen a gradual progression in ascribing rights to them. Inanimate and intangible entities such as trusts, corporations etc. also have rights. Taking this argument in the context of whales only, the authors: D'Amato and Chopra said that there is nothing strange about recognizing the rights of whales-"creatures that are more animate than corporations, more communicative than infants and mentally enfeebled persons, more communal than the society of nations, and perhaps more intelligent than the smartest human beings."[25]

In the same vein, in the United States of America, two different cases were allowed to be filed under the Endangered Species Act, 1973, where the plaintiffs were the species who were "injured". For example, in *Loggerhead Turtle* v. *Volusia County Council*[26], the court authorized a species listed as endangered to sue "in its own right" as a named plaintiff, separate from any associated rights of human individuals and

22 Principle 15 of the Earth Charter talks about specific protection of animals.

23 *Id.*, principle 1.

24 85(1) *American Journal of International Law* 21 (January 1991).

25 *Supra* note 24 at 51.

26 896 F. Supp 1170 (M.D. Fla. 1995).

organizations. In *Marbled Murrelet* v. *Pacific Lumber Co.*[27], in the same year, similar status was granted to a nine-inch seabird related to the puffins in the suit to protect its habitat against logging. About five years later, the Indian judiciary went much further in their concern for ISJ. The Kerala High Court stated in *N.R. Nair* v. *Union of India*[28]:

> If humans are entitled to fundamental rights, why not animals? In our considered opinion, legal rights shall not be the exclusive preserve of humans, which has to be extended beyond people, thereby dismantling the thick legal wall with humans all on one side and all non-humans on the other side. While the law currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily end.[29]

This is the kind to evolutionary thinking which would be supported better by a Charter -type of framework rather than any of the prevailing hard law. It is true that the CBD also acknowledges the importance of biodiversity as having intrinsic value, for evolution and for maintaining life sustaining system of biosphere; also the common concern of humankind, in-situ conservation, and benefit-sharing to be done by traditional and indigenous communities. It is also "determined to conserve and sustainably use biological diversity for the benefit of present and future generations."[30] Similarly, the UNFCCC[31] s ays that changes and adverse effects on climate are a common concern of humankind.[32] However, the tone of these UNCED instruments is very different. It is set by the CBD whose Principle says that: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[33] However, the Charter differs sharply. It talks about ecological justice as well as environmental justice. Its tone is set by its Preamble as: "...the resilience of the community of life and the well-being of humanity depend upon preserving a healthy biosphere with all its ecological systems, a rich variety of plants and animals...global environment with its finite resources, is a common concern of all peoples. The protection of Earth's vitality, diversity, and beauty

27 880 F. Supp. 1343, 1346 (N.D. Cal. 1995).

28 AIR 2000 Ker. 340. This judgment was delivered after extensive discussion of the cruelties perpetrated on animals and the lack of its justification. This judgment amounts to a call for conferring fundamental rights on animals - a concept which is only just coming of age in the most "advanced" countries in realms of animal protection.

29 *Id.*, at 353.

30 Preamble.

31 *Supra* note 3, http://unfccc.int/essential_background/convention/background/items/1349.php.

32 Preamble.

33 Article 3.

is a sacred trust". This tone is what which may well set the future international environmental law towards a higher achievement of sustainability, justice and rights.

Intra-generational equity (IAGE) is a related concept and an equally important one, both of the international environmental law and SD. It implies an equitable allocation of and access to resources among human members of the same/present generation. It is directed at the vast disparities within nations and within sections of people within the same nation. These disparities have resulted in increasing environmental degradation and the problems resulting from the majority of the humans on this earth to meet even their basic needs and for a minority to be able to enjoy affluence which was unimaginable only a few decades back. It is gratifying to note that the need for IAGE has been duly recognized in the international environmental law for some time. For instance, the RD says that to achieve SD and a higher quality of life for all people, states should reduce and eliminate unsustainable patterns of production and consumption and should promote appropriate demographic policies[34]. In the Charter too, IAGE has been inextricably linked with SD[35]. This linkage is demonstrated by almost all of the Charter's provisions; but especially those on social and economic justice where IAGE is advocated in clearly,[36] discussed in far more equitable terms, squarely placing more responsibility on those who are more privileged in certain respects to be aware of their duties to those, as yet, less privileged. A faithful reading and following of the IAGE in the Charter would definitely lead to a less cavalier attitude to those suffering from various forms discrimination and deprivation – again towards a faster achievement of an actual SD.

In connection to the above, it has long been acknowledged that one of the crucial ways to conserve biodiversity (BD), achieve IGE, IAGE and SD, is the recognition of the significance of traditional knowledge (TK) – both ecological and otherwise; respecting cultural diversity; and different ways of life and ideologies. TK has received a lot of attention lately as many of the western societies have realized that there is something wrong with their systems and the psychological, social, economic and environmental concerns worldwide have to be addressed in some other way. The CBD has also articulated, quite sensitively, that TK and interests of indigenous peoples should be promoted to move towards sustainability.[37] However, post-CBD, it has to be recognized that TK is not just a body of knowledge which can be salvaged and classified in order to increase ecological sustainability. It is a holistic entity and not merely ecological in nature. Representing a whole way of life, it cannot be used without its context and without protecting the peoples whose repository it is. The livelihoods, relationships, languages etc. which are its components add to the cultural

34 Principle 8.

35 Preamble.

36 Principles 9-12.

37 Preamble.

wealth of humanity; and to TK in its highest and broadest sense. Traditional communities are both protectors of valuable ecosystems and victims of environmental degradation, despite their wealth of TK. This is a paradox. How can this be resolved? The provisions of the CBD's Nagoya Protocol[38] associate TK with genetic resources that are covered by the CBD and the benefits arising out of their utilization.

These provisions and those on the indigenous and local communities in the Nagoya Protocol are pro-active and considerably advanced. However, they are couched in non-universal terms. It is as if a separate community is being talked about instead of one world with different cultures and peoples. On the other hand, however, the Charter talks about the TK as if the knowledge belongs to the whole world and is the common concern of humankind.[39] In its "The Way Forward", the Charter talks about a total transformation of the thought, value-system and the common destiny is beckoning us to a new beginning and that we have much to learn from the ongoing collaborative search for truth and wisdom. Also that our cultural diversity is a precious heritage and different cultures will find their own distinctive ways to realize the vision: this kind of a value-system is reflected in all its provisions.[40]

The Preamble says that the global environment with its finite resources is a common concern of all peoples. The Preamble also says very clearly that the dominant patterns of production and consumption are causing environmental devastation and depletion of resources, and a massive extinction of species. All other problems are also the result of human activity. "These trends are perilous – but not inevitable". It also clarifies that the challenges ahead are forming a global partnership to care for earth and one another. Fundamental changes are needed in our values, institutions and way of living. The solutions which we formulate now should be inclusive. This is the kind of thinking about TK, diversity of people, diversity of cultures and their importance,[41]

[38] UNEP/CBD/COP/10/L.43/Rev.1 29 October 2010. See http://www.cbd.int/abs/about.

[39] Principles 8 and 4.

[40] This has been reflected in the fairly recent developments in the international law on cultural property and heritage. The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005 and the Council of Europe Convention, 2005 reverberate with the need for protection of traditional and diverse cultural expressions and heritage. The discussion that the protection of cultural heritage and biological/natural heritage should, and eventually will be in tandem with each other has been undertaken in a previous paper by the author. See "Convergence of International Thought in Environmental and Cultural Heritage Regimes" vol. I *Conference Papers* 149-167 (The Indian Society of International Law's Fifth International Conference on International Environmental Law, 8-9 December 2007, New Delhi).

[41] This line of thought has been developed more in the author's recent conference-paper: "Sustainable Development through Sustainable Principles: The Road to Rio+20 and Beyond" (Paper presented at the International Conference on "Contribution of International Environmental Law for Sustainable Development: Global and National Perspectives", organized by the Faculty of Law, *contd...*

which is needed for the actual SD, which so far, seems elusive in our contemporary world. The same is true with equity, justice and fairness.

III Conclusion

For some time now, it has been recognized that we have reached the stage where humans should start considering the earth and the entire ecosystem as entities to be cherished and healed, not as resources to be "harvested". Such a realization is the precursor to SD which is its ultimate incarnation. Such a realization is also the precursor of the solution of the current environmental problems facing our planet. As such, we need a clarion-call to wake up to its urgency and to our responsibility towards it. The Charter is that clarion-call, as the statement of the Charter says: "It is a vision of hope and a call to action". It seeks to guide the transition of humanity to a new and sustainable future. To that end, it teaches that the goals of poverty eradication, respect for human rights, ecological integrity, peace etc. are interrelated and interdependent. Its major theme is SD but it is not limited to it. In fact, the Charter transports the three pillars of SD to new heights and highlights the significance of their absolute inter-relationship. Taken as a whole, it takes us to the road to true equity and justice, via SD. "The goal of the ecosystem approach is to restore and maintain the health, sustainability and biological diversity of ecosystems while supporting sustainable economies and ecosystems."[42] Relevantly, sustainability, equity in all spheres and ecological integrity are themes which resound throughout the text and spirit of the Charter.

The Charter is soft law. An effort has been made to demonstrate the reasons for this soft law to be translated into a one-stop solution for the multi-hued ills plaguing the world today; and why it should form the basis for future hard law. To this end, some of the more important components of international environmental law and SD were examined.[43] In this context, it is also heartening to note the very recent Report of the United Nations Secretary-General's High-Level Panel on Global Sustainability: Overview.[44] Its Recommendation 14 says that the panel welcomes discourse on the ethical dimensions of sustainable development at the United Nations Conference on

University of Delhi, 17-18 February 2012). This paper discusses the viability of culture and cultural diversity as the fourth (and as yet unrecognized) pillar of SD.

[42] White House Interagency Ecosystem Management Task Force 1995, *The Ecosystem Approach: Healthy Ecosystems and Sustainable Economics* 1 (The White House, Washington D.C., United States of America, 1995); as quoted in S. Stoll-Kleemann, T. O'Riordan, *Enhancing Biodiversity and Humanity* in T. O'Riordan, S. Stoll-Kleemann (Eds.), *Biodiversity, Sustainability and Human Community* 298 (Cambridge University Press, Cambridge, United Kingdom, 2002) at 298.

[43] Due to limitations of space, not all the components could be taken up here; this may be remedied in another, future forum.

[44] *Resilient People, Resilient Planet. A Future worth Choosing* (New York: United Nations, January 2012). See http://www.un.org/gsp/sites/default/files/attachments/GSPReportOverview_Letter%20size.pdf.

Sustainable Development (Rio+20) in 2012 among all stake-holders, based on relevant experience and instruments, including the Earth Charter, to inform Governments in their efforts to shift to SD. This is clear evidence of the relevance of the Charter to contemporary problems and the recognition of its role in their solution. It is also a clear pointer to the relevance and importance of Charter to any future legal formulations on SD.

The Charter is unique, but it is not the only document or statement on equity and sustainability. There are many others whose goals and aspirations are at par. However, its history, relevance, idealism and comprehensiveness set it apart from other instruments of similar nature. Its special strength and potential acceptance lies in its participatory process which has involved huge numbers of people and has withstood the test of time. It is already being used as an educational tool for teaching about SD and ecological sustainability at many levels, including the school-level. If an international convention be developed using the framework of the explicit principles and implicit philosophy of the Charter, it would dovetail into the needs of the today's environment – human and non-human. It would veritably prove to be a blueprint for a truly equitable world.

RECONCEPTUALISING THE 'FAIR USE' UNDER EUROPEAN AND INDIAN TRADEMARK LAW

*R. Neethu**

I Introduction

The trademark law has developed as a structural frame works for product/service identification and related profiling in the market. Third party unauthorised uses have found place in penal provisions of the law. However an unanticipated fair use in an unanticipated way finds no resonance in the structural frame work of the law. Altruism provides for a Fair Use provision under the trademark laws; however it has almost been suffering neglect. This paper tries to examine various relevant instances of such fair use in order to understand the scope of protection offered for a fair trademark use under the European and Indian Trademark law. The paper also emphasises a need for a creative and expansive construction of the fair use provision in balancing conflicting interests.

A studiously crafted personality profile of a product or service is a representation of many variables like idealism, the quality and the origin, prospects of its representative which may with reference to the law of trademark be a company, a product or that of services. Ideally the purpose of trade mark has been to enable the identification of origin or the ownership of the goods to which it is affixed.

Schechter[1] deconstructs the foundations of modern trademark protection as being found in the selling power which emanates from its psychological holding upon the public not merely upon the merit of the goods upon which it is used. The view is bed rocked upon the judicial principles that resounds the absence of any property in trademark apart from the business or trade in connection with which it is employed.[2] Irrespective of the essence of a product, the trademark distinguishes itself in the buying

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1 Frank I. Schechter, "Rational Basis of Trade Mark Protection", 40 *Harv. L. Rev.* 833(1926-1972).

2 *Id.* at p. 339.

decision making process of every individual who proposes to be the consumer of the good.

Commentators pursuing proactive view[3] of trademark law may seem satisfied if a given norms fits to the above mentioned role of trademarks. While it seems to be a magnetic proposal to view this plain state of affairs without any reference to its context of the trademarks applicability, it delimits the scope of the role played by the same. With due respect and importance to such a view, it is also of concern to disparage the use of marks in contexts of its sign function rather than purely a consumer guidance role. Against this background trademark use concept has many ramifications and poses to question the very foundations upon which it is built. It builds queries as to what is the purpose of a mark after all? Could it back the psyche of the user? Can there be any other reminiscence for a trademark fair use? These are some of the underlying thematic questions which this article examines particularly in the context of India and Europe. The discussion carries relevance in the light of a plethora of discussions in Europe over the concept of Trademark use.

II The Base Line: Use and Fair Use

'Use' as a concept under intellectual property (IP) law has always been under a veil of insecurity. The reason too is obvious for most of the legal and supportive literature has viewed it from the prism of infringement[4] or possible extractions of protected IP rights. It is however to be remembered that such legal protection of rights were in lieu of use and benefit for the community as such.[5] The privilege or benefit as the word connotes had been diabolical as far as trademarks were concerned. In its commercial sense it gave the trademark owners the privilege of distinction among the consumers while also enabling the consumer in distinguishing goods or services. Along with this the uses of trademarks have created in the minds of the consumer psyche a cognitive emotion a s well. The image congruence of consumerism[6] s uggests the significant overlap between values of self-concept and the choice alternatives available to the consumers. Thus a conclusive choice is depended upon the values common to the self-image and the brand or product under consideration.

The definition of 'Use' has squarely been examined though it permeates the entire debate on trademark use. One of the earliest discussions regarding the scope of 'use'

3 See Graeme B. Dinwoodie & Mark D. Janis, "Confusion over Use: Contextualism in Trademark Law", 92 *Iowa L.Rev.*1597 (2007).

4 *Supra* note 4.

5 See also, William M. Lades & Richard A. Posner, *The Economic Structure of Intellectual Property Law*, pp. 328-9.

6 Flemming Hansen, *Consumer Choice Behavior: A Cognitive Theory* (1972).

has been by the House of Lords in the *Yeast-Vite* case[7] (which will be discussed below in the Indian context) wherein it was opined by Lord Tomlin that:

> 'use' of such mark carries... an implication of use of the mark for the purpose of indicating in relation to the goods upon or in connection with which the use takes place, the origin in the user of such marks'.

Article 16 of TRIPS Agreement[8] serves as a starting point for examination of this concept. As per this the owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. However it is also enjoined that these rights shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use. Article 17 of the TRIPS Agreement provides certain exceptions to the rights provided under the trademark law. As per this members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties. The exclusive right afforded in article 16(1) of TRIPS, can thus be subject to limited exceptions. In other words, in a situation where even all the four elements of article 16(1) are satisfied, a mark is used in commerce on identical or similar goods in a way that causes a likelihood of confusion. Such use may be treated lawful. The WTO Panel Report[9] states that the exception under article 17 of TRIPS must satisfy two conditions in that (1) it must be limited and (2) it ought to take the interest of both the owner and the third party equally. The example of "fair use of descriptive terms" is illustrative only, but it can provide interpretative guidance because, *a priori*, it falls within the meaning of a "limited" exception and must be capable of satisfying the proviso in some circumstances. Any interpretation of the term "limited" or of the proviso which excluded the example would be manifestly incorrect[10].

Under the U.K. Trademark Act, 1994[11] and the European Trademark Directive[12] specifies various acts that are considered infringement. Article 5 of the European Council Directive[13] while preventing a third party infringing use also prescribes that member states may provide for any provisions against 'use' of a sign other than for

7 *Irving's Yeast-Vite Ld.* v. *F.A. Horsenail*, (1934) 51 R.P.C 110.

8 Agreement on Trade Related Aspects of Intellectual Property Rights, 1994.

9 WTO Report of the Panel on European Communities – Protection of Trademarks and Geographical Indications for agricultural products and Foodstuff's, WT/DS174/R (2005).

10 *Supra* note 8.

11 Sections 9 and 10.

12 First Council Directive 89/104/EEC.

13 *Ibid.*

distinction, if such use is detrimental to the distinctive character or repute of the trademark. The provision however dose not transcribe the nature and extend of such use.

Guidance may also be sought out for from the preceding article 6 of the Council Directive[14] which offers some uses of trademark an exemption from infringement proceedings. The article also serves as a fair use provision. It outlines three broad categories of 'use' namely:

(i) use of own name or address

(ii) indications as to kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods, rendering of services , other characteristics of goods or services;

(iii)the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts

The above mentioned uses have been enjoined within the confines of honest industrial and commercial practices. Thus it follows from the discussion above, that 'use' may be 'infringing use', a 'permitted use' or a 'fair use'. However the scope of these provisions especially 'fair uses' of trademark has been lesser in light for a broader interpretation and understanding.

In *Gerolsteiner Brunnen GmbH* v. *Putsch GmbH*,[15] the ECJ while discussing a referral made on factual confusion between a geographical indication and registered trademark dealt with the question on invoking article 6 of the First Council Directive. In answering that question the court said that the only test mentioned in article 6(1) of the European Directive 89/104 is whether the indication of geographical origin is used in accordance with honest practices in industrial or commercial matters. The condition of honest practice constitutes in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner.[16] To avoid further fuss on the issue the court also reemphasised that in order to examine whether a use is or not in accordance with honest practices in industrial or commercial matters, the national courts ought to carry out an overall assessment of all the circumstances of the particular case in that regard.[17]

In *Trebor Bassett Limited* v. *Football Association Limited*,[18] the claimants (Trebor Basset Ltd.) had been constantly threatened with proceedings against infringement action by the Football Association Ltd. who alleged that Trebor had infringed their trademarks by using their logo in conjunction with the confectionery packets sold by them. A suit

14 *Supra* note 12.
15 [2004] EUECJ C-100/02.
16 *Id.*, para 24.
17 *Id.*, para 28.
18 [1997] FSR 211.

was brought against the football association under the UK Trade Mark Act, 1994[19] and the defendants immediately sought an action for infringement against the claimants. While deciding upon the two issues the High Court (Chancery Division) held that the claimant was not using the defendant's trade mark in relation to any goods or services, nor was the claimant's 'use' of the defendants logo on the cards used in the trade mark sense. It was merely a badge of support to the iconic players of the team. The decision in Trebor was just the beginning of the concept of 'use' before it turned Janus faced in Arsenal.[20]

In *Arsenal Football Club Plc* v. *Matthew Reed*,[21] the High Court of Justice, Chancery Division found that since the 'use' of Arsenal's signs on Mr Reed's product would be perceived as a badge of origin rather than a trade origin, there could not be an infringing use of the same. The Advocate General[22] sounded in an allied tone that:

[T]he rights granted to the trade mark proprietor do not allow him to prevent any use of the mark. Instead, a trade mark owner is entitled to prevent third parties from using, in relation to the same goods or services, identical signs which are capable of "giving a misleading indication as to their origin, provenance, quality or reputation". Whether "use" of a sign by a third party is use "as a trade mark" is a question for the national court to decide on the facts of the case.

This opinion gives trademark 'use' a wider connotation than the traditionally understood badge of origin function. It also suggests the possibility of other 'uses' of trade mark. While the contentions between the parties to the case continued in terms of the requirement of the use of a sign as a trademark especially for the purposes of article 5(1)(a)[23], the ECJ brought in a new dimension to the whole dialogue. It stated that in order to confirm a case of infringement, a third party's use of a registered trademark must be such as is likely to affect or jeopardise the guarantee of origin which constitutes the essential function of the trademark.[24]

However when the ECJ decision was before the High Court[25] for consideration the court found for Mr. Reed based on findings of fact. As per the court the 'use' by Reeds memorabilia does not amount to trade mark use instead it is perceived by public at large as a badge of loyalty towards the football club.

The concept of use was kicked against another goal post with the court of appeal's[26] interpretation of the ECJ pronouncement wherein use in a trade mark sense

19 Section 21.
20 *Arsenal* v. *Reed* [2002] ETMR 82.
21 [2001] ETMR 77.
22 *Supra* note 20.
23 *Supra* note 12.
24 *Arsenal* v. *Reed* [2003] ECWA Civ. 96, 33.
25 *Arsenal* v. *Reed* [2002] EWHC 2695 (Ch).
26 *Arsenal* v. *Reed* [2003] UKHL 28.

was found not necessary to find an infringement. The public's outlook as to the trade origin of the mark or its use in trade mark sense was an irrelevant consideration in the assessment of infringement. As to Mr Reed's use though he does differentiate his goods from official goods, but his goods marked with the trade marks were identical to those emanating from Arsenal and therefore his use of the word Arsenal would, absent an explanation carry the same inference as similar use of the trades mark by Arsenal.[27]

It is of academic interest to note that while the issue in Arsenal roused a clash of opinions and discussions, the concept of 'use' has not been clarified leaving commentators[28] to wonder if at all there existed a difference between trade mark use and a use that is likely to affect or jeopardise the guarantee of origin.

The subsequent decision in *Adam Opel*[29] reaffirms certain opinions raised in the previous decisions specially Arsenal while observing that:

> [t]he exclusive right under article 5(1) of the directive was conferred in order to enable the trade mark proprietor to protect his specific interests as proprietor, that is, to ensure that the trade mark can fulfil its functions and that, therefore, the exercise of that right must be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods.

Therefore, the affixing by a third party of a sign identical to a trade mark registered for toys to scale models of vehicles cannot be prohibited under article 5(1)(a) of the European trademark Directive unless it affects or is liable to affect the functions of that trade mark specially looking from the point of view of the relevant consumers.[30] What appears incongruent in the line of discussion from Arsenal to Opel is the adherence to the mind of the consumer of the products from a non-post sale view. Instead the emphasis is given to the consumer mind for an assessment as to the trademark 'use'.[31] This criterion expresses the inability of the ECJ to comprehend a 'use' on similar type product when the same may be used in relation to prototypes. If Autec and Opel were both manufacturing cars with a single difference of one being a prototype (toy models) then it is quite difficult to see Reed's Memorabilia should be offering a different connotation in relation to the 'use' as viewed by the relevant public.

The question that needs to be considered is whether the consumer often taken in legal sense of a reasonable ordinary man capable of cognitive understanding of product origin especially in case of is marked disclaimers. Any user of the Aqua CD or

27 *Supra* note 26, para 69.

28 Noam Shemtov, "Trade Mark Use in Europe: Revisiting Arsenal in the Light of Opel and Picasso", 2(8) *JIPL* (2007).

29 *Adam Opel* v. *Autec AG*, Case C-48/05.

30 [2007] ETMR 3.

31 *Id.*, paras 20 -24.

viewer of the album would be able to appreciate that the usage of Barbie is simply iconic. Even in the case of their tapes and CD's an attention was drawn to the disclaimers to prevent any likelihood of confusion.[32] The examples as illustrated above like Arsenal or Opel and Barbie have surpassed their identifying function and have become an integral part of human dialect, such that it carries with it emotional sentiments. These emotions have been reflective in the badge of loyalty or role model functions which find hard to be placed as real infringements. This is perhaps were we may need to draw the line of infringing trade mark use and fair use of trade marks.

Consider an instance of the league matches that are played in the country which carry a lot of enthusiasm and competitive fire. A fan X decides to support his team A, by printing t-shirts carrying the logo of the team he supports and for his efforts he also charges. Now it is difficult to find a case for infringing 'use'. In the illustration above for finding a cause for an action against Trademark use the Fan who prints the T-shirts had to cause a disruption to the reputation to the team, which obviously he is not while supporting the team wholeheartedly. Looking at the elements of deception it is clear that his intention is not to deceive but to support and he accepts himself to be the source of the T-Shirts while also perhaps declaring the same to be unofficial. To find a case of damage in the instant case, it goes without saying that an increase in fan support give a positive strength and not damage to the reputation of the team. Badges of loyalty, or iconic uses, if found as instances of infringement, would be amounting to curbing the freedom of expression of an individual. There of course seems to be clearly a lack of clarity on this paradox at the moment in Europe.[33]

III Concept of 'Use' Under Indian Trademarks Law

The concept of use in India has had its fair share of influence from the British statutes.[34] Under section 29 of the Trade and Merchandising Marks Act, 1958 requires that for an infringement the 'use' must:

(a) not be one as is likely to be taken as being a use as a trade mark

(b) the use ought not be one such as to deceive

(c) and the use complained of does not function as a designation of origin

Section 30 of the 1958 Act offered only a limited perspective to fair uses. The four recognised categories under the Act were:

(a) use in consonance with conditions or limitations of sale or export;

32 For more see *Mattel Inc* v. *MCA Records Inc.*, 296 F.3d 894 (9th circuit 2002).

33 Max Planck Institute for Intellectual Property and Competition law, *Study on the Overall Functioning of the European Trademark System* (2011).

34 Section 21, the Trademark Act, 1940, section 4(1) of Trade mark Act, 1938, ss. 10 and 11 of the Trade Mark Act, 1994.

(b) use by acquiescence;

(c) use denoting adaptability being an accessory to another trademarked good or

(d) honest concurrent use

These provisions of the 1958 Act were in *pari materia* with the UK Act of 1938.[35] The law relating to concept of 'use' under the Indian Trade mark law[36] is rooted in the Yeast-Vite case decided by the House of Lords in 1934. In this case the plaintiffs moved to restrain the defendants from using their registered trade mark 'Yeast-Vite' in connection with their goods. The use by the defendant's upon its products were 'Yeast-Tablets' a substitute for 'Yeast-Vite'. The use was held to distinguish the defendant's products from those of the plaintiffs. Hence the House of Lords held that 'it did not constitute a case for infringement as *...the alleged mark must be used for the purpose of indicating the origin of goods as being in him.*[37]

The courts have also been of the opinion that the test of use under the relevant provision is to assess from the perspective of an ordinary cautious consumer of the product[38] while also verifying the elements of deceit. The onus of proving sufficient precautions to distinguish goods resets on the defendant in cases of adoptive 'use' of the trademark belonging to the plaintiff[39]. Although under the Trade Marks Act 1999, the essential limb of the law still remains the same as in the 1958 Act, the grounds finding an infringement have been made much more elaborate with a view to the inclusion of protection against Passing-off, dilution, tarnishing of marks as well as unfair practices in comparative advertising. Thus the amplification under the Trade Marks Act, 1999 provides a two-step fair use criterion by which it will not be an infringement of a registered trademark if :

1. the use is in accordance with the honest commercial matters and
2. the use is not such as to take an unfair advantage of or be detrimental to the distinctive character or reputation of the registered trademark

In *Carlsberg India Pvt. Ltd* v. *Radico Khaitan Ltd.*,[40] the Delhi High Court summarised the position of claims of Fair use by stating that "in an action for infringement, the 'fair

35 Section 29, the Trade and Merchandising Act, 1958 has been a re modified version of the UK Act of 1938, which itself was amended under the considerations of the Board of Trade: Trade Marks Committee, 1933 (Goschen Committee); for more discussions see http://www.nationalarchives.gov.uk ; see also, Venkateshwaran, S., *The Law of Trade Mark and Passing off* (4th Ed., 1999).

36 Sarathi, Vepa P, *The Trade and Merchandising Act*, 1958, (2nd ed., 1982).

37 *Supra* note 7; See also *Ox Cart Wine* case.

38 *Modi Sugar Mills Ltd* v. *Tata Oil Mills Co Ltd.*, ILR (1943) Lah. 427.

39 *National Electric Stores* v. *General Electric Co. Ltd.*, AIR 1944 386; also *Banga Watch Company* v. *N.V. Phillips*, AIR 1983 P&H 418.

40 FAO (OS) 549 of 2011, 567 of 2011.

use defence' is available only to situations where the alleged infringer employs a trademark in its descriptive sense, as opposed to: a trademark".

Thus if a mark is used in such a manner that it is not likely to be taken as an indication of origin then the possibility of infringement remains minimal.[41] The assessment as to such use is to be made on the lines of section 30 of the Act. While the precise delimitation of 'honest practice' is not provided by the Act it can be tested on two-fold basis:

(i) reasonable man having knowledge in the trade, and

(ii) practice prevalent in the industry concerned.[42]

Although such decisions provide excellent guidelines as to fair uses, the courts may need to verify the other facets as well to find a case of infringement. This is so particularly in the light of the prescription of 'balancing interest' of the owner and the third party as enjoined in the TRIPS agreement to which India is a Party.

In *Hawkins* v. *Murugan Enterprises*[43], Hawkins Cookers Limited owner of the trademark "Hawkins" and using it on several products including pressure cooker gaskets claimed against the defendants, Murugan Enterprises for use of their mark on the gaskets sold by defendants. The defendants claimed that the use of the Hawkins trademark was subservient since they had their own well-established trademark "Mayur" with a prominent peacock displayed on its product packaging. In addition, the front of the packaging of the Murugan Enterprises' product contained the words 'Suitable for: Hawkins Pressure Cookers', which meant that the gasket produced by the defendant was suitable for the particular kind of cookers produced by Hawkins. The single bench of the Delhi High Court in this case held that no reasonable person or purchaser could assume a trade connection between the "Mayur" brand of gaskets and the "Hawkins" brand of pressure cookers. Further, the court opined that in this case the Murugan Enterprises neither sought to benefit from Hawkins' trademark nor did it try to show a connection between the two and that the defendants' use of the "Hawkins" mark was only to show the suitability of the product to be used as an ancillary product in a Hawkins pressure cooker and that such use would evidently fall within the exception carved out under section 30 of the Trademarks Act, 1999. Further, the court held that the said case satisfies the conditions of 'honest use'. The court opined that the deception should be such that customers would assume that the mark is indicative of the same being a trademark of the plaintiff hence the *object* of filing of the suit by Hawkins was to be to create a monopoly over such (gaskets) ancillary items so that no third party is able to sell the same in the market.

41 *Ruston and Hornby Ltd.* v. *Zamindara*, AIR 1970 SC 1649; See also *Durga Dutt Sharma* v. *Navaratna Pharmacy Laboratories*, AIR 1965 SC 980.

42 *Supra* note 40.

43 2008 (36) PTC 290 Del.

While this case seemingly lauded honest fair use of trademark, the logic of the single bench was ousted in an appeal before the Division bench of the Delhi High court. Thus in *Hawkins* v. *Murugan Enterprises*[44], decided on April 13, 2012, the Division bench reversing the earlier decision held that while writing 'Suitable for Hawkins Pressure Cookers' the respondent has given undue prominence to the word Hawkins by printing it in a distinct red colour. The Indian Court thus seemed to have made literal observations ignoring the aspect of 'use', fair use and above all consumer judgement.

IV Commercial Expressions and Trademark

Freedom of speech and expression is one of the most important and primary right available to mankind. Much of the functional and ethnic expressions have its foundations in this innate property of humankind. However in the current context in conceptualising Trademark 'use' a discussion on freedom of expression is inevitable.

The UN Declaration on Human Rights[45] offered to this world a legal basis for this chaste right. The European Convention on Human Rights[46] under article 10[47] sets forth a playground for discourse especially viewing from the perspectives of trade mark use. Though the article describes in broad terms the freedom of expression, it has been contented to be including in fact most forms of trade mark 'use'.[48] Thus in practical terms the freedom of expression i.e. both commercial and non-commercial, poses a conflict with the trademark rights.[49] It has also been cautioned by commentators[50]

44 RFA (OS) 09/2008.

45 Article 19, Universal Declaration of Human Rights, 1948.

46 European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No.005 accessed from http://conventions.coe.int.

47 Article 10 – 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 duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests 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 reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

48 Sakulin, Wolfgang, *Trademark Protection and Freedom of Expression: An Enquiry into the Conflict between Trademark Right and Freedom of Expression under the European Law*, (2011).

49 *Id.*, at 2.

50 Burrel, Robert & Gnajee, Dev, "Trade Marks and Freedom of Expression: A Call for Caution", RP NO. 10-05 *Legal Studies Research Paper Series*, The University of Queensland.

considering the judicial opinion in *Miss World*[51] that judicial reluctance in applying freedom of expression concept to trademarks law and the rationality of a conflict between constitutional rights to property and expression gives no leeway for arguments based on the freedom of expression. Whilst this is true considering the successful invocation of property rights as against expression; it in no way undermines the importance and consideration of fair 'use' expressions. Thus the material interest of creators ought to be balanced with the freedom of expression which includes the right to information and ideas of all kinds.[52] This seems to be the legal outlook offered by the jurisprudence of trademark and human rights laws in Europe. In particular the third party rights possess much challenge in this regard. In third party freedom of expression and trademark rights positive obligations seem essential from the part of courts and legislators so as to ensure a non-disproportionate impairment of the freedom of expression while giving due protection to trademark holders rights against unfair competition.[53]

V Freedom of Expression and 'Use' in India

The broader ambits of law have been discussed earlier in relation to the Indian Trademark Act[54]; however the freedom of expression and its applicability under Indian Trademark Acts needs discussion herein. Freedom of expression is one of the most important fundamental right available to the Indian citizen under the Constitution of India. The democratic clime thrives on the bedrock of this right provided under article 19(1)(a) of the Constitution of India which states that "all citizens shall have the right to freedom of speech and expression".

The right to free discussion, expression of one's ideas is an essential element of the right. It offers a plausible right to express one's own ideas and to propagate the same.[55] However the freedom provided by the Indian constitution is not unbridled. Reasonable restrictions may be imposed on the freedom of speech and expression.[56] The question of commercial expressions has been well within the ambit of freedom of expression. However the same had found place in the constitutional interpretative structure after surpassing several legal trials.

51 *Miss Worlds Ltd.* v. *Channel 4* [2007] ETMR 66 (ch)

52 Carpenter, Megan, "Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?" 99 *Trademark Rep.* 892 (2009).

53 *Supra* note 39.

54 Trade and Merchandising Marks Act, 1958 and Trademarks Act, 1999.

55 Jain MP, *Indian Constitutional Law*.

56 Article 19(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

In *Hamdard Dawakhana*,[57] while discussing article 19 in relation to the authenticity of advertisements pertaining to drugs under the Drugs and Magic remedies objectionable Advertising Act, 1954, it was declared by the Supreme Court of India that "when an advertisement takes the form of commercial advertisement which has an element of trade and commerce, it no longer falls within the concept of freedom of speech and expression, for the object is not just propagation of ideas social, political or economic or furtherance of literature or human thought but the commendation of the efficacy, value and importance of certain goods".

This reluctance by the court in recognising commercial advertisements was however not long standing. Considering its importance especially to an advancing open economy and also considering the need to create a right balance of rights the supreme court of India has recognised the same in *Express News Papers* v. *UOI*.[58] The recognition for commercial expressions received its confirmation in *Tata Press Ltd.*[59] where the court affirmed that "advertisements howsoever tasteless are not removed from an expression of ideas...therefore commercial speech is a part of the freedom of expression guaranteed under article 19(1) (a) of the Constitution of India."

The guarantee thus entails enabling a right of expression defence in trademark cases. The same may be invoked in trademark litigation or by way of appeal before the High court or the Supreme Court of India under its 'Writ' Jurisdiction.[60] The scope of successfully invoking such a plea under trademark Act would depend on the issue as to whether such reference to the trademark involved has been used in the trademark sense.[61] Thus factually considering the broader framework of legislation an expression kind of argument could even otherwise sustain in provided the interpretation by judicial authority finds its role play in appropriate case in hand. For example in ICC *Development* v. *Arveee Enterprises and Another*[62], the plaintiffs filed a suit for injunction pleading that they own and control the commercial rights including IP rights relating to ICC events. The ICC had declared in advance their official sponsors for the 2003 ICC World Cup who along with the plaintiffs had the sole right to use the World cup logo for promotion of the said event. The defendants were alleged to misrepresent their association with the plaintiff's event through advertisements in media using the world

[57] *Hamdard Dawakhna* v. *UOI*, AIR 1960 SC 554.

[58] AIR 1995 SC 2438.

[59] *Tata Press Ltd.* v. *Mahanagar Telephone Nigam Ltd.*, AIR 1995 SC 2438.

[60] The grounds of invoking the writ jurisdiction under article 32 is an act or omission on the part of the Registrar of trademarks that infringes the freedom of expression of a citizen. All actions invoking the violations of fundamental rights of Indian citizens need to be directed against the state or any authority of the state as per article 12 of the Indian Constitution and not against private individuals unlike under the European convention on Human rights (ECHR) article 10 and article 13.

[61] AIPPI Summary reports for Questions Q188, India: Conflicts between Trademark protection and freedom of expression.

[62] 2003 (26) PTC 245 (Del).

cup logo thereby securing a commercial advantage while piggybacking on the reputation of the plaintiffs. While rejecting the claims of the plaintiffs, the Delhi High Court held that the defendants have not used any logo of the plaintiffs as a trademark thought a representation was made in their advertisements in the form of a slogan that the consumers of the defendants goods may win a ticket to the said event organised by the plaintiffs. Use of such generic words identifiable by the public at large constitutes a fair use of the same. While considering the right of expression the court observed:

> Commercial advertisement ... is a part of the freedom of speech and expression guaranteed under article 19(1) (a) ... however unlike the first Amendment under the United States Constitution, our constitution lays down under 19(2), the restrictions which can be imposed by law to restrict such rights ... the world cup is not protected by any treaty or domestic law unlike the Olympics nor under the Emblems and Names Act, 1950, hence such use cannot be held unlawful.

In the case of *Tata Sons Ltd.* v. *Greenpeace International*[63], the plaintiff's India's oldest private sector company and owners of the trademarks 'TATA' as well as T within a circle for various classes of products sued the defendant, an International NGO (working in the area of environment protection) following the launch in May 2010 of a Pac-Man style game called "Turtle v. Tata" on Greenpeace India's website. The game not only uses the protected "TATA" mark and a stylized version of its "T within a circle" device, but also referred to "Tata demons". It was argued by the plaintiffs that there had been an infringing use of their trademarks. It was also contended that by using the protected trademarks the defendants were creating a false impression amongst the public regarding the activities of the plaintiff. It was robustly opposed by the defendants who pointed out that '*without due cause*' as provided under section 29(4)[64] gave ample scope for justified uses under the freedom of speech and expression which is in fact a constitutional mandate. The defendants also contended that the use of the trademark of TATA was for a peaceful, creative mechanism of registering their protest against potential environmental hazards from the project that was to be taken up by the plaintiffs contrary to the claims of tarnishment and infringement raised by the plaintiffs. In a very thoughtful judgment the Delhi High Court expressed its scepticism of finding an infringement for every use of protected trademark. Instead it declared:

> The question to be asked is whether, looking at the facts as a whole, and analysing them in their specific context, an independent observer who is sensitive to both the free speech values of the Constitution and the property protection objectives of trademark law, would say that the harm done by the parody to the property interests of the trademark owner outweighs the free speech interests involved. The

[63] Dt. 01.09.2011, +I.A.No.9089/2010 in CS (OS) 1407/2010.

[64] Trade Marks Act, 1999.

balancing of interests must be based on the evidence on record, supplemented by such knowledge of how the world works as every judge may be presumed to have.

Thus the mere fact that the expressive activity has a commercial element should not be determinative itself.[65] While it may not be always possible for the court to give a value judgment none the less fair use analogous to copyright exceptions might essentially be pressed into service to preserve the rightful balance.[66] The nominative generic fair use is well recognised by the Indian courts as evident from the above decisions. A balanced approach also calls in to count on the balance of convenience before issuing injunctions especially in marginal cases of trademark use.[67] This may prove to be assistance in measuring the error cost from pro plaintiff verdict[68] that holds a direct impulse on freedom of expression in such marginal 'use' cases.

VI Conclusion

From the discussion on 'use' in two different jurisdictions, a measure of tolerance is observed in the Indian scenario. Perhaps this may be due to the underlying constitutional sentiments that often rule the judgments of the Indian superior courts. The lack of constitutional foundations however does not demolish the right of expression claims in Europe either. The traditional principles of equity have a lesser fragrance in the current context. As an observer[69] points out that decision's like Arsenal

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65 *Supra* note 56.

66 *Id.*, see para 84.

67 *Wander Ltd. and Anr.* v. *Antox India P. Ltd.*, 1990 Supp (1) SCC 727: The court must weigh one need against another and determine where the "balance of convenience lies". The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted. See also *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] AC 396, Cyanamid principles:

(1) That the claimant can show that there is a serious issue to be tried.

(2) That the court considers where the balance of convenience lies. The important things to consider here are:

(i) the court's ability to quantify likely damages;

(ii) the sufficiency of the claimant's cross-undertaking in damages (if the defendant is successful at trial); and

(iii) the sufficiency of the defendant's financial resources to compensate the claimant (if the claimant is successful at trial).

(3) If there is no imbalance, then the status quo is preserved.

68 Mark A. Lemley, "Grounding Trademark Law through Trademark Use", 92 *Iowa L. Rev* 1669 (2007); while defining the characteristics of 'use' points out at two issues 1) the trade mark was used by the defendant in a non –source identifying and non-sponsorship way and 2) the error cost from pro-plaintiff verdict are high.

69 *Supra* note 39.

and Opel avouch the reluctance to contain and interpret fair use provisions while considering most of such issues from the perspective of likelihood of confusion test under the infringement clause. This calls for creative role of the courts in the perspectives of human rights jurisprudence.

Trademark use as such is seen as a shaky concept though it is an inevitable element in understanding the extent of trademark application. Much of its instability can be owed to lack of delimiting the notion of use. This has been much of a challenge to the harmonisation of trademark laws particularly in Europe[70]. While we talk specific fair use exceptions as granted in other forms of intellectual property rights as in copyright or patent, the case of trademark fair use seem distinguished. Use of copyright or patent offers a different platform of fair use in contrast to trademark which fits more into cognitive sentiments of human mind. This is perhaps what the new TRIPS advancement proposals[71] hope to achieve. These new proposed changes[72] hope to reflect a fair balance between private economic interests and the larger public interest in social and economic welfare as well as the interest of third parties. It aims at a horizontal validity in the balancing process without distinguishing the different categories of intellectual property rights. However the particular character of trademark as mentioned above needs special attention in this process. A trailblazing regulatory change is thus much awaited. The EU Trademark Directives and the national legislations need to incorporate a nominative expressional fair use other than the ones for descriptive and comparative advertising. The fulfilment of this would require an opening up of the 'use' concept whilst counterbalancing the same with trademark protection.

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70 *Supra* note 28.

71 Max Planck Institute for Intellectual Property and Competition Law, IPT Project on proposals to reform the TRIPS Agreement.

72 Article 8(a) to be included in TRIPS.

SECULARISM IN INDIA
Its Content and Context

*Amit Kumar**

I Introduction

I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State would look after your secular welfare, health, communications, foreign relations, currency and so on, but not your or my religion. That is everybody's personal concern! **--Mahatma Gandhi**[1]

India has been declared a secular State by its written Constitution and it is the duty of every Indian to stand by and believe in this declaration. The recent political and social events have questioned this declaration. Is India a secular country only on paper or does secularism actually exists in India; or is in the form of pseudo- secularism?

Freedom of religion has always been a volatile subject engaging the attention of philosophers, politicians, jurists etc. Man has always treated freedom of religion as his precious possession and has tried to preserve it from intrusion by the authority of the State. The long panorama of human history depicts man's struggle to maintain his religion free from the clutches of the State and out of this battle has emerged the concept of the secular State.[2]

The idea of a secular State has been the product of changing relationship between State and religion. In the early stages of human history, it was religion which had the pre-dominant influence over the State, in view of the fact, that lives of men all over the world were under the over powering influence of religion. Then came a period when the political and religious powers were concentrated in the hand of the king. Gradually, religion and State each contending for supremacy over the other, resulting in a clash between them went decisively in favour of the State.[3]

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1 Mahatma Gandhi, *India of My Dreams* 258 (Rajpal & Sons Publication, Delhi, 2009).

2 V.M. Bachal, *Freedom of Religion and Indian Judiciary* 1 (Shubhada Saraswat Publication, Poona, 1975).

3 A.R. Blackshield, "Secularism and Social Control in the West: The Material and the Ethereal," in G.S. Sharma (ed.), *Secularism: Its Implications for Law and Life in India* 30 (N.M. Tripathi Pvt. Ltd. Bombay, 1966). *contd...*

During the modern period, both religion and State have recognized and accepted each other's claim regarding the sphere of control over man's life. Gradually, both State and religion developed a sense of mutual tolerance and finally an ideal pattern of the secular State emerged out, which envisaged the creation of a wall of separation between State and religion. Secularism as a modern political idea evolved in Europe during renaissances period.

II Meaning of Secularism

Secularism is a variable concept, defying all efforts to pin it down to precise, concrete proposition. The *Encyclopaedia Britannica*[4] defines secular as 'non-spiritual' having no concern with religious or spiritual matters. It is used in the wider sense of anything which is distinct, opposed to, or not connected with religion. According *to Encyclopaedia of Religion and Ethics*[5], it may be described as a movement intentionally ethical, negatively religious, with political and philosophical antecedents.

Secularism first used in 1648 at the end of thirty year war. Though the concept of secularism is old, it acquired wide currency and new significance in British liberal thought and literature as a result of the writing of *G.L. Holyoake (1817–1906),* the father of secularism, who coined the term "Secularism" and laid down its basic principles in his famous books: *"Principles of Secularism"* and *"The Origin and the Nature of Secularism."*[6] He explained the concept of secularism with religion, and emphasized that the relation of secularism to religion is mutually exclusive rather than hostile. Secularism does not mean total abandonment of religion, it is not opposed to religion as such in harmony.[7] *A.R. Blackshield*[8] submitted that, secularism is religiously neutral; it neither endorses nor disapproves of religiousness.

Justice Gajendragadkar[9] was also inclined to think that "secularism would be a purely passive force if it was content to base itself on the negative aspect of being anti-religion, anti-God, or anti-spiritual quest".

There are two possible models of secularism. In the first one, there is a complete separation of religion and State to the extent that there is an 'impassable wall' between religion and secular spheres. In such a model, there is no State intervention in religious matters and *vice versa*. In the other model, all religions are to be treated equally by the State; in other words, the State is equidistant from all religions. This model is also referred to as 'non-discriminatory' and is particularly relevant for multi-religious

4 *Encyclopaedia Britannica*, vol. xx at 264 (1960).

5 *Encyclopaedia of Religion and Ethics*, vol. xi, at 347-48 (1920).

6 Y.B. Damle, "Process of Secularization", in G.S. Sharma (ed.), *Secularism: Its Implications for Law and Life in India* 86 (N.M. Tripathi Pvt. Ltd. Bombay, 1966)

7 G.J. Holyoake, *The Origin and Nature of Secularism* 51 (Watts and Co. London 1896).

8 *Supra* note 3 at 30.

9 P.B. Gajendragadkar, *Secularism and the Constitution of India* 3 (University of Bombay, 1971).

societies. In contrast to the former model, the latter allows for State intervention on grounds of public order and social justice.[10]

In Europe, the vision of secularism evolved as the negation of all things religious, particularly in political functioning.

The modern concept of a wholly secular government in United States is sometimes credited to the writings of English philosopher John Locke, but the phrase "separation of church and State" in this context is generally traced to a January 1, 1802 letter by Thomas Jefferson, addressed to the Danbury Baptist Association in Connecticut, and published in a Massachusetts newspaper.[11]

The principle of 'secularism' as understood in the United States means that the State and the church co-exist in the same human society without having to do anything with each other.[12] The United States' concept of State-secularism presents a significantly different pattern based, essentially, on the principle of freedom for the individual in the exercise of religion as a segment of the general scheme of individual liberty.

The first amendment to the United States Constitution, which embodies the relevant provision, enjoins that the "Congress shall not make any laws regarding an establishment of a religion or restricting the free exercise thereof". Article VI specifies that "no religious Test shall ever be required as a qualification to any Office or public Trust under the United States". It will be seen that the United States Constitution guarantees not only the "free exercise" of religion but it also enjoins Congress not to make any law establishing a religion.[13]

The incorporation of the First Amendment establishment clause in the landmark case of *Everson* v. *Board of Education*[14] has impacted the subsequent interpretation of the separation of church and State in regard to the State governments. Although upholding the State law in that case, which provided for public buses to private religious schools, the Supreme Court held that the First Amendment establishment clause was fully applicable to the State governments. Another case involving the application of this principle against the States was *Board of Education of Kiryas Joel Village School District* v. *Grumet*.[15]

[10] A. Akbar, "Secularism- Conceptual contradictions: need for secular minds", *Secularism and The Law* 1(National Foundation for Communal Harmony, Delhi, 2010).

[11] Separation of Church and State in the United States, available at: http://en.wikipedia.org/wiki/.

[12] *Supra* note 9 at 2.

[13] P.K. Tripathi, "Secularism: Constitutional, Provision and Judicial Review", in G.S. Sharma (ed.), *Secularism: Its Implications for Law and Life in India* 165 (1966).

[14] 330 U.S. 1 (1947).

[15] 512 U.S. 687 (1994).

It is said that religious freedom is guaranteed both in India and the USA, but the non-establishment clause of the US Constitution provides for separation between the Church and the State and that the same is absent from the Indian Constitution.[16]

In the Russian Communist pattern of State-secularism, for instance, besides abstaining from sponsoring or favouring any religion, the State actively favours and encourages anti-religious beliefs. In this system, there is no freedom to propagate religion. Religion is tolerated with considerable grudge. Its exercise is riddled with attenuating restriction and far-reaching limitations. And, except consideration of practicability and policy, there is nothing in the constitution to prevent the State from altogether abolishing religion.

III What Secular State Connote?

Secular State means a State which guarantees individual and corporate freedom of religion and deals with the individual as a citizen irrespective of his religion. It is not constitutionally connected to a particular religion nor does it seek either to promote or interfere with religion. The basic assumption must be that the secular State will have nothing to do with the religious affairs and any departure from this principle must be justified on reasonable secular grounds.

Secular State implies separation of State and religion. The individual as a member of the political society has a fundamental freedom to subscribe to any religious belief or to be an atheist, agnostic or nihilist. The State has no role to play in determining the religious faith or practice to which any particular member or individual should subscribe. It is not the function of the State to promote, regulate, direct or otherwise interface in religion.

The working definition, which *D.E. Smith* suggests is that the secular State, is a State that guarantees individual and corporate freedom of religion a deal with individual as a citizen irrespective of his religion, and is not constitutionally connected to a particular religion.[17]

In *St. Xavier College* v. *State of Gujarat*,[18] the Supreme Court has stated, "although the words 'Secular State' are not expressly mentioned in the Constitution but there can be no doubt that Constitution makers wanted to establish such a State" and accordingly articles 25 to 28 have been included in the Constitution.

It can be stated that secular State has three components namely, qualified freedom of religion, qualified religion equality and religious tolerance.

[16] Udai Raj Rai, "The Relationship between the State and Religion under the Indian Constitution", Alice Jacob (ed.), *Constitutional Developments since Independence* 587 (N.M. Tripathi Pvt. Ltd. Bombay, 1979).

[17] D.E. Smith, *India as a Secular State* 4 (Oxford University Press, Bombay, 1963).

[18] AIR 1974 SC 1389.

IV What is Religion?

Like "secular" expression "religion" is also not defined in the Constitution of India and United States. According to dictionary meaning, religion means "belief in worship of, or obedience to a supernatural power or powers considered to be divine or to have control of human destiny.[19] In short religion is a particular system of faith, worship of a super-natural force which ordains, regulates and controls the destinies of human kind.[20] The Supreme Court of India defined the meaning of "religion" in *The Commissioner of Hindu Religions Endowment* v. *Lt. Swamiar*[21]:

> Religion is certainly a matter of faith with individual or communities and it is not necessarily theistic. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who prefers that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine of belief.

It was the first case before Supreme Court in which articles 25 and 26 were relied on for invalidating the provision of State legislation.

A religion may not only lay down a code of ethical rules for its followers to accept, it may also prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances may extend to even matter of food and dress.

In *S.P. Mittal* v. *Union of India*,[22] the Court laid down the essential ingredients of religion:

(i) a spiritual ideal;

(ii) a set of concepts or percepts on God-man relationship underlying the ideal;

(iii) a methodology given or evolved by the founder or followers of the religion to achieve the ideal; and

(iv) a definite followings of persons having common faith in the percepts and concepts.

V Secularism: Indian Context

The history of Indian secularism begins with the protest movements in the 5th Century B.C. The three main protest movements were by the Charvakas (a secularistic and materialistic philosophical movement), Buddhism, and Jainism. All three of them rejected the authority of the Vedas and any importance of belief in a deity.[23] However,

[19] Collins, *English Dictionary* (III Ed.).

[20] Deepak Miglani, "Right to freedom of Religion v. Religious Conversion" available at http://www.legalserviceindia.com/articles/rel_rel.htm.

[21] AIR 1954 SC 282.

[22] AIR 1983 SC 1.

[23] Domenic Marbaniang, *Secularism in India: A Historical Analysis*, 37 (2011).

it was in the 18th Century, when the British East India Company began to gain total control over India that ideas of secularism began to have impact on the Indian mind. Until then, religion was considered to be inseparable from political and social life. On the other hand, the British codified laws pertaining to practices within religions on the sub-continents. To this effect, they instituted separate laws for Hindus, Muslims, Christians, Sikhs, Parsis and others as part of their divide-and-rule policy.

A bird's eye view of the period April 1937 to 1945 is the declaration of the time frame for partition or transfer of power which would show that the colonialists apprehending a threat to their empire shrewdly encouraged Muslim minority against so called non perceived threat of Hindu dominations by the Indian National Congress. The separate identity of the followers of Islam was cultivated by providing for separate electorate for minority especially Muslim.[24]

The policy of dividing Indian political society on religious basis into groups was extended by granting separate electorates to Indian Christians, Sikhs, Anglo-Indians and Europeans. At the time of the framing of the Government of India Act, 1935, the British Government made most contemptible attempt at further sub-dividing India on communal lines by declaration of its intention to grant separate electorate to scheduled castes.[25]

The British policy of divide and rule or what has been styled as its exploitation of the socio-religious contradictions between the two principle communities successfully diverted those contradictions into Indian politics using them in their nefarious performance, which led to the vivid-section of this ancient land. Loot, murder, plunder and massive destruction of opposite community at the time of partition of our nation was the price extorted for long treacherous British rule.[26]

Post-Independence Period

It will be seen that the tragic memories of the partition of India, which deeply shocked the Indians, were vivid in the minds of the framers of the Constitution, and impelled them to adopt a secular Constitution. They vowed not to permit religion to be mixed with politics. While drafting the Constitution, care was taken to concede liberty of belief, faith and worship. Religious minorities were guaranteed freedom of conscience and freedom to profess, practice and propagate religion. Its membership of the society would not depend on what faith he/she subscribes to or follow. Public activities, public service, and national institutes need not take note of the religion of the individual. In short there would be complete separation of religion from the State.

In spite of partition and the consequent formation of an independent Muslim State of Pakistan, Muslims in India remained a sizable minority community forming almost

[24] D.A. Desai, "Relevance of Secularism Today", 14(3), *Indian Bar Review*, 334 (1987).

[25] J.M. Shelet, *Secularism: Principles and Application* 82 (N. M. Tripathi, Bombay 1972).

[26] D.A. Desai, *supra* note 23.

one-tenth of the total population of India. Under such circumstances, a secular constitution, under which all religions could enjoy freedom, equal rights, and which could weld together into one nation the different religion community, became inevitable. The development of multi-religious, multi-lingual, multi-cultural pattern of Indian community, which was disclosed by the panorama of her long history constituted a relevant factor in determining the basic character of Indian secularism as evolved by the Constituent Assembly.[27]

VI Secularism and Indian Constitution

The development of Indian secularism might perhaps have been influenced to a certain extent by India's contact with the western thought for the last three hundred years. Her long standing tradition, toleration of diversity of religious opinion and faith would also facilitate the acceptance of the concept of a secular State.[28]

India understands this constitutional principle in two ways. The first is *"Dharma Nirpekshata"* and the second is *"Sarva Dharma Samabhaava"*. The State that is *"dharma nirpeksha"* is neutral towards all religious groups. The State *"sarva dharma samabhaava"* is a State to which all religions are possible at the same time.[29] In the Indian context, secularism and communalism are considered to be binary opposites. Secularism is a sign of modernity, plurality, co-existence, and rationalism and it is developing with a fast growing multicultural society.

It is remarkable that the word "secular" did not appear in the preamble to describe the character of the sovereign, democratic, republic; nor is the word "secular" used in the relevant provisions of the Constitution which guarantee freedom of religion. The objective resolution, the precursor of the preamble equally did not incorporate the word "secular" even though all those who were involved in the work of drafting the Constitution were clearly agreed that Indian republic would be secular in character. Indeed, the Constituent Assembly declined to insert such an expression, despite at least two attempts to do so by Prof. K.T. Shah with massive support of Shri H.V. Kamath. On both these occasions, the amendments were opposed by Dr Ambedkar.[30]

Thus, it is clear that the omission of the word "secular" or "secularism" was not accidental, but deliberate. One reason behind the exclusion of word "secularism" according to Justice P.B. Gajendragadkar,[31] was that the constitution makers were apprehensive that if the words secular or "secularism" were used, they might unnecessarily introduce, by implication the anti-religious overtones associated with the

27 *Id.* at 338.

28 Swarna Rajagopalan, "Secularism in India" in William Safran (ed.), *The Democratic Republic and the Problem of Religion* 4 (Frank Cass, London, 2001).

29 *Id.* at 5.

30 *Constituent Assembly Debates*, vol.7, at 815, 1948.

31 *Supra* note 8 at 52.

doctrine of secularism as it had developed in Christian countries. The Indian Constitution does not seek to create a rigid wall of separation between the State and religion in the sense in which Christian countries made religion almost irrelevant. The Indian concept of secularism recognizes its relevance. The Indian concept of secularism recognizes the relevance and validity of religion in the life of every individual. It seeks to establish a rational synthesis between the legitimate functions of religion and the legitimate and expanding function of the State.

Another reason for not accepting the amendment may be that the guaranteed liberty of faith, worship and belief as set out in the Preamble coupled with the more detailed provisions as set out in articles 25, 26, 27, 28 and 30 make explicit what can be achieved by the use of the expression "secular".

In the post-independent scenario the social dynamics was very complex. The process of secularization/industrialization was going on at a slow pace. Today the biggest challenge to the Indian nation is coming from forces claiming to represent the mainstream majority. There is an emergence of extremist voices that claim to speak for Hindus and are laying down demands that threaten the very idea of a secular India.[32] Even at this stage, though Constitution was secular, the State apparatus: the bureaucracy, the army and the police were infiltrated by communal elements. The Congress government, though predominantly secular, had many leaders in important positions that were influenced by a Hindu communal ideology. This resulted in a social development that was mixed; on the one hand secularism thrived and on the other though communalism remained dormant, was never dead. With the social changes of the late 70's and the early 80's, communalism got a strong boost and it started attacking secularism in a big way.[33]

Communal riots, atrocities on Harijans, and caste divide slowly appeared as the ugly features of the Indian society. While Hindus constituted a large majority, the State did not support any particular religion, yet the communal divide surfaced and the communal strife became recurrent. Religious parties such as the Indian Union Muslim League, Akali party, Muslim United Front and the like vigorously carried on propaganda in support of their sectarian interest. With a view to buttress the secular characters of Indian republic the expression "secular" was specifically put into the preamble of the Constitution of India by the 42nd Amendment Act, 1976. One of the CPI members *Shri Indrajit Gupta*, during the discussion on the amendment bill observed: "by introducing word secular, what we want to assure the people of all faith and communities and religions particularly minorities is that on our part we mean to take

32 Shubhangi Dinesh Rathi, "Historical Background of Secularism in India", 1(11) *Indian Streams Reserach Journal* 2 (Dec; 2011).

33 "Secularism in India", available at: http://www.civilserviceindia.com/subject/Essay/secularism.html

some further action, legislative and others, to strengthen and secularize the content of our democracy.[34]

The object of insertion was to spell out expressly the high ideas of secularism and the compulsive need to maintain the integrity of the nation which was subjected to considerable stresses and strains, and vested interests have been trying to promote their selfish ends to the great detriment of the public good.[35]

VII Constitutional Provisions which Strengthen Secularism

In order to completely understand the interpretation of secularism in Indian context, it is important to analyze some articles of Constitution of India. This along with a few judgments of Supreme Court can give us a clear idea on this issue.

Indian concept of secularism recognizes both, the principle of secular State and religion of the people and these are embodied in the Constitution especially in Part III and Part IV, dealing with the Fundamental Rights and Directive Principles of State Policy respectively.[36]

In dealing with the question about the character of Indian secularism, it is necessary to begin with the primary proposition that citizenship in India is a purely secular matter. Articles 5 to 7 of the Constitution which deal with citizenship are altogether secular in character having nothing to do with race, religion or creed. Every person who had at the commencement of the Constitution domiciled in India or who was born in India or either of whose parents was born in India or who has been ordinarily resident in India for at least five years, immediately before such commencement is a citizen of India.[37] Unlike a theocratic State, there is no ban against citizenship on the ground of faith or religion. Further, the provision for universal adult franchise, irrespective of race, religion, creed or sex, makes the secularity of citizenship potent and purposeful.[38]

Article 14 guarantees equality before law and equal protection of laws irrespective of religion, race or creed of any person. Article 15(1) and (2) prohibits discrimination between citizens on grounds of religion, race, caste, sex or place of birth. Article 16(1) and (2) guarantee equality of opportunity in a matter of public employment. Article 19 guarantees the several fundamental freedoms to all citizens, regardless of what religious or social group they belong to. Rights which form the corner stone of the democratic set up are conferred on all citizens alike without regard to their religion.

34 V. Lingamurty, *Impact of the Forty-second Amendment on Our Parliamentary Democracy*, available at: http://yabaluri.org/TRIVENI/CDWEB/impactofthefortysecondamendmentoct77.htm.

35 *M.P. Gopalakrishnan Nair* v. *State of Kerala*, AIR 2005 SC 3053.

36 R.L. Chaudhari, *The Concept of Secularism in Indian Constitution* 3 (Uppal Publishing House, New Delhi, 1987).

37 Article 5, The Constitution of India, 1950.

38 *Supra* note 25 at 95.

Even atheists or agnostics are equally entitled to the status of citizenship and can claim and are entitled to the fundamental rights.[39]

The Constitution of India also requires that the important offices of the State such as that of the President[40], Vice-President[41], Judges of the High Courts[42] and the Supreme Court[43], Attorney-General[44] and Advocate-General[45] shall be filled in only by the citizens of the country irrespective of their religion, race or caste. Articles 25 and 26 which deal with the freedom of religion constitute the basis of the concept of Indian Secularism. Article 25 guarantees four aspects of religious liberty – (1) freedom of conscience; (2) right to freely profess; (3) right to practice; and (4) right to propagate one's own religion or belief.

The freedom so guaranteed is however subject, firstly, to the public order, morality and health; secondly, to the other provisions of Part III and thirdly, to the reservation of the State's power to regulate non-religious activities which may be associated with religious practice and to provide measures for social welfare or reform or throwing open the Hindu religious institution to all classes and sections of the Hindus.

Article 25(1) embodies the principle of equality as it reads "all persons are equally entitled to". The provision thus, brings out the attitude of State neutrality in the matter of religion.[46] Aid, facilities, protection and even encouragement given by State to religion will not offend this provision as long as the State adheres to the principle of equality and to that extent, neutrality among the various religious group and community.[47]

It is noteworthy that the four areas covered by the freedom and right in article 25(1) have been placed in a deliberate ordering: freedom of conscience mentioned at the head, which is by its very nature is illimitable, not susceptible to governmental restriction. Among the rights; the first mentioned again is the right to profess, which is least likely to affect secular interests or rights of others, next is right to practice, which obviously has a wide significance to public order, morality, health and the civil rights of others, and logically, last comes the right to propagate religion and to proselytize

39 *Id.* at 27.

40 Article 58(1) (a), The Constitution of India, 1950.

41 *Id.*, article 63(3) (a).

42 *Id.*, article 217(2).

43 *Id.*, article 124(3).

44 *Id.*, article 76(1) read with article 124(3).

45 *Id.*, article 165(1) read with article 217(2).

46 P.K. Tripathi, *Spotlights on Constitutional Interpretation* 106 (N.M. Tripathi Pvt. Ltd Bombay, 1972).

47 P.K. Tripathi, "Secularism: Constitutional Provision and Judicial Review", 8(1) *JILI* 8 (Jan.-Mar. 1966).

right in regard to which conflicts with competing public interest will necessarily be most pronounced.[48]

Article 25(2) (a) and (b) recognizes the overriding power of the State to regulate and restrict over the entire area where secularism and religion are found to commingle with economic, financial, political, or other secular problems or problem of social welfare and reforms. Thus these provisions are the expression of the complete supremacy of secular authority and secular interest over religious authority and interest.[49]

Article 26 flows from article 25 and it deals with the freedom to manage religious affairs. This freedom is subject only to public order, morality and health. Article 26(a), (b) and (c) show that every religious denomination is given the fundamental right - (1) to establish and maintain institution for religious and charitable purposes; (2) to manage its own affairs in matter of religion; and (3) to own and acquire movable and immovable property and to administer such property in accordance with law.

The word "religious denomination" which is used in article 26 takes its colors from the word "religion". In *Ramaswami Mudaliar*[50], the Apex Court held that in case of denomination, there must be a common faith of the community based on religion and the community members must have common religious tenets peculiar to themselves.

It is noteworthy that unlike article 25, article 26 is not subject to the other provisions of Part III. Under clause (d) of article 26 the right to administer the property is subjected to the condition that administration of that property – must be in accordance with law. Law in this context means the relevant law passed by the State legislature and that explains why it was thought unnecessary to mention any other right guaranteed by Part III in the first part of this article.[51]

Finally one of the remarkable features of articles 25 and 26 and the philosophy behind it may be noticed that unlike any other article in Part III of the Constitution, both the articles are open with the recitation of the limitations, which is against the general scheme of the Constitution followed in all other articles of Part III which mentions the right first thus giving it the primary place and mentions the limitations only subsequently. Another limitation "the other provisions of the Part III" cannot be seen anywhere in the Constitution except in article 25. The reason behind this scheme is that the right guaranteed in article 25 especially those relating to practice and propagation of religion is susceptible of being so exercised by person as to encroach

48 *Ibid.*
49 *Id.* at 9.
50 (1999) 7 SCC 332.
51 *Supra* note 47.

upon the various fundamental rights of the others. The Constitution would not permit this to be done even in the name of State; much less in the name of religion.[52]

Thus the unusual arrangement of articles 25 and 26 only indicate unmistakable, salutary principle of our constitutional philosophy in this regard, namely the principle of giving primacy to the individual, placing him before and above religion, and recognizing freedom of religion and of religious denomination as incidental only to his well-being and liberty.[53]

In *Saifuddin Sahib* v. *State of Bombay*,[54] the court stated the main principle of articles 25 and 26 as follows:

> The protection of these articles is not limited to matter of doctrine or belief, they extend also to acts done in pursuance of religion.
>
> What constitutes an essential part of a religion or religious practice has to be decided by the counts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of religion.

In *Venkataraman Devaru* v. *State of Mysore*,[55] the Supreme Court observed that matters of religion in article 26(b) include even practices which are regarded by the community as a part of its religion.

In all the above cases, the court failed to appreciate that article 26 is ancillary to the rights guaranteed under article 25 to the individual. The denominational rights enshrined in the article 26 are only to supplement and to complete the right given to individual under article 25.

Article 27 provides that no person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Under this article, what is prohibited is payment of taxes for any particular religion and not the promotion of all religions generally. It would not bar any provisions if it benefits all religious institutions along with secular ones without any discrimination, or indeed, if it benefits all religious institutions in general without making any discrimination. Thus, this brings out the fact that the secularism contemplated by the Indian Constitution is not anti-god or anti-religion apart from the claim that it has no religion of its own.[56]

To ensure State's neutrality towards all religions, Constitution of India provides that no religious instructions shall be provided in any educational institution wholly

52 *Ibid.*
53 *Supra* note 48 at 7.
54 AIR 1962 S.C. 853.
55 AIR 1958 SC 255.
56 *Supra* note 9 at 58.

maintained out of State funds.[57] This inhibition applies only when educational institution is wholly maintained from State funds. It does not apply to those who receive grant-in-aid and are partially supported from government funds.

However, clause (2) of article 28 is an exception to clause (1). It states that inhibition does not apply to educational institutions established under an endowment or a trust which requires imparting religious instruction even when it is administered by the State. But there is a limitation in clause (3) which states that no person attending such institution, can be compelled to take part in the religious instruction or to attend any religious worship, unless such person or in case of a minor, his guardian has given consent thereto. This shows that our Constitution does not contemplate the necessity to eliminate religion from life, thus not anti-religion or indifferent towards religion in general. However, State-aided institutions are permitted to impart religious instruction and conduct religious practices, provided they are not involuntary.

Articles 29 and 30[58] provide for the cultural and educational rights of linguistic or religious minorities. In a multi-religious, multi-lingual society as ours, the freedom of religion clauses would have been inadequate unless protection was given to the religious linguistic minority to enable them to preserve their language script and culture and for that purpose to establish and administer educational institutions of their choice. To make such protection purposeful, the Constitution lays down two mandates, which are based upon the principle of equality and the principle of primacy to individual freedom: one is that no citizen shall be denied admission in any educational institution maintained by the State or aided from State fund on grounds only of race, religion, caste, language or any of them and the other is that the State shall not, in granting aid to educational institutions, discriminate against any one of them on the ground that it is under the management of a minority, religious or linguistic.

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57 Article 28 (1), The Constitution of India, 1950.

58 Article 29- Protection of interests of minorities.—
(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.
Article 30- Right of minorities to establish and administer educational institutions. —
(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

There is one directive principle which needs to be mentioned here. Indian Constitution provides that "the State shall endeavour to secure for these citizens a uniform civil code throughout the territory of India."[59] It would be enough to state that the idea underlying this directive principle is that in the matter of personal law which would be governed by a uniform civil code, there should be no divergence. Personal law is secular matter, and all citizens should be governed by the same principle of personal law based on reason, justice, equality and good conscience. This emphasizes the fact that the Constitution makers knew that, whereas religion may play its legitimate role in the lives of citizens who owe allegiance to religion, the State has to discharge its functions in its own sphere, uninfluenced and unhampered by any consideration of religion.[60]

Secular law, the Constitution say, is a social matter with which religion has no concern. But here a question can be raised that why "uniform civil code" put in article 44 which, though fundamental in the governance of the country, does not lay the State under positive obligation enforceable either by legal or constitutional means? The main reason may be that it is too difficult to apply one personal law uniformly because of the wide spread diversity within the territory of India regarding the culture and heritage where the personal raw is largely interwoven with religion. *Pandit Nehru* also visioned at that time that the time was not ripe to push through common civil code and he wanted to prepare the ground for the same.[61] The Constitution also contains instructions for the citizens of India, who must make it their duty to promote communal harmony and a fraternal spirit, "transcending religious, linguistic and regional or sectional diversities".[62]

VIII Indian Judiciary on Secularism

The Supreme Court of India explained the concept of secularism for the first time in *Sardar Taheruddin Syedna Saheb* v. *State of Bombay*[63] wherein Ayyangar, J., observed:

> Articles 25 and 26 embody the principle of religious tolerance that has been the characteristic feature of Indian civilization from the start of history. The instances and periods when this feature was being absent is merely a temporary aberration. Besides, they serve to emphasize the secular nature of the Indian democracy which the founding fathers considered to be the very basis of the Constitution.

In *Prafull Goradia* v. *Union of India*,[64] once again, the secular functioning of India was called in question. While deciding the case, the Supreme Court observed that "*India is*

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59 Article 44, The Constitution of India, 1950.

60 *Supra* note 24 at 340.

61 V.P. Bharatiya, *Religion- S tate R elationship and Constitutional Rights in India*, 99 (Deep & Deep Publication New Delhi, 1987).

62 Article 51(e), The Constitution of India, 1950.

63 AIR 1962 SC 853, 871.

64 Writ Petition (civil) No.1 of 2007.

democratic country of tremendous diversity, which is due to the fact that it is broadly a country of immigrants, it is absolutely essential if we wish to keep our country united to have tolerance and equal respect for all communities and sects".

In *Kesavananda Bharati* v. *State of Kerala*[65], the Constitutional Bench of the Supreme Court reiterated that secularism was a part of the basic structure of the Constitution. This view crystallized in the landmark case of *S.R. Bommai* v. *Union of India*.[66] In fact, the Court in *S.R. Bommai*'s case went on to say that the concept of secularism in the Indian Constitution is in broad agreement with the U.S. Constitution's First Amendment. The Court further held that religion cannot be mixed with any secular activity of the State. Encroachment of religion into secular activities of the State is strictly prohibited. Justice B.P. Jeevan Reddy observed:

It's clear that if any party or organization seeks to fight elections on the basis of a plank which has proximate effect of eroding the secular philosophy of the Constitution it would certainly be guilty of following an unconstitutional course of action.[67]

However, within a year the Supreme Court in *Ismael Faruqui* v. *Union of India*[68] started diluting the active, positive concept of secularism based on scientific thinking it had advocated in the S.R *Bommai's* case. Subsequently, in the infamous *Ram Janambhoomi* case, the Supreme Court justified its concept of secularism by quoting extensively from Indian scriptures. *Verma, J.* quoted from the *Yajur Veda, Atharva Veda* and *Rig Veda* to justify its concept of secularism: '*Sarwa Dharma Sambhava*', i.e., tolerance of all religions. This reasoning seemed to be odd wherein the Supreme Court was justifying secularism by religious scriptures. The Supreme Court seemed to have rejected the western concept of secularism based on separation of the Church and the State as explained in the earlier verdict of *S.R. Bommai* and went back to equating secularism with tolerance.

The Court also noted that the State has the power to take over any religious place including a mosque. Though dissenting, *Bharucha, J.*, supported the concept of absolute, positive and active secularism, more in tune with that spelt out in *S.R. Bommai*. Yet even he accepted that secularism in India exists because of the tolerance of the Hindus who are the majority religion. However, though in some of the recent judgments the Supreme Court has again shifted from the confusing interpretation of secularism. But this again highlights an important issue that the secular character of India has in fact received a setback and the issue of secularism in India today is not simple especially in the light of growing religious fundamentalism which owes its revival to the failure of the government in controlling societal attacks.

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65 (1973) 4 SCC 225.

66 (1994) 3 SCC 1.

67 Justice Aftab Alam, *The Idea of Secularism and The Supreme Court Of India*, Annual Lecture at The Honourable Society of The Inner Temple, Temple Church, London (The Gandhi Foundation 2009).

68 (1994) 6 SCC 360.

IX Conclusion

To conclude, it may be observed that the framers of the Constitution of India contemplated secularism which was the product of India's own social experience and genius. They certainly did not contemplate a State which was hostile to religion. In fact our Constitution envisaged a classless, casteless egalitarian society. But caste consciousness became more and more visible. Some political parties who deliberately tend their support to caste consciousness in their constituencies fragmented the Indian society on cast and communal line which is dangerous to secular character of the State. Caste consideration and communal consciousness are antithesis of secularism.

The present scenario of 'secularism' in India is indeed a cause of concern. Today, the secular character of the Indian democracy is considered to be under threat. The razing of the Babri Mosque in Ayodhya (Uttar Pradesh) led to riots and killings. The massacres of innocent Hindus in Godhra (Gujarat) touched off a larger massacre of equally innocent Muslims in tit-for-tat killings. Apart from these, the unspeakable atrocities of 1984 against the Sikhs in Delhi and an occasional slaying of proselytizing Christian missionaries clearly present a grim picture of "Indian secularism". Moreover, the intrusion of religious passions and caste loyalties into Indian politics cast serious doubts over the claim of India to be a secular and theocratic State.

The present situation also owes its origin to the misconception what is secular and secularism. Secularism is not value free. It does not mean irreligious attitude to life. One can be secular even though he has his faith in some belief. It stands for religious neutrality.

In order to be secular in true sense of the word, it is in that we eschew caste a communal consideration. It can flourish only if the people who are its constituents are educated and trained in the secular way of life. That way of life is as mutual, vital and essential as the democratic way of life to a democracy. Both the ways are intimately connected for without religious freedom, the other freedoms are depleted of much of their content. There is need for positive change in the attitude and outlook of the society towards secularism. In a multi-religious, multiracial and multi-cultural developing society like India, it is necessary that rulers, leaders, administrators and citizens have very clear ideas about secularism. If we are to evolve as a secular State, we need to produce secular minds.

In the end, secularism begins in the heart of every individual. There should be no feeling of "otherness" as we all have a shared history. India being a traditional society, which contains not one, but many traditions owing their origin in part to the different religions that exist here, has so far managed to retain the secular character of its polity. Ours is a society where Sufis and Bhakti saints have brought in a cultural acceptance for each other. Are we going to let it all go wasted and listen to people who have concern for their careers as politicians or leaders rather than for our welfare at heart? Let us instead concentrate our efforts at making India a powerful and progressive nation.

MAKING PARTICIPATORY CONSERVATION WORK
An Appraisal of Joint Forest Management in India

Priya Urs[*]

India's Joint Forest Management (JFM) programme has been effective in its contribution towards the recognition of local community interests in forests and their resources, yet, is severely deficient in its understanding of the principle of decentralisation. It has failed to recognise that decentralisation in the context of forest management must not be limited to efforts towards implementation of conservation measures, and must embrace the decentralisation of decision-making. This envisages an understanding of decentralisation that incorporates the principle of subsidiarity; involving local communities and forest dwellers, not as agents of the Forest Department, but as active participants in policy-formulation and micro-management.

I Introduction

Efforts towards the conservation of forests, and natural resources in general, have seen a considerable change in the regulatory frameworks they adopt. Beginning with a policy that was largely centralised and the exclusive mandate of the State, forest conservation in India has made significant developments, not only in creating mechanisms for greater participation by local communities, but also in affording recognition to those that already function in accordance with customary laws.

Joint Forest Management (JFM) is a form of participatory conservation that became popular in India during the 1990s, largely as a result of the failure of social forestry and the need to extend to forest-dwellers certain rights in connection with forests, not solely as a means of meeting their subsistence and livelihood needs, but with a view to use the provision of these rights as an instrument of implementation of State forest policy. Is this the extent to which JFM must extend, or should it contemplate something more substantial, i.e. the devolution of decision-making upon communities that are better acquainted with local conditions and requirements than forest officials?

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Participatory conservation in the context of Indian forestry is peculiar in that it creates not only environmental imperatives, but social obligations as well. JFM was created with a view to decentralise forest management and consequently make it more effective, engaging and incentivising local communities. Yet, there remains a constant danger that the provision of economic benefits in exchange for local participation in forest protection defines a restricted relationship that fails to afford local forest protection committees any extent of decision-making power. Through an extensive analysis of JFM in India, using examples from various parts of the subcontinent, with a comparative analysis of other models of participatory forest conservation that continue to be successful in other parts of the world today, the author seeks to establish that the most effective model of forest management is one which gives effect to the principle of decentralisation in a manner that minimises decision-making by the State, and affords local communities the autonomy to function in a manner best suited to local conditions. The author concludes, thus, that the incorporation of *subsidiarity* into the existing decentralised framework of JFM is vital to its success.

II Why do we Need Participatory Conversation?

The most common system of ecosystem management adopts a regulatory framework that is largely centralised. The Indian Forest (Conservation) Act, 1980, for example, deems the Central Government to be the protector of Indian forests.[1] More recently, however, it has been recognised that the practical effectiveness of this approach is limited. Centralised management denies the opportunity of decision-making to those most closely attached to individual subsystems that are both complex and diverse. Its greatest limitation is thus its failure to account for biological, environmental and social differentiation.[2] More generally, it fails to recognise that social capital is necessary for enduring resource management practices and sustainable forest use.[3]

In India, in particular, the additional imperative of social equity serves as a driving force in the fight for participatory conservation, as commercial forestry has systematically excluded local communities from accessing forest resources in order to meet their biomass needs.[4] This is largely because forest policy is drawn up in the context of our conventional understanding of ownership; traditional rights of forest communities have been disregarded in the State's initiative to reserve forests.[5] Arguments are thus made in favour of the *abolition* of State control over forests, leaving local communities to manage their resources independently. Is this necessarily the

1 Section 2, The Forest (Conservation) Act, 1980.

2 C.D. Oliver *et. al., Forest Organisation, Management and Policy Maintaining Biodiversity in forest Ecosystems* 578, 556, 578 (M.L. Hunter Jr. edn., 1999).

3 J. Pretty, "Social Capital and the Collective Management of Resources", 302(5652) *American Association for the Advancement of Science* 1912, 1912 (2003).

4 R. Guha *et. al., Ecology and Equity: The Use and Abuse of Nature in Contemporary India* 163, 167 (Routledge, 1 ed. 1995).

5 J. Human *et. al., Community Forest Management: A Casebook from India* 54 (Oxfam, 2000).

most effective policy of forest management? It is often the case that village communities, divided along caste or other lines, are unable to act collectively. These efforts remain inequitable (the very allegation made against the State) and unregulated.[6] The need to define, with clarity, the limits of State action in an effort to balance these contrasting views, is obvious.

Recent trends in forest management reflect a realisation that there are a number of participants, besides the State, who have an interest in the management of forest ecosystems. The Fundamental Duties enumerated in its Constitution make specific reference to citizens' obligation to '*protect and improve the natural environment*'.[7] In India, it is more than evident that there exist various interests, both local and otherwise, in the manner in which forest law and policy is framed and implemented. While attempts have been made to integrate their particular interests into decentralised forest management strategies, and various actors have been afforded roles in the implementation of forest policy, public involvement in India is almost entirely absent during the framing of forest policy.[8] There is, then, a need to reconcile these conflicting claims in order to arrive at an equilibrium that is tenable and effective in the goal of forest protection. Who represent these various interests? Characteristic of the Indian subcontinent is the significantly large role played by non-government organisations (NGOs); a result of the gulf between those whose interests are most affected by forest management decisions (i.e. local communities) and decision-makers.[9] How effectively large NGOs capture the essence of local concerns is a matter of some concern. This is especially vexatious in the context of tribal communities, whose knowledge of forest environments continues to be afforded little or no respect during negotiations.[10]

While it is unquestionable that the incorporation of local communities and their social values into forest-related decisions is both desirable and necessary for effective management, there is no easy solution. Problems relating to forest management are not *all* local, and may require a legal framework that operates at a broader level.[11] This article shall evaluate the frameworks that have been created in furtherance of participatory conservation in India, their limitations, and shall finally offer solutions to make them more viable and effective.

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6 *Supra* note 4 at 168-9.

7 Article 51A, Constitution of India, 1950. See R.S. Tendulkar, "Forest Conservation and the Law" in N.L. Mitra *et. al.* (eds.), *Environmental Management, Constitution and the Law* 360, 364 (1998).

8 In developed countries like the United States, forest planning and other environment-related initiatives by the State have made greater room for public participation in environmental decision-making. For a more detailed discussion on U.S. forest planning, see L. A. Maguire, *Social Perspectives Maintaining Biodiversity in Forest Ecosystems* 639, 641-646 (M. L. Hunter Jr. ed., 1999).

9 *Id.* at 651-2.

10 F. Padel, "Forest Knowledge: Tribal People, their Environment and the Structure of Power" in R.H. Grove *et. al.* (eds.), *Nature and the Orient: The Environmental History of South and South East Asia* 891, 891 (2nd ed., Oxford University Press, 2000).

11 *Supra* note 8 at 649.

III Introducing a New Policy: Joint Forest Management

A Forest Department Initiatives and the Failure of Social Forestry

Forest management continues to fall within the domain of the Forest Department constituted under the British administration in 1864.[12] Challenges to the functioning of the Department are frequently made by proponents of community management, who remain rooted in their belief that State control over forests is illegitimate. Their stance is sought to be justified on the ground that commercial timber harvesting activities that are monitored and allegedly supported by the Department have destroyed rural subsistence economies.[13] More concrete criticisms levelled against the Department deal with the unreliability of the data it collects, the lack of initiative of its officers and its hostility towards local communities.[14] These concerns, coupled with conservationists' claims that commercial forestry has contributed substantially to the depletion of biodiversity in forests, resulted in anxiousness during the 1970s to completely revamp forest management strategies. Efforts towards collaborative forest management arose, then, with the recognition of the role of *ecosystem people* who depend on forests for their personal welfare, and, as a result, are most affected by their destruction.[15]

As a result, the Indian Social Forestry Programme was initiated in 1978, consisting of three elements: (1) farm forestry, where private farmers were encouraged to grow trees on their own lands; (2) community woodlots, where trees were planted by communities on public lands; and (3) trees planted by the Forest Department on government lands.[16] Farm forestry was hugely successful during the 1980s; yet, the objective of meeting local subsistence needs remained unfulfilled. Farmers focused on reaping commercial benefit rather than engaging in activities that would benefit them more directly, and the absence of local ownership prevented forest farmers from recognising community requirements.[17] Allegations have also been levelled against the Forest Department for imposing commercial varieties upon local communities, leaving local needs wanting.[18] Social forestry has, by and large, been regarded as a failed endeavour, giving way to the formulation of a new policy: *joint forest management*.

B Characterising Joint Forest Management

As a consequence of the Department's failings and the flaws of social forestry, a modified form of community participation has been developed in the form of JFM that is in place in most states in India today. Beginning with the introduction of the

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12 *Supra* note 4 at 148.

13 *Supra* note 4 at 148.

14 *Supra* note 4 at 160-1.

15 *Supra* note 4 at 158.

16 *Supra* note 5 at 32-3.

17 *Supra* note 5 at 33, 51.

18 W. Fernandes *et. al.*, *Forest, Environment and Tribal Economy: Deforestation, Impoverishment and Marginalisation in Orissa* 309, 318 (1988).

National Forest Policy in 1988, and the subsequent Circular issued by the Ministry of Environment and Forests in 1990, local communities now contribute effectively to forest management in many parts of the subcontinent. JFM embodies the notion that the State and local communities can jointly manage forest resources for mutual benefit.[19] It thus formulates the environmental goals of forest management in a manner which creates vested interests in forest dwellers, encouraging them to protect and enhance their livelihoods.[20]

In order to incentivise local communities to collaborate with the Department, it is imperative that these participants are adequately rewarded for their efforts. Most JFM initiatives envisage the provision of usufructory rights to local communities.[21] Additionally, the recognition of community rights over public lands, including the right to exclude outsiders and regulate the use of forest resources, is essential.[22]

IV Law and Policy Relating to Forest Management

A *Statutory Law*

The Indian Forest Act, 1927, a remnant of British forest policy in India, continues to be the prevailing legislation governing forests. This law, by and large, displays blatant disregard for the customary rules and regulations of communities living in and around forests that once regarded them as common property resources.[23] The relevance of this Act in contemporary contexts continues to be questioned, not just because it reeks of exploitative, revenue-centric interests, but also as a result of its complete indifference towards environmental imperatives.[24]

While there is a general consensus as to the inadequacy of this legislation, the Act does, in fact, reflect a semblance of initiative with regard to forest protection and community participation. In recognising certain forested areas as *village-forests*,[25] it affords State Governments the power to assign rights in relation to reserved forests to village communities, who may, as a consequence, be required to undertake certain duties for their management. However, as this legislation is tilted largely in favour of

19 K.E. Andersen, "Institutional Flaws of Collective Forest Management", 24(6) *Economic and Political Weekly* 349, 349 (1995).

20 R.A. Sharma, "Participatory Forest Management in India", 24(2) *Economic and Political Weekly* 131, 131 (1995).

21 S. Kolavalli, "Joint Forest Management: Superior Property Rights?", 30(30) *Economic and Political Weekly* 1933, 1933 (1995).

22 *Supra* note 4 at 161.

23 *Supra* note 5 at 25.

24 P. Leelakrishnan, *Environmental Law in India* 14 (2nd ed. 2005).

25 Section 28(2) of the Indian Forest Act, 1927 provides "The State Government may make rules for regulating the management of village forests, prescribing the conditions under which the community to which any such assignment is made may be provided with timber or other forest-produce or pasture, and their duties for the protection and improvement of such forest".

commercial users, the interests of tribal and other rural communities have been placed on the back-burner, despite their direct relationship with forests. This trend reflects obsolete colonial policy that is focused solely on regulating the exploitation of forest resources using an authoritative, centralised administration.[26]

As a response to the degradation of forest resources long after Independence, the Forest (Conservation) Act was enacted in 1980. While the ambitious objective of this statute is the broad goal of forest conservation, its effectiveness is limited as its provisions are framed in *only* prohibitive terms. It fails to impose on the State the obligation to undertake affirmative forest conservation initiatives, either through the participation of local communities through village-forest assignments, or otherwise. Nevertheless, it was a step in the right direction.

B *Forest Policies*

The National Forest Policy, 1988 was well-received by many, a result of its emphasis on ecological concerns rather than economic interests, providing a fresh perspective on forest management in India.[27] It has also accorded recognition to the rights of tribal communities and their role in forest protection, and emphasises that the interests of local populations would constitute the first charge on forests, affording them protection from competing commercial demands.[28] The most significant contribution by this document is that it considers forests as *local* rather than *national* resources, to be managed by local populations in accordance with ecological imperatives.[29]

For the first time, State policy reflected the crucial social element of forest management, laying the foundation for participatory conservation in the form of JFM. The Policy specifically states that local communities should be incentivised to undertake programmes of forest management, including the vesting of ownership rights in trees to weaker sections of society.[30] Providing the framework for JFM, the Policy states:

The holders of customary rights and concessions in forest areas should be motivated to identify themselves with the protection and development of forests from which they derive benefits. The rights and concessions from forests should primarily be for the bona fide use of the communities living within and around forest areas, specially the tribals.[31]

26 M. Buchy, *British Colonial Forest Policy in South India: An Unscientific or Unadapted Policy? Nature and the Orient: The Environmental History of South and South East Asia* 636, 668 (2nd ed., 2000).

27 *Supra* note 5 at 26.

28 *Supra* note 24 at 54.

29 *Supra* note 5 at 26-7.

30 Including landless labour, small and marginal farmers, scheduled castes, tribes and women. See The National Forest Policy, 1988, 4.2.3.

31 The National Forest Policy, 1988, 4.3.4.2.

On June 1st, 1990, the Central Government issued a Circular for the involvement of village communities and voluntary agencies in the regeneration of degraded forests.[32] While recognising the supply of fuel wood, fodder and small timber as constituting a first charge on forest produce, the essence of the Circular is the provision of usufructory benefits to individuals who participate in forest management.[33] The involvement of local communities and voluntary agencies is, however, permissible only under the supervision of the Forest Department.[34] Moreover, this Circular makes no move towards promoting the autonomy of local bodies, or the devolution of decision-making powers upon them.

In 2000, the Ministry of Environment and Forests introduced new guidelines in order to improve the existing JFM programme. Some of the essential elements include the registration of JFM committees as societies or co-operatives, micro-planning, the expansion of JFM to include 'good' as well as degraded forests, greater co-ordination among JFM committees, forest officials and NGOs, and, most importantly, the recognition of *existing* forest protection committees.[35] These are yet to be implemented by state governments, after which their efficacy may fall for consideration.

V Joint Forest Management: Lessons Learned

From a development perspective, JFM has played a considerable role in facilitating the fulfilment of local development needs by affording forest-dwellers and rural communities the opportunity to participate in economically beneficial activities. This is especially important because many of their requirements cannot be derived from the marketplace and are derived directly from the forest ecosystem.[36] JFM was welcomed as it incorporated the idea that forests are sources of Non-Timber Forest Products (NTFP) on which forest communities depend not merely for the incomes they earn, but, more importantly, for self-consumption.[37]

From the State's standpoint, therefore, JFM provides a cost effective system of forest management that plays the dual role of forest conservation and the fulfilment of local subsistence needs.[38] Dependence on the resources of the Forest Department is reduced substantially, as earlier policing mechanisms to prevent encroachers (including, and chiefly, forest-dwellers themselves) would no longer be necessary.[39]

32 The Circular Concerning Joint Forest Management, No. 6-21/89-P.P (June 1st, 1990), 1.

33 *Ibid.*

34 A. Menon, "Constructing the 'Local': Decentralising Forest Management", 30(34) *Economic and Political Weekly* 2110, 2110 (1995).

35 C.F. *supra* note 5 at 35-6.

36 *Supra* note 19.

37 D. Nathan *et. al.*, "Case for Local Forest Management: Environmental Services, Internalisation of Costs and Markets", 36(30) *Economic and Political Weekly* 2835, 2835 (2001).

38 D. Arora, "From State Regulation to People's Participation: Case of Forest Management in India" 29(12) *Economic and Political Weekly* 691, 692 (1994).

39 *Supra* note 21.

Similarly, expenditure on rural development programmes would be less substantial. Existing forest protection committees that had been set up in many areas as a reaction to State-sponsored commercial forestry can also be made more effective with the aid of the Forest Department under the new JFM policy.[40]

Despite these advantages and a number of successful JFM initiatives, the most important question that needs to be raised is this: *is JFM as participatory and decentralised as it should be?* The focus on affording local participants economic gains through usufructory benefits has prevented them from effectively contributing to the decision-making process. What is more disconcerting is the failure of forest policy – both the 1988 Policy and the 1990 Circular – to explicitly recognise the importance of decentralisation and subsidiarity in JFM.

By and large, forest protection committees merely assist the forest department in implementation; even these limited functions are supervised by the State.[41] As a result, while local participation has certainly been incorporated into JFM, the objective of making these committees autonomous remains unfulfilled.[42] JFM frameworks do not adequately incorporate the principle that decisions that *can* be taken at a lower level must not be overruled by a higher authority, which is crucial for effective participation. In some states, JFM strategies are similar to existing State rules under section 28 of the Forest Act, 1927, making no perceivable improvements.[43] In other cases. the purpose of JFM has been wholly defeated, as in the Western Ghats, where the State is reluctant to release its control over commercially important forests, excluding local communities altogether.[44]

Even when successful, evidence seems to suggest that it is local initiative that makes JFM successful, rather than its institutional mechanisms.[45] The experience of Tamil Nadu shows that even when purportedly 'local' solutions are sought to be incorporated, these solutions are really based on the State's perception of what local solutions *ought* to be.[46] The primary function of Forest Protection Committees (FPCs) must be to represent community needs and offer local knowledge during the planning stage of forest management.[47] In Bihar, for example, FPCs have been afforded the power to make certain decisions, such as the choice of micro-level plans and tree

40 S. Jewitt, "Voluntary and 'Official' Forest Protection Committees in Bihar: Solutions to India's Deforestation?" 22(6) *Economic and Political Weekly* 1003, 1019 (1995).

41 *Supra* note 38 at 694.

42 *Supra* note 38 at 695.

43 *See* e.g. The Orissa Village Forest Rules, 1985.

44 Y. Gokhale, "Reviving Traditional Forest Management in Western Ghats: Study in Karnataka", 39(31) *Economic and Political Weekly* 3556, 3559 (2004).

45 *Supra* note 34.

46 *Supra* note 34.

47 S.B. Roy, "Forest Protection Committees in West Bengal", 27(29) *Economic and Political Weekly* 1528, 1530 (1992).

species, and also see greater participation of women.[48] The JFM Guidelines in Uttar Pradesh also reflect the Government's resolution to incorporate people's participation in preparing micro-plans for afforestation of degraded areas, limiting State inputs to technical guidance only.[49] In fact, in the village of Behroonguda in Andhra Pradesh, the local community successfully restored timber and firewood resources that were dangerously close to exhaustion, without any State intervention at all.[50] In order to maximise the success of joint initiatives, then, local participants must be recognised as more than just agents of the Forest Department. The value of local inputs cannot be overemphasised.

Department control of FPCs also prevents them from effectively utilising their own potential with respect to their traditional knowledge of local ecosystems. Micro-planning must rely not only on purely scientific evidence, but also on local management practices. Forest planning generally does not recognise that *local environmental services* are understood far better by local communities than by the Forest Department.[51] The implementation of JFM has been faced with resistance from local communities in some areas, resulting from distrust of forest officials through past experiences. In Orissa, for example, independent forest groups have been in existence since 1936, and have functioned effectively without any assistance from the Forest Department.[52] JFM has been difficult to implement in these regions. This example is illustrative of the importance of recognising, *legally*, 'pre-JFM' forest management systems.

Moreover, the virtually institutionalised role of voluntary agencies (recognised in the Circular of 1990) as providing the link between the State and local communities is questionable. These agencies do not always capture the needs and capabilities of forest-dwellers accurately, and, more importantly, prevent them from functioning independently.[53] Regardless of whether intermediaries are necessary in the JFM mechanism, it is important to ensure that a more equitable sharing mechanism is in place. Marginalised groups, including tribal communities, landless labourers and women need to be considered in allocating benefits under JFM.[54]

The institutionalisation of JFM committees, though a noble endeavour, may also prove to be problematic as a result of the overlapping jurisdiction of *panchayats*. It has

48 *Supra* note 40 at 1018.

49 D.N. Dhanagare, "Joint Forest Management in UP: People, Panchayats and Women", 35(37) *Economic and Political Weekly* 3315, 3317-8 (2000).

50 E. D'Silva *et. al.*, "Behroonguda: A Rare Success Story in Joint Forest Management", 37(6) *Economic and Political Weekly* 551, 557 (2002).

51 *Supra* note 37 at 2839.

52 *Supra* note 5 at 34-5.

53 *Supra* note 38 at 695.

54 N.S. Jodha, "Joint Management of Forests: Small Gains", 35(50) *Economic and Political Weekly* 4396, 4397 (2000).

been suggested that FPCs must be placed within the existing system of decentralisation, alongside Panchayati Raj Institutions, in order to prevent jurisdictional disputes.[55] However, this may prevent these committees from functioning autonomously, and there must be a clear division of powers and functions among local institutions. In addition, there is a need for a regulatory framework that recognises the efforts of FPCs legally, in order to prevent the value of forests that are restored from being exploited once again by commercial interests. The law in its present form includes no safeguards of this sort.

VI A Comparative Analysis

A Existing Models of Participatory Conservation in India

Van Panchayats (forest councils) in the Kumaon Himalayan region have implemented the principle of decentralisation effectively since 1931, even before efforts at decentralisation were made by the Revenue or Forest Departments. These Councils were established in accordance with two simple principles: *first*, the withdrawal of the Centre from certain activities, and *secondly*, the transfer of decision-making to lower levels of administration.[56] The role of the State is limited to providing technical advice and the regulation of timber felling. The success of council-managed forests that have afforded these forest communities secure livelihoods over the years is encouraging in efforts towards decentralisation.[57] Allowing decisions to be made at the local level incentivises local communities to protect their own interests, simultaneously reducing the burden of higher authorities.

Another community forestry initiative began in West Bengal more recently in 1972 (largely out of necessity) as a result of the extent of degradation of its *sal* forests. Consequently, there was an increase in the frequency of disputes between villagers and forest officials, a result of the policing mechanisms adopted by the Forest Department, requiring immediate State attention.[58] This scheme, incentivising local communities by affording them usufructory rights and employment opportunities with the Forest Department, has been successful in over a thousand villages, regardless of social and political differentiation.[59] Local communities have been incentivised further by affording them a share in timber produce from these forests.[60] This instance makes amply clear the value of integrating local interests in various aspects of forest management.

55 *Ibid.*

56 A. Agarwal, "The Regulatory Community: Decentralisation and the Environment in the Van Panchayats (Forest Councils) of Kumaon, India", 21(3) *Mountain Research and Development* 208, 208 (2001).

57 *Supra* note 4 at 169-70.

58 *Id.*, at 170-1.

59 *Id.*, at 171.

60 *Supra* note 47 at 1528.

In addition, the framework adopted in West Bengal seems to allay several fears in connection with the JFM model. A Working Group comprising forest officials, NGOs and research institutes has been established to oversee (but *not* overrule) FPC activities. This serves two important purposes. *First*, it decreases the impact of conflict and mistrust between local communities and the State. *Secondly*, informal groups of this kind can co-ordinate activities and aid in resolving inter-FPC disputes without hampering the flexibility afforded to FPCs.[61]

B *Participatory Conservation in Other Parts of the World*

The benefits of extending greater responsibilities to FPCs can be seen from the success of Nepal's community forestry strategy that has been in place since 1978, when the State returned the authority to manage and protect forests to local communities. This resolved two important problems. *First*, it reduced conflict between local communities and the Department of Forests by recognising traditional use-rights instead of excluding them by reserving forests. *Secondly*, it created an obligation in people to maintain forest quality that was non-existent under State-controlled management.[62] Nepal's community forestry programme must also be commended for the active participation of forest officials at the local level, whose proximity to local communities and familiarity with their practices makes them agents of co-operative management.[63]

What is unique about forest management in Nepal is the differentiation at the central level in its approaches toward the implementation of community forestry in different regions. Nepal's forests are divided into three regions – Churiya, Terai and the Mid-Hill region – each of which use different approaches to community forestry.[64] Local representatives in all three regions are constituted into Community Forest User Groups (CFUG), which are empowered to a substantial extent. CFUGs are vested with land rights (though ownership remains with the State) and take all management decisions independently. The State serves only as an advisor and a provider of technical assistance.[65]

An effective mechanism that has been incorporated in some parts of China also provides local communities the flexibility to manage forest resources in the manner they see fit, while adhering to the standards required of them by the State, such as the preservation of biodiversity or conditions imposed upon water use. This has been the experience in the village of Yu Xiaogang, where forests are owned by village collectives, and the State, in turn, requires that the community maintain its wetlands as

61 *Supra* note 47 at 1530.

62 *Supra* note 40 at 1004.

63 M. Kurian *et. al.*, "Forest Guards as Partners in Joint Forest Management", 26(8) *Ambio* 553, 553 (1997).

64 K.P. Acharya, *Private*, "Collective, and Centralised Institutionalised Arrangements for Managing Forest "Commons" in Nepal", 25(3) *Mountain Research and Development* 269, 269 (2005).

65 *Id.* at 269-70.

a bird sanctuary.[66] In light of the valuable traditional knowledge held by local communities in India, this seems to be a viable and effective mechanism for participatory conservation, minimising State intervention (as in the case of Nepal) and extending autonomy to local communities.

In Pakistan, current forest management practices have built upon traditional community-based organisations called *jirgas*, which try to accommodate the specific interests of various user groups in order to ensure that their subsistence needs are met.[67] Interestingly, in the Malakand Division of the North-West Frontier Province, the settlement of disputes by *jirgas* result in legally binding decisions provided the consensus of all concerned parties has been achieved.[68] This mechanism is, however, flawed in a number of ways. *Jirgas* do not consist of elected representatives; their members are chosen on the basis of political or economic alliances and are thus plagued with factionism. Moreover, they prohibit the participation of women.[69] These features portray a management system considerably different from others, including India. The most striking contrast lies in the fact that while the State owns and regulated Pakistan's forests, many areas are under the *de facto* control of local communities.[70] The Government has established in 2001 and continues to make efforts towards establishing a framework that incorporates public participation in more meaningful ways. Strategies envisage participation in decision-making through elected representatives who are given real authority in accordance with the principle of decentralisation.[71]

During the 1970s, several South American nations, beginning with Ecuador, made significant changes in existing systems of resource management, particularly tropical rainforests, as a consequence of organised indigenous movements. Regional organisations that were formed in Ecuador, Peru, Bolivia, Venezuela and Colombia created cross-border alliances with a view to make representations before international organisations.[72] As a result, a new concept – *indigenous territory* – emerged. This implies the protection of forest ecosystems by autonomous indigenous communities within a new land tenure system, enabling them to protect their economic and biomass needs.[73]

JFM is, predictably, contrasted to a greater extent with the United States, which is recognised as a country with a highly developed system of collaborative management,

66 *Supra* note 37 at 2841.

67 S. Southwold-Llewelyn, "Devolution of Forest Management: A Cautionary Case of Pukhtun Jirgas in Dispute Settlement", 34(5) *Human Ecology* 637, 637 (2006).

68 *Id.* at 638.

69 *Supra* note 67 at 638.

70 *Id.*, at 638.

71 *Id.*, at 639.

72 S.H. Davis *et. al.*, "Indigenous Land Tenure and Tropical Forest Management in Latin America", 23(8) *Ambio* 485, 488 (1994).

73 *Ibid.*

incorporating a commendable degree of public participation even during the preliminary planning process. In an attempt to incorporate a spectrum of interests, forest management plans are subject to public scrutiny. More recently, efforts have even been made to allow public interest representatives to engage with planners in a sustained manner, during the entire period during which plans are drawn up. This process, involving the articulation of interests, collection of information and plan formulation is generally termed *multiparty collaboration*.[74] It is based on the notion that in order for collaborative planning to be successful, values need to be given primacy, and scientific inputs by officials must play a secondary role.[75] However, these time-consuming processes are not always practical, and their implementation would be more challenging in the Indian context.

VII Finding a Workable Solution

Despite several regions in which India's JFM programme has been hugely successful, the need to make the functioning of FPCs more autonomous through a reworking of its regulatory approach is essential. What is absent in State guidelines, and even in the Circular on JFM, is the realisation that *any* collaborative or participatory effort must necessarily be accompanied by the principle of decentralisation in its most liberal (and consequently effective) form. Perceived in this manner, participatory conservation must recognise and embrace the principle of subsidiarity, as has been contemplated in Kumaon and Nepal. By constituting FPCs, the devolution of functions and decision-making powers falls squarely on the shoulders of these representative institutions, making them accountable by making them active stakeholders, and empowering them to take initiative.

State intervention must, therefore, be minimised, and made necessary only when communities require guidance for the establishment of collective decision-making mechanisms, and when technical assistance is to be rendered.[76] In this way, local communities will be allowed the flexibility to function more effectively in accordance with subsidiarity, and will be more than instruments of implementation, lacking any decision-making authority. It is evident from the experiences of various states in India that the provision of usufructory benefits is a feeble attempt at remedying past commercial practices and colonial forest laws, and is not an enduring incentive for local participation in forest management.

In addition to the establishment of a more effective mechanism of decentralisation, the value of local community efforts, in other forms, must also be incorporated into the JFM framework to a more noticeable extent. This includes the knowledge of forest ecosystems in specific areas, and the consequential incorporation of local forest

74 *Supra* note 8 at 641-44.

75 *Id.*, at 646.

76 *Supra* note 40 at 1018.

management practices into the plans drawn up by the higher levels of administration. In addition, in order for decentralisation to be more effective and in recognition of the fact that resources, ultimately, constitute an inter-connected whole, provision must be made for intermediaries whose primary role must be communication amongst FPCs, and the resolution of disputes that may arise among them. This proposal can be operationalised in the manner already done in West Bengal, incorporating various interests at every level.

The lessons to be learned from India's past experiences, its current practices under JFM and those employed by comparable participatory management systems both within the subcontinent and in other countries, are thus twofold. *First*, decentralisation must not be limited to implementation, and must be accompanied by subsidiarity to ensure effective decision-making by local authorities. This includes respect for local knowledge, and must be accompanied by the legal recognition of existing forest protection initiatives. *Second*, provision must be made for participation not only through local decision-making, but also during the process of policy-formulation at higher levels. These modifications, once introduced into the existing JFM framework, can be implemented by incentivising local communities, not just commercially, but through their empowerment within the forest administrative system, consequently minimising unnecessary State intervention at the local level.

BOOK REVIEWS

Designs Law by *Ashwani K. Bansal*. Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012, ISBN: 978-93-5035-164-2, Pp. XXIV + 246, ₹275/-

The essential purpose of design law is to promote and protect the design element of industrial production. It is also intended to promote innovative activity in the field of industries. Earlier designs were protected under the auspices of copyright law. The erstwhile Designs Act, 1911 was enacted with an objective to protect creative commercial designs. After a significant period of time, this Act was repealed by the Designs Act, 2000 taking into account the rapid changes in technology and international developments. The present legislation is aligned with the changed technical and commercial scenario and conforms to international trends in design administration.

The publication of a book on Industrial Design occurs less frequently than on any other area of Intellectual Property. There was a long felt need for a good textbook on Designs Law. The book under review fulfils this demand. Divided into twelve chapters, the book gives an exhaustive and integrated account of design law in India incorporating international conventions and case laws.

Chapter 1 is a primer where the author has discussed the nature of design protection. It gives a comprehensive insight into the history and evolution of design law in India as well as in UK & USA. Chapter 2 deals with the subject matter of design law. The meaning and concept of design as per the Designs Act 2000 has been explained in an informative and organized manner citing recent case laws. To be able to differentiate the subject matter of design protection (from copyright and trademark), a thorough understanding of definitions and legal aspects is required. The author's vast knowledge, experience, authority and clarity of the subject become apparent as the reader goes through this chapter.

The intricacies in the area of overlap of design rights with copyright and trademarks are dealt in a precise manner under chapter 3 in a simple and lucid language. Only little in-depth information about this area is available but this book is one of its kinds which facilitate understanding of the subject in detail.

The definition of design[1] excludes both copyright and trademarks from designs. In the absence of Copyright Act section 15(2) like provision in trademark, the author has opined that common law rights may still be asserted by the design holder. Although, in a recent judgment[2], the Delhi High Court has ruled out the availability of common law remedies for

1 Section2(d) of Designs Act,2000

2 *Microlube India Limited* v. *Rakesh Kumar Trading as Saurabh Industries* decided on 15 May 2013.

a design right holder under trademark. The Court has held that the availability of remedy is dependent upon the election of rights by the party. However, it appears that the author has perceived this situation in a much broader aspect.

Chapters 4, 5 and 6 have been devoted to discuss another very important aspect of design law. They deal with different aspects of registration –the registerability criteria, procedure and cancellation of design registration. There being no rights in designs without registration, unlike copyright and trademarks, this area assumes importance.

Chapter 7 explains the extent and scope of copyright in registered designs under section 22 of the Act. The right holder must protect his design from piracy to maximize benefits out of the design activity undertaken by him. It is a comprehensive coverage of statutory provisions and relevant judgments by the author. Other than statutory protection available, the author has covered Border Control Measures notified by the government of India in 2007[3] which highlights the expansive approach of the author on the topic.

Wealth can be generated by the right holder not merely by exploiting the work himself but also by sharing it with others. Chapter 8 deals with the assignment and licensing of designs. The author has also touched upon the provisions for controlling abuse of IPRs by restrictive practices on the part of rightholders which can be detrimental to the interests of manufacturers and consumers. It is a unique contribution of the author.

The applicability of sections 99-103 of The Patents Act, 1970 is dealt under chapter 9. The jurisdictional aspect along with the remedies for contravention has been dealt skilfully and concisely by the author under chapter 10. Certain miscellaneous matters like authorities, powers of controller and central government have been summed up in chapter 11.

The author has also provided a window to the system of 'International Registration' under various international conventions.[4] All the information relating to international registration has been compiled in the last chapter.

The subject area of designs as intellectual property has been the most neglected area because of other closely related rights like copyright and trademarks. The book is very well written in a lucid and organized manner. It deals with a vast area in a very effective manner in a short volume. The immense knowledge and vast experience of the author is evident from the insightful comments and clarity of expression over the subject. The book indeed is a valuable asset not only for legal professionals, teachers, students and scholars but for people from all walks of life who want to understand design law in its right perspective. Considering the amount of information contained therein, the book is very reasonably priced. It would be a very valuable addition to any library.

*Deepa Kharb**

3 IP Rights (Imported Goods) Enforcement Rules, 2007.

4 Hague System, TRIPS Agreement, Paris Convention and Locarno International Classification System.

International Law by *Malcolm N. Shaw*. Cambridge University Press, Delhi, First South Asian edition 2010, ISBN: 978-1-107-00832-8, Pp. clxvi+1542

Law is that element which binds the members of the community together in their adherence to recognized values and standards. The same is true about national law as well as international law with the difference that principal subjects of international are nations and not individuals. There are many contrasts between the law within a country (municipal law) and the law that operates outside and between States, international organizations and, in certain cases, individuals. The later is known as international law. The book under review is a comprehensive work on international law. The book has been divided into 23 chapters.

The author discusses nature and development of international law in the first chapter. The author discusses law and politics in the world community and traces the origin of international law by referring to early cultures and civilizations. The author also discusses the communist approaches to international law and the third world perspectives.

The second chapter is on international law today, in which the author discusses the expanding legal scope of international concern. The author also discusses some modern theories as to the nature and role of international law such as positive law and natural law with the help of theories propounded by several noted jurists. Sources of international law have been discussed in chapter 3. Apart from discussing traditional sources of international law, the author has also discussed modern sources of international law and the work of International Law Commission in this chapter. Customs as a source of international law has been discussed in great detail with the help of large number of cases.

The fourth chapter deals with international law and municipal law, in which the author has discussed the theories of monism and dualism on the relationship of international law and municipal law and the role of municipal rules in international law. The author writes that internal laws of a State including its Constitution cannot be invoked to evade an international obligation. The author has discussed the State practice on implementation of international law in municipal sphere of United Kingdom and United States in detail and referred to State practices of several other States. The fifth chapter is devoted to the study of subjects of international law. The author after giving a brief introduction of legal personality, has discussed various subjects of international law, such as States, mandated and trust territories, condominium, the status of the Holy See and the Vatican See, insurgents and belligerents, national liberation movements, transnational corporations, individuals and international organization, etc.

Chapters 6 and 7 deal with international protection of human rights and regional protection of human rights respectively. In chapter 6, after referring to the nature of human rights and development of international human rights law, the author discussed several treaties and conventions on human rights in detail. The human rights treaties within the system of United Nations have been dealt with elaborately. The role of Human Rights

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Committee has been discussed with the help of case law. In chapter 7, the author discusses Arab Charter on Human Rights and several conventions and agreements on human rights in European, American and African continents.

The individual criminal responsibility in international law has been discussed in chapter 8. The author referred to several international criminal courts and tribunals, particularly, Nuremberg Tribunal, Tokyo Tribunal, International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and International Criminal Court. In addition to these courts/tribunals, the author has also discussed hybrid courts and other internationalized domestic courts and tribunals and the cases dealt by them.

Chapter 9 is written on recognition. The author has discussed recognition of States, governments, collective recognition, etc. The legal effects of recognition and the impact of withdrawal of recognition, etc. have been discussed in detail. The concept of territory has been discussed in chapter 10. The author explained territorial sovereignty; modes of acquisition of additional territory; international boundary rivers and the law of outer space. The law of the sea has been explained in a different chapter i.e. chapter 11. The author has discussed various maritime zones. Territorial waters, internal waters, contiguous zone, exclusive economic zone, continental shelf and high sea have been discussed in detail. The author also discusses 1994 Agreement on Implementation of Part XI of the U.N. Convention on Law of the Sea, 1982 apart from Geneva Conventions and U.N. Convention on Law of the Sea. Issues related to jurisdiction have been explained by the author in chapter 12 in which the author referred to civil and criminal jurisdiction, domestic jurisdiction, extraterritorial jurisdiction, etc. Immunities from jurisdiction have been discussed in chapter 13.

One of the most important topics in international law which is still in the process of codification i.e. State responsibility has been discussed in chapter 14 in great detail. The author explained the subject by referring to the International Law Commission's Draft Articles on State Responsibility of 2001 and the ILC commentary of the same year. A large number of cases decided by international court/tribunal have also been discussed to exemplify the provisions.

International environmental law found place in chapter 15. The author, apart from referring to a large number of international instruments on environment and contemporary trends, also discussed the state responsibility with respect to environment. The author discussed law of treaties in chapter 16 in great depth. The treaty making process, issues relating to reservation of treaties, entry into force of treaties, treaties and third States, treaty interpretation, termination and suspension of treaties, apart from many other things have been discussed with the help of Vienna Convention on Law of Treaties, 1969. The concept of State succession and various issues related thereto have been discussed in chapter 17 of the book.

The author has discussed various peaceful means of settlement of dispute in chapter 18, as it is obligatory for States to settle their disputes in a peaceful manner. The author has discussed *inter alia* negotiation, mediation, inquiry, conciliation and arbitration as means of settlement. The role of regional agencies in the settlement of disputes has also been discussed. As resolution of disputes by International Court of Justice is also a method of

dispute settlement mechanism, the author has discussed ICJ in chapter 19. The author after giving a brief background of ICJ, has discussed the organisation of the court, its jurisdiction, and various issues which have come up in the contemporary time. The use of force by States has been discussed in chapter 20. The author has discussed use of force by States prior to the establishment of the United Nations and thereafter. Various means of coercive methods, such as retorsion, reprisals, intervention, etc. have been explained by the author. The author has discussed when the use of force will be considered legal and when it will be considered illegal.

Chapter 21 contains international humanitarian law, in which the author has discussed the background, the four Geneva Conventions and two additional Protocols apart from various international instruments. International and internal armed conflicts and enforcement of humanitarian law is also discussed in this chapter. The discussion on United Nations finds place in chapter 22. The author has discussed various organs of the United Nations and the crucial roles played by them. The concluding chapter is on international institutions, in which the author gave a historical background of international institutions and also discussed regional institutions.

The author made some reshuffling in the old edition to make the book more useful. The author has discussed a plethora of cases in all the chapters of the book. The author referred to a large number of international instruments on various subjects. The book is an excellent work on international law. It is very useful for the students of international law, lawyers, researchers and all other persons who deal with international law.

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Better Criminal Reference by *Vinod Nijhawan*. Vinod Publications (P) Ltd., Delhi, Second edition, 2008, Pp. xcix + 1556, Price: ₹1,260/-

A.N. Saha Criminal Reference by *M.R. Mallick*. Eastern Law House Private Ltd., Kolkata, Sixth edition, 2009, Pp. 2006, Price: ₹1,290/-

The study and research of criminal law has always been the most fascinating amongst all the branches of law. The subject of crime is as old as mankind itself but due to the varying content of crime, it is impossible to define crime with perfection. "To define crime is a task which has so far not been satisfactorily accomplished by any writer. In fact, criminal offences are basically the creation of criminal policy adopted from time to time by those sections of the community who are powerful or astute enough to safeguard their own security and comfort by causing sovereign power in the state to repress conduct which they feel may endanger their position".[5]The subject of criminal law requires a complex and detailed study of not only our major substantive and procedural enactments on criminal law such as IPC[6] and CrPc[7] but also of a gamut of innumerable other legislations enacted to curb criminal activities, along with a general understanding of the constitutional as well as the basic principles applied in ascertaining and affixing criminal liability.

Reference books are an integral and indispensable part of the study and practice of law as they are a useful guide for research of cases. In reference books the coverage of subject is more extensive, information is more up to date and much faster to find. The two books currently under review collectively are a vast reservoir of cases in the field of criminal law.

The book by Vinod Nijhawan stands testimony to the author's commitment for putting knowledge gained into practice. The book is well written in an organised fashion, free of superfluous material and deals with practical aspects of criminal law. Important points have been mentioned after judgments, which present the crux of the legal issues involved in that particular case. The editorial notes given after some topics provide useful insights in practical applicability of the legal principles. The book begins with a table of contents followed by a table of cases. Each chapter is preceded by a well-structured synopsis of the contents contained therein. The first chapter offers an in depth analysis of the basic principles of criminology, penology and victimology, the definition and causes of crime, its basic elements, role of heredity, mental health and biological factors in criminal behaviour. A separate chapter dedicated entirely to the topic of Court martial further adds to the value of the book. The chapter on 'Medical Science helping the Process of Criminal Law' proves to be the highlight of this book. The human anatomy has been explained in detail with the help of diagrams[8] which are very important for a proper understanding of medical jurisprudence and forensics. The author has painstakingly put together pictures of injuries[9] for a better understanding of nature of wounds. Similarly extensive coverage of the topic of

5 Russel, *Crime*, Vol. 1 98 (11th Ed.).

6 The Indian Penal Code, 1860.

7 The Criminal Procedure Code, 1973.

8 Vinod Nijhawan, *Better Criminal Reference* 876-91(Vinod Publications, Delhi, 2nd Ed., 2008).

9 *Id.* at pp. 924- 28 and 977- 85.

poisoning along with relevant pictures[10] makes this book unique and engages the reader thoroughly. The new methods of interrogation and scientific techniques employed in criminal investigations such as DNA technology, brain mapping, narco analysis and polygraph tests have been explained elaborately along with a critical analysis of the risks involved, legal implications as well as the constitutional issues involved. The latest information on the subject available from Indian as well as foreign judgments has been meticulously compiled for a comprehensive coverage of information on this topic.

On the flip side, this book makes a very fleeting response to the Information Technology Act, 2000 and the more recent legislations on domestic violence[11] and prohibition of child marriages[12] have not been taken up by the author which makes this work appear slightly outdated. In the subject index appended at the end of the book, the index relating to 'Medical Sciences helping the Process of Criminal Law' is haphazard. The current placement of topics makes it confusing and difficult to sort out relevant material. Arranging it in a chronological fashion like the rest of the subject index would have been a better idea. However, no text can be encyclopaedic. Overall the book is an excellent reference book which can be referred for authoritative facts. The coverage of the subject is wide and presentation of material is pedagogically friendly, straightforward, relevant as well as interesting.

The book by M.R. Mallick is an extensive work covering almost all the criminal major as well as minor acts. The book spreads over 41 chapters arranged in a chronological manner and an index appended towards the end, thereby making it easier to access information on the desired topic. The book begins with a chapter exclusively dealing with the principles of interpretation, which helps to establish a philosophical and theoretical foundation for dealing with the construction of legal principles and their utility in understanding of criminal laws. The next two chapters are also dedicated towards understanding the applicability of general principles of criminal prosecution and liability in adjudication of criminal cases. The book also covers the recent legal developments in the fields of child marriages as well as domestic violence. Important amendments in the IPC and the CrPC have also been incorporated in this edition thereby imparting a contemporary feel to this book. However, the omission of the Information Technology Act, 2000 which is one of the most significant legislations of recent times, from this treatise leaves the reader disappointed. Further, a case index which forms an integral part of any good legal reference book is conspicuous by its absence. Yet this book strives to cover all important aspects of criminal justice system. The highlights are substantive and well integrated into the subject matter. Overall the information contained in the book is well structured, readable, accurate and interesting. The breadth as well as the depth of this book makes it well suited for legal practitioners.

Both the books reviewed, taken together form a comprehensive collection of attention grabbing judgments and thought provoking highlights. The books will be of immense help

10 *Id.* at pp. 1213- 16.

11 Protection of Women from Domestic Violence Act, 2006.

12 Prohibition of Child Marriage Act, 2006.

in sharpening critical thinking by dealing with all sorts of judgments. Both the authors have successfully examined the transition in approach of the courts in treatment of the applicable laws and how the present day jurisprudence on criminal law has evolved. All students or professionals needing a resource for writing research papers or preparing arguments for cases will find these books of great help. All others also associated with the maintenance of law and dispensation of justice in criminal justice system such as police and the judiciary will also benefit from the information provided in these books regarding the recent legislative developments and judicial innovations. The books are highly recommended for use in all institutions engaged in imparting legal education or practice of law.

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Licensing Intellectual Property by *Raman Mittal*. Satyam Law International, Delhi, First edition 2011, ISBN: 978-81-902883-4-2, ₹525/-

A licensing agreement defines the relationship between an intellectual property rights owner (licensor) and another who is authorized to use such rights (licensee) in exchange for an agreed payment often denoted as a fee or royalty. Modern business development may require multiple associates who may contribute to the development, expansion or improvement of the goods or services of an Intellectual property right holder. Licensing is the most effective tool that may contribute to the balancing of interdependencies of business concerns. Licensing may relate to varied aspect of Intellectual Property law and may be broadly categorised into technology license agreements, copyright licenses and trademark licenses. The law of Licensing is a conglomerate of the law of contracts and intellectual property.

The book contains 18 chapters which are divided over four parts. Part one deals with the core concepts of licensing and contains three chapters. Part two deals with the proprietary concerns in licensing and contains five chapters. Part three outlines the business practices based on intellectual property licenses and contains six chapters. The last and the fourth part of the book discusses the overarching issues in licensing and contains three chapters. Chapter 1 of the book elaborates on an introduction to intellectual property licensing. The author traces the very foundation of the concept of licensing that revolves between creation and exploitation of intellectual resources. The author also discusses the role of licensing in business and its placement under intellectual property. Chapter 2 contains the core concept of licensing particularly the contract law as is applicable to intellectual property licensing. The distinctiveness of license contracts from simple contracts has been clearly brought out in this chapter. Chapter 3 deals with the types of contractual transactions of intellectual property rights and the attributes of each one of them and also covers specifically the kinds of licenses ranging from exclusive licenses to electronic licenses which are more common used in contemporary business world.

The fourth chapter has been devoted to the understanding of license clauses while drafting a license agreement. The author offer useful tips in drafting for the endurance and sustainability of the license as well as the relation between the parties. While the aim of a good license agreement is minimisation of disputes between the parties and smooth functioning of the agreement yet disputes may become inevitable. Hence this event has also been covered under the chapter with specific emphasis on mediation, arbitration and clauses subjecting to the jurisdiction of the court.

Chapter 5 deals in licenses within specific domain of Intellectual property law and discusses on the copyright licensing for literary, dramatic, musical, artistic works, licenses in sound recording and cinematographic films. The author has discussed the form, contents, rights of parties, the remedies for breach of license and statutory licenses. Distinctly the chapter also covers the growing concept of copyleft and the terms and conditions under this new practice.

Chapter 6 deals with trademark licensing and the different theories pertaining to trademark licensing. A prominent area discussed by the author under this chapter is trafficking in trademark and debates on the validity of it which according to the author is harmless because quite often the consumer satisfaction is attained due to the fictional character being used by the mark although the same may not have any factual connection with the good sold. The chapter also looks at the breach of trademark and the measure on its account and also the business dimensions of trademark licences.

Chapter 7 deals with Patent licensing in particular the procedures of assignment, types, and rights of parties, termination and remedies for breach of patent licenses. Chapter 8 discusses the aspects of trade secret licensing particularly the specific confidentiality obligation pertaining to trade secrets including pre-licensing and post-licensing confidentiality. It also elucidates employee restrictions with ample case laws on the point.

Chapter 9 looks at the contractual transfers of lay out designs with specific reference to statutory provisions under the Semiconductors Integrated Circuits Layout Designs Act, 2000. It also deals with the licensing aspects of industrial designs.

Chapter 10 deals with the business practice of merchandising and the aspects of licensing related to it. The author looks deeply into both character merchandising and personality merchandising. It looks at the character merchandising and licensing relating to copyright, trademarks and industrials designs and the recourse to statutory provisions in case of unauthorised use of characters. The author also describes the international law on personality merchandising with prominent case laws from different jurisdictions and in particular devotes to discuss on the aspect of right to privacy along with special clauses to be involved in personality merchandising contracts.

Chapter 11 discusses an important facet of Intellectual property licensing in technology transfers. It outlines the importance of technology transfer and its patterns like international technology transfer, the north- south transfer, public-private and private-private technology transfers. It offers an insight for the licensor as well as licensee as to the transfer of technology and the full exploitation of the licensed technology.

The practice of Franchising is dealt with under chapter 12. As per the author though franchising is at an early stage in India, it is quite a popular method of business thus offering the readers a good understanding of the practices, procedures of franchising and the intellectual property licenses involved in franchising contracts.

Chapter 13 is of much academic interest as it deals with the Licensing aspects involved in publication of work and the various issues that arise in a publication license. More so it looks at the sensitive relationship between the author and the publisher were both parties venture out to risk while awaiting return on their investments and were the licence often rests on bargaining power of either party. The author moots to strengthen the position of the creators. Another distinctive feature of the chapter is open licensing. The chapter is well researched and highlights current trends in open publishing like the creative commons, the GNU licenses and its varied models.

Chapter 14 deals with software licensing which includes intellectual property involved in software licensing, software distribution licenses and enforceability of mass market software license. The author has also included the aspect of fair use of computer programs and debates on the question of terminating fair use rights through contract by examining the position of law in UK, India and US law. Chapter 15 on the other hand expatiates on

collective licensing of copyright works and examines the licensing process of copyright societies.

Chapter 16, 17 and 18 under Part four deals with issues in licensing extending from valuing and pricing, competition law, its limits and management of licenses which are applicable to all kinds of intellectual property Licenses.

The book under review is a laudable work of the author. It offers an in depth understanding of all aspects pertaining to licensing in the area of intellectual property law. The author has succeeded in developing an excellent frame work in the subject by involving statutory and practical knowledge in intellectual property Licensing. The book has a wider outlook due to its treatment of international cases and materials apart from Indian jurisprudence in the field of study. The book is a magnum opus of the author and is highly recommended for legal practitioners, researchers, academicians, jurists and in particular the intellectual property right holders and all those who may deal with the subject of intellectual property licensing. The book is a good asset for any library.

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Form IV

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I, Ashwani K Bansal, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Dated: September 30, 2013 Ashwani K. Bansal