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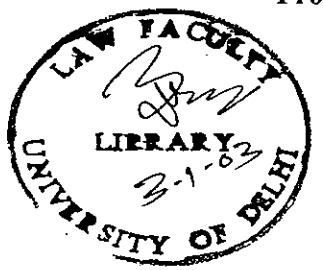

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Pradyumna Kumar Tripathi

(1924-2001)

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EDITORIAL

On behalf of the Faculty of Law and the Editorial committee I present volume XXIII of *Delhi Law Review* to its readers. It is a matter of great satisfaction to us that with this volume the Review enters the 30th year of publication. The *Review* was launched way back in 1972 as an annual issue with a view to project the research work of the Faculty so that over the years it could develop into a premier Law Journal of the country. It is difficult to assert that we have succeeded in achieving this goal but one thing is certain that we have been able to sustain the *Review* and it has acquired a prestigious place and is recognised as one of the best law journals. The colleagues and the students of the Faculty have remained the main source of strength of the *Review* and it is my fond hope that more and more colleagues and students would come forward by contributing excellent pieces for further growth of the *Review* reflecting predominantly the research activity of the Faculty.

When I took over as the Dean of the Faculty of Law on October 1, 2001 there was hardly any paper for publication in the *Review*. The Editorial Committee, however, did not lose hope and worked relentlessly to procure good papers for this issue. It took some time for the committee to lay down its own policy and plan to bring out this issue closest to the form and pattern of the standard legal periodicals in the U.S. The delay in the publication of the *Review* is therefore, not deliberate but circumstantial. I beg to apologise to the readers for the delay. The delay may be excusable in view of the special efforts made by Professor J. L. Kaul and his team to further improve the quality of the journal.

The present volume is dedicated to the memory of our beloved colleague Professor P. K. Tripathi who had a long association with Faculty of Law. Professor Tripathi unfortunately passed away in 2001. His sad demise has created a void in the entire legal community. His contributions in the modernisation of legal education in Delhi Law Faculty cannot be expressed in mere words. Professor Tripathi is still respected as the foremost scholar in the field of constitutional law across the globe. He introduced far reaching changes in the structure of legal education in our Faculty and all credit goes to him for innovating case-method of law teaching under a three year law course. He joined the Faculty in 1949 and

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second was the invention of a three-year law study programme (with core and optional curricular components); and the third provided for greater academic direction for the reformation of Indian legal education, marking a significant involvement of the University Grants Commission, especially in the development of postgraduate legal education and faculty improvement. The 1961 Advocates Act conferred superintendence of professional legal education specification on the statutory Legal Education Committee within the Bar Council of India. In each of these developments, Professor Tripathi played a determinative role.

Each development marked a greater engagement of the Indian judiciary, legal profession, and the academe in the remaking of Indian legal education. The relationship between the three classes of actors was also marked by not always creative tensions and by struggles for power of control over the direction of change and the pace of transformation. New patterns of social cooperation had to be forged within a legal culture in which the Judge and senior lawyer claimed hierarchic, even feudal deference from the law teacher. The reformist law teacher was required to render hierarchic tribute, even while making scope for the emergence of patterns of grudging respect for the professional academic. This role entailed a whole range of negotiation skills, with Professor Tripathi possessed in abundance.

The Golden Jubilee of the Constitution, and the Supreme Court, has already been variously celebrated. Fifty years after the Indian independence, however, the history of Indian legal education remains in search of gifted raconteurs. As and when that task is seriously addressed, the scope for informed assessment of Professor Tripathi's contributions will also expand.

Professor Tripathi was fortunate to have as wayfarers in the long and risky journey some of India's most eminent innovators: Professors G.S. Sharma (Jaipur), Anandjee (Benaras), A.T. Markose (Cochin) — all eminent scholars who were catalysed by the legendary Professor R.U. Singh (Lucknow). The distinctive feature of their camaraderie, despite all the professional and personal differences, lay in the common cause of professionalizing legal education. If law teachers are today held high in social esteem, they owe much of their institutional *izzat* to the inaugural institutional labours of these five men. Quite simply, modernization of legal education and research would have simply not occurred at the same pace if these men (there were unfortunately very few women academics at that point of time, a fact that imbued the reform agendum a distinctly patriarchal character) did not happen to it. At the same time, but for the dedication

of a great many scholars of their generation,[1] these five men would have found their role even more arduous.

These Five Horsemen, as it were, through their diverse labours, brought to a decisive end the *ancien régime* of Indian legal education. They insisted that:

- as far as possible, legal studies should be full time; graduation in law must increasingly reflect serious commitment to learning the law;
- the modes of teaching law should imbibe public virtues, that is legal pedagogy and research should be the carrier, the social critique of legal happenings and events;
- legal research may not be divorced from teaching; indeed, good teaching and research form Siamese Twins;
- teachers and students must develop the art of exegesis, without losing sense of the social context of legal decision and states of affairs;
- traditional modes of examination (external and mechanical, modes of third-party assessment, where the examiners remained totally divorced from the daily context of teaching and learning) should give way to internal evaluation;
- new ways had to be found (such as the semester system) of managing imaginatively and efficiently teaching and learning time;
- postgraduate education should be intensive and should primarily be devoted to specialization, in ways that promoted both sound scholarship and a high rate of return to law-teaching career;
- resources should be raised for planned development of library resources;
- continuing faculty improvement should be a high priority.

1. Eminent among them are the names of Professors Ramaswamy (who preceded Professor Tripathi as Dean of Delhi Law School), Charles Alexandrowiez (who founded *The Indian Yearbook of International Studies,* way ahead of traditions of university-based law reviews), S.S. Nigam, M.P. Jain, Lotika Sarkar, T.S. Rama Rao, B.S. Murthy, I.C. Saxena, V.N. Shukla, S.P. Sathe, S.K. Agarwala, R.K. Mishra, Paras Diwan, D.N. Saraf, B.N. Sampat, R.P. Anand, T.K. Tope, Ranganatha Rao, M.K. Nawaz and Phiroze Irani. The happy features of this listing is that it is far from exhaustive.

after having served as Dean for two terms and finally retired in 1989. The contributions made by Professor Tripathi has been very vividly chronicled by Professor Upendra Baxi and Professor M. P. Singh in this issue.

Professor B. Errabi who served the Faculty for more than 35 years retired in June 2001. The Faculty gratefully acknowledges the contribution of Professor Errabi both as an accomplished law teacher and as a Legal Scholar. Professor J.L. Kaul, the learned editor of this issue has been gracious enough to write a brief profile of Professor Errabi. This issue of the *Review* contains the contributions on the contemporary and topical themes penned by distinguished colleagues and students and it is hoped that the readers will enjoy reading the *Review*. The Editorial Committee will, however, gladly accept the critiques and comments, if any from the readers. Ultimately it is for the readers of this volume to form their opinion about the *Review*. Any suggestions for further improving the quality of the journal will be welcomed. With utmost sincerity and gratitude I thank and congratulate all the learned contributors to this volume. I also thank the colleagues who helped the editorial committee in the selecting the papers for the *Review*. The maximum credit of course goes to Professor J. L. Kaul who has ungrudgingly spent long hours in editing, correcting and organising the manuscript. Dr. Kamala Sankaran and Dr. V. K. Ahuja deserve great appreciation and thanks for performing the most ardous task of editing the papers, reading the proofs and correcting the footnotes for uniformity. Mr. S. K. Minocha also helped the Committee in many ways.

Finally, I thank the proprietor of Shivam Offset Press for doing a meticulous and professional job in the publication of this issue with a quality print, finest paper and elegant cover and design.

Parmanand Singh

Delhi
August 1, 2002

PROFESSOR PRADYUMNA KUMAR TRIPATHI : A TRIBUTE[†] (1924-2001)

*Upendra Baxi**

I

The recent sad demise of Professor P.K. Tripathi marks an end of an era of pioneering modernizers of Indian legal education and research. It is important, I believe, to recall the context of his achievement if we are to honour the man and the scholar.

When Professor Tripathi came to the task of pioneering leadership of modernization of Indian legal education, the landscape was remarkably bleak. The concept of full-time law studies was virtually unknown. Lawyers, not all of exceptional qualities, and a few with talent for teaching, comprised the bulk of law-teaching profession. Law colleges and university departments offered only part-time two-year LL.B. programme; even LL.M. studies were part-time. Full time law teachers and students were a rare phenomenon; LL.B. degrees the easiest to obtain; no noticeable application of the mind was required to graduate, even with distinction. No practical training programmes existed. The tradition of legal writing, beyond textbooks, was still nascent. Colonial patterns of legal education, firmly in place for decades, made any alternative way of doing legal education almost inconceivable. Quality control and ideas of excellence was remote from the minds of leading lawyers and Judges, who believed that legal education began only after the law degree certificate was somehow at hand.

Three events, occurring within a decade, however, testify to new beginnings; the establishment of the Indian Law Institute, the enactment of the Advocates Act, and the Gajendragadkar Report on Legal Education. The first marked national concern with advanced legal research; the

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[†] The memorial article was first published in (2001) 5 SCC(J) 1. The article is reprinted with permission of the author and publishers of Supreme Court Cases.

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All this is, more or less, generally accepted today. It is important to acknowledge that this was not always so. Institutionalisation of new ways of legal education and research entailed creation of new social markets for professional legal education and research and the all-important tasks of carrying conviction to indifferently educated, but still somehow highly successful, law persons (judges, lawyers, public officials trained in law) that India's "developmental" needs may no longer be served by the colonial patterns of legal education.

As the second generation innovators know, this latter has never been an easy task,[2] given the utter lack of humility and openness to learning, by the most eminent Indian Justices and the eminences at the Bar and the insolence of State and Union Law and Education Ministers. Indeed, the first generation of innovators of legal education seem, in retrospect, to have been more fortunate in terms of the potential of multi-sectoral collaboration.

In any event, the legacy of the pioneers beyond this agendum is not easy to summarize. The pioneers were a diverse lot, after all. Their social imagination of the future of Indian legal education and research varied a great deal. Professor Gyan Swaroop Sharma went the farthest in his insistence on sociological understanding of Indian jurisprudence and legal development. Dean Anandjee pioneered teaching and research in labour law and jurisprudence. Charles Alexandrowicz, T.S. Rama Rao, B.S. Murthy, M.K. Nawaz, R.P. Anand, Nagendra Singh (though not a law teacher) and R.P. Dholakia laid the foundations of public international law Indian scholarship. But, given the exploding importance of constitutional and administrative law, the pride of place, among the innovators, was

2. Generational lines are somewhat difficult to draw but by the "second generation", I refer to the following agendum of struggles to:
   - Ensure that State Governments ensure the same level of funding to law colleges as to arts, science, and commerce colleges;
   - Secure acknowledgement of legal studies as an aspect of social and human sciences;
   - Reshape pedagogy and curriculum in the direction of greater social relevance;
   - Revitalize the LL.M. programme, through the introduction of foundation courses in legal theory and social and legal research methods (and to add a third year for those would pursue the degree on a part-time basis);
   - Introduce clinical legal education and legal services components;
   - Find/create social markets for even a more thoroughgoing renovation of legal education through the 10+2+5 programme;
   - Ensure residential campus-based-single-faculty law universities, the prototype of which, stands furnished by the National Law School University of India, Bangalore.

claimed by public law scholarship, led mainly by P.K. Tripathi, A.T. Markose and M.P. Jain.

The "legacy" that I speak of, however, is one of curricular and pedagogic reforms, which they initiated and had mixed reception. Clearly the most lasting impact is visible, across generations, among the Central and State universities where the Departments of Law remained responsible for undergraduate teaching. These institutions were better poised than most law colleges across the country (with slender full-time staff, underdeveloped libraries and large enrolments) to seize the moment for ushering is some lasting changes. Clearly, in these latter institutions, conditions remained hostile to change. Even today, generations later, too many law schools in India have yet to move towards renovation of Indian legal education.

The crucial aspect of their collective legacy lay in the creation of cadres of competent and dedicated teachers, a vibrant research culture, and in the production of outstanding students who served not only the growing needs of sound legal education and research but also created a cadre of knowledge-based lawyers and public administrators. Many Indian appellate Justices owe their exalted positions, and proud performance, to the collective, and at times unremitting labour of these five men and their honoured colleagues. No tribute to Professor Tripathi would be complete outside this frame of juris-generative collectivity.

Prad (as he very unusually suffered me to call him!), I know, would not have wholly agreed with my privileged construction of this collectivity. He would have had no difficulty with the acknowedgement of his peers. But he would have articulated a sense of injustice. It was his view (which he in several personal conversations, at length, indicated to me) that the Delhi experiment was unique. To be sure, Delhi and Benaras (as well as Chandigarh, Aligarh, Jammu, Cochin, for example) showed the way, Delhi having a situational (cosmopolitan) advantage. But Prad displayed also a very strong sense of selfhood, which marks the ways of "leadership" in India, often manifested as narcissism, a love of the Self, that often overrides the Other. Duties toward a nascent historiography of Indian legal education, however, stand served a whole lot better through this form of contextuality.

II

I arrived at Delhi University far too late for a participant observer status in relation to the "modernization" programme. I had met Professor Tripathi during my first year and half stint at the Indian Law Institute (1967-68). When I invited him to my home in Sydney (1970, when he was

visiting the Melbourne Law School), Prad was warm in his appreciation of my work (as well of Krishna Mohan Sharma, still teaching at the University of New South Wales). He advised me to keep up my good work and urged me to return to India when a Chair became available. In his estimate, given my young age, this would happen 15-20 years later. That I would be invited within two years of his forecast did truly astonish both of us: but he was urbane and gracious in his reception of me (by this time he had already moved to the first ever full-time Member of the Indian Law Commission). Our professional interaction was brief, however, since his return to the Law School coincided with my assumption of the office of Vice-Chancellor of South Gujarat University (1982-85). We did not relate institutionally since 1985, when I returned to Delhi, save when he returned to Delhi Law School from the Law Commission. He remained somewhat unhappy that I was not effective in restoring his old house in Cavalry Lane on the Delhi University campus. When he returned to Deanship for a brief while, he cautioned me, in a friendly way, against acceptance of assignment of Vice-Chancellorship of South Gujarat University, Surat.

However, there was times (especially during his long and first ever law academic's tenure as a full-time Member of the Indian Law Commission) when I was privileged with long narrative conversations concerning the School and legal education. I also read everything that he wrote (he made this possible by resisting the temptation to go to print too often) and I always benefited from what I read.

Despite these compensations, I thus missed having a full ringside view of Professor Tripathi's leadership style. But he generated an astonishing wealth of collegial narratives, through which I feel able to situate Prad's claims to his "uniqueness". There is no doubt that he was an intense person, who evoked hero-worship as well as character assassination. If the "loyalists" at Delhi University Law School worshipped him, his detractors had to scrape the barrel, as it were, to discover a virtuous trace! The truth about his personality lay uncomfortably in the middle.

It is a rather harsh thing to say but all narratives, based on anguished experience of his colleagues, suggest that Professor Tripathi himself operated the dichotomous logic of the friend and the enemy.[3] The slightest

3. Prad obviously never read Carl Schmitt, who built around this distinction a theory of governance and public law and much else besides; *see*, for a recent efflorescence, *Symposium: Carl Schmitt: Legacy and Prospects* 21 CARDOZO LAW REVIEW 1467-1928 (2000); Jacques Derrida, THE POLITICS OF FRIENDSHIP (1997); Chantal Moufee (ed.) THE CHALLENGE OF CARL SCHMITT (1999).

formal or informal opposition or criticism to his leadership style or concrete policy proposals (or even his academic writings) often carried the risk of enduring hostility. "Friends" were colleagues who so internalised this impending hostility as often to become sycophantic, a feature that deeply irritated Prad but one that he still found useful. "Friends" had to be rewarded; "enemies" punished. (A powerful Dean always had enough leverage to distribute rewards and sanctions.) The binary distinction did not, for Prad, mean the lack of space for adversaries, people whom one can respect because of an honest difference of opinion and from whom one may even learn. But the acknowledged these sparsely.

A future biographer of Prad (it is astonishing indeed that there exists no biography of an Indian law teacher![4]) will have to concern herself with the origins and mutations of this style of academic leadership. Widely prevalent even now, despite substantial degree of democratization of the campus life, academic feudalism was the defining feature of academic culture in which Prad and his equally gifted colleagues, came to maturity.

Professor Tripathi, like his peers, subscribed to a command and control model of directing transformation in legal education. Yet the very reforms he initiated seemed to make this model of leadership increasingly insecure. Management of innovation tormented him because he realized that the very features he so prized as a teacher and educationist contributed to subversion of authority.

The pedagogy he founded (a distinctive Delhi version of the Langdellian "case-method", in itself a fascinating sage of indigenisation of American pedagogic imports) entailed a questioning mindset among teachers and students. Students trained to raise acute questions concerning judicial and legal decisions were bound to carry their interlocution to the Delhi Law Dean's doorstep. Colleagues, so many of them sponsored by him for the Ford Foundation exchange program,[5] returned with new ideas of collegiality. Trusting them with powers of evaluation of their own students made

4. I suggest to the UGC Panel on Law, as well as my eminent colleagues directing master's and doctoral dissertations, a research agendum directed to individual and social biographies of innovation in legal education and research.

5. He (with Dean Anandjee of Benaras Law School), made the most of the Ford Foundation's inclination, in the sixties, for the Faculty improvement programme involving, rightly, an asymmetrical exchange of the Faculty; under his leadership a considerable number of Indian law teachers earned their doctorates from American law schools. This decisively marked an end to the more generous, University of London lead (under Professor Allen Gledhill) of the Indian post-colonial commonwealth legal education.

hegemonic assertion over them more perilous than ever imagined, in the first flush of reforms.

Mutation of the authoritarian pattern of doing things thus emerged as an unanticipated, latent, and to Prad as counterproductive outcome for the reform of legal education. Professor Tripathi sought to advance his pioneering vision and agendum by drawing bright lines between permissible and forbidden academic dissent. "Guided democracy" in the period of transition is not an unfamiliar theme and although he would have criticized this approach in national and regional politics, Tripathi saw very little in enacting a command and control model for managing innovative legal education.[6]

No tribute to Professor Tripathi would be complete without a full rendering of accounts that shaped the transformative moment for Indian legal education as a whole. Nor would be a tribute sincere, which did not accept the enormous intensity of his commitment. There is simply no question that the fact that Delhi Law School retains the edge of academic leadership worldwide owes a great deal to the labours of his commitment and to those colleagues at Delhi who sought to redefine it. To raise necessary questions as to the past, present and future ways and means of academic leadership is one way to describe the full measure of Prad's contribution.

III

Professor Tripathi is among the handful of constitutional law scholars to have transformed its basic structure. His writings on developments in constitutional law showed in a very rich measure the potential of legal exegesis have for reshaping doctrinal practice. Appropriately he titled his Telang Lectures as *Insights*, and his earlier collection of essays as *Spotlights*. *Insights* illuminate the very core of constitutional hermeneutic;

6. My own value preferences lie in the opposite direction and I can honestly say that I was able to enact them at the Law School as Prad's successor to the Deanship and as Vice-Chancellor of Delhi University. I do not believe that values informing the processes of transition can be separated from results that are achieved or follow. But views on such matters may differ, even profoundly, and I respect Prad's way of relating means and ends, even when I could never have practised these myself. As a matter of fact, Prad's legacy in the management of legal education and research seems more institutionally lasting than "ultra-participatory" ways of fostering collegiate responsibility. His lead today is more universally followed by his former students and colleagues, now at the helm of managing yet another transition; indeed, those who may not be counted in this category also show strong allegiance to this model of leadership and management.

Spotlights bring to full public view the whims and vagaries of judicial process. Light, illumination, was Prad's magnificent obsession; interpretation of the interpreters was the leitmotif of his writing. He had, and rightly so, no difficulty in saying loud and clear to lawyers and Judges that only juristic academic labours may illumine the heart of darkness constitutional interpretation. In exemplary ways, he succeeded in installing a model of constitutional scholarship of judging the Judges.

To do complete justice to Professor Tripathi, it remains necessary to ask at least two questions: in what did this model consist? And what were its impacts on legal pedagogy and the craft of justicing? On the latter question, it is my impression that Justices, even of the Supreme Court, rarely explicitly acknowledged Professor Tripathi's writings. But this is a wholly unreliable indicator in a judicial and forensic culture where the failure to acknowledge scholarly writings while using these is a common "courtesy"![7] I think his impact, regardless of judicial citations, on the craft of judging was significant. Scholarly citations to him have become rare[8] perhaps because his own former students who guide research, edit law journals and occupy leadership positions have so internalised Prad's insights that acknowledgment of what he actually said seems superfluous, a scarcely sound academic practice! A wider explanation may also be found in the changing agendum and patterns of the Supreme Court decision-making; for example, the doctrine of "reasonable classification" (which Prad critiqued so remarkably) is no longer at the centre stage of contemporary constitutional jurisprudence. I mention these factors at random here in the hope that some day the question of appropriate measure of impact of Indian legal scholarship on development of adjudication may be thought worthy of research. It remains equally important to ask why contemporary scholarly writing on public law is so forgetful of the work of their predecessors in the field.

More important is the first question concerning the model that Prad evolved. At one level, the level of his literary practice, one may say that

7. The situation has improved noticeably after the late eighties and Justices remain less reticent to cite Indian scholars. Tripathi wrote in an era when it was considered inappropriate by Justices to cite a living author! He nevertheless delighted in culling out passages from the Supreme Court decisions where whole paragraphs appeared from his books without any source acknowledgement!

8. The lack of availability of his text, at this point of time, may provide a part of the explanation. The way, in which textbooks are written, with very little mention of scholarly contribution, may also have contributed to this situation of indifference. A major refreshing exception is provided by a tall constitutional law scholar, Professor S.P. Sathe, who even when he disagrees, directs attention to Professor Tripathi's corpus.

he exemplified the virtues of critical fidelity to judicial discourse.[9] Argus-eyed, Prad never missed internal inconsistencies in judicial decisions; and he felt that it was the duty of scholars to highlight, though in urbane ways, shoddy judicial performances and to acclaim those that responded to the virtue of judicial coherence. But he believed strongly in the institutional integrity of court; Prad believed that each Justice signing an opinion was an equal author of the decision as his remarkable article, in the Journal of the Indian Law Institute, concerning contributions of Justice Gajendragadkar demonstrated.[10] While himself well-versed in comparative constitutional jurisprudence, Professor Tripathi stressed the relative autonomy of the Indian approach to interpretation.

Beyond this, the substantive components of his model are more complex. If Professor Tripathi had a distinctive theory about judicial process, he allowed it to emerge through episodic commentation rather than by its full-fledged articulation. I believe it fair to say of his implicit theory that it was liberal positivist. His corpus presents, overall, a finely nuanced view concerning legitimacy, and therefore the limits, of judicial power.[11] This signified that Justices should not be, or seen to be, politicians in judicial robes.[12] Judicial "populism" was anathema to his implicit theory of constitutional adjudication. Professor Tripathi did not think that sociology of law type perspectives were relevant to the craft of judging. What mattered to him were not the raw social political context of legal development but the ability and the potential of judicial power and role that allowed juridical translation of the social.

This having been fully said, it must (in all fairness) also be said that Professor Tripathi remained animated (to evoke Professor Sanford Levinson's germinal phrase) by a "constitutional faith". It was an article of faith with Prad that the constitutional rule of law was an "unqualified public good" (he would have here evoked E.P. Thompson's characterization to so describe the rule of law, in its "progressive" aspects).

9. He showed us the virtues of close reading of decisional texts, at a time when "headnote" reading of cases sufficed even for eminent Justices and law persons.
10. Prad was not overly troubled by the fact that Brother Gajendragadkar never authored a dissenting opinion, usually considered to offer a window to individual judicial worldview.
11. In his germinal article in Columbia Law Review, on *Precedent in Indian Law* so abundantly suggests, Professor Tripathi adhered to a view of judicial creativity held within the confines on an internal discipline of the tradition of adjudication. See for a bibliography of his writings, Mahendra P. Singh (ed.) COMPARATIVE CONSTITUTIONAL LAW (1989).
12. And, I suspected that he felt somewhat affronted by my THE INDIAN SUPREME COURT AND POLITICS (1980).

Prad had little use for Marxian critiques of the rule of law model, Indian-style. His corpus does not elaborate Indian constitutionalism as a reign of terror coexisting with the vaunted rule of law. In his view, the task of constitutional scholarship lay in the quest for understanding and explanation of the foundations of Indian constitutionalism, not in the shaking of the foundations. They may use polemics (as he so abundantly did) but not to the point of questioning the authority of authority. For, if you take this away what remains is constitutional chaos. The principal task, according to Prad, of legal scholarship is not to aid and abet this chaos but to bring into being the significant forms of meaning that reinforce legal authority.

These are important insights, which reject constitutionally ordained forms of impatience (like mine) with unconstitutional, and fully violent, patterns of Indian governance and development. From my standpoint, what matters are constituencies of hurt and harm created and sustained by these acts of interpretive collaboration among Justices and jurists.[13] I recognize that this is an important matrix of creative dissensus. Evaluating constitutional development and interpretation beyond the legal doctrine, extending juristic labours to a fellowship of suffering for the recurrently disenfranchised constitutional underclasses, summons traumatic transformation of inherited modes of doing constitutional theory and practice. I persist in my belief that a "jurist" must at all times be an anguished and engaged citizen. I realize, of course, that neither of us can have the last word, though each one of us would want to have the final say. Even when I fancy that my "final" say is more radically democratic than Prad's. I have also to acknowledge the fragility of this saying. Constitutional theory and practice is produced and consumed by the constitutional haves. To bring to it the tasks of caring for the constitutional have-nots (in Babasaheb Ambedkar's idiom the *atisudras*) is an insurrectionary enterprise, whose future must always remain in peril.

IV

For fifty long years, the constitutional provision, which enables the elevation of a jurist to the Supreme Court of India has been consistently ignored. This has deprived India of its best prospect of conversion of a law Professor into a Justice. The prospect of having our own equivalent of a Felix Frankfurter has been wilfully squandered.

13. See U. Baxi, *Violence, Constitutionalism, and Struggle: Or How Not to Avoid Being a Mahamoorkha* in S.P. Sathe (ed.) LIBERTY, EQUALITY AND CHANGE: STRUGGLES FOR A NEW SOCIAL ORDER (forthcoming).

The analogy, if I may say so, is wholly accurate, Justice Tripathi would have provided a heroic model for judicial self-restraint, like Justice Frankfurter. Like him, Justice Tripathi would have asserted that Judges may not watch election returns in reaching their decisions. Like Frankfurter, Tripathi on the High Bench would have, at the same time, constituted workable boundaries against judicial activism as well as judicial abdication. Like Frankfurter, he would have been discerning concerning creative uses of judicial role and power, held within articulate bounds of judicial selfdiscipline. Equally, Triapthi would have imparted elegance to the appellate judicial prose.

His non-elevation exemplifies India's constitutional misfortune, by now the custom of the Indian Constitution that says, contrary to its original intention, that *no jurist may ever be elevated to the Supreme Court.* Indian citizens thus remain unaccountably deprived of potential *judicial* contribution of Indian Jurists.

V

By way of a tribute and a memorial to Prad I have to insist we need to revisit his insights into constitutional theory and practice, in the context of the contemporary anxiety concerning the very future of Indian constitutionalism. I can do no more here than to say that Professor Tripathi summons us all, as he did during his tumultuous lifetime, to a faithful historiography of transformative modes of legal education in India. While I do not advocate "ancestor-worship", I do suggest that the massacre of ancestors remains violently inimical to the future of Indian legal education and research.

To end on a rather personal note, I grieve with Dr (Ms) Kusum Tripathi at Prad's sad demise. And I hope that Parag Tripathi, now a successful lawyer, pauses time and again, on the typical (and often tragic for Indian democratic destiny) runaway escalator of appellate lawyer's prosperity track, to return to his illustrious father's anxious interrogation concerning the future of Indian constitutionalism. Nothing is, unfortunately, more corrupting to this cause than a successful career at the Bar and the Bench. I know how proud Prad was at the distinguished potential and performance of Parag, who was also our common student. I want him to know that both he and I look forward to his constributions to the remarking of Indian public law in the midst of a human rights denying rampant economic globalisation, the new theology of development unfortunately so enthusiastically embraced by today's Bench and the Bar.

LEGAL EDUCATION AND SCHOLARSHIP IN INDIA— REMEMBERING PROFESSOR P.K. TRIPATHI (1924-2001)

*M.P. Singh**

Professor Pradyumna Kumar Tripathi, who studied and taught at the Faculty of Law, University of Delhi for over four decades and was its two times Dean, unexpectedly passed away on 23 January 2001. Until a few days before his passing away he was living a healthy life and was absorbed in research and writing. One of his writings appeared only a few days after his passing away.[1] More would have continued to appear had he lived longer. I understand he was engaged in a fundamental work on law, which he thought of discussing only after it was concluded. His untimely and sudden departure from our midst, besides being an irreparable loss to his family and friends, has created a void in the kind of legal education and scholarship he cherished, promoted and pursued throughout his life in thought, action and deed. He was unique in many ways. The void can, therefore, never be filled.

I had the fortune of knowing Professor Tripathi since 1970 when I joined the Faculty of Law, University of Delhi. In no time I developed admiration for him not because he was the then Dean or later held important assignments but because he was the embodiment of ideals I could think of in a university professor and a human being. Those ideals pervaded all aspects of his life, professional as well as private. During my personal and professional contacts with him, I cannot recall a single instance of any distortion of the image I had of him. Until a couple of hours before his death when I expressed my desire of meeting him in the hospital, his response was that let us meet leisurely in the cosy and quiet environ of his house after he was discharged from the hospital. The meeting did take place at his house next morning but only with his mortal remains in an environment full of sorrow and grief. A few weeks before, seeing me off after a long meeting at the same place, in his usual and unmatchable cordiality and courtesy associated with extreme politeness

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1. P.K. Tripathi, *Lawless Withdrawals from Pulic Funds: Cocking a Snook at Parliament* (2001) 1 SCC (J) 1.

he spoke to me: "*Singh Saheb aap se mil kar bahut khushi hoti hai, aap aksar aya kariye.*" But hastened to add: "Although it is unfair on my part to expect you to see me frequently." I was overwhelmed and returned with the fond promise of meeting him as frequently as possible without ever knowing even in my wild imagination that that was our last meeting and that those were his last words to me. Those words continue to give me a sense of accomplishment that I could give joy to someone like him.

Like his last words I could recall many statements from him, which reflected his humaneness and wisdom. A biographical sketch of the man and his achievements and thinking process could be drawn from these statements. Someone could undertake that exercise in the interest of legal education and scholarship. I tried a little bit in the *Festschrift* for him at his sixty-fifth birthday on 24 May 1989.[2] But it is utterly incomplete and inadequate. Much more needs to be done. I wish to do it. If I fail, someone must do it one day.

I could have availed of the present opportunity to make some progress towards the satisfaction of my wish. But that seems to me too big a task to be undertaken at this point. For the moment I shall try to recount some of the impressions I gathered from him of his concern for legal education and scholarship. Once addressing the students at the Faculty he recalled his entry into the world of teaching and research in law, which I summarise as I could understand him on this issue in the course of my various interactions with him. He could have started legal practice after his basic legal education. But, besides the uncertainty of success in legal practice, he was inspired towards higher studies and research in law because he saw a definite objective in quality legal education and research. That objective could be achieved only in the university life. He did not doubt that most of our laws come from the legislators and judges supported by legal officers and lawyers. But the legislators and judges were only legal source of law. The material for law came from research done by scholars at the universities or even otherwise. He believed that law in society could never take the right course unless backed by research and scholarship. He realised that the place law holds in the western world was due as much, if not more, to legal scholarship as to legislators and judges. In the civil law world definitely, law is considered a product of scholarship in the universities, *professorenrecht* in German. Even in the Far East like Japan and China, where traditionally law did not hold an exalted place in society, the civil law approach to law has become the basis of modern society. In

2. M.P. Singh (ed.) COMPARATIVE CONSTITUTIONAL LAW. FESTSCHRIFT IN HONOUR OF PROFESSOR P.K. TRIPATHI IXff. (1989).

the common law tradition too, despite the legal realism and legislative drive since the nineteenth century, legal scholarship of persons like Bentham, Austin, Hart, Llewelyn, Fuller, Pound, Rawls, Dworkin, Raz, Unger, to name only a few, has played and is playing decisive role in the formation of law. The whole of ancient law of India and much of the law given during the British rule is impregnated with the work of scholars, though most of them were not associated with the universities in the modern sense of the word. Indisputably, time and again law has been brought in line with social requirements through the efforts of scholars, who pointed out its incongruities and inadequacies before the legislators and the judges took them up. Thus we find that while the legislators and judges have found legal solutions to current issues faced by the society, the legal scholars have drawn a general plan of action for law. Undoubtedly the views of these scholars have influenced the judicial decisions and legislations.

Such being the case, Professor Tripathi perceived even a greater need of that kind of work for a country which, while he was still a student of law, had just made a break from the past in 1947 and was going to reconstruct and restructure itself through its first ever Constitution. For whatever reasons the Constitution envisaged a Euro-American model of a democratic republic. Sustenance of that model required the kind of scholarship that has been the hallmark of the Euro-American countries. Like the universities in those countries, universities in India also must perform that task. The universities are, however, not exclusively research centres but also the planners and providers of legal education. The module of law for the society must be developed through legal education, which must be based on serious research.

Professor Tripathi believed in the interdependence of legal education and research inasmuch as neither could survive or flourish without the other. Once he remarked that the Indian Law Institute failed to achieve its laudable goals because fundamentally its conception of legal research was unsound. Legal research could not flourish without a provision for legal education. He did not elaborate and I also failed to ask for it. Later when I saw the functioning of the Max Planck Institutes in Germany, I could realize the depth of his remark. The Max Planck Institutes are autonomous institutes in different disciplines spread all over the country funded by Federal grants. But they are all attached to the university within whose territorial jurisdiction they are situated. The universities are state (*Land*) universities. All the professors of these institutes, though appointed independently for these institutes, are also professors on the respective faculties at the universities under whose jurisdiction they are situated.

They primarily organise and conduct research in the institute but also teach at the faculty and supervise students for research degrees. All students and researchers attached to the university or the institute are entitled to utilise each other's resources and expertise. In the process both benefit and flourish and the available national resources are put to maximum use. It is not so with the Indian Law Institute. It is not attached to any of the universities in Delhi or elsewhere. Those who work at the Institute are not part of the university system. Nor the university system has anything to do with the Institute. Therefore, if anyone from either of the institutions wants to avail of the facilities of the other she is treated as an outsider. In the process both are disadvantaged. Institute's effort to run diploma classes, apparently for non-lawyers, is no more than diversion of its limited resources for research. In the process neither the legal education nor the research gains. Whether the Institute's effort from time to time to acquire deemed university character goes well with its initial objectives of fundamental research requires serious consideration.

Even on the question of training of lawyers in the universities, Professor Tripathi had his definite views. He believed that the universities must examine and plan what kind of lawyers society needs or, the other way round, what kind of society the lawyers may create or help in creating. Law is not merely a technique. It is a concept, like theology or religion with a social purpose. It cannot be developed and applied mechanically to meet the day-to-day needs. It requires a vision of the society, which comes from deep thought and understanding of the society in its overall perspective, past, present and future. Such perspective requires more than craftsmanship and knowledge of the existing rules. It requires the understanding of the reasons for those rules and the purpose they serve and whether those purposes are still relevant and the rules most suitable for attaining them. These issues require an abstraction, which is different from application. Of course application helps in developing the abstraction, but the two are not one and the same thing. Universities are universally accepted as the most appropriate place for such abstraction. And this is what they are meant for. Traditionally applied sciences were taught outside the universities. Until recently the institutes teaching them were designated as polytechnics. It is only recently that some of them have been converted into or affiliated to the universities. Initially the universities all over Europe had only three faculties, law, theology and medicine. The other faculties are only later additions. Accordingly Professor Tripathi believed that the university law faculties could not be a substitute for or extension of either the bar or the courtrooms. The universities must definitely train lawyers for the bar and the bench but that is not their sole

or even main objective. Their main objective is the development of the science of law in the service of the society. The bar and the courts are definitely most important forums of the application and creation of law in our legal system, but neither they apply nor do they produce all the law. Law is something that pervades the society and concerns as much to anybody as to lawyers. Law, like medicine, does not come into existence only when people get sick. Just as medicine requires planning to save society from the misery of disease, law also requires planning of a society that is strife-free and efficient. Nobody goes to lawyers and courts for pleasure. Nobody, in fact, would like to go to them if one could help it. Law's purpose is not merely to resolve disputes when they arise. Its purpose is creation of a dispute free society as far as possible. Lawyers and courts are not meant to plan and create that society. But the universities are. Therefore, law schools or faculties should not be confused with courtrooms or law chambers. University's goals are much more lofty and fundamental. It is only because the human beings fail to meet the standards evolved by the universities that we need lawyers and judges and not that we need lawyers and judges therefore we create universities. Creation of the universities or law schools on the assumption that they are meant only for training our best lawyers and judges is fundamentally unsound and against the concept of legal education and law. Unfortunately, however, at the moment everybody is racing for producing best-trained lawyers without leaving the slightest space for envisaging a lawyer or court free society. We should know that legal scholarship precedes and is more fundamental than the lawyers and the law courts and that we should not divert our limited resources towards the training of lawyers and judges and converting whatsoever legal scholars we have into trainers. The contest for creating the best training centres must be halted.

Professor Tripathi was also not impressed by the plea of imparting practical training to law students in the universities. He believed that that was something, which could be learnt only by practice in the courtrooms or in the law chambers. The realities of courtrooms and law chambers could not be enacted in the classrooms at the university. The universities could acquaint their students with the realities of the courtrooms and law chambers but they could not be a substitute for them. The fact that the society needed good lawyers and judges was not enough reason for asking the universities something impossible.

The universities, Professor Tripathi believed as I have already noted, were meant for educating students in law as it is and as it ought to be. And for that reason they needed scholars, devoted and committed to that cause. Therefore, he fully endorsed and supported the recommendation of

Gajendragadkar Committee that "teaching of law should be left almost entirely to full-time teachers who are dedicated to the work of teaching, are progressive and forward-looking in their approach and are fully conscious of the radical change which is required to be made in the content and methodology of legal education in our country today." The Committee added: "Part-time teachers may be invited to join in the task of teaching law only in respect of some subjects which can be usefully left to them."[3] It is under the mandate of the recommendations of this Committee that Professor Tripathi started his first tenure of deanship of Delhi Law Faculty in 1965. Not only he looked for the best talent for teaching but he also ensured that the teachers got necessary facilities and devoted their full time to teaching and research. Under the Ford Foundation grants he invited several famous professors from the United States to teach and guide at the Faculty and also sent almost all teachers of the Faculty to US law schools for exposure and learning of best techniques and skills of teaching and research. Already the Faculty was vibrant with the atmosphere of a full-time engagement to teaching and research when I joined it in July 1970. In early 1971 Professor Tripathi gave up voluntarily his deanship. After teaching for some time as professor he went to Australia for a few months and was later invited to be a member of the Law Commission where he served until 1977. Again, after teaching for over a year he was invited to Australia and then to Singapore. On his return in 1981 he was again asked to take up the responsibility of piloting the Faculty as its Dean and Head. By this time the Faculty had changed from what it was during his first tenure. Perhaps by now he had lost the initiative of making any major changes and just took care that no further damage was done to it during his tenure. When he noted that several full-time teachers had started court practice, he also got a clarificatory decision made by the University that full-time law teachers could not practice in courts even for legal aid purpose. But he could not stop the malaise. Recently in a public interest petition on this issue the High Court of Delhi has also decided that court practice by full-time law teachers is

3. The Committee consisting of Justice Gajendragadkar (later CJI) as Chairperson and P.N. Sapru, S.V. Gupte, Arthur von Mehron, Anandjee, M.P. Jain and M. Ramaswamy as members was constituted by C.D. Deshmukh the then Vice-Chancellor of the University of Delhi in 1963 "to study the problem of reorganization of legal education in Delhi University." The Committee submitted its report in 1964 which was also published. An edited version of the reoprt is reprinted in 11A of DELHI LAW REVIEW appended to 16 DELHI LAW REVIEW (1994). The extracts quoted from the report are from page 25 of the REVIEW.

4. *Anees Ahmed v. University of Delhi and Others*, CWP No. 3412/1997, decided in May 2002. Special Leave Petition no. 14287/2000, against this decision is pending before the Supreme Court. (Ed)

against the university as well as bar laws.[4] Whether the decision would in any way change the situation is yet to be seen. It may be noted that the expression "full-time" is not formal; it means a full time engagement and commitment to legal education and scholarship. Unless that happens nothing is going to change. Professor Tripathi, though, a highly composed person, always lamented the fact that no university including the University of Delhi could do to legal education and research, which it is expected to do. Therefore, he was very apprehensive whether we shall be able to sustain, much less to attain, through law our grand vision of India on the eve of independence incorporated in our Constitution.

Although Professor Tripathi was associated with the plan of national law schools from its very inception and also had all praise for what Professor Madhava Menon did at Bangalore, he was not enamoured of the five-year law course after twelve years of schooling. He believed that legal education required more mature brains and wider exposure to university education at graduation level before entering the law school. The five year law schools did not have enough law programmes for all the years and spend about two years in general courses, which could be better taught in the respective university departments at the under-graduate level. Even the school age, unless parents made the decision, was too early to decide about a career in law. It also excluded the possibility of someone deciding to join the law school at a later stage. In view of these and some other factors he could successfully stem the wave of introducing uniformly and exclusively five-year law course throughout the country including the University of Delhi. Until now the University of Delhi does not find any inherent weakness in three-year course. From my limited experience of legal education I find the concept of national law schools unique, if not incongruous, inasmuch as they are the only single faculty universities anywhere in the world, including India. They have so much narrowed down the concept of the university that their students and faculty have no opportunity to interact with anyone except themselves. Law courses are so much interlinked with other social sciences that in many law schools around the world law students take elective courses in other faculties. Of course inter-disciplinary legal education is not so common in India, but the option is not closed so long as law schools are part of a bigger intellectual community. That possibility is foreclosed in our national law schools. I doubt whether this issue has ever been seriously debated and discussed. The Gajendragadkar Committee made a very different recommendation on this issue. It said:[5]

5. *Supra* n. 3 at 32. Emphasis added.

> As we were holding deliberations at the meeting of the committee, some of us felt that it would perhaps be a good idea if three or four model national law schools are instituted in our country in some chosen representative places. It is our hope that the Delhi Faculty of Law will, while carrying out the recommendations of our report, develop into one such national law school. These national law schools, *each of which should be an integral part of a university community*, would be able to attract eminent law teachers who believe in the significance and importance of reorienting legal education in India and who would be prepared to dedicate themselves to that task.

I do not know whether those who designed our so-called national law schools had considered the above recommendation.

True to his belief, rather faith, Professor Tripathi devoted all his time, energy and resources in teaching and research. He also enjoyed it most. He used to say that the pleasure he got in exposing the prevalent myths about the law and its application was immeasurable and incomparable. Therefore, he always wanted to stay in that state of pleasure. He always lamented that he could not get the kind of time he would have liked to spend on research and writing because under the then university system, where normally every law faculty had only one professor, as professor he had to shoulder the responsibilities of head and dean, which took a lot of his time, energy and peace of mind, which he would have otherwise devoted to research. He also lamented the fact that he did not get the kind of support from his peers, as he would have liked in terms of critical research. Whatever he wrote generally remained a lone voice unlike the Western countries where several comments for or against or at variance would appear when anybody takes up any issue or arrives at certain research findings. Consequently he could not get the required feed back for further research and refinement of his views and findings. Nor could he get the required challenge for further work. Therefore, the best in him could also not be utilised.

To me Professor Tripathi never expressed any desire that he would have liked to do anything else other than serious teaching and research. Only he regretted that he was born at a wrong time and place. He took some pride in expressing that he was the first full time academic member of the Law Commission consecutively for two terms, but he never gave any hint that as member Law Commission he served law better than he served it as professor. Even during his membership of the Commission he continued to research and write on subjects of his interest and, among

others, produced a book in Hindi on the constitutional law of India, which was sponsored and published by the Government of India and was later awarded prize for being the best legal publication of the decade in Hindi.

I also do not know how keen Professor Tripathi was in being appointed as a judge of the Supreme Court. Whenever the issue arose he simply said that such appointment of any suitable professor would inspire research and scholarship, which is so important for law. It seems that more than once he was close to being appointed but for one reason or another that did not happen. Once a former Chief Justice told me that his name was considered for appointment but by that time he had reached an age where he would have been a judge at the Court for less than two years. One of the norms for the appointment of judges to the Supreme Court and the High Courts is that one must have at least two years to serve. Therefore, the offer could not come to him. Of course his appointment to the Supreme Court would have brought a sense of pride to the legal scholars. But the kind of scholar he was must be a matter of greater pride for all of us who are in his profession. He has contributed so much to our law through legal education and research that no judge can be proud of.[6] As professors we are assigned a particular role in the scheme of things, which is no less important than any other role in the society. We must perform it to the best of our abilities. This is what Professor Tripathi did. The best memorial we can create for him is that we follow and strengthen the path he laid down for the legal education and scholarship in this country.

6. For a summary of some of his contributions see *supra* n. 2 at 479 ff.

A TRIBUTE TO A RETIRING COLLEAGUE

J.L. Kaul *

I take this occasion to put on record the great accomplishments of my colleague, Professor B. Errabi who reached his superannuation in June 2001, after a very distinguished teaching career of more than three decades. The task of writing a tribute would have been better accomplished, had someone else having a longer association with Professor Errabi, mapped the finer qualities of Professor Errabi. However, as Editor of the *Delhi Law Review* it is my pleasant duty to write about Professor Errabi on his retirement. In doing so I carry forward the great tradition of *Delhi Law Review*, of having write ups of retiring colleagues of the Faculty of Law in the esteened journal, as a mark of respect and also as a record of their accomplishments.

Professor Errabi had joined the Faculty of Law, University of Delhi as Lecturer way back in 1965 immediately after completing his Masters in Law. Indeed joining a teaching career must surely have been, a deliberate decision for Professor Errabi. Though other lucrative options were open to him, it was his academic orientation that led him to choose teaching rather than any other career option. His academic bent of mind is evident from the fact that he completed his doctoral degree in law while pursuing his teaching career simultaneously in University of Delhi. His hard work and dedication saw him emerge as an accomplished teacher and a distinguished legal researcher. He pursued his research undertakings uninterruptedly.

I came to know Professor Errabi only in 1997, when I joined the University of Delhi and its Campus Law Centre(CLC), although I had gone through his writings in the field of constitutional and family law even prior to that. While at CLC I realized that there were immense difficulties, which were proving hostile to a genuine work culture. Professor Errabi's encouragement and friendly advice proved quite useful to people like me to overcome those difficulties. In due course of time I found in Professor Erabbi, a pragmatist and a mild mannered friend. I soon realized that he demonstrated soft-spokenness and an astute judgement. Aggressiveness

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was never his hallmark; instead he convinced all and sundry by his humility and a mature advice.

Professor Errabi's extraordinary qualities as a human being and as a teacher have been so refreshing to his colleagues, admirers and a generation of his students, that every now and then they would feel his absence. His approach to life, as I discerned was that of self-restraint, indeed a rare quality nowadays. I also realized that he treated with compassion and respect, all those who came in contact with him, even if they disagreed with him. I recall in a faculty meeting chaired by him, how his innocent yet transformative words could overcome any fiery combative colleague. At the end of the meeting he underlined the need for such interactive meetings in which the challenges facing the legal education could be thoroughly discussed. Indeed as he remarked , legal profession is upto a challenging task ahead in view of newer developments in the field of law, which the legal education cannot ignore. If legal profession has to be proficient, it cannot be without the legal education being professionalized, both of them being highly interdependent. He convinced most of us, that no aspect of our life, no human interaction we come across, no problem we face, is to be treated as routine. Everything can be engaged, every thing can be transformed, only if we have the will and commitment of purpose. This applies absolutely to reforming of the legal education as it does to many other walks of life.

Professor Errabi stands as a source of inspiration for generation of students, his colleagues and his admirers. His creative writings demonstrate the characteristic qualities of a law professor's position on many legal issues. His view point was invariably supported by precedents. He was fond of illustrative simplicity in his academic discourses and was equally open to suggestions from his friends and colleagues as well. He was unhesitatingly available for any help or guidance particularly to his younger colleagues, as and when they approached him. I recall after having shown him a first draft of a review article of a book on constitutional law, how forthright in his comments and suggestions on the review, he was. However, these personal interactions apart, he also recommended a fortnightly, if not weekly presentations by colleagues in the Faculty of Law on diverse issues of law.

That indeed is happening in many law schools: I wish such a thing was happening in Delhi Law School too, he sighed!

Professor Errabi's legal scholarship has included a variety of subjects in the legal curriculum. No doubt he has written extensively in constitutional law, but other subjects notably international law and family law etc. have

as well not escaped his legal analyses. Professor Errabi demonstrated an inclination to confine his inquiry within a narrow compass, particularly when they related to interpretative investigations. He was also perhaps not in favour of empirical approach to the examination of legal conduct. A greater problem inherent in such an empirical research lies in its limited ability to produce predetermined results, when applied to human actions and decisions. Reliance on statistical generalizations in forecasting human conduct may prove perilous, he remarked once. However, he relished comparative law techniques to the understanding and interpretation of diverse legal doctrines. Indeed his approach is demonstrative of explaining the influence of diverse constitutional structures of the world in explaining and interpreting a constitutional program. Needless to say, it depicts a new interdependence of thought and critical evaluation of constitutional interpretations in various countries. The interposition of this approach has got a seminal importance in judicial interpretations of contemporary issues in Indian context as well. It is because of this that Professor Errabi was fond of teaching compartive jurisprudence. His post-graduate students would recall his profundity of thought and interpretations.

I know that Professor Errabi has an unfinished agenda, as is apparent from the fact that he has not stopped writing even after his retirement. I am sure, his thirst for engaging himself more in legal research would not die down, he is presently with Max Plank Institute, Germany on a research fellowship. Also given any chance to engage himself in teaching would also not be missed by him. That is apparent from the fact that immediately after his retirement from the University of Delhi, he found a position of Visiting Professor in the National Academy of Legal Science and Research, Hyderabad. Professor Ranbir Singh, the Director of the Academy hardly misses an occasion of engaging the talent of the genre of Professor Errabi.

In the last, whatever, Professor Errabi engages himself in, henceforth, I and my colleagues wish him very well. We wish and pray for Professor Errabi's happier, active and most engaging post-retirement life.

HUMAN RIGHTS OF PERSONS WITH DISABILITIES: SOME REFLECTIONS

*Parmanand Singh**

I. INTRODUCTION

Broadly speaking, approximately over 600 million persons are disabled in the sense that they are restricted in or unable to perform an activity or function considered normal for a human being because of physical, sensory, mental or psychological impairment. People with disabilities have been effectively excluded from economic, social and public spheres of life throughout history and in most cultures.[1] By and large such exclusion has no rational basis whatsoever and rests on either naked prejudice or popular indifference. Disability causes social stigma on the ground that the condition of disability is considered as "undesired differentness" from socially defined norm of "normality".[2] The society and its institutions are designed for the "normals" and not for the people with stigmatised traits. People with disability generally experience a "spread effect' in which it is assumed that an impairment that affects particular life functions also indicates universal disability.

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UNSR) were adopted by the General Assembly on December 20, 1993 with the purpose of achieving positive and full inclusion of persons with disabilities in all aspects of society under the leadership role of the United Nations.[3] The Standard Rules are firmly built on the principles and concepts enshrined in the World Programme of Action

* Head and Dean, Faculty of Law, University of Delhi, Delhi-110007. I wish to thank the Max Planck Institute, Heidelberg, Germany, for granting me Visiting Professorship during the summer of 2000 for pursuing research on disability equality and giving me an opportunity to prepare this paper.

1. V.K. Dixit, *Historical Foundation of Disability Discrimination in Classical Hindu Law* XX DELHI LAW REVIEW 65-70 (1998).
2. Samuel R. Bagenston, *Subordination, Stigma and Disability* 86(3) VIRGINIA LAW REVIEW 397 (2000).
3. THE UN STANDARD RULES ON THE EQUALIZATION OF OPPORTUNITIES FOR PERSONS WITH DISABILITIES 1993 (UNSR).

concerning Disabled Persons (WPA) of 1982.[4] The UNSR establish that the States have a responsibility "to create the legal bases for measures to achieve the objectives of full participation and equality for persons with disabilities".[5] It is hoped that the Rules "can become customary rules when they are applied by a great number of States with the intention of respecting a rule in international law".[6] Earlier the ILO standards provided guidelines for employment opportunities for the disabled people.[7] Various instruments of the European Community and the Council of Europe also made aspirational reference to the objective of social integration and equality for disabled workers.[8]

As a corollary of the growing recognition of human rights law, each State is expected to provide legal safeguards against discrimination and secure the equal enjoyment and exercise of human rights of the persons with disabilities. Within the European Union only Germany[9] and the United Kingdom[10] have passed comprehensive legislations on disability discrimination and in the remaining countries the disability issues are treated as matters of social policy. Amongst the Western countries the United States[11] and Canada[12] have passed disability laws. Australia[13] and New Zealand[14] have also enacted laws. Among the developing Third World countries India is perhaps the first to have enacted a legislation in 1995 in response to the Beijing meeting held in December 1992 to launch the Asian and Pacific Decade of Disabled Persons 1993-2002.[15]

4. Bengt Lindquist, *Standard Rules in the Disability Field — A New United Nations Instrument* in Degener and Koster-Dreese, HUMAN RIGHTS AND DISABLED PERSONS : ESSAYS AND RELEVANT HUMAN RIGHT INSTRUMENTS 63 (1995).
5. UNSR Rule 15.
6. UNSR Introduction, para 14.
7. ILO VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION No. 159, 1983.
8. EUROPEAN SOCIAL CHARTER 1961 Part-1, para 15 and Part -II Art 15, E.C. CHARTER OF FUNDAMENTAL SOCIAL RIGHTS OF WORKERS 1989. The new text of Article 15 of the Charter provides that the parties must aim to develop a coherent policy for the people with disabilities and ensure for them a right to independent social integration, personal autonomy and participation in the life of the community. It also states that the disabled people should be provided education, vocational training and rehabilitation.
9. *SCHWERBEHINDERTENGESETZ* 1986.
10. DISABILITY DISCRIMINATION ACT 1995.
11. THE AMERICANS WITH DISABILITIES ACT 1990.
12. CANADIAN CHARTER OF RIGHTS AND FREEDOMS 1982, S. 15 HUMAN RIGHTS ACT 1985.
13. DISABILITY DISCRIMINATION ACT 1992.
14. HUMAN RIGHTS ACT 1993.
15. THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT 1995.

II. APPROACHES TO DISABILITY RIGHTS

Today the medical view of disability has been discarded. The medical welfare approach treats disability as an inherent personal characteristics rather than a characteristic that draws its meaning from social context. In such an approach disability is a matter of a personal tragedy. Such a view encourages dependence on doctors, rehabilitational professionals and charity. Apparently the medical paradigm stigmatises the disabled people by describing them as not "normal". The classification of disability made by World Health Organisation (WHO) in 1980 also supports the medical approach. WHO defines 'handicap' as a disadvantage for a given individual resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, social and cultural factors) for that individual. 'Impairment' is any loss or abnormality of psychological, physiological or anatomical structure or function. 'Disability' indicates 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.[16] The WHO classification overlooks the fact that discrimination experienced by a disabled individual is the product of society's negative reaction towards impairment and disability.

According to contemporary thinking disability should be located in the prevailing social context. Disability is not considered as a product of limitation imposed by physical or mental impairment. Rather disability is regarded as a result of interaction between societal barriers and the impairment. A person is disabled not because of his personal tragedy but because of the disadvantages suffered by him by a disabling environment besides the prevalence of stereotypes, prejudices and neglect of the so-called 'normal' individuals.[17] The advocates of social relations model, therefore, insist that the society as a whole has the responsibility to eliminate social and physical structures that exclude people with disabilities in having access to opportunities.

Let us now turn to the concept of disability equality. The demand for equality is based upon the concept of human autonomy, which consists of personal capacities to have an access to the opportunities that society offers to all the people. As has been observed by Joseph Raz[18] :

16. INTERNATIONAL CLASSIFICATION OF IMPAIRMENTS, DISABILITIES AND HANDICAPS, Geneva, WHO, 1980.
17. Samuel R. Bagenston, *supra* n. 2 at 418-32. Also see Len Barton, *Sociology, Disability Studies and Education : Some Observations,* in THE DISABILITY READER SOCIAL SCIENCE PERSPECTIVE 53-59 (1998).
18. J. Raz, THE MORALITY OF FREEDOM 369 (1986).

> The ideal of personal autonomy is the vision of people controlling to some degree, their own destiny fashioning it through successive decisions throughout their lives.

John Rawls describes personal autonomy "as the ability to frame, to revise and to pursue a conception of the good and to deliberate in accordance with it".[19] The norm of human autonomy is central to civil rights tradition which means self governance. In the context of disability equality the concept of "autonomy" cannot be located to the existence of personal capacities to have an access to opportunities. The ethical principle of equality that all human beings are equal in their self worth, dignity and autonomy would be false for people with disabilities. The disabled people would demand a concept of equality in which society should undertake special efforts in order to equalize opportunities for them. "Disability" and "ability" as well as "difference" and "sameness" are relational concepts. Much depends upon how "difference" and "sameness" are viewed. The problem here is not of "difference" but privileged social norm of ablebodiedness. In other words "sameness" and "difference" are nothing, but social constructions. No one is "different" without a counterpart having some other traits and nobody is "disabled" as long as there is no person to compare with who is differently "abled". "Sameness" and "difference" very much depends upon our point of comparison. We assign the label "normal" to our group and then we compare our group of normals with a counter-example, that we call "different".[20] Equality, therefore, is not a synonym for the promotion of "sameness" but implies a right to be "different". The notion of formal equality entails a optimistic view of individual autonomy and rationality and completely ignores the social disparities and social disadvantages and their impact on free competition.

In the context of disability the notion of substantive equality or genuine equality would be more appropriate. Substantive equality seeks to aid the disadvantaged or otherwise vulnerable groups by giving them special treatment in an effort to enhance their equal rights. This notion of equality takes account of both personal and environmental barriers which may inhibit societal participation. Rawlsian concept of maximum justice also supports the notion of substantive equality according to which goods should be distributed equally — as opposed to the "same" — among the members of society unless an unequal distribution will be to the advantage

19. J. Rawls, POLITICAL LIBERATION 72 (1993).
20. M. Oliver, *Discrimination, Disability and Social Policy* in M. Brenton, C. Jones (ed.) YEARBOOK OF SOCIAL POLICY 74ff (1984-1985).

of less fortunate.[21] According to Friedland[22] the society's obligation to create a fully accessible society for disabled people would be justified by Rawlsian theory of justice. She argues that rational individuals behind a Rawlsian-like veil of ignorance[23] would agree to provide benefits/accommodations to individuals with disabilities in order to insure against the possibility that they themselves would turn out to be disabled. According to her such a notion is the basis for Ronald Dworkin's[24] assertion that society has a moral responsibility to assist the individuals with disabilities.[25] Dworkin argues that people, if they could have done so before they were born, would have paid into an insurance scheme to compensate them should they turn out to be disabled and that society should therefore set up the equivalent of that insurance scheme now.[26]

The notion of substantive equality would entitle the people with disabilities a host of social and economic rights such as housing, health, education, employment and also certain "market-participation rights" such as the right to work, the right to fair conditions of employment, right to fair remuneration, the right to organise and the right to social security. Only through the market inspired rights the people with disabilities can achieve economic empowerment and independence.

WPA adopted by the General Assembly in1982 describes the principle of equality as follows.[27]

> The principle of equal rights for the disabled and non-disabled implies that the needs of each and every individual are of equal importance, that their needs must be made the basis for the planning of societies and that resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation.

The World Conference on Human Rights[28] confirmed that "all human rights and fundamental freedoms are universal and thus unreservedly

21. J. Rawls, A THEORY OF JUSTICE 303 (1971).
22. Michelle T. Friedland, *Not Disabled Enough : The ADA's "Majorlif Activity" Definition of Disability* 52 STANFORD LAW REVIEW 171, 191 (1999).
23. J. Rawls, *supra* n. 21 at 136-42.
24. R. Dworkin, *What is Equality? Part 2 : Equality of Resoures*, 1022 PHILOSOPHY AND PUBLIC AFFAIRS 283, 296-304 (1981).
25. Friedland, *supra* n. 22 at 191-92.
26. Dworkin, *supra* n. 24 at 297.
27. WORLD PROGRAMME OF ACTION CONCERNING DISABLED PERSONS, General Assembly of the Untied Nations Resolution 37/52.63, December 1982, para 25.
28. VIENNA DECLARATION AND PROGRAMME OF ACTION, U.N. Doc. A/CONF. 157/23 Title II para 63 (1993).

include persons with disabilities... The World Conference on Human Rights calls on all Governments, where necessary to adopt or adjust legislation to ensure access to these (life, welfare, education, work, living independently and active participation in all aspects of society) and other rights for disabled persons."

The people with disabilities should be protected against both direct and indirect discrimination. Direct discrimination occurs when the disabled people are singled out for differential treatment in jobs, schools, transportation, etc. Indirect discrimination occurs against persons with disabilities when an employer or service imposes a condition or requirement which is applied universally in terms of formal equality but such condition or requirement has a discriminatory impact of effect on the disabled individuals.[29] Reasonable accommodation goes beyond a simple equal treatment principle to require changes in some practices and structures to alleviate the disavantageous effects of physical differences. The duty to provide reasonable accommodation ought to be a legally enforceable duty with a corresponding right of disabled persons to require positive action to lift the barriers that obstruct their societal participation. Reasonable accommodation may be defined as "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity".[30] Examples of "reasonable accommodation" include the instalment of ramps and elevators, the introduction of part-time work-schedules, and availability of readers as well as sign translation. These accommodations seek to ensure equality and social integration by breaking down environmental barriers.

III. Global Concern for Disability Rights

Declaration of the Rights of the Disabled Persons adopted by the United Nations in 1975 was the first important step towards disability equality.[31] The Declaration's objective is to promote "the dignity and worth of the human person and the necessity... of assisting disabled persons to develop their abilities in most varied fields of activities and promoting in so far as possible of ... their integration into... normal life"[32].

29. For an incisive discussion of direct and indirect discrimination see. M. David Lepofsky, *The Charter's Guarantee of Equality To People with Disabilities : How Well is it Working?* 16 Windsor Yearbook of Access to Justice 155, 172 (1998).
30. Ch. G. Bell, R.L. Burgdorf, *Accommodating the Spectrum of Individual Disabilities*, United States Commission on Civil Rights, Publication No. 81, Washington D.C.
31. Declaration of the Rights of Disabled Persons , 9 December 1975, U.N.G.A. Resolution 347 (XXX).
32. *Id.* Preamble.

The Declaration proclaims the rights of disabled persons to dignity, self reliance, medical and rehabilitational treatment, assistive aids, educational and vocational training, and social integraion.[33] Entitlement to live with one's family, to participate in social and recreational activities and to freedom from discrimination with respect to accommodation are also enumerated.[34]

The World Programme of Action concerning Disabled Persons (WPA) in December 1982 and the period 1983-1992 being designed as the United Naitons Decade of Disabled Persons marked a significant global strategy for achieving equality to the people with disabilities.[35] "Equalization of Opportunities" had been the main theme of WPA. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities were adopted by General Assembly on December 20, 1993.[36] As stated in the Preamble the purpose of UNSR is:

(a) to stress that all actions in the field of disability pre-supposes adequate knowledge and experience of the conditions and special needs of the people with disabilities;

(b) to emphasise that the process through which every aspect of societal organization is made accessible to all is a basic objective of socio-economic development;

(c) to outline the crucial aspects of soical policies in the field of disability; including as appropriate, the active encouragement of technical and economic co-operation;

(d) to provide models for the political decision-making process required for the attainment of equal opportunities, bearing in mind the widely differing technical and economic levels, the fact that the process must reflect keen understanding of the cultural context within which it takes place and the crucial role of persons with disabilities.[37]

The UNSR recognise four pre-conditions for equal participation by persons with disabilities in society, namely, the raised awareness in society about rights, needs, potential and contributions of persons with disabilities the provision of effective medical care and rehabilitation services to people with disabilities and finally the development and supply of support services including assistive devices for persons with disabilities.[38]

33. *Id.* Art. 6-8.
34. *Id.* Art. 9.
35. *Supra* n. 27.
36. U.N. Doc A/Res/48/96.
37. UNSR Preamble.
38. UNSR Rules 1-4.

Eight target areas are recognised. These include accessibility, in terms both the physical environment and information and communication, education, employment, income maintenance and social security, family life and personal integrity, culture, recreation and sports and religion.[39]

The Standard Rules contain fundamental principles of the international disability movement and is based on the social model of disability equality. These rules acknowledge that environmental barriers are a great impediment to participation in society than functional limitations and barrier removal through legislation, universal design, provision for accommodation and other means, has been identified as the key to equalization of opportunities for people with disabilities. The Rules recommend to the governments of the member States to take measures to eliminate the real causes of disadvantage and vulnerability and should remove all the environmental barriers that inhibit disabled persons from exercising their human rights. The Standard Rules contain a powerful message to the World. The message is that the concept of equality implies the notion of the indivisibility, interrelation and interdependence of the two sets of human rights: civil and political rights on the one hand and economic and social rights on the other hand. The Rules proclaim[40]:

> Equalization of opportunities means the process through which the various systems of society and environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity of participation. People with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of eduation, health, employment and social services.

It is hoped that the Standard Rules will "become customary rules when they are applied by a great number of states with the intention of respecting a rule in internaitonal law".[41] Within the European Union the most significant event has been the amendments to the Treaty of Rome, 1957 in October 1997 which took effect from May 1, 1999 by which the

39. UNSR Rules 5-12.
40. UNSR Introduction, paras 24-27.
41. UNSR Introduction, para 14.

member States have been enabled to pass legislations to protect the human rights of the disabled people. However, the potential provided by the Treaty of Amsterdam for the advancement of disability rights within the European Community is substantial. The system of the law of the European Union is unique in the sense that the protected rights are made accessible to the individual. The role played by the European Court of Justice in developing disability jurisprudence would be of great significance.[42]

In most of the countries of the European Union the protection of human rights of the disabled people is a matter of social policy rather than a matter of social legislation. In Belgium, the disability policy focuses on education, social integration, entry into labour market, the improvement of living conditions and greater independence for people with disabilities.[43] There is no direct legislation on disability. In Denmark[44] the government accords high priority to the U.N. Standard Rules in the national handicap planning of activities. The government has set up Equal Opportunities Centre For Disabled Persons in 1993. In Spain[45] an action plan for disabled people was adopted in 1996 for social integration of people with disabilities. In Austria[46], the Federal Ministry for Labour, Health and Social Affairs defends the interests of disabled people and implements the constitutional commitment to the people with disabilities. In July 1997 Article 7 of Austria's Federal Constitution was extended to include the prohibition of discrimination on ground of disability. Article 7 of the Constitution also includes a national commitment to ensure that people who are disabled are treated in the same way as non-disabled people. Sweden[47] has designated the Disability Ombudsman to evaluate the measures adopted by the government to implement the U.N. Standard Rules.

42. Richard Whittle, *Disability Rights After Amsterdam : The Way Forward*, 1 EUROPEAN HUMAN RIGHTS LAW REVIEW 33-48 (2000). Whittle argues that the newly introduced Articles 13 and 137 to the Treaty of Rome 1957 at Amsterdam in 1997 provide legislative bases for disability discrimination legislations within the European Union. However, these articles do not create any effective enforceable rights to the individuals with disabilities but are in the nature of enabling provisions urging the community institutions to introduce secondary legislations conferring enforceable rights to the disabled individuals before the national courts.
43. *Compendium On Member States' Policies on Equality of Opportunity for People With Disabilities : Employment and Social Affairs : European Commission* (1998). This information can be accessed through the Europa server (http://europa.eu.int).
44. *Id.* at 17-21.
45. *Id.* at 35-40.
46. *Id.* at 71-76.
47. *Id.* at 89-94.

The Disability Ombudsman can hear complaints of disabled people but has no power to take action before the court. The policies for vocational rehabilitation, employment, accessibility and social integration of disabled people have also been adopted. In France[48], the disability rights are laid down in two basic texts namely Act of 30 June 1975 on guidance for people with disabilities and the Act of 10 July 1987 on the promotion of the employment of disabled people. The principle underlying French policy is priority for integration of the disabled people into an ordinary environment. The Greek Parliament has ratified WPA by Act No. 2430 of 1996 and a Committee has been set up to prepare a national action plan for the people with disabilities.[49] In Ireland[50] the government has undertaken a number of initiatives since 1993 for promoting equal opportunities for people with disabilities including the establishment of the Commission on the Status of the People with Disabilities and Irish Council of People with Disabilities. The government has also promised to pass a Disability Act. Italy[51] has issued a statement of policy under the title "Framework Law On the Care, Social Integration and Rights of the Disabled People" (Law 104/92) encompassing matters relating to prevention and diagnosis, treatment and rehabilitation, right to educational, vocational, and social integration. In Luxembourg[52], the Minister for Disabled People coordinates disability policies in the field of education, employment and social integration of the people with disabilities. Disabled Workers Act of 12 November 1991 seeks integration of disabled people in the labour market. In Netherlands[53], The Vocational (Re) integration of Disabled People Act came into force on 1 July 1998 which seeks vocational rehabilitation of people with a disability. The Facilities for the Disabled Act take care of social integration of disabled people. Portugal[54] has passed Law No. 35.96 of 2 May1996 for implementation of policies relating to rehabilitation and integration of people with a disability. In Finland[55] the National Council on Disability published a national disability programme in 1996 on empowerment of disabled people in the fields of education, employment and social integration.

In 1996 the European Union made a crucial policy shift to right-based approach in the disability field. The present policy focuses on integration

48. *Id.* at 41-46.
49. *Id.* at 29-33.
50. *Id.* at 47-52.
51. *Id.* at 53-58.
52. *Id.* at 61-63.
53. *Id.* at 65-70.
54. *Id.* at 77-82.
55. *Id.* at 83-87.

of people with disabilities. The disability policy goes beyond the provision of social and medical services in order to reduce functional limitations and increase independence of people with disabilities.

A. United Kingdom

In the United Kingdom the disabled workers were protected by Disabled Persons (Employment) Act 1944 by which a system of statutory job quota prevailed upon employers of twenty or more employees. With some exception this quota was fixed at three percent. In effect, however, the quota system did not work well and had not produced tangible results. The latest legislation in U.K. is Disability Discrimination Act 1995 (DDA).[56] DDA prohibits discrimination against disabled persons in respect of provision of goods, services, facilities and in relation to disposal and management of premises.[57] The quota system has been repealed. DDA demands new accessibility standards for disabled users of taxis, public service vehicles and rail vehicles.[58] Educational instituitons have been placed under a duty to encourage access for and the integration of the disabled pupils and students at all levels of education.[59] The Act also prohibits disability related discrimination in respect of employment and contract work[60] or by trade unions, employer's associations and trade or professional organisations.[61]

DDA makes it unlawful for employers to discriminate against disabled individuals in recruitment and selection, in terms of employment[62] and in employment opportunities generally.[63] According to DDA discrimination means "for a reason which relates to the disabled person's disability" the employer "treats or would treat others to whom that reason does not or would not apply".[64] However, the employer can take the plea of justification where it can be shown that the less favourable treatment of a disabled person is a reason that "is both material to the circumstances of a particular case and substantial"[65]. The employers have also a duty to

56. Brian Doyle, *Disabled Workers Rights, the Disability Discrimination Act and the U.N. Standard Rules* 25 INDUSTRIAL LAW JOURNAL 1-14 (1996).
57. DISABILITY DISCRIMINATION ACT 1995 Ss. 19-24.
58. *Id.* Ss. 32-49.
59. *Id.* Ss. 29-31.
60. *Id.* Ss. 4-12.
61. *Id.* Ss. 13-15.
62. *Id.* Ss. 17-18.
63. *Id.* Ss. 4(1) and (2).
64. *Id.* Ss. 5(1) (a).
65. *Id.* Ss. 5(1) (b).

make reasonable accommodation.[66] The examples of reasonable accommodation include making adjustment to premises and alteration or adjustment to policies and practices. An employer discriminates if it unjustifiably fails to comply with the duty to make reasonable adjustments.[67] The employment provisions of DDA are enforceable by litigation in the industrial tribunal system. The tribunal can make an award of unlimited compensation to a successful complainant. The tribunal can also make recommendations to prevent future discrimination.[68] DDA applies to all employers with 20 or more employees. From 1998 the employment provisions have been extended to employers employing 15 or more employees. The Act defines disabled perosn as "a person who has (or has had) a disability" and a person has a disability "if he has a physical or mental impairment which has substantial and long term adverse effect on his ability to carry out day to day activities".[69]

According to Brian Doyle, DDA falls short of social model of disability recognised by UN Standard Rules and reflects the medical model of disability which has been totally rejected by disability rights activities.[70] The DDA makes no reference to the UN Standard Rules although it meets many objectives of the Rules. Nevertheless DDA creates a strong moral commitment for equalization of opportunities for disabled persons.

B. Germany

Since the birth of the present post World War II German Government, the Federal Republic of Germany, the Federal Parliament (Bundestag) has approved comprehensive legislations protecting disabled persons in 1953[71], 1961[72],1974[73],1976[74] and 1986.[75] In World War II thirty two million German soldiers and more than 500,000 civilians lost their lives and many were rendered physically handicapped. Thousands of disabled people remained

66. *Id.* S. 6.
67. Exclusion of employers employing less than 20 employees from the purview of DDA is regarded as a flaw in the law. See Brian Doyle, *supra* n. 56 at 14.
68. DDA, Ss. 8(2)(a) and (b).
69. *Id.*, Ss. 1-2, Schedules 1-2. The term "impairment" has however not been defined in the Act.
70. See Brian Doyle, *supra* n. 56 at 12-13.
71. *Gesetz uber die Beschaftigung Schwerbeschadigter* 1953, BGB I I 389.
72. *Neufassung des Schwerbeschadigtengesetzes* 1961, BGB1 I 1233.
73. *Gesetz zur Weiterentwicklung des Schwerbeschadigtenrechts 1974*, BGB1 I 1481.
74. *Das Achte Gesett uber die Anpassung der Leistungen des Bundesversorgunesetzes* 1976, BGB1 I 1481.
75. *Schwerbehindertengesetz or SchwbG*. BGB1 : I 1110.

unemployed. The impact of two world wars was so devastating for German people that the German Government was the first to take initiative to pass disability laws.[76]

In 1986 the German Parliament or *"Bundestag"* approved a major amendment to its existing comprehensive law affecting the disabled, the *Schwerbehindertengesetz* or *SchwbG*. The main aim of *SchwbG.* is to eliminate employment discrimination and prejudices against the disabled and to promote their employment opportunities. Even the German Constitution, called Basic Law *(Grundgesetz)* contains clause (3) in Article 3 to the effect that "no person shall be disadvantaged on account of his or her disability".[77] The extension of the disability discrimination provision in the Basic Law has consolidated the position of the people with disabilities because it contains a provision that it is the duty of the state to take steps to ensure that people with disabilities can participate in the life of the society on equal footing. In Germany every person with a physical, mental or psychological disability is entitled to claim a social right to the assistance necessary to prevent the disability or to remove it. The 'social right' is the legal and guiding principle for Germany's rehabilitational and disability policy. The government has provided a comprehensive social benefit system to achieve equality for the disabled people.

The German disability law *(SchwbG.)* is completely coherent and all encompassing leaving very little for judicial law making which is quite alien in a civil law system. According to *SchwbG.* any public or private business which has atleast 16 positions for employees is required to fill 6 percent of those places with disabled persons.[78] Failure to comply with the quota obligations entails civil penalty of DM 200 per month (since 1990) for every job not filled by a disabled person and in a serious case of breach, criminal fine upto DM 5000 might be imposed. The proceeds of this penalty are spent on disabled employment policies.

A disabled person in an individual who suffers from a functional disability *(Behinderung)* which affects his or her capacity for social integration, as a consequence of the effects of an irregular physical, mental or psychological condition. The disability must have duration of at least six months and limits functional freedom of ability by atleast 20 per

76. For a brilliant comparison between American and German legislations see Carol D. Rasnic, *A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States* 9(2) Arizona Journal of International and Comparative Law 283 (1992).
77. The amendment to the Basic Law was introduced in 1994.
78. *SchwbG.*5 Abs. 1.

cent. To qualify under the quota law as a disabled person (*Schwerbehinderter*), disability is measured at 50 per cent or more whatever the actual effect upon life activities. A disabled person who is unable to find or retain employment, without assistance or whose disability is measured at 30 per cent or more is also treated as disabled (*Gleichgestellte)*. Disputes about a persons's disability are heard by a social court rather than a labour court. The German law provides adequate safeguards to a disabled worker against wrongful dismissal.

The *SchwbG.* is a classical affirmative action law which mandates every employer to comply with the provision of the statute. The employers are not only bound by 6 per cent quota but also by the procedure prescribed in the statute for terminating a disabled worker. As stated by Carol D. Rasnic, the development of German disability law has been influenced by three major factors; (1) Germany's extensive obligatory involvement with European regional and international organizations; (2) the German government's basic assumption of responsibility to make amends for most of the social ills of its people, and (3) the impact of the two world wars fought in large part of German soil.[79] One of the basic principles set forth in the Grundgesetz declares Germany to be a democratic and social welfare state[80], a principle to protect the weaker members of Germany's society.

"The federal government has undertaken a *parens patriae* task of sorts, bearing the responsibility of caring for its people in nearly all areas of need".[81]

The basic flaw, in German law, however, lies in its methodology in determining disability. The determination of disability has been left to the non-medical administrative personnel. The other flaw is its statistical nature. Once a business has hired its 6 per cent quota of disabled workers, it has no remaining duties. This method does not accord any benefit to those disabled workers who have been denied jobs. The non-compliance of law simply entails monetary punishment which goes to the government, the proceeds do not benefit the disabled people.[82] The German law treats disabled people as a class to be statistically assisted. The disabled people do not receive individualized treatment and relief. And in Germany affluent business will prefer to pay a paltry sum of DM200 per month per violation instead of complying the statutory quota.[83]

79. Carol D. Rasnic, *supra* n. 76 at 325.
80. Basic Law Art. 20 Abs. 1.
81. Carol D. Rasnic, *supra* n. 76 at 331.
82. *Id.* at 327.
83. *Id.* at 329.

C. *United States of America*

The Americans with Disability Act 1990 (ADA) states that its primary purpose is "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities".[84] ADA also articulates the goal of ensuring that individuals with disability have "equality of opportunity".[85]

The term "disability" means with respect to an individual : (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such an impairment, or (C) being regarded as having such an impairment.[86] If an individual cannot demonstrate that she meets this definition of disability, then she receives no protection of ADA, Dismissal of claims brought by a plaintiff whose conditions fail to qualify as a disabled individual under ADA has led to a widespread critique of the American disability law.[87]

The definition of "disability" under ADA is identical with the definition of "handicap" under the provisions of Rehabilitation Act 1973 (RA 1973). The ADA is intended to supplement not supplant the RA 1973. The RA 1973 affected government contractors and private entities that are the beneficiaries of Federal financial aid but ADA extends even to private employers. The Equal Employment Opportunity Commission (EEOC) has defined "major life activity" to include walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself and carrying out manual tasks. A "substantial limitaiton" means significnat restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.[88] The EEOC

84. The Americans with Disabilities Act 1990 (ADA) 42 U.S.C., S. 12101(b) (i).
85. *Id.* 42 U.S.C., S. 12101(a) (8).
86. *Id.* 42 U.S.C., S. 12102(2).
87. For a critique of some controversial decisions of the Supreme Court (*Bragdon* v. *Abbot*, 524 U.S. 624 (1998), *Sutton* v. *United Airlines*, 119 S.Ct. 2139 (1999), *Albertsons Inc.* v. *Kirkingburg*, 119 S.Ct. 2162 (1999), *Murphy* v. *United Parcel Service*, 119 S.Ct. 2133 (1999) see Samuel R Bagenstos, *supra* n. 2, Elizabeth A. Crawford, *The Court's Interpertation of a Disability under the Americans with Disabilities Act : Are They Keeping Our Promise To the Disabled?* 35(4) Houston Law Review 1207 (1998), Michelle T. Friedland, *supra* n. 22. ADA leaves many terms within the definition of "disability" ambiguous. It excludes several conditions such as illegal drug users, homosexuals, bisexuals etc.
88. 29 CFRS, S. 1630 2(i) (1998).

regulations have also defined physical or mental impairment.[89]

The ADA prohibits discrimination on the ground of disability in employment, housing, public accommodation, education, transport, communications, recreation, institutionalisation, health services, voting etc. It requires all new public transport to be accessible to the disabled people and existing public rail system must be made accessible during the course of time. Architectural barriers in existing buildings must be removed and new construction projects must be designed and built to be accessible to individuals with disabilities.

Under Title I of the ADA no employer may discriminate against a qualified individual with a disability because of disability of such individual.[90] This anti-discrimination law applies to all aspects of employment as well as pre-employment hiring process[91]. The ADA is binding on all employers with atleast 15 employees. These employers are required to provide reasonable accommodation for qualified individuals with a disability unless they can show that it would impose an undue hardship on that business[92]. The term reasonable accommodation may include (1) making existing facilities used by the employees easily accessible to and useable by individuals with disabilities and (2) job restructuring part-time or modified work schedules, re-assignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision for qualified readers or interpreters and other similar accommodations for individuals with disabilities.

The ADA incorporates the same powers, remedies and procedures as employed in Title VII of the Civil Rights Act 1964, An aggrieved individual under ADA can file a charge with EEOC within 180 days of the

89. Physical of mental impairment means (1) any physical disorder or condition, cosmetic disfigurements, or anatomic loss affecting one or more of the following body systems, neurological, muscular-skeletals, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, haemic and lymphatic, skin and endocrine or (2) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. 29 CFRS, S. 1630 (h) (1998).
90. 42 U.S.C., S. 12112(a).
91. *Id.* S. 12112(b) (6).
92. *Id.* S. 12112 (b) (5)(A). A qualified individual with a disabilty is one who with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires, *id.* S. 12112(8). If the individual cannot perform such essential functions of the employment position, then in deciding what job functions are essential, ADA gives deference to the employer's judgement.

alleged discriminatory act. EEOC has no enforcement powers but may allow the aggrieved individual "a right to sue". The aggrieved individual can then file a suit against the employer in a federal district court within 90 days from the issuance of the letter from EEOC.[93] Remedies available under DA include equitable relief requiring hire, reinstatement, back pay, and seniority, cessation of unlawful employment practice and such affirmative action as may be appropriate.[94] A plaintiff who proves intentional discrimination shall be entitled to compensatory and punitive damages from 50,000 US dollars to 3,00,000 US dollars depending upon the number of employees. These damages are in addition to any back pay already awarded in conjunction with equitable relief.[95]

D. Canada

Section 15 of the Canadian Charter of Rights and Freedoms grants constitutional protetion to the people with disabilities.[96] Disability is one of the forbidden grounds of discrimination in section 15's equality guarantee clause. The goal of the Canadian Constitution is to achieve a right to full inclusion and participation of the people with disabilities in a barrier free society. Discrimination is prohibited both on grounds of mental and physical disability. The right to full participation includes the right of a disabled individual to have his needs accommodated where necessary.[97]

The Canadian Human Rights Act 1985 prescribes a number of grounds for discrimination and prohibits certain discriminatory practices.[98] Disability is one of the proscribed grounds of discrimination.[99] Disability denotes "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohal or a drug".[100] The Act addresses both direct and indirect discriminaiton in all aspects of life including employment.[101] It also describes discriminatory employment practices and policies.[102] The Canadian Human Rights Commission is

93. 42 U.S.C., S. 2000 e-5(f)(1)(1988).
94. 42 U.S.C., S. 2000 e-5(g) (1991).
95. Carol R. Rasnic, *supra* n. 76 at 325-30.
96. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS came into force in April 1982.
97. For a fuller discussion, see M. David Lepofsky, *supra* n. 29 at 155-214. In *Eaton* v. *Brant County Board of Education* (1997) 142 DLR 385 (SCC), the Canadian Supreme Court has offered important protection to the disabled children.
98. HUMAN RIGHTS ACT 1985, S. 2.
99. *Id.* S. 3(1).
100. *Id.* S. 25.
101. *Id.* S. 7.
102. *Id.* Ss. 10, 12, 44.

charged with making general recommendations to the employers to provide reasonable accommodation to the people with disabilities.

E. Australia

In Australia the Disability Discrimination Act 1992 seeks to eliminate disability based discrimination in all walks of life, including employment. The Act applies throughout Australia and to both public and private sector employment and recognises the principle that people with disabilities have the same fundamental rights as the rest of the community.[103] The Act prohibits both direct and indirect discrimination on the ground of disability. The definition of disability includes past, present and even imputed disability and disability which may exist in future. HIV positive individuals are also covered. Disability discrimination is prohibited in recruitment, selection, employment offers, terms and conditions, opportunities for promotion, transfer, training, dismissal, etc.[104] However, the disabled person must be able to carry out the "inherent requirement of the job"[105].

F. New Zealand

In New Zealand the Human Rights Act 1993 aims to empower people with disabilities by providing legal protection against discrimination on the ground of disability. The employment provisions prohibit discrimination against disabled people in all aspects of employment process including hiring, training, compensation and benefits. The Act also requires an employer reasonably to accommodate a qualified individual with a disabiltiy to perform a job. Such accommodation is not required if it would be unreasonable or the individual would pose a direct threat to the health and safety of the individual or other employees in the workplace. Disability includes physical disability or impairment, physical illness, psychiatric illness, intellectual or psychological disability or impairment, any loss or abnormality of psychological, physiological or anatomical structure or function, reliance on guide dog, wheelchair or other remedial means etc.[106] The Act prohibits both direct and indirect discrimination on the ground of disability. In New Zealand the Employment Services Workbridge Programme assists the employers for providing reasonable accommodation to the disabled workers. Human Rights Act applies only in open employment. Those disabled people who fail to qualify for a job in open

103. Disability Discrimination Act 1992, Ss. 3(b) and (c).
104. *Id.* Ss. 15 (1) and (2).
105. *Id.* S. 15(4)(a).
106. Human Rights Act 1993, S. 21.

employment can seek job in labour market. For them the Disabled Persons Employment Protection Act 1960 provides for sheltered workshops where disabled people are employed.[107]

IV. The Indian Disability Act 1995

The Constitution of India, like the German Constitution does not contain any provision in the chapter on fundamental rights that no person shall be disadvantaged on account of his or her disability and that no person shall be subjected to disability discrimination.[108] In India the persons with disabilities are the most neglected and least served strata of the society. The root causes of disability in this country are poverty, ignorance, superstition, poor housing, lack of health care, low educational level and lack of political will. It occurred only in 1995 for the Parliament to pass a law entitled The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 which came into force on February 7, 1996.

The Persons with Disability Act simply requires the appropriate government to "endeavour", "ensure", and "promote" equality for the people with disabilities.[109] The Government is also expected to frame[110] "schemes" for the rehabilitation of the disabled people. And above all, the promised affirmative or equalizing measures are subject to the economic capacity and development of the Indian State.

The Act provides that the State shall "ensure that every child with disabilities has access to free education in appropriate environment till he attains the age of 18 years" and "promote setting of special schools" for such children.[111] The State shall also frame schemes "which shall make provisions for transport facilities to children to enable them to attend

107. See Stephanie Cowdell, *Employment Law and People with Disabilities* 8(3) Te Tata Koi Auckland University Law Review 806 (1998).
108. Constitution of India, Seventh Schedule, List II, Entry 9 contains a sub-heading "Relief of the Disabled and Unemployable." Art. 41, an unenforceable directive principle contains a reference to the "public assistance in cases of disablement." Beyond this the Constitution of India contains no protection to the people with disabilities.
109. In India more than 60 million people suffer from physical, mental or other kinds of disabilities out of which 80 percent live in villages.
110. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995. S. 2(i) defines disability which means blindness, low vision, leprosy cured, hearing impairment, locomotor disability, mental retardation, mental illness.
111. *Id.* S. 26.

schools" and "for removal of architectual barriers from schools, colleges and other institutions imparting vocational and professional training."[112] Schemes shall be made to provide aids and appliances to disabled people and also to allot land to them on concessional rates for house, setting up business etc.[113]

There are numerous disability friendly schemes envisaged under the Act which will be accomplished within the limits of economic capacity and development of the State. For example, measures to be taken by the government for prevention and early detection of disabilities,[114] for adaption of rail compartments, buses, vessels, air crafts to make them accessible to wheel chair users,[115] for installation of auditory signals at red lights on the roads for the visually handicapped people[116] will be subject to the economic capacity and development of the State. Similarly, the ramps in public buildings, adaption of toilets to wheelchair users, Braille symbols and auditory signals in elevators and lifts, ramps in hospitals etc. shall be subject to the economic resources which renders the whole exercise a promise of unreality. The arguments of economic constraints will always be available with the government for denying reasonable accommodation to the people with disabilities.

However, in the field of education and employment the Act envisages a statutory quota. All government and government aided educational institutions have an obligation to reserve three percent of seats for persons with disabilities.[117] "Every government shall appoint in every establishment such percentage or vacancies not less than three percent, for persons or class of persons with disability of which one percent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment (iii) locomotor disability or cerebral palsy in the post identified for each disability".[118] The State within its economic capacity and development shall also provide incentives to employers both in public and private sectors to "ensure that at least five percent of their workforce is composed of persons with disabilities".[119] Then, no promotion shall be denied to a person merely on the ground of disability and no disabled

112. *Id.* S. 30.
113. *Id.* Ss. 42-43.
114. *Id.* S. 44.
115. *Id.* Ss. 66-68.
116. *Id.* S. 45.
117. *Id.* S. 39.
118. *Id.* S. 33.
119. *Id.* S. 41.

employee shall be removed or reduced in rank who acquired a disability during his or her service.[120]

However, three percent reservation will cover only a microscopic minority among the disabled persons from the well-to-do families who have acquired prior accomplishment due to congenial home environment. The reservation provision applies only to the identified jobs which account for one-third of all categories of jobs. Thus in actual practice, three percent becomes one percent of the total vacancies. Reservations are largely confined to Group C and D levels of positions except in some States where reservation scheme has been extended to Group A and B level positions. Reservation of posts which applies to identified posts in the government offices only leave vast majority of the individuals with disabilities outside quota regime. The Act does not cover employees in public and private sector. The position is gloomy even in educational field. As the disabled persons can hardly reach the level of higher education, the reservation of three percent in government and government aided educational institutions is of no avail.

Shockingly, the Committees which have identified jobs for the three categories of disabled — the visually impaired, hearing impaired and the orthopaedically challenged, have effectively excluded disabled persons from more than 95 percent of jobs available in the government sector.

Despite the provisions enshrined in the Act barrier free environment in the buildings, lifts and other places, the architects and builders have paid scant regard for making reasonable accommodation for the disabled people. The building, rail compartments, buses, vessels, public toilets, are not accessible to wheelchair users. The road crossings, zebra crossings etc. do not have audio-signals to inform the hearing and visually impaired persons. The transport system is not at all disabled friendly. The disabled people are still being considered to be an object of pity and charity. Paucity of funds remains the standard answer for inaction of the authorities in implementing the provisions of the Act.

The Indian disability law does not offer any hope of constituting a shift from charity and welfarism to civil rights and social integration of people with disabilities. The Act suffers from some major flaws. First, unlike German, American and United Kingdom's laws, it does not cover

120. *Id.* S. 47. In *Pushkar Singh* v. *University of Delhi* 90 (2001) DELHI LAW TIMES 36, the High Court of Delhi issued directions to Delhi University to implement its 1994 decision to reserve 3% of teaching posts for blind and orthopaedically handicapped candidates. Also see *Javed Abidi* v. *Union of India* AIR 1999 SC 512.

employment in private sector. Second, there is no enforcement of the rights of the disabled people through any disability tribunal or special disability court to provide relief to the individuals against disability discrimination. Third, there is no provision in the Act for imposing sanctions or fine for non compliance of the provisions of the Act. Fourth, it is not mandatory for the government to remove structural and environmental barriers for the integration of the disabled people. Finally, the definition of disability is still based on medical approach outrightly rejected by UNSR.

V. Conclusion

The persons with disabilities are also human beings entitled to our respect and concern. The effects of disability are felt directly in the medical and health dimensions and then indirectly in the spheres of education, transports, physical access and the built environment, social and welfare schemes, housing, health services, leisure activities and social interaction and above all in the field of employment. The disadvantages suffered by the people with disabilities are largely the product of prejudice, ignorance, neglect and sheer thoughtlessness.

The disabled persons need strong laws and strong remedies to achieve the goal of their social integration. The domestic legislations addressing the rights of the disabled people have to be measured against the yardstick of the United Nations Standard Rules. The UNSR enshrine the "principle that persons with disabilities must be empowered to exercise their human rights" and recognize that the "equalization of opportunities for persons with disabilities is an essential contribution in the general and worldwide effort to mobilize human resources."[121] The UNSR accord priority to employment rights of the disabled people. This is reflected in the requirement that "laws and regulations in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment" and that "any discriminatory provisions against persons with disabilities must be eliminated."[122] The Rules also address the problem of harassment and victimization of the employees with disabilities.[123] The duty to make reasonable accommodation has been recognised as an example of affirmative action.[124]

121. UNSR Rule 7, Introduction, para 15.
122. UNSR Rule 7.1 and 15.2.
123. UNSR Rule 15.2.
124. UNSR Rule 15.3.

The rules also require State support for measures to design and adapt work places and work premises and to provide auxiliary aids and equipment.[125] Most importantly, the UNSR place nation states "under an obligation to enable persons with disabilities to exercise their rights... on an equal basis with other citizens" and "national legislation should provide for appropriate sanctions in case of violations of the principles of non-discrimination."[126] UNSR recognise a social model of disability a concept that indicates "the close connection between limitation experienced by individuals with disabilities, the design and structure of their environment and the attitude of general population."[127] Disability embraces "a great number of functional limitation" and individuals "may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness (which may be) permanent or transitory in nature."[128] It is hoped that the domestic legislations would meet the standards set by UNSR in every respect so that the Rules really becomes international customary rules as envisaged by the Rules. The main objective of the nation states should be to remove the obstacles to achieve equal opportunities for people with disabilities.

Persons with disabilities are vulnerable to discrimination and disadvantage in all walks of life. Disadvantage and inequality of opportunity represent the everyday experience of individuals with disabilities. Disability discrimination is institutionalized and is interwoven in the fabric of our society and culture. However, the environmental barriers are a greater impediment to participation in society than functional limitation. Barrier removal through legislation, provision for accommodation, universal design and other means have to be identified as the key to equal opportunities for the disabled person. And the responsibility for elimination of structural and environmental barriers remains with the nation states. Law has only partly succeeded in empowering disabled persons, largely because of inadequate enforcement, conflicting interpretation and limited scope. But it would be right to end upon a note of optimism and positive expectation.

Equality implies that unnecessary and avoidable differences should be prevented and once they have occurred, they should be remedied. In the case of disabled persons the inequality may both reflect and be the result of the discriminatory attitudes of the able bodied persons. Besides direct form of discrimination the disabled persons experience indirect forms of

125. UNSR Rule 7.3.
126. UNSR Rules 15.1 and 15.2.
127. UNSR Introduction, para 5.
128. *Id.* para 7.

discrimination. It is imperative that the states should introduce affirmative action programmes to ensure that disabled people can effectively enjoy and exercise their human rights on an equal footing. The persons with disabilities should be bestowed with an enforceable right against all forms of discrimination, including discrimination that results as a result of the failure to provide reasonable acommodation. There is an urgent need for every nation State to develop programmes which effectively eliminate the real causes of disadvantage and vulnerability.

EMERGENCE OF CYBER CRIME : A CHALLENGE FOR THE NEW MILLENNIUM+

*Gurjeet Singh**
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"The long arm of the law does not yet reach across the Global Internet."

—McConnell International

I. INTRODUCTION

The present phase in the history of mankind has ushered in various new technological advancements which are going to have a far-reaching impact on the present as well as the future of human existence. The world is now passing through an unprecedented phase of an unparalleled metamorphosis in the arena of information technology designed and destined to effect drastic and dramatic changes in the day to day lives of the people and to replace the conventional snail pace systems of communication. New communication systems and digital technology in particular have made dramatic changes in the way we live. Further, a revolution is occurring in the way people transact business. For instance, business community and consumers are increasingly using computers to create, transmit and store information in the electronic form instead of traditional paper documents. The new information technology explosion would further generate exodus of creativity reducing time and distance and our globe would seem to be shrunk and much shorter than it has been thought to be hitherto.[1] Such is the impact of technological advancements and innovations that today we cannot imagine our lives without them. The

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1. Shakil Ahmed Syed and Rajiv Raheja, A GUIDE TO INFORMATION TECHNOLOGY (CYBER LAWS AND E-COMMERCE) (2001).

modern day technology has shrunk distances around the world and made the inflow and outflow of information across borders much easier than ever before.

It was during this period that the wonder machine 'computer' made its mark. Computers have been dominating the technological scenario world over since the early 1970s. In general terms, a computer is an electronic device used to process the data and converting the data into information that is useful to people. These electronic devices have certainly made us more efficient by doing the repetitive tasks themselves. They, *inter alia*, help us create, design, programme and communicate. Computers have now entered all walks of life. As a matter of fact, we have entered the 'Information Age'. We find ourselves dependent on cellular phones, computers, electronic diaries and organisers and pagers in a way that we wonder how we managed without them in the past.

The Internet and the World Wide Web blossomed in the 1980s. Through the medium of Internet, it is possible to have a world of information and connectivity at the click of a mouse. Internet is thus an irreversible phenomenon that has set new benchmarks for the entire mankind. As the world enters the threshold of the 21st century and the third millennium, almost half of all the spheres of human activity the world over has got wired into a unique connectivity that has transcended national frontiers, geographical boundaries and cosmic contours.

Behind this new dimension of rapid advances in technology is the shady Internet criminal. Exceedingly rapid advances in technology also leave certain loopholes for the criminal mind and slow legal reform adds risk to the technology for consumers. When Internet was developed, its founding fathers did not probably imagine that Internet could also be misused for criminal activities. However, today there are many disturbing things happening in cyberspace, especially the cyber crimes. It will not be out of place to mention here that cybercrime has acquired international dimensions and that today the cyber criminals can move at the speed of light on a highway on which there are no traffic signals, no constables, and no custom or immigration authorities to check them for anything.

Broadly speaking, 'cyber crime' refers to all activities done with the criminal intent in cyber space. Computer related crime has virtually no boundaries and does or may affect every country in this world. These could either be the criminal activities in the conventional sense or the activities newly evolved with the growth of Internet. Thus the crucial question that arises in this context is as to what has led to the worldwide spurt in cyber crimes? There are various reasons for this which will be

discussed later. First of all, it is important to discuss the concept and nature of cyber space.

II. Concept and Nature of Cyber Space

The computer's ability to share data with other computers over a network linked through telephone has led to a major telecommunication revolution in the contemporary world. A computer network is a network consisting of a central computer (server) and a number of remote stations. This network working has led to the concept of 'cyber space'. The word 'cyber space' was never known to the world until 1984. As a matter of fact, the origin of word 'cyber' in the context in which we are referring to today, is credited to a scientific fiction novel, *Necromancer*, by William Gibson that was published in 1984. According to Gibson, 'cyber space' refers to that imaginary space which is created by computers when they communicate. 'Cyber space' is thus an abstract concept that represents an area where a kind of activity takes place in which the computers connected through a network are engaged. It is that invisible realm in which one particular computer is linked to other computers in the world, and retrieving or sending almost any information anywhere in more than 150 countries cheaply, quickly, and reliably. Cyber space is real time, online communication through high speed data links that crisscross the globe. It is often referred to as the 'Information Highway'.[2]

One of the major components of cyber space is the Internet, or just the Net. It is a network of millions of computers that can dial up each other through a maze of connected communication technologies. The Net has acquired a sort of suprahuman existence. It is not owned by any country or organisation and it is free. In other words, nobody owns the Net. Somehow, it continues to expand, estimated to be doubling (in volumes of transactions) every two months. The Net is often dubbed as the 'Network of Networks'[3].

Cyber space is, therefore, not the computer, nor the telephone cables, routers, servers or any other piece of hardware. It is also not any of the software that is running in any of these hardware gadgets. All these, as well as the people who use them, exist in the 'non-cyber space' or the 'meta space'. Between them is an invisible virtual space of Internet the existence of which can only be felt in its impact on those who traverse this space. One may not be able to enter, traverse or exit from this virtual

2. K. Aswathappa, Essentials of Business Environment 8 (2001).
3. *Ibid.*

space without the meta world objects such as the computers, the connecting device etc.[4]

III. Concept of Cyber Crimes

A. Concept and Definition

As a matter of fact, there is no exhaustive and universally accepted definition of the term 'cyber crime'; rather functional definitions have been adopted. There has been a great deal of debate amongst the legal experts as to what constitutes a 'cyber crime' or 'computer crime'. Generally speaking, computer crime is a form of white-collar crime, meaning thereby, that it is usually committed by the individuals/professionals or organisations during the course of their occupation/profession etc. Nevertheless, some of the commonly spelt out definitions of 'cyber crime' are:

- A criminal activity that involves unlawful access to, or utilization of, computer systems.
- Any illegal action in which a computer is used as a tool or object of the crime; in other words, any crime, the means or purpose of which is to influence the functions of a computer.
- Any incident associated with computer technology in which a victim suffered or could have suffered loss and a perpetrator, by intention, made or could have made a gain.
- Any violation of the law in which a computer is the target of or the mean for committing crime.

The Organisation for Economic and Cultural Development (OECD) however, has adopted the following definition as the working definition for computer-related crime or computer crime:

> Computer abuse is considered as any illegal, unethical or unauthorised behaviour relating to the automatic processing and transmission of data.[5]

On the basis of the above definitions, one could broadly argue that any activity which involves the unauthorised and unlawful access to or utilisation of computer systems or networks in order to tamper with the data or to intentionally transact anything illegal with the help of computers and the Internet can broadly be called as 'cyber crime'.

4. The word 'Meta Space' has been evolved in order to distinguish it from the word 'Cyber Space'. 'Meta Space' or 'Meta World' refers to the 'Real World', while the word 'Cyber Space' refers to the virtual 'World of Internet'.

B. Elements of Cyber Crime

Strictly speaking, crime is an act or omission, which is prohibited by the law particularly by the criminal law. The basic definition of 'crime' is that it is an activity which the society considers as wrong or any action which is likely to be harmful to the society is dubbed as crime. It is one of the cardinal principles of the criminal law that there must be guilty mind (*mens rea)* behind that act which is sought to be labelled as a crime *(actus reus*). Thus, a crime essentially consists of two elements, namely, *actus reus* and *mens rea*. Cyber crime is the latest, dynamic and most often used terminology in the field of cyber laws.

The first constituent of cyber crime is *actus reus* or the wrongful act. In case of the Internet crimes, it is relatively easy to identify *actus reus* but usually difficult to prove. It can be said that all those acts which are specifically prohibited by the cyber legislations, such as the Information Technology Act 2000 constitute *actus reus* in cyber crimes. They are difficult to prove because of various difficulties encountered in idenitifying the culprit, e.g. anonymous and transnational nature of the Internet, jurisprudence issue, weak laws, lack of international consensus regarding cyber crimes etc.

The second essential constituent of a crime is guilty mind or *mens rea. Mens rea* in case of cyber crimes presupposes on the part of the offender that he or she is aware at the time of causing the computer to perform the function that the access is unauthorized. Thus the cyber crime must be committed knowingly or intentionally. Like in ordinary crimes, *mens rea* is assumed in the commission of cyber crimes if it is proved that the cyber crime was committed intentionally or knowingly. Thus this ingredient of cyber crimes is relatively easier to prove.

C. Distinction between Cyber Crime and Terrestrial Crimes

Undeterred by the prospect of arrest or prosecution, cyber criminals around the world lurk on the Net as an omnipresent menace to the financial health of businesses, to the trust of their customers, and as an emerging threat to nations' security. Headlines of cyber attacks command our attention with increasing frequency. Moreover, countless instances of illegal access and damage around the world remain unreported, as victims

5. Suresh T. Vishwanathan, *The Criminal Aspect in Cyber Law*, in The Indian Cyber Law 81 (2001).

fear the exposure of vulnerabilities, the potential for copycat crimes, and the loss of public confidence.[6]

Cyber crimes which are harmful acts committed from or against a computer or network, differ from most terrestrial crimes in four ways. They are easy to learn how to commit; they require few resources relative to the potential damage caused; they can be committed in a jurisdiction without being physically present in it; and they are often not clearly illegal.

Strictly speaking, the laws of most countries do not clearly prohibit cyber crimes. Existing terrestrial laws against physical acts of trespass or breaking and entering often do not cover their "virtual" counterparts, Effective law enforcement is complicated by the transnational nature of cyberspace. Mechanisms of cooperation across national borders to solve and prosecute crimes are complex and slow. Cyber criminals can defy the conventional jurisdictional realms of sovereign nations, originating an attack from almost any computer in the world, passing it across multiple national boundaries, or designing attacks that appear to be originating from foreign sources. Such techniques dramatically increase both the technical and legal complexities of investigating and prosecuting cyber crimes.

In order to protect the future of the networked world there is a need of a more proactive approach, whereby governments, industry, and the public work together to devise enforceable laws that will effectively deter all but the most determined cyber criminals.

D. Classification of Cyber Crime

Broadly speaking, cyber crimes can be divided into three broad categories:

(i) Cyber Crimes Against Individual

Amongst others, the major kinds of cyber crimes committed against individuals generally include:

1. Harassment Via E-Mails

Cyber harassment is a distinct type of cyber crime. Various kinds of harassment can and does occur in cyberspace, or through the use of

6. McConnell International, REPORT ON CYBER CRIME AND PUNISHMENT : ARCHAIC LAWS THREATEN GLOBAL INFORMATION (2000), available at http://www.mcconnell international.com/service/cybercrime.htm (visited on 20 September 2001).

cyberspace. Harassment can be mental, physical,[7] racial, religious, sexual or other. Persons perpetuating such harassment are also guilty of cyber crimes. Cyber harassment as a crime also brings us to another related area of violation of privacy of netizens (users of the Internet). Violation of privacy of online citizens is a cyber crime of a grave nature. No one likes any other person invading the precious and extremely touchy area of his or her own privacy which the medium of Internet grants to the netizen.

2. Dissemination of Obscene Material

The dissemination, distribution, posting, and trafficking of obscene material including pornography, indecent exposure, and child pornography constitute one of the most important cyber crimes known today. The potential harm of such a crime to humanity can hardly be overstated. This is one cyber crime which threatens to undermine the growth of the younger generation as also leave irreparable scars and injury on the youth if it is not checked and controlled.

In India, publishing, distributing or causing distribution of obscene material on the Internet has been declared as an offence under Section 67 of the Information Technology Act 2000. A conviction can result in imprisonment of up to 5 years and a fine of rupees one lakh, which can go upto 10 years imprisonment and a fine of rupees two lakhs in respect of second and subsequent commission of the offence.

3. Cyber Stalking

Cyber stalking is a term used for following a person while he is on the Net observing where he goes and what he does on the Net. This can be done by a marketing agency to profile a potential customer or by a potential criminal in search of information that can be used to commit further crimes. Cyber Stalking is normally considered as a privacy invasion and if it is done with the intention of committing a crime, the normal laws have to take care of the punishments. Laws are yet to be developed specifically for controlling this type of crime.

In the United States, Federal laws are being attempted to punish online stalking. Several states in the US have some laws for the real world which can be invoked for cyber stalking. In California, for instance, the

7. According to a recent newspaper report, a mysterious e-mail message was received wherein the sender had threatened to eliminate the Delhi Chief Minister Sheila Dikshit. For further details, See *E-Mail Threat to Delhi CM* THE TRIBUNE, January 11, 2002.

criminal penalty for stalking is imprisonment for up to a year and/or a fine of up to $500. If a stalker pursues the victim in violation of a previous court order, the punishment may be the imprisonment for two to four years. In California, one may request to be notified 15 days before his stalker is released from prison. Similarly in Canada, stalkers may be imprisoned for up to five years.

4. Impersonation

Impersonation could usually be a means of committing a financial fraud. In the simplest form, it could be a case of entering an ISP service using a stolen password. In a more serious version, it could be using somebody else's credit card information to buy on the Net. In another version of impersonation, it could be a means of disguising and committing a crime such as hacking or virus introduction.

In all such cases, the criminal, when asked, provides an identity that is false and is aimed at depriving the genuine owner of a right. It would involve telling a lie to get financial gain and therefore would tantamount to a fraud.

Indian laws through the Information Technology Act 2000 club this offense under Section 43.

One of the ways impersonation is done at the computer level is called 'Spoofing', where the IP address of the computer is made to appear different so that access can be gained to other restricted Networks working with IP filters.

(ii) Cyber Crimes Against Property

The second category is that of cyber crimes against all forms of property. These, *inter alia*, include:

1. Hacking and Cracking

Hacking and cracking are amongst the gravest forms of cyber crimes known till date. Hacking is a generic expression in the computing world and can be applied in many contexts. For the purpose of convenience or probably our fascination for the term, we have termed all kinds of illegal activity as hacking. Hacking is an unauthorised access by any person using a computer and any other communication device to break computer security or circumvent it to enter into a computer system. It is an infringement that is at par with "break and enter". The gravity of hacking

is to be weighed against what is actually done upon illegally entering the computer system. Data may be stolen or integrity of the information may be affected which is at par with sabotage and in both cases there is damage. Some hackers may do nothing but browse. If the intention of the hacker is to destroy files, there is a crime by electronic means. In other words, the motive behind hacking is criminal in nature. A crime is a crime by whatever means it is perpetrated. At this point it will be useful to distinguish between hackers and crackers.

Hackers

Hackers break the security of computer network, by using their skill in a way which is illegal. Their activities involve denial of service, or entering a secure area by subverting its security cordon. Denial of service is attempted by flooding the web server with false requests for pages to engage it in processing such requests leaving hardly any time to respond to legitimate requests and thereby affecting its ability to respond and perform its internal functions. Entry in secured area is obtained by setting up programmes that tries millions of passwords until one is accepted. They invade the private data and further invade the network to reach the sensitive data. Once hackers get into the machines that host networks, they can alter and remove files, change information and erase evidence of those activities.[8]

Crackers

Cracking is another form of hacking. It involves breaking the security on software applications. Crackers develop their own software that can circumnavigate or falsify the security measures that keep the application from being replicated on a PC. For example, if a registry access is permitted to everyone, passwords could be cracked. An employee could be able to dump password registry contents, if he is allowed access, and crack them at leisure. Password dumping and cracking is not difficult. Plethora of tools for that purpose are available on the Internet. Password having been cracked, it permits the cracker to log on to the server with cracked user name and password. He then gains a legitimate access to the restricted system resources.[9]

Thus, protection is needed against theft of equipment, loss of software or data, virus incidents, internal system attacks and hacking. Loss of

8. D.P. Mittal, LAW OF INFORMATION TECHNOLOGY (CYBER LAW) 35 (2000).
9. *Ibid.*

software or data and virus incidents have been the main cause for loss of computerised information.

It may be appropriate to mention here that Section 66 of the Information Technology Act 2000 has defined hacking and has proceeded to prescribe punishment for the same. It states as follows:

Hacking with Computer System

(1) Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking.

(2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

Simultaneously, Section 43 of the Act states as under:

Penalty for damage to computer, computer system, etc.

If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network:

(a) accesses or secures access to such computer, computer system or computer network;

(b) downloads, copies or extracts any data, computer database or information from such computer, computer system or computer network including information or data held or stored in any removable medium;

(c) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder; he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.[10]

It is unanimously agreed that any and every system in the world can be hacked. Using one's own programming abilities as also various programmes with malicious intent to gain unauthorised access to a computer or network are very serious crimes. In order to prevent hacking, it

10. See THE INFORMATION TECHNOLOGY ACT 2000.

would be necessary for the system owner to install a suitable hardware or software 'firewall' that is configured to allow only authorised persons to the computer.

2. Virus Contamination

The second most prevalent cyber crime is creating and distributing computer virus which causes damages of various kinds. The loss could be on account of viruses, worms, trojan horses and logic bombs. It will be worthwhile to differentiate between these terms.

Viruses

Virus by definition is a computer programme that can reproduce itself while residing in a target computer (host). Subsequently it may attack causing destruction of data. It may also distribute itself, enter other computers in the network through an e-mail or otherwise and later repeat the process in the new host computer. Computer virus has become very common because the transfer of infected file from one computer to another causes the viruses to replicate. There are thousands of different types of viruses, each having its own characteristics. Some of the viruses are benign. An example is the *'Ping -Pong'* virus whose effects are limited to causing the image of a bouncing ball to move continually across the computer screen. Other viruses such as the *'Friday 13th'*, and *'Michelangelo'* can result in the permanent loss of data stored in the victim computer.[11] Over the years, virus has become a matter of great concern to the society and is being used as a tool for hacking or for disabling vital e-commerce services and corporate networks. Virus incidents have been the main cause for the loss of computerised information. All organisations must protect themselves against these viruses through anti-virus scanning software which must be updated every fortnight.[12]

Worm

A worm is a program whose purpose is to duplicate itself. An effective worm will fill the entire disks with copies of itself, and it can spread to multiple computers on a network, essentially clogging the entire system with copies. They use the network to spread themselves. Worms are commonly spread over the Internet via e-mail message attachments and

11. Gurbax Singh Karkara and S.K. Sharma, *Law of Cyber Crime in India* 29 JOURNAL OF THE LEGAL STUDIES 14 (1988-99).
12. *Supra* n. 8 at 36.

Internet Relay Chat (IRC).[13] Worms may also invade a computer and steel computer's processing resources to replicate themselves. *'Love Bug'* is a recent example. It was spread by making copies of itself and sending them out to listing in victim's e-mail address book. It did shut down many corporate and government networks.[14]

Trojan Horses

A trojan horse is a malicious program that appears to be friendly. For example, some trojan horses appear to be games. Because trojan horses do not make duplicates of themselves on the victim's disk, they are not technically viruses. However, since they can do harm, they are also considered viruses. A trojan horse virus is the most destructive type of virus. It is program which appears useful and purports to perform some constructive task, but it is actually destructive and malicious. It is a dangerous code inserted or hidden in some authorised programme. Within the host program is a section of computer code (the virus) which performs a secret task. The task may be as simple as transmitting the virus into another program. Destructive functions may destroy or alter data, or provide a means of security breach. It is used to cover the tracks of the hackers.[15]

Logic Bombs

A logic bomb is a dormant virus which is activated by some signal to attack the host computer. Its attack is triggered by an event like computer clock reaching a certain date, a change to a file or a particular action taken by a user or a program. Chernobyl and Melissa viruses are the recent examples.[16]

The advent of viruses and similar mechanisms whereby computer software can be made to act almost on its own initiative poses a new and significant threat. Sophisticated viruses and devices such as 'logic bombs' and 'trojan horses' can be targeted for specific objectives at specific industries to commit a variety of traditional criminal offences from mere mischief to extortion. These crimies, furthermore, can be committed immediately or can be planted to spring at a future date.[17]

13. Peter Norton, INTRODUCTION TO COMPUTERS 539 (2001).
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. Gulshan Rai, *Computer Related Crimes*, available at http://www.mit.gov.in (visited on 12 March 2000).

Creating a virus and leaving it in the world is a recognised cyber crime which calls for a strong punishment. In India, it is covered under Section 43(c) of the Information Technology Act 2000. It provides that if any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network causes virus contamination shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected. In order to protect oneself against the attack of a virus, it is essential to install the latest virus protection software (popularly called as the 'Anti-Virus Software') and keep it updated. Not providing a network with the appropriate virus protection could be construed as negligence of a network manager and consequent damages if any.

3. Copyright Infringement

Copyright infringement arises when the rights of the owner of a copyright material are infringed by another. In the cyber world, it can happen through copying of web content without permission.

Copyright infringement takes place either as piracy or violation of rights. Piracy occurs when there are no rights and the material is put to commercial use. Violation happens when there is some right but there is a dispute as to whether the use is within the interpretation of the permitted rights or not. Where there is no specific contract the benchmark would be what is called 'fair use'.

The main remedy for copyright infringement is compensation to the copyright owner. However, most copyright laws including the Indian Copyright Act as well as the Digital Millennium Copyright Act of USA provide for imprisonment and fine in certain cases. It is a matter of debate when the harsher punishments are to be awarded. According to experts, it should be ideally left to the discretion of the judge who could decide about the quantum of punishment depending upon the facts and circumstances of each and every case.

4. Patent Infringement

Patent is a right created out of specific registration of an invention with an appropriate authority. Patents can be registered within the jurisdiction of a country. Priority for the date of invention and common examination system can however be invoked through international treaties such as the Patent Cooperation Treaty (PCT). India is a party to the PCT but has not yet established a full software patent system. The remedy to a patent owner for infringement of patent rights is compensation for the

loss caused by the infringement. The Information Technology Act 2000 does not cover the patent infringements.

5. Impersonation or Cyber Fraud

Impersonation could usually be a mean of committing a financial fraud, especially in case of sale and purchase transactions through the use of credit cards etc. on the Internet. As mentioned above, in its simplest form, it could be a case of entering an Internet Service Provider (ISP) using a stolen password. In a more serious version, it could be using somebody else's credit card information to buy on the Internet. In another version of impersonation, it could be a mean of disguising and committing a crime such as hacking or virus introduction.

In all such cases, the criminal provides an identity, which when asked is false, and is aimed to deprive the genuine owner of the identity of a 'right'. It would involve telling a lie to get a financial gain and would, therefore, tantamount to a fraud. Indian laws through Information Technology Act 2000 again club this offence under Section 43(h). This section provides that if any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network, charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

6. Cyber Squatting

In simple words, 'cyber squatting' is a term which has come to be associated with the registration of domain names without the intention of using them in the names of popular brands or personalities solely for the purpose of making money. As long as the cybersquatter owns the domain name, the trademark owner cannot register its own trademark as a domain name. In this sense, the cybersquatter breaches the legal rights of the trademark owner to use its trademark.[18] Thus, its key ingredients are that name belongs more appropriately to another entity. Secondly, the registrant is intending to trade the name.

Domain names are assigned at present by the Internet Corporation for Assigned Names and Numbers (ICANN) on behalf of the National Science Foundation of the U.S. on first come first served basis. This has led to cyber squatting which involves buying of domain names which have a close resemblance to a similar or identical recognizable trade mark like

movie titles, company names and products with a view to sell them to the trade mark holder at exorbitant prices. Cyber squatting raises the question whether such practice should be prohibited or not. Since cyber squatting results in consumer fraud and public confusion impairing the economy by depriving the legitimate trademark owners of substantial revenues and goodwill, many domain name disputes are arising in cyber space.

In this connection, it needs to be mentioned that the domain name registration system started on the basis of the first come first served basis. However, as the Internet became more popular, large popular companies wanted to enter the Internet with their own web sites and often found that the domain name they were seeking had already been booked. Some of these companies brought the names for a price which were sometimes astronomical.

In an effort to prevent cyber squatting, some countries have imposed rather arbitrary limitations on domain names. These limitations include restrictions on the choice of domain name, such as requiring the domain name to match the registrant company's name or to contain no generic terms. Also, some countries have imposed limits on the number of domains that a registrant may own, making it difficult for companies to register multiple brands. USA has passed a specific law regarding the domain names called the Anti-Cyber Piracy Act to define the rights on domain names. The Act establishes that a registrant of a domain name may be liable to the owner of a trademark or others that may be affected by the 'bad faith' of the domain name registrant.

In the absence of any law, disputes regarding domain names are resolved through the Uniform Dispute Resolution Mechanism that the registrants have agreed to practice. The World Intellectual Property Organisation (WIPO) has been supporting the dispute resolution based on trademark rights. Disputes are mainly resolved through an arbitration process.

In India there have been cases like *Rediff Communications Ltd.* v. *Cyber Booth*[19]; *Yahoo! Inc.* v. *Akash Arora and Another*,[20] and

18. For further details, see C.J. Ravandale and Abhijeet Sinha, *Domain Name Disputes: Problems and Prospects* SOUVENIR OF THE NATIONAL CONFERENCE ON CYBER LAWS AND LEGAL EDUCATION 27 (2001). Also see John D. Mercer, *Cyber Squatting: Blackmail on the Information Superhighway* 6 BOSTON UNIVERSITY JOURNAL OF SCIENCE AND TECHNOLOGY LAW 11-30 (2000).
19. AIR 2000 Bom 27.

between ICICI and LIC on www.jeevanbhima.com which have come up for scrutiny in courts. The *Rediff* case was decided in their favour and the name www.radiff.com was held to be confusingly similar to their name and forced to withdraw. Similarly Yahoo also won its case against an Indian registrant of yahooindia.com. ICICI and LIC settled their disputes out of court. Another case between an Indian registrant of www.indiainfospace.com was decided in favour of infospace.com, through an uncontested arbitration in WIPO. These could be conceptually like cyber squatting disputes.

(iii) Cyber Crimes Aganist Government

The category of cyber crimes against government mainly includes cyber terrorism.

1. Cyber Terrorism

Everyone seems to be talking about the menace of terrorism after the September 11, 2001 attack on World Trade Towers and Pentagon in USA which has been termed as the worst act of terror and, closer to home, the December 13, 2001 attack on the Indian Parliament. Just as terrorism is a stigma in the real world, it is also a bane in the cyber space. The growth of Internet has shown that the medium of cyber space is being used by individuals and groups to threaten the governments worldwide as also to terrorise the citizens of a country.

The concept of 'cyber terrorism' may be best explained by saying that it is the 'convergence of terrorism and cyberspace.' It is generally understood to mean unlawful attacks against computers, networks, and the information stored therein when done to intimidate or coerce government or its people in furtherance of political or social objectives.[21] Since the main motive behind such attacks is to paralyse the use of information crucial to government or society (for some time or permanently), hence it is also known as the 'information warfare.'

Further, information technology developments will no doubt increase the speed, scale and complexity of computer crime. And that isn't all. The next generation of cyber-criminals will certainly be even more skilled and better funded, and more of them will choose to go it alone - so tracking them down will be even harder.

20. 1999 PTC (19) 210 (Delhi).
21. Aarti Dubey, *Cyber Law and Terrorism* SOUVENIR OF THE NATIONAL CONFERENCE ON CYBER LAWS AND LEGAL EDUCATION 39 (2001).

The latest instances of cyber terrorism have, thus, become all the more hazardous as they are intended on not only to "wipe out crucial information" but also to cause acute violence against persons or property. Both attacks that lead to or threats to cause death or bodily injury, explosions, plane crashes, water contaminations, or severe economic losses would be the some instances of cyber terrorism.

This crime manifests itself into terrorism when an individual "cracks" into a government or military maintained website. Information warfare is seen by most as a war fought over computer networks where legions of hackers are looking for weak spots in the enemy's computer system and trying to bombard them with hordes of viruses, worms, logic bombs and trojan horses. The cyber terrorist may be a personal rebel who may plant virus to attack unknown destinations. He may plant a mail bomb which keeps sending and resending worthless mails, clogging and crashing systems over a network.

Information warfare is also perceived as psychological manipulation through the media. The whole idea is to effect the pshychology of government and people by creating an element of "fear" in their mind.

The recent virus attacks have led the US Federal Agencies to believe that there are a number of underground hacking groups operating in the Third World countries who are thriving on international virus propagation and subversive hacking activity.

Countries like India have seen organized attacks on the website of the countrymen by the enemies of the physical country. The Internet with its worldwide connectivity is an ideal medium for an information or rather disinformation campaign, e.g. Kashmir-related propaganda by Pakistan. Sometimes the freedom of speech is also misused to run rogue sites that carry messages aimed at hurting the sentiments of sections of the society or affecting the sovereignty and integrity of a country. The Governments have in turn reacted with cyber patrolling and censorship, which has been decried as privacy invasion.

The handling of such anti-social elements on the net is a challenge before the governments across the globe. To handle such high-tech crimes, the enforcement authorities in each country are creating special cells with appropriate skills. Besides the Cyber Police, countries are creating a network of Cyber Informers who help them patrol the cyber space.[22] Some countries have also come up with 'Computer Emergency

22. For further details, see Vishal Verma, *Net Police and Cyber Lawyer Will Soon Be Here* THE TRIBUNE, December 11, 2000.

Response Teams' that provide technological support to the community to fight cyber crimes. However in the future, it may be necessary for governments to create a 'Cyber Army' to protect and counter attack organized gangs of terrorists who attack the cyber space belonging to citizens of a country.

India has taken various meaningful steps in this direction. For instance, hacking of the Bhabha Atomic Research Center (BARC) and other similar incidents had prompted the National Association of Software and Service Companies (NASSCOM) to set up the country's first anti-hacker Organisation called the 'National Cyber Cop Committee' consisting of senior policemen, government officials, young experts apt in the art of hacking and representatives of NASSCOM.[23]

It is also worthwhile to mention here that India's first police station to exclusively handle cyber crimes such as computer hacking, data damage and Internet fraud has also started working in Bangalore since September 2000. Similar initiatives are also underway in other states of India as well.

IV. Reasons Behind the Increase in Cyber Crimes

The topic of cyber crime leads us to a very crucial question as to what are the reasons behind the commission and frequency of such crimes. As a matter of fact, there are a variety of factors behind this increase. Some of them are discussed below.

A. Anonymous Nature of the Internet

Internet enables transactions between people who do not know, and in many cases cannot know each others' physical location. Thus, Internet is anonymous in nature and this is perhaps the main reason that it is possible to engage into a variety of criminal activities. As a result, people with criminal bent of mind have been using this aspect of the Internet to perpetuate criminal activities in cyber space.

The field of cyber crime is just emerging and new forms of criminal activities in cyber space are coming to the forefront with the passing of each new day.

B. Global Spread of Internet

The transnational expansion of large scale computer networks and the ability to manipulate content including images from remote login and

23. For further details, see The Tribune, June 16, 2000.

access to systems through regular telephone lines increases the vulnerability of these systems and the opportunity for misuse or criminal activity. The potential extent of computer crime is as broad as the extent of the international communication system. The consequence of computer crime may, therefore, have serious economic impact on social as well as human fabric of the society.

C. Lack of Effective Laws Relating to Cyber Space

Laws, criminal justice systems and international cooperation have not been able to keep pace with technological advancements. Only a few countries have drafted laws to address the problem. However, none of the countries has resolved all the issues concerning legal, enforcement and prevention of problems arising out of technological changes.

D. Unclear Issues of Jurisdiction

Jurisdiction is the competence of a court to hear and determine a case. It requres determination of whether a claim (in case of subject matter jurisdiction) or person (in case of personal jurisdiction) is subject to the court in which the case is filed. The territorial rules of determining jurisdiction do not apply in cyber space. The Internet's decentralised nature makes it likely that any given Internet transaction will involve parties from more than one jurisdiction. Thus a general consensus on the issue of jurisdiction among countries is difficult to arrive, as it might amount to surrendering some amount of sovereignty of a country.

It is a well-established principle of international law that control over physical space and people is an attribute of sovereignty and statehood. However, cyberspace challenges this assumption. Cyberspace is a borderless environment. It has no territory-based boundaries. The Internet address has no relation to the physical location of computers and individuals accessing them thus render geographical borders of nations meaningless. The geographical boundaries of nations and the electronic frontiers do not have any co-relationship. Since nations assert authority on the basis of territorial nexus over individuals, events and happenings occurring within its jurisdiction, when territorial borders lose their meaning, the main question that arises is: on what basis states can exercise jurisdiction in cyberspace over persons who may not be within its territory or over events and transactions, which have no meaningful nexus with the state seeking to exercise jurisdiction?[24]

24. For further details, see *Cyber Frontiers and the Path of Law* The Hindu, July 4, 2000.

E. Lack of International Consensus for Regulation of Cyber Crimes

Internet crimes are likely to continue to proliferate as territorial regulations are insufficient to counter them in the absence of a general agreement among nations on the issue of jurisdiction. Computer crime is a new form of transnational crime and its effective addressing obviously requires concerted international cooperation. And this can only happen if there is a common framework for understanding what the problem is and what solution there may be.

F. Lack of International Harmonisation

Also the need of the hour is to bring about international harmonisation, that is, to ensure that legal protection from computer crimes is synchronised globally. Over recent years, such attempts have been made through international organisations to create a "global machinery" to fight against the terror of cyber crimes. In this connection, it may be appropriate to mention that the members of the Council of Europe have signed the first ever International Cyber Crime Convention, an international treaty designed to harmonise laws against crimes committed via Internet on 23 November 2001 at Budhapest (Hungary). Its main aim, as set out in the Preamble, is to pursue "a common criminal policy aimed at the protection of society against cybercrime, *inter alia* by adopting appropriate legislation and fostering international co-operation."[25] The Convention represents an initial legal response to the menace of cyber crime; which is increasingly affecting the security of the citizens of the world.

G. Technological Developments

Computer crime is also facilitated by the tools provided by the computers, printers, modems, scanners, the Internet, the web and the programming tools that enable people to have access to money, mail and thoughts of others stored in the computer. The incidents of computer crime have increased considerably in the last ten years because the tools of committing computer crimes have become more and more technologically advanced with time.

Nowadays, it is possible to change or erase computer data with minimum chances of detection, like in case of virus or logic bomb.

25. Available at http://press.coe.int/cp/2001/875a (2001).htm, *30 States Sign the Convention on Cyber Crime at the Opening Ceremony*, 23 October 2001 (visited on 15 December 2001).

Anybody can easily modify the files and then cover the evidence of the offence thus committed. Data can be duplicated on floppies/tapes without any audit trails. By wire tapping, the computer can be intercepted or false commands may be generated to change the data and the files. Cases have been reported where electromagnetic radiations emitted by the computer have been intercepted to capture the data, delete or manipulate the program files without physically logging on to the system. Moreover, all hardware is susceptible to failure through aging, physical diameter and environmental change. These factors result in a problem of reliability, environmental dependency and vulnerability to interference and interception.[26]

Needless to say that within the next decade or so, it will be necessary for all developing nations to enact cyber legislation to cope with the numerous challenges thrown by the rapid technological advancements in the post-globalised world.

V. Worldwide Impact of Cyber Crimes

A. The Global Scenario

There is a great concern world over regarding various types of crimes being committed through computers and the Internet. Almost everyday there is an international story about some or the other portal that has been attacked, credit card fraud, or some virus bringing down the system. Business is the prime target — but public authorities and even individuals are vulnerable too.

It has generally been acknowledged by the experts that there is hardly any computer in the world that is hacking proof. The most mentionable of these cases was the 'denial of service' of giants like Yahoo.Com, Buy.Com, Amazon.Com, eBay, the shutting down of the website of World Trade Organisation, 'stealing' of www.web.net and www.bali.com, the infamous losses caused by the 'I Love You' virus and 'Melisa' virus, among others.

A survey of US business firms showed that 85% of those covered had at some time been targeted by hackers. In Great Britain, a report by the Communications Management Association (CMA) states that a third of the country's major businesses and public authorities have been hit. In the US, the Pentagon's systems alone were attacked more than 22000 times—

26. *Supra* n. 17.

in one year. And the FBI has identified 5000 systems as being "highly vulnerable" to cyber-crime, which has — according to Ronald L. Dick, the FBI's new director — the capacity "to destabilise a country's whole economy".[27]

Gauging the economic impact of cyber-crime is complicated by the fact that reported offences are merely the tip of the iceberg. Several studies carried out in Europe and the US suggest that only a third of the victims call in the police. Credit card fraud is thought to cost some 400 million dollars every year — and virus attacks some 12 billion. Finally, profits lost by firms whose patents and trademarks are stolen reportedly amount to 250 billion dollars every year, or nearly 5% of world trade.[28]

B. The Indian Scenario

Computer crimes had not emerged as a major problem area for the law enforcement agencies in India until recent past. The main reason for low incidence of computer-related crimes in India was that computerisation of banks and other financial institutions were still in early stages. Further, the networking of computers had not yet taken place in any big way in the sensitive sectors which could be vulnerable to theft and alteration of data. But as the process of computerisation has now picked up significant increase in computer crime is expected in the near future.[29]

Cyber crime has now become a reality in India. Difficult to detect, seldom repeated and even more difficult to prove, computer-related crime lacks a traditional paper audit trail, is away from conventional policing and requires specialists with a sound understanding of computer technology. Furthermore with the country poised to enter the information superhighway-over three million computers in place — and industry and banks networked, the realisation of the dangers and threats is finally sinking in.[30]

The major areas of concern, which are highly vulnerable to the threat of computer crimes, include critical infrastructures like banks and other financial institutions, telecommunications, airlines, railways, power sector

27. Available at : http://www.coe.int./T/E/Communication and Research/Press/Themes Files / Cybercrime / e_cybercrime.asp., *Cyber Crime — The Target It Hits, The Damage it Does* (visited on 15 December 2001).
28. *Ibid.*
29. Balwinder Singh, *Cyber Crime — A New Challenge for the Police* CBI BULLETIN, 35 (February 2000).
30. Krishna Kumar, CYBER LAWS - INTELLECTUAL PROPERTY AND E-COMMERCE SECURITY 295 (2001).

and other crucial departments of both the Government of India and numerous states etc.

As regards incidents of computer crimes in India, a few examples would give an idea about the nature of cases which have occurred so far.

(i) In New Delhi Municipal Corporation, a private agency entrusted with the responsibility of preparing and collecting electricity bills, embezzled Rs. 6.5 crore by creating duplicate set of bills showing lower receipts.

(ii) In Railway Computerised Reservation System, a few cases of false accounting by wrongly categorising upper class seasonal tickets has come to notice.

(iii) Subscribers of Videsh Sanchar Nigam Ltd.'s (VSNL) Internet service in Mumbai were pleasantly surprised on the morning of 2 March, 1999 as they received an email from Mr. Amitabh Kumar, the acting Chairman and Managing Director of VSNL, stating VSNL's aggressive price cuts. From Rs. 3,500 for 100 hour account the rates had been slashed to Rs. 1,800 for 100 hours and for 500 hour account the rates were down from Rs. 10,000 to Rs. 6,500. However the e-mail turned out to be nothing but the first instance of a system break-in at VSNL that hurt its pride.

(iv) Indian Airlines was defrauded of several lakh rupees when open-ended tickets for shorter sectors were issued in fictitious names by some staff members. Computer records were tampered with to show longer sectors and refunds obtained.

(v) In the Purulia Arms Drop case, the main players used the Internet extensively for international communications, planning and logistics.

(vi) Post-Pokhran, hackers gained access to the Bhabha Atomic Research Centre computer system and pulled out vital data. It was like a bolt from the blue. Scientists at the Bhabha Atomic Research Centre (BARC) got the shock of their lives when they found rude anti-nuclear messages splashed across their computer screens. Someone had breached the centre's advanced security system and stolen sensitive mail. The hackers were later traced to be based in New Zealand.

(vii) Computer professionals who prepared the software in an MBBS examination were found responsible for altering data by manipulating the computer's corrector reader. They had been giving an upward revision of scores to students in return for a hefty fee.[31]

31. *Ibid.*

(viii) The websites of the Indian Parliament, Zee TV, Punjab Police etc. have also been broken into by anti-India hackers at one time or the other.

(ix) Pakistan's disinformation campaign on Kashmir has been highly active and a number of Kashmir-related websites, replete with radical fundamentalist ideas are doing the rounds of the World Wide Web.[32]

Above mentioned are some of the instances which indicate the vulnerability even of the most sophisticated computer networks to hacking and cracking. These instances also amply demonstrate the ability and reach of cyber criminals and hackers to manipulate the systems and walk away freely from the long arm of the law. Hence there is a pressing need for stringent cyber laws to deal with problem of such magnitude and dimension. It is right time that we wake up from our slumber and take positive action against the growing challenge of cyber crime.

VI. Need for Cyber Laws

The spread of Internet has brought forth a number of legal issues which cannot be handled by the criminal law designed to deal with the physical world. Some of the vital questions that arise are e.g. can the traditional criminal law designed to deal with the physical world be applied to offences committed in the virtual one? Can the Internet remain an area where no law applies, a space where freedom is absolute? It is now clear that the virtual impunity from which criminal conduct in cyberspace has seemed to benefit hitherto could no longer continue, at risk of jeopardising both the future and the potential of computerised networks, and particularly of the Internet at the risk of leaving unprotected the individual rights of all Internet users in the face of attacks committed against or through the networks by certain pirates of cyber-terrorists.[33]

There is an urgent need to combat cybercrime for several reasons. Firstly, because the world has become a global information society which no longer has any borders for either legitimate activities or offenders; secondly, because all information has become accessible — legally or

32. For further details, see Prashant Bakshi, *And Now Cyber Rogues* The Tribune, July 23, 2000.

33. Guy De Vel, *The Cyber Crime Convention : A Pioneering Effort of Wide Legal Scope*, opening address at the Conference on Cyber Crime, Budapest, 22-23 November, 2001, available at http://www.coe.int/T/E/Communication and Research / Press / Themes Files / Cybercrime / e Discours De Vel Nov 2001. asp. (visited on 15 December 2001).

illegally — to all users, without impediment, from anywhere in the world; thirdly, because the networks carry within them the promise of a new age of "online trade", the value of which will soon go beyond hundreds of billions of dollars.[34]

However, this virtual world full of promise is under threat from a new kind of crime. Computer networks now make it possible to distribute at phenomenal speed and to an unlimited number of users unlawful content, such as child pornography, computer viruses, or even the encoded orders of terrorist organisations. Through these networks, confidential information is spied upon and stolen, information which is often of great economic value, or governments' and private companies' computer systems are attacked from far-off by people who are completely anonymous, causing a very significant degree of damage.[35]

Not all of this is done by the young computer whiz kids trying out their knowledge; it is frequently deliberately done by pirates, cyber-terrorists or cyber-spies who are professionals, acting for other individuals, companies or even governments, in return for payment. Consequently, the advantages offered by a worldwide information network can rapidly disappear if impunity is the only response to these criminal abuses.,

As mentioned above, nowadays Internet is also emerging as a popular medium for doing business, thus giving rise to the concept of 'electronic commerce' (popularly called as e-commerce). The activities in cyber space have influenced almost all branches of laws, like banking law, commercial law, intellectual property law and law of evidence. As we move from the paper-based society to the digital era, the need for laws to govern and regulate this society becomes imperative.

While the legal systems of different countries are grappling with the issue of developing cyber law to meet novel challenges posed by the Internet, time alone will tell whether progress made in the cyber law would be adequate to meet evolving business needs of the global community. A variety of new challenges are coming up for those who use the Internet for business purposes. Under the circumstances a new stream of law-cyber law has emerged. In simple words, cyber law is a stream which refers to legal and regulatory aspects of the Internet and the world wide web.[36]

34. *Ibid.*

35. *Ibid.*

36. A.S. Anand, *Cyber Law Needed to Meet IT Challenge* The Tribune, January 21, 2001.

It is in this background that we have to appreciate the importance of cyber laws. More than anything else, India, by its sheer numbers, as also by virtue of its extremely talented and ever growing IT population, is likely to become a very important Internet market in the future and it is important that we enact cyber laws in India to provide for a sound legal and technical framework which, in turn could be a catalyst for growth and success of the Internet revolution in India.

The Government of India has rightly responded by coming up with the first cyber law of India — The Information Technology Act 2000 which is based on the UNCITRAL Model Law recommended by the General Assembly of the United Nations by a resolution dated 30th January 1997. Its object is to give effect to the resolution of the United Nations which recommended giving favourable consideration to the said Model Law while enacting or revising their laws so that uniformity of law applicable to the alternative to the paper based methods of communication and storage of information is achieved. Its other object is to promote efficient delivery of Government services by means of reliable electronic records. The preamble to this Act gives a very clean picture in this regard. It says:

> An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act 1872, the Banker's Book Evidence Act, 1891 and the Reserve Bank of India Act 1934 and for matters connected therewith or incidental thereto.[37]

In essence, the Indian Information Technology Act 2000 gives legal recognition to electronic records by granting legal validity to information stored in the form of an electronic form.

VII. Cyber Crime and Legal Regime

Today, cyber law is at an early stage of its development. Though Internet access is growing rapidly throughout the world, yet a majority of countries are debating on whether or not to legislate regarding regulating cyber space within their national territorial boundaries. Even amongst the

37. The Information Technology Act 2000.

different nations, there is a diversion of opinion on the issue of how much to legislate in the field of cyber laws. While some countries like Malaysia believe in the philosophy of legislating on every conceivable issue of cyber space. Others are in favour of a more balanced approach of "crossing the bridge when it comes" and legislating cyber laws only where and when necessary.[38]

A. Cyber Crime Legislation Worldwide

To meet the challenge posed by new kinds of crime made possible by computer technology including telecommunication, many of the countries largely industrialised and some of those which are moving towards industrialisation, have in the past ten years reviewed their respective domestic criminal laws from the point of adaptation, further development and supplementation so as to prevent computer related crime. A number of countries have already introduced more or less extensive amendments by adding new statutes in their substantive criminal law. These are Australia, Austria, Canada, Denmark, Finland, France, Germany, Greece, India, Italy, Japan, Sweden, Switzerland, Turkey, and USA. United States has made numerous amendments to the law of federal and constituent level. Countries like Malaysia, Portugal, Singapore, Spain, and UK have made isolated supplements by enacting new Acts to prevent computer-related crinies.[39]

The salient features of the legislations enacted by different countries are briefly summarised below:

Australia has covered offences related to computers in the Australian Crimes Act. The offences covered are: (a) unlawful access to data in computers; and (b) damaging data in computer etc. The penalty for the former is imprisonment upto 6 months to 3 years while for the latter imprisonment is upto 10 years.

Canada on the other hand has covered three computer crimes, namely: (a) possession of device to obtain unauthorised telephone facilities; (b) unauthorised access to computer; and (c) committing mischief with data. The imprisonment varies from upto 2 years to 10 years depending upon the crime.

Germany has classified the following computer crimes as offences: (a) data spying; (b) computer fraud; (c) forgery of prohibitive data;

38. Pavan Duggal, *Cyber Law — An Overview*, available at http://www.cyberlawindia.com. (visited on 31 August 2001).
39. *Supra* n. 17.

(d) alteration of data; and (e) computer sabotage. The punishment ranges from 2 years to 5 years depending upon the nature of crime.

Japan while amending its penal code has classified following activities as computer crimes: (a) false entry in an authentic deed; (b) false entry in permit licence or passport; (c) electronic record made wrongfully; (d) electronic record made wrongfully by public servant; (e) interferences with business by destruction or damage of computer; (f) interferences with computer; (g) destruction of public document; and (h) destruction of private document.

Singapore in its Computer Misuse Act 1993 has classified the following activities as computer crime: (a) unauthorised access to computer material; (b) unauthorised access with intent to commit or facilitate commission of further offences; (c) unauthorised modification of computer material; and (d) unauthorized use and interception of computer services. The punishment ranges from imprisonment up to 2-5 years with fine up to Singapore $ 2,000-20,000.

United Kingdom in the Computer Misuse Act 1990 has included (a) unauthorised access to computer material; and (b) unauthorised access with intent to commit or facilitate commission of further offences as the computer crimes. The punishment is imprisonment from 6 months to 5 years with fine.

United States has created a formidable legal framework to deal with the peril of computer crimes. Following are some of the top Internet-related laws that have been framed for this purpose: The Federal Fraud and Abuse Act 1986; The Computer Misuse Act 1991; The Data Collection Improvement Act 1996; The Digital Signature Legislation 1996; The Electronic Fund Transfer Act (EFT) 1996; The Federal Trade Marks Dilation Act 1996; The Intellectual Property Protection Act 1996; The National Information Infrastructure Protection Act 1996; The Telecommunications Act 1996; The Electronic Communications Privacy Act 1997; The Electronic Theft Act 1997; The Child Online Protection Act 1998; The Digital Millennium Copyright Act 1998; The Internet Tax Freedom Act 1998; The U.S. Trademark Cyberpiracy Prevention Act 1999; The Electronic Signatures in Global and National Commerce Act (E-Sign) 2000; The Uniform Computer Information Transactions Act (UCITA) 2000; and The Children's Internet Protection Act 2001.

These Acts classified computer crimes as: (a) wilful unauthorised access of computer related to national defence or foreign relation; (b) intentional access of computer without authorisation to obtain financial

information; (c) unauthorised access of computer of a government department or agency; (d) unauthorised access of computer of federal interest with intent to defraud; (e) knowingly causing transmission of data/program to damage a computer network, data or program or withhold or deny use of computer, network etc.; (f) knowingly causing transmission of data/program with risk that transmission will damage a computer network, data or program or withhold or deny use of computer, network etc.; and (g) unauthorised access of computer with intent to defraud.[40]

B. Indian Legal Regime on Cyber Crimes

The Indian legal regime on cyber crimes is created by the Information Technology Act 2000. This Act, passed with the objective of promoting a secure electronic environment, deals with issues subsidiary to this electronic environment such as contraventions relating to electronic transactions and information technology offences. It also seeks to set up various authorities to help regulate an information technology regime. Moreover, it also amends the Indian Penal Code 1860 and the Indian Evidence Act 1872 in the light of the electronic transactions.

This enactment deals with civil wrongs in chapter IX providing for liability to pay damages by way of compensation for wrong doings against the computers and wrong doings by means of computers. Computer crimes have been dealt with in chapter XI in this enactment. Tampering with computer documents, hacking of computer systems, publication of obscene information in electronic form, breach of confidentiality and privacy, misrepresentation and suppression of material before the controller or certifying authorities and publication of digital signature certificates without such certificate having been issued by the authority or accepted by the person and use of digital signature certificates for a fraudulent purpose, have been declared to be offences under the Act.

Section 75 of the Act gives it extra-territorial operation by making it applicable to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

A police officer not below the rank of Deputy Superintendent of Police or any other officer of the Central or State Government duly authorized have been empowered to enter any public place for the purpose of search, seizure and arrest without a warrant. Section 81 gives the

40. *Supra* n. 5 at 105-06.

Act overriding effect.

This enactment has to keep itself abreast with legal and technological complexities, which are bound to arise, and its shortcomings removed. The extra territorial operation of the enactment in relation to contraventions and offences in this Act could become meaningful only when backed with provisions recognizing orders and warrants for information issued by competent authorities outside their jurisdictions and measures for co-operation for exchange of material and evidence of computer crimes between law enforcement agencies.

VIII. Cyber Crime as A Challenge Facing the International Community

Cyber crime is one such kind of crime where different societies are likely to rule differently. As a result what may be a crime within the jurisdiction of one country may not be so in the jurisdiction of another. This would, very obviously, create unique problems in the enforcement of law. Since electronic crimes can simultaneously be committed across borders, questions of national sovereignty are also the important issues to be taken into consideration. Today's computer networks have removed barriers for the cyber criminals. Police officials, investigators, prosecutors and judges alike are struggling hard to catch up with the emerging situation. In some cases, countries are requesting for the extradition of computer hackers who have never even physically entered the country whose laws they have allegedly broken. Law enforcement officials are contending with new computer-based evidence that must convince a court of the authenticity and show that it has not been electronically altered. Internet communications, as a matter of fact, can easily be routed through many different jurisdictions, thus making tracing of the cyber rogues indeed very difficult. Electronic evidence or proceeds from electronic transactions can easily be moved to locations where a lack of effective laws or technical expertise puts them beyond the legal recourse. Data can be encrypted to make it difficult for law enforcement agencies to read. The spread of networks in the developing world is proceeding at a slower pace. Many developing countries are caught in between the need to go "on line" to spur economic development and the desire to prevent cyber crime. The lack of a legal frameworks creates greater opportunities for offenders to commit economic crimes beyond their home countries.[41]

41. See *Transnational Computer Crimes : The Crimes of Tomorrow are on our Doorsteps*, available at http://www.undcp.org/paler.mo/cybercrime.htm. (visited on 22 October 2001).

Addressing all these problems will require a concerted effort from national governments and the international community as a whole. The need for universality and for a forum in which all countries can participate in drawing up policies, legal reforms and technical solutions suggests that international organisations like the United Nations and its subsidiary agencies will be called upon to play an important role in this arena, too.

It may be appropriate to mention here that one of the most important developments in the field of cyber law in the year 2001 relates to cyber crimes, 11 September attacks on the World Trade Center, and the consequent signing of the International Cyber Crime Treaty. Since the beginning of the Internet, cyber crime has emerged as a major source of concern for governments across the world. The absence of any international law on cyber crime further complicated matters with different countries assuming distinct national approaches for controlling, regulating and preventing cyber crime.

As a matter of fact, the September 11th attack saw the turning point in the history of the World Wide Web and the Internet. The attacks on World Trade Center's Twin Towers were an example as to how terrorist acts had been discretely conceived, meticulously planned and perfectly committed using the means of Internet. That singular instance of September 11th changed the way we use the Internet and the way Internet is going to be regulated.

The scenario emerging post-September 11th 2001 saw the adoption of the International Cyber Crime Treaty on 23 November 2001 in Budhapest, Hungary. The Treaty deals in particular with offences related to infringements of copyright, computer-related fraud, child pornography and offences connected with network security. It also covers a series of procedural powers such as searches of and interception of material on computer networks. This international treaty, being a baby of the European Union, was adopted after 29 drafts and more than 4 years of intensive work. Thirty members of the European Union apart from the Canada, Japan, South Africa and the United States have already signed the International Cyber Crime Treaty.

Its main aim, as set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, *inter alia* by adopting appropriate legislation and fostering international co-operation. It will have an Additional Protocol making it a criminal offence to disseminate racist or xenophobic propaganda via computer networks. The drafting of this Additional Protocol was to begin in December 2001.

The International Cyber Crime Treaty promises to become the first international benchmark for controlling and regulating cyber crime and for ensure cooperation amongst different signatory nations for exchanging information concerning cyber crime and cyber criminals. The International Cyber Crime Treaty is yet to come into implementation. However, almost single handedly the Treaty promises to fill up the void about the need for having an international regulatory mechanism for controlling cyber crime that has existed since the beginning of Internet.

The International Cyber Crime Treaty also becomes the first international treaty to be in place for any issue concerning cyber laws. The treaty may not be perfect, and no treaty is perfect. However, it does give a very strong starting point for international efforts to regulate and control cyber crime. The Treaty also promises to possibly change the way cyber crime would be investigated, regulated and punished on a global scenario, in the context of increasing cooperation and exchange of information between signatory member countries on the issue of regulating cyber crime.[42]

The strategy for combating computer crime would have to incorporate investigative powers which could be used to obtain evidence from anywhere on a computer network-regardless of national jurisdiction — more quickly than offenders can either move or erase evidence. At the same time there should be national and international requirements for the protection of privacy, freedom of expression and other basic human rights. This will be particularly difficult because at present the most effective human rights protections in criminal cases are codified in national laws and constitutions and enforced by national courts ill-equipped to deal with transnational cases.

Perhaps the greatest challenge to developing an effective global strategy will be to train skilled investigators and prosecutors and keep them up to date on the latest technological developments relating to cyber crimes. This effort strains even wealthy and technically advanced countries, and expertise will be needed to avoid legal loopholes which electronic offenders can exploit. In the ultimate analysis, our goal should be to ensure that everyone can participate in the electronic community without the fear of being victimised.

42. Pavan Duggal, *Cyberlaw 2001 : Two Dramatic Developments* available at http://www.zdnet.com. (visited on 15 January 2002).

IX. Conclusion

The benefits of electronic revolution have reached in each and every nation of the world, but most nations do not, however, have got separate domestic law to deal with the problem of cyber crimes. Nor are there any mutual agreements and treaties between the nations except the aforesaid. The absence of all these have made countries vulnerable to the threats of cyber crimes. Therefore, there is no denying the fact that an international agreement on the ways and means of dealing with cyber crime is urgently required to address the problem in a holistic manner. Cyber crimes are the 'crimes against humanity', 'crimes against development' and above all 'crimes against civilisation'. To sum up, it can be stated that as the contemporary world is basking in the achievements in the field of communications and information technology it has become highly imperative to check the emergence and growing menace of cyber crime.

EMERGING RIGHT TO COMPENSATION IN INDIAN ENVIRONMENTAL LAW

*Vinod Shankar Mishra**

I. INTRODUCTION

In India, the concept of compensation for environmental pollution goes as far back as 1857, when an attempt was made to regulate the pollution produced by the Oriental Gas Company by imposing fines on the company and giving a right to compensation against the company for fouling water.[1] In India, the civil courts played a limited role to combat pollution and offered no relief for violation of enviro-legal right. In personal injury cases, the Courts hardly awarded compensation for non-pecuniary loss. However the Courts made awards for pain and suffering or loss for amenities of life but the compensation awarded was notoriously low.[2] However, there was an exception when a substantial sum was awarded as a compensation against a persistent industrial polluter in Calcutta where the Calcutta High Court awarded damages of rupees one thousand.[3] Of late, In *Bhopal Mass Disaster case* the civil court awarded compensation to victims of industrial mass disaster.[4] Thus a claim or action for compensation[5] is result of harm which has been caused to an

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1. Ss. 15-17, ORIENTAL GAS COMPANY ACT 1857 as referred to in A. Rosencranz, S. Divan and M.L. Noble, ENVIRONMENTAL LAW AND POLICY IN INDIA : CASES, MATERIALS AND STATUTES 37 (1992).
2. *Id.* at 78.
3. *J.C. Galstaun* v. *Dunia Lal Seal* 9 CWN 612 (1905).
4. The District Court of Bhopal on 17th December, 1987 ordered that the defendant Union Carbide Corporation would deposit in that Court a sum of Rupees three thousand five hundred million for payment of substantial interim compensation and welfare measure. *Union Carbide Corporation* v. *Union of India* AIR 1988 NOC (50) M.P.
5. In *Monogahela Navigation Company* v. *U.S.* (1892) 149 U.S. 312. It was stated that "The noun-compensation standing by itself carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages as distinguished from punitive or exemplary damage, the former being the equivalent for the injury done and the latter by way of punishment". (*Id.* at 326).
   It is necessary to make apparent distinction between the words compensation and damages. While the former is used by Indian Courts to denote the monetary redress and it is a public law remedy, damages is its equivalent in western world. Therefore, a reference to these term means one and the same.

individual by a private person or public authorities through their acts, omissions and commissions.

The basic question regarding the existing rule of civil law sanctions and particularly, the rule on civil liability, is whether existing rules on civil liability and compensation provide an effective remedy to an individual in case of environmental pollution? S. Ercman has a very convincing and lucid explanation.[6]

> The procedural shortcomings renders the system inefficient e.g., the need to prove fault under the fault liability system, the potential difficulty of proving a casual link between the activity and damage, the difficulty of identifying tortfeasor and the problem of multiple polluter and multiple victims. Moreover, the environmental damage affects the socially weak, who are often reluctant to initiate action against the economically powerful polluter, for that reason, environmental action under the civil law have been comparatively rare.

II. THE INDIAN APPROACH AND PRACTICE

A. General Development

Article 32 (1) of the Indian Constitution provides for the right to move to the Supreme Court by appropriate proceedings for the enforcement of fundamental rights. The Supreme Court under Article 32 (1) is free to devise any procedure for the enforcement of fundamental right and it has also the power to issue any process necessary in a given case.[7] Generally, the Constitutional Courts are not willing to entertain claim for damages under the writ jurisdiction because it involves the disputed question of fact.[8] In a trend setting judgement in *Rudal Shah* v. *State of*

6. S. Ercman, *'European Environmental Law : Legal and Economic Appraisal'* 488, 489 (1977). See also, Michael R. Anderson and Anees Ahmad, *Assessing Environmental Damage under Indian Law* in 3 LAW AND JUSTICE 141-51 (1996).
7. The Constitution, however, no where defines what are appropriate proceedings. In *Daryao Singh* v. *State of U. P.* AIR 1961 SC 196, 199 the Apex Court observed : the expression 'appropriate proceedings has reference to proceedings which may be appropriate having regard to the nature of the order or direction which the petitioner seeks to obtain from this court. This appropriateness of the proceedings would depend upon the particular writ or order which he claims, and it is in that sense that the right has been conferred on the citizen to move this court by 'appropriate proceedings".
8. This traditional view is indicated is *Jiwan Kocher* v. *Union of India* AIR 1983 SC 1107.

Bihar[9] the Apex Court devised a new remedy for awarding monetary, compensation for enforcement of fundamental rights under Article 21.[10] The decision in *Rudal Shah* was further reiterated in two other cases[11] where the Court granted compensation to the citizens whose rights had been violated by the State and; with these rulings *compensation* as a remedial measure was firmly established in India. Indian courts have been frequently awarding compensation in many cases where fundamental rights of the citizens have been infringed or violated.[12]

This missionary zeal found reflection in *SAHELI*,[13] were a writ petition was admitted by the court under Art. 32, even though it was not mentioned which of the fundamental right, if any had been violated.[14] In the instant case the Supreme Court directed the Delhi Government to pay Rs. 75000/- as compensation to the mother of a victim, a boy of 9 years who died because of beating by police officer. Thus , it may be said that Indian judiciary has made unique contribution in the field of compensatory jurisprudence by forging new remedy to compensate the poor people

9. AIR 1983 SC 1086. The petitioner in a *habeas corpus* writ petition prayed the Supreme Court to pass an appropriate order for payment of compensation for his illegal detention of 14 years.
10. The Supreme Court formulated a general guideline to award compensation to victims of state violence which included;
(i) Art. 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of the Supreme Court is limited to passing orders of release.
(ii) The violation of right guaranteed under Art. 21 can reasonably be prevented and due compliance of Art. 21 secured, is to mulct the violators in the payment of monetary compensation.
(iii) The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the power of State as shield.
(iv) The respect for rights of individual is the true bastion of democracy. Therefore the State must repair the damage done by its officer to the petitioner.
11. *Sebastin M Hongray* v. *Union of India*, AIR 1984 SC 1026 and *Bhim Singh* v. *State of J. & K.* AIR 1986 SC 494.
12. *State of Maharashtra* v. *Ravikant Patil* (1991) 2 SCC 373, *Kumari v. State of Tamil Nadu* AIR 1992 SC 2069. *Niabati Behera* v. *State of Orissa* AIR 1993 SC 1960, *Haranjet Kaur (Smt) v. Union of India* (1994) 2 SCC 1, *Miss Radha Bai* v. *Union of India* AIR 1995 SC 1476. *Bodhisattwa Gautam* v. *Subhra Chakraborty* (1996) 1 SCC 490. *D.K. Basu* v. *State of W.B.* (1997) 3 SCC 416. *PUCL* v. *Union of India* (1997) 3 SCC 433.
13. *SAHELI* v. *Commissioner of Police, Delhi* AIR 1990 SC 513.
14. It indicates the evolution of a fundamental right to compensation. See also *Rural Litigation and Entitlement Kendra* v. *State of U.P.* AIR 1985 SC 652.

against the mighty power of the State.[15] The new remedy was extended to the jurisdiction of high court[16] under Article 226. Bhagwati J. made it clear in *Bandhua Mukti Morcha* v. *Union of India*[17] that same powers must be exercised by High Courts while exercising jurisdiction under Article 226.[18] In India, High Courts have awarded monetary compensation in number of cases.[19] It is interesting to note that the courts have taken the help of the compensation awarded under the Motor Vehicle Act 1988[20], salary and also the status[21] of the victim. In these cases the competisation has ranged from Rs. 5000[22] to 10,00000 lacs.[23]

Keeping in view the aforesaid developments in the field of compensatory jurisprudence in India, an attempt is made to study environmntal law position under the following heads:

III. Who Can Claim Compensation

Under Public Liability Insurance Act 1991 (PLIA) and National Environment Tribunal Act 1995 (NETA) a victim may claim compensation for injury resulting from industrial disaster. However, the PLIA saves the right of claimant to plead for compensation under, any other law subject to deduction for awards made under the instant Act.[24] Under the NETA the claim for compensation can also be brought by legal representative of the victim.[25] The Tribunal can also initiate *suo motu* action.[26] The Tribunal has also incorporated the basic philosophy of public interest litigation, by

15. See generally, P. Leela Krishnan, *Compensation for Governmental Lawlessness* 27 Cochin University Law Review 52 (1992), K.C. Joshi, *Compensation through Writs* 30 JILI, 69 (1988) P.K., Tripathi, *Article 32 and Compensation Conundrum* (1984) 2 SCC (J) 51, S.N. Jain, *Monetary Compensation for Administrative Wrong through Article 32*, 25 JILI, 118 (1988), B.P. Diwedi, *From Shah to Saheli* 36 JILI, 99 (1994), Vikram Raghavan, *Compensation Victims of Constitutional Torts* AIR (J) 100 (1998).
16. *R. Gandhi* v. *Union of India* AIR 1989 Mad. 205.
17. AIR 1984 SC 802.
18. Awarding of compensation in appeal cases under Article 136 is another innovation *Jwala Devi* v. *Bhoop Singh* AIR 1989 SC 1441.
19. *C. Ram Konda Reddy* v. *State of A.P.* AIR 1989 All 235, *Kalawati* v. *State of H.P.* AIR 1989 HP 5, *R. Gandhi* v. *Union of India* AIR 1989 Mad. 205, *Inder Puri General Store* v. *Union of India* AIR 1992 J. & K. 11.
20. *Kalawati* v. *State of H.P.* AIR 1989 H.P. 5.
21. *Nilabati Behera* v. *State of Orissa* AIR 1993 SC 1960.
22. *Ganga Das* v. *State of Orissa*, 1993 (2) SCALE 989.
23. *Chairman Railway Board* v. *Chandrima Das* (2000) 2 SCC 465.
24. S. 4(1)(C) NETA and S. 6 PLIA.
25. *Id.* 4(1)(C).
26. *Id.* 4(2)C.

granting access to representative body or organisation, to file an application on behalf of victim. It also gives power to any representative body or organisation functioning in the field of environment or recognized by central government under all or any heads specified in the schedule to the Act to make an application for claim of compensation.[27] It means that central government has unfettered discretionary power to recognise or derecognise organisation to be entitled to make an application for compensation. It is submitted that this requirement would discourage the take person to move the tribunal to protect their private interest. The Act also makes provisions for claims of compensation by the central or state government or local authority under all or any of heads specified in the schedule.

The evolution of public interest litigation has liberalised the doctrine of *locus standi* in India. It allows, a publicly conscious individual to file a suit under extraordinary writ jurisdiction of the High Court and the Supreme Court. It has been extended to embrace all interest of public minded citizen and organizations or associations. Since 1985, public interest litigation has played a important role in majority of environmental pollution cases and it has significantly contributed to the development of the law relating to environmental compensation.

The Indian judiciary has concretized the right to live in clean environment through bold and innovative interpretation of Article 21. The *Maneka* wave has opened doors for neo-fundamental rights and in this dynamism, developed the right to get compensation against environmental pollution.

In the *M.C. Mehta Case*,[28] the Apex Court took the stand that apart from issuing directions, it could forge new remedies and fashion new strategies designed to enforce the fundamental right under Article 32. The court pointed out that a contrary position would robe article 32 of all the efficacy and render it impotent and futile.[29] Emphasizing its role under Article 32, the Supreme Court made it is clear that it could award compensation in writ petition itself. The Court further pointed out, "we can not adopt a hyper technical approach which would defeat the end of justice".[30]

27. *Id.* S. 4 (1)(e).
28. AIR 1987 S.C. 1086.
29. *Id.* at 1091.
30. *Id.* at 1089.

The Supreme Court put emphasis on the word appropriate cases. It observed:

> We are deliberately using the words in appropriate cases because we must make it clear that it is not in every case where there is breach of fundamental right committed by the violator that compensation would be awarded by the Court in a petition under Article 32.[31]

The Court left the question open as to what are the appropriate cases. However, the compensation cases referred[32] to above give a clear indication that it should affect a large number of persons and, in particular, the poor. Rajeev Dhavan says that what seems to be emerging as a general theory that 'damages' may be awarded in "appropriate cases" where[33] fundamental rights are affected or there has been breach of statutory duty, the government action has been found to be ultra-vires (but not necessarily malafide), or where the citizen has been adversely affected. He has further pointed out that all this is sought to be done not by way of an ordinary civil suit in an action by way of alleging a constitutional tort but fundamental right and public interest petition determined by a summary procedure before the Supreme Court and High Courts.[34]

However, in *Oleum Gas Leak case*[35], the court directed the Delhi Legal Aid and Advice Board to take up the cases of all those who had suffered on account of gas leakage and to file action on their behalf in the appropriate court for compensation. It is interesting to note that the court could not award compensation to victims under its writ jurisdiction as it failed to decide whether Shriram, the polluting industry, was 'a State' within the meaning of Article 12 of the Constitutons.[36]

IV. Rights of Unborn to Claim Compensation

The rights of unborn to claim compensation has been recognized in western countries. In this connection, the report of Law Commission of U.K. is worth quoting which states that liability already exist under common law. In India the unborn's right to compensation got judicial

31 *Supra* n. 29.
32. *Supra* n. 12.
33. Rajiv Dhavan, *Promises Human Rights in India* 39 JILI 149, 184 (1997).
34. *Id.* at 184.
35. AIR 1987 SC 1086.
36. *Id.* at 1099. See also, *M.C. Mehta* v. *Kamal Nath* (2000) 6 SCC 213, 224.

cognizance for the first time in the Bhopal Settlement case.[37] It is interesting to note that Union of India invoked doctrine of *parens patriae* for future generation of victims before American Judge Keenan. The Apex Court while reviewing the settlement arrived in *Bhopal Mass Disaster* case suggested that a medical group insurance cover could be taken from the General Insurance Corporation of India or the Life Insurance Corporation of India for compensation to this contingent class of possible prospective victims. The apex court emphasized that 'there shall be no individual upper monetary limit for the insurance liability.

It is humbly submitted that Indian Parliament should enact a law which would equip the unborn with a right to compensation for pre-natal injuries.

V. Who Shall Pay Compensation

Under the PLIA and NETA, no distinction has been made between public sector and private sector or between an individual or a government official. National as well as multinational are equally liable. Any person who has control of any hazardous substance is liable to pay compensation under the Act.

It is gratifying to note that Parliament in order to implement the provision of the PLIA in letter and spirit amended the Act in 1992 and provided for the establishment of an Environment Relief Fund. Under the amended provisions, owner shall contribute an amount equal to the premium money. Initially this amount will be deposited with the insurer who shall remit the money to the appropriate authorities within a prescribed period. The collector shall arrange to pay from the fund to the affected persons.

The PLIA in order to compensate victims to a reasonable extent, requires that even after the payment from the insurer and the Environment Relief Fund, if the victims are not adequately compensated, the remaining liability shall shift on the owner of hazardous industries. This provision, it is submitted intends to compensate the victim in a true sense.

Section 3(3) of the NETA provides the apportionment of compensation on those who are responsible for the pollution on the equitable basis. Although the quantification of compensation has not been clearly specified, it is expected that a proper application of this provision would ensure a fair deal to every section of the society.

37. AIR 1990 SC 273, See also, C.M. Jariwala, *Complex Enviro-Techno Scientific Issue: The Judicial Direction* 42 JILI 37-39 (2000).
38. S. 7A of PLIA.

Coming to the case of industrial disasters, the *Bhopal Settlement case*[39] is a classic example, the Bhopal District Court passed an order against the Union Carbide Corporation for depositing Rs. 350 crore as interim compensation.[40] On appeal the Madhya Pradesh High Court[41] reduced the compensation to Rs. 250 crore. When the matters ultimately came up before the Supreme Court, it passed a final order of settlement comprising all the claims civil and criminal and quantified the amount to 470 million U.S. dollars.[42] This settlement order of 470 million U.S. dollars was again challenged before the Constitutional Bench of Supreme Court on October 3, 1991[43] which unanimously upheld the settlement and directed the Central Government to make good deficiency if the settlement fund was found insufficient. Thus the apex court used its good offices to compel the polluter to provide relief to victims of industrial disaster.

It has been said that judge made law of environmental protection in India recognizes international law principles which tend to be treated in a more circumspect manner in other common law jurisdiction.[44] Indian judiciary has incorporated the polluter pays principle, the precautionary principle and the principle of sustainable development into the domestic law and applied in deciding the claim for compensation.

The Apex Court first introduced the polluter pays principle in the *Bichari Village ('H'acid)* case[45], invoking Article 130(2) of European Community Treaty and text of European Community Fourth Action Programme on the Environment. The Apex Court read the principle into provisions of environmental statutes, thus requiring the central government to issue order against factories producing highly acidic waste. The immediate significance of this decision was that it shifted the cost of remediation from the government to polluting industries. The principle was linked to Indianized principle of absolute liability. In the subsequent

39. AIR 1990 SC 273.
For interesting literature on the Bhopal case, see generally, Upendra Baxi, Inconvenient Forum and Convenient Catastrophe, The Bhopal Case (1986); Upendra Baxi and Thomas Paul, Mass Disaster and Multinational Liability (1986); Upendra Baxi, *et. al.* Valiant Victims and Lethal Litigation : The Bhopal case (1990).
40. *Supra* n. 4.
41. *Ibid.*
42. *Supra* n. 39.
43. AIR 1992 SC 298.
44. *Infra* n. 47.
45. AIR 1996 SC 1446.

'Vellore Citizen Welfare Forum' case[46], the court affirmed this principle as an incorporated rule of customary international law. The court also affirmed the principle by requiring the polluter to pay compensation to injured parties as well as to cover the cost of remediation of damaged environment. It has been pointed out that this view of principle goes well beyond the formulation which are found in international instruments, which generally confine the liability of polluter to lower standard.[47] Moreover, it is strange that an Indian court could seek guidance from a regional treaty to which India was not a party.

The apex court has applied the polluter pays principle in number of cases to defray the cost of remedial measures for damage done to environment. In *S. Jagannath* case,[48] the court ordered to close down all aqua/shrimp culture industries within the CRZ notification areas and pay compensation to reverse the damage done to environment. It may be said that the apex court has activised itself to contain the damage done to environment. In this process, it has invoked principles of international customary laws to fix the accountability on the ecosider and compelled him to pay the cost of remedial measures.

It is interesting to note that the apex court through Justice Kuldip Singh in *Kamal Nath* case[49], ordered for compensation against the private companies without any caveat, for the damage done to environment and did not refer to the scope of jurisdiction under Article 32 (2). However, the court in subsequent order modified its earlier order and pointed out that in addition to damages, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as deterrent for others not to cause pollution.[49a]

VI. Procedure To Award Compensation

The NETA makes provision that complainant shall deposit a fee not exceeding, one thousand rupees but exempts the poor persons and the non-governmental organisation for depositing mandatory fees for filing an application for clamis of compensation.[50]

46. AIR 1996 SC 2715.
47. Michael R. Anderson, *International Environmental Law in Indian Courts* 7 *RECIEL* 28 (1998).
48. (1997) 2 SCC 87.
49. (1997) 1 SCC 388.
49a (2000) 6 SCC 213, 224.
50. S. 4 (5) NETA.

The objective of the Act is to facilitate the filing of a complaint but the ceiling imposed on the income of such person is not realistic. It is important to note that an award made by the Tribunal under the Act shall be executable as a decree of civil court but it shall not be bound by procedure laid down by Civil Procedure Code 1908 but guided by principle of natural justice. Moreover, it shall have power to regulate its own proceeding, including fixing appeals and times of inquiry.

Under the PLIA a claim for relief in respect of death of, or injury to, any person or damage to any property shall be disposed as expeditiously as possible. It specifically provides that every endeavour shall be made to dispose of such claim within three months of receipt of application of claim of compensation.[51]

It is important to note that Indian judiciary has also laid down the procedure to award compensation.

In *Indian Council for Enviro Legal Action* v. *Union of India*[52] a writ petition was filed by an environmental organization, projecting the miseries of people living in the vicinity of chemical industrial plants. The court was of the view that so far as the claim for the damages for the loss suffered by villagers or concerned affected area was concerned, it was left to them or any organization on their behalf to institute suits in the appropriate civil court. If they filed the suit or suit *in forma pauperis*, then the State should not oppose their application.

The question of awarding compensation again came up before the Supreme Court in *Vellore Citizens Welfare Forum* v. *Union of India*.[53] The writ was filed by the Vellore Citizens Welfare Forum against pollution caused by enormous discharge of the untreated effluents from the tanneries in the State of Tamil Nadu. The apex court laid down the following procedure:

(i) The central government shall constitute an authority under section 3(3) of the Environment Protection Act 1986 by September 30, 1996 and shall confer on the said authority, all the powers necessary to deal with situation created by tanneries and other polluting industries in the State of Tamil Nadu. The authority shall be headed by a retired judge of a High Court and it may have other members,

51. S. 7(7) PLIA. See also, Vikram Raghavan, *Public Liability Insurance Act: Breaking New Ground for Indian Environmental Law* 39 JILI 96-115 (1997).
52. *Supra* n. 45.
53. *Supra* n. 46.

preferably with expertise in the field of pollution control and environment protection.

(ii) The authority shall with the help of experts opinion and after giving opportunity to the concerned polluters assess the loss to ecology/ environment in the affected areas and shall also identify the individuals/families who have suffered because of Pollution and shall assess the compensation to be paid to the said individuals and families. The authority shall further determine the compensation to be recovered from polluters as a cost, of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

(iii) The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment of individuals. Statement showing the amount to be recovered from each polluters their names, the total amount to be recovered and the person to whom the competisation is to be paid and the amount thereof shall be forwarded to the Collector/District Magistrate of the area concerned.

(iv) The authority shall direct, the closure of the industry owned/managed by polluter in case lie evades or refused to pay the compensation awarded against him.

(v) The Pollution fine and compensation amount recovered from the polluters shall be deposited under a separate head called "*Environment Protection Fund*" and shall be utilized for compensating the affected person as identified by the authorities and also for restoring damaged environment.

(vi) The authority in consultation with expert bodies like NEERI, Central Board, State Board shall frame scheme/schemes, for reversing the damage caused to ecology and environment by the pollution in the State of Tamil Nadu. The schemes so trained shall be executed by the State Government under the Supervision of the Central Government. The expenditure shall be met from the Environment Protection Fund and from the sources provided by the State Government and the Central Government.

Pursuant to the observations of apex court a notification[54] has been issued by the Government of India for the State of Tamil Nadu under section 3(3) of Environment Protection Act 1986 (EPA) appointing a "Loss of Ecology (Prevention and Payment of Compensation) Authority,

54. S.O. 671 (E) dated 30.9.96.

it shall be manned by a retired High Court Judge and other technical members who would frame scheme or schemes in consultation with NEERI. It could deal with all industries including tanning industries. A similar authority has also been constituted under Section 3(3) of EPA to deal with shrimp Industries.

In *Calcutta Tanneries* case[55] and *S. Jagannath* v. *U.O.I.*[56] the apex Court also directed the State Governments to appoint an authority/ commissioner who with the help of Board and other expert opinion and after giving opportunity to the polluting tanneries would assess the loss to the ecology/environment in affected areas. The authority shall further determine the compensation to be recovered from the polluting industries is cost of reversing the damaged environment.

The Karnataka High Court in *Obayya Pujari* v. *Member Secretary K.S.P.C.B. Bangalore*[57], directed the State Government to appoint an authority for entertainment and adjudication of claims for compensation. It further pointed out that the citizens of the area were authorised to prefer then claim for grant of compensation, against stone crushers. The court further laid down that the claims for such compensation may be entertained within two months after such right was notified to the inhibitant of the area. Such claim, if preferred, shall be considered and disposed of within three months and if any of the respondent stone crusher is found to be lacking in payment of compensation, the same shall be paid by him within a period of 2 months, thereafter, failing which his license for carrying an stone crushing shall be cancelled.[58]

In a writ petition concerning *Bhopal Mass Disaster* case,[59] the categorisation and registration of claim was challenged as defective. The apex court rejected the contention and explained the rationale of the system to claim compensation in following words:

> There is now a system in place and any claims which are made, have to be determined within this system. There is first determination by the Deputy Welfare Commissioner against which an appeal can be filed to the Additional Welfare Commissioner and thereafter revision to the Welfare Commissioner. If even then, there is a grievance of claimant,

55. (1997) 2 SCC 411.
56. *Supra* n. 48.
57. AIR 1999 Kant. 157.
58. *Id.* at 166.
59. *K.M. Shukla* v. *Union of India* 2000 (1) SCALE 340, 343.

> proper remedy is to approach the High Court who would be in a position to deal 'with a case more expeditiously and give relief to the individual claimant where it is called for, without undue expense rather than approaching this court under Article 32 or 136 of the Constitution.[60]

In the instant case the apex Court directed that matters related to compensation to be transferred to the High Court as to, according to the court, will deal them as petitions under Articles 226 and 227 as expeditiously as possible.[61]

Thus, judiciary has evolved procedure to compensate the victims of environmental pollution.

VII. Quantification of Compensation

The PLIA introduces a statutory scheme for limited strict liability. The schedule to the Act lays down the award. It has been said that assessment of damage has never been a exact science, but essentially a practical exercise.

The rate of compensation prescribed under PLI is given below :

S.No.	Nature of Injury/Damage	Amount
1.	Reimbursement of medical expenses	Maximum Rs. 12,500
2.	Fatal Accidents	Rs. 25,000 per person + Reimbursement of medical expenses as above.
3.	Permanent/partial/disability other injury or sickness	Reimbursement of medical expenses as above+cash relief based on percentage of disablement+certified.
4.	Total permanent disability	Rs. 25,000 + reimbursement of medical expenses
5.	Loss of wages due to temporary partial disability necessitating three days hospitalization and victim is above 16 years of age.	Fixed monthly relief with maximum of Rs. 1,000 per month not exceeding three months.
6.	Damage to property	Actual damage or Rs. 6000 which ever is lower.

60. *Ibid.*
61. *Id.* at 344, See also, *Bhopal Gas Peedith Mahila U. Sangat* v. *Union of India* 1993 (3) Scale 8.

The prescribed amount of compensation under the PLIA is too inadequate to meet the present day realities. Moreover, it is only an interim relief and not a total compensation.

Though the amount fixed under the Act is not sufficient but it can be said that this is beginning and not an end. It has been rightly pointed out by the present author that the content of compensation table may not be acceptable in dollars, pounds and even in Indian currency but it is starting point to specifically quantify degree of compensation in varying injuries.[62]

NETA has used the word 'just compensation'. What is 'just'? This question generated a lot of heat in Lok Sabha; speaking on the Bill, Mal Lodha pointed out:

> just means reasonable which is a relative word. It is theory of relativity, difference of opinion and different point of view. The approach is different to view same thing. Just means it is upto discretion of judge to decide whatever he deems fit.[63]

He further observed:

> The judge will give according to his discretion whatever be his political or social philosophy, lie will award compensation according to that some where it will be Rs.5/- and some where Rs 1 Lakh. In this country, there is great inequality in the matter of compensation. It is unfortunate that there is no uniform standard for valuation of human life in our country.[64]

He illustrated his argument by using amount of compensation paid under various statutory provisions.[65] The Hon'ble member, taking the help of various statutory provisions, observed that:

> in place of just compensation a schedule of compensation should be drawn so that value of human life should be equal everywhere.[66]

62. Vinod Shankar Mishra, Environment Disasters and the Law 98 (1994).
63. Lok Sabha Debates, Vol. 41, Part I, 24th May, 262 (1995).
64. *Id.* at 224.
65. Carriage By Air Act 1972, Aeroplane Crash (death) - 5 Lakh. Railway Act 1989, Accident (death) - 1 Lakh.
66. *Supra* n. 64.

It is submitted that computation, of the damages depends on the facts and circumstances of each case and it is not possible to make it equal everywhere.

In *M.C. Mehta* case[67]; the Court evolved an indianized principle of 'strict liability' and termed it as principle of absolute liability. The court laid down that the measure of compensation must be co-related to magnitude and capacity of the enterprise so that compensation could have deterrent effect.[68] In the instant case, the court laid down the principle of liability and left the amount of compensation to be decided by the appropriate court.[69]

Victims of environment disaster in general and industrial disaster in particular need relief immediately. The process of litigation or evolving criteria for compensating the victim is, inevitably a long drawn battle. *Bhopal Mass Disaster*[70] is a classical example, the apex court quantified the damages to the tune of Rs. 750 Crores, according to following formulae:

(i) For 3000 fatal cases where compensation could range from Rs. 1 lacs to Rs. 3 lacs. This would account for Rs. 70/- crores.

(ii) For 30,000 total or partial permanent personal injury cases the compensation was estimated from Rs. 2 lacs to Rs. 50,000/- per individual for total or partial disabilities which would account for Rs. 250/- crores.

(iii) For another 20,000 cases of temporary total or partial disability compensation would range from Rs. 1 lacs to Rs. 50,000/- per individual winch would come to Rs. 100/- crores.

(iv) There might be possibility of injuries of utmost severity in which case even Rs. 4 lacs per individual might have to be considered and Rs. 80/- crores additionally for about 2000 of such cases were envisaged.

(v) For specialised institutional medical treatment for cases requiring such expert medical attention and rehabilitation and after care Rs. 25/- crores for the creation of such facilities was envisaged.

(vi) For cases of a less serious nature comprising claims for minor injuries, loss of personal belongings, loss of live-stock etc., for which there was a general allocation of Rs. 225/- crores. If in respect of these claims allocation are made at Rs. 20,000/-, Rs. 15,000/- and Rs. 10,000 for about 50,000 persons or claims in each category-accounting for about 1.30 lacs more claims the sum required would be met by Rs. 225/-crores.[71]

67. AIR 1987 S.C. 1086, 1099.
68. *Ibid.*
69. *Ibid.*
70. AIR 1990 SC 273.

In the settlement order, the Supreme Court also took into consideration the general sum of the damages in comparable fatal-accident-actions or personal-injury-actions arising under the Motor Vehicle Act 1939 and the Workmen's Compensation Act 1923 and made broad allocation higher than those awarded or awardable in such claims. For example, having found that in the Bhopal mass disaster a large number of deaths were of the children of very tender age, the court reminded that in usual fatal accident action related to children the awardable compensation must range from Rs. 15,000 to Rs. 30,000 in each case. Even in cases of adults taking into consideration the income group comparable to deceased, the damages, according the court, could be between Rs. 80,000 to Rs.1 lacs. But the Supreme Court applied the Justice Seth's wavelength and for the fatal cases it allocated Rs. 1 lacs to Rs. 3 lacs nearly three times higher than what could otherwise be awarded in comparable cases in Motor Vehicle accident claims. Similarly the court allocated the higher amounts for other claims relating to different injuries etc. According to the court these higher standards of compensation indicate 'emerging' postulates of tortions liability' which should be taken is 'social limit on economic adventurism.[72] It is submitted that several factors such as reduced eligibility for employment and loss of career will have to be considered. The new prospective burden of expenses to be incurred as a result of accident, the cost of medical expense, if any, his need for constant nursing, constant attendance, have to be taken into account.

The assessment of damages in cases of personal injuries is a difficult task which a judge has to perform and there is no doctrine of precedents in fixing the quantum of damages.[73] The proper computation of damages is a question which will depend on the facts of each case and no hard and fast rule can be laid down. There is no omnipotent criteria, capable of solving all problems at all time arising in the law of damages. At the end of the day arthematic may have to be mitigated by common sense. However compensation awarded must be fair and just.

71. See Upendra Baxi and Amita Dhanda, VALIANT VICTIM AND LETHAL LITIGATION: THE BHOPAL CASE (1990).
72. See, *Id.* at i-viii. *Union Carbide Corporation* v. *Union of India,* AIR 1990 SC 273, 283. See also A. Rosencranz, *et. al.* (ed.) ENVIRONMENTAL LAW AND POLICY IN INDIA 384-405 (1992).
73. B.N. Banerjee, LAW OF INSURANCE 895 (1994).

VIII. Disbursal of Compensation

In Indian Council for *Enviro Legal Action* v. *Union of India*[74] the apex court dealt with the dual question of payment of compensation to the farmers' whose lands were affected on account of the pollutants, and the second question, in regard to the treatment of pollutants before the discharge of the effluents into the Nakkavagu stream. So far as the first aspect is concerned, the court had directed the Government of A.P. to deposit a sum of Rs. 28, 34,000/- minus the amount paid by the industrialists which came to Rs. 7,49,963/-.The concerned District Judge was directed to submit a report in regard to further damage suffered by the farmers and also to ascertain if the treatment plant were set up and also their functioning if already set up. The District Judge Medak submitted his report through the High Court on both the aspects. The apex court directed that the amount of compensation which had been deposited in the High Court of Andhra Pradesh should be disbursed to the farmers. The Registrar of the High Court was directed to ask the District Judge of Medak to examine the claims of the farmers and disburse this amount to them taking care to see that the amount reaches to the farmers and no third party intervention was allowed and further that the remaining balance had to be deposited with the High Court for any further similar disbursement.[75]

In *Krishna Mohan Shula* v. *Union of India*[76], the contention of the petitioner before the apex court was that the claimants were compelled to go to the Lok Adalats as the doors of the regular adjudicatory authority were closed; and the compensation paid was a bare minimum. It was further pointed out from the Report of the Committee appointed by the court that, in several cases, the claimants had a grievance and had even moved the claims which were settled in Lok Adalats, be entertained by way of an appeal. The apex court conceded that many of the claimants had entertained a grievance regarding categorisation and in regard to the manner in which their claims were determined at the Lok Adatats. The court directed office of the Welfare Commissioner to place statistical information regarding the total number of claims decided at each Lok Adalat indicating the claim made by the claimant and the compensation awarded and the date of the Lok Adalat. It further pointed out that it would enable the court to determine whether compensation paid was grossly inadequate or was well founded.[77]

74. 1996 (4) SCALE Sp. 36, 37.
75. *Id.* at 38.
76. *Krishna Mohan Shukla* v. *Union of India* 1996 (4) SCALE, SP 52.
77. *Id* at 54, 55.

In *Bhopal Mass Disaster* case, it has been reported that in all 6.19 lacs claims were reported to have been filed, out of these 2.72 lacs were rejected and 6.14 lacs cases disposed of, however, the number of victims continued to increase due to unforseen effects of toxic MIC gas, particularly on pregnant mothers.[78]

Though the death figure in the world's worst industrial disaster has crossed 16,000 by now, the government acting as guardian of the victims has granted death compensation in only 5097 cases. It took 11 years for the settlement officer to declare persons killed in the disaster.[79] The settlement officer had also mercilessly rejected the claims of thousands of dependent of victims and even while granting compensation for death, the officer fitted varied amounts of different categories of death victims. The maximum amount of Rs. 3 lacs or above for a death was given only to 19 families, Rs. 2 lacs or a little above was paid to another small section of 76 dependents and above one lacs rupees to 5002 claimants.[80]

It is submitted that even a person killed in road accident is awarded a reasonable amount by the courts. It is interesting to note that government announced in the Lok Sabha that 6,375 claims were not provided as death cases and they were compensated for suffering 'personal injury'. It has been observed that in the civil and criminal law stiple cases, even a minor injury if it results in death becomes a major case where the victim must be treated accordingly.[81]

In *Tamil Nadu Tanneries* case,[82] apex court directed the central government to constitute Loss of Ecology (Prevention and Payments of Compensation) Authority to assess the damage and estimate the compensation. Persuant to the, aforesaid directive authority asked the tanneries to pay a compensation of Rs. 26.82 crore to 29,193 people as pollution damages. According to Authority's assessment, each farmer gets approximately Rs. 9000/-. However it did not cover the land cost where they used to grow three crops in a year. Moreover, the authority identified only 29,000 farmers while affected population was 10 fold. Besides, the Authority has not considered health impacts and water contamination. It may be pointed act that the original apex court directive

78. See Times of India, February 10, 2001.
79. *Ibid.*
80. *Ibid.*
81. *Ibid.*
82. *Supra* n. 46.

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20-21, April 30, 2001.

The apex Court has invoked the principle of customary international law to fix the accountability of ecosider and compell the polluter to the pay the remedial cost. In case of procedure to award compensation, under both the PLIA and the NETA the claimant has to file all application for claim of compensation by depositing fee. In this connection, it is important to note that NETA exempts poor person and the non-governmental organization from depositing the fee for filing such application.

It is important to note that the Indian Judiciary has tried to simplify the procedural formulations and, advocated for the establishment of an authority/ commission to assess and determine the loss caused by environmental pollution. It has been suggested that State should activate itself to recover damages from polluters who have damaged the environment. In this connection, apex court has suggested for Constitution of Environment Protection Fund' to restore the damage done to environment. It is submitted that 'community based compensation scheme' should be evolved. The community based scheme will take into consideration, the need of community and other measures required to restore the natural environment. The money should be used to compensate the community as whole and to provide all infrastructure which are necessary for clean and healthy environment.

In case of disbursal of compensation, the apex court and the high courts have activised themselves and asked the polluter to deposit compensation in the court or in the Environment relief fund and took on themselves the burden of the monitoring disbursal of compensation so that it reaches to the victims. It is hoped that this judicial gesture will activate executive to fulfil their assigned role.

In balancing the scale of environmental justice, judiciary felt difficulties to quantify compensation. The assessment of damages in cases of environmental damage is difficult task which a judge has to perform and there cannot be any doctrine of precedents in fixing the quantum of damage. It is submitted that judiciary must consider pecuniary loss and non-pecuniary loss in deciding the claim of compensation. The compensation should be fair and just.

The perusal of the provisions of the PLIA reveal that the compensatory remedy has gained a quantified statutory base. This innovation has yet to find a place in other jurisprudence.

Coming to misgivings and leftouts, the apex court has endorsed the polluter pays principle. The Court has not dealt with this principle in detail.

Does it give blanket licence to polluter "to pollute and pay"?

Indian judiciary has applied customary Interational Law principles to supplement the domestic provisions in deciding the claim for compensation and it draws its strength through such international convention or treaty, to which India is not party. It is submitted that Parliament should enact appropriate legistations incorporating customary International Law principle to suit the Indian condition and needs.

The benefit of both PLIA and NETA is limited to industrial disaster. It is surprising to note that NETA has not yet been notified by Central Government. It means that at present only PLIA provides monetary compensation. It may be pointed out that maximum compensation under the Act in case of death is Rs. 25000/-. This was similar to the amount payable to victims of accident under Motor Vehicle Act, 1988, subsequently this limit has been raised to Rs. 50000/- Keeping in view the rising prices, inflation and cost of living, it is humbly submitted that compensation under PLI should be revised to keep pace with changing time and needs.

In balancing the scale of environmental justice, the judiciary felt the need of appropriate forum to decide the quantum of compensation. In number of cases the court unfortunately left this task to the executive. Coming to the relief against the private parties, the apex court shirked its responsibility and directed the victims to institute their suits in appropriate civil court, a' long drawn way.

The quantification of compensation has posed a major problem before the judiciary. Indian judiciary in general and apex court in particular has not laid down any specific criteria in quantifying compensation. In the Shriram case, the court laid down that the measure of compensation must be co-related to magnitude and capacity of enterprises. This principle was invoked by M.P. High Court in Bhopal Mass Disaster, case but afterwards it has not been applied in any case where compensation was awarded to victims. In *Bhopal Settlement* case the apex court took into consideration the general sum of damages in comparable fatal accidents actions or personal injury actions arising under Motor Vehicle Act. It awarded the amount three times higher than what could otherwise be awarded in comparable cases. It is not clear, on what basis the apex court made it three times higher. It is difficult to arrive at any rational conclusion.

So what is ultimate direction, Indian legislature should recognize latest developments in comparative environmental laws and amend the existing laws accordingly. It should take up new challenges of 21st century.

Indian judiciary has lived up to the expectation of masses and successfully handled cases of claim of compensation by inventing innovative method and pragmatic approach to solve the complex problem of compensation. Now it is the turn of legislature to take initiative to implement it in letter and spirit as to do justice with the victims of environmental pollution.

LAW, PUBLIC OPINION AND PROPERTY RELATIONS IN INDIA

*Vijay Kumar**

I. INTRODUCTON

The cohesive living of human beings evolved the institutions of the state and the law. The monolithic kingship states of the feudal era, where the king's fait ruled the society, rendered no scope for public opinion. It was, indeed, with the breaking of old feudal relations in Europe and the coming into being of new property relations grounded in capitalism that brought about the ideological changes developed in the form of liberalism to suit the new property relations[1]. The emerging concepts of representative governments and constitutionalism which provided a firm base to the rule of law did suggest the basis of people's will or public opinion and, thus, its effect on making or non-making of the laws, albeit in a limited way. However, despite the gradual change in the character of the state from *lassez-faire* to a welfare one, individual property relations formed the basis of societal relations. Consequently, the property relations came to have a controlling effect not only on making or non-making of the laws and their content but also their working. The continuous representation of propertied interest in legislatures and identification of their interests with the state accentuated and facilitated it.

II. HISTORICAL AND THEROETICAL PERSPECTIVE

The modern state ramifying its welfare activities in various spheres[2] originated in Britain and other western countries alongwith industrial development. The Indian political and legal system owes its origin to the British system due to historical reasons. Before the industrial development in Britain, the societal relations revolved around agricultural land with a hierarchy of land relations controlled by the King and the feudal lords. This enabled them to control the life and liberty of the farmers and

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1. Harold J. Laski, THE RISE OF EUROPEAN LIBERALISM - AN ESSAY INTERPRETATION 11-12 (1958).
2. See W. Friedmann, LAW IN A CHANGING SOCIETY 377-78 (1970).

labourers living in object poverty. The British Poor Law Acts beginning in 1838 to help the disabled and destritutes were married by their mal-administration. The recommendations of the Royal Commission appointed in 1832 to enguire into the operation of the poor laws motivated the enactment of the Poor Law Amendment Act 1834. But the operational system under the 1834 Act (alongwith subsequent amendments) could not tackle the problem of destitution and unemployment[3].

The beginning of industrial revolution gave another dimension to exploitative and inhuman conditions of living and working of the workers resulting even in slavery and bondage of the children. The earliest British Factory Act — The Health and Morals of Apprentices Act 1802, being an amendment in the Poor Law, restricted working day for pauper children to 12 hours. Later, the Act of 1819 put the same restrictions on working day for free children.[4] The exploitative conditions, thus, found a legal base. It would be pertinent here to refer to two thinkers Marx and Bentham — who propounded two different theories to cope with the exploitative societal conditions.

It was the persistence of the oppressive societal conditions which led Marx to identify the exploitative instruments of the state and the law and to stand for a systemic and revolutionary change in economic relations — the mode of production, exchange and distribution through abolition of private property. On the theoretical plane, it required reversing of the Hegelian theory of deducting the laws of dialectics from Absolute Idea or consciousness to that of seeking their origin in the material world.[5] Needless to say, the complete change in uneven property relations has the effect of doing away with the very basis of inequitable interests forming the base of public opinion giving rise to the laws consonant with the wishes of the propertied class.

In contrast to Marx's systemic change in production relations, the English philosopher, Jeremy Bentham stood for mitigating oppressive societal conditions through law reform. Propounding the principle of utility as the basis for legislative action and defing utility as the property or tendency of a thing to prevent some evil or to procure some good, he explained it with the help of twin natural concepts of pleasure and pain governing man. To him, good is pleasure or the cause of pleasure and evil

3. J. Walker, BRITISH ECONOMIC AND SOCIAL HISTORY 1700-1980, 184-89 (1981).
4. *Id.* at 193-94.
5. Karl Marx, CAPITAL, A CRITIQUE OF POLITICAL ECONOMY, Vol. 1. 29 (1954, reprinted 1977).

is pain or the cause of pain[6]. However, pleasure and pain being subjective factors, it would be difficult to measure his "greatest happiness of the greatest number" — the ultimate societal aim of his theory. It may be mentioned that the Benthamite principle of utility and its instrument-the law-seek to operate in the given economic and social set up. Accordingly, Benthamism concerns itself with building a legal order on an existing economic system allowing, in turn, the interaction between the law and economic relations to continue, the law using mainly the distributive aspect for ordering such relations in the name of distributive justice.

The Benthamite philosophy alongwith the philosophies of other thinkers[7] taking a middle path between "laissez faire" and Marxian theses, advocating social welfare through state activities basically on the basis of prevailing economic relations, provided the theoretical base to the concept of welfare state. Thus, the seeds of the welfare state lie in opposition to the complete revolutionary change which led to the gradual development of the liberal welfare state seeking changes in economic and social relations through law. The revolutionary upheaval of 1917 in Russia, the material conditions caused by the two world wars and the depression of 1930s gave a fillip to the activities of such a state resulting in benevolent interference in people's lives. On the political plane, it used the parliamentary system to order the legal system and on the economic plane, capitalism was made to subserve the aims of the welfare state.[8] This was, however, an uneasy marriage since the aims of capitalism and the welfare state differed. Capitalism aims at profit accumulation and thrives in conditions of free market and individual property relations. The welfare state lessens these conditions. Again, the contradiction between the concepts of "welfare" and "state" also bring forth the built in constraints. Welfare connotes material well-being of the people. A welfare state does not want to leave the people at the mercy of the blind market forces[9] and the values emanating from it but extends its helping hand to the deprived sections of the society. But the inherent nature of the state in protecting the interest of the dominating class owning property *vis-a-vis* the propertyless and deprived sections,[10] makes it contradictory. The fusion of the concepts of "welfare" and "state" thus, brings out the inherent limitations. Consequently,

6. Jeremy Bentham, THE THEORY OF LEGISLATION 1 (1975).
7. For instance, George Bernard Shaw, H.G. Wells, Graham Wallas, Sidney Webb, Ramsay MacDonald, Robbert Owen, William Thompson, Washington Gladden and Richard T. Ely.
8. See George Dalton, ECONOMIC SYSTEMS AND SOCIETY 95-96 (1974, reprinted 1979).
9. See P.B. Gajendragadkar, LAW LIBERTY AND SOCIAL JUSTICE 63-64 (1965).
10. Laski maintains that the fundamental aim of the liberal state was to serve the owners of property. See Harold J. Laski, *supra n.* 1 at 260.

the welfare state works under several basic constrains. In a society with a feudal base and low capitalistic formation, like the Indian one, the situation becomes more complex since feudalism works as a hindering factor in respect of democracy and welfare. The rampant poverty, illiteracy and lop-sided property relations allow the feudal forces full play in economic, social and political life of the society in controlling the policy and implementational framework of welfare laws. The propertied interests become, therefore, identified with the state and the people's interests and opinion are relegated to the background.

III. THE DICEYAN APPROACH AND ITS IMPLICATIONS

Since law-making became a task of the representative institutions, public opinion as the basis of law making could, obviously be presumed. With law becoming the operational tool of liberal philosophy, the need for a systemic relationship between law and public opinion became quite obvious. This need was aptly fulfilled by Dicey in the beginning of twentieth century by analysing the relation between law and public opinion in England during the nineteenth century.

In establishing the relationship between public opinion and making or non-making of laws, Dicey limits his assertion by saying that it has not been true of all countries and not even of England at all times[11]. He accordingly holds the view that opinion dictates legislative change only under the peculiar conditions of an advanced civilization and describes the opinion in many Eastern countries as traditional or instinctive, feeling hostile to change and favourable to the maintenance of inherited habits[12]. However, viewed in the wider context, such a traditional outlook in less-developed societies appears to have its basis in economic and social-relations. In view of the fact that educational and other developmental opportunities are generally concomintant with the propertied status, conservatism of the propertied people becomes largely linked with their interest of maintaining existing economic and social relations while conservatism of the poor and unpropertied people comes to be generally related with ignorance, illiteracy and lack of economic independence. Public opinion requiring change is either non-existent or relates to a microscopic minority such as the political leaders whose motivating factor is political expedency. The opinion of the mass of the people[13] in less-

11. See A.V. Dicey, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 3 (1963).
12. *Id.* at 4.
13. *Id.* at 10.

developed countries, thus, becomes subject to the inherent limiting factors like feudal base, concentration of means of production, poverty, illiteracy, religious conservatism, vertical social stratification, feudal political hold, political manoeuvring, low percentage of voting, forced voting, voting on caste and creed lines, no voting and lack of open and proper issue-based debates. The economic and social stratification of society and control of property and the represntative institutions makes the public opinion and its relationship with law a complex one. As a result, the development of informed and reasoned public opinion is quite slow in such countries. This accentuates the vested interest oriented legislation. Dicey, though, does not deny that men are guided in matters of legislation mainly by their real or apparent interest, yet he tries to reconcile it with his thesis by saying that the view of their interest and, therefore, legislation is determined by their opinion. While admitting that the individuals and classes support laws or institutions beneficial to themselves and injurious to others, he justifies this conduct by making distinction between biased judgement and uncorrupted heart[14]. It may be mentioned in this regard that such a bias has its roots in the propertied outlook which conditions man in totality. Examples are not wanting to show that legal protection of class interest has been conscious and deliberate. In feudal times in England, the legal control of the King and feudal lords over the family affairs of their vassals[15] had the motive of keeping the land and vassals within the control of the lords. Similar was the case with regard to the legally permitted system of child labour at the beginning of industrial revolution reflecting industrialists' control over children even in the form of regulatory Factory Acts of 1802 and 1819 restricting the working day to 12 hours for children working in the cotton and woollen mills. In India too, the maintenance of zamindari system and exploitation of agricultural labourers and tenants by the zamindars and even ousting of tenants by them at the time of zamindari abolition for carving out a larger area of land[16] could not be due to any sort of delusion but based on sheer propertied outlook conditions by economic and social factors and having the support of law. The systems of bonded and child labour perpetuate for the same reason.

IV. Colonial and Feudal Hold in British Period

In the British period, the states interaction with society was mainly limited to policing and collecting revenue. It was the colonial and feudal

14. *Id.* at 12-15.
15. See Fred A. Cazel, Jr. (ed.) Feudalism and Liberty 199, 201, 218 (1961).
16. See A.M. Khusro, Economic and Social Effects of Jagirdari Abolition and Land Reform in Hyderabad 46-48 (1958).

interest in maintaining property relations which characterised the nature of laws made during this period. However, the Benthamite utilitarianism influenced the course of legislation in India too, albeit with different motives and effects. The doctrine was utilized to bring the country under unified control in view of the political expediency of maintaining existing property relations. The enactment of the Charter Act 1833 by the British Parliament initiating the process of codification in India with the provisions for the establishment of an All India Legislature, appointment of the Law Commission and introduction of the Law Member in the Government of India, provided a base for it. Besides Macauley, who was Secretary to the Board of Control and James Mill, who was the examiner of correspondence at the India House, there were other Parliamentarians in England influenced by the Benthamite principles who made India a testing ground of these principles[17]. The vast Indian population being poor and illiterate and under British subjugation, there hardly existed any public opinion in faviour of or against the enactment of laws. Dicey, describing legislation in British India as the work of a body of English specialists following largely the current of English opinion, is of the view that these officials did not represent Indian public opinion[18]. It was, in fact, the English law that was made the basis for codification and it came to be introduced virtually in all areas except the religion-based personal laws. Thus, the enactment of Indian Penal Code 1860, Code of Criminal Procedure 1861, the Police Act 1861, Code of Civil Procedure 1859, Evidence Act 1872, Contract Act 1872, Negotiable Instruments Act 1881, Transfer of Property Act 1882 and Official Secrets Act 1923 virtually brought the whole fabric of Indian life relating to person and property under the unified control, facilitating British administration on existing property relations. The feudal economic system provided the base for such property relations with a vertical hierarchy of intermediaries for collecting revenue, relegating the cultivators of social to the bottom. Conferring of proprietary rights on zamindars[19] the intermediaries, for smooth collection of revenue in respect of the lands tilled by the peasants, solidified and accentuated such a system. The laws enacted subsequently strengthened this system by providing for keeping the property of the zamindars or talukdars intact.

In Oudh, for instance, the Talukdari Succession Law of 1869 allowed the eldest son of the talukdar to inherit whole of his property as a consequence of the bindingness of the law of primogeniture in inheritance

17. See A.B. Keith, A Constitutional History of India 131-35 (1937), and M.P. Jain, Outlines of Indian Legal History 503-06 (1972).
18. *Supra* n. 11 at 5.
19. See Bengal Regulation I of 1793, Arts. II and III.

in respect of the talukdari property. Likewise, the Encumbered States Act 1870 by allowing an insolvent talukdar to vest the management of his states in the government upto twenty years, protected such a talukdar in that no attachment or sale of the estate could take place during such period. Moreover, the income from the estate could be utilized in paying off the encumbering debts and liabilities after deducting government's revenue and talukdar's fixed maintenance allowance. Subsequently, the estate was to be restored to the talukdar, thus making him economically stable[20].

The history of tenancy laws in India vividly depicts the maintenance of absentee ownership over tenanted lands consonant with feudal interest[21]. In view of the fact that feudal ties were to be maintained, these laws legalised the parasitic stratification by vertically classifying the tenants into various categories[22] relegating the actual tillers of the soil to the bottom. The continuance of the system was facilitated by conferment of benefits of tenancy on intermediary tenants, leaving the actual tillers unprotected and at the mercy of the intermediaries. By not defining a "tenant" in terms of cultivation of land[23] a wide scope for coverage of the host of intermediaries was left open.

The economic life in British India revolved around agricultural land which, in turn, gave rise to hierarchical social relations. People lower in the hierarchy of such relations — the labourers and tenants depending solely for their livelihood on the land owned by the intermediaries forming the upper crust of the society could obviously have no opinion affecting law-making. The opinion of the intermediaries depending for proprietorship of the land on their British masters, could not be independent of the

20. See Thomas R. Metcalf, *Social Effects of British Land Policy in Oudh* in R.E. Fryknberg (ed.) LAND CONTROL AND SOCIAL STRUCTURE IN INDIAN HISTORY 147-48 (1979).
21. These laws generally favoured the intermediary rent receivers in the garb of protecting the tenants and left the actual cultivators unprotected against illegal evictions and arbitrary enhancement of rent, more so in the absence of recording of their rights. It may be mentioned that before partition, in Punjab, about 48.2 percent of the cultivated area was formed by the tenants at will — the actual tillers and only 7.3 percent area by the occupancy tenants. In U.P., tenants constituting 81 per cent, cultivated about 86 per cent of the entire cultivated area in the state. See Government of India, AGRICULTURAL LEGISLATION IN INDIA, Vol. VI, Land Reforms v (1955).
22. See BENGAL TENANCY ACT 1885, S. 4. and BIHAR TENANCY ACT 1885, S. 4.
23. S. 2(17) of BENGAL TENANCY ACT 1885, defines a tenant as a 'person who holds land under another person and is liable, to pay rent for that land to that person. Similar definition of tenant has been given under S. 3(3) of BIHAR TENANCY ACT 1885.

colonial rulers. Thus, the laws enacted in this period reflected the colonial and feudal interest.

V. CONTINUANCE OF FEDUAL HOLD IN THE WELFARE STATE

Unlike the gradual development of the welfare state in England and other western countries, the welfare state in India has been declaratory through the constitutional document. This makes the nature of the Indian welfare state different from its western counterpart since the values of the different societies enshrined in the constitution did not match the prevailing values of our society and the state establishment. The ideals contained in the preamble of the constitution and unfolded in the Directive Principles of State Policy and the Fundamental Rights proclaim India a welfare state setting the norms for state action and non-action. While Article 38 directs the state to promote welfare of the people in general terms, the rest of the directions are quite specific. As to property relations, clauses (b) and (c) of Article 39 contain positive and negative directions for distributive justice — that the distribution of the ownership and control of material resources of the community has to subserve the common good and that the operation of the economic system is not to result in the concentration of wealth and means of production. However, the fact that the right to property formed part of the fundamental rights (Article 31) denotes that the individual property relations were not to be disturbed. Making of right to property a non-fundamental right through the Forty-fourth Constitutional Amendment 1978, hardly changes the basic relationship. Articles 31A, 31B and 31C were added to make the principles contained in clauses (b) and (c) of Article 39 workable, putting state's interference in the prevailing property relations beyond challenge on the ground of infringement of certain fundamental rights.

However, inspite of the constitutional welfare framework, feudal hold over law-making continued even in the post-independence period. The reasons are, obviously, systemic. The implementation of land reform measures could not break the feudal relations completely. Consquently, feudal interests continued to have a firm hold over economic, social and political life of the country. The systemic factors of concentration of holdings with few people, resourcelessness, poverty, illiteracy, social stratification and lack of effective people's organisation provided free operational base to the feudal forces. In fact, the welfare system in India came to operate at a time when capitalism had not peneterated much into the prevailing feudual economic formation. Obviously, the land-reform laws came to be influenced by the feudal interest. Thus, maintenance of

the intermediary interests, albeit in a different form, by the zamindari abolition law[24] depicts that political expediency — not the general public opinion-formed the basis for enactment of these laws in view of the wishes of the propertied interests. Had these laws been passed consonant with the wishes of the actual tillers of soil — the tenants and agricultural labourers, there would have been no provisions allowing the intermediaries to retain vast areas of land in the name of "khudkasht" or "self-cultivated land" and payment of large amount of compensation to them, side tracking the people's interest and developmental needs of the country. In Bihar and Orissa, even the lands of the intermediaries under certain type of leases in favour of the tenants were treated to be in "Khas possession" of the intermediaries[25] and hence were to be retained by them. The Orissa Act ousted the temporary lessees of an intermediary holding less than thirty three acres of land by such presumption. Likewise, in U.P. the main concern of the United Provinces Zamindari Abolition Committee was to avoid hardships to the zamindars than to the rural poor and, therefore, the idea of proposed limit on land-holdings and redistribution of land in excess of such a limit[26] became a lost cause. The superiority of colonial status of intermediaries was maintained by conferring superior title on intermediaries in respect of their so-called "self-cultivated land" and inferior title on tenants[27], even after the zamindari abolition. The ceiling laws enacted subsquently in respect of rural land[28] containing high ceiling limits, sizable exceptions and provisions regarding choice of land by landlords as also settling of surplus land with rural poor, only in lieu of a purchase price payable by the allottees[29], speak of the political overtones of such measures in view of the wishes of big landholders.

24. For instance, see U.P. Zamindari Abolition and Land Reforms Act 1950; Bihar Land Reforms Act 1950; Orissa Estates Abolition Act 1951; M.P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act 1950 and Rajasthan Land Reforms and Resumption of Jagirs Act 1952.
25. See Bihar Land Reforms Act 1950, S. 6. and Orissa Estates Abolition Act, 1951, S. 7.
26. See Report of United Provinces Zamindari Abolition Committee, Vol. I, 389 (1948).
27. For instance, see U.P. Zamindari Abolition and Land Reforms Act 1950, Ss. 18 and 19.
28. For instance, see U.P. Imposition of Ceiling on Land Holdings Act 1960; Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 1961; Madhya Pradesh Ceiling on Agricultural Holdings Act 1960; Punjab Land Reforms Act, 1972; Haryana Ceiling on Land Holdings Act 1972.
29. For instance, see Bihar Land Reforms (Fixation of ceiling Area and Acquisition of Surplus Land) Act 1961; M.P. Ceiling on Agricultural Holdings Act 1960; and Haryana Ceiling on Land Holdings Act 1972.

The welfare laws enacted in respect of the poor labouring class, having no opinion of such class as their basis, simply regulate the existing exploitative practices. The Contract Labour (Regulation and Abolition) Act 1970, for instance, in providing for licensing of contracts (Section 12) regulates the existing practice of contract labour through the intermediaries. The ambit of these laws, the fact, remains circumscribed by the developmental limits. These laws, therefore, have to compromise with the exploitative practices even in case of child labour, such as, in regulating the conditions of work of children by the Child Labour (Prohibition and Regulation) Act 1986, in the establishments not carrying on occupations and processes in which employment of child labour has been prohibited.

Thus, with built-in hurdles of economic and social set-up militating against formation of public opinion by common people, it is the opinion of only vocal elites which matters so far as the making or non-making of laws in particular areas is concerned. The tenor of the welfare laws being generally against the interest of the economically deprived beneficiary class, is indicative of lack of opinion of such a class in the making of these laws. A look at the debt-relief laws further reveals it. Under the Punjab Agricultural Indebtedness (Relief) Act 1975, the debtor being a small farmer could be wholly discharged only if he had in the discharge of his debt paid a sum exceeding or equivalent to one and a half times the amount of debt [Section 4(a)]. Likewise, the Gujarat Rural Debtors Relief Act 1972, wholly discharged certain debtors, only if they had already paid an amount equal to or exceeding twice the amount of the principal. The debtor was consequently entitled to the refund of the amount paid only in excess of twice the principal (Section 4). The Andhra Pradesh Agricultural Indebtedness (Relief) Act 1977 and the M.P. Gramin Rin Vimukti Adhiniyam 1982 (M.P. Rural Debt Relief Act 1982) even disentitled the debtor for refund of any payment towards the debt, even if paid in excess of the amount of principal and interest (Explanation to Section 4 and Explanation to Section 3 respectively). These laws, thus, protecting the interest of the propertied class of creditors cannot be said to have been based on the opinion of debtors. They even go contrary to their avowed aim in penalizing the debtors and are no different from the colonial laws in that the Madras Agriculturists Relief Act, 1938, contained similar provision for discharge of debt if it exceeded twice the amount of the principal [Section 8(2)].

Even in the field of personal laws where public opinion is mainly swayed by religious leaders, the feudal interests keep a tight rein on such opinion through these leaders. The status quoist character of both the religion and feudal thinking facilitates such a hold. Thus, the reformatory

measure like the Hindu Succession Act 1956 reflects the feudal hold of keeping the property intact in the hands of male heirs, in allowing the female heirs only a right of residence in the dwelling house life behind by a person dying interestate, and not to a right to claim its partition unless the male heirs choose to device it (Section 23). Since hold over property and subjugation of women have been concomitant, the women find lower place in the laws. For instance, the Hindu Adoptions and Maintenance Act 1956 though empowers a male Hindu, to take in adoption a son or a daughter with the consent of his wife, it does not so empower a married female (Sections 7 and 8). Likewise, the mother is also not empowered to give the child in adoption except after the death of father or incurring of disability (Section 9). Enactment of Muslim Women's (Protection of Rights on Divorce) Act 1986 nullifying the Supreme Court's judgement in Shah Bano Case,[30] depicts the same trend.

It would, thus, appear that it is not the opinion of the beneficiary class which motivated the legislature for the enactment of the laws in respect of the specific target groups. The motivating factors may be the pressure of fufilling the constitutional goals, periodic elections and the liberal intellectual and judicial thinking. However, the political manoeuvring work as a mediating factor between these factors and the interest of the propertied vested interest for maintaining status quo.

VI. Summing up

The above analysis reveals that in a society with feudal base, public opinion is characterised by systemic limitations. Law-making public opinion remains either non-existent or depicts the views of a microscopic minority. The contents of the Welfare laws indicate that even these laws came to be affected by the propertied interest through political manoeuvring. Since the old economic and social relations basically remain operative in the society, the legal relations are also affected by such relations despite the state taking on the welfare role.

30. See *Mohd. Ahmad Khan* v. *Shah Bano Begum* AIR 1985 SC 945. In this case, the Supreme Court held that there was no conflict between the provisions of S. 125 of the Criminal Procedure Code 1973 and those of Muslim Personal Law regarding Muslim husband's obligation for providing maintenance for his divorced wife who was unable to maintain herself and she could avail the remedy available under S. 125 of the Code.

SERVICE PROVIDER'S LIABILITY FOR DEFAMATION

*Farooq Ahmad**

I. Introduction

Defamation as a distinct tort came to be recognised in early sixteenth century. It recognised individuals right to enjoy their reputation unimpaired by false and defamatory attacks and imposes obligation on others not to make any statement that is injurious to subject's reputation or exposes the subject to hatred, contempt, or redicule.[1]

The chief characteristics of wrong of defamation are; (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either special harm or actionable conduct irrespective of special harm.[2]

Defamatory statements lowers down the subject in the estimation of the right-thinking members of the society. It is possible only when there is a publication of a defamatory statement. Publication is generally described as the intentional or negligent communication of the alleged defamatory statement to a third person but it may sometimes be unintentional.[3]

Publishers are regarded as persons or entities exercising such extensive control over the content, either, by creating, editing, or reviewing the content, that knowledge of the defamation can be fairly imputed as a matter of law.[4] Publishers are deemed to have a reason to know of defamatory matter by virtue of their editorial control.[5] Having reproduced and dessiminated the defamatory statements with knowledge of what they

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1. W. Keeton, et. al. Prosser and Keeton on the Law of Torts 773-78 (1984).
2. *Ibid.*
3. Restatement (Second) of Torts, Section 568 (1977) See also, *Pullman* v. *Hill* (1891) 1 Q.B. 524.
4. Keith Siver, *Good Samaritans in Cyberspace* 23 Rutgers Computer & Technology Law Journal 9 (1997).
5. *Ibid.*

It is in this back drop that an attempt is made in this paper to evaluate how far the above dichotomy is flexible enough to resolve the nebulous issue of service provider's liability for defamation.

II. Defamation and Service Providers

The above dichotomy of publisher-distributor maintained by the courts does not provide solution to the issues raised by online medium because there is a fundamental difference between the traditional media and the online medium. These differences are; (1) the speed of transmission; (2) voluminous distribution of contents[10]; and (3) lack of gatekeepers between information producers and mass distribution online.[11] The publication of the matter by traditional media like newspapers, magazines and books is no match for online medium because of the speed and online traffic. In traditional media, content can be easily reviewed before its final publication and dessimination which is impracticable and many times impossible in online medium because of its speed and volume of traffic. Furthermore, unlike in traditional media, producers of information online are largely anonymous.[12]

The above practical difficulties make the position of service providers vulnerable. These service providers include Online Service Providers (OSPs) who provide content through proprietary networks in addition to internet access, which is provided through the same networks and Internet Service providers (ISPs) who provide direct access to the internet and usually have content provided in a central location, often a web site, that can be accessed by any one.[13]

The ability of OSPs to fuse different functions of traditional communication media allows it to perform multifaceted functions. These service providers while providing content through their proprietary networks function like a television station, newspaper or magazine. They act like a post office when their network carries private e-mail messages and act like telephone networks when simultaneous online discussion through relay chats is hosted.[14]

10. Prodigy was posting over 60,000 subscriber messages per day in 1993. See 23 *Media L. Rep.* at 1796.
11. *Supra* n. 4 at 24.
12. Robert Charles, *Computer Bulletin Boards and Defamation : Who Should be liable? Under What Standard?* 2 Journal of Law and Technology 121, 145 (1987).
13. Mitchell P. Goldstein, *Service Providers Liability for Acts Committed by Users: What You Do Not Know Can Hurt You XVII* Journal of Computer and Information Law 592 (2000).
14. *Supra* n.11.

The extent to which OSPs exercise control on content varies widely because the source of content transmitted by them is varied. Many providers create their own content. They also make contract with other information providers to post content on their systems, and provide access to the internet. In addition, a substantial amount of content is subscriber generated, either through e-mail, postings or bulletin boards or discussion groups or real-time communication in chat rooms.[15]

The control or editorial review of the contents is possible if it is generated by the service provider himsel for by any person with whom there is a contract. But this editorial control is difficult for subscriber generated content. Although, the softwares have been designed to automatically filter obnoxious or filthy language, yet well-publicized incidents have shown that at the current level of technology, automatic screening software is unable to discriminate between legally permissible and perverse language.[16] The service providers with large resources engage gatekeepers or reviewers to screen messages before they are made available online to determine their relevance and to churn out material which is in tune with the standards of the service providers. But the voluminous traffic and the rapidity of the transmission makes it highly impracticable for even those service providers which have large monitoring resources to make effective screening of subscribe based content. This power of review, whatever little it may be, is totally absent in real-time communication in "chat" rooms in the same way as the telephone company is unable to review telephone conversations.[17]

Similar difficulties have been experienced by the service providers to screen material obtained from the internet and transmitted through their systems. The remote information retrieval system has further compounded the difficulties of the service providers as it makes technically impossible for the host network to screen all the material accessed from other networks because of the volume of traffic.[18]

The traditional equation between producer and consumer of information has undergone transformation. A user of the internet may speak or listen

15. See, S. B(1), ACLU, 929 F. Supp. P. 824 (No. 96-511).
16. Amy Harmon, *On-line Service Draws Protest in Censorship Flap, L.A. Times*, (2 Dec, 1995. (Stating that after its obscenity screening software purged the word "breast" from its files, American Online was barraged with protest by women who used this service to share information about breast cancer.
17. *Supra* n. 11 at 5.
18. *Id.* at 6.
19. See Plaintiff's memorandum in support of motion for T.R.O. and Preliminary Injunction; section (B)(3), ACLU, 929 F. Supp. at 843.

interchangeably, blurring the distinction between 'Speakers' and 'listeners' on the internet.[19] The immense potential of service provider to provide a platform for unlimited and diverse number of information, producers stand in sharp contrast to the traditional mass media, which are based on an architecture with a fixed number of available channels.[20] Unlike centralized broadcast radio and television services, there are no central control points through which either a single network operator or government censors can control particular content. The proliferation of individual speakers stands in sharp contrast to television broadcast or even cable television, where one may count five, ten or perhaps one hundred speakers, each of whom controls a channel.[21]

The role of service providers in an online communication is pivotal. The third party content can be transmitted to a service provider's computer and retransmitted from there to others without any human intervention. When online communication of defamatory material is made using the service provider's computer but without his knowledge of its contents, the questions which arise are: (a) what is the status of a service provider? is he a publisher or republisher or distributor for the purposes of defamation law?; (b) will it be presumed that he has knowledge of the defamatory matter transmitted to others through his computers or will plaintiff be required to prove the circumstances under which knowledge of the defamatory matter will be imputed to the service provider?; (c) Will it be in tune with the present technical handicaps and the practical difficulties to give blanket immunity, to service providers from any legal action for defamation?; (d) would it be feasible to hold service providers liable where reasonable care or due diligence has not been exercised by him, which would have prevented the alleged defamation?

To find answers to the above queries, a review of the judicial opinions is presented here.

III. Judicial Trends

In *Cubby Inc.* v. *CampuServe Inc.*[22] an American District Court for the Southern District of New York was called upon to determine the liability of CompuServe, a commercial online service provider. In this case the plaintiff *Cubby Inc* developed "Skuttlebut" a database jointly with

20. See Jery Berman and Daniel J. Weitzner, *Abundance and User Control : Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 *Yale L.J.* 1623-24 (1995).
21. See Interactive Working Group Report to Senator Leahy.
22. 776 F. Supp. 135 (S.D. N.Y. 1991)

Robert Blanchard. The database was maintained to carry news of the Journalism industry as a parallel to "Rumorvilla", another database. Rumorvilla published defamatory news items about Cubby that were carried nationwide on CompuServe. Cubby filed a suit for defamation against CompuServe for publishing alleged defamatory matter of Cubby.

CompuServe had engaged Cameron Communications, Inc. (CCI), to manage, review, create, delete, edit and control the content of the "Journalism Forum in accordance with the editorial and technical standards and conventions of CompuServe.[23]

Rumorvilla was a daily newsletter that provided reports about broadcast journalism and journalists, which was published by Don Fitzpatrick Associates (DFA). DFA had control over Rumorvilla's contents. The agreement provided that CCI would limit access to Rumorvilla to those CompuServe information service subscribers who had made membership arrangements with DFA.

CompuServe had neither editorial control nor an opportunity to screen Rumorvilla's contents. CompuServe did not share fee received by DFA for providing access to Rumorvilla not did CompuServe pay any fee to DFA for making Rumorvilla available to the journalism forum. CompuServe had not received any compliant before the present suit.

The plea of CompuServe was that its function was similar to a distributor and not that of a publisher or republisher. It did not know, nor had a reason to know the contents of alleged defamatory matter. It is only he who repeats or republishers defamatory matter is liable in the same way as if he had originally published the statement.[24] As against this, news vendors, bookstores, libraries, vendors and distributors of defamatory publications are not liable if they did not know or has no reason to know of the defamation.[25]

The Court ruled that the technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such a CompuServe than that which is applied to a public library, book store, or news-stand would impose an undue burden on the free flow of information.

23. *Id.* at 137.
24. *Id.* at 139 (quoting *Cianci* v. *New York Time Publishing Co.* 639, F. 2d 54.61 (2d Cir. 1980).
25. *Ibid* (quoting *Lerman* v. *Chuckleberry Publishing, Inc.* 521 F. Supp, 228 (S.D.N.Y. 1981).

Given the relevant First Amendment consideration, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorvilia statements.[26]

The Court equated the functioning of CompuServe with that of a publisher/distributor and held that CompuServe's role is more akin to a distributor of information such as a public library, book store or news-stand. The Court admitted that CompuServe may refuse to carry a given publication and may even block the access of the subscriber to the system, but the volume of traffic coupled with the electrifying speed with which the matter is uploaded, knowledge of the defamatory matter cannot be imputed to CompuServe because of the lack of reasonable opportunity to know the contents of the transmitted material. The Courts also found that CompuServe did not exercise any on control content at issue, which was managed by an independent company having contract with CompuServe.[27] Because of the CompuServe's lack of editorial control, it was ruled that CompuServe cannot be held liable as publisher of the defamatory matter. Similarly, the court did not hold CompuServe liable as a distributor of the defamatory matter because of the lack of editorial control and "reason to know" the alleged defamatory statements at issue.

The plaintiffs claimed that an agent - principal relationship existed between DFA and CompuServe. DFA being an agent, all its acts are subject to the control and direction of its principal, i.e., CompuServe. As against this, an independent contractor, in exercising an independent employment, contracts to perform a task according to the contractor's own skill and judgement, without being subject to the employer's control, except as to the product of the assigned task. An employer can be held vicariously liable for the tort of an independent contractor if the employer directed the act from which the injury resulted or took an affirmative or active part in its commission. It is, therefore, claimed that CompuServe's contractual right to remove text from its system, if the text did not conform with its standards, constituted control over, not direction of CCI's work.[28] This right is sufficient to rise to the level of an agency relationship.

The Court held that although CompuServe had contractual responsibilities to provide CCI with training and to indemnify CCI from claims resulting from information appearing in the Journalism forum, CompuServe did not have sufficient control over CCI and the management of forum to form an agency relationship. CompuServe had no direct

26. *Id.* at 140-142.
27. *Id.* at 137.
28. *Id.* at 143.

contractual relationship with DFA. Their relationship was at most, that of an employer and an independent contractor.[29]

In *Stration Oakmont, Inc. v. Prodigy Services Co.*[30], an identified BBS user made some defamatory remarks about Stratton Oakmont, a securities investment banking firm, on Prodigy's "Money Talk" electronic bulletin board.

The plaintiff argued that unlike CompuServe, Prodigy in this case exercised editorial control on the content over its bulletin boards which is sufficient enough to call it a publisher. In support of this argument, the plaintiff cited newspaper articles written by Geoffrey Moore, Prodigy's Director of Market Programs and Communications, admitting that Prodigy exercised editorial control over the content of messages posted on its computer Bulletin Boards.[31] Prodigy's content guidelines were also invoked, which request users not to post notes that were "insulting". These guidelines advised users that messages that annoy other members, or, are taken in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to prodigy's attention. Prodigy had engaged "Board leaders"[32], whose duties were to enforce Prodigy's guidelines by deleting insulting or otherwise offensive messages from the Bulletin Board.

Prodigy's much publicized "automatic software screening program", which pres-creened all Bulletin Board postings for certain words identified in the program as offensive, was also used by the plaintiff against Prodigy in a bid to establish that an effective content control similar to one expected of a publisher has been exercised by Prodigy.[33]

The court held that Prodigy's own policies, technology and staffing decisions have altered the scenario in which Bulletin Board services are generally regarded as distributors. The court showed full agreement with the decision of *Cubby* that computer Bulletin Boards should generally be equated with book stores, libraries and network affiliates and should be

29. *Ibid.*
30. 23 *Media L. Rep.* (BNA) 1794, 99 (1995).
31. One such statement was: "we make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate. See No. 31063/94, 1995 N.Y. Misc. Lexis 229.
32. These Board Leaders were called by the court as an editorial staff who had the ability to continually monitor incoming transmissions and in fact did spend time censoring notes. *Supra* n.30 at 1798.
33. *Id.* at 1797.

held liable only if they knew or had reason to know of the defamatory statement at issue. However, the Court did not apply distributor standard to prodigy and admitted that Prodigy's current system could have a chilling effect, but that was, in the opinion of the court what Prodigy wanted[34]. The Court outlined reasons for its decision in the following words:

> By actively utilizing technology and manpower to delete notes from its computer Bulletin Boards on the basis of offensiveness and 'bad taste', Prodigy is clearly making decisions as to content, and such decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made does not minimize or eviscerate the simple fact that Prodigy has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its Bulletin Boards which makes Prodigy a publisher rather than a distributor.[35]

The court described Prodigy as publisher because of its editorial control over content through its software screening program and Board Leaders without making any express finding as to whether it knew or had reason to know of the defamatory content when they were retransmitted to other Prodigy users. Nor did it make any finding as to whether the quantum of control exercised by Prodigy was sufficient to impute knowledge of the content of the 60,000 or more messages posted each day on Prodigy's Bulletin Board. Instead, a common law duty was imposed on the Prodigy to inspect manually all the messages and evaluate for defamatory content before allowing them to be retransmitted to other users.[36]

This decision has been criticized on many counts. This judgment makes service providers strictly liable for defamation regardless of whether they had any reason to know of its existence or opportunity to prevent its transmission. Which appears to contravene American First Amendment principles, which prohibit faultless defamation liability. It encourages service providers to adopt "blind eye" policy and not to exercise any content control at all. This would undoubtedly cause an increase in defamatory, obscene, and vulgar transmission, as well as reduce opportunities and efforts for detection. This decision gives two undesirable options to service providers: (a) either to bear the immense burden of

34. *Id.* at 1798.
35. *Id.* at 1797.
36. *Id* at 1796.

comprehensive screening for defamation; or (2) abandon all content control efforts it order to avoid being labelled as publisher.[37]

The decision of *Stratton Oakmont, Inc* v.. *Prodigy Services Co.*[38] was not approved by Appellate Division of the Supreme Court of New York in *Lunny* v. *Prodigy Services Co.*[39] In this case plaintiff's name was used by an "infantile practical jobber" to fraudulently open an account with Prodigy. This account was then used to make allegedly defamatory statements in an e-mail message and in two posts on a Prodigy Bulletin Board.

The Court held that the position of Prodigy is much analogous to that of a telephone company than to that of a telegraph company. It is a well established position that the telephone company is not considered as a publisher of material transmitted over its lines because it is not actually involved in the transmission of the material which is sent directly by the sender to the addressee.[40]

The Court did not approve the ruling of *Stratton Oakmont* on the ground that it was not in line with the established position that the telephone company's role is that of a supplier and not that of a publisher[41]. The Court did not, however, give a blanket immunity to service providers in all circumstances but laid down that Prodigy is a telecommunication company, it can be held liable for those messages which it transmitted or in whose transmission it participated and were found defamatory.[42] The Court ruled that it hardly makes any difference that sometimes Prodigy excludes texts which in its opinion are bad in taste or harass or annoy any third party. What matters is that there is no proof that any such control was exercised in connection with the transmission of the messages complained of by the plaintiff.[43]

The above case was decided after the enactment of Telecommunications Act, 1996 that gives absolute immunity to service provider, yet the court declined to apply or even rule on the applicability of this Act, believing that the case did not call for it.[44]

37. See Keith Siver, *God Samaritan* in *Cyberspace*, 23 Rutgers Computer & Technology Law Journal 16-17 (1997).
38. *Supra* n. 30.
39. *Lunney* v. *Prodigy Services Co.*, Nos 97-07342 and 98-00842, 1998, N.Y. App. Div, Lexis 14047 (Sept. 24, 1998).
40. *Id.* at 10.
41. *Ibid.*
42. *Id.* at 14.
43. *Id.* at 15.
44. See *Lunney* v. *Prodigy*, 723 N.E. 2d 242 (N.Y. 1999).

IV. Legislative Measures

In America, the Telecommunications Act 1996 was passed on February 8, 1996.[45] Title V of this Act is the Communications Decency Act (CDA) which makes it a federal crime to knowingly transmit indecent or patently offensive material to minors by means of a telecommunication device. However, a person who has taken in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to an indecent communication shall not be liable. These indecency provisions of CDA were declared unconstitutional. States District Court for the Eastern District of Pennsylvania in *ACLU v. Reno*[46] which was limited to section 223(a) and (d) of the Act and has no bearing on the Provision titled, "Protection for Good Samaritan Blocking and Screening of Offensive Material" contained in section 230(l) which provides:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> No provider shall be liable for any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable whether or not such material is constitutionally protected.[47]

Congress made it amply clear that the object of the above provision was to overrule *Stratton Oakmont*. The object was outlined in the following words.

> One of the specific purposes of section 230(c) is to overrule *Stratton Oakmont* and any other similar decisions which have treated such providers and fibers as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the contents of communications, which their children are likely to determine the content of communications, which their children are likely to receive through interactive computer services.[48]

45. 47 U.S.C.A. Sections 101-710.
46. 929 F. Supp. at.824.
47. U.S.C. Section 230(1).
48. See R.H. Rep. No. 104-458 at 194 (1996), U.S.C.C. A.N. 10, 207-08. *House Com. Rep.* No. 104-458, at 194.

The initial reaction to "Good Samaritan Provision" was that it does not protect online provider from liability for exercising content control. Simply foreclosing publisher status providers exercising content control does not go far enough; content control may also implicate distributor liability, if a court determines that such control constitutes " "reason to know" of defamatory material on its system. Moreover, precedent suggests that courts will likely subject providers to distributor liability based on content control.[49] Although Congress overruled *Stratton*, it did not fully sever the underlying link between content control and liability, which survives *Stratton* in the form of distributor liability.[50]

The language of section 230(1) is plain. It does not discriminate between a service provider who has knowledge of defamatory matter on his site and a service provider who lacks such knowledge. It provides blanket immunity to all service providers against defamatory action regardless of the fact that they know or had reason to know that the material on their system is defamatory and it makes no difference that the service provider is the only entity with the power to remove it. This is made clear by the ruling in *Zeran v. American Online, Inc.*[51]

In Zeran, AOL, Bulletin Board was advertising shirts. An unidentified person posted a message on it carrying slogans relating to the April 16, 1995 bombing the Alfred P. Murrah Federal Building in Oklahoma city and interested customers of shirts were advised to call "Ken" at Zeran's home phone number. Zeran received angry and derogatory calls and even death threats. He called AOL the same day and was assured by a representative that the posting would be removed. But refused to post retractions as a matter of its policy. A local radio announcer also received a copy of the posting and made it known on air. It urged people to call Zeran who in turn called on police and AOL.

In the meanwhile, Oklahoma city newspapers exposed the advertisement as a hoax and the radio announcer made an apology on air. Zeran filed a defamation suit first against the radio station and then against AOL. The ground of defamation against AOL was that it failed to remove defamatory messages promptly, inspite of the notice, and refused to post retractions of these messages. It failed to screen out similar postings thereafter.

The Fourth Circuit court held that section 230 of the CDA plainly immunizes computer service providers like AOL from liability for

49. *Supra* n. 37 at 22.
50. *Id.* at 23.
51. 129 F. 3d 327 (4th Cir. 1997).

information that originates with third parties.[52] Furthermore, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions such as deciding whether to publish, withdraw, postpone or alter content are also barred.[53]

The Court outlined the reason for such immunity by saying that Congress recognized the Internet and interactive computer services as offering a forum for a true diversity of political discourse, unique opportunities for cultural development and myriad avenues for intellectual activity. Imposing tort liability in an areas with so much potential to enable speech world have an unacceptable chilling effect.[54]

The Court did not uphold *Zeran's* distinction between publisher liability, which is barred by section 230, and distributor liability but held that every one who takes part in the publication is charged with publication for the purposes of defamation law. There are different standards of liability that may be applied, within the larger publisher category, depending on the specific type of publisher concerned. In fact, once a service provider receives notice of a potentially defamatory posting, it is thrust into the role of traditional publishers.[55]

Zeran's argument that holding service providers liable for defamatory matter of which they had notice is in tune with the legislative policy outlined in part II A of the CDA was also not accepted by the Court. It was held that the liability upon notice could defeat the dual purposes advanced by section 230 of the CDA. It would encourage service provider to restrict speech and avoid self-regulation. Notice based liability would also deter service providers from regulating the dessimination of offensive material over their own services. Moreover, Court did not assume that Congress intended to leave liability upon notice intact.[56]

In *Blumenthal* v. *Drudge*[57], AOL made available a report, popularly known as 'Drudge Report', to its Bulletin Board user which was created, edited, updated and managed by Matt Drudge. Matt Drudge had made contract with AOL make its "Drudge Report" available in exchange for a monthly royalty of $ 3,000. AOL reserved the right to remove content that it considers violative of its own standard terms.

52. *Id.* at 328.
53. *Id.* at 330.
54. *Id.* at 330-331.
55. *Id.* at 332
56. *Id.* at 333.
57. 992 F. Supp. 44 (D.D.C. 1998).

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Court ruled that Demon could be sued for posting the alleged defamatory message because Demon knew of the posting but did not remove it. Demon initially challenged the ruling but settled at the last minute prior to trial to avoid final decision.

The above opinion of the Court has been taken with a pinch of salt. European Court of Human Rights has been urged by Outcast, a magazine for the gay community, to rule that British laws violate the right of freedom of expression on the Internet.[65] The Internet Service Providers Association has requested the British Government to review the present legal position so as to protect service providers.[66]

The legal position of service providers is not clear in Australia and the same is the case with other jurisdictions. However, to safeguard the interest of service providers, insurance policies are now made available to them by their Industry. "Cyberliability Plus" policy is made available by the Internet Industry Association which covers domestic and international liability for infringement of intellectual property rights, negligent acts, unauthorized access, data tampering, defamation and other causes of action.[67]

In India, Section 79 of the Information Technology Act 2000 (ITA) provides that a network service provider shall not be liable for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence or contravention. The network service provider means an intermediary and third party information means any information dealt with by a network service provider in his capacity as an intermediary.[68]

The ITA has come close to the UK Defamation Act 1996 by providing that the service provider will be liable where he himself makes a defamatory statement or where he fails to exercise due diligence to prevent commission of offence. Where an offence has been committed without his knowledge or even after he exercised reasonable care, he will not be responsible. So there is a significant shift from Americaf approach, which grants blanket immunity to service providers. Here, onus lies on the service provider to prove that he is innocent. This approach has advantages as in the faceless

64. *Ibid.*
65. Available at <http://www.lawnewsnetwork.com> (visited on 14 June 2002).
66. *Ibid.*
67 Information is available at 1995 W.L 8322602.
68 See explanation to S. 79 of the Information Technology Act 2000.

digital world author of the defamatory matter may not be traced, or he may be outside the jurisdiction. As against this, ISP's can be easily located. This legal position strikes a just balance between the competing interests. It is true that service providers cannot monitor every message or bit of information, with billions of bites of information travelling throughout the Internet every minute, this task is absolutely impossible[69], but if a defamatory matter posted on the service providers system is brought to his notice, there is no reason why there should be no duty on him to remove it. However, it remains to be seen whether this due diligence is equivalent to common law duty on the part of ISPs to check every transfer of information which will be equivalent to a task impossible. Because information travels on even without human intervention, and sometimes because of the volume of traffic and the speed with which the information travels, it becomes impossible to screen all information that passes on.

Even in America there is a now a growing feeling that courts, in reading distributor immunity into Good Samaritan Provision, probably stretched the immunity supplied by the Statute beyond what its drafters had intended.[70] It is now suggested that service providers should have an obligation to remove an offending communication, which has been anonymously posted. However this obligation should arise only when the alleged victim; (1) provides a sworn statement indicating both that a communication transmitted by the service provider concerns a fact that is material to the reputation of the complainant and that the communication, which has been anonymously posted. However, this obligation should arise only when the alleged victim; (1) provides a sworn statement indicating both that a communication transmitted by the service provider concerns a fact that is material to the reputation of the complainant and that the communication is false; and (2) notarize or somehow verifies the statement. The advantage of this scheme is that it would shift the investigatory burden to the potential plaintiff, making more manageable the service provider's burden in addressing allegations of defamation.[71]

Notwithstanding the above discussed immunity, it is debatable as to whether service providers in India enjoy qualified immunity against an action of defamation because of the relevant portion of section 79 of the ITA. provides that a network service provider shall not be liable under this Act, rules or regulations made thereunder for any third party information

69. *Supra* n. 13 at 631.
70. See NANCY W. GUETHER, *Good Samaritan to the Rescue : America Online free from Publisher and Distributor Liability for Anonymously Posted Defamation* COMMUNICATIONS AND THE LAW 87 (1998).
71. *Id.* at 90.

or data made available by him if he proves that the offence or contravention was committed without his knowledge or..."

Thus the immunity granted to the service providers is limited to an offence or contravention under the ITA or rules or regulations thereunder. The wrong of defamation does not fall in the category of offences or contraventions provided under the ITA. However, Common Law precedents suggest that courts in India will, even if they decide that section 79 of the ITA is not applicable for determining the wrong of defamation, most likely take the stand similar to the one taken by the English Courts. That is, the service provider will be liable for defamation only when it is proved that he had knowledge of defamatory mater or had reason to know the defamatory matter.

V. CONCLUSION

Service providers perform a pivotal rule in online information dessimination. These service providers not only facilitate transfer of information but also generate information on their own or allow third party to provide content in pursuance to the contract executed by them. The third party may post an information without informing service provider or an information may be posted anonymously. Thus the content control of the service provider varies and depends upon the given circumstances.

The traditional tests evolved and adopted by the Common law Courts do not suit the peculiarities of the Cyberspace. The dichotomy of publisher/ distributor test maintained by the Common Law Courts does not provide desired solution to the issues generated by the Internet. In these circumstances, a better course is to provide a half way house between the two extreme positions. It will not be in the interest of this evolving technology to apply publisher standard to service provider to determine his liability but at the same time it will be too much to provide blanket immunity to them. As has been discussed, even in America where absolute immunity has been provided to the service providers, it is now contended that in many situations it will be inadvisable to absolve the service provider from responsibility. Thus to provide reasonable balance of competing interests, service provider should be liable only when he has knowledge of the alleged defamatory material or when due diligence, which he ought to have exercised, would have prevented the commission of wrong of defamation. This proposition is contained in Section 79 of the IT Act but this section is likely to create confusion because of the words "...a network service provider shall not be liable under this Act (ITA),

rules or regulations made thereunder..." It is to be seen how will the courts in India interpret this provision.

Notwithstanding that interpretation it is suggested that, keeping in view the present technological handicaps, practical difficulties in monitoring voluminous online traffic and the possibility of anonymous defamatory matter, the service providers should be held liable for the defamatory matter of the third party only when he knows the contents of the disputed matter or by exercising reasonable diligence he could have prevented the publication of the defamatory material be it under Section 79 of the ITA or under general Law of Torts.

FRAUD PREVENTION : DETECTION AND CONTROL STRATEGIES IN NIGERIA

*Yusuf Mohammad Yusuf**

I. INTRODUCTION

Fraud prevention and detection in Nigeria has engaged the attention of successive governments. Attempts at curbing fraud both in the private and public sector of the economy have led successive governments to enact stringent legislations. But the question that needs to be asked and, indeed, it has always been asked is: Have these legislations succeeded in preventing, detecting or controlling fraud? The answer is both yes and no. In this paper, an attempt would be made to highlight efforts of various governments in Nigeria, through the instruments of legislations, mainly, to control fraud. We intend to do that by examining a number of legislations enacted or promulgated over the years aimed at checking fraud in the country. But before we do that, an attempt to define the word "Fraud" would be made.

Fraud when used as a noun means harming someone (by obtaining property or money from him) after making him believe something which is not true. The Black's Law Dictionary defines fraud as "an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.[1] Fraud has been defined in the case of *Delahanty v. First Pennsylvania Bank*[2] as "anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innundo, by speech or silence, word of mouth, or look or gesture". The Black's Law Dictionary again quoting the case of *Johnson* v *Mc Donald*[3] defined fraud as "a generic term, embracing all multifarious means which human ingenuity can device, and which are resorted to by one individual to get advantage over another

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1. Henry Campbell Black, BLACKS LAW DICTIONARY 594 (5th ed. 1979).
2. N.A. 318 2a, Super, 90.
3. 170 Okl. 117, 39, P. 2d 150.

by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated".

Having looked at the definition of fraud, let us attempt to look at how fraud in Nigeria is controlled or prevented. Fraud in Nigeria over the years has been controlled and is still being controlled through legislations. We have a lot of legislations dealing with fraud. Some are general legislations e.g. The Penal Code Law Chapter 89; Laws of the Northern States of Nigeria 1963 and the Criminal Code Act Chapter 77, Laws of the Federation of Nigeria 1990 applicable in the Southern States of Nigeria. Others are specific legislations like the Advance Fee Fraud and other Fraud Related Offencs Decree 1995, otherwise known as the '419' Decree and the recently enacted Corrupt Practices and Other Related Offences Act 2000.

In Nigeria, when the word "Fraud" is used it may also sometimes be referring to "corruption". The Black's Law Dictionary offered a definition of "Corruption" as "an act done with intent to give some advantage inconsistent with official duty and the rights of others". It can also mean the act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.[4] In fact, the Corrupt Practices and Other Related Offences Act 2000, otherwise called the Anti-Corruption Act, defines corruption to include bribery, fraud and other related offences. What this means is that fraud is an aspect of corruption. That being the case, in the course of this discussion corruption and fraud may sometimes be used interchangeably.

II. Preventive and Control Measures

A discussion of the measures aimed at preventing and controlling the occurrence of fraud in Nigeria means discussing the legislations enacted to prevent it. As we have noted in passing earlier, there are several of such legislations. The laws are:

(i) The Penal Code Law Chapter 89 Laws of Northern Nigeria 1963. This law is applicable in all the 19 Nothern States of Nigeria, even though some States have amended some provisions of the Law.

(ii) The Criminal Code Act Chapter 77 Laws of the Federation of Nigeria 1990. This law operates in all the Southern States of the Federation.

4. *Supra* n. 1 at 311.

(iii) The Advance Fee Fraud and Other Related Offences Decree 1995 (the "419" Decree).

(iv) Recovery of Public Property (Special Military Tribunal) Act Chapter 389, Laws of the Federation of Nigeria 1990 (as amended).

(v) Failed Banks (Recovery of Debts) And Financial Malpractices in Banks Decree No. 18 of 1994 (as amended).

(vi) The 1995 Draft Constitution (though it was never put into use).

(vii) The Code of Conduct Bureau and Tribunal Act Chapter 56 Laws of the Federation of Nigeria 1990.

(viii) The Provisions of the 1999 Constitution dealing with the Code of Conduct Bureau and Tribunal as shown in the Fifth Schedule to the 1999 Constitution.

(ix) The Corrupt Practices and Other Related Offences Act 2000.

A. The Penal Code Law (PC)

The Penal Code contains a number of provisions dealing with corrupt practices and has also provided stiff penalties for would-be perpetrators of these acts. The Penal Code Law in Section 320 created an offence called cheating which is defined thus:

> "Whoever by deceiving any person; (a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property or (b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat".

The punishment for cheating is up to three years imprisonment or with fine or with both according to Section 322. Section 323 provides that "whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction, to which the cheating related, he was bound either by law of by a legal contract to protect, shall be punished with imprisonment for a term which may extend to five years or with fine or with both". A person cannot be convicted for cheating unless a successful evidence of deception is established.[5] The offence of cheating must usually be committed by the wrongful obtaining of consent. Section 323 P.C. punishes an offender who cheats a person

5. S.S. Richards, Notes on the Penal Code Law 252 (4th Ed.)

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advantage for himself or another or to cause loss to another person. According to S.S. Richardson, whenever the words "fraud" or "intent to defraud" or "fraudulently" occur in the definition of a crime at least two elements are essential : deceit or intention to deceive or in some cases mere secrecy or concealment; and actual injury or risk of possible injury by means of the deceit.[8]

To prove falsification of accounts under Section 371 P.C. it must be shown that the accused was a clerk, officer or servant or acted in such capacity; that he destroyed, altered, mutilated or falsified a book, paper, writing, valuable security or account in question; that the book, paper belonged to or was in the possession of his employer or had been received by him for or on behalf of his employer and that the accused destroyed, altered, multilated etc. the book or account in question willfully and fraudulently.

The Penal Code (Northern Region) Federal Provision Act 1990 punishes offences relating to coin and notes in Chapter XXXI. Counterfeiting coins or notes is punishable with imprisonment for life or any less term and a person shall also be liable to a fine. Offences relating to revenue stamps are also punishable e.g. counterfeiting revenue stamps in section 440 P.C. Offences relating to weights and measures are punishable under Chapter XXXIII. Sections 453-468 of the Penal Code (Northern Region) Federal Provision Act, 1990 punishes offences relating to posts and telegraph. Also, Chapter X provides for offences by or relating to public servants which include public servants taking gratification in respect of official act in Section 115, taking gratification in other to influence public servant under Section 116, while Section 117 punishes offering or giving gratification to public servants.

The Penal Code Law after criminalising the above stated offences also provides different punishments and penalties to punish those who break the law and deter potential lawbreakers. The punishments range from imprisonment, fine, forfeiture, combination of imprisonment and fine and also canning as provided by Section 68(1) Penal Code. It can be seen from the foregoing therefore that the Penal Code has tried to prevent and control fraud and fraud related offences through legislation.

B. The Criminal Code Act (CC)

The Criminal Code Act Laws of the Federation of Nigeria, of 1990 Chapter 77 like the Penal Code Law has enumerated a list of some fraud

8. *Supra* n. 5 at 33.

and fraud related offences and prescribed punishments thereof. Chapter 38 punishes offences relating to obtaining property by false pretence. Section 418 C.C. defines false pretence as "any representation made by words, writing, or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true. Section 419 C.C. punishes obtaining property by false pretence. section 421 C.C. punishes the offence of cheating. It provides thus: any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen or to pay or deliver to any person any money or goods, or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour, and is liable to imprisonment for two years. Section 422 C.C. punishes conspiracy to defraud by up to seven years imprisonment.

An interesting provision is Section 424 C.C. which punishes anyone that pretends to exercise witchcraft or tell fortunes. Any person who for gain or reward pretends to exercise or use any kind of witchcraft, juju, sorcery, enchantment or conjuration or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult science to discover where or in what manner anything supposed to have been stolen or lost may be found, is guilty of misdemeanour, and is liable to imprisonment for one year. This is interesting provision because of the believe of our people in local fortunetellers and sorcerers.

Chapter 39 Criminal Code punishes receiving stolen property or fraudulently obtained and the like offences.[9] Chapter 40 Criminal Code punishes frauds by trustees and officers of companies and corporations. Section 435 of the Criminal Code punishes directors and officers or corporations of companies fraudulently appropriating property or keeping fraudulent accounts or falsifying books or records. Section 435(2)(e) provides that any person who "being a director, officer or member of a corporation or company does any of the following acts with intent to defraud:

a. destroys, alters, mutilates or falsifies any book, document, valuable security or account which belongs to the corporation or company, or any entry in any book, document of account or is privy to any such act; or

b. makes or is privy to make any false entry in any such book, document or account; or

9. Ss. 427-433 Criminal Code 1990.

c. omits or is privy to omitting any material particular from any such book, document or account, is guilty of felony, and liable to seven years imprisonment.

Section 346 of the Criminal Code punishes false statements by officials of companies with seven years imprisonment. By Section 437 C.C. fraudulent false accounting by a clerk or servant or employee attracts seven years imprisonment. Section 439 C.C. punishes false accounting by a public officer by providing that "any person, who being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of any money or property received by him or entrusted in his possession or under his control is guilty of a misdemeanor, and is liable to imprisonment for two years".

Chapter 43 punishes forgery and like offences. Chapter 49 prohibits secret commissions and corrupt practices. By Section 494 C.C. corrupt acceptance of a gift or corrupt gift to an agent is punishable with two years imprisonment. Aslo, preparation to commit offences, conspiracy, etc. is punishable under Section 508-521 C.C.

The Criminal Code Act has provided different kinds of punishments for corrupt practices and other related offences. Punishments like imprisonment, fines and forfeiture are provided under Section 17 of the Code.

C. The Advance Fee Fraud and Other Fraud Related Offences Decree 1995 (The 419 Decree)

The Advance Fee Fraud Decree hereinafter in this section called the Decree is divided into twenty-four sections broken into three parts. Part One deals with the offences that will be committed under the Decree. It is an offence under the Decree to obtain property by false pretence, with the intent to defraud. It is also an offence for a person to represent himself as capable or producing from a piece of paper or from any currency note by washing, dipping or otherwise treating the paper or material with or in a chemical substance or any other substance or to allow his premises to be used for a purpose that constitutes an offence under the Decree or to fraudulently invite or otherwise induce a person to visit Nigeria for a purpose connected with the commission of an offence under the Decree.[10] The provision of section 1(1) of the Decree is a replication of the provisions of Section 419 Criminal Code except that the phrase "in Nigeria

10. See explanatory note to the Advance Fee Fraud Decree 1995.

or in any other country" was added in the Decree. Under the Decree, obtaining property by false pretence attracts a conviction for a term of not less than 10 years without the option of a fine as provided by Section 1(3) of the Decree, other fraud related offences like producing from a piece of paper or from any other material, any currency note by washing, dipping or otherwise treating the paper or material with or in a chemical substance or any other substance, or a person who with the intent to defraud, represents himself as possessing the power or as capable of doubling or otherwise increasing any sum of money, through scientific or any other medium of invocation of any juju or other invisible entity or anything whatsoever or a person not being the Central Bank, prints, makes or issues or represent himself as capable of printing, making or issuing any currency note is guilty of an offence and is liable on conviction to imprisonment for a term of not less than 5 years without the option of fine.[11] The Decree punishes a person who conspires with, aids, abets or counsels any other person to commit, or the person who attempts to commit or is an accessory to an act or offence, or incites, procures or induces any other person by any means whatsoever to commit an offence. The punishment for conspiracy, aiding, abetting is the same with the punishment prescribed by the Decree for the offence.[12]

The Advance Fee Fraud is a stiff piece of legislation to deal with the so-called "419 offence". In addition to heavy punishments like imprisonment and fine, a convicted offender may be ordered to make restitution to the victim of the false pretence of fraud.[13]

D. Recovery of Public Property (Special Military Tribunal) Act Chapter 389 (As Amended)

This law was promulgated during the tenure of General Muhammadu Buhari to recover ill-gotten wealth from politicians of the second republic. The Act (formerly Decree) made provisions for the investigation of the assets of any public officer who is alleged to have been engaged in corrupt practices, unjust enrichment of himself or any other person who has abused his office or has in any way breached the Code of Conduct of public officers contained in the Constitution of the Federal Republic of Nigeria[14]. The punishment under the Act to be meted to any officer who

11. S. 2(a) (b) ADVANCE FEE FRAUD DECREE 1995.
12. *Id.* S. 8.
13. See Y.M. Yusuf, *The Advance Fee Fraud Decree*, III PUNJAB UNIVERSITY LAW JOURNAL 22-30 for a full discussion on the Decree.
14. See Preamble to the RECOVERY OF PUBLIC PROPERTY ACT 1994.

engages in corrupt practices or has corruptly enriched himself or any other person, etc. shall, apart from any penalty, include forfeiture of assets to the Federal Government as provided by Section 1(2) of the Act. Apart from the penalty of forfeiture, a convicted person may also be liable to imprisonment for a term not exceeding 21 years or a sentence of life imprisonment according to the provisions of Section 13(1) of the Act.

E. The Failed Banks (Recovery of Debts) etc. Decree of 1994 (As Amended)

The Decree, as amended, established the Failed Bank (Recovery Debts and Financial Malpractices) Tribunal with the power to, among other things:

a. Recover the debts owed to failed banks arising in the ordinary course of business of the banks and which remain outstanding at the date the banks are closed or declared failed banks by the Central Bank of Nigeria; and

b. Try offences, created under the Decree, relating to certain financial malpractices in banks.

The offences punishable under the Decree are provided for under Section 199 (1) (2). The offences concern (1) any director, manager, officer or employee of a bank who without due care and compliance with banking regulations misused the banks facilities and (2) any person who being indebted to or being a customer of a bank negligently, willfully or recklessly among others falsify his document or account for the use of the bank.[15] Section 20 of the Decree provides punishments such as imprisonment without the option of fine, and terms of imprisonment ranging from 3 to 5 years. The Tribunal (now the Federal High Court) may order the confiscation of the property, movable or immovable of a person convicted under the Decree, of the value equal to the amount involved in the offence as provided by Section 20(2). The property so confiscated or voluntarily surrendered shall be forfeited to the bank that suffered the loss, or to a receiver or liquidator in the case of a failed bank or to such other person who, in the opinion of the Tribunal (now Federal High Court) deserves to be compensated for the loss suffered.[16] Section 21 punishes attempt to commit the offences specified under Section 19 of the Decree as the full offence. Offences by bodies corporate other than the banks can on

15. K.S. Chukkol, *Enforcement Institutions. Powers, Procedures and Penalties. Under the Various Anti Corruption Laws in Nigeria*. A paper delivered at a workshop for Borno and Yobe legislators at Maiduguri, September 13-14, 2000.
16. S. 20(4) FAILED BANK DECREE.

conviction attract an order for winding up and all assets, after satisfying all other claims of the receiver or liquidator, shall be forfeited to the federal government. This is provided for by Section 22(2) of the Decree.

F. The 1995 Draft Constitution

The 1995 Draft Constitution that was never put into use contained some novel provisions aimed at curbing corruption and corrupt practices. In fact, the still born Constitution made eradicating corruption as one of the fundamental rights of Nigerians. It gave a person the right to fight corruption and abuse of power, protect and preserve public property and fight corruption and abuse of power, protect and preserve public property and fight against misappropriation and squandering of public funds. This would have been the first provision of its kind in any of Nigeria's previous Constitutions. The 1995 Draft Constitution also provided for the establishment of a tribunal for the recovery of ill-gotten Wealth. The Tribunal would have had the power to try any public officer and any other person (whether being a citizen or not of Nigeria) who has engaged in corrupt practices, or has corruptly enriched himself or any other person; or has by virtue of office, committed an act or omission contributing to the economic adversity of Nigeria. The penalty to be imposed if the Constitution had been put to use would have been, apart from forfeiture, the penalties stipulated in the Criminal Code, the Penal Code or any other Act of the National Assembly. Had the 1995 Draft Constitution been put to use these provisions would have gone a long way in checking corruption and corrupt practices.

G. The Code of Conduct Bureau and Tribunal Act Chapter 56, Laws of the Federation of Nigeria, 1990

The preamble to the Act states that it is "an Act to provide for the establishment of the Code of Conduct Bureau and Tribunal to deal with complaints of corruption by public servants for the breaches of its provisions. Section 23 (2) of the Code of Conduct Bureau and Tribunal gives the Tribunal powers to impose punishment including any of the following:

a. vacation of office.
b. disqualification from holding any public office.
c. seizure and forfeiture to the state of any property acquired in abuse of, or corruption in office.

Where the breach of the Code of Conduct is a criminal offence under the Criminal Code or the Penal Code or any other enactment, then without

prejudice to the punishment that may be imposed under Section 23 (2) of the Act other punishments commensurate with the criminal offence may be imposed.

H. The 1999 Constitution

The 1999 Constitution like the 1979 Constitution in the Fifth Schedule provides for a Code of Conduct for public officers. Public officer for the purposes of code of conduct are the president of the Federation, the Vice President, the President and the Deputy President of the Senate, Speaker and Deputy Speaker of the House of Representatives, the Speaker and Deputy Speaker of the State Houses of Assembly and all members and staff of legislative houses. Others are State Governors, Deputy State Governors, Ministers, Chairmen, Members and staff of Local Government Council, Chairman and Board Members of Boards of Parastatals, all staff of Universities, Colleges and Institutions owned or financed by the Federal or State Governments or Local Government Councils etc.

A public offcer should not put himself in a position where his personal interest conflicts with his duties. The Code of Conduct prohibits a pubic officer from asking or accepting property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties.

Offering a public officer of any property, gift or benefit of any kind as an inducement or bribe for the granting of any favours or the discharge of the public officer's duties is prohibited[17]. Under the Code of Conduct a public officer is supposed to declare his assets immediately after taking office and thereafter at the end of every four years and at the end of his term of office. The public officer should submit to the Code of Conduct Bureau a written declaration of all his properties, assets and liabilities and those of his unmarried children under the age of eighteen years[18]. Any property or assets acquired by a public officer after any declaration required under the 1999 constitution and which is not fairly attributable to income, gift or loan approved by the Code of Conduct shall be deemed to have been acquired in breach of the Code of Conduct unless the contrary is proved[19]. The Code of Conduct Tribunal may impose any of the following punishments on a person who breaches the Code of Conduct:

17. CONSTITUITON (1999) V. Schedule para 8.
18. *Id.* Para 11.
19. *Id.* Para 11(3).

a. vacation of office or seat in any legislative house as the case may be;

b. disqualification from membership of a legislative house and from holding of any public office of a period not exceeding 10 years.

c. seizure and forfeiture to the state of any property acquired in abuse or corruption of office.[21]

I. The Corrupt Practice and Other Related Offences Act 2000

This Act is the most recent legislation in Nigeria aimed at fighting corrupt practices. The Act seeks to prohibit and prescribe punishment for corrupt practices and other related offences. The Act also sets up an Independent Corrupt Practices and Other Related Offences Commission to investigate and prosecute offenders. This is a very comprehensive and detailed legislation. To do justice to this legislation requires a discussion of its own which is outside the scope of this paper. It suffices therefore for us to comment in passing about some of its salient provisions.

The duties of the Independent Corrupt Practices Commission are listed in Section 6 of the Act. The Commission among other things is empowered to examine the practices, systems and procedures of public bodies and where, in the opinion of the Commission, such practices, systems or procedures aid or facilitate fraud or corruption, to direct and supervise a review of them. The Commission shall have the power to instruct, advise and assist any officer, agency or parastatals on ways by which fraud or corruption may be eliminated or minimized by such officer, agency or parastatal. Section 8-26 of the Act provides offences and prescribes punishments for these offences. These offences include accepting gratification, making corrupt offers to public officers, fraudulent acquisition of property, fraudulent receipt of property, making false statement or return, bribery of public officer, using office or position for gratification, bribery for giving assistance as regards to contracts; making a statement which is false or intended to mislead is also an offence[21].

The punishments provided for these offences include imprisonment of various terms, fine of various amounts, or combination of fine and imprisonment with hard labour and also forfeiture of property as provided by Section 8-26 and Section 47 of the Act. Attempts, preparations, abetment and criminal conspiracies are also punishable as offences under the Act.

20. *Id.* para 18.
21. ANTI-CORRUPTION ACT 2000 Ss.18-20.

Other laws like the Nigerian Deposit Insurance Corporation Act Chapter 301, Laws of the Federation of Nigeria 1990 has provisions relating to return on frauds and forgeries by providing in Section 39 of the Act that an insured bank shall render to the Nigeria Deposit Insurance Corporation (NIDC), monthly returns of frauds, forgeries or outright theft occurring during such months and shall include a detailed report of such events. Section 40(1) of the NDIC Act provides that an insured bank shall notify the corruption by any staff dismissed, terminated or advised to retire on the ground of fraud. Persons affected under sub-section(1) of Section 40 of the NDIC Act shall not be employed in an insured bank without the bank first notifying the NDIC.

III. FRAUD DETECTION STRATEGIES

Detecting frauds is much more difficult than preventing it. Those saddled with the responsibility of prevention of fraud of any type need to pay close attention to the means of prevention as well as those of detection. Strategies for detecting fraud depend on the organisation concerned. The strategies adopted by banks may differ with the strategies of a company or government parastatal may adopt. In most cases frauds are not detected just because there are no strategies in place for detecting them, bu the organisations concerned will just stumble across a fraud.

Many agencies and organisations are involved in fraud detection control strategy. Some of these strategies are in-house; others are external to the organisation. Banks and other financial institutions employ fraud-detecting measures. These measures vary from one bank to another. However the Central Bank of Nigeria through the use of their bank examiners assist in detecting frauds. The CBN sends examiners to banks to inspect their books. Individual banks too have their own inspection departments; banks have both external auditors and internal auditors who periodically audit the accounts of the banks. Banks are normally alert to detect any questionable transaction. There are some built-in warning signs which the banks look out for. Erasure and alterations on any accounting document, incorrect coding, irregular types of journal entry, any gaps in documents that could be filled after use are normally warning signs to put banks on alert. A successful bank fraud normally succeeds as a result of the collaboration of an insider. Banks take measures to prevent or detect fraud by close monitoring of the lifestyle of their staff, use of regiscope in banking halls to take the photographs of payees along with cheques cashed by them as a means of tracing the fraudsters in case a fraud is committed. Other measures include coding, decoding and testing of cable

and telex messages, periodic rotation of staff in sensitive areas, etc.[22]

However, inspite of all the detecting strategies, frauds sometimes succeed because of the poor control systems that are in place, lack of attention to details and carelessness of staff in the execution of their duties.[23] The more the internal control systems are understood and applied, the less chances of success of fraud in most organisation. Fraudsters are constantly fine-tuning and perfecting their strategies to succeed, organisations too should not rest on their oars. A more serious dimension to fraud in banks is telex or fax fraud where false or misleading telex messages are transmitted to fictitious collaborators either in Nigeria or abroad. Because of the growing instances of such frauds, banks have devised stricter control measures. Only trusted and vigilant officers are charged with the duties of performing sensitive schedules especially with regards to letters of credit confirmations and pay away telex authorisations[24].

Fraud detecting strategies cannot be complete without the role of the police. The Nigerian Police Force inspite of its inadequacies and handicaps has a very important role to play in detecting fraud. In fact, the police force has a whole department in charge of fraud. Accountants and Auditors too have roles to play. At the end of the day the best strategy to detect fraud is to control and prevent its occurrence because it is much more preferable to prevent fraud than to detect it. Those concerned with prevention of material fraud of any type need to pay close attention to the means of prevention as well as to those of detection.[25]

IV. Concluding Remarks

What we have seen so far is that there is enough legislation to control, prevent and punish fraud in Nigeria. These laws have been in place for a very long time. In fact, some of the legislations are merely repetitive of earlier ones. Yet, Nigeria's reputation as one of the most corrupt countries in the world continues to soar according to recent statistics. However, what is clear is that what we lack in Nigeria is not the absence of

22. A.I.J. Etuk, *"White Collar Criminality and Frauds in Financial Institutions in Nigeria-Possible Solution"*, in Awa U. Kalu and Osinbajo. Y (eds.) In Perspctives on Corruption and Other Economic Crimes in Nigeria 112 (Federal Ministry of Justice Lagos).
23. P.A. Ogwuma, *"White Collar Criminality Land Frauds in Financial Institutions in Nigeria Possible Solutions*, in Awa U. Kalu and Osinbajo, *id.*
24. G.K. Olufon, *"White Collar Criminality etc."* in Awa U. Kalu and Osinbajo, *id.* at 132.
25. I.K. Humtington, Fraud Prevention and Detection 183 (1992).

laws but the will to apply the laws without fear or favour. As long as we continue to be selective in our application of laws the country will continue to drift further toward corruption. A clerk caught stealing in the Managing Director's office should equally be punished as much as an Executive director found to have embezzled millions of Naira, instead being asked to "voluntarily retire". An armed robber caught operating along the highway has been paraded in front of journalists during the monthly press briefing of the police commissioner and later executed while a commissioner in a state who diverts millions of Naira meant for a hospital in the state and sets the medical stores on fire will only be re-assigned to the more lucrative Ministry of Agriculture! The full weight of the law should be made to bear on all and sundry. There should be no separate law for the "small time" criminal and another for the "big time" criminal. A criminal is a criminal. All agencies set up to prevent fraud should be properly empowered and strengthened. There should be commitment to apply the laws in letter and spirit.

An important organ that can assist in curbing fraud and fraud related offences is the judiciary. The Nigerian legal system has its problems though. There is too much delay and cases take a long time to be disposed off. People point to the delay in bringing criminals to book as one of the major reasons why frauds are committed daily. The judiciary should be well funded, more qualified and well-trained judicial staff should be employed. There is need to have more men, materials and equipment to strengthen the judiciary. This will go a long way in overcoming delay in cases being heard, remove court congestion and facilitate speedy dispensation of justice. Lawyers too in this regard have a role to pay. Sometimes, the delay is from lawyers. They have too many cases to handle and too few partners, associates or juniors in the chambers to assist them. So in one day you find a lawyer having to appear before three/four courts. In relation to court delays the report of the Roskill Committee in England is relevant in Nigeria too. The committee noted that "The public no longer beleives that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditously and effectively to book. The overwhelming weight of the evidence laid suggests that the public is right. In relation to such crimes, and to the skillful and determind criminals who commit them, the present legal system is archaic, cumbersome and unreliable. At every stage, during the investigation, preparation, committal, pre-trial review and trial the present arrangements offer an open invitation to blatant delay and abuse"[26]. All that has been said about the delay in

26. See *The Fraud Trials Committee Report* 1 (1986).

hearing cases in England are applicable in Nigeria. In fact the delay is much more serious here.

The Nigerian Police Force as we noted earlier has an important role to play in fraud prevention and detection. But first they have to improve their image. The general belief is that the police only takes interest in investigating cases of fraud if the offender refuses to "settle them" by giving them "their share" of the loot. That may not be true but the fact is that the police are ill equipped, undermanned, under funded and ill trained to deal with the sophistication and ingenuity of fraudsters who are daily sharpening their skills. Nigerians too should cultivate the attitude of furnishing the police with information about criminals in their midst. And such informants should be protected by the police and not end up being molested by both the police and the criminals they report. The press as watchdogs of the society have roles to play in exposing acts of fraud in the society. The press should expose government officials who live above their means and government should investigate such exposures and those indicted publicly punished. Contract inflation, over-invoicing or under-invoicing in return for kickbacks should be punished. Government should introduce a system of rewarding people who blow the whistle on those who are engaged in fraudulent activities. As an incentive to expose fraud, immunity from posecution should be given to anyone who has earlier been involved in the planning of a fraud but who changes his mind to expose his co-conspirators. The life style of public officers should be monitored. Any public officer who lives above his means should be made to explain his sources of income.

POPULATION STABILISATION VIS-À-VIS THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION+

*Usha Tandon**

The "National Commission to Review the Working of the Constitution"[1] has touched casually the population problem of the country in its consultation paper entitled "Pace of Socio-Economic Change and Development"[2]. It is a matter of regret that the burgeoning population of the country which is one of the major factors that has constrained the pace of India's socio-economic progress, has not found any place in any heading or sub-heading of the contents of the paper released by the Commission. The issue has been taken up by the Commission to demonstrate one of the lessons learnt from experience i.e. 'co-operation and not coercion is the golden key for the success in implementation of programmes'. This lesson, they have illustrated by one example only. And that example relates to the coercive measures taken during emergency to ensure success in family planning programmes. Then the Commission has argued, that in areas like population stabilisation coercion and authoritarian approach would not work. Though the Commission has stated[3] that one of the objectives of the paper is to highlight factors that have constrained the pace of India's Socio-economic progress it has failed, totally, to link the torrential increase in the population of the country as one of such major hinderances. Thus the Commission has not taken up the issue of population stabilisation in the right perspective. India's population problem is too serious and complex to be treated casually. Commission's apathy towards this demanding issue is appalling.

Be that as it may, the Government of India was one of the first in the world to recognise the long-range implications of unchecked population growth for the socio-economic development of the Nation.[4] The very First

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1. Hereinafter referred to as Commission.
2. Chapter VII para 7.6.3-7.6.5.
3. *Id.* para 3 of Executive Summary.

Five Year Plan (1951-56) recognised that the population control should be one of the essential components of socio-economic planning of the country. However, inspite of the existence of family planning programmes for the last fifty years, India has hit the one billion mark in May 2000[5] . The Census of India 2001 delivers billion plus figure.[6] Everyday, about fifty thousand persons are added to the already large base of its population. The population control programme as going on in India has been a miserable failure. And the root cause of the failure to control the country's population growth has been the lackadaisical and unsound approach to the problem. And it is the same faulty approach that has been referred to and accepted by the Commission.

As stated the issue of population stabilisation has been recognised as an essential requirement for promoting sustainable development in official policies and that too in the National Population Policy 2000.[7] The only debate is with respect to the ways to bring down the growth rate of population. Here, two models are talked about. One which is described as the "development model" and the other the "coercive model". The coercive model reminds the people of the emergency period in the country. Even the Consultation paper states that "the political and human wounds of those (emergency) measures are yet to heal completely.[8] But what political wounds! It took Indians only 34 months to bring the mother and son back to power, overlooking everything that had happened during the dreadful 19 months of the emergency. The only thing not forgotten was the excesses committed in the name of implementing family planning. Even today when one asks the political parties as to why they are so apathetic towards the population problem of the country, the reply is always, "have you forgotten the Emergency"? The Emergency and family planning have unfortunately become almost synonymous. The fallout is that population control is taboo to the country's politicians. The credit for creating such retrograde apathy and fear against family planning in the minds of both public and politicians goes to India's intelligentia and policy makers.[9] In their anxiety and zeal to condemn the emergency they highlighted the excesses committed during that time by family planning programme. They were right to sear the emergency in the minds of the

4. See the Government of India, Planning Commission, FIVE-YEAR PLAN DOCUMENTS.
5. UNFPA, POP. TIMES, Vol. 1, No. 2, (Oct. 1999).
6. See Registrar General and Census Commissioner of India, CENSUS OF INDIA 2001, Series, 1, Paper 1 of 2001.
7. Government of India, Ministry of Health and Family Welfare, NATIONAL POPULATION POLICY, 2000 see also http://mohfw.nic.in.
8. *Supra* n. 1, para 7.6.3.
9. K.B. Sahay, *Tarred With Political Brush* TIMES OF INDIA, August 31, 1993.

public. But in the case of family planning they succeeded in tarring the good along with the bad. The emergency and family planning became one and the same in the nation psyche. However, the intelligentia did not care to correct this psychological distortion even after the end of the emergency. The result has been a psychological hurdle to the government's effective measures to stabilise the nation's population.

According to the "development model" rise in the standard of living, education, employment, health care and other basic social needs will automatically lead to reduction in birth rate. The example of Kerala is often quoted to prove that literacy and health care leads to population reduction. The Kerala hypothesis prevailed as an axiom for over a decade in the eighties and then slowly if faded out, as it was not found scientifically true. Kerala population growth rate (PGR) declined sharply during seventies as evidenced from 1981 and 1991 census data. Kerala PGR during the decades 1941-51, 1951-61 and 1961-71 have been 2.08, 2.22 and 2.37 percent a year. But during 1971-81 the State's PGR registered, for the first time, a decline—that too a sharp one and came down to 1.78% a year which further fell down to 1.32% a year during 1981-91 and to 0.90% a year during 1991-2001.[10] So 1971-1981 was indeed a turning decade in Kerala's demographic history. Kerala's literacy rate and population growth had been increasing from 1941-51 to 1951-71. During this period Kerala's PGR increased from 2.08% to 2.22% a year while its total and female literacy rates increased from 35% to 70% and 25% to 65% respectively.[11] Thus, these data are clearly in contravention to the Kerala hypothesis. Another important aspect of its growth pattern to note is that the increase of Kerala's population growth rate from 1941-51 to 1951-61 has been identical to the same during 1951-61 to 1961-71: both being equal to 0.65% per year. The impact of any truly effective control method must get reflected in the rate of change of population growth rate. Had literacy been really effective in controlling population growth then the significant increase in Kerala's literacy during 1951-71 as mentioned above ought to have made some change in the state's population growth rate during the same period which did not happen. Further it is important to highlight again that the increase in Kerala's literacy rate did not show any sudden increase that might account for the sharp decrease in the state's PGR in 1971-81. Thus simultaneous increase in literacy and population growth rate in Kerala from 1941 to 1971 (i.e., for 30 years) and then a sudden and a sharp decline in the state's PGR in 1971-81 are two such critical features of Kerala's population dynamics that cannot be overlooked

10. See *supra* n. 6; see also A. Boe, INDIA'S BILLION PLUS 62 (2001).
11. *Ibid.*

before extending the erroneous Kerala hypothesis to other parts of the country.

There is yet another important but unexplained aspect of Kerala's demographic transition. As per 1991 and 2001 Census Kerala's total and female literacy rate are as high as comparable to the literacy rates of even developed countries (i.e., + %). Inspite of this "near total literacy" the population growth rate of Muslims who constitute one-fourth of Kerala population is higher (2.3% per year, as per 1991 census) than the national PGR (2.1%) and is almost double the PGR of Hindus in Kerala itself. It is therefore not possible to accept Kerala hypothesis as scientifically valid.

However, the basic question remains : what then was the cause of the significant decline in Kerala's PGR from 1971-81? The late sixties onwards, Keralites in large numbers started getting jobs in the Middle East and other Gulf countries. It is estimated that by 1981 about 6 lakhs workers had gone to the Gulf and the number of migrants increased to 17 lakhs in 1991 and then to 28 lakhs in 1996. This constitutes about 5% of Kerala's total population. And it is well known that the earning of one person in these countries is enough to raise substantially the living standard of atleast 15 persons in Kerala. Most of the people migrating to Gulf did not take their families with them. So the remittances from these workers to their families back home did not only provide direct financial assistance to their kith and kin but the remittances also helped in promoting overall growth of Kerala's economy. This assertion is supported by the fact that the percentage of people below poverty line in Kerala declined from 48.4% in 1977-78 to 26.8% in 1983-84 that is the highest decline in the country. So it is the "Gulf boom" which led to economic prosperity especially of the working class, which is the primary cause of Kerals's excellent performance in population control post 1971. [12] It is factually wrong as written in the Commission's Consultation Paper "that in Kerala the State has invested well in people's health and education and therefore PGR declined." [13] The puzzle that is baffling demographers and officials, now, is the significant fertility decline taking place in Andhra Pradesh but without any significant improvement in the conventional socio-economic parameters.

Further the Commission has without any analysis or examination approved the National Population Policy anounced by the Government of

12. K.B. Sahay, *Demographic Transition in South* YOJANA, 16 Dec. 1999.
13. *Supra* n. 1 para 7.6.4.

India in February 2000. [14] About a year later in March 2001, the Census 2001 data became available. The Census 2001 report makes it clear that the NPP 2000 has already become invalid. The Census report analyzes that "it has been assumed in the policy document that the medium term objective of bringing down the total fertility rate to replacement level of 2.1 by 2010 will be achieved. It is envisaged that if the NPP is fully implemented the population of India should be 1,013 million by 2002 and 1,107 Million by 2010. However, in March 2001 itself, India has already exceeded the estimated population for the year 2002 by about 14 million. It will take a herculean effort on the part of the government and the people to achieve the much-cherished goal of a stable population." [15] I wish the Commission had seen the Census report 2001.

The National Population Policy 2000 has several flaws, but the most serious lacuna is in the long-term objective of the policy. According to NPP 2000, "the long term objective is to achieve a stable population by 2045, at a level consistent with requirements of sustainable economic growth, social development and environmental protection". But what is that sustainable population size at which the NPP 2000 wants to stabilize India's population? The document provides no answer. In fact defining and estimating the country's sustainable population size ought to have been top priority for the policy makers. Because it is this sustainable size of the population that must in turn determine the medium and short-term objectives of the population policy and not the other way around. Moreover India's population is already close to an unsustainable level. It is already running ahead of its natural resources. [16]

As far as the way to bring down the fertility rate is concerned the NPP follows the Development Model. The Karunakaran population committee (1992/93) had proposed certain disincentives for those who do not follow the programme's norms. [17] The present Government (led by BJP) has sometimes, casually expressed the concern for the stringent measures, less than coercion, for population control. [18] But none of them, so far has been adopted by the Government, because of the unfortunate legacy of the emergency. As a matter of fact, except for a brief period of emergency in 1975-77, India's population control programmes since

14. *Supra* n. 7, hereinafter referred to as NPP.
15. *Supra* n. 6 at 33-34.
16. World Watch Institute, STATE OF WORLD (2000), Chapters 3 and 4.
17. Government of India, Ministry of Health and Family Welfare, DRAFT STATEMENT OF NATIONAL POPULATION POLICY, 1994.
18. See Home Minister L.K. Advani's statement, HINDUSTAN TIMES, Febuary 11, 2001.

1951 have indeed been mostly on these lines. The analysis of this method further reveals that there is a critical level of standard of living, which has been found to lead to a rapid reduction in birth rate. However hardly 15% of India's population is above this critical level. To induce the remaining 85% of the people to adopt family planning requires a quantum jump in living standard. Such a jump seems highly unlikely at present. If India's economic growth rate and population growth rate is compared, EGR is marginally higher than the PGR.[19] According to the development model, to control population growth the economic growth rate has to be on the fast lane. In other words, it is not the development but the rate of development that is critical for the economic growth to serve to effectively rein in population growth. But India has yet to show that it can achieve rapid economic development. The result will be little or no decline in population control. This is precisely what has happened in India. It is important, therefore, for the country to rescue itself from this 'marginal development syndrome'. The way to come out of this marginal development syndrome before it is too late is by bringing down the population growth rate with the help of extra-developmental methods. The issue here is not development versus coercion or authoritarianism versus cooperation but of a proper combination of the two i.e. co-operation, obligation, incentives, and disincentives to check India's population growth. It is necessary that the people are educated and convinced that the hard measures are not enemies but saviors. Law can be a very useful instrument in this regard. The need is to enact a social welfare legislation, like enactment of Responsible Parenthood Act which should encourage and constrain the people to adopt small family.

The Indian Constitution adopted in 1950 had no specific provision in this regard. Some Constitutional changes were introduced in 1976 to boost family planning norms. The Constitutional amendment of 1976[20] has added a new entry 20A to List III to the 7th Schedule to the constitution that entry 20A was entitled "Population Control and Family Planning." Another change made was in Article 81. A proviso was added to Article 81 to the effect that froze the number of seats in the Lok Sabha and State Assemblies till 2001 as per 1971 census. Similar provisions were also added to Articles 55, 82, 170, 330 and 332. The freeze on undertaking fresh delimitation has been now extended up to the year 2026.[21] Apart from these provisions, there is no other provision which deals directly with the population problem

19. Government of India, Ministry of Finance, Economic Survey (1999-2000).
20. The Constitution (Forty-Second Amendment) Act 1976.
21. The Constitution (Ninety-First Amendment) Act 2000.

of the country. Thus the Constitution of India as it exists today is inadequate to effectively deal with this burning issue of the country. In this respect, I propose the amendment to the Constitution at four places:

(i) A mention should be made of small family (of not more than two children) in Part IV of the Constitution "Directive Principles of State Policy".

(ii) In Part IV-A "Fundamental Duties" a duty to promote and practice small family must be included.

(iii) In Part III "Fundamental Rights", the right of access to the means of birth control measures must be included. The word access can be explained to include information, knowledge, supplies and service of birth control measures.

(iv) A provisions should be made for the creation of fully autonomous organ namely Population Commission.[22] The political parties have not been taking this sensitive issue seriously and effectively for fear of losing vote bank, therefore it is necessary to de-link population control from political processes.

The Constitution of India although is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below poverty line. The percentage of illiterate persons and those below poverty line might have decreased, but the absolute number of such persons has increased. In spite of India's commitment to WHO's declaration "Health for all by the year 2000". India has acquired the distinction of achieving ill health for most by 2000. The laudable goals spelt out in the Directive Principles of State Policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Therefore, the population control assumes a central importance in providing social and economic justice to the people of India. So the National Commission to review the working of the constitution must take up the issue of population control with much more urgency and seriousness.

22. The present jumbo Population Commission, 2000 is a political organisation constituting Prime Minister as its Chairman the Deputy Chairman of the Planning Commission as the Vice-Chairman, Chief Ministers of States, Ministers of related central Ministries, Secretaries of the central departments etc. See Government of India, Planning Commission, No A-43011/17/2000, May 11, 2000.

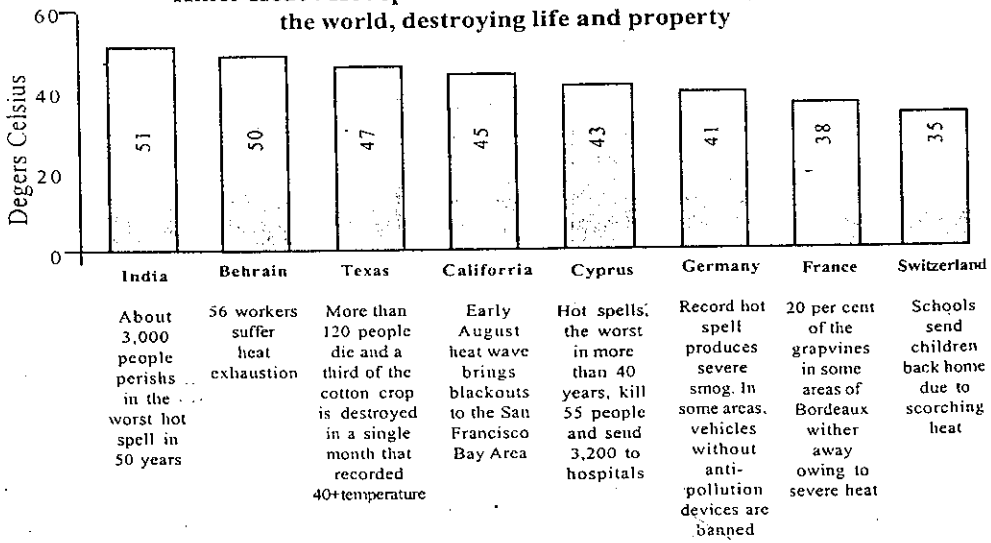
LEGAL REGULATION OF ATMOSPHERE WITH SPECIAL REFERENCE TO CLIMATE CHANGE: INTERNATIONAL SCENARIO

*Gitanjali Nain Gill**

I. INTRODUCTION

The Earth's climate system is as fickle as it is delicate. Climate systems are variable and vary from year mainly because of human activites which alters the chemical composition of the atmosphere through the buildup of greenhouse gases - primarily carbon dioxide, methane and nitrous oxide. The heat trapping property of these gases is undisputed. As the Earth's surface temperature increases, weather pattern changes resulting in frequent storms and hurricanes. Polar ice melts as a result of the rising temperature and combined with the thermal expansion of sea water, causes oceans to slowly creep up and swallow low-lying islands. Scientists have predicted that if conentrations of greenhouse gases (GHGS),

Killer Heat : Hot spells in 1998 affected several parts of the world, destroying life and property



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continue to build up in the Earth's atmosphere, it is likely to accelerate the rate of climate change.[1] The below mentioned chart indicates several parts of the world, life where life and property have been destroyed due to climatic changes[2].

In recognition of the fact that many of the problems, caused by air pollution can have impacts across th globe, international efforts have been made to shape policies and rules on both continental and domestic level for environmental protection. An attempt has been made in this paper to highlight these developments with special emphasis on climatic changes.

II. INTERNATIONAL CONVENTIONS

The realization that the world is getting warmer, struck Swedish scientist Svante Arrhenius in 1896[3], but it was hardly of any concern as the industrial revolution had just begun and the capacity of the atmosphere to absorb gaseous by product seemed endless. In 1957, Scientists Roger Revelle and Hans Suess put together a paper on the climate change phenomenon and presented it to the international political community during the run-up to the 1972 Stockholm Conference.[4]

A. Stockholm Conference

The United Nations Conference on Human Environment and Development of Stockholm in 1972 is considered to be the *Magna Carta* of environment protection. It was for the first time that the world community got together to deliberate seriously on an important issue of environmental protection.

To defend and improve the human environment for present and future generations was considered an imperative goal for mankind-a goal to be pursued together with and in harmony with the established and fundamental goals of peace and of world-wide economic and social development. To achieve this environmental goal demanded the acceptance of responsibility at both the international and national level, all sharing equitably in common efforts. A growing class of environmental problems becuase they are regional or global in extent or because they affect the common international realm require extensive co-operation among nations and actions by

1. http://www.epa.gov/globalwarming/actions/index.html, (visited on 12 February 2002).
2. Anon, *Planet Watch*, New York, TIMES, August 31, 1998.
3. Anil Aggarwal and Sunita Narain, GREEN POLITICS-GLOBAL ENVIRONMENTAL NEGOTIATIONS Vol. 1, 24 (1999).
4. *Ibid.*

international organization in the common interest[5].

B. Convention on Long Range Transboundary Air Pollution

Recognising the existence of possible adverse effects, in the short and long term of air pollution including transboundary air pollution and considering the pertinent provisions of the Declaration of the United Nation Conference on the Human Enviornment 1972 and in particular Principal 21[6], the Geneva Convention on Long Range Transboundary Air Pollution, agreed under the United Nations Economic Commission for Europe (UNECE) in 1979 was the first real attempt to set up a formal framework of controls overs air pollution between nations.

The Convention on Long-range Transboundary Air pollution is one of the main means of protecting our enviornment. It was drafted after scientists demonstrated the link between sulphur emissions in continental Europe and the acidification of Scandinavian lakes and later studies confirmed that air pollutants could travel several thousand kilometers before deposition and damage occurred. This implied that cooperation at international level was necessary to solve problems such as acidification. The Convention was the first internationally legally binding instrument to deal with problems of air pollution on a broad regional basis. It was signed in 1979 and entered into force in 1983. It has greatly contributed to the development of international environmental law and created the essential framework for controlling and reducing the damage to human health and the environment of transboundary air pollution. It is a successful example of what can be achieved through intergovernmental cooperation.[7]

Since its entry into force the Convention has been extended by eight protocols:

1. The 1984 Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air pollutants in Europe (EMEP);
2. The 1985 Protocol on the Reduction of Sulphur Emission of their Transboundary Fluxes by at least 30 percent;

5. Preamble, THE U.N. CONFERENCE ON HUMAN ENVIRONMENTAL AND DEVELOPMENT (1972).
6. Principle 21 states:
   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.
7. http:/www.unece.org/env./lrtap/ (visited on 10 January 2002).

3. The 1988 Protocol concerning the control of Nitrogen Oxides or their Transboundary Fluxes;
4. The 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes:
5. The 1994 Protocol on Further Reduction of Sulphur Emission:
6. The 1998 Protocol on Heavy Metals:
7. The 1988 Protocol on Persistent Organic pollutants (POPs); and
8. The 1999 Protocol to Abate Acidification, Eutrophication and Ground level Ozone.

C. Ozone Depletion — Vienna and Montreal Protocol

Determined to protect human health and the environment against adverse effects[8] resulting from human activities which modify the ozone layer, the Vienna Convention for the protection of the ozone layer was signed in 1985. The aim of the Convention was to:

(i) cooperate by means of systematic observations, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer;

(ii) adopt appropriate legislative or administrative measures and cooperate in harmonizing appropriate policies to control, limit, reduce and prevent human activities under their jurisdiction or control should it be found that these activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification on likely modification of the ozone layer.

The Convention identified few chemical substances of natural and anthropogenic origin having the potentiality to modify the chemical and physical properties of the ozone layer, primarily being[9].

(a) carbon substances;
(b) nitrogen substances;
(c) chlorine substances;

8. Art. 1(2) defines 'adverse effects' as changes in the physical environment or biota, including changes in climate, which have significant deleterious effects on human health or on the composition, resilience and productivity of natural and managed ecosystems, or on materials useful to mankind.
9. Annexure 1, VIENNA CONVENTION ON PROTECTION OF OZONE LAYER (1985).

(d) bromine substances; and

(e) hydrogen substances.

This was subsequently followed by the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, a landmark international agreement designed to protect the stratospheric ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations and bearing in mind in particular the needs of development countries. The Protocol has been amended on a number of occasions in the light of experience and new information[10].

The Montreal Protocol stipulates that the production and consumption of compounds that deplete ozone in the stratosphere - chloroflurocarbons (CFCs), halons, carbon tetrachloride, and methly chloroform are to be phased out by 2000 (2005 for methyl chloroform). Scientific theory and evidence suggests that, once emitted to the atmosphere, these compounds could significantly deplete the stratospheric ozone layer that shields the planet from damaging UV-B radiation[11].

One of the interesting aspects of the Protocol is that it has the effect of binding non-signatories in the sense that signatories cannot trade either the substances themselves or goods which contain those substances to any country[12].

D. Rio Declaration

The watershed in the fight against atmospheric pollution and climate change was seen in 1992 in the United Nations Conference on Environment and Development (UNCED), popularly known as *Earth Summit,* at the Rio de Janeiro, which culled out the United Nations Framework Convention on Climate Change (UNFCC), signed by 154 Countries[13]. The aim of the Convention was to achieve stabilization of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adopt naturally to climate change, to ensure, that food production is not threatened and to

10. Adjustments and Amendments to the MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER (1990). Amendment to the MONTREAL PROTOCOL Copenhagen (1992).
11. *Supra* n. 1.
12. Bell, Struart and Mc Gillivray, ENVIRONMENTAL LAW 416 (2001).
13. *Ibid.*

enable economic development to proceed in a sustainable manner[14].

The UNFCC stressed upon:

(a) adopting the precautionary principle, so that lack of scientific centainity is not used as a reason to postpone action against climate change mitigation[15];

(b) calling on industrialised countries to take the lead in combating climate change[16];

(c) recognizing the principle of 'common but differentiated responsibilities' and the separate social and economic capabilities of developing and industrialized countries[17];

(d) calling on countries to recognize their responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of the other countries[18]; and

(e) stating that measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade[19].

Under UNFCC, industrialized countries would[20]:

(a) adopt national policies with the aim of returning individually or jointly to their 1990 level of anthropogenic emissions of carbon dioxide and other green house gases not controlled by the Montreal Protocol by the year 2000;

(b) take the lead in modifying longer term trends in green house gas emissions;

(c) promote, facilitate and finance transfer of and access to environment-friendly technology to developing countries; and

(d) keep the secretariat informed of the policies and measures adopted to implement commitment, along with specific estimates of the effects of policies and the measures.

The developing countries would[21] -

(a) propose projects for financing specific technologies, materials, equipments, techniques or practices needed to implement such projects

14. Art. 2 RIO CONVENTION 1992.
15. *Id.* Art 3(3).
16. *Id.* Art 3(1).
17. *Id.* Art 4(1).
18. *Id.* Art 3(2).
19. *Id.* Art 3(5).
20. *Id.* Art 4(2).
21. *Id.* Art. 4(8).

and provide, where possible, an estimate of the increment cost and consequent benefits;

(b) develop, update and publish national inventories on the souce and sinks of green house gas emissions.

(c) formulate, implement, publish and regularly update national and where appropriate, regional programmes containing measures to mitigate climate change;

(d) promot and cooperate in full through open and prompt exchange of information related to climate system and climate change.

Thus, the Climate Convention underlined the climate change as the most serious threat to the sustainability of the world's environment, the health and well being of its people and the global economy, thereby providing a conceptual framework for international regulation with respect to what would otherwise be activities or resources within the sovereign control of individual countries.

However, the Protocol was subject of tough negotiations primarily as a result of political difficulties (North South tensions) faced by the United States in setting significant reduction targets[22]. This resulted in proposing number of novel mechanism which could be used by countries to meet the emission targets, namely, tradeable permits, clean development mechanism, carbon sinks[23].

E. Kyoto Protocol

On 11th December, 1997, delegated of 159 nations reached a historic accord calling for mandatory cuts in emission of greenshouse gases by industrialized nations in the next millennium to help save the planet from potentially devasting global warming[24]. The accord came after the ten day UN Climate Conference in Kyoto (Japan) which aimed at achieving stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent anthropogenic interference with the climate system within a time-frame sufficient to allow ecosystems to adopt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. The Protocol has been guided by UNFCC[25] which lists the principles of

(a) benefits of present and future generation;

(b) equity; and

22. *Supra* n. 12 at 416.
23. *Ibid.*
24. P.S. Jaswal and Nishtha Jaswal, ENVIRONMENTAL LAW 93 (1999).
25. Art. 3, UNITED NATIONS FRAMEWORK ON CLIMATE CONVENTION (1992).

(c) common but differentiated responsibilities and respective capabilities of nations.

The Protocol[26] calls for reduction in overall emission of such greenhouse gases by at least 5 percent below 1990 levels in the commitment period 2008-2012 by industrialized countries as a whole. The industrialized counries can meet their reduction targets individually or jointly and aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases should not exceed their assigned amount. Further, by 2005 countries are expected to have made demonstrable progress, though this has not been specifically defined. Countries have been asked to create an effective greenhouse gas accounting system.

The development countries are called upon to assist the developing countries vulnerable to adverse effects of climate change in meeting the costs of adaptation.[27] These provisions say that the extent to which developing countries implement their commitments under UNFCC will depend upon the extent to which developed countries fulfill their commitments of providing financial and technological resources. Infact, India, China and other developing countries stood firm on their position that it was for the major polluters to cut down on their heat trapping emissions and help developing countries with advanced technologies and funds to promote clean industries.[28]

Although it has yet to enter into force, it is difficult to say that by 2012, the industrialized countries can achieve quantified targets for decreasing their emissions of green house gases and world would be safe from the green house effect.

III. EFFORTS BY INTERNATIONAL ORGANISATIONS

In addition to international conventions, many international organizations began to drive the political process emphasing upon the need for a global agreement on climate change from 1980's. A series of meetings were sponsored by the World Meteorological Organsation (WMO), the United Nations Environment Programme (UNEP) and the International Council of Scientific Unions (ICSU), WMO organized the first world Climate Conference in Geneva in 1979, and in 1985 concluded that based on present understanding, it was clearly possible that the increase in carbon dioxide in the earth's atmosphere due to human activities may result in

26. Art. 3(1), KYOTO PROTOCOL (1997).
27. *Id.* Art. 11 read with Art. 4(4), (5), (6), (7), (8), (9).
28. Pact on Global Warming, THE TRIBUNE, Dec. 1, 1997).

major long term changes of the climate[29], having profound effects on global ecosystems, agriculture, water resources and sea ice.

In 1987, the Brundtland Commission[30] identified the dangers caused to the security, well being of the human world and the very survival of the planet due to global warming. To quote:

In Europe, acid precipitation kills forests and lakes and damages the artistic are architectual heritage of nations; it may have acidified vast tracts of soil beyond resonable hope of repair. The burning of fossil fuels, puts into the atmosphere carbon-dioxide, which is causing gradual global warming. Ths greenhouse effect may by early next century have increased average global temperatures enought to shift agricultural production areas, raise sea levels to flood coastal cities, and disrupt national economies. Other industrial gases threaten to deplate the planets protective ozone shield to such an extent that the number of human and animal cancers would rise sharply and the ocean's food chain would be distrupted...[31].

The Brundtland Commission called on UNEP and WMO to, take appropriate action in this regard.[32] Following the recommendations of the Brundtland Commission, a Conference on the *Changing Atmosphere; Implications for Global Security* was organized in Toronto in 1988 recommending 20 percent reduction of carbon dioxide emission over 1990 levels by 2005- known as Toronto Targets.[33] It suggested a world atmosphere fund, at least partly funded, by a levy on fossil fuel consumption in the industrialized world.[34]

This was followed by the creation of Inter-Government Panel on Climate Change (IPCC) by the UNEP and WMO in November 1988 to address knowledge gaps related to science, impact and policy responses to the atmospheric and climatic problem[35]. The penal has three working groups:

29. *Supra* n. 4 at 26.
30. Report of World Commission on Enviornment an Development, Our Common Future (1987).
31. *Id.* at 2-3.
32. Irving M. Mintzer, *A Matter of Degrees : Energy Policy and the Green House Effect* 17 Environmental Policy and Law 251(1987).
33. John Lanchbery and David Victor, *The Role of Science in the Globle Climate Negotiations*," in Helge o/e Bergesen and Geoog Parman (eds.) Green Globe Yearbook of Internationl Coopertion on Environment and Development 32 (1995).
34. Anon, *Interntional Conference on Atmosphere 18* Environmental Policy and Law 155(1988); Govind Rajan Mukund, Global Environmental Politics. India and the North South Politics of Global Environmental Issues 94-5 (1997).
35. *Ibid.*

(a) working group I for scientific assessments;
(b) working group II for impacts, adaptations and mitigation; and
(c) working group III for economic and social dimensions of climate change.

A Ministerial Conference on Atmospheric Pollution and Climate Change, held on November 1989 in Noordwijk, the Netherlands, represented the peak of the scientific-environemental coatition that came into existence after Toronto. The Declaration puts climate change down as a common concern of humankind and urged all countries to initiate action to control greenhouse gas emissions. Developing countries were called upon to meet future targets on emissions.[36] Industrialised countries were asked to facilitate the transfer of technologies to developing countries. The Conference recommended a framework convention to address the financial needs of developing nations in gaining access to technology.[37]

The Second World Climate Conference in Geneva in November 1990, attended by 137 countries noted that the developed world is responsible for about three-fourths of all emissions of greenhouse gases but the South could not get the North to accept the main responsibility for climate change mitigation or the polluter pays principle.[38] Instead, a North - South compromise should built around 'common but differentiated responsibility. The Declaration provides:

> Recognizing that the principle of equity and the common but differentiated responsibility of countries should be the basis of any global response to climate change, industrialized countries must take the lead. They must all commit themselves to actions to reduce their major contributions to all global net emission and enter into and strenghten cooperation with developing countries to enable them to adequately address climate change without hindering their national development goods and objectives.[39]

The Declaration further provides:

> Developing nations, meanwhile, were to commit themselves to appropriate action, though it was recognized that their net emissions must grow from their, as yet relatively low, energy

36. *The Noordwijk Declaration on Climate Change*, Ministerial Conference on Atmospheric Pollution and Climate Change, Ministry of Housing, Physical Planning and Environment, (1989) para 7.
37. *Id.* paras 13, 19 and 29.
38. Anon, *Second World Climate Conference Ministerial Declaration* 20 Environmental Policy and Law 220 (1990).
39. *Id.* para 5.

consumption to accommodate their development needs.[40]

The Conference reiterated the need for developing countries to avoid the potentially disastrous course followed by industrialised countries in the past and to adopt modern technologies early in the process of development, particularly in regard to energy efficiency.[41] The Geneva Conference pledged scientific and technological expertise, capacity building and easy access to technology and financial resources to help developing nations.[42] An Inter Governmental Negotiation Committee (INC) was set up on December 21, 1990 by the UN Geneva Assembly supported by UNEP and WMO for the climate Convention to negotiate with North and South before the Rio Summit.[43] As many as five meetings of INC were held before the Rio Summit and six meetings after the Rio Summit where the developing countries were obliged to cooperate with the North and develop economic and administration instruments to limit greenhouse gas emissions.[44] It provided for the establishment of a Subsidiary Body for Implementation (SBI) to review information relevant to the implementation of the Convention. It only committeed the North to take all practicable steps to promote, facilitate and finance, as appropriate, access to and transfer of environmentally sound technologies and know-how to the South. Though the sessions were not very productive but the hopeful sign of commitment seemed to come from the European Union.

At the UNFCC, the Global Environment Facility (GEF) was named as the interim financial mechanism for implementing the objectives of the Convention. It was made accountable to UNFCC Conference of Parties (COP). COP was also to decide the amount of funding necessary and available for implementation of the Convention.[45]

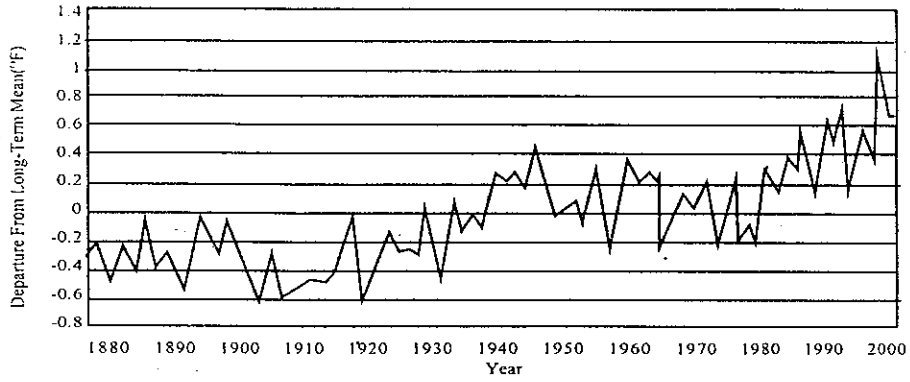
Since the UNFCC entered into force in 1994, seven meetings of the Conference of the Parties have taken place. Invariably, in all the meetings the need for legally binding targets for industrialized countries was accepted. It was felt that action to reduce greenhouse gas emissions at global, regional and national levels was sought to be strengthened, particularly through action by industrialized nations and that new reduction targets and timetables are needed for industralized countries on 1990 level beyond the year 2000.

40. *Id.* paras 5 and 15.
41. *Id.* 28.
42. FINAL STATEMENT OF THE WORLD CLIMATE CONFERENCE ON ENVIRONMENTAL CONSERVATION Vol 18 No. 1, 65 (1991).
43. GENERAL ASSEMBLY RESOLUTION 45/212, United Nations December 21, 1989.
44. *Supra* n. 2 at 39.
45. *Id.* at p 46.

IV. CONCLUSION

Against this background, it is submitted that, the international concern for protection and improvement of human environment is a major issue which affects the well being of people and economic development throughout the world. The influence of international law on the regulation of air pollution has been quite significant as there is a general acceptance that there is a natural responsibility amongst the nation states of the world to protect the atmosphere being a common property resource, to which every human being has an equal right. As a result many international conventions and organizations have come into existence calling upon nations to reduce their emission of gases. But despite these 'globle initiatives' the range of problems affecting the atmosphere have increased tremendously. Since the beginning of the industrial revolution, atmospherc concentrations of carbon dioxide have increased nearly 30%, methane concentrations have more than doubled and nitrous oxide concentration have risen by about 15%.[46]

The global mean surface temperatures have increased 0.5°F-1.0°F since the late 19th century. The 20th century's 10 warmest years all occurred in the last 15 years of the century. Of these, 1998 was the warmest year on record. The snow cover in the Northern Hemisphere and floating ice in the Artic Ocean have decreased. Globally, sea level has risen 4-8 inches over the past century. Worldwide precipitation over land has incresed by about 1 percent[47]. The below mentioned graph indicates the global temperature changes[48].



46. http://www.epa.gov/globalwarming/actions/index/html. (visited on 20 Janury 2002).
47. *Ibid.*
48. US National Climate Data Center, 2001.

This is mainly because of lack of vision for a framework that would help the countries of the world to cooperate in natural confidence and address the ultimate objective of international resolution, which is to avert that the thereat to atmospheric pollution and climatic change.

For instance industrialized countries owe their current prosperity to years of historical emissions, which have accumulated in the atmosphere since the start of indusrial revolution, and also to a high level of current emission. Developing countries, meanwhile, have only recently set out the path of industrialization and their per capita emissions are still comparatively lower. The greenhouse gas emissions of the US citizen, for instance, were equal to 19 Indians, 30 Pakistanis, 17 Maldivians, 19 Sri Lankans, 107 Bangladeshis, 134 Bhutanese or 269 Nepalis in 1996.[49] Under these circumstances, any limit on emissions amounts to a limit on economic growth turning all these international resolutions into an intensely political issue. Infact, these international negotiations have turned into a tug of war with rich countries unwilling to accept a premature cap on their right to basic development.[50]

Combating climatic change will be difficult task in a world heavily dependent on carbon based fuels to be effective, emphasis must be placed to create a framework for global cooperation so that the world can move as fast as possible towards a world economy that can keep on growing and promoting ecological efficiency, social justice and global solidarity. A three pronged combination of emissions trading equitable entitlements and promotion of renewables must be created which in real sense would constitute a truly meaningful plan of action.

49. See, Marland Gregg *et. al.* NATIONAL CARBON DIOXIDE EMISSIONS FROM FOSSIL FUEL BURNING, CEMENT MANUFACTURER AND GAS FLARING (1999).
50. *Supra* n. 3 at 87.

DOHA DECLARATION AND HEALTH CONCERNS OF DEVELOPING COUNTRIES+

*Surya Deva**

I. INTRODUCTION

Individual's intellect has been of a great value not only for the survival but also for the development of the society at all points of time, though contours of its area, extent and rationale of protection have varied. The 20th century, especially after the advent of liberalisation, free international trade and globalisation, has witnessed a spurt in the demand for the effective protection and enforcement of intellectual property rights (IPRs). This concern was necessitated by some fundamental questions, *e.g.*, why an inventor should invest his time, skill and resources for creation? Why the society should be interested in the disclosure of such invention? Above all why a lazy person should be allowed to use or abuse the fruits of the labour and intellect of a creator?

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement) is manifestation of these concerns at the transnational level. It treats 'knowledge' as property[1] and affords it a universal protection by imposing mandatory obligations on member states. The Agreement promotes creativity, discourages free rides and creates the possibility of choices for the public.[2] This in turn opens the vistas of global monopolisation of knowledge resources by the multinational corporations and the legitimisation of right to earn profit out of one's

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1. The Preamble to the TRIPs Agreement provides that the "IPRs are private rights". For a critical analysis of the issue, see Christopher May, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS — THE NEW ENCLOSURES? 6-8, 11-14, 42-64 (2000). See also Anselem K. Sanders, UNFAIR COMPETITION LAW: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL CREATIVITY 79-82 (1997).
2. Sanders, *id.* at 101-2.

intellect even at the cost of public good.[3] Some provisions of TRIPs Agreement have a direct link with the price as well as availability of the drugs and medicines, and would have a consequential impact on the level of public health and nutrition, especially in the developing countries. This concern of the developing countries has now been 'officially' accepted in the Declaration on the TRIPs Agreement and Public Health (Public Health Declaration/PHD)[4].

India also faces the dilemma of resolving this seeming conflict between the obligations under the TRIPs Agreement and the constitutional mandate of not only ensuring realisation of fundamental right to health but also 'improving public health' and 'raising the level of nutrition and standard of living'.[5] This could be the reason why India played a key role in bringing public health concern of developing countries to forefront at the Fourth Ministerial Conference of the World Trade Organisation (WTO) at Doha (Doha Declaration).[6] In fact, the combined efforts of the developing countries led to a separate declaration, i.e., Public Health Declaration.

In these circumstances there is an acute need to test some of the issues related with constitutional obligation to protect right to health juxtaposed with the obligations under TRIPs Agreement. The present paper makes an attempt to address the issue as to how the Indian Government[7] can do justice with its constitutional obligations regarding social welfare, protection of public health and equitable development while at the same time complying with the obligations under TRIPs Agreement. The core argument is that even though the TRIPs Agreement unreasonably protects IPRs and unduly favours developed countries yet some of its provisions and the Doha Declaration could be utilized by developing countries for effective realisation of human right to health.

II. Right to Health as Fundamental to Human Rights

The term 'health' signifies more than absence of sickness.[8] Health is

3. The European Union's Competition Commission has recently imposed a fine of $ 750 million on a slew of pharmaceutical MNCs for unethically rigging the prices of vitamins and grossly overcharging the consumers, see Praful Bidwai, *Big Pharma* v. *People's Health*, The Hindustan Times, November 28, 2001.
4. Para 3 of the *Declaration on the TRIPs Agreement and Public Health (Public Health Declaration / PHD) inter alia*, mentions: "We also recognise the concerns about its (protection of IPRs under TRIPs) effects on prices", WT/MIN (01)/DEC/2, adopted on 14th November 2001.
5. See, for example, Arts. 39(e), 41, 42 and 47 Constitution of India.
6. WT/MIN (01)/DEC/1, adopted on 14th November 2001.
7. Here India has been picked up as an indicator of developing countries.
8. *CESC Ltd.* v, *Subash Chandra Bose*, AIR 1992 SC 5 73, 585.

thus, a state of complete physical, mental and social well being.[9] In fact, health provides the basic condition to the effective exercise of other human rights. In other words, right to health is *fundamental* to the very exercise of all human rights. It is a ladder to development. A denial of this right hits at the root of life, without the existence of which no human right can be exercised. Therefore, the recognition and protection of right to health is *sine qua non* to the survival of human rights jurisprudence.[10] This stands fortified also by extensive recognition of this right both at the national and international levels.

Despite the significance of health, the Indian Constitution does not expressly recognise right to health as a fundamental right[11] though it imposes several related obligations on the State under Part IV, dealing with directive principles of state policy. For example, Article 39(e) mandates State to ensure that the health and strength of workers is not abused. Whereas Article 41 provides for public assistance in cases of old age, sickness and disablement, Article 42 speaks of securing just and humane conditions of work and of providing maternity relief. Article 47 is more explicit and general in scope. It lays down that "the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health *as among its primary duties*".

Although the duties imposed on the State under Part IV of the Constitution are not judicially enforceable yet the Supreme Court has invoked these provisions to read fundamental right to health in Article 21 of the Constitution. After the judicial recognition of right to health, the position is as if this was expressly made a fundamental right. Despite possible jurisprudential objections, the judicial extension bridged an undesirable gap. In *Parmanand Katara* v. *Union of India*[12] the Apex Court for the first time gave a clear indication of the recognition of this right under Article 21. The Court opined: "Preservation of human life is of paramount importance.... A doctor at the government hospital is duty-bound to extend medical assistance for preserving life". The Supreme Court moved one step forward in *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*[13] where it held that the denial of medical facility

9. *Kirloskar Brothers Ltd.* v. *ESIC*, (1996) 2 SCC 682, 687.
10. For interrelation between health and human rights See, Scott Burris, *Human Rights, Law and Public Health: Exploring the Connections* The Lawyers Collective (22 April 2001).
11. This omission is surprising though can be defended on the ground that the founding fathers had put socio-economic rights in Part IV of the Constitution of India.
12. AIR 1989 SC 2039, 2043.
13. (1996) 4 SCC 37, 48.

by the government hospitals on the ground of non-availability of beds would amount to violation of Article 21. The Court in the instant case rejected the argument of the State Government based on financial constraints.

These above two cases were, however, dealing with government entities and therefore, the principle laid down therein might not be applicable in cases involving private institutions, which was a serious limitation on the extent of right to health. In *Consumer Education & Research Centre* v. *Union of India*,[14] a case dealing with working conditions in asbestos industries, the Supreme Court seems to have removed this limitation as well because even private industries are put under an obligation to provide health insurance to workmen. Regarding the inter-relation of right to health and other rights, the Court observed: "The right to health is an integral facet of meaningful right to life, to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery; lack of health denudes livelihood." Being alive to the needs of liberalised economy, the Supreme Court in *Kirloskar Brothers Ltd.* v. *ESIC*[15] again opined that Part IV enjoins even private industries to ensure health and vigour of the workmen.

The recognition of right to health, however, goes beyond the provisions of the Constitution. Various international conventions expressly impose obligation on all the member countries to protect health of the people. Article 25 of the Universal Declaration of Human Rights (UDHR) 1948 assure that everyone has a right to a standard of living adequate for the health and well being. Article 12(1) of the International Covenant on Economic, Social and Cultural Rights 1966 lays down:

> "The state parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Article 16(2) of the African Charter on Human Rights and Peoples' Right, 1981 goes one step further and imposes a *positive* obligation on the concerned states to take all necessary measures to protect the health of the people.

In the light of above discussion, it is clear that the recognition and protection of right to health is not only a constitutional compulsion but also a binding aspiration of the international agreements. The UDHR and other

14. AIR 1995 SC 922.
15. *Supra* n. 9 at 688. See also *Air India Statutory Authority* v. *United Labour Union*, (1997) 9 SCC 377, 409.

conventions should not be treated mere ceremonial in nature as the Indian Government is under an obligation to "foster respect for international law and treaty obligations".[16]

III. Backdrop of TRIPs Agreement and Uniform Protection of IPRs

The issue, why IPRs should be protected, is generally explained by two theories. The natural law theory, which focuses on labour, claims that creative people have an inherent right to their creations. The theory is usually connected to a Lockean view that property rights arise from the labour that a person contributes. Property for Locke is the reward for the conversion or 'improvement' of nature.[17] On the other hand, the second theory, which focuses on creativity, affords legal protection in the form of limited monopoly to creative people as an economic incentive to create. But in rewarding the useful invention, the rights and welfare of the community must be dealt with fairly.[18]

The TRIPs Agreement, which is a modern manifestation of universal and uniform protection of IPRs, has come into force on 1st January, 1995 though some relaxation regarding enforcement of its certain provisions have been afforded to the developing and least-developed countries.[19] The Agreement deals with seven types of intellectual properties: patents, copyrights, trade marks, geographical indications, industrial designs, layout designs of integrated circuits and undisclosed information. It lays down the minimum standards which WTO members have to accord in respect of the availability, scope and use of IPRs in each of the seven areas.

Before exploring the feasibility of balancing the constitutional obligations regarding right to health with the obligations under the TRIPs Agreement, it becomes pertinent to appreciate the true contents of TRIPs Agreement within the umbrella of which the accommodation has to be made. A closer reading of the relevant provisions would reveal the following facts:

(a) Preamble to the Agreement makes it clear that its *primary* object is to "reduce distortions and impediments to international trade" and not protection of IPRs *per se*. But as the issue of IPRs has nexus with the promotion of international trade, their effective and adequate protection is also emphasised, provided such "measures and procedures

16. See Art. 51(c) of the Constitution of India.
17. A. Ryan, Property and Political Theory 28 (1984).
18. Kinney and P.A. Lange, Intellectual Property Law for Business Lawyers 3-4 (1996).
19. See for example, TRIPs Agreement, Arts. 65 and 66.

to enforce the IPRs do not themselves become barriers to legitimate trade."

This aspect of the Preamble is very important because if any provision of the Agreement is prone to two reasonable interpretations, then the view which facilitates international trade has to be accepted and not the construction which only protects the IPRs though to a greater extent. The key role of the Preamble in interpreting international treaties is beyond doubt, as H.D. Treviranus puts it : "The Preamble serves to set forth not only the motives but also the object and purpose of the treaty concluded...a Preamble can be of great importance for establishing the meaning and clarifying their purport."[20]

(b) A rule of customary international law provides that international law leaves the decision on the method under which the treaty rules are to be incorporated into the domestic law. The TRIPs Agreement also follows the same rule.[21] Although the members are obliged to give effect to the provisions of the Agreement yet freedom is granted to them "to determine the appropriate method" for implementing the provisions of the Agreement.[22] The freedom to decide the *modus operandi* of implementing the provisions of the Agreement negates any requirement of ensuring uniformity in different legal networks of the world. Harmonisation is required with the provisions of the TRIPs Agreement and not with any particular legal system. In other words, members are free, within the permissible limits, to choose the mode of protecting the IPRs as well as the respective national interests.

(c) The Agreement expressly recognises the mutual obligations which the members may have under the Paris Convention, the Berne Convention and the Rome Convention.[23] However, in the field of patents the TRIPs Agreement goes much further than the Paris Convention because the latter leaves it to each country to define which invention must be patentable, what right must flow from ownership of a patent, what exceptions to those rights are permissible or how long the protection should last.[24] This is not the position under

20. H. D. Treviranus, *Preamble* in, R. Bernhardt, (ed.) ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. III 1097-98 (1992).
21. Carlos M. Correa and Abdulqawi A. Yusuf, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE – THE TRIPS AGREEMENT 97 (1998).
22. TRIPs AGREEMENT, Art. 1(1).
23. *Id.* Art. 2.
24. WTO Secretariat, GUIDE TO THE URUGUAY ROUND AGREEMENTS 214 (1999).

TRIPs Agreement as it prescribes minimum binding standards on all these particulars.

(d) Article 6 makes it clear that nothing in this Agreement shall be used to address the issue of 'exhaustion' of IPRs. The principle of exhaustion implies that once the patent holder has sold his patented product, he cannot exercise any control on the later stages of the marketing of the product. Each nation can have its own provisions regarding exhaustion of patents[25] and can resort to 'parallel imports'. The PHD has now expressly recognised this position regarding exhaustion.[26]

(e) Objectives of the protection of IPRs are detailed under Article 7 which speaks of "promotion of technological innovation and transfer and dissemination of technology" to the *mutual advantage* of both producers and users of technology. The protection and enforcement of IRPs should also be in a manner *conducive to social and economic welfare* and to a *balance* of rights and obligations.

Regarding the objective clause, three points must be noted. First, TRIPs Agreement contemplates mutual advantage of both creator and user and is, therefore, not totally one sided in scope. Second, the Agreement itself is not in favour of granting protection to IPRs in absolute manner without being sensitive to other social and economic welfare issues. Third, it underlines the need for 'balancing' of rights and obligations. The balancing has to be done by each country in view of one's diverse socio-economic considerations, provided of course that it does not violate the spirit of the TRIPs Agreement.

These objectives offer an important framework for the interpretation and application of the provisions of the TRIPs Agreement. They lay down the overall criteria against which the adequacy and effectiveness of national legislation for the protection of IPRs should be measured.[27] Taken together with the provision of Article 8, they provide the developing countries "with legal bases for maintaining some degree of domestic control over intellectual property policies in a post-TRIPs environment".[28] The PHD affirms this stand as follows: [E]ach provision of the TRIPs Agreement shall be read in the light

25. H. Ashok Chandra Prasad, WTO NEGOTIATIONS: SOME IMPORTANT ISUUES AND STRATEGIES FOR INDIA 32 (1999).
26. *Supra* n. 4, para 5.
27. *Supra* n. 21 at 12.
28. J.H. Reichman, *Implications of the Draft TRIPs Agreement for Developing Countries as Competitors in an Integrated World Market*, Discussion Paper No. 73 UN CONFERENCE ON TRADE AND DEVELOPMENT, 17 (November 1993).

greement as expressed, *in ciples*".[29]

guiding principles which the ıging their national laws in easures may be adopted to o promote public interest in. :lopment sectors if they are es may also be taken which :es unreasonably restraining

ecognises the position that ace' to members, especially serve their national interests iate measure on the aforesaid 2), (3), 30, 31 and 40 of the ' of public interest measures, ement, consideration should ıent as a whole, including its iples (Article 8).[30] Moreover, ɔpropriate measures, should ncy with TRIPs Agreement ınce and not on form of such

vailable for any inventions, :lds of technology provided *ve step* and are capable of evant whether the products :crimination can be made on f technology or origin of the ı given freedom to exclude

methods for the treatment of

'o-organism and essentially tion of plants/animals; and :ion of which is necessary to health of humans, animals ment.

This provision is relevant from two angles. First, the Agreement does not define 'trinity test' of patentability and this affords some latitude to the members to protect their peculiar interests. The member countries may apply strict or liberal, as per the individual needs, criterion of novelty, inventive step and industrial application. For example, new use of known product satisfies the requirement of novelty and therefore, patentability in the US[31] but not in some other countries. Second, the grounds for exclusion from patentability are quite comprehensive and may as well encroach upon the provisions of the TRIPs Agreement because it is not specified therein that such exclusion would be valid only if consistent with the Agreement. The only limitation is that such exclusion is not made merely because their law prohibits the exploitation. But this condition only implies that a member cannot take the excuse that its law demands exclusion from patentability, if any one or more above-mentioned grounds are not available.

(h) Since the Agreement treats patent as private property, the patent owner shall have the right to assign, transfer or enter into licensing contracts by virtue of Article 28. Besides, a joint reading of Article 28 with Article 27(1) makes it clear that the protection of patents is extended even to importation of products, i.e., imports will also amount to working of patent. On this issue the Agreement makes a departure from the Paris Convention as Article 5 of the Convention had recognised that failure to work patent in the country granting the patent is an abuse of exclusive rights. This departure is a major source of worry for the developing countries.

(i) Article 29 makes it mandatory for the applicant of a patent to disclose the invention in sufficiently clear and complete manner as to be carried out by a person skilled in the art. This provision may be invoked by member countries in ensuring that no patentee is able to pay lip services to the 'disclosure requirement' and at the same time claim the benefits of royalty.

(j) The members may, acting under Article 30 of the TRIPs Agreement provide *limited* exceptions to the exclusive rights conferred by a patent if it does neither conflict unreasonably with a normal exploitation of the patent nor prejudice unreasonably the legitimate interests of the patent owner. This provision also affords a leeway to the member states to incorporate some well-defined exceptions. The freedom conferred by Article 30 can be used, for example, for

31. *Id.* at 201.

acts done privately and on a non-commercial scale, use of invention for research or teaching purposes, prior use, etc.[32]

(k) Article 31 permits compulsory licensing and government use of a patent without the authorization of its owner, but subject to certain conditions aimed at protecting the legitimate interests of the right holder. Such licence should be non-exclusive, non-assignable and considered on its individual merits. The licence should be granted only after the attempt to require a voluntary licence on reasonable terms have been unsuccessful[33] and only after paying the 'adequate remuneration' to the patentee. The legal validity of any such licensing as well as the amount of compensation must be subject to judicial or other review by a distinct higher authority in that member country.

Regarding the scope of this provision, some points should be noted. Firstly, it is only a permissive or enabling rather than a mandatory provision. Secondly, its ambit is limited to use other than allowed under Article 30. Thirdly, the provision does not, strictly speaking, specify the grounds for issuing compulsory licensing though prescribes certain conditions to be satisfied before invoking the provision. Fourthly, the exercise of power under the provision should be guided by the considerations enumerated in the preamble and Articles 7 and 8 dealing with objectives and principles, respectively. This being the amplitude of Article 31, it seems that it can be resorted on the grounds of emergency or extreme urgency, public interest, health and nutrition, environmental protection, anti-competitive practices, public non-commercial use, lack or insufficiency of funds, etc.

(l) According to Article 33 of the Agreement, the patent shall last for *twenty* years counted from the filing date of the patent. This again brings uniformity in the varying level of protection afforded by different legal systems.

(m) Article 40 acknowledges that some licensing practices and conditions pertaining to IPRs may restrain competition and affect trade as well as transfer and dissemination of technology adversely. Therefore, the provision expressly empowers the member states to take *appropriate* anti-competitive measures.

(n) Article 41 of the Agreement lays down general obligations on the members regarding enforcement of IPRs. It *inter alia* provides that the enforcement procedures shall be applied in such a manner as to

32. *Id.* at 208.

33. A member in case of national emergency, other circumstances of extreme urgency or public non-commercial use can waive this requirement.

avoid the creation of barriers to legitimate trade and to provide *for safeguards against their abuse*. This provision reaffirms the conclusion (a) reached above that the basic object of the TRIPs Agreement is to facilitate trade and prevent the abuse of IPRs. Therefore, the focus of the IPRs protection measures should be directed not towards the consumers but the abusers of IPRs. In other words, the law should protect the interest of patent owner that no one will steal the fruits of his labour and intellect, but not his right to sell his invention to the consumer at any price.

IV. TRIPs and Developing Countries: Issues at Crossroads

The perception that the object of the TRIPs Agreement is to protect IPRs so as to facilitate international trade is not shared by the developed and developing countries alike. The developing countries feel that in the garb of IPRs' protection, the industrialised countries want to retain major share in the global market, and the uniform universal umbrella of TRIPs Agreement only confers legitimacy to this end. They also argue that the level of protection accorded to IPRs by any country represents a balance between a number of conflicting national considerations and, therefore, the countries at different stages of development must be allowed to retain the flexibility in their legal regime.

The developed countries, on the other hand, contend that it is just that the rules of the game have changed and it is now for the developing countries to change their strategy. This may be considered as over-simplification because the developed countries have enjoyed historical advantage vis-á-vis developing countries and the TRIPs Agreement has also chosen those standards to be adhered which are approximately equal to those already achieved in developed countries.[34]

The apprehensions expressed by the developing countries are, however, not totally baseless. The Agreement, instead of helping build competitive strength of developing countries, is proving to be more discriminatory and creating trade impediments. Similar fears are expressed about the rising cost of health care.[35] The UNCTAD in its Trade and Development Report, 1999 underlined that the cost of the TRIPs Agreement to the

34. Arvind Panagariya, *Yes to TRIPs but not under the WTO* The Economics Times, January 26, 2002.

35. See V.R. Krishna Iyer, *Human Health and Patent Law* Frontline, October 14-27, 2000.

developing countries is outweighing its benefits.[36] So, how the developing or least-developed countries can meet the challenges posed by TRIPs Agreement? One way of resolving the conflict between the obligations under the TRIPs Agreement and the constitutional mandate might be to find out and exploit to the fullest extent the benefits and opportunities afforded by the Agreement. How much developing countries will gain, would partly depend on how they choose to take advantage of the new opportunities presented.[37] Positive efforts by all the members are also necessary to encourage and cement this integration of developing countries' economics into the global trading system.[38]

Means should be found out to balance the concern of the developing countries, especially related with life and public health, with the right of the patentee under the TRIPs Agreement. Ideally, none should be sacrificed at the alter of the other but when 'life' of human beings itself is in danger, no legal or moral argument under any Act, Agreement or Convention should be invoked to legitimise the monopoly of the patent holder. Here it may be pertinent to note that the UN Conference on Science and Technology for Development, 1997 resolved that science and technology should aim at improving the *well being of mankind* and should be developed and shared *equitably*.[39] A similar concern is visible in the Human Development Report, 1999. The report at one place says: "Policies are urgently needed to turn the advances in the new technologies into advances for all of humankind, and to *prevent the rules of globalisation from blocking poor people and poor countries out of the knowledge economy*."[40]

It is true that international treaties should be respected and the obligations flowing from these treaties should be incorporated in the municipal law. The Vienna Convention on the Law of Treaties also supports this proposition. It can, however, be argued that in a situation where fundamental right to health or life comes under threat by the provisions of the TRIPs Agreement, the exception contained in Article 46(1) of the Vienna Convention will get attracted and therefore, the

36. J.C. Srivastava, *WTO: Address the Trade Impediments* THE ECONOMIC TIMES, February 19, 2000.
37. The UNITED NATIONS HUMAN DEVELOPMENT REPORT 2001 indicates that more than half a billion people in South Asia have become poorer under globalisation, because of lack of efforts on the part of the Governments. See THE HINDUSTAN TIMES, February 18, 2002.
38. *Supra* n. 24 at 3.
39. Dhajjai Subhapholsin, *Intellectual Property in Economic Development*, WIPO/IP/Del/91/9 at 3.
40. HUMAN DEVELOPMENT REPORT 72 (1999).

provisions of an international treaty may not prevail over domestic constitutional law. Besides, the right to health is recognised not merely at the constitutional level but also at the international level. It should not be assumed lightly that the provisions protecting IPRs under the TRIPs Agreement would override all the previous international conventions recognising right to health.

V. DOHA DECLARATION: APPEASEMENT OR BALANCING ACT?

The Doha Declaration is a significant step, in recognition of the peculiar interests of developing countries, because of at least four reasons. First, it proves the power of collective bargaining in negotiations at the international level. Second, the Declaration accepts the worth of 'implementation issues' as it puts on record the negative effects of undue protection of IPRs. Third, the Declaration admits, at least by way of rhetoric as some would say, that majority of WTO countries are developing countries and, therefore, seeks to place their needs and aspirations at the heart of the work programme. Fourth, it also sends a message to the developing countries that the 'postponement device' may not work for long and that sooner they move for creative thinking as well action the better it is for them.

The Doha Declaration reaffirms the commitment to 'sustainable development' and recognises "that under the WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate", provided that no arbitrary or unjustifiable discrimination is done between countries.[41] It further provides: "We stress the importance we attach to *implementation and interpretation* of the Agreement on TRIPs *in a manner supportive of public health*, by providing both access to existing medicines and research and development into new medicines".[42]

One of the positive outcomes of the Doha Declaration, especially, though not necessarily[43], for the developing countries, was a separate declaration on public health, i.e., Public Health Declaration.[44] The PHD recognises the gravity of the public health problems[45] afflicting many

41. *Supra* n. 6, para 6.
42. *Id.* para 17.
43. The recent outbreak of anthrax in the USA and consequent demand for procuring the required medicine in sufficient quantity and at a reasonable price indicates this.
44. *Supra* n. 4.
45. It mentions, though without being exhaustive, HIV/AIDS, tuberculosis, malaria and other epidemics as some of the health problems.

developing and least-developed countries and declares in categorical terms: "We agree that the TRIPs Agreement *does not* and should not prevent Members from taking measures to protect public health...we affirm that the Agreement can and should be *interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.*[46] The use of 'does not' puts it beyond doubt, and supports the argument made earlier, that the right to public health can be safeguarded even under the original provisions of the TRIPs Agreement. In other words, the PHD is only making explicit what was implicit in the TRIPs Agreement. It is also significant to note that the solemn declaration is directed to interpret and implement the TRIPs Agreement so as to provide 'access to medicines for all'. Here 'access' should mean availability of medicines at a reasonably affordable price. If the TRIPs Agreement, *per se* or read with PHD, affords this *right* to member countries to protect public health, then this should be sufficient to settle the issue that the right of a patent holder of the medicine can be curtailed to protect public health.

The PHD reiterates the flexible nature of the TRIPs Agreement. Also, by enumerating[47] some of these flexibilities the Declaration has buried all the doubts, if any, in this regard. The PHD provides, firstly, that each member has the right to grant compulsory licenses and also the freedom to determine the grounds for issue of licenses. The liberty to choose the grounds provides much needed leeway to the developing countries. Secondly, every member has the right to determine what constitute a national emergency or other circumstances of extreme urgency. This right becomes more potent in the light that freedom is available to define 'emergency' individually as per the national needs. Thirdly, each member is free to establish, subject to Articles 3 and 4 of the TRIPs Agreement, its own regime of exhaustion of IPRs.

In the light of above observations, whether Doha Declaration can be construed as mere linguistic appeasement or a balancing act reflecting a trade off between the developed and developing countries? It is submitted that Doha Declaration and the PHD, like the TRIPs Agreement, is pregnant with positive possibilities though it would require efforts on the part of members to bear the fruits. Now it is for member countries to show commitment, willingness and sincerity towards promoting public health as the justificatory base at the international level is already in place.

46. *Supra* n. 4, para 4.
47. *Id.* para 5.

VI. Harmonising Right to Health with TRIPs Obligations: Suggested Course

It is in the interest of the society that both the right to health and the right to secure one's intellect is protected. This can only be done by maintaining equilibrium between the two. Then it becomes the solemn duty of the Government to make a search for avenues of harmonisation because the obligations flowing from the Constitution are no less sacrosanct than flowing from any international agreement.[48] Regarding right to health the Indian Constitution imposes a mandate which can ever be displaced, whatever are the obligations under any international agreement. Therefore, the Government has to ensure that the protection of the IPRs in the field of essential life saving drugs and medicines does not run counter to the equity claim of the indigent people to have medicines at an affordable price. It is submitted that this can reasonably be done by utilising the existing provisions of the TRIPs Agreement. An attempt can be made on the following lines:

A. Definition of Patentability

Article 27 of the TRIPs Agreement defines 'patentable subject matter' in liberal terms. As it only prescribes 'trinity test' for patentability but does not define the three terms, this flexibility can be utilised. For example, there is considerable flexibility available in defining 'novelty', 'inventive step' and 'industrial application'. Indian law can be designed in such a manner to protect the peculiar interests of India.

B. Exclusion from Patentability

Articles 27 (2) and 27(3) permits members to make exclusion from patentability on specified grounds. The grounds of *order* public, morality, protection of health (of human, animal or plant) and avoidance of prejudice

48. The position of relative supremacy of international treaties and Constitution, in case of conflict between the two, is not uniform under all the legal systems. For example, the Constitutions of US (Art. VI, clause 2) and Argentina (Art. 31) declare that all treaties shall be the supreme law of the land. If the law enacted by the US Congress modifies or is inconsistent with a treaty in force, the former would prevail because of 'last-in-time' rule. The 'last-in-time' rule is, however, discarded in Argentina by amending the Constitution in 1994 (Art. 75, para 22). The Indian Constitution is silent on the point, though in some recent cases e.g., *D.K. Basu* v. *Union of India*, AIR 1997 SC 610 and *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241, the Supreme Court held that those provision of the international treaties which are not inconsistent with the express provisions of Part III of the Constitution can be read into it even without any legislative implementation.

to environment are quite wide and there is no reason why India should not avail of the exemption on these grounds. In construing these grounds, provisions of the preamble and Articles 7 and 8 should be kept in mind. However, as the import of these grounds is not fixed and bound to vary as per different societies, no country should ordinarily question the determination of these grounds by the other unless they are used as a pretext. In other words, the judgement of a country should not be questioned unless it destroys the very protection itself.[49] This stand finds further support form the Public Health Declaration.[50] Therefore, as suggested by the Law Commission,[51] these exemptions should find place under section 5 of the Indian Patents Act, 1970 in the form of a proviso. By claiming the benefit of this provision, the Indian Government can ensure that life saving and essential drugs and medicines are made available to the indigent people at an affordable price.

C. Compulsory Licensing

One of the basic features of the patent law is to strike a balance between the interests of an inventor and those of consumers and to ensure that benefits of the new technological development reach to the people and not exploited by the inventor alone due to monopoly control. Therefore, the ideal legal framework should ensure that the inventions are worked on a commercial scale. Lack of reasonable commercial working of the patent by its owner might result in restriction or denial of his exclusive right.

Article 31 of the TRIPs Agreement[52] incorporates this principle by providing that the members could permit the use of patents by third parties or Governments without the authorisation of the patent owner. The provision, however, does not enumerate the grounds for granting compulsory licenses though provides for certain conditions regarding procedure and actual use of compulsory licenses. For example, such licenses are to be sought only after three years from the date of grant of patent and are decided on individual merit. Further, the compulsory license shall be issued only after paying adequate remuneration to the right holder. The adequacy has to be judged by "taking into account the economic value of the authorisation".

As Article 31 does not put any limitation on the grounds for issuing compulsory license, it provides a freedom to developing countries to give

49. *Supra* n. 21 at 136.
50. *Supra* n. 4, para 5.
51. 167TH REPORT OF THE LAW COMMISSION OF INDIA 20 (1999).
52. The corresponding provision in the PARIS CONVENTION is found in Art. 5A.

individual treatment to their needs. The PHD has now expressly conferred the right to determine the grounds, upon which such licenses are granted, to the member countries.[53] The provision, however, demands creativity on the part of the draftsmen in fixing the grounds for issue of compulsory license in such a manner that wide power is available to the Government though at the same time not coming in conflict with the basic postulates of TRIPs Agreement. Articles 51 to 58 of the Patent Law of the People's Republic of China, 1992 enumerates some grounds for issuing compulsory license. One of the grounds mentioned therein is quite general in nature as it specifies that where any entity that is qualified to exploit the patent fails to obtain the patentee's authorisation under "reasonable terms" within a "reasonable period of time", the compulsory license can be granted.[54] India can also amend the provisions of Chapter XVI of the Patents Act on similar line.

D. Control of Anti-competitive Practices

Fair competition is *sine qua non* for free trade. A market with competition is one having a number of suppliers and having no one seller with a sufficient advantage over other suppliers. Basically, both protection of IPRs and fair competition is integral part of the trade though they may come in conflict at some stage and, therefore, their balancing becomes important. The US Supreme Court in *Dawson Chem Co.* v. *Rohan & Hass Co.*[55] underlined the same point in the following words: "[T]he policy of free competition runs deep in our law...But the policy of stimulating invention that underlines the entire patent system runs no less deep".

The TRIPs Agreement confers monopoly on the owners of the IPRs and in a way frees them from competition, though not absolutely. The protection of IPRs may contribute, to a large extent, to a dominant position in the market,[56] which may distort competition and impede in free flow of trade. If reaping what one has not sown amounts to unfair competition, then even unjust enrichment, due to one's position, at the cost of health and life of poor people should amount to unfair competition, or lack of competition. Due to this reason, Article 40 of the Agreement allows the members to take appropriate measures to prevent or control such practices which may have adverse effect on trade and may impede the transfer and dissemination of technology.

53. *Supra* n. 4, para 6.
54. Jayashree Watal, *Implementing the TRIPs Agreement – Policy Options Open to India* ECONOMIC AND POLITICAL WEEKLY, September 27, 1997.
55. 448 US 176, 221 (1980).

On the basis of this provision the Indian Government can develop comprehensive anti-competition law so as to control the abuse of IPRs. Some of the developed countries of the world have comprehensive anti-competition law.[57] The US courts have also applied the theory of 'essential facilities' to curb the monopoly of a particular enterprise.[58] It is, however, surprising to note that the Competition Bill, 2001, as introduced in the Lok Sabha on 6th August, does not cover anti-competitive practices by the owners of IPRs. Clause 3 of the Bill deals with anti-competitive agreements but it specifically excludes patent, copyright, design, geographical indications and layout design from the ambit of this provision.[59]

E. Effective Safeguards for Protection of IPRs

An efficient system for the production of IPRs is equally necessary, otherwise no one would be willing to spend one's intellect, time and energy for the welfare of the society. Therefore, the system of granting patents should be expedited and due impetus should be given to research and development sector. Besides, the efforts should be made to document and protect the indigenous knowledge.

F. Special Care for Poor People under the National Health and Drug Policy

Keeping in mind the significance of right to health, the Government is under an absolute and non-delegable duty to ensure access to diagnosis, treatment and drugs at an affordable price. This can be done either by controlling the price of essential drugs or by making it mandatory for the manufacturers to sell certain percentage of medicines to the indigent people at a lesser price. For this purpose the provisions of Section 3 and 4 of the Drugs (Control) Act, 1950 can be utilised by the Government. As even drug manufacturers are part of society, they should be *compelled* to bear this social responsibility. In return of sharing this responsibility the Government can give them some benefits in terms of tax rebates, social recognition and other business benefits. However, on the contrary, it

56. *Supra* n. 2 at 116.
57. Ss. 85 and 86 of the EEC TREATY, and Ss. 1 and 2 of the SHERMAN ACT 1890 and S.5 of the US FEDERAL TRADE COMMISSION ACT 1914 are good examples of such regulatory regimes.
58. See *MCI Communications Corp.* v. *AT&T Co.* 708 F. 2d 1081, as cited by D.M. Raybould and Alison Firth, LAW OF MONOPOLIES – COMPETITION LAW AND PRACTICE IN THE USA, EEC, GERMANY AND THE UK 119 (1991).
59. See S. Chakravarthy, *Intellectual Property Rights and Competition Law* 45 CORPORATE LAW ADVISER 59 (2001).

seems that the Government is planning to relax the regime of price control under the proposed Drugs (Price Control) Order, 2002.[60]

Moreover, the Government should also think of providing medical insurance cover to weaker strata of society. This could be achieved by extending the ambit of recently launched *Janashree Bima Yojana*, a social security scheme. This is the minimum what the Government should do to humanise and sensitise the trend of 'liberal knowledge economy'.

G. Strategic Alliance for Future Review and Negotiations

Article 71 provides for periodic reviews of the TRIPs Agreement, in the light of experience gained in its implementation and new developments. To protect the interest in more fair and equitable manner the developing countries should resort to collective bargaining by acting together during all future reviews and negotiations.[61] By doing so, they would also be able to trade off their advantages with the developed countries in a better way.

H. Invoking Principle of 'Compensatory Inequality' in Treating Developing Countries

The developing countries should press for invoking the principle of compensatory inequality at the international level. In fact, the TRIPs Agreement recognises this as it has certain special provisions for the developing and least-developed countries, though only transitory in nature. The Doha Declaration[62] also affirms that the provisions for special and differential treatment are an integral part of WTO Agreement and agrees that all such provisions shall be reviewed to make them more precise, effective and operational. As every country has some peculiar socio-economic considerations to be dealt with, a reasonable leeway should be afforded, provided it does not conflict with the basic postulates of the Agreement. In the absence of this, apprehensions of developing countries will continue to haunt the negotiations and will not allow growth of mutual trust, which is vital for any trade relation.

VII. CONCLUSION

It has been established above that the right to health is vital for development as well as for exercising other human rights, and the

60. See *Price Control Span for Drugs Reduced*, THE HINDUSTAN TIMES February 6, 2002 and *Price Curbs may be Lifted on 47 Drugs*, THE HINDUSTAN TIMES February 7, 2002.
61. An indication of this was visible in a meeting of the commerce ministers of SAARC countries. See, THE HINDUSTAN TIMES, August 24, 2001.
62. *Supra* n. 6, para 44. See also para 7 of the PUBLIC HEALTH DECLARATION.

Government is under a *positive* obligation, under the Constitution and International Bill of Rights, to ensure its realisation. The Government cannot abdicate this duty by merely making a deliberate choice of moving on the path of globalisation. At the same time, right to protect and exploit one's intellect is equally important for the development of society and for encouraging creativity. However, both these rights can come in conflict on certain occasions, especially in the aftermath of the TRIPs Agreement. As neither of these facets of development can be abandoned without much damage to basic object of survival, there is a need to achieve a reasonable and equitable balance. The law regulating IPRs has to balance and harmonise the 'private interest' with 'public interest'.[63] In other words, the claims of the inventors on the one hand and the users on the other have to be adjusted in such a manner that no undue or unreasonable disadvantage occurs to either of them. The member countries can utilise the provisions of the TRIPs Agreement and the Public Health Declaration to maintain this balance.

It is argued that the TRIPs Agreement and the PHD afford ample opportunities, and more can be added by future negotiations, for the developing countries to attain desired balance. It is also suggested that the legal regime protecting IPRs should be directed towards not consumers but those who try to take commercial benefits out of the inventions of others, though without willing to invest their time, intellect and money.

Every right has a cost. This should be understood both by the consumers and the inventors alike. The people having capacity to afford and the Government, for those who cannot afford themselves, should realise that a reasonable cost has to be borne for protecting right to health. Similarly, the inventors should also accept that their right to benefit out of their creation could be outweighed by public interest. Inventors are part of society and if they expect society as well as legal system to protect their intellect, they should also be willing to share some societal costs.

It is true that the TRIPs Agreement has changed the rules of the game, i.e. international trade, to the advantage of the developing countries but today the need is not only to fight against the unfairness of the rules but also adapt ourselves to the changed scenario. A beginning can be made in that direction by moving on the suggested course.

63. This balancing role of law becomes more complicated in the era of free international trade, for it has to balance the peculiar national socio-politico-economic interest with the international obligations under different agreements and conventions.

THE FORGOTTEN RITE : LEGAL AND VEDIC IMPORTANCE OF *SAPTPADI*

*Pankaj Bhagat**

I. Introduction

The subject of marriage has permanent fascination, but its definition has never been established to general satisfaction. In India marriage has an overwhelming social importance and careful definition in this regard is obviously expected. In modern terms marriage or its counterpart mean either the ceremony by which marital status of spouses commence or the married status itself. Even the courts of law, have not given satisfactory answer to the curiosities that exist in the Hindu Marriage Act 1955 (HMA). The question that often arises is whether a couple have married or that the formalities requisite for the proper marriage have been complied with.

Section 7(1) of HMA says that a Hindu marriage may be *solemnized* in accordance with the customary rites and ceremonies of either parties thereto. Sub section (2) of Section 7 lays down that when such rites and ceremonies include the *saptpadi*, the marriage becomes complete and binding when the seventh step is taken. The ceremonies and rites fall under two heads:

1. The shastric ceremonies and rites prescribed by the Hindu law, or
2. The customary rites and ceremonies which prevail in the caste or community to which one of the parties (or both) belong.

Thus, the shastric ceremonies and rites are still necessary. These can be dispensed with only if one of the parties to the marriage can establish customary ceremonies in substitution of the shastric ceremony.[1]

II. Ceremonies of Marriage

We propose to give a limited list of such ceremonies here. The ceremonies usually commence with the performance of the *vriddi shradda*.

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1. *Rabindra Nath* v. *State* AIr 1969 Cal. 55.

The father of the bride on the forenoon of the day of the soleminization of the marriage, performs *vriddi shradda* in honour of his ancestors.[2] On the same forenoon, with chanting of *mantras* the ceremonious bathing of the bride takes place.

"Anciently there was a practice of setting apart a cow for the wedding feast.[3] But later on when beef eating was prohibited, a practice grew of tying a cow and then letting it loose on the arrival of bride groom. At several places this practice is still followed, though is not of much significance in modern Hindu society".[4]

On the bride groom coming to the house, he is ceremoniously received. The first of these is the ceremony of *Sampradana*. In this ceremony *padya* (or water) for washing of the feet, *arghya* (water mixed with flowers, *druva* grass, rice and sandal paste), for washing the head, a cushion to sit upon and *madhuparkha* (mixture of honey, curd and ghee) are given to the bridegroom along with other presents. This ceremony is performed amidst the chanting of *mantras* and recitation of prayers.

This ceremony is followed by the *Kanya-dana* cermony, in which the father of the bride formally gives the bride to the bride groom amidst the chanting of the mantras. Then the bride is formally accepted by the bride groom with the recitation of the following hymn from *kama sukta*.

Who gave her?
To whom did he give her?
Love (kama) gave her (to me),
To love he gave her,
Love is the giver,
Love is the taker,
Enter thou, (oh) my bride the ocean of love,
With love I accept her,
May she remain thin,
Thine own, O! God of love (kama),
Verily, thou art (oh! My bride),
Prosperity itself,

2. The performance of this "*Shradda*" is not essential. *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885) 112 Cal 140 at 142.
3. See the Uttar Charita, IV cited in, Paras Diwan, *Ceremonial Validity of Hindu Marriages, Need for reform* (1977) 2 SCC (J)23.
4. *Id.* at 23.

May the heaven bestow thee,
May the earth receive thee.[5]

The father of bride then gives a piece of gold to the bride groom by way of present. This is followed by the tying of the skirts of the mantles of the pair, signifying their union, the father of the bride invokes the bride groom not to fail the bride in his pursuit of *dharma, artha, kama* and *mokhsha*.[6] To which the bride groom replies thrice that he shall never fail her.

However, the *Asvalayana-grhya-sutra* does not speak of *Kanya-dana* as a ceremony, although in defining the first four forms of marriage, it uses the word *dadyat* signifying *dana*.[7]

The next ceremony that is performed is *vivahhoma*. The *Asvalayana-grhya-sutra* says that first of all, fire has to be kindled on the altar to the west of which there would be placed a mill stone, and to the north east of it a water jar would be placed. The groom would then offer sacrifice with *surva*, while the bride would touch the right hand of the groom. These sacrifices are made to earth, sky and heaven (*the mahavayahritu-homa*). The bridegroom also recites several *mantras* and addresses the wife.

On the night of the day, or on the day following, the operative marriage ceremonies are performed by the bride groom and the bride. This is called *pani-grahana*, or the acceptance of the brides hand by the bride groom.[8] In this the bride groom would stand up facing the east while the bride should remain sitting with her face towards the east. The groom then would grasp the right hand of the bride with the utterance of the Vedic mantra:

"I take hold of thy hand for happiness"[9]

However, according to Saha the bride groom touches the heart of the bride saying[10] :

5. *Supra* n. 3 at 23-24.
6. *Ibid.*
7. See Dr. Krishna Nath Chatterjee, HINDU MARRIAGE: PAST AND PRESENT 201 (1972).
8. E. J. Trevelyan, HINDU LAW – AS ADMINISTRED IN BRITISH INDIA 60 (1917).
9. गृभ्णामि ते सौभगत्वाय हस्तं मया पत्य जरदष्टिर्यथासः। भगो अर्यमा सविता पुरन्धिर्मह्यं त्वादुर्गार्हत्याय देवाः॥Rg Veda X.85.36. As referred in Kane, HISTORY OF DHARAMSHASTRA Vol. 2, Pt. 1. 526 (1941).
10. Saha, MARRIAGE AND DIVORCE 64 (1981).

"May your heart be my heart,
may your mind be mine,
may you obey me and all thy heart
may you follow me and my companion".

The ceremony of *pani-grahana* is followed by the ceremony of *Agni-parnayana*. The sacred fire is kindled and oblations are made. The bridegroom takes the brides hand, she steps on a stone. The bride groom recites a fixed text. He should then lead her thrice[11] round the fire and the water jar with their right sides turned to the fire with the utterance of the Vedic mantra:

"I am ama, thou art sa,
thou art sa, I am ama,
I am heaven, thou art earth,
I am saman, thou art rik,
Let us both marry here,
Let us beget offspring,
Dear to each other, bright,
Having well disposed minds,
May we live for a hundred years".[12]

Each time, while leading on to the stone, the groom would make his bride tread on the stone with the words:

"tread on this stone,
be firm like a stone,
over come the enemies,
trample down the foes".[13]

Then comes the ceremony known as *Laja-homa* in which clarified butter and fried grain are poured over the joined hands of the bride by the bride's mother or by someone capable of representing the bride's brother twice and thrice in case the groom is of Jamadagni gotra. The rest of the

11. Though in practice it is 5 or 7.
12. अमुमहमस्मि सा त्वम्। द्यौरहं पृथिवी त्वम्। सामहमृक्त्वम्। तवेहि संस्भावहै। सह रैतो द्धावहै पुंसे पुत्राय वत्तवै। रायोस्पोषाय सुप्रजस्त्वाय सुवीर्यायेति। As referred in Kane, *supra* n. 9 at 528 and in Dr. Krishna Nath Chatterjee, *supra* n. 7 at 198.
13. आतिष्ठेममश्मानमश्मेव.....भव। अभितिष्ठ पृतन्यतः सहस्व पृतनायतः। Apastamba-mantra-aptha, 1.5.1, See, *Ibid*.

havis (sacrificial material or offering) is to be poured on the fire by the groom. The groom will then recite a Vedic mantra.

With these the bride pours the fried grain with her joined hands as if they were the spoon used in the sacrifice. Then the fourth time the bride pours the fried grain without the recitation of any Vedic verse. Then she is made to loosen two locks of her hair, the right one with the mantra:

"I release thee from the feathers of Varuna"[14]

and left one with a mantra from *Rg-veda*.[15] Then comes the most material of the marriage rites-*Saptpadi*. This is the ceremony in which the bridegroom leads the bride for seven steps in the north east direction with the words:

"O bride, trace your first step,
may our food stuffs increase,
may God help me keep your company as long as I live,
trace your second step,
may our life juice increase;...
Trace your third step,
May our wealth increase...
Trace your fourth step may our pleasures increase...
Trace your fifth step,
May our prognency increase,
Trace your sixth step,
May we have fruits and flowers in all seasons,
Trace your seventh step,
May we live long dowered with our relation[16]"

The priest sprinkles water on the heads of the bride and the groom from the water jar.

After completion of the following prayer water is poured in the hands of the couple:

'May water and all goods cleanse our hearts.
May air do so, may creators do so,
May the divine instructress unite our hearts, [17]

14. Rg Veda X 85.24, cited in Kane *supra* n. 9 at 529.
15. Rg Veda X 85.2. *Ibid.*
16. Manu VIII, 22; See A. Mookherjee, MARRIAGE AND DIVORCE 93 (1973). Gaur's HINDU LAW OF MARRIAGE AND DIVORCE 93 (1973).
17. *Supra* n. 3 at 26.

Joining his hand with his wife, the husband recites certain prayers and then addresses her. The marriage becomes complete and irrevocable on the completion of the *saptpadi* or ceremony of seven steps,[18] and from that moment the wife passes into the husband's gotra.[19]

III. Is there any Prescribed form of *Saptpadi*?

While describing the forms of performance of *saptpadi* the text-book writers also do not add to clarity. *Saptpadi* has been described as circumbulation of the holy fire by the bride and the groom.[20] Another text explains *saptpadi* or advancing seven steps as consisting of the bridal pair facing and approaching each other step by step till they join hands in the completion of the seventh step which is then regarded as the final and irrevocable step.[21] Sir Ernest Trevelyan[22] explains it as the bride is conducted by the bridegroom and directed by him to step successively into seven circles, a text being recited at each step.

A different view regarding it is that the bride is made to walk seven steps.[23] A similar view in this regard is that the ceremony of *saptpadi* consists of taking seven steps and it is not necessary to go round the fire seven times.[24] Even Jaspal Singh[25] says that "the seven steps are not to be confused with seven rounds".

This actually raise the question whether there is any prescribed form of *saptpadi* or the manner of taking seven steps by the bride groom and the bride jointly before the sacred fire, which it may be necessary to adhere to in order that the seven steps taken may constitute the ceremony *saptpadi*.

In *S Bulliappana* v. *Subamal*[26] it was urged that the marriage was not valid because what the parties had done in that case was to walk round

18. Manu, VIII, 227; See *Bulli Appanna* v. *Subamal* AIR 1938 Rang III; *Rabindra Nath Dutta* v. *State* 1969 Cal. LJ 164. *Bridabun Chandra Kusmaokar* v. *Chundra Kusmaokar* (1885) 112 Cal. 140 at 143; Colebrooke's Digest, Vol 11 at 487-88.
19. Samskara Mayukha, Gharpure's Edition, 52; Ghose, Vol. 1 789.
20. Tahir Mahmood, *Concept of Marriage in Modern Indian Law-Decline of Traditional Values* Islamic and Comparative Law Quaterly Vol I (1981).
21. Sir Hari Singh Gaur's Hindu Code (3rd ed) at 286.
22. *Supra* n. 8 at 54.
23. Sir Goorudas Banerjee, Tagore Law Lectures on the Hindu law of marriage and stridhana.
24. Mayne's Treatise on Hindu law and Usage (14th ed), Chapter 5, 145.
25. Jaspal Singh, Hindu law of Marriage and Divorce 47 (1996).
26. AIR 1938 Rang 111.

the sacred fire seven times instead of the bride merely taking the seven steps required in the *saptpadi* ceremony.

The court held that the bride had in that case taken seven steps in the course of carrying out the said rite, and the fact that she had taken more steps than seven did not invalidate the marriage.

Reliance was placed on the decision given by the same court in which it was held that there could be no *saptpadi* by merely taking five rounds of the fire, on the assumption that seven steps and seven rounds mean the same thing.[27]

The Bombay High Court in this regard held, that seven steps should not be confused with seven rounds, and that the only requirement of the ceremony called *saptpadi gamana* is that seven steps should be taken round the nuptial fire.[28]

It is important here to note that in *Bulliappanna's* case the assumption taken in *Rampiyar's* case that seven steps is same as seven rounds was criticised. The Hon'ble court has clearly distinguished between the terms steps and rounds. What the court tried to maintain here is that seven steps is the only requirement and not seven rounds and the word "step" should not be confused with the word "round".

If we give it a practical look, then could it be said that as one round of fire consists of 7 steps or even more, one round is sufficient? If it is so, then, it may be said that whatever be the *modus operandi*, 4, 5 or 7 rounds of the sacred fore is not at all required and has also not been asked by the courts.

IV. Is *Saptpadi* a Part of *Sapt Pheras*?

In a landmark case of Rajasthan High Court it was urged by the appellants that the *Phera* ceremony is tantamount to the taking of seven steps by the bride and the bridegroom jointly. Honb'le Justice Bhargava in this case pointed out "under the Hindu law the ceremony called the saptapadi is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire and it is not to be confused with the taking of seven rounds of the fire.[29]

27. *Rampiyar* v. *Devaram ILR* 1 Rang 129; AIR 1923 Rang 202.
28. *Sitabai* v. *Vitabai* AIR 1959 Bom 508.
29. *Bhunrilal* v. *Kaushalya* 1970 Raj 83; 1969 (2) Raj CW 427.

In case of *Brijlal Bishnoi* v. *State*[30], the court held that "the requisite of a valid marriage, thus, is that it should have been celebrated with proper ceremonies and in due form. Surely to say that the marriage was soleminzed according to Hindu rites or that "*phera*" ceremony had taken place without anything more cannot be taken to be sufficient to prove that necessary ceremonies had been performed.

The distinction between the two (i.e. the *pheras* and *saptadi*) is borne out from the following description of the ceremonies of marriage given by Kane[31] "*Agniparinayan* as the bride groom going in front takes the bride round the fire and water jar, and *saptpadi* as taking seven steps together. This is done to the north of the fire; there are seven small heaps of rice and the bridegroom makes the bride step on each of these seven with her right foot beginning from the west."

In *Ram Awadh* v. *Krishna Nand Lal*[32], Deoki Nandan, J. takes help of the Sanskrit *sabdartha* Kaustubha[33] for the meaning of the word in which it is a marriage rite in which the bridegroom and the bride, tied with a knot, take seven rounds of the sacred fire.

The Hon'ble Judge here held "it may be that in certain parts of the country the true Vedic rite of four rounds of the sacred fire, followed by *saptpadi* has been modified into seven rounds followed by a *saptpadi* combined with seven promises".

The court further held that according to the strict Vedic rites observed by the Arya Samajist, the bridegroom and the bride take only four rounds of the sacred fire, on the other hand according to the customary rights prevalent in these parts of the county, seven rounds have come to be generally performed and even thought to be and essential marriage rite rather than the *saptpadi*. According to law, a marriage is complete only when the seventh step of *saptpadi* is taken, where *saptpadi* is one of the rites required to be performed under the customary rites of the party according to which the marriage is soleminized, but it is generally believed in these parts of the country that a marriage is complete on the completion of the seventh round of the sacred fire made by the bridegroom and the bride together. The seven rounds of the sacred fire are not the same thing as the *saptpadi*. *Saptpadi* is the ceremony which follows immediately after the four rounds of the sacred fire taken by the bridegroom and the

30. (1996) II DMC 137 (Delhi) at 140.
31. Kane, *supra* n. 9 at 534.
32. AIR 1981 All, 432.
33. IV Den. 1218 (1977)

bride according to the strict Vedic rites or after the seven rounds of sacred fire according to the current customary rites.

For example the *Asvalayana-grhya-sutra* (1.7.7)[34] describes going round the fire before *saptpadi*, while *Apastamba-grhya-sutra*[35] describes saptpadi (IV. 16) before the act of going round the fire (v.I.). the *Gobhila-gshyasutra*[36] , the *Khadira-grhyasutra*[37] and the *Baudhayana-grhya-sutra* or jain pani-grahana[38] after saptpadi while other before saptpadi. [38a]

Whatever may be the position of *saptpadi* whether before or after *agniparinayana* it is clear they are two completely different rituals and independent of each other.

After examining all the facts the Calcutta High Court held "in order to become a valid registered marriage under the provisions of the HMA two ceremonies essential had to be performed, namely (1) invocation before the sacred fire and (2) *saptpadi* and the absence of these two essential ceremonies invalidates the marriage. [39]

In a recent judgment by the Rajasthan High Court it was held in the given case *saptpadi* did not take place and as such a valid marriage within the meaning of section 7 HMA did not come into existence. [40]

The importance of *saptpadi* was well stated in the case *Joyita Saha v. Rajesh Kumar*[41] wherein the Calcutta High Court quoted the judgement of the Apex Court in the case of *Gopal Lal* v. *State of Rajasthan*[42] while defining the word 'soleminize' in connection with a marriage under the HMA held *inter alia*, that "the word solemnize means in connection with a marriage to celebrate a marriage with proper ceremonies and in due form", according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and in due form' it cannot be said to be 'soleminized'. The Calcutta High Court in *Joyita Saha's* case further went to say that "the

34. 1.7.7 *Asvalayana-grhya-sutra*.
35. *Apastamba-grhya-sutra*.
36. II. 2.16.
37. I.3.31.
38. I.4.10.
38a. Cited in Kane, *supra* n. 9. at 531.
39. *Mausumi Chakraborty* v. *Subrata Guha Roy* (1991) II DMC 74 Cal (DB).
40. *Raju @ Rajinder* v. *Mst. Pushpa Devi* (1999) II DMC 32 Raj.
41. AIR 2000 Cal 109.
42. AIR 1979 SC 713 at 715.

bride and the bride groom sat together and "*homa*" was performed but the ceremonies were not performed properly. *Saptpadi* was not performed... Therefore no marriage between the appellant and the respondent could be said to be solemnized according to the Hindu rites".

V. Is Saptpadi Necessary to be Established in Case of Bigamy?

The question important to be considered here is whether the performance of *saptpadi* and other rites have to be established by evidence before a person can be convicted for bigamy under Section 494 Indian Penal Code (IPC)?

This question arose in *Bhaurao Shankar Lokhande* v. *State of Maharashtra*[43] wherein the state contended that for the commission of the offence under Section 494 IPC it was not necessary that the second marriage should be a valid one and a person going through any form of marriage during the life time of the first wife would be guilty of the offence. The court rejected the contention of the state and observed as follows:

> "[P]rima facie the expression 'whoever...marries' must mean whoever...marries validly or whoever...marries and whose marriage is a valid one. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of it's taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in eyes of law". [43a]

In *Priyabala Ghosh* v. *Suresh Chandra Ghosh*, [44] Priyabala went in appeal in relation to the second marriage of her husband with Sandhya Rani. The Hon'ble Court dismissed the appeal on the ground that no evidence was adduced for the performance of *homa* and *saptpadi* (essential ceremonies).

Similarly the Apex Court in another judgement acquitted the accussed in a bigamy case because performance of *saptpadi* was not proved in second marriage and also that there was no plea that accused's marriage was performed as per custom which dispensed with *saptpadi*.[45]

43. 1965 SC 1564.
43a. *Id.* at 1565.
44. AIR 1971 SC 1153.
45. *Santi Dev Berma* v. *Kancho Prava Devi* AIR 1991 SC 816.

The conclusion that we can draw from the discussion of *saptpadi* ceremony is that *saptpadi* is essential. The custom not requiring *saptpadi* must be proved to supercede shastra. The custom to be held as established must be continuous and uniformly observed for a long period and should have obtained a force of law. [46]

The last ceremony of the marriage is *Uttara Vivah*. The bride should live at the residence of a brahmin woman who is endowed with her husband and children. She then sees the pole star '*Arundhati*' and seven constellations and breaks her silence with the words—"may my husband live and may I have offspring". Then the bride should be made to mount a chariot with the verse "many *pusan* lead thee from here holding thy hand.[47]

> Then the groom should make her enter his house with the mantra—"here may happiness increase upto you through offspring."[48]

Then sitting on a bull's hide, the groom should offer ablations to the kindled nuptial fire. The bride should at the time hold him with her hands. While offering ablation the bridegroom should utter following four mantras-

> "may *Prajapati* create offspring to us..."[49]

Then while taking curd he should recite the verse—"may all Gods unite our hearts"[50] For three nights or twelve night or for a year from hence they should refrain from taking *Ksara* and *Lavana* and observe celibacy and sleep on the ground.

VI. Conclusion

As evident from the above discussion *saptpadi* is a ceremony of seven steps before the sacred fire and has nothing to do with *sapt pheras*. Various decisions of the courts have articulately distinguished between the terms "*pheras*" and "*steps*". It can also be noted that the marriage is complete and irrevocable after the completion of the seventh step which is quiet possible in the single round of the sacred fire (which may consist

46. 1969 CRLJ 836, (837) AP; (1990) 1 DMC 196 (198) (Karn); (1986) Raj L.R. 896 (900).
47. पूषा त्वेतो नयतु हस्तगृह्याश्विना त्वाप्रवहत रथेन गृहङ्गच्छ गृहपत्नी यथासो वशिनी त्वं विधथमा वदासि। Rig Veda X 85.26. See Kane, *supra* n. 9 at 530.
48. Rg Veda X.85.27; As cited in Dr Krisha Nath Chatterjee, *supra* n. 7 at 200.
49. *Ibid.*
50. *Ibid.*

of seven or more steps). That is to say in no case 4, 5 or 7 rounds of the sacred fire is necessary.

It is also important to note that though Section 7(b) mentions the term '*Saptpadi*' but defines it only as an act of 7 steps before the sacred fire not clearly distinguishing that whether it is only the act of 7 steps before the sacred fire or taking of these 7 steps in a particular manner and in a particular direction as mentioned in *grhya sutras*.

Different texts have explained the method of *saptapadi* in different way, there by leaving the question open to further interpretation.

According to some authors *saptpadi* is a ceremony of going round the fire which is no where mentioned in the section itself. What the section talks about is merely the phrase "before the sacred fire" and no where says "round the sacred fire".[51]

Where as another view talks about *saptpadi* in a totally different fashion, According to it while performing *saptpadi* the bridal pair faces and marches towards each other till the time they join their hands whereas Section 7(b) HMA clearly says that the bride and the bride groom takes seven steps "jointly" before the sacred fire i.e. they move together.[52]

This is to say that different texts have maintained different modes and where the law is not very clear it is quite difficult to say which form V to be accepted.

This then is the state of law of ceremonial validity of Hindu marriages. This state of law is far from being satisfactory. Many cases of prosecution for bigamy fail because of lack of proof of solemnization of the second marriage with requisite rites and ceremonies.

Thus when in the suit for the restitution of conjugal rights, the validity of the marriage itself is disputed, it is not enough to find that the marriage took place, leaving it to be presumed that the rites and ceremonies necessary to constitute a legal marriage in the particular case were performed; the court must find specifically what these rites and ceremonies are and whether they were performed.

51. See *supra* n. 20 and 22.
52. See *supra* n. 21.

THE BALCO JUDGEMENT : A CASE COMMENT

*Nandita Govind**

The Supreme Court recently delivered a landmark judgement in the case filed by the BALCO Employees' Union against its Employer Company.[1] The ruling is bound to have far-reaching consequences not just by way of the issues it adjudicates upon but also by way of its refusal to pass judgement on certain aspects which the Court acknowledges and strongly emphasizes to be beyond the scope of judicial review. This article aims to draw out the main principles, propositions and solutions enunciated in the judgement and discusses them from various perspectives. This writer has structured her comment by considering the main contentions raised by the labour union as well as the Court's opinion on each of these and broadly analysing the same.

I. The Main Contention

The primary contention of the labour union was that prior to the sale of 51% equity to Sterlite Industries, BALCO's share capital was owned entirely by the Government of India and this meant that it was 'State' under Article 12 of the Constitution. Thus as a result of the disinvestment the workers would lose their right to approach a High Court under Article 226 or the Supreme Court under Article 32 if their fundamental rights were violated. This was equivalent to stripping them of their protection under Articles 14 and 16. The Union[2] also argued that the workers should have been consulted at every step. The disinvestment process was an adverse civil consequence for them and hence they had a right to be heard in consonance with the principles of natural justice. Clearly, the issue raised strikes at the very heart of the disinvestment policy. It also seeks to secure a more powerful, participatory role for the workers in the entire process. Thus it may be asked if the workers enjoy the right to veto the policy itself or simply the technicalities of its implementation.

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1. *BALCO Employees Union (Regd.)* v. *Union of India*, 2000 (8) Scale, 541 at 551.
2. *Id.* at 558.

In respect of the first contention, the Court has expressed the impropriety of judicial comment on and judicial scrutiny of what is essentially an executive policy decision. It has also conceded the inadequacy of the Court in undertaking such an exercise. The Court's judgement is one in a long line of similar decisions where it has refused to adjudicate on administrative and policy matters many of which have been cited in the present ratio. BALCO ruling reaffirms the trend of judicial restraint in commenting on administrative decisions. By exercising restraint the Court has once again reiterated that in matters of executive policy, the judiciary has only a negative duty and it can examine only the procedure by which the decision was taken and not the substance of it. In matters of economic policy, judicial attitude has been so restrained as to be almost deferential.

In *R.K. Garg.* v. *Union of India*[3] the Court said that "laws relating to economic activities should be viewed with greater latitude than laws touching civil rights and that the legislature should be allowed some play in the joints because it has to deal with complex problems which donot admit of solution through any doctrinaire or strait-jacket formula". A similar view was taken by the Court in *Jalgaon Municipal Council Case*[4] in which it was held that economic policy decisions are beyond the domain of the courts "unless they violate constitutional or legal limits on power or have demonstrative pejorative environmental implications or amount to abuse of power". The consistent judicial view has been that "the Court's duty is to see that in the undertaking of a decision no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible by the Constitution"[5]. The ratio in *Delhi Science Forum* v. *Union of India*[6] also advocated the same line of reasoning. In that case he Government's policy to encourage private sector participation in the telecom sector was unsuccessfully challenged. It was held that the court would not interfere in policy decisions for all such questions were best discussed in Parliament. It would step in only in case of a constitutional or statutory violation. While stating this, the Court has emphasized the applicability of the test laid down in the *Wednesbury case.*[7] The principle requires that every new experiment undertaken by the executive must satisfy the tests laid own in the case. This principle is attracted where it is shown that the authority exercising discretion has taken a decision

3. *R.K. Garg* v. *Union of India* (1981) 4 SCC 676.
4. *G.B. Mahajan* v. *Jalgaon Municipal Council*, (1991) 3 SCC 91.
5. *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664.
6. *Delhi Science Forum* v. *Union of India* AIR (1996) SC 1356.
7. *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* (1947) 2 All E.R. 680.

which is devoid of any plausible justification and any authority having reasonable powers could have taken the said decision. So, the central government was expected to put forward such conditions as would safeguard public interest and interest of the nation. A lot of stress was laid on the non-creation of a separate Telecom Regulatory Authority. This has been the general practice in other countries like the UK, Canada, Japan and Australia where telecommunications have been privatised. Subsequently, the TRAI Ordinance of India, 1996 was promulgated keeping in mind the growing concern for an independent regulator. Another case where a similar trend in judicial reasoning can be recognised is *State of Gujarat* v. *Ambica Mills*[8] where administrative convenience in respect of economic legislation was accorded grater freedom from strict judicial scrutiny than legislation relating to civil and political rights, saving it from the otherwise rigid application of the equal protection clause in Article 14.

With regard to the second question about locus standi of the workers the Court held that they were not entitled to a hearing. It has unequivocally laid down that principles of natural justice are not applicable in matters governed by economic policy. In its opinion, "the existence of rights of protection under Articles 14 and 16 does not veto the government's right to disinvest."[9] Nor can the workers claim a right of continuous consultation.[10] As a shareholder, it has the right to transfer its shares under the provisions of the Companies Act.[11] It has also held that employment under the State is not a prerequisite to approach the High Court or Supreme Court and industrial workers have this right like all other citizens. Decisions rendered by civil, labour and industrial courts are open to challenge before the HC or SC.[12] With regard to protection of workers' interests it was felt that they were adequately protected by the shareholders agreement even though it was said that[13] it wouldnot be open to Court to go into the comprehensive package evolved towards policy implementation. Further, it was held that though it was desirable that wide range of consultations be held before taking the decision, there was no provision in law which required a pre decisional hearing and non-granting of the same did not make the decision invalid.[14]

8. *State of Gujarat* v. *Ambica Mills Ltd.* AIR, 1974 SC 1300.
9. *Supra* n. 1 at 567.
10. *Ibid.*
11. *Ibid.*
12. *Id.* at 570.
13. *Id.* at 573.
14. *Id.* at 572.

A. Comment

It cannot be denied that the case raises fundamental questions about the legal control of government, specifically, the legal control of government policy. The judiciary need not always exercise this control. In this writer's view, however, the judiciary is certainly a forum to give a fillip to issues that will need a more democratic, formalised, and structrued legal solution in the future.

A change in economic policy advocating liberalisation and rolling back state frontiers in various sectors has found favour with most political camps, albeit to varying degrees. Needless to say, questions about public control and interest group participation are inevitable, as they should be in any healthy democracy in the throes of a historic policy change. To say that law and policy are distinct in their application to situations indicates an impractical approach to reality and an insensitive one to the democratic process. The two cannot be given water-tight classifications. For law is based to a great extent on policy and policy derives its legitimacy from the law. Judicial decisions reflect government policies to varying degrees and likewise administrative decisions cannot be wholly divorced from the law.[15] Law is one of the means of pursuing policy goals and courts play a central role in applying and enforcing (polices which have been embodied in) legal rules and principles.[16] Since the distinction between law and policy is unclear it is often used by courts to regulate the amount of judicial control of government decision-making. In that sense, the Court's refusal to adjudicate upon economic policy decisions are perhaps a tacit endorsement of the same. More generally speaking, courts do give effect to views of the executive on a wide range of issues.

On the whole the Court's judgement is a mixed bag. It would not be easy to fault the logic behind the things it says. However, the things that it does not say or refuses to go into ought to be reconsidered. Firstly, the opinion that courts are not empowered to examine and adjudicate upon policy goals is a forceful one. They are not equipped with either the constitutional mandate or the requisite expertise. Further, the nature of judicial review makes it unsuitable for policy review. It is mainly perspectival and hence debating the merits of a policy in Court after it has been implemented is merely an academic exercise. Which is not to say that judicial review does not serve a purpose in alerting a sensitive and responsible administration of the effects of its future conduct on those

15. Peter Crane, AN INTRODUCTION TO ADMINISTRATIVE LAW 113 (2nd edition).
16. *Ibid.*

who will substantially be affected by it. We have seen such a scenario in respect of the New Telecom Policy. Consequent to the writ petitions filed in Court in the *Delhi Science Forum Case*, the government realised the need for an independent regulator to oversee and regulate the practices of private entrants in the field. The experience of other countries that had gone in for such an exercise was of help as well. This has been referred to earlier in the article.

This also brings us to one of the other central questions that the case has highlighted. The *locus standi* of the workers and their right to a continual consultative process. This question in its various avatars will be imminent now that the government is picking up the pace of second generation reforms as is evident from the announcement of some big-ticket divestitures in the past few days. The answer cannot be easily surmised and articulated as it would depend, not only on legal principles and perspectives but also democratic values and administrative maturity. For this purpose, certain points in the court's ratio need a more detailed discussion. One of these is regarding non-interference by the Court with the comprehensive plan worked out by the State for policy implementation and for the workers in the post-disinvestment scenario. In other words, it has refused to be drawn into disputes regarding technicalities of implementation except when the procedure followed in arriving at the decision is improper or is not in accordance with the law. Such a legal position has far-reaching implications. Practical disinvestment of PSEs has begun very recently. Modern Foods being the first followed by BALCO. IBP and VSNL being the latest announcements. Though there has been sustained debate on the merits of privatisation in the political arena for many years this was entirely theoretical. It is now that the results of this experiment in the economic sector and its enormous ramifications in the social sphere will be felt. To deny judicial review of the government package at this juncture would not be in public interest. It is nobody's case that a policy decision can be challenged on grounds other than illegality, irrationality, want of bonafides or lack of proper procedure. In the Court's own words, "matters of economic legislation or executive action related to it are based on trial and error" and logically, should be given some leeway. It follows from such a line of reasoning that a forum for redressal of grievances must be avilable to eliminate the flaws that such an empiric method would possess. It is open to debate, whether the workers are entitled to a pre-decisional hearing or continual consultation at every stage prior to the decision. However they must be given platfrom to raise any point of dissatisfaction that they may harbour with respect to those aspects of the plan that affect them materially. It

would also be useful to remind ourselves that the judiciary is the guardian of the constitutional objectives enshrined in the Preamble and Part IV. In *National Textile Workers* v *P.R. Ramakrishna,*[17] this court has favoured a greater participatory role for the workers taking a modern, progressive, socially responsible definition of the Company as opposed to the traditional, purely capitalistic view which considers it to be the property of the shareholders. The Court has distinguished that case in the present judgement as it deals with the winding-up and not disinvestment of the organisation. However, the case does enunciate a legal principle that is applicable in the BALCO judgement. Particularly in an era of dynamic policy changes, it would be advisable to reiterate the enduring nature of the directives in Articles 38(1), 39(c) and 43A of the Constitution.

Article 43A of the Constitution envisages increased participation of workers in the management of industries and of special relevance. Therefore, it can be asked if there is a case for greater use of mandatory publicity and consultation in this context. This question is of considerable significance for non-parliamentary rule-making, which is usually not as public as parliamentary legislative process where the proposed legislation is subjected to intense public discussion and scrutiny both inside and outside parliament.

B. A Global Perspective

In this respect an overview of the practices followed in other countries reveal some interesting facts. Both sides of the Atlantic present different pictures in this context. Expectedly, the Indian experience keenly resembles the British practice. [18] The most notable difference between American and English administrative process is the dominant role played in the former by the legal profession. In the USA, cases are normally presented heard and decided by trained lawyers. The use of laymen as adjudicators, without legal representation of the parties, that obtains in a number of British tribunals is exceptional in the United States. The near monopoly exercised by the American legal profession is itself a function of the trend toward judicialisation, which is both a cause and consequence of the use of lawyers. [19] The law of adjudicatory procedure in the USA starts with the due process clause, which exists in American Constitution. Due process is essentially a requirement of notice and hearing. Building on this

17. *National Textile Workers' Union* v. *P.R. Ramakrishnan,* (1983) 1 SCC 228.
18. See Schwartz & Wade, LEGAL CONTROL OF GOVERNMENT ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 108 (1972).
19. *Id.* at 107.

foundation American courts have built an imposing edifice of adjudicatory procedure. The consequence has been the judicialisation of administrative process. Administrative procedure in the United States has acquired most of the attributes of courtroom procedure.[20] The Administrative Procedure Act imposes a variety of formal consultation and hearing requirements on rule-makers and the courts play an active role in enforcing these requirements and in ensuring that rules made are supported by sound reasoning and that they do not conflict, with the Constitution. The elaborate procedure is dominated by judicial formality.[21] The position in Britian is very different. Most statutory rule making powers reside in officials or bodies which are not and are not seen as being or required to be politically independent. Their function is seen as that of putting flesh on the bones of policy objectives laid down by parliament in the enabling legislation. Thus, rule making is seen as a political activity. The legitimacy of political decision-makers tends to derive from the mode of their selection than from the substance of the decisions they make. But in Britain, practice counts for more than the law. Consultation with interests, organistions likely to be affected by decisions is one of the foremost and most carefully observed conventions. It is so well settled a practice that it is unusual to hear a complaint. Here, consultation which is not subject to statutory procedure is seen to be more effective than formal hearing which may produce legalism and artificiality. But duty to consult is recognised in every sense except the legal one. For the civil law perspective, we look at the German system where the law on planning is much more legalised and provides more procedural safeguards than the common law system in India or England where no common law or statutory rules common to all plans seem to have been attempted. According to German law, the person responsible for any project or plan any administrative authority or private person who seeks planning permission must present a detailed plan to a hearing authority provided under the law. Opinions, comments are then invited from other authorities whose spheres of competence and interests are affected by the plan. It is also displayed for inspection by the public so as to get feedback and give people the opportunity to raise objections that they may have. The decision of the hearing authority is reached after thorough discussion and is sent to the planning authority which again decides the matter. The entire procedure is meticulous, time bound and very transparent, informed by democratic values stressing on the consideration of all factors.[22]

20. Crane, *supra* n. 15 at 196.
21. *Id.* at 197.
22. See Mahendra P. Singh, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 109-17 (2001).

II. The Second Contention

The second argument against the disinvestment is founded on the ratio in *Samatha* v. *State of Andhra Pradesh*.[23] In that case, Court had to adjudicate on the validity of grant of mining lease of Government land in a scheduled area to non-tribals. For that purpose it had to interpret Section 3(1) of the Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959. On the basis of its interpretation of the aforesaid section as well as Fifth Schedule of the Constitution Court held the transfer to be invalid. In the BALCO judgement, Court has questioned the Samatha decision while rejecting its applicability on the ground that the relevant Section 165(1) of the M.P. Land Revenu Code was different from Section 3(1) of the Andhra Pradesh Regulation. At the time of transfer of the said land to BALCO in 1968 permission for the same had been attained from the appropriate officer as required by Section 165 (6). Later, this sub-section was repealed and a new one substituted in place, but it still excluded 'lease' from being a transfer prohibited by it.

While it is true that questioning the transfer of the said land 25 years after it was made in accordance with the law of the land at that time would lead to a great deal of administrative and legal chaos, however, it would be imprudent to overlook some question of wider implication. The Court has expressed reservations on the majority judgement in the *Samatha Case*. These ought to have been clarified in the interst of sound jurisprudence. The Apex Court has also doubted the authority of the interpretation given to Section 3(1) of Andhra Pradesh regultion as well as the 5th Schedule in light of the fact that provisions of Constitutional law can be decided only by a 5 judge bench as opposed to a 3 judge one in the *Samatha Case*. While it is the Court's prerogative to agree or disagree with the judgement but an elucidation of its views on the subject would have settled the position of the law. Such an exercise would have been particulary useful in view of the passing of the Provisions of the Panchyats (Extension to the Scheduled Areas) Act, 1996. This statute extends the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. For the purpose of the present case certain provisions are of special interest. Section 4(b) makes recommendations from Gram Sabha or Panchayat mandatory before granting license or mining lease for minor minerals in Scheduled areas. Section 4(1) talks of their prior recommendations before grant of concession for exploitation of minor minerals by auction and 4(m)(iii) endows them with the power to prevent

23. *Samatha* v. *State of Andhra Pradesh* (1997) 8 SCC 1991).

alienation of land in Scheduled areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe. Implicit in the scheme of things prescribed by this Act is the mandate to restore greater powers of self government on tribal and Scheduled areas. Thus, the Supreme Court would have served the interest of future jurisprudential discourse by opining on the interpretation of the 5th Schedule.

III. Concluding Remarks

This article is an attempt to discuss the judgement in light of its potential to meet the challenges that are likely to arise in the judicial and policy domains in the near future. The case gives us an opportunity to discuss, not only the legal arguments and the executive – judiciary demarcation, but also the nature and extent to which democratic process pervades governmental decision-making. The reasons why we seem to accept executive decisions without seeking a more active role in their planning and review even though they place limitations on our rights and freedoms are manifold – the nature of our polity, constitutional background or plain apathy. However, in view of the mixed results that privatisation has thrown up in different parts of the world, an independent, impartial, legalised forum to address issues that will inevitably come up is the need of the day. Such an effort would also be in keeping with the vibrant and bustling spirit of the world's largest democracy.[24] Without doubt, the exercise has to be undertaken in a wholly indigenous manner, suited to our specific demands and objectives. The comparative overview of the systems in other countries is in place in order to impart a global dimension to this writer's case.

The views on the Samatha argument seeking a more elucidatory judicial interpretation may seem somewhat incongruous with the stick-to-controversy practice prevalent in common law systems. This would, however lend credence to the claim that the judiciary speaks in one voice. Surely, all questions cannot be answered by the Court. But with some, it cannot be otherwise.

24. T.T. Ram Mohan, *Privatisation: Theory and Evidence* Economic and Political Weekly, December 29, 2001.

STATE v. *CHENCHU SUDARSHAN HANSDA* : A CRITICAL APPRAISAL

Mrinal Ojha and Rajat Khosla**

'The nation's children are a supreme important asset. Their nurture and solitude are our responsibility. Children's programs should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for the development to all children during the period of growth should be our aim, for this would serve out large purpose of reducing inequality and assuring social justice.'[1]

The above stated quote was recently cited in the ruling of the case: *State* v. *Chenchu Sudarshan Hansda*[2] as given by the Hon'ble bench comprising of Shri Sukumar Sahu and Shri Gajendra Mohapatra. It seems though, from the decision of the case, that the Hon'ble judges have not been able to appreciate the spirit of the quote. The judgement raises many questions, both of legal and social value. In the discussion that follows, we shall try to look the judgement from various angles.

The case involves the gruesome murder of the Australian missionary, late Graham Staines and his two minor sons, Timothy and Philip on the night of 22nd January 1999, while they were fast asleep inside two station wagons which were set ablaze by a mob. The murder took place at a village called Manoharpur in the district of Keonjhar, Orissa. Chenchu Hansda, a village boy of about 13 years (about 11 years at the date of occurrence of the crime) was one of the accused in the case in question. He was charged under Sections 120-B, 147, 148, 149, 436 and 302/199 of the Indian Penal Code. The Hon'ble judges on finding Chenchu guilty of being involved in the offence of unlawful assembly, murder, causing murder by mischief of setting fire to two vehicles wherein the deceased

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1. Preambulatory Declaration of National Policy for the Welfare of Children also quoted in *Sheela Barse* v. *Union of India*. AIR 1986 SC 1973 at 1977.
2. The case was decided by the Juvenile Court of Bhubneshwar. (Govt. Case No. 21 of 1999). The judgement was delivered on 30.9.2000.

were deep asleep at night, ordered him to be sent to a Juvenile home for a period of 14 years.

I. NATURE OF TRIAL

Due to the age factor of the accused the inquiry was rightly held in a Juvenile Court, separate from the other accused persons. However, it is humbly submitted that though the court has been designated a Juvenile Court, it does not seem to be any different from other criminal courts due to reasons stated in the subsequent discussion. The Hon'ble judges seem to have ignored the age factor of the juvenile while trying him. It is not enough to merely designate the court a Juvenile Court and then forget the real objective behind such provisions. 'A Juvenile Court differs from others courts in its philosophy, objectives, functioning and powers. Owing to its origin to the doctrine of *parens patriae*, it is for providing protection like a parent to a child deviating from the accepted norms of society. It neither seeks to punish a juvenile who has committed an offence nor does it protect the civil interests of the juvenile.'[3] The preamble of the Juvenile Justice Act states that this is 'an Act to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to and disposition of, delinquent juveniles.'[4] The preamble makes clear the intention of the legislature. The intention was never to punish or find the guilt of the juvenile. The purpose of the Act and the procedure to be followed by the Juvenile Court has been adequately summarised in the judgement of Bandela Ailaiah's case.[5] The Hon'ble judges in the said case have stated – 'The juvenile justice law appears to be so emphatic and mandatory that no juvenile delinquent shall be tried for any offence charged against him much less he be convicted or sentenced for such on offence and on the other hand a special treatment should be given to him for his care, protection by way of correctional measure.'[6] It is not a matter of coincidence that the word 'trial' finds no mention any where in the Act and instead the term 'inquiry' has been used. The Hon'ble judges in the judgement of Bandela's case have made clear that there is a distinction between the terms 'trial' and 'inequity'. While a trial leads to an acquittal or conviction, an inquiry is for the purpose of seeking information. The Hon'ble judges have stated – '...if the result of the judicial proceeding does not or should not end in the result of conviction, acquittal, discharge

3. Ved Kumari, TREATISE ON JUVENILE JUSTICE ACT 50 (1993).
4. The Juvenile Justice Act 1986.
5. *Bandela Ailaiah* v. *State of U.P.* 1995 CRI. L.J. 1083 (Andhra Pradesh High Court).
6. *Id.* para. 13.

etc., such proceedings cannot be infested with the concept of trial. That is how Section 21 (1) of the Act has restricted the powers of the juvenile court in an inquiry to pass particular orders from (a) to (e) of Section 21 (I) of the Act.'[7] The spirit of the Act was to go into the reasons of such behavior of the juvenile, which amounted to an offence and not the establishment of his guilt. This is clear from the fact that under the Act an inquiry is held and not a trial. The inquiry undertaken by the juvenile court leads not to conviction, acquittal, discharge etc, but to find correctional means for the benefit of the juvenile.

In Chenchu's case we find it hard to see the spirt of the Act being followed. Though it is true that the Hon'ble judges have used the term 'inquiry' in the judgement, yet they have not appreciated its true meaning since almost the entire judgement deals with the establishment of the guilt of the juvenile. Nowhere in the judgement there seems to be any talk of the social maladjustment that the juvenile was apparently going through. There is no mention of his background and other factors which probably played a very forceful role in his alleged delinquent behaviour. How can the Hon'ble judges then state that it was an inquiry and not a conventional trial that took place? What seems apparent is that the court behaved in the fashion of an adult criminal court. The Act sees the delinquent juveniles as victims of social maladjustment and desires their treatment and care. The Hon'ble judges seemed to have swayed away from the path shown by the legislature and have instead lost themselves on the road that wrongly leads them to undertaking the task of establishing the guilt of the juvenile.

Another question that inevitably clouds the mind is that why was such a hurry shown in disposition of this case. It seems that the Hon'ble judges have instead of expeditiously disposing the case have hastily done so. One has to bear in mind that being expeditious is one thing and being hasty is quite another. It is true that one of the reasons for an inquiry of a juvenile delinquent to be held separately is that the case is dealt with efficient swiftness. But special care has to be taken that this swiftness does not translate into undue haste that could prove fatal to the interest of the juvenile. It is humbly submitted that due to the nature of charges against the juvenile it becomes imperative to keep in mind as to where the cases against the other accused are heading. Among other charges the juvenile has been charged with offences, which fall under the category of group liability and conspiracy. It is therefore, essential of keep in mind the stage at which the cases against the others accused of the offences have

7. *Id.* para. 14.

reached. While all the other cases are still pending, the amazing speed with which Chenchu's case has been decided seems absurd. The speedy disposal of the cases against juveniles is required for the purpose of protecting their interest. Hasty disposal on the other hand could lead to the damage of these interests. How come there is failure to apply swiftness, which is anywhere near the kind that has been displayed in Chenchu's case, to the pending cases against the other accused in the crime? It seems to us that under the guise of efficiency, Chenchu's case has been decided in a surprisingly hasty manner. Where would the judgement stand if none of the others accused in the crime is found guilty?

II. Charge-Whether Proved Beyond Reasonable Doubt?

The juvenile has been found guilty of the offence of criminal conspiracy under Section 120B of the Indian Penal Code on the basis of the testimony of a prosecution witness. The witness states that he saw the accused juvenile sitting in a group with Dara (the chief accused in the crime) and that he was asked by Dara to join them to Manoharpur where they were going for the purpose of assaulting members of the Christian community. The gist of the offence of criminal conspiracy as defined under Section 120A of the IPC is that there should be an agreement of minds to commit an illegal act. The crime can be proved on the basis of circumstantial evidence also. It is our humble submission that even if the testimony of the prosecution witness is believed to be true, it is insufficient to prove beyond reasonable doubt that there was an agreement to commit an illegal act between Dara and Chenchu. Similarly, the subsequent alleged acts of the accused could have been done at the spur of the moment without any prior agreement. To elaborate further – it is possible that a person is seen in the company of the perpetrator of the crime while no agreement between them existed at that time and that he could have joined the unlawful assembly later. 'Conspiracy lies not in doing the act or affecting the purpose for which the conspiracy is formed, nor in attempting to do any the acts, nor in inducing others to do them. It lies in the forming of the scheme or agreement between the parties.'[8] The crime of criminal conspiracy can be proved by circumstantial evidence but such circumstantial evidences has to be extremely strong in nature that it proves the guilt beyond doubt. It seems that the age factor has been completely ignored while bringing home the offence of criminal conspiracy against the juvenile. In proving agreement of minds to do the alleged illegal act in this case, one has to bear in mind the age of the accused. It is

8. Hari Singh Gour, Penal Law of India 1112 (1983).

noteworthy that the Hon'ble judges found the evidence enough to prove that a child of about 11 years and of immature understanding was capable of having an agreement with the other accused to commit the alleged crime.

It is now pertinent to discuss Section 149 of the Indian Penal Code under which the accused juvenile has been found guilty. The section deals with the concept of group liability. It is a well-settled principle of criminal law that a person is liable only for those acts that he has committed and not for the acts committed by someone else. There are however certain exceptions in which a person may be held vicariously liablle for the act of others. Section 149 of the Indian Penal Code is one such example of vicarious liability under which the juvenile has been found guilty. Under the said section, it is not essential that all the participants of the crime must have done some over act. 'It is sufficient that the act is done by at least one of them in furtherance of the common object or is such an act which is likely to be committed in furtherance of the common object.'[9] It seems once again that Hon'ble judges have failed to keep in mind the tender age of the accused. It has not been established that the common object of the assembly was the murder of Christians. An assault on the members of the Christian community seems to be the common object of the assembly. To any adult it would be apparent that the act of murder is one of the likely acts that could be committed in the prosecution of the common object. But it is not possible to attribute such mental element to a child who was about 11 years old at the time of the prosecution of the crime. To say that a child of about 11 years would not only adequately understand the common object of unlawful assembly but also understand the nature of the acts which are likely to be committed in the prosecution of the common object like any other adult, is unacceptable. If this were so then it is submitted that the entire purpose of holding an inquiry in a Juvenile Court by virtue of Section 6(3) of the Juvenile Justice Act, by judges who have special knowledge of child psychology and child welfare, is defeated.

III. Credibility of Witnesses

It is humbly submitted that the credibility of the prosecution witnesses is not beyond doubt. The religious background of the witnesses cannot be ignored keeping in mind that the very motive of the crime that was committed revolves around religion. All the witnesses except one, are Christians. Although it is not implied that this reason is enough to discredit the witness, yet special attention and care is required to be taken while

9. Ratan Lal Dhiraj Lal, Law of Crimes 4580 (1987).

deciding the case on the basis of their testimonies. The fact that every prosecution witness has been able to positively identify the accused juvenile under trying circumstances and amongst so many people clouds our minds with doubt. 'It is one matter for a witness to make adequate observation, in a time of stress, of the physical characteristics of a single criminal. It is quite another matter for him to performs the same feat when the crime involved is committed by 4/5 or more people.'[10] Then there are problems which arise due to the fact that during the time of original observation of the accused the witness was unaware that a crime situation was involved. 'Usually when a person observes the accused at the time when he knows that the crime is taking place there is strong motive to observe the guilty party as carefully as possible. The stress at the moment could often prevent this from happening but at least the motive exists. But where the witness is unaware that the person he is observing is involved in a crime situation no such motive exists and therefore no such careful observation. This distinction is very important although it is not often commented upon.'[11] The above observation creates more than one doubt as to the credibility of the prosecution witnesses.

IV. Validity of Sentence

Even if it is presumed that the arguments in the above discussion are untenable, the judgement still proves to be questionable on another very important ground. The sentencing in the judgement does not seem to be in line with the provisions of the Juvenile Justice Act 1986. The main reasons for this contention are the provisions of Section 21 of the Juvenile Justice Act. Section 21 of the Act lays down the orders that may be passed regarding delinquent juveniles. The proviso to Section 21(1)(d) clearly states that in no case can the period of stay of a juvenile in a special home be extended beyond the time when the juvenile attains the age of 18 years in case of a boy and 20 years in case of a girl. In the present case the juvenile has been sentenced for a period of 14 years. In support of the sentence the Hon'ble judges have cited the case of *R.* v. *Accring Youth Court*.[12] It is humbly submitted that the case has no persuasive value, as the provisions of the Juvenile Justice Act are very clear with respect to the question of sentencing. Section 21 (1)(d) of the said Act is the most severe provision and is resorted to only when no other order is suital be.[13] It is, however apparent that the Hon'ble judges have

10. Patrick Wall, Eye Witness identification in Criminal Cases 128 (1975).
11. *Id.* at 126.
12. 1998 (2) All England Reports, 313.
13. *Supra* n. 3 at 160.

awarded a sentence which is beyond the ambit of the provisions laid down in the Juvenile Justice Act. Another case that has been cited by the Hon'ble judges is that of *Umesh Singh* v. *State of Bihar*.[14] In that case though the conviction of the juvenile was upheld, the sentence set upon him was set aside. In yet another case, *Bhola Bhagat* v. *State of Bihar*,[15] it was decided that the benefit of tender age shall go to the juvenile while deciding the sentence that is to be awarded to him. The Hon'ble judges seem to have ignored the various precedents set in this regard by the Hon'ble Supreme Court. The juvenile justice sentencing system is based on the principles that young offenders can and should be rehabiliated. This reflects the spirit of article 40 of the Convention on the Rights of the Child that treatment of children who come into conflict with the law must take into account the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. It is true that for the purpose of seeking the definition of penal offences, reference to the Indian Penal Code is inevitable. The Juvenile Justice Act does not redefine the offences for the purpose of juveniles. But it would be a grave error to look to the Indian Penal Code for the purpose of sentencing the juvenile. In that sense the Juvenile Justice Act is a separate code altogether. Why else would the legislature provide Sections 21 and 22 and the Juvenile Justice Act? Ignoring statutory provisions or going beyond their ambit defeats their *raison d'etrê*.The said sections provide an exhaustive list of orders that can or cannot be passed against the juvenile. They restrict the powers of the juvenile court with respect to the question of sentencing. The sections in question exist because of the clear intention of the legislature that the juveniles are a special category of people for whom the punishments cannot be as severe as the one meant for adult criminals. The intention is further made clear by the very fact that Section 21 of the Act, which spells out the orders that may be passed regarding juvenile delinquents, does not contain the word 'sentencing'. The omission of the word was not meant merely to sound polite or politically correct. The word 'order' specified in the sections cannot become a mere euphemism. Different words were used because they were meant to bring a different import to their meaning. The intention was to specify orders under Section 21 that may be passed regarding juvenile delinquents that are not penal in nature. The Hon'ble judges in the present case have ordered that Chenchu be sent to a juvenile home for a period of 14 years. Notwithstanding that the judgement goes against the provisions of the Juvenile Justice Act, what corrective effect do the Hon'ble judges think this will have on the

14. JUDGEMENTS TODAY 2000 (6) SC 508.
15. JUDGEMENTS TODAY 1997 (8) SC 537.

juvenile? Can they be of the opinion that 14 years in a juvenile home would prove beneficial to the juvenile? And if so, is their opinion based on strong grounding in child psychology and child welfare? Or is the opinion a sub-conscious display of strong revulsion pertaining to the heinousness of the crime? If the philosophy behind the orders meant for juvenile delinquents is not strictly adhered to, the line between adult and juvenile courts will soon disappear. Also, there would be no difference between the meaning of the words 'adult' and 'juvenile' if the spirit of the Juvenile Justice Act is not followed. The basic policy behind juvenile sentencing maintains a balance between the twin responsibilities of protecting the society from harm and at the same time to see that the interest of the juvenile is also protected. If the courts deviate from the correct approach in this regard, it could result in a drastic effect on the juveniles and the society might suffer in the long run. It is submitted that cases involving juveniles should be dealt with utmost sensitivity and care. The outcome of each of these case would somehow or the other also reflect in the country's future.

V. CONCLUSION

To sum up it is submitted that such a judgement defeats the entire purpose of a Justice Act. The designation of the court as a juvenile court seems to be paying only lip service to the purposes for which it was created. It seems as if the Hon'ble court has not acted in any different way from other criminal courts meant for adults. The defence of the juvenile does not seems to have carried out its tasks to the best of its abilities. The Hon'ble judges seem to have been swayed by emotions while deciding the case. 'No free man should be amerced by framing or to assuage feelings as it is fatal to human dignity and destructive of social, ethical and legal norm. Heinousness of crime or cruelty in its execution however abhorrent and hateful cannot reflect in deciding the guilt.'[16] It is true that the brutal killings are an act which deserve condemnation of the highest order and strict legal action; but such action cannot be beyond the ambit of legal provisions. A through understanding of the purposes of the Juvenile Justice Act and the procedure to be followed is extremely important. It is not that the judges are not aware of the law while deciding the case. What is surprising is that though they seem to know the law as well as anyone else, they have decided the case in a manner that does not seem to be in confirmation with the provisions of the Act. Such a judgement not only erodes the spirit of the Juvenile Justice Act, but also affects the welfare of the nation.

16. *Dilaavar Hussain v. State of Gujarat* (1991) 1 SCC 253.

BOOK REVIEWS

KANOON KI DAAL PAR. By Pawan Chaudhary 'Manmauji'. New Delhi : Vidhi Sewa, 2001. Pp. xi + 376, Rs. 400/-.

Pawan Chaudhary is well known for his writings on law and law related issues. He writes in English as well as in Hindi. His works in Hindi have, however, drawn greater attention than the works in English. They have become so well known in Hindi circles that at least one person has already done Ph.D. in Hindi literature on some of them. Definitely there must be others also who must be working on his works either for their research degrees or otherwise. This brings special credit to him and to his writings.

Pawan Chaudhary is lawyer by profession and writer by inclination. His profession provides him different themes for writing but the writer in him turns these themes into themes of general interest. Therefore, his writings are not as much for the lawyer, which he reads for his professional work, as they are for any enlightened citizen, including a lawyer. He explores the legal phenomenon in its various dimensions not just through enacted law or judicial decisions but in a much broader context of what the law does to the society and to the common person. He explodes various myths associated with the law and the legal process through his narration either in the form of an essay or a story, or a novel or in any other form suitable for the theme. Sometimes these writings are also biographical or autobiographical. Some times they are plain facts to be assessed by the reader. Quite often they are critical as well as satirical. Unlike many literary figures, his writings are not based on imagination and perception alone. Most of them are based on his personal experiences in the courts or with his colleagues or with the common man in the society. Therefore, they are authentic and shake the reader to sit up and think afresh on his impressions about law. As the reader moves along his writings he finds himself learning about the law critically. He starts reformulating his own notions about it.

The author is a product of the Faculty of Law, University of Delhi where he has also been teaching from time to time. Just as a practicing lawyer he has given shape to his experiences in his writings, his experiences as law teacher have also appeared from time to time in his writings. Among others, he has also written on legal education as it is and as it ought to be. One of his essays in the book under review drawn our attention towards improving the quality of legal education. His suggestion about doing it makes an interesting reading. His interactions with his colleagues

in the faculty also give a perspective of law, which is mostly different from what we read in the law books and communicate to our students. The law teacher should definitely look into the reality and give a picture to the student, which is as close to it as possible. Definitely a law teacher who interacts with law in the way Pawan Chaudhary does will provide better insights to his students. He will do it still better if he also adopts the simple narrative style found in Pawan Chaudhary's writings.

The book under review is a collection of seventy-nine essays on different subjects of contemporary importance written on different occasions and published in different journals, magazines and newspapers. They include subjects as diverse as the Constitution and its Basic Structure Doctrine, the National Human Rights Commission, Appointment, Transfer and Removal of Judges at different court levels, the Uniform Civil Code, Marriage and Divorce among different communities, Salaries and Wages of Workers, Women and Sexual exploitation, Law's delays, Procedural Wrangles, etc. They are not all confined to legal issues. Some of them cover issues as diverse as biographical sketch of Sachidanand and Vatsyayan Agyeya, Hindi and Law, Population Issues and a note on autobiographies. As the essays were written not for the lawyers exclusively but rather for the common man they do not demonstrate grand legal learning. But definitely in every essay the author has something to say. Others may have said some of these things. But the way they are said in these essays is unique in its simplicity and impact. Either through a satire or through a simple social fact they convey the intensity with which the author associates himself with each and every subject. This is the beauty of all the essays. Definitely in this regard the author stands out of the category of legal writers and joins the literary writers. He may not be counted totally in one or the other category, but definitely he has made a place for himself as writer.

Professor Upendra Baxi has contributed an introduction to these essays, which try to encapsulate their gist and also adds some of his own views on the Indian law and the legal system. The introduction of course adds glamour to the book immensely.

It is hoped that the author would continue to contribute to law and literature in the way he has been doing so far. His writings would continue to guide and inspire people in the operation of their laws and the legal system. I hope this book and his many other writings which have already appeared or will appear in future will be read with interest by all alike.

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COPYRIGHT AND INDUSTRIAL DESIGNS. By P. Narayanan. Calcutta: Eastern Law House, 2002. Pp.1020, Rs. 890/-.

The law of copyright has continuously endeavoured to achieve a symbiotic relationship between the creative artist and his risks, financial as well as his hard work which *per se* must be compensated and not allowed to be pirated for the reason that the creators of works and innovations are entitled to reap the rewards of their hard work and labour. The right of the copyright holder to exploit his creativity is of course, limited in duration and circumscribed in a manner that the intellectual creativity must continue and others have a right of access to his creativity for fair or permitted use. This right after some years falls in the category of public domain as the monopoly right of the copyright holder cannot be allowed to continue *ad-infinitum*; once the work falls in the public domain it can be made use of by any person without any prior permission or paying royalty.

With the onward march of civilization and scientific innovations in technology, the scope of copyright has broadened from the literary and artistic works to dramatic, musical works, cinematographic films, and sound recordings. It is equally true that the rights of performers, producers of phonograms and broadcasting organisations have been recognised as neighbouring rights. In the last decade or so the law of copyright has seen further advancement as the computer, audio-video recordings, reprography, cable television, satellite broadcasting and Internet have unfolded not only a clamour for having copyright but also posed challenges to copyright law as these scientific inventions have made the scope of piracy much more wider and easier.

The law of copyright in the modern world provides the legal framework not only for the protection of traditional beneficiaries of copyright, the individual writer, composer or artist, but also for the investment required for the creation of works by the major cultural industries, the publishing, film, broadcasting and recording industries and the computer software industry. Copyright is important not only to the individuals, and industries which depend upon it for their livelihood but it also impinges in one way or another on the daily life of members of the public or business. Copyright protects a vast array of everyday items including for example on the private level, letters, photographs, videos and in business all manners of advertisement brochures, designs, documents, graphics, manuals and reports

published or used. No business can afford to be ignorant of the implications of copyright in its daily work[1].

The law of copyright in India is governed by the Indian Copyright Act 1957 which was amended in 1984, 1994 and 1999. While the 1984 amendments attempted to prevent piracy, the 1994 amendments covered the areas of protection of performers rights, copyright societies, assignment of copyrights by authors and artists, protection of computer programmes, cinematography of films and sound recordings. The 1999 amendments amended the definition of literary work, the meaning of copyright in respect of computer programmes, and increased the term of copyright of performers from 25 to 50 years. The earlier law of industrial designs, Designs Act 1911 have been substituted by the Designs Act 2000 and Design Rules 2001.

The book under review first published in 1986, has been thoroughly revised and updated in the present third edition of 2002. The book is divided into twenty-seven chapters.

In chapter I, introduction, the author traces the growth of copyright law from ancient to modern times and alludes to international conventions such as Berne and Universal Copyright Convention of 1886 and 1971 respectively, as well as British and Indian enactments. Chapter 2 is devoted to the nature of copyright and is followed by the scope and meaning of literary, dramatic and musical works (ch.3) including the copyright in database, catalogues, newspaper stories, computer programmes, songs etc. Artistic works (ch.4) discusses copyright in paintings, sculpture, drawing, and engraving or photographs whether or not any such work possesses artistic quality, work of architecture and any other work of artistic craftsmanship as artistic copyright is concerned with visual image. Cinematographic films and sound recordings (Ch.5) deals with videotapes, sound track in films, cinematograph film, sound recordings and recording of music and who is an author and owner of a copyright (ch.6) followed by rights conferred by copyright (ch.7) are two most litigated aspects of copyright law which is followed by term of copyright (ch.9) where the term of performer's right has been extended to fifty years.

There are various ways in which a copyright work can be exploited for instance, in the case of a novel, it can be published as a volume, or serialised in newspapers and magazines, licenced for translation, or filming or dramatisation etc. Each of these rights can be separately assigned or

1. See Copinger and James Stone, COPYRIGHT 14 ed. (1999) para 1.02.

licenced which are very important rights for the original author. The author discusses all the nuances involved in such transactions (ch.10) followed by voluntary licence and non-voluntary or compulsory licence, however, the compulsory licence is circumscribed by the Copyright Act in India.

Rights of broadcasting organisations and of performers (ch.12) deals with broadcasting reproduction rights which has been introduced in the Indian law by way of Copyright Amendment Act 1994.

The author in chapters 14 to 18 deals extensively with infringement of copyright, in varieties of copyrights as well as what amounts to fair dealing supported by case law of English and Indian courts.

Remedies and actions for infringement of copyright and the defences available to the alleged infringes (ch.19 to 21) are very important as the author has discussed all types of remedies against infringement, civil, criminal and administrative.

Although registration of copyright is not necessary nor compulsory, yet the Indian Copyright Act provides for the establishment of Copyright office, Copyright Board, registration of copyright and appeals (ch. 24) the author outlines the powers, duties and responsibilities of the Registrar of copyright and various other authorities subordinate to it.

International Copyright Conventions (ch.25) deals very briefly with Berne Convention and Universal Copyright Convention, however, it may be noted that, after the establishment of WIPO (World Intellectual Property Organisation) two treaties WIPO Copyright Treaty and WIPO Performers and Phonograms Treaty 1996 have been adopted which are specially meant to take care of copyright in digital environment.

Apart from these treaties, the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIP) adopted as a part of WTO, has given added dimension to the international copyright protection.

The author in ch.26 deals with breach of confidence, a branch of law wherein, trade secrets, literary and artistic secrets, personal secrets and public and government secrets are amenable to copyright protection. The determination whether a given body of information is confidential depends on; (a) the extent to which the information is known outside his (owner's) business; (b) the extent to which it is known by employees and others involved in the business; (c) the extent of measures taken by him to guard the secrecy of information; (d) the value of information to him and his competitors; (e) the amount of effort or money expended by him in

developing the information; and (f) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Copyright in industrial designs is the subject matter of chapter 27 wherein the author has extensively discussed the issues arising under the copyright in industrial designs in the light of Industrial Designs Act 2001. The protection given to an industrial design under the Designs Act is not copyright protection but a true monopoly based on statute. Designs as such were never protected by the common law which was basically concerned with the protection of literary copyright. The Designs Act, unlike he Copyright Act, gives monopoly protection in the strict sense of the word rather than mere protection against copying as under the Copyright Act.

The book contains 21 Appendices of nearly two hundred pages devoted to; The Copyright Act 1957 as amended upto date, the Copyright Rules 1958, as amended upto date, International Copyright Order 1999, the Cinematographic Act 1952 as amended upto date, the Designs Act 2000, The Design Rules 2001, GATT 1994, TRIP Agreement extracts, Paris Convention and UK legislations on the subject.

In sum, Narayanan's treatise on Copyright and Industrial Designs, 2002 is a running commentary on a most important subject which is of daily concern not only to lawyers, law students and judges but to everybody who is in one or the other way encountering copyright and its allied components. The book is meticulously documented with case law both from India and United Kingdom, covering all the aspects of the subject in detail, and written profoundly and powerfully. The book is a store house of knowledge on the subject and will be cherished by all lawmen and laymen alike.

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THE LAW RELATING TO PUBLIC SERVICE. By Samaraditya Pal. Calcutta, New Delhi : Eastern Law House, 1998. Pp 819 (hardcover), Rs. 650/-.

The number of persons employed by the State in India has grown phenomenally in the decades following Independence. The importance given to the notion of the welfare state in the early years and the growth in the number of public enterprises, both under the Central government and the State governments, has contributed to the recruitment of millions of persons in public employment in India. A complex web of laws, rules, regulations and administrative instructions supplemented often with judicial decisions has emerged, which regulates the service conditions of those in public employment. These norms have a bearing on all aspects of the employment relationship—recruitment, appointment, remuneration, seniority, promotion, disciplinary powers and pensions - to name only a few aspects, that govern those employed in services under the State. Service law thus presents a bewildering array of norms to the civil servant, legal practitioner and academic alike. The importance of studying this branch of law is no doubt of practical importance to the civil servant, whose tenure in office is regulated by these laws and rules, it is also important for persons employed in the private sector. The quality of the employment relationship of those in public employment often serves as the benchmark model for the private sector to emulate.

The task of ordering and systematizing this branch of law is what the author of the book under review seeks to do. Describing his efforts rightly as a 'treatise', he has sought to state the basic principles in the form of systematic propositions followed by an elaboration of those principles. The book seeks to clarify the law relating to those in 'public employment', a term defined by the author as those employed under the State, employees under corporations directly incorporated by statute and employees under agencies or instrumentalities of the State. Commenting on the scope of those thus covered under public employment law and the varying judicial interpretation given to Article 12 of the Constitution of India dealing with the definition of 'State', the author states that in the 1990's the "recent trend appears to be restrictive" while noting that the constitutional provision has been liberally construed in the case of educational institutions receiving aid to be treated as an instrumentality of the State.

The unique feature of public employment, *viz.* that almost all aspects of the employment relationship are governed by statutory rules has been

the basis for holding that while the origin of governmental service is contractual, once appointed, the status and conditions of those in public employment are regulated by statutory rules, which are capable of unilateral modification by Government. The author has dealt with Part XIV of the Constitution and the scope of power of the Government to make statutory rules governing the employment relations of those services under the State. The recent judicial decisions in the context of the rule-making function under Article 309 of the Constitution and the implications of inconsistency between State Rules and Central Rules as also the invoking of the "occupied field" principle in this constitutional provision have been discussed. The role played by administrative instructions, in the absence of statutory rules governing any aspect of the employment relationship have been noted. The author has highlighted the distinction between administrative instructions and rules and pointed out that the distinction has no significance when the administrative instructions have binding character and are enforced by the courts. This is an aspect that requires further study.

The conditions of service of those in public employment have been elaborately dealt with in the book. The creation of the employment relationship through the stages of recruitment, the process of selection through the Public Service Commission, reservation of posts; nature of appointment to the posts among others have been dealt with. In these areas the aim of the author is not to provide an exhaustive list of case law covering the various topics, but rather to highlight the principles that have been followed in dealing with such matters. The incidents of the employment relationship such as remuneration, the rights to substantive holding of a post and lien, seniority, promotion, deputation, reversion, leave and break in service are treated comprehensively. The author has rightly pointed out, while dealing with disciplinary control and the end of the employment relationship, that the discussion in the book must be supplemented with a book on administrative law for a proper appreciation of the subject. The author has pointed to the distinction between government servants and others in public employment while dealing with the provisions of Article 311 of the Constitution. The discussion of the unique constitutional safeguards available to government servants and the consequences of the Forty-Second Constitutional Amendment and the law laid down in *Tulsiram Patel's* case and subsequent cases are very thorough.

While no single volume can hope to cover the entire branch of service law in the country, the author has attempted to cover the main aspects of public employment law. Yet, the purpose of the book to provide a 'relatively simple and coherent statement of the law' would have been served better,

had there been brief mention of the service conditions of those working in the armed forces of the Union and in the police forces, and the reasons for their exclusion from the purview of the book. The fundamental rights of those in public employment and the extent, if any, to which these can be curtailed as a necessary concomitant of public employment might have been usefully discussed. Similarly some discussion of the effect of the functioning of the Administrative Tribunals in providing remedies and the consequences of the overlapping of the remedies under the Industrial Disputes Act with the Administrative Tribunals and the constitutional remedies available to some sections of the government employees would have surely enhanced the value of the book. It is hoped that future editions of this book (which is certainly required in this fast changing branch of law) would deal with some of these issues. However, there is no doubt that The Law Relating to Public Service is a valuable and handy reference guide, useful to practitioners and academics alike for its competent and thorough handling of this vast subject area and is an important contribution to the field of service law.

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"ISIL YEAR BOOK OF INTERNATIONAL HUMANITARIAN AND REFUGEE LAW. (Ed) Lakshmi Jambolkar, Vol.1(2001) Indian Society of International Law, Pp 352, Rs.700/-.

Over the years, tremendous changes have occurred in various areas of human activity. Rapid advances in science and technology have been rapidly affecting the human life all across the globe, be it in the working conditions, markets or corporations, production and distribution of goods, services and knowledge. At the same time the technological developments have been instrumental in the development and mass production of weapons of mass destruction. The armaments and materials capable of imposing immense misery on the human kind have been wantonly used not only by the States but also by sub-regional and regional groups in international and non-international armed conflicts respectively. These conflicts have over the years been affecting a large number of peoples throughout the world, which have more or less nothing to do with these conflicts and have been the worst victims of these conflicts. Needless to state that these conflicts have consumed immense number of human lives and have rendered an equally large number of people sick, wounded and homeless and driven out of geographical borders. At the same time peoples, women and children have been subjected to torture, inhuman and degrading treatment on the ground that they belong to the enemy State. These overwhelming developments have brought to forefront many legal and political issues.

The foremost issue affecting the international community has been to protect the general population in the event of an international or a non-international armed conflict. In the course of such an approach, the rules of warfare have been so framed as to make a distinction between the immediate military objectives and non-military objectives. While the former could legitimately be made the objects of attack or reprisal, but the latter could not be. Similarly a distinction has also been drawn between the combatants and non-combatants, while the former could become the immediate targets of the use of force, the latter could not be. Although theoretically the laws of war proceeded on this distinction, however, over the years it has been found that such a distinction has not been rigorously followed by the combatant States. The non-observance of this distinction has led to immense damage to the general population at large. Secondly, it has been observed that the combatants and non-combatants alike have been subjected to immense torture, inhuman and degrading treatment by

those in whose possession they are found. Although the laws of war protect these victims against such a treatment, yet these are recurring features of any battlefield. Thirdly, over the years, non-international armed conflicts and civil wars, and the resultant damage to the human life has demonstrated greater challenges to international community, particularly in focussing upon the subjection of such conflicts to international surveillance and a semblance of protection of civilian population. Fourthly, since the military objectives have been pursued by the participating combatants from distant locations and by the use of sophisticated weapons, such operations have resulted into greater damage to non-military targets including the damage to non-combatant civilian population and the physical environment they reside in. All in all the challenge before the international community and the international legal order has been, how to protect the victims of war in general in both international and non-international armed conflict, and how to interpose a degree of accountability on the States and their armed forces for violations of customary and conventional norms on armed conflicts.

The Laws of War as contained in the Hague Convention 1907 on the Laws and Customs of War on Land and Four Geneva Conventions for the Protection of Victims of War 1949 and other international instruments, dealt customarily with the regulation of armed conflicts. However, over the years, the direction of the international law making in the realm of war and armed conflicts has been guided by the considerations of human rights and the principles of humanity. The growing influence of International Human Rights Law is evident in the principles contained in Two Additional Geneva Protocols. The language and substance of 'international humanitarian law' which may infact be refered as the entire law of 'armed conflict' now demonstrates the international community's long resolve to protect the rights of the human beings in worst scenarios of war as well. Therefore most naturally the scope and range of operations of combatants are, and ought to be, restricted by the humanitarian considerations. A second component of the humanitarian law has been to infuse a degree of accountability for those, who pursue the military objectives of war without any regard to humanitarian considerations, which has largely been responsible for worst tragedies on human beings and innocent victims. With the establishment of international criminal law and an international criminal court, it is hoped that the perpetrators of worst acts of brutality on the victims of war are brought to justice. The third component is to uphold the rule based on chivalry and humanity, to protect the non-combatants like the women, children and old men incapable of any help in the hostilities. Along with this is the duty to protect the

combatants in matters such as quarter, perfidy, unnecessary suffering and inhuman and degrading treatment to them. All in all the mandate and direction of the evolving 'international humanitarian law' is to uphold the humanitarian face of the modern battlefield and theatres of war. The utmost consideration in such a human engagement is to stop practices which are derogatory to human rights in general.

The Year Book under review is a collection of essays on diverse aspects of the evolving humanitarian law. These topical essays written by distinguished scholars of human rights, international law and humanitarian law, provide a meaningful insight in the evolution, interpretation and shortcomings of the new law. The authors have successfully demonstrated how the context and the content of the legal rules on humanitarian law have undergone a transformation over the years. The subjects of these essays include all possible victims of war, and the way in which their rights and interests could best be protected. While it is not possible for this reviewer to analyze the issues highlighted by each one of the contributors, for, there are sixteen of them, however, certain common points may be highlighted. All the authors are guided by the considerations of respect to human beings in their approaches to the elucidation of principles of international humanitarian law. The victims of present day conflicts are too many and too varied and need to be identified and protected, not only at national but at international levels also. Yet the characterization and the enforcement of principles of international humanitarian law have posed difficult, indeed intriguing questions.

One of possible shortcomings, as rightly highlighted is the lack of universal recognition of the mutual commitment of the States to uphold and implement the rules of humanitarian law. Secondly, international law being as it is, its recognition and the lack of a uniform interpretation of its legal texts has not been forthcoming at all, it might be trite to state that use of vague phraseology is only helping the powerful and the mighty. It might also be stated that the use of force by the States or collectively by them at institutional levels, have been guided by considerations of military strategies and victory. Institutionally, adhoc coalitions over the years, have guided the joint enforcement and peace keeping, with little legitimacy and accountability. As Secretary General Kofi Anan has stated that the United Nations is surrendering any role it might have had in this area. The UN does not have at this point in history, the institutional capacity to conduct militiary enforcement measures under Chapter VII.[1] The only

1. RENEWING THE UNITED NATIONS : A PROGRAMME FOR REFORM, UN Doc.A/51/950 (1997), para,107.

casuality in such a scenario is laws of war and human rights. It is very hard to imagine that these considerations will be given a go by in any armed conflict in future also. Some of the recent conflicts in history bear witness to wanton disregard of well recognized rules of warfare and human rights not only of combatants, but also of non-combatants.[2] Indeed these conflicts have demonstrated the sharp and often bewildering conflict between the normative regime of humanitarian law and the stark barbaric reality of the battlefield. The functioning of the national and the international criminal tribunals have fructified, but only a little of international humanitarian law. If one has to recount the horrific events in Bosnia, Congo, Somalia, Kosova and Afghanistan, he would only be convinced about the rhetoric of a humanitarian approach to armed conflicts. The intimidation, brutalization, torture and killing of helpless civilians in situations of armed conflicts, demonstrate the deliberate indifference on the part of States and their armed forces to the laws of armed conflicts, which has only accentuated the misery of humankind.[3] However, it has also increased the duty of the international order towards the victims of war. The core requirement of a genuine humanitarian law is that of an effective individual and collective enforcement of the humanitarian law and sensitizing the international community towards a better climate of compliance.

The essays, it may be stated are critical evaluations of the normative regime of international humanitarian law and its practical difficulties. They also explore the various possibilities of enhancing the destination of international humanitarian law and also contain useful suggestions. The Year Book also contains various book reviews and a select bibliography, which is quite informative for the readers. The book is therefore quite useful and can easily be recommended for all those who are interested in the subject. The quality of the print and the get up is quite impressive. It is only hoped that the Year Book is regularly published, which is indeed a big job for the editor, the ISIL and its collaborators.

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2. See e.g., V.S. Mani, *The Fifth Afghan War and International Law* THE ECONOMIC AND POLITICAL WEEKLY, January 26, 2002; See also, Lord Robertson, *The Kosovo Crisis*.http://www.mod.uk/news/kosovo/account/intro.htm.
3. See, GA PROTECTION OF CIVILIANS IN ARMED CONFLICT, REPORT OF THE SECRETARY GENERAL, Doc. S/1999/1957 for an account of the violations of international humanitarian law.

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IMPLEMENTATION OF BASIC HUMAN RIGHTS. By Manoj Kumar Sinha. Delhi: Manak Publications Pvt. Ltd., 1999. Pp. xxviii + 438, Rs. 375/-, ISBN 81-7827-044-7.

All societies and cultures have developed some conception of rights and principles that should be respected. Some of these principles and rights have been recognised as universal in nature by the international community. The struggle against injustice and inequalities have been an integral part of the history of all human societies. The conception of the rights which every human being is entitled to enjoy by virtue of being a member of the human species has evolved through history in the course of these struggles. The implementation of these basic rights, however remains ineffective in various states even today.

The book under review is a commendable effort by the author on the issue of implementation of basic human rights not only in India but also at regional and international level. The book contains seven chapters including introduction and conclusion.

In the introduction of the study, the author traces the origin of human rights in India and at international level. To establish the fact that the ancient India had a definite knowledge of human rights law, the author refers, *inter alia* to Rig Veda, the guiding principle "*sarva dharma samanan*", Buddhist and Jainist doctrine of non-violence and Kautilya's Arthasastra. At international level, according to author, the notion of law of nature played the paramount and principle part in the development of the idea of fundamental rights. The concept of law of nature for the rights and freedoms of the individuals was supported by the Stoics, Greek, Roman, Cicero and Christan fathers. The author has also discussed the development of human rights prior to and within the United Nations by referring to various treaties. Apart from this, he has discussed non-derogable rights at universal and regional levels and under Indian Constitution and supported them with the help of the doctrine of *jus cogens*.

The author discusses non-derogable human rights in the second chapter. These rights are-right to life; right against torture; right not to be held in slavery or servitude; and the right not to be held guilty in retroactive application of criminal law. Apart from the aforesaid rights which are common to all international and regional human rights instruments, the

author also discusses other non-derogable human rights which are not common to all the aforesaid instruments, such as the right not to be imprisoned for non-fulfilment of contractual obligation; the right to legal recognition; the freedom of thought, conscience and religion; and the right to participate in government.

The third chapter is on implementation of non-derogable rights and is divided into six sections. The first section discusses the implementation mechanism at international level. The author discusses in addition to Universal Declaration of Human rights, UN Commission on Human Rights and certain resolutions of the ECOSOC for handling complaints of human right violations, and the implementation mechanism under the Covenant on Civil and Political Rights in detail. The author covers supervisory mechanism; Human Rights Committee under the Optional Protocol of 1977; legal basis for follow-up procedure; and the procedure for the handling of individual communications under the Covenant. Section II, III and IV cover implementation mechanism available under the European Convention; American Convention; and African Charter on Human Rights respectively. Section V is on implementation of non-derogable rights under the four Geneva Conventions of 1949 and two Additional Protocols of 1977. These Conventions and Protocols alongwith some other instruments applicable to armed conflicts form humanitarian law. The author discusses non-derogable human rights vis-à-vis humanitarian law. The author lays emphasis on the obligations of states parties to Geneva Conventions to enact national legislations for "effective penal sanctions" for the violation of international humanitarian law. The last section discusses the role of NGO's in implementation of human rights at international and regional levels.

In the fourth chapter, the author discusses the implementation mechanism for non-derogable rights in the indian legal system. The author discusses Articles 20 and 21 of the Constitution of India which have acquired the status of non-derogable human rights. The author also discusses our international obligations and various articles of the Constitution to perform such obligations. The emergency provisions in the Constitution and the various writs such as habeas corpus, mandamus, prohibition, certiorary and quo-warranto have also been discussed in the chapter. The role of public interest litigation in enforcing human rights has been highlighted. The law of preventive detention has also been discussed with the help of decided cases.

The author discusses the role of National Human Rights Commission in the implementation of human rights and the scheme of the Protection

of Human Rights Act, 1993. The role of media and NGO's in the promotion of human rights has also been discussed.

The fifth chapter is devoted to the jurisprudence of non-derogable human rights at international level. Section I of the chapter covers the decisions of the Human Rights Committee given under Article 6 of the Covenant (right to life); Article 7 (torture); and Article 18 (right to freedom of thought, conscience and religion). Section II discusses the role of European Commission of Human Rights and European Court of Human Rights for upholding human rights in Europe. European Convention for the Prevention of Torture, 1987 has also been discussed in detail. According to the author, the scope of the Torture Convention is wider than the European Convention on Human Rights. Unlike the European Commission, the Torture Committee under the Torture Convention has visited places of detention like police stations, prisons, and mental hospitals of its choice in all of the states parties.

Section III discusses the role of Inter-American Commission and the Court of Human Rights for the protection and enforcement of human rights in the American states. The author discusses the contentious jurisdiction of the Court and the various cases decided by it. The advisory opinion given by the American Court has also been discussed. In the last section, the author has discussed the jurisprudence of the international humanitarian law by referring to various cases particularly *Nicaragua* v. *United States*[1] and *Bosnian Genocide*[2] case.

Chapter VI of the book discusses the jurisprudence of Indian Judiciary and national human rights institutions. The chapter discusses various important decisions pronounced by the Supreme Court and the various High Courts of India as well as National Human Rights Commission. The author also makes a comparative study of the various provisions of the Covenant on Civil and Political Rights and the Constitution of India. Apart from discussing judgements on the right to life, the author discusses the issuse of death penalty at length. The author also discusses about torture and mentions the requirements to be followed in all cases of arrest or detention as preventive measures as laid down by Supreme Court in *D.K. Basu* v. *State of West Bengal*[3].

The author also discusses important judgements on procedural rights. The procedural rights indetified by the author are right to human dignity,

1. ICJ REPORTS, 1986 at 14-546.
2. 35 INTERNATIONAL LEGAL MATERIALS, 1996 at 35-88.
3. AIR 1997 SC 610; (1997) 1 SCC 416.

right of detenus not to be hand-cuffed, right to bail, right to speedy trial and right to free legal aid.

In conclusion of the study, the author summarises the chapters and makes certain valuable suggestions.

The book is, no doubt very useful for the teachers, judges, advocates, researchers, students, and all other persons committed to the study of this noble area. The author should come out with revised edition of this book by updating his study in the light of national and international developments. The book is worth keeping in all the libraries. The book has been priced at a very resonable price of Rs. 375/. It is highly praiseworthy on the part of the Publishers Manak Publications Pvt. Ltd. for beautifully publishing this book.

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