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Faculty of Law
Chhatra Marg
University of Delhi
Delhi -110 007

Phone : 011-27667483, 27667725/ Extn. 1510

Fax : 011-27667483

E-mail : lawfaculty@vsnl.net

Website : www.du.ac.in

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VICTIM'S RIGHTS AND CRIMINAL JUSTICE REFORMS

Prof.(Dr.) N.R. Madhava Menon
Director, National Judicial Academy
Bhopal

AMONG THE many proposals on the table for reforming criminal justice, the one which attracts universal acclaim relates to the status and role of the victim in criminal proceedings. Today he is an informant and possibly a witness for the prosecution depending upon the good sense of the police and the discretion of the public prosecutor. Unlike the accused, he has no rights to protect his interests in the proceedings which are supposedly conducted on his behalf by the State and its agencies. And when the State agencies fail to do its duties as often happened in many cases in the recent past, the victim is left to suffer injustice silently or (as happened in Nagpur Court in 2005 when the victims assaulted the rapist and killed him) to take the law in his hands and wreak vengeance on the offender.

Being victim of a crime is indeed a distressing and unsettling experience. If the victim belongs to weaker sections of society the experience may be traumatic and frustrating. Some even go to the extent of committing suicide and seek heavenly justice! Some say that the system supposed to provide the victim with the relief itself becomes a problem to victims of crime. Often he faces double victimization.

Does the criminal justice sytem work as an end in itself and neglect the needs of the victim even denying him information on the progress of the proceedings? What are the rights, if any, the victim has in the legal proceedings conducted on his behalf? If the system does not operate to support the legitimate needs of the victim, can it at least ensure that he is not harassed, intimidated, humiliated and exploited? Respect for the victim can be an end in itself which may serve as public good in administration of justice. What can be done to give a better deal to the victims of crime as a strategy to improve the efficiency of the system and to make the proceedings equally fair to both sides.

U.N. Declaration on Basic Principles of Justice to Victims

In 1985 the United Nations adopted the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration recognized four types of rights and entitlements to victims of crime. They are:

a) **Access to justice and fair treatment** – which includes prompt redress, right to be informed of benefits and entitlements under law, right to necessary support services throughout the proceedings and right to protection of privacy and safety.
b) **Right to Restitution** – return of property lost or payment for any harm or loss suffered as a result of the crime.
c) **Compensation** – When compensation is not fully available from the offender or other sources, the State should provide it at least in violent crimes which result in serious bodily injury, for which a national fund should be established.
d) **Personal Assistance and Support Services** – include material, medical psychological and social assistance through governmental, voluntary and community based mechanisms.

Developments on Victim Rights and Support Services in other Countries

The Council of Europe has recommended the revamping of criminal justice incorporating victims' rights in every state of criminal proceeding. Following it, many countries have amended the laws to include victims' rights and services.

The United Kingdom has enacted the *Criminal Injuries Compensation Act* in 1995. In 2001 in a report on "Criminal Justice: The Way Ahead", the Home Department found "that many victims felt that the rights of the accused of a crime take precedence over theirs in criminal proceedings". Every time a case is discharged or acquitted or the verdict is perceived to be unjust, a victim's suffering is made worse. During the long proceeding of investigation and trial, victims are not kept properly informed or provided with a sense of security. Too often they are expected to turn up at court for cases that are adjourned, or are subjected to unnecessarily stressful courtroom experiences. Crime can leave victims physically injured, emotionally traumatrised, with potentially long lasting psychological trauma, all of which can be compounded by severe financial difficulties, observed the U.K. report. The agencies with which victims come into contact, particularly during the period after the crime, do not always understand and respond effectively to their needs. The U.K. report therefore recommended the following measures to balance the system of justice in that country :

a) Legislate to entitle victims with information about release and management of the offenders and progress of their cases.
b) Enable victims to submit a "victim personal statement" to the courts setting out the effect of the crime on their lives.

c) Introduce measures to protect vulnerable victims/witness such as screens, video evidence, etc.
d) Provide extended specialized support for victims of road traffic accidents and their families.
e) Establish a victim's Commissioner (Ombudsman).
f) Enable victims to report minor crime online and to tract their case online.
g) Legislate to produce a Victims' Code of Practice setting out what protection, practical support and information, victims have a right to expect from criminal justice agencies.

Bereaved families, children, repeat victims, victims of human trafficking, of domestic violence, or sexual abuse and those belonging to minority communities are found to have particular needs which also need to be addressed in the Victims' Code of Practice. *A Victims and Witnesses Bill* was to be enacted in U.K. on the above lines.

In France, all those who suffer injuries on account of crime are entitled to become parties to the proceedings from the investigation stage itself. He can assist investigation to proceed on proper lines and move the Court for appropriate directions when the investigation gets delayed or distorted for whatever reasons. He may suggest questions to the Court to be put to witnesses produced in Court. He may conduct the proceedings if the Public Prosecutor does not show due diligence. He can supplement the evidence adduced by the Prosecution and put forth his own arguments. He will be of help to the Court in the matter of deciding the grant or cancellation of bail. He will adduce evidence in the matter of loss, pain and suffering to decide on his entitlement of interim relief and compensation by way of restitution. Wrongful attempts to withdraw or close the prosecution due to extraneous facts can be resisted. All these are valuable rights available to victims under the French system of criminal justice.

It is believed that the above rights of the victims are necessary to ensure fairness of proceedings to both the parties and to assist the Court in the search for truth. If the victim is dead or otherwise not available this right should vest in the next of kin. The right extends to preferring and appeal against any adverse order passed by the trial court.

Thus basically there are two sets of rights recognized in legal systems of Europe. Firstly, victims' right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the Court in the pursuit of truth). Secondly, the victims of crime have

the right to seek and receive compensation for injuries suffered as well as appropriate interim reliefs from the criminal court itself.

Victims under Indian Criminal Justice System

In Indian Criminal Law, the victims' right is confined to a token compensation (section 357 CRPC) at the end of trial at the discretion of the judge. His right to participate as the dominant stakeholder in criminal proceedings got vested in the State. He has no right to lead evidence, he cannot challenge the evidence through cross-examination of witnesses nor can he advance arguments to influence decision-making.

If the victim of cognisable offence gives information to the police, the police is required to reduce the information into writing and read it over to the informant. The informant is required to sign it and get a copy of the FIR (section 154 (1) and (2) of Cr. P.C.). If the police refuses to record the information, the victim-informant is allowed to send it in writing and by post to the SP concerned (Section 154(3)). If the police refuses to investigate the case for whatever reason, the police officer is required to notify the informant of that fact (Section 157(2)). Alternatively, victims are enabled by section 190 of Cr. P.C. to avoid going to police for redress and directly approach the Magistrate with his complaint.

Complaints of victims are many. They are ill treated or harassed. Police do not truthfully record the information. Investigation being exclusively and police function, victim has a role in it only if police consider it necessary. Otherwise till the police report (*challan)* is filed under Section 173 Cr.P.C., the victim suffers the injury in silence running from pillar to post. If the magistrate decides to drop the proceedings, victim does not have an opportunity even to ventilate his grievance though the Supreme Court desired the Magistrates in such cases to issue notice and hear the victim-informant. There is no special provision for support to victims of rape to enable her overcome the trauma and hurt.

If the victim wants to engage a counsel, the Cr. P.C. allows him with the permission of the Court to assist the public prosecutor. He may also submit with the permission of the Court, written arguments after the closure of evidence in the trial.

In the granting and cancellation of bail, victims have substantial interests though not fully recognized by law. Section 439 (2) Cr. P.C. allows a

victim to move the Court for cancellation of bail; but the action thereon depends on the stand taken by the Prosecution. Similarly, Prosecution can seek withdrawal at any time during trial without consulting the victim (section 321, Cr. P.C.). Of course, the victim may proceed to prosecute the case as a private complainant. However, he cannot challenge the prosecution decision to withdraw at the trial stage itself.

Yes, victims have a right to testify as prosecution witness. But he is subject to intimidation and harassment from offenders and he has no protection. There is no victim protection law. If the victim belongs to the weaker section, the plight is indeed alarming. As the Malimath Committee remarked: " The adversarial trial built around cross-examination of witness often result in adding insult to injury against which even the Court may not be of much help. In several offences the experience may be a nightmare to victims".

Compensation provision is of little value. Section 357 CRPC says when the sentence of fine is imposed as the sole punishment or any additional punishment, the whole or part of it may be directed to be paid to the victim as per the discretion of the Court. Section 357 (3) makes provision for compensation even if fine does not from part of the punishment. There is no question of compensation if there is acquittal or where the offender could not be apprehended.

In 1992 the U.P. Governemnt through an amendment to Section 357 provided that where the victim is an S.C. or S.T. and the person convicted is not of that category, the Court is obliged to order compensation to the victim.

Substantial compensation is sometimes ordered to be paid by the State for illegal detention, custodial torture etc. by the Constitutional Court under writ jurisdiction.

Recommendations of the Committee on Criminal Justice Reforms

"The *Malimath Committee on Criminal Justice Reforms (2003)* recommended the following measures by way of justice to victims:

1. The victim and if he is dead, his legal representative, shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with 7 years imprisonment or more.

2. In select cases notified by the appropriate government, with the permission of the court, an approved voluntary organization shall also have the right to be impleaded in court proceedings.
3. The victim has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer.
4. The victim's right to participate in criminal trial shall, inter alia, include:
   a. To produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence.
   b. To ask questions to the witness or to suggest to the court questions which may be put to witnesses.
   c. To know the status of investigation and to move the court to issue directions for further investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth.
   d. To be heard in respect of the grant or cancellation of bail.
   e. To be heard whenever Prosecution seeks to withdraw and to offer to continue the prosecution.
   f. To advance arguments after the Prosecutor has submitted arguments.
   g. To participate in negotiations leading to settlement of compoundable offences.
5. The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a leser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.
6. Legal services to victims in select crimes may be extended to include psychiatric and medical help- interim compensation and protection against secondary victimization.
7. Victim compensation is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by Parliament.

8. The Victim Compensation Law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in different offences for the guidance of the Court. It may specify offences in which compensation may not be granted and conditions under which it may be awarded or with drawn.

It is the considered view of the Committee that criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognized by law and restitution for loss of life, limb and property are provided for in the system. The cost for providing it is not exorbitant as sometimes made out to be. With increase in quantum of fine recovered, diversion of funds generated by the justice system and soliciting public contribution, the proposed victim compensation fund can be mobilized at least to meet the cost of compensating victims of violent crimes. Even if part of the assets confiscated and forfeited in organized crimes and financial frauds is made part of the Fund and if it is managed efficiently, there will be no paucity of resources for this well-conceived reform. In any case, dispensing justice to victims of crimes cannot any longer be ignored on grounds of scarcity of resources.

PROMISES AND PERILS OF PUBLIC INTEREST LITIGATION IN PROTECTING THE RIGHTS OF THE POOR AND THE OPPRESSED

*Parmanand Singh**

I Introduction

PUBLIC INTEREST Litigation (PIL) has today become the household word for judicial involvement for the protection of the rights of the poor and the oppressed. Over the years a vast literature has emerged on the role of PIL in social empowerment and social change.[1] With the active assistance of social activists, PIL activism aims at innovative remedial measures for the vindication of constitutional commitments for the welfare and relief of the disadvantaged groups. The increased judicial repertoire symbolizes the politics of emancipation and social empowerment. PIL has today acquired unprecedented legitimacy and binding power and is acknowledged as a powerful weapon to combat governmental lawlessness and social oppression. The judicial messages radiated through PIL cases provide legal resources to launch struggles against domination and abuses of power. The Indian PIL has grown in the context of political history of State repression. It emerged as a device to activate judicial power to force the government to live up to its commitments. This paper seeks to portray

* Professor of Law, Formerly, Dean, Faculty of Law, University of Delhi.

[1] For a detailed analysis of the evolution and development of PIL see, Parmanand Singh "Human Rights Protection Through Public Interest Litigation in India" Vol. XLV, *Indian Journal of Public Administration*, 731-749(1999), Also see the present author's survey of cases on PIL published in *Annual Survey of Indian Law* Vol. XXI 160(1985), Vol. XXII 483(1986), Vol. XXIII 13(1987), Vol. XXIV 123(1988), Vol. XXV 45 (1989), Vol. XXVI 181(1990), Vol. XXVII 35(1991), Vol. XVIII 239(1992), Vol. XIX 245 (1993) Vol. XXXIX 661(2003), Vol.XL,543(2004) .Rajeev Dhavan, "Law As Struggle :Public Interest Law India", 36 *Journal of The Indian Law Institute* 302-338(1994); Rajeev Dhavan, "Ambedkar's Prophesy: Poverty of Human Rights in India", 36 *Journal of The Indian Law Institute*, 9-36(1994); B.B. Pande, "When They Came To the Court Seeking Basic Needs: Alternatives To The Flawed Responses", 31 *Journal of The Indian Law Institute* 368(1989); S. Murlidhar, Law , Poverty and Legal Aid: Access To Criminal Justice,175-298 (2004); C.D. Cunningham, "Public Interest Litigation in Indian Supreme Court: A Study in the Light of The American Experience", 29 *Journal of The Indian Law Institute*, 494(1987) Upendra Baxi, " Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in U.Baxi(ed) Law and Poverty: Critical Essays, 387-415 at 389 (1988) Also see by the same author, " The Avatars of Indian Judicial Activism: Explorations in the Geographies of (in)justice" in S.K. Verma and Kusum (eds) Fifty Years of the Supreme Court of India : Its Grasp and Reach, 156-209(2000). Also see, J. Cassels "Judicial Activism and Public Interest Litigation: Attempting the Impossible" 37 *American Journal of Comparative Law* 495(1989); Carl Baar, "Social Action Litigation in India: The Operation and Limitation of the World's most Active Judiciary", 19 *Policy Studies Journal*, 140-147(1990), S.P.Sathe, Judicial Activism in India (2003).

the evolution and growth of PIL ever since early eighties and offers a critique of judicial responses to the PIL actions alleging violation of human rights of the poor and the oppressed.

II Promises of PIL movement

PIL is a unique phenomenon in the Indian constitutional jurisprudence that has no parallel in the world. This technique is concerned with the protection of the interests of a class or group of persons who are either the victims of governmental lawlessness, oppression, or social oppression or denied their constitutional or legal rights and who are not in a position to approach the court for the redressal of their grievances due to the lack of resources or ignorance or their disadvantaged social and economic position. In the area of human rights judicial activism was evolved in the post emergency period as a result of what has been called "judicial populism"[2]. The Indian Supreme Court began to identify itself as an institution of last resort when the other two branches of the government were facing legitimation crisis. With the change of political situation after the 1975-77 emergency, the judges began to realize that by strict adherence to the Anglo-Saxon model of adversarial litigation the human-rights of the masses who had no access to justice could not be realized. Under the traditional system of adversarial litigation only the person "aggrieved" could approach the court for the redressal of grievances. Thus, those people who, because of ignorance, poverty, lack of resources, or economic disability, could not on their own approach the court had to suffer violations of their human rights. No one could espouse their cause on their behalf. The result was that for the poor, the disadvantaged and the exploited the legal procedure became a hindrance for the vindication of their legitimate rights. Realizing this deficiency in our legal procedure some judges, particularly Justices V.R.Krishna Iyer and P.N.Bhagwati openly started to disregard the impediments of Anglo-Saxon procedure to provide access to justice to the poor and disadvantaged sections of the society. This they did by relaxing the

[2] The expression 'judicial populism' was used by Upendra Baxi. He observed "Judicial populism was partly an aspect of post-emergency catharsis. Partly it was an attempt to refurbish the image of the Court tarnished by a few emergency decisions and also an attempt to see new historical bases of legitimation of judicial power." See, U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" 8-9 *Delhi Law Review* 91(1979-80); Parmanand Singh, "Access to Justice: Public Interest Litigation and the Supreme Court, 10-11 *Delhi Law Review* 156(1980-81).

[3] The concept of PIL was most clearly articulated in *S. P. Gupta v Union of India* 1981 (Supp) SCC 87 and further explained in *Bandhua Mukti Morcha v. Union of India* (1984) 4 SCC 161.

rule of *locus standi*. In *S.P. Gupta v. Union of India*[4], Justice P.N. Bhagwati articulated the concept of PIL as follows[5]:

> Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of person by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for appropriate direction , order or writ in the High Court under Article 226 and in case any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons.

The new procedure evolved by the Indian Supreme Court allows any member of the public acting in a *bona fide* manner to espouse the cause of the victims of human rights violations. One can invoke court's jurisdiction just by writing a letter or sending a telegram. This has been termed epistolary jurisdiction. Only a person acting *bona fide* and having sufficient interest in the proceedings of PIL has a *locus standi* and can approach the court to wipe out the tears of the poor and the needy, suffering from violation of their fundamental rights but not for personal gain or private profit or political motive or any oblique consideration. PIL proceedings entail new forms of fact finding such as appointment of socio-legal commissions of inquiry and handing over the investigation to the National Human Rights Commission or CBI. The court has taken the help of journalists, lawyers, district judges, bureaucrats, and expert bodies for ascertaining the facts alleged in PIL proceedings. This has been called investigative litigation. In dealing with these cases the courts have fashioned new kinds of relief for the victims of State lawlessness – compensatory, rehabilitative, restitutive, preventive and curative. For example, the court can award interim compensation to the victims of governmental lawlessness. This stands in sharp contrast to the Anglo-Saxon mode of adjudication where interim relief is limited to preserving status quo pending final decision. The grant of interim relief in PIL cases does not preclude the aggrieved person to claim damages from a civil court.

[4] *Supra* note 3.
[5] *Id.* at 210.

To sum up, PIL is not in the nature of adversary litigation but it is "a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the downtrodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true they can in the discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements".[6] In entertaining PIL, the court does not do so "in a caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The court is thus merely assisting in the realization of the constitutional objectives".[7]

Ideologically, the PIL activism addresses and confronts the domination formations in civil society and activates public discourse on practices of power with the partnership of the media, legal academics, bar and the judges. It is in essence a movement to involve the judicial process for the creation of norms of a just social order based upon the principles of justice and humanism. In this movement, people participate in the activation of the judicial power for creating a regime of human rights with the active support of the social activists PIL seeks to hold the government and its agencies within the leading strings of egalitarianism, humanism and fairness and correct by judicial admonition, episodes of governmental lawlessness and excesses of power or abuse of authority or lapses.[8]

[6] Per Justice P. N. Bhagwati in *Bandhua Mukti Morcha*, *supra* note 3 at 182-183.
[7] *Ibid.*
[8] In *Bipin Chandra* v. *State of Gujarat* A.I.R.2002 Guj. 99, a PIL was filed for a direction to the government to provide relief to the earthquake victims in Gujarat. On the morning of 26th January 2001 an earth quake of a high magnitude had shook the whole of Gujarat leaving thousands dead, injured, crippled, orphaned and homeless. The PIL was filed on the basis of newspaper reports that the government had failed to meet the situation arising from the calamity and had no adequate infrastructure to satisfactorily perform the stupendous task of providing relief and rehabilitation to quake victims.

A. Human rights

Hussainara Khatoon v. *State of Bihar* was the first reported case of PIL seeking relief for the under-trial prisoners languishing in jails.[9] The PIL proceedings in this case resulted in the release of nearly 40,000 under-trial prisoners, then languishing in Bihar jails. *Anil Yadav* v. *State of Bihar*[10] depicted the police brutalities. About 33 suspected criminals were blinded by the police in Bhagalpur jail in Bihar through putting acid into their eyes and then eyes were burnt. The Supreme Court quashed the trial of blinded persons, condemned the police barbarity in strongest terms and directed the Bihar government to bring the blinded persons to Delhi for medical treatment at the state's expense. The court declared free legal aid as a fundamental right as an aspect of right to life and personal liberty. The human rights of prisoners subjected to torture,[11] victims of police excesses,[12] inmates of protective homes[13] and mental asylums,[14] bonded[15] and child labour,[16] victims of sexual harassment[17] and earthquake victims[18] and many others have been protected by the Supreme Court.

In environmental cases, the court has addressed the issues of environmental degradation such as vehicular pollution,[19] leakage of oleum gas from a factory,[20] danger to the Taj Mahal from Mathura refinery,[21]

[9] *Hussainara Khatoon* v. *State of Bihar* (I to V) A.I.R. 1979 SC 1360, (Right to speedy trial recognized as a fundamental right under Article 21 of the Constitution).

[10] (1981) 1 SCC 622.

[11] *Khatri* v. *State of Bihar* (1981) 1 SCC 627, 635; *Veena Sethi* v. *State of Bihar* (1982) 2 SCC 583 (Right to legal aid declared as an aspect of Article 21).

[12] *Nilabati Behera* v. *State of Orissa* A.I.R. 1993 SC 1961.

[13] *Upendra Baxi* v. *State of UP* 1981 (3) SCALE 1136.

[14] *R.C. Narain* v. *State of Bihar,* (1986) Supp SCC 576; *B. R. Kapoor* v. *of India* A.I.R. 1990 SC 752. On the basis of a newspaper report that more than 25 mentally challenged patients housed in mental asylum in Ervadi in Ramanathpuram district of Tamil Nadu were charred to death as the patients could not escape the blaze as they had been chained to poles or beds, the Supreme Court in *In re: Death of 25 Chained Inmates in Asylum Fire in T.N.* (A.I.R. 2002 S.C. 979) took *suo moto* action by way of PIL and issued several directions to every State and Union Territory to implement the Mental Health Act, 1987.

[15] *Bandhua Mukti Morcha* v. *Union of India supra* note. 3. *See,* Parmanand Singh, "Bandhua Mukti Morcha: Social Action and the Indian Supreme Court", 12 *Indian Bar Review* 228 (1985).

[16] *M. C. Mehta* v. *Union of India* (1986) Supp. SCC 553.

[17] *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241.

[18] In *Bipinchandra* v. *State of Gujarat* A.I.R. 2002 Guj, the High Court of Gujarat applied the doctrine of *parentsparents' patriae* for providing relief to earthquake victims of Gujarat , holding that under the Constitution the State has an obligation to help people in distress. Article 21 was the repository of all human rights. The court gave directions for the relief and rehabilitation of earthquake victims.

[19] *M.C. Mehta* v. *Union Of India* 1996 (1) SCALE 42.

[20] *M.C. Mehta* v. *Union Of India* (1987) 1 SCC 395.

[21] *M.C. Mehta* v. *Union of India* (1996) 4 SCC 351.

degradation of Ridge area in Delhi,[22] pollution caused by shrimp farming,[23] tanneries,[24] and chemical industries[25] and so on. The court has taken several activist measures to ensure compliance of pollution standards. However, the judicial activism in this area has been criticized on the ground that the Court has not taken into account the interest of the workers and their families while passing orders for the closure of polluting industries. The interest of the tribal population has not been taken into account by the court while passing orders for the enforcement of Forest Act and Wildlife Protection Act.[26]

The most abiding contribution of PIL has been the emergence of new human rights such as right to speedy trial, right against torture, right against bondage, right against sexual harassment, right to shelter and housing, right to dignity, right to clean environment, right to education, right to legal aid, right to health care and so on. It creates a new jurisprudence of accountability of the State for constitutional and legal obligations adversely affecting the interest of the weaker sections of the society. It reminds and alerts the political executive of its failings and lapses. Much of the future of PIL in India will depend upon the active partnership and co-operation between the bench and the bar on the one hand and the political executive on the other. Since the executive will always be interested to cover up the facts, any allegation of governmental lapse or callousness will be countered by questioning the bona fides of the initiators.

The *Best Bakery* case[27] is a blatant example of the callousness of the political executive. The communal violence had gripped Gujarat in the aftermath of the killing of *Karsevaks* aboard *Sabarmati* express at Godhra on March 1, 2002 killing 14 persons. A SLP was filed by the National Human Rights Commission of India (NHRC) for setting aside the judgment and order dated 27.6.2003 passed by the Additional Sessions Judge, Fast Track Court, No.1 at Vadodara, acquitting 21 accused in the Best Bakery case in which 14 innocent persons were burnt alive. The NHRC sought a direction from the Supreme Court for fresh investigation of the case by an independent agency and trial by a court outside the State of Gujarat. On April 12, 2004 the Supreme Court created history by ordering that the infamous *Best Bakery* case be tried all over again–this time in Maharashtra. Making stinging remarks against the political executive, Justices Doraiswamy Raju and Arijit Pasayat

[22] *M.C. Mehta* v. *Union of India* (1996) 1 SCALE SP –22. *M.C. Mehta* v. *Union of India* (1996) 6 SCC 756.

[23] *S. Jaganath* v. *Union of India* (1997) 2 SCC 87.

[24] *Citizens Welfare Forum* v. *Union of India* (1996) 5 SCC 647.

[25] *In re Bhavani River Sakti Sugar Ltd* (1998) 6 SCC 335.

[26] *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664.

[27] *National Human Rights Commission* v. *Union of India* 2003(9) SCALE 329, 2003(8) scale 701, 2003(10) SCALE 126

said that modern day Neros fiddled while the innocent children and hapless women were burning. These Justices criticized the Gujarat High Court for making "irresponsible" remarks against those seeking trial—social activists and the key witness and NHRC. The Supreme Court directed Bombay High Court to designate a court in Maharashtra to conduct the trial.[28] The re-trial of this case in Maharashtra is in progress at the time of writing this paper.

PIL activism has brought to the notice of the Supreme Court incidents of human rights violations by custodial institutions such as prisons, mental asylums and women's homes. Incidents of police brutalities and encounter killings have also attracted remedial attention. In 1981 two law professors drew the attention of the Supreme Court to the barbaric conditions of the inmates of Agra Protective Home for women. The letter petition, after some initial difficulties, succeeded in securing humane conditions for the inmates.[29] The horrific conditions of institutions for mentally ill in Ranchi and Delhi were chronicled by *R.C. Narain* v. *State of Bihar*[30] *and B.R.Kapoor* v. *Union of India*[31] and in response to PIL, the administration of these institutions was taken out of the hands of local administration and broad guidelines were issued for the better management of these mental asylums. In a landmark judgment the Supreme Court ruled that every injured person has a fundamental right to get immediate medical treatment and that a hospital cannot refuse to treat a medico-legal case.[32] Five women prisoners in Bombay city jail were subjected to custodial violence. The Supreme Court issued guidelines applicable to whole of Maharashtra requiring that only police women be used to guard or interrogate women prisoners.[33]

In *D.K. Basu* v. *State of West Bengal*[34] the Supreme Court acted upon a letter petition in August 1986 by the chairman of the Legal Aid Services, West Bengal which referred to the increasing incidents of custodial deaths in West Bengal. The Court issued extensive directions to be followed by the police upon the arrest of a person and the minimum facilities available to such person. The Court observed:[35]

> Police is no doubt, under a legal duty and has a legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but the law does not permit use of third degree methods or torture of the accused in custody during interrogation and investigation with a view to solve the crime.

[28] *The Times of India*, New Delhi, April 12, 2004.
[29] *Upendra Baxi* v. *State of Uttar Pradesh*, *Supra*, note. 18.
[30] See *Supra* note 19.
[31] *Ibid.*
[32] *Parmanand Katara* v. *Union of India*, AIR 1989 SC 2039. Also see, *Paschim Banga Khet Majoor Samity* v. *State of West Bengal* (1996) 4 SCC 37.
[33] *Sheela Barse* v. *State of Maharashtra*, AIR 1983 SC 378.
[34] (1997) 1 SCC 416.
[35] *Id* at 439.

The court ruled that a relative of the arrested person must be promptly notified and that the police stations must prominently display the basic rights available to a detainee. The non-compliance of the directions would amount to contempt of court. PIL has been used to activate the court in cases involving encounter killings and police brutalities. In *R. S. Sodhi* v. *State of U.P*.[36] the Supreme Court directed the Central Bureau of Investigation (CBI) to investigate into the encounter killings in Pilibhit. During the troubled days of militancy in Punjab, the killings of lawyers in Punjab formed the subject-matter of PIL. On a direction of the Supreme Court, a CBI inquiry revealed the involvement of Punjab police in the abduction and killing of lawyers. The Punjab government was directed to pay compensation to the families of the deceased.[37] In another PIL the Supreme Court awarded compensation to the parents of a person killed as a result of criminal conspiracy of Punjab police.[38] A CBI inquiry revealed mass cremation of 585 bodies labeled as unidentified by Punjab police. The Court directed the National Human Rights Commission to determine the amount of compensation to be paid to the families of the deceased.[39] On November 11, 2004, the Commission has awarded compensation of 2.5 lakh each to 109 families whose relatives were reported missing during the insurgency and alleged to have been killed in extra-judicial encounters. Though the Commission is hearing cases of 2,097 missing persons, the aforesaid compensation has been awarded in cases where the Punjab Government has accepted to have taken the deceased into their custody.[40] However, the Commission has, in its order, cautioned the petitioners that the award should not be taken in the spirit of victory or loss. Both the State authorities and the citizens should treat this order as an application of balm to whatever wounds still left and to engage themselves to make the State of Punjab more prosperous and peaceful.

These are few instances of denial of human right where the only way to protect human rights has been to grant compensation. The compensation jurisprudence was most clearly articulated by the Supreme

[36] (1994) Supp. 1 SCC 143.
[37] *Punjab and Haryana High Court Bar Association* v. *State of Punjab* (1994) 1 SCC 616, *Navkiran Singh* v. *State of Punjab* (1995) 4 SCC 591.
[38] *Ranjit Kumar* v. *Secretary of Home Affairs*, Punjab 1996 (2) SCALE 51.
[39] *Paramjit Kaur* v. *State of Punjab* (1996) 7 SCC 20.
[40] See, Indian Express, November 12, 2004, New Delhi p. 6.

Court in 1993 in *Nilabati Behera* v. *State of Orissa*[41] in response to a PIL alleging death of a boy of 22 years in police custody. The Court evolved the principle of public law doctrine of compensation for violation of human rights. According to this doctrine, liability of the state for violation of human rights is absolute and admits of no exception such as sovereign immunity. In this case the court awarded Rs. 1,50,000 to the mother of the boy as compensation for custodial death. In *D.K. Basu*, the Supreme Court has articulated compensation jurisprudence thus:[42]

> Award of compensation for established infringement of indefeasible rights guaranteed under Article 21 is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved.
>
> Compensation jurisprudence for custodial violence is a positive achievement of PIL but compensation award appears to be arbitrary and look more like a charity. The Court has not laid down the criteria or yardsticks to measure the amount of compensation to be given for violation of human rights. Then, there is little evidence that the guilty officials have actually been punished. Even in those cases where the prosecution has been launched, the cases remain pending for years in the absence of judicial monitoring of proceedings.

B. Gender justice

> Women's issues have increasingly been brought before the Supreme Court with the growth of women's movement and investigative journalism exposing cases of dowry, rape, sexual harassment and discrimination. It is widely perceived that investigation into crimes against women have been unsatisfactory and in some cases even the judges have shown gender bias. Then there are complaints about long delays in final disposal of cases not only in lower courts but also in higher courts.

In *Delhi Domestic Working Women's Forum* v. *Union of India*,[43] the PIL arose out of indecent sexual assault by seven army personnel against six domestic servants traveling in train from Ranchi to Delhi. The Supreme

[41] See *Supra* note 17. The idea of awarding interim monetary relief was articulated in early cases of *Rudal Shah* v. *State of Bihar*, AIR 1983 SC 1086; *Sebastian M. Hongary* v. *Union of India*, AIR 1984 SC 571; *Bhim Singh* v. *State of J & K*, AIR 1986 SC 494.

[42] *Supra* note 41 at 439.

[43] (1995) 1 SCC 14.

Court, with a view to assisting rape victims, has laid down various broad guidelines. These guidelines include the legal assistance, anonymity, compensation and rehabilitation to rape victims. The National Commission for Women was directed to evolve a scheme for providing adequate safeguards to these victims. In another significant pronouncement, *Vishaka* v. *State of Rajasthan*,[44] the Supreme Court declared that sexual harassment of women at workplace constitutes violation of gender equality and right to dignity, which are fundamental rights. Taking note of the fact that the existing civil and penal laws in India did not provide adequate safeguards against sexual harassment at work place, the court laid down 12 guidelines to be followed by every employer to ensure prevention of sexual harassment. Most importantly, the court ruled that all courts in India must construe the contents of fundamental rights in the light of international conventions so long as such conventions were not inconsistent with fundamental rights.

The judicial response in addressing the injustices to women has not been satisfactory. Even where the courts have directed inquiries, this has taken many years. Recourse to PIL has been futile in many cases relating to custodial rape. The broad guidelines issued by the Supreme Court on rape trial and sexual harassment have remained largely of academic interest.

C. Justice for the victims of human bondage

In India the bonded labour system continues to be the most pernicious form of human bondage. Under such system a worker continues to serve his master in consideration of a debt obtained by him or his ancestors. Bondage can be inter-generational or child bondage or loyalty bondage or bondage through land allotment. According to an early study there were 26,17,000 bonded labourers only in ten States.[45] Most of these labourers come from lowest strata of the society such as the untouchables, *adivasis* or agricultural labourers. It occurred to the Indian government only in 1976 to pass a central legislation, Bonded Labour System (Abolition) Act, 1976. After the Act came into force bonded labour system has been abolished at least on paper and the practice of bonded labour has been made punishable.

Most of the PIL proceeding on bonded labour seek to implement the Act. The first major PIL on this issue was *Bandhua Mukti Morcha* v. *Union of India*,[46] filed in 1981 and decided on December 16, 1983. The

[44] See *Supra*, note 22. This principle was reiterated in *Apparel Export Promotion Council* v. *A. K. Chopra*, AIR 1999 SC 634.

[45] M. Sharma, "Bonded Labour in India: A National Survey on the Incidence of Bonded Labour" *Final Report, Academy of Gandhian Studies, Hyderabad*, (1981).

[46] *Supra* note 3. Also see *Bandhua Mukti Morcha* v. *Union of India* (2000) 10 SCC 104.

action was brought for the identification, release and rehabilitation of hundreds of bonded labourers working in the stone quarries of Haryana. The court issued 21 directions to Haryana government. During the proceedings, the court monitored its own directions and appointed a number of commissions of inquiry. Unfortunately most of the directions remained unimplemented for many years. The court acknowledged its limited capacity in monitoring the schemes of rehabilitation. In 1992 the court recounted the history of the case and was shocked to note that there was not the slightest improvement in the conditions of the workers of the stone quarries. The litigation ended up with one more warning to the government to be responsive to judicial directions[47]. Despite the initial failure of *Bandhua Mukti Morcha* case in terms of effectiveness, PIL were brought before the courts for the liberation of bonded labourer in Madhya Pradesh,[48] Tamil Nadu,[49] Bihar[50] and other states.

> In my view the public interest actions focusing on the plight of bonded labourers have to some extent helped the implementation of the Act. The basic problem, however, in the implementation of this Act is that emphasis is being placed only on the identification, release and rehabilitation of bonded labourers. There is no effort to punish the owners of these labourers. The real emancipation of bonded labourers would be achieved not by cutting them off from the life support system but rather by allowing them to work where they are working. The Government must ensure them a reasonable wage and better living conditions.

D. Juvenile justice

Public interest actions on children have sought the implementation of constitutional and statutory obligations towards children[51]. Early PIL cases focused on the children in prisons. In 1981, the Supreme Court's attention was drawn to a news report about sexual exploitation of children by hardened criminals in Kanpur jail.[52] The court directed the District Judge, Kanpur to visit the jail and report. The report confirmed the crime of sodomy committed against the children. The court directed the release of the children from jail and their shifting to children's home. No punishment was given to the

[47] *Bandhua Mukti Morcha* v. *Union of India* A.I.R. 1992 S.C. 38.
[48] *Mukesh Advani* v. *State of M.P.*, AIR 1985 SC 1363.
[49] *H.P. Sivaswamy* v. *State of Tamil Nadu*, 1983 (2) SCALE 45.
[50] *T. Chakkachal* v. *State of Bihar*, JT 1992 (1) SC 106.
[51] See Article 15(3), 21(A) 24, 39(e), 39(f) and 45 of the Constitution of India; Juvenile Justice Act, 1986; Child Labour (Prohibition and Regulation) Act, 1986.
[52] *Munna* v. *State of UP.* (1982) 1 SCC 545.

administrators of the jail. Another PIL exposed the inhuman conditions of children in Tihar jail, Delhi.[53] Sexual exploitation of children in Orissa jails also formed the subject matter of PIL.[54]

A major PIL on juveniles in jails was filed by a journalist in 1985. The petition asked for release of children below the age of sixteen and for information on the number of such children. The court was also asked to ensure that adequate facilities were provided for the children in the form of juvenile courts, homes and schools, that district judges should be directed to visit jails and so on. There were many orders from 1985 onwards which remained unimplemented for a long time.[55] In the meantime Parliament passed the Juvenile Justice Act 1986. The court's attention was now diverted to the implementation of the Act. Then the Supreme Court Legal Aid Committee pursued the case. In its final order in 1989, the Supreme Court stressed the need to create juvenile courts, homes and schools. A committee of advocates was appointed to prepare a draft scheme for the proper implementation of Act. PIL in this case was ultimately effective as today the country has no juvenile delinquents in jails.[56]

We may now briefly address to the problem of child labour. PIL on child labour began in early 1980s in response to a large number of news reports exposing the exploitation of children in fire works and match factories of Sivakasi in Tamil Nadu and in carpet industries in Mirzapur, Uttar Pradesh. The investigative journalism coupled with PIL cases led to the passing of Child Labour (Prohibition and Regulation) Act 1986. This Act prohibits the employment of children in hazardous industries. In response to a PIL the Supreme Court appointed a commission of inquiry on the child labour in carpet industries in Uttar Pradesh. The report indicated high incidence of child labour. With the help of local administration these children were released.[57] In 1986 a major PIL was brought before the Supreme Court complaining that thousands of children were employed in match factories in Sivakasi, Tamil Nadu.[58] These children were exposed to fatal accidents occurring frequently in the manufacturing process of matches and fire works. The court directed the state government to enforce the Factories Act and to

[53] *Sanjay Suri* v. *Delhi Administration*, 1987 (2) SCALE 276.
[54] *M.C. Mehta* v. *State of Orissa*, W.P. (Cr) 1504 of 1984 (Unreported).
[55] *Sheela Barse* v. *Union of India*, AIR 1986 SC 1773.
[56] *SCLAC* v. *Union of India*, (1989) 2 SCC 325. On 17th March 1989 the court again issued directions to every district judge to report to the court as to the exact position of juveniles in jails, setting up of juvenile homes, special homes and observation homes. In *SCLAC* v. *Union of India*, (1989) 4 SCC 738, the court expressed its satisfaction that except in Andaman and Nicobar, a Union Territory, no state had kept the children in jails.
[57] *Bandhua Mukti Morcha* v. *Union of India*, 1986 (Supp) SCC 553.
[58] *M.C. Mehta* v. *State of Tamil Nadu*, AIR 1991 SC 417.

provide facilities for recreation, medical care and basic diet to the children during working hours and facilities for education. The court also advocated a scheme of compulsory insurance for both adults and children employed in hazardous industries. Every employee had to be insured for a sum of Rs. 50,000. A committee was appointed to monitor the judicial directions. It is rather surprising that although the Child Labour (Prohibition and Regulation) Act, 1986 has banned the employment of children in manufacture of matches yet the court in this case permitted the child labour in the process of packing because "tender hands of the young workers were more suitable to the task." The court here failed to recognize that manufacture and packing of matches is inseparable. In a sense, in this case the response of the court on child labour was superficial.

In its final judgment delivered in 1996 the Supreme Court directed that the offending employer of child labour in match factories will pay Rs.20,000 which would then be deposited in a Child-Labour-Rehabilitation-Cum-Welfare-Fund.[59] The children illegally employed would receive education at the cost of the employer. This is a happy development.

The PIL activism on child labour has been unsatisfactory. Some countries still continue to refuse to purchase goods made through the employment of child labour. Frequent reference is being made to the International Convention on the Rights of the Child. The real solution lies not in the displacement of child labour and pay compensation to them but in launching a massive developmental programme, especially in irrigation so that the land owning parents experiencing economic recovery might withdraw their children from exploitative labour conditions. Problem of child labour cannot be eliminated by judicial activism alone in the face of capitalist development and global power relations. Complete absence of data on the prosecution of the employers of the child labour is disturbing.

In *Centre For Enquiry Into Health And Allied Themes (CEHAT)* v. *Union Of India*[60], a PIL was filed by a social action organization for a direction for the effective implementation of the law banning sex selection and sex determination.[61] The court has expressed its deep concern over the non-action of the executive in preventing pre-natal sex determination leading to female foeticide. The court observed that discrimination against girl child

[59] *M.C. Mehta* v. *State of Tamil Nadu*, 1996 (1) SCALE 42.

[60] 2003(7) SCALE 345.

[61] The Pre-natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994. This Act has now been re-titled as The Preconception and Pre-natal Diagnostic Technique (Prohibition Of Sex Selection) Act. In this PIL, the Supreme Court issued several directions to the government to create public awareness about the new law through advertisements throughout the country through both electronic and print media.

still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind set and also because of insufficient education and the tradition of women being confined to household activities. Sex selection and sex determination further adds to this adversity. The court referred to all its earlier directions[62] to the Central and State Governments and found it very unfortunate that they have not been implemented. Here also the judicial intervention to end female foeticide has not made much impact. For instance a study conducted by a Research Group has indicated that the PNDT Act has not been used as stringently as it should have been to book the guilty. The report says that the practice of female foeticide is on the increase in the ravines of Mornea and Bhind in Madhya Pradesh where hundreds of unborn baby girls are being killed secretly and in silence and the offence go largely unreported .The ultrasound clinics providing safe haven for illegal foetal sex determination are proliferating with widespread social acceptance of eliminating the girl child. Not one case of female foeticide has been reported in the State so far.[63]

E. Freedom from hunger

The Indian Supreme Court has recognized various social rights such as right to means of livelihood, right to adequate health care, right to housing, right to education as aspects of 'Right to Life' guaranteed by Article 21 of the Constitution of India.[64] A food petition[65] arising out of starvation death in certain parts of the State of Orissa has given rise to a claim that right to food should be declared a fundamental right. The NHRC has also been dealing with the reports of starvation deaths since 1996 and the Supreme Court has issued certain directions to the State government from time to time to take preventive and curative measures to avoid starvation deaths and provide for adequate food supply to the needy people. In *People's Union for Civil Liberties* v. *Union of India*[66] the petitioners sought a direction for the enforcement of Famine Code and immediate release of food grains lying in the stocks of the Government of India. Directions were also sought

[62] Directions issued on 4.5.2001, 19.9.2001, 17.11, 2001, 31.3. 2003. Also see *CEHAT* v. *Union Of India* (10) SCALE 118,119.

[63] See, Vinati Bhargava, "Little Girls Dying to be Born", *The Indian Express*, New Delhi, October, 22, 2004, p 9.

[64] *Francis Coralie* v. *Union Territory of Delhi* (AIR 1981 SC 746); *Bandhua Mukti Morcha* v. *Union of India, supra* note 3; *Chameli Singh* v. *State of U.P.* (AIR 1996 S.C. 1051); *Samatha* v. *State of AP* AIR 1997 SC 3297. *Unni Krishnan* v. *State of A.P.* AIR 1993 SC 2178; *State of Punjab* v. *M. S. Chawla* AIR 1997 SC 495.

[65] *People's Union for Civil Liberties* v. *Union of India* (2001) 7 SCALE 484. In this case the Supreme Court issued directions to make available the bare minimum rations through public distribution system for those below poverty line.

[66] 2003(9) SCALE 835 and 840.

requiring the Government to frame fresh schemes of Public Distribution for the Scientific and Reasonable Distribution of food grains. The Court expressed its deep concern that despite the fact that plenty of surplus food grains was lying in the stocks of the Union of India or drought affected areas, people were dying of starvation. The Court recalled that between 2001 and 2003 it had passed various directions to see that food was provided to the aged, infirm, disabled and destitute men and women who were in danger of starvation, pregnant and lactating women and destitute children especially in cases where they or members of their family did not have sufficient funds to get food. It was unfortunate that plenty of food was available but distribution of the same was among the very poor and destitute was scarce leading to starvation, malnutrition and other related problems. Mere schemes without implementation was of no use. The Court observed:[67]

> Article 21 of the Constitution protects for every citizen a right to live with human dignity. Would the very existence of life of those families, which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide adequate aid to such families? Reference can also be made to Article 47 which *inter alia* provides that the State shall regard the raising of level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

The NHRC in its report of January 17, 2003 expressed the view that right to food should be recognized as a guaranteed fundamental right:[68]

> The reading of Article 21 together with Articles 39(a) and 47, places the issue of food security in the correct perspective, thus making Right to Food a guaranteed fundamental right which is enforceable by virtue of the constitutional remedy under Article 32 of the Constitution. It follows, therefore, that there is a fundamental right to be free from hunger.

In *Kapila Hingorani* v. *State of Bihar*[69] the matter of denial of human right to food was and means of livelihood was brought to the attention of the Supreme Court by way of PIL. The PIL arose from a newspaper report that due to non-payment of salary for a long time resulting in starvation

[67] *Id* at 836.

[68] NHRC Order January 17, 2003, Case No. 37/3/97: Coram :Justice J.S. Verma, Chairperson, Justice Sujata V. Manohar and Sri Virendra Dayal.

[69] (2003) 6 SCC 1.

of an employee of Bihar State Agro-Industries Development Corporation, the employee tried to immolate himself. This employee later succumbed to burn injuries suffered by him. It was also reported that apart from the employees of public sector undertakings, even the teaching and non-teaching staff of unaided schools, *madarsas*, and colleges had been facing the similar fate. It was reported that about 250 employees died due to starvation or committed suicide owing to acute financial crisis resulting from non-payment of salary to them for a long time. Holding corporate entities liable to respect the life and liberty of all citizens in terms of Article 21 and also their own employees, the Court came to a finding that food, clothing, and shelter are core human rights in a civilized society and the State of Bihar made itself liable to mitigate the suffering of the employees of the public sector undertakings and government companies. The Court directed the State of Bihar to deposit Rupees 50 crores with the High Court for disbursement of salaries to the employees of the corporations. The Court recognized that hunger was a violation of human rights and the State has an obligation to satisfy basic human needs.

IV Perils of PIL movement

PIL has produced astonishing results which were unthinkable three decades ago. Degraded bonded labourers, tortured under-trials and women prisoners, humiliated inmates of protective women's home, blinded prisoners, exploited children, beggars,[70] and many others have been given relief through judicial intervention. The greatest contribution of PIL has been to enhance the accountability of the governments towards the human rights of the poor.[71] However, the judges acting alone cannot provide effective responses to state lawlessness but they can surely seek a culture formation where political power becomes increasingly sensitive to human rights. When people's rights are invaded by dominant elements, PIL emerges as a medium of struggle for protection of their human rights. The legitimacy PIL enjoys in the Indian

[70] *M.S.Pattar* v. *Government of N.C.T.Delhi* A.I.R. Delhi 133, (A PIL was filed by a social worker seeking appropriate compensation and direction fixing responsibility on persons responsible for the death of 8 beggars in a beggars home in Delhi. The High Court of Delhi issued directions to make the beggars home more habitable).

[71] See Mahendra P. Singh, Statics and Dynamics of Fundamental Rights and Directive Principles—A Human Rights Perspective, in S.P. Sathe and Satyanarayan (eds) Liberty, Equality and Justice: Struggles for a New Social Order 45-58 (2003) Eastern Book Company, Lucknow. Singh brilliantly argues that social rights which are largely enshrined as directive principles must be given equal weight and should be judicially enforceable. He laments that the current scholarship and judicial intervention have paid scant regard to these rights and have focused attention on negative rights concerning bodily harm. Also see his Judicial Activism in India—an overview, 5 Waseda Proceedings of Comparative Law 72 (2003) where he traces the evolution of judicial activism in India since the commencement of the Constitution.

legal system is unprecedented. PIL activism interrogates power and makes the courts as people's court.

There are however certain perils of PIL. PIL actions may sometime give rise to the problem of competing rights. For example, when a court orders the closure of a polluting industry,[72] the interests of the workmen and their families who are deprived of their livelihood may not be taken into account by the court. A court order for the closure of a polluting abattoir may deprive the means of subsistence of the butchers.[73] The construction of a dam to provide water to the people may deprive other citizens their right to shelter.[74]

> To conclude, it may be said that judicial activism and PIL will not automatically achieve the goal of social empowerment. We need to know how far the judicial initiatives have been effective in providing symbols for rallying victimized or exploited groups before the courts and other forums. How far the awareness of the new dispensation is accompanied by enhanced capabilities of the dispossessed groups to make a sustained and effective use of legal resources to combat governmental lawlessness? How far the judicial initiatives have been able to promote drive for wider legislative changes or law reform or for launching people's movement to force the government to be responsive to judicial prodding? It must be recognized that PIL emphasizes litigation as a means of social change and thus enhances the dependency the victim groups on the social activists. Perhaps, it does not generate any effective participation of these groups who remain passive depending upon the efforts of others. PIL strategy is largely controlled by the elites who utilize the legal resources according to their own priorities and choices.

The impact of PIL decisions is hard to measure and requires serious social research. The effectiveness of judicial decisions are powerfully affected by several interlocking factors too remote from the knowledge and control of the courts such as traditional resistance to change, alliances of the implementers of law with vested interests (local *dadas*, influential politicians, and other dominant elements), improper or ambiguous

[72] *M.C. Mehta* v. *Union of India* (1997) 11 SCC 227, 312, 327.
[73] *Buffalo Traders Welfare Association* v. *Maneka Gandhi* 1994 Supp (3) SCC 448.
[74] *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664.

dissemination of judicial directions, etc. Weak communication channels accompanied by well-nurtured and well-structured barriers to information may also lead to the diffusion, delay or defiance of judicial directions. It is undoubtedly true that in recent years the cause of social justice and emancipation of the oppressed groups has been advanced in many ways through the device of PIL but the fact that in some cases PIL has achieved positive success does not certify this technique as a sovereign remedy to protect human rights of the poor. Mass production of rights through PIL has resulted in heightened expectations from the judges that they are available to provide relief from all miseries and misfortunes. Human rights of the poor and the disadvantaged groups will be better protected by subjecting PIL to discipline and control that should be limited only to the cases focusing on hapless victims of domination and governmental lawlessness. The overuse of PIL for every conceivable public interest might dilute the original commitment to use this remedy only for enforcing human rights of the victimized and the disadvantaged groups.

RECEPTION OF THE DOCTRINE OF PRECEDENT IN A MIXED LAW JURISDICTION

*Prof. Rajen Narsinghen**

I Introduction

THE DOCTRINE of precedent is one of the main pillars of 'common law' legal system[1]. Along with common law doctrine and equity, there is no dispute about its importance and its contribution for the growth and expansion of 'common law system' within the bounds of England[2], and also its flourishment in ex-colonies and many commonwealth countries. However, it is also known that the civil law system rejects the doctrine of precedent[3] on philosophical, technical, cultural and legal grounds. Mauritius is one of the few countries which, though being a commonwealth country and ex-colony of U.K., has a hybrid system of law[4]. Before becoming a British colony in 1810, this tiny Island of the Indian Ocean was a French colony. In spite of the defeat of the French in 1810, the legal system has kept many aspects of the Civil law system. The scope of this research is to find out how can the doctrine of precedent be applied in a context of a hybrid system. Such application is inherently difficult as common law system accepts almost blindly the doctrine of precedent and other systems like the civil law system rejects it.

II The main features of a mixed-legal jurisdiction and qualification of the Mauritian legal system

The Mauritian legal system is neither civilian nor common law in nature[5]. It possesses features, which belong to both systems. Is the Mauritian legal system, a species of its own? The present analysis will show that it is a hybrid system.

> Mauritius was initially a French colony (1715 to 1810) and subsequently it became a British colony (1810 to 1968). It acceded to Independence in 1968, but remained a member of the Commonwealth with the Queen as the Head of State where the Governor General was her representative in Mauritius having residual 'constitutional powers'. The country acceded to the status of Republic in 1992. Thus, French law had a considerable impact up to 1810 and then common law came in force as from 1810. In spite of the conquest of the Island by the British, French law continued to play a major role, because the Treaty of Capitulation and later confirmed by the Treaty of Paris. The two treaties accepted that "the inhabitants were allowed to preserve their religion, laws and customs." Private law in Mauritius is derived to a great extent from the French Civil code, the Penal code and the 'code de commerce'[6]. Contrastingly the adjectival law or procedural law is derived mainly from English law[7]. The public law seeks inspiration from English law, with a Constitution adapting the 'export model of the Westminster', which differs from the English constitution, having a lot of original features. Other branches of law pertaining to commerce, shipping finance, banking, company law, trade, negotiable instruments and bankruptcy etc, have been borrowed from English law. The administrative law is modelled more or less on English law[8]. In many modern legislations, the legislators have created original Mauritian solutions. At the same time, the judiciary and the Bar comprised mostly Mauritians, though at the beginning there were a few British. Hence, the Mauritian professionals, especially the judges, have been fully alive to the Mauritian realities and specificities and then developed a sort of Mauritian approach to precedent and in their judicial thinking.

It can be seen that Mauritian law has a dual foundation. It combines English law (common law) and French law (civil law) and there is also the emergence of 'Mauritian law'[9]. Civil law and common law provide the ingredients, which form the pillars of the Mauritian legal system. Thus, the Mauritian legal system fully satisfies the first important criterion of a mixed legal system. It also satisfies the second criterion from qualitative and psychological perspectives[10]. Mauritian law does not borrow blindly from English law and French law. In fact, in many areas of private law, family law[11], property law, the Mauritian judges have provided original solutions. It is also a fact that in spite of the undertaking by the British to keep intact the law, custom and language in the two treaties, the compliance was not complete in practice. For instance Justice Blackburn in 1835 expressed the view that he would be guided by English case law when presiding over a criminal trial.

* Head, Department of Law and Management, University of Mauritius, Mauritius.

[1] Farrar and Dagdale *Introduction to Legal Methods*, Sweet and Maxwell, 21
[2] G. Williams *Learning the Law*, 35
[3] Ricci J. C. *Introduction à l'étude du droit*, Hachelle
[4] Venchard L. E., 1982 L'application du droit mixte à Maurice; Mauritius Law Review, 34
[5] *Id.*, 36
[6] D'Unienville, (1994) *L'Evolution du droit civil mauricien* ; Best Graphics; Port Louis
[7] Doolaky PAC *Comité Judiciaire du Conseil Privé et le droit mauricien*, Thesis, 24-28
[8] Bridge, 1997 Judicial Review In Mauritius and the continuing legal process
[9] Supra note 4 at 36.
[10] Vernon Palmer *Mixed Jurisdiction Worldwid,e* 20
[11] Ramsamy v. Ramsamy (1989) MR 25 – where for a case of divorce and 'Logement Principal', the judge had recourse to English precedents.

The British judges sent to Mauritius, faced difficulties to understand the French law and even the French language. An Order in Council in 1841 put an end for the drafting and promulgation of laws in English and French and favoured only the English language. This short analysis of the mixed nature of the legal system, shows that though the civil law is antagonistic to the doctrine of precedent, yet in the Mauritian legal system, which is of mixed nature, there is room for manoeuvre to accommodate the doctrine on account of historical, cultural and technical grounds. A hybrid legal environment is not the same as a civil law environment.

III The essence of the doctrine of precedent

A judicial precedent can be described as the main legal reasoning (ratio decidendi) derived from a case, decided by a relatively higher court, where a relatively lower court is bound to follow. There is always a legal obligation on a judge or Magistrate to give reasons for his decision[12]. The binding nature of the principle in the case will depend upon whether the legal issues at stake are same or more or less the same and also whether the facts resemble. The ratio decidendi of a case is not attached to the facts of the case. However, it would constitute a precedent for the future cases, only so far as the facts of the two cases are similar. Such proposition was laid down by Lord Halsbury in Quinn v/s Leathern[13]. The judge stated, "Every judgement must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found, then are not intended to be exposition of the whole law, but govern and are qualified by the particular facts of the case on which such particular expression is to be found."

The application of the doctrine of precedent presupposes the existence of a well-established hierarchy of courts[14]. In UK, at the bottom there are the Country Courts and Magistrate's courts. The High court came just above. Then there are the courts of appeal with the criminal and civil divisions. At the apex there is the House of Lords[15]. In Mauritius also, there is a well-established hierarchy of courts. At the apex, there is the Judicial Committee of the Privy Council. Then, there are the Court of Appeal and the Supreme Court as court of first instance and in the middle there is he Intermediate Court and down the ladder, there is the District Court.

[12] Goodhart, A. L. Determining the ratio decidendi of a case, Yale Journal, (1930)161.
[13] 1990 AC 495.
[14] Ss. 76 – 81 of the Mauritian Constitution.
[15] Heap B *General Principles of English Law*, HLT Publication.

Therefore, it is not in all cases, that there would be precedents established. This will arise only when there is a dispute on a new point of law, which requires a finding. In the majority of cases, there is no dispute on law, but a dispute on the facts and such pronouncement in a judgement revolving around facts will not constitute a ratio decidendi. At the same time, comments and pronouncements made by the judge(s), by the way that or these are not related to the problem(s) of the present cases are known as the 'Obiter Dicta'[16]. Such 'Obiter Dictum' is not binding in the lower court, but it will have a highly persuasive authority.

In England, judicial decisions gathered great importance, through the doctrine of stare decisis, which is a Latin word. It means: 'to stand by decided cases.' Such doctrine has been fundamental for the development of English common law. The decision of the court in a case not only binds the parties, but the main legal reasoning has to be followed in similar cases in the future, unless they are overturned by an act of Parliament or by a higher court or exceptionally by the same court.

IV Reception of the doctrine in Mauritius

The doctrine is fully applicable in Mauritius. Even the decisions of the Judicial Committee of the Privy Council (J.C.P.C), which is not a Mauritian court, will be binding on the lower courts of Mauritius. Since its independence in 1968, and even after the accession to the status of Republic, Mauritius has retained the J.C.PC as the ultimate Court of Appeal[17], just like a few other commonwealth countries have done, for example Trinidad, Jamaica etc. The J.C.P.C is an English Court, but does not try English cases. Mauritian courts will be bound by decisions of the J.C.P.C, when it has adjudicated on Mauritian cases, as pointed out in the case of Société United Docks v/s Government of Mauritius[18]. Though trial judges may not be satisfied with the decision of the J.C.P.C, they are still bound by it, as demonstrated in the case of Curpen v Q[19] and Samputh v Q[20]. The J.C.P.C is bound by its own precedent, though it can depart, when the conditions have changed drastically. There should be solid and valid reasons for overruling as pointed out in Buxoo v Q[21]..

Inferior Courts in Mauritius are bound by the precedents of the Supreme Court. The case of Andre v/s Baissac[22] stated that when the Supreme Court

[16] Orbiter dicta is the plural form of orbiter dictum.
[17] S. 81 of the Constitution.
[18] 1981 MR 50.
[19] 1987 MR 328.
[20] 1987 SCJ 382.
[21] 1987 P. C. Appeal No. 18.
[22] 1862 MR 83.

has settled the law, the lower courts are expected to follow the doctrine of precedent to safeguard the principle of certainty in law. The case of D.P.P v/s Mootoocurpen[23] came to confirm the acceptance of the doctrine of the precedent in Mauritius. The judge stated: " It is clear that if a treaty was to be written in Mauritian law, the source of our law would not be limited to statute, but would have to include case Law." (At this stage, it would be apposite to find how the difficulties for mixed law jurisdiction to incorporate the doctrine of precedent.)

V Obstacles for the reception of the doctrine

There are a few obstacles for the reception of the doctrine of precedent. The mixed legal system of Mauritius seeks a lot of inspiration from the Civil law system as well as the Common law system. The civil law system in France after the Revolution has harboured a deep-rooted suspicion towards the judiciary, because the latter was close to the ruling class. Thus, after the revolution, France opted for a strict separation of powers[24]. Judges could not be creative because they would be accused of encroaching upon the legislature. Judges were adhering to legislations and codes. On account of this general suspicion and judicial culture, article 5 of the Napoleon code was enacted. This article prevented judges from giving judgement in the nature of a general rule. Furthermore, Article 1351 of the same code consecrated the principle of 'Resjudicata'[25], whereby a judicial decision has authority only for that specific case and it binds only the parties, but cannot be extended further to third parties.

However, Article 4 of the same code seems to contradict the two previous articles. It is a penal offence for a judge to refuse to adjudicate on the pretext that the law is silent. However, in France, the initial approach, after codification, was to reject the doctrine of precedent. In Mauritius also, we have the same three provisions of the law, namely Articles 4, 5 and 1351 of the Napoleon code. Mauritius should have followed the French approach and ignored the doctrine of precedent. Yet, it has adopted the British approach, by incorporating the doctrine of precedent. It is to put on record that even in France, judicial decisions have over the years gained importance, without having a binding authority in law. Judicial decisions do have some weight and some authority, according to circumstances. Such situation is known as 'jurisprudence constante'[26].

[23] 1988 MR 195.
[24] Pactet, P. *Droit Constitutionnel et Science Politique.*
[25] Venchard, *Le Code Napoleon; "Le Principe de l'Autorité relative de la chose jugée".*
[26] Blanc-Jouran and Boulouis *International Encyclopedia of Comparative Law* F.36.

The application of this 'jurisprudence constante' used to be an exception in France, but it is more and more applied. Thus, when there is a consistency of judicial decisions on a particular point, adapting the same solution or view, such reasoning is qualified as 'jurisprudence constante'. Such 'consistent precedent' will be followed by lower courts. Unlike normal precedent in common law countries, here the principle (ratio) must be consecrated repeatedly. Now, it would be important to find out the justification for the adherence to the doctrine of precedent in Mauritius.

VI Justification for the reception of the doctrine of precedent

First and foremost, there is a historical reason for the reception of the doctrine of precedent in Mauritius. In spite of the undertaking[27] of the British to keep intact the customs, language and law, the British judges were forced to have recourse to common law procedures and techniques because of their ignorance of civil law[28]. Thus, the British judges started to apply the doctrine of precedent.

Next, the Charter of Justice was promulgated in 1881[29] and that was a real turning point. The Supreme Court was set up and that court was to have the same process as the High Court in UK. The Supreme Court was vested with the same powers of the High Court in U.K[30]. Therefore, it could have recourse to common law and equity in the absence of statutory provisions. Judges could use general provisions and precedents, in spite of the provisions of Article 5 of the Napoleon Code, which prohibits such recourse. In terms of interpretation of statutes, the latest legislation supersedes the previous one, in the eventuality of conflict. Hence, the Charter of Justice came in force after the code and therefore the former prevails.

Another justification for the reception of the doctrine of precedent is a structural one. An analysis of our structure and hierarchy of courts shows that the J.C.P.C. is the highest court. The J.C.P.C is an English Court based in England, but it has no significant jurisdiction for U.K, but a jurisdiction for some commonwealth countries, including countries like Jamaica, Trinidad, Mauritius etc. The J.C.P.C uses the doctrine of precedent. How can a relatively lower court in Mauritius refuse to follow its established precedent? The Mauritian courts cannot afford to do so. It is firmly established that the

[27] Undertaking given in the 'Treaty of Paris' and in the "Treaty of Versaille'.
[28] Supra note 6 at 41.
[29] Ordinance 2 of 1881.
[30] S. 17 of Courts Act, ".....the Supreme Court and the judges shall sit and proceed to and conduct and carry on business in the same manner as the High Court of Justice in England and its judges".

Mauritian courts are bound by the 'ratio' of the J.C.P.C when it rules on Mauritian law[31]. Does it include also the 'ratio' pronounced in cases from foreign countries, like Trinidad or Jamaica? The Mauritian courts will be bound by the ratio from the 'foreign cases' and only to the extent where the provisions of law under scrutiny are the same or similar to existing Mauritian legal provisions. Otherwise, the ratio from the foreign cases will only have persuasive effects and no binding effects. The case of Sip Heng Wong Ng shows how the Mauritian judges or magistrates are bound by the precedents of the Judicial Committee of the Privy Council, even when they are not personally satisfied by the reasoning[32]. Thus, the retention of the J.C.P.C as an ultimate court of appeal, consolidates the justification to accept the doctrine of precedent as a legal source of law. A local court cannot afford to depart from an established precedent of the J.C.P.C, where the point of law at stake was same or similar with the Mauritian legal provision. Any departence would constitute a breach of the doctrine of precedent and any eventual decision of a lower court, which does not comply, with the ratio of the J.C.P.C will be granted ultimately.

[31] Société United Docks v. Government of Mauritius 1981 MR 500.
[32] Curpen v. Queen and Samputh v. Queen.

DEALING WITH INTERNATIONAL MIGRATION: NEED FOR A GENDER SENSITIVE MIGRATION POLICY

Kamala Sankaran[*]

PEOPLE HAVE been on the move from the beginning of humankind. What sets the past couple of decades apart has been the increase in the number of women migrants across regions.[1] These women are not merely migrating as part of 'family unification programmes' but are instead migrating alone as part of the growing force of migrant women workers moving from South and Southeast Asia to other countries in the same region, the Middle East or the West. There is thus a feminisation of the migrant workforce in certain sectors. This mobility of women workers is also occurring simultaneously with a marked increase in the number of women being trafficked or smuggled illegally across borders. In addition there are a large number of persons who are internal migrants within countries in South Asia. Much of the internal migration is in the form of movement of people from rural to urban areas, contributing to the growing urbanisation of the population. It is reported that unlike male migration which is subject to economic upswings and downswings (as witnessed in the spurt in demand for construction workers in the Gulf in the 1970's and later the demand for higher skilled professionals there), the demand for female migrants is relatively constant and not subject to much variation since it is in the area of domestic work and care work.[2]

Much of this immigration flows have been unilaterally determined by destination countries, leaving source countries to manage migration flows. The current period has been characterised by the 'commercialisation of migration' through smuggling and trafficking and the employment of migrant workers in informal employment in destination countries, posing challenges to the managing of migration and the rights of migrant workers.

This paper argues for the urgent need for countries in this region to articulate a comprehensive policy on managing migration in a safe manner that also keeps in mind the rights of the persons migrating. Such a policy needs to deal with both migrations across borders as also internal migration (the paper focuses more on the former). It is also becoming clear that the

[*] Reader, Campus Law Centre, Faculty of Law, University of Delhi, Delhi 110007. Contact: kamala_sankaran@hotmail.com

[1] The ILO notes that from women constituting 47 percent of international migrants in 1960 they constituted 49 percent of international migrants in 2000. See, ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy* 10 (2004).

[2] See Maruja M.B. Asis, *Asian Women Migrants: Going the Distance, But Not Far Enough*, Migration Policy Institute 2 (2003). *Available at* http://www.migrationinformation.org/Feature/display.cfm?ID=103 (visited 14 February, 2006).

migration process is not gender-neutral but can in fact impact women very differently. Women migrants need to become more visible in policies and laws dealing with migration. This paper deals with identifying the key components of a policy on gender-sensitive safe migration that countries in this region need to adopt, the framework within which safe migration would be managed, and the legislative regime within which the rights of migrants, particularly women could be best protected. Part I of the paper situates the context within which migration particularly by women takes place in order to understand the special concerns of women migrants. Part II sets out the need for a proactive policy on migration and identifies the components of a gender-sensitive safe migration policy and the legal and administrative measures needed for this purpose.

I Greater migration by women

Women economic migrants from Asian countries usually work in destination countries as domestic workers, workers in labour intensive manufacturing industries such as ferment manufacture, health workers such as nurses, entertainment workers, and agricultural workers, in the informal economy and as self-employed.[3]

There is growing demand for domestic services in the more developed countries in the world. The nuclear family with adult working members coupled with lack of adequate child-care and other support services for the aged has led to a spurt in demand for such forms of work. The sexual division of labour within the household now has an added global dimension. Informal activities, domestic and care work in the developed countries is now being performed by immigrant labour from developing countries.[4] The gendered nature of this work – seen as women's work and non-remunerative - has meant that it is a sector capable of being filled by migrants. In such a situation, any shortfall in the supply of regular economic migrants in the destination countries is filled by irregular migrants. It has often been pointed out that development of new forms of communication technology and means of transport has considerably broadened the means of entering other countries in an irregular manner. The domestic nature of the work that renders it 'invisible' also poses challenges to the enforcement of rights of migrants in host countries. Domestic work is an area where labour laws scarcely apply. Flexible (read: unprotected) labour contracts, dispersed workplaces under

[3] For instance, 81% of all women migrant from Sri Lanka are in the domestic work market in Arab States. See ILO, *Gender and Migration: The Case of Domestic Workers* 15 (2004).

[4] Saskia Sassen, Global Cities and Survival Circuits, in Barbara Ehrenreich and Arlie Russell Hochschild, *Global Woman: Nannies, Maids and Sex Workers in the New Economy* 258 (2003).

disparate employers and vulnerable workers contribute to informal and potentially exploitative work conditions. Getting labour laws enforced is also another challenge since it typically opens up the private domain of the home of the employer to inspection and scrutiny. In addition, handing over the passport to her employer or the employer sending her wages directly to her family (in instances where the employer and employee are linked through common region or caste) also occur. On the other hand the conflation of the place of work and the place of residence for the domestic workers implies that she can enjoy her 'own' private space and time with great difficulty alone. The possibilities for sexual and economic abuses are very high. Often if a woman is found to be pregnant, she is deported.[5] Framing laws and policies for the domestic work place are notoriously difficult. The problems are compounded in the case of irregular migration. Where the woman is an irregular migrant, she may be unable to claim her welfare benefits even if the employer was making the contribution to the social security system.

There is also a great demand for nurses from countries in the South Asian region who are predominantly women. As the population ages in developed countries there is greater demand for migrant health workers. Some of the problems faced by health workers who are usually women are the lack of recognition of skills or technical qualifications or previous experience obtained in the home country prior to migration. Some of these services are covered by what is known as Mode 4 under the General Agreement on Trade in Services (GATS) dealing with migration of natural persons for services.[6]

There is a also a general feminisation of the workforce in the labour intensive manufacturing sector such as garments in developed countries, and this demand is often met by migrant women workers. The other areas where women migrant workers are presently employed are newly emerging forms of informal employment in developed countries such as entertainment workers. A large number of irregular migrants crowd these sectors making it difficult for law enforcers to monitor their employment conditions and to intercede where needed.

Migrants are also in self employment in which case many of the international standards of the ILO (which relate in the main to those in employer-employee relationships) would not apply. It is reported that immigrants are over-represented in self-employment in OECD countries

[5] Mandatory maternity tests are contrary to the ILO Maternity Protection Convention 2000 (No. 183).

[6] For further details about GATS, see Rupa Chanda, GATS: Implications for Social Policy-Making XXXVIII(16) *Econ. and Pol. Weekly* 1567, 1567 (2003).

running shops, news agencies and cafes which would otherwise have closed down.[7] As has been noted in South Asia, women who are in self-employment are often performing unpaid family labour in businesses owned by their husbands. Thus family reunification form of female migration (where women may not have a work permit) may see women in this unpaid form.

Women are increasingly being employed as domestic workers in destination countries in South-east Asia and in the Middle-East. There are also patterns of irregular migration and trafficking of women from Nepal, Bangladesh and India within and out of this region. Obviously there are a host of factors responsible for these patterns of migration that we are currently witnessing. Apart from economic aspects, structures of patriarchy and patterns of family-life have also influenced why the migration of women is greater in some societies. There is also a close intersection of these structures with those of religion, caste and region within the South-Asian region. An understanding of the economic and social factors underpinning the position of women in these countries is needed in order to articulate a progressive women-centred stance on migration.

One of the spheres where women participate in 'outside work' (that is, work outside the home) is in agriculture, and this coupled with the fact that agriculture until recently was the major sector of employment for the labour force in these countries explains the relatively higher work participation rates for women here. Other than in agriculture, women's work participation has been in the informal sector. Quite often in both these sectors, her employment has been in the form of unpaid family labour. There is a rich literature on the aspect of how national accounts are 'gendered' and make invisible much of the unpaid family work and care work that women perform.[8] This has not only contributed to her not being seen by policy makers as a contributor to national income, it has also lowered her status within the family and society. Where women are in wage employment, it has been noted that there are gender differentials in wages that discriminate against women.[9] There is an difference in the wage levels of men and women workers for same or similar work performed, This wage differential has been compounded by the occupational segregation of women into certain

[7] See Nigel Harriss, Migration of Labour: Constructing Transitional Arrangements, XXXVIII (42) *Econ. and Pol. Weekly* 4464, 4467 (2003)

[8] See for instance, Adriana Mata Greenwork, 'Gender Issues in Labour Statistics', in Martha Fetherholf Loutfi (ed.), *Women, Gender and Work: What is Equality and how do we get there?* (2002) and Sarthi Acharya and Vinalini Mathrani, 'Women in the Indian Labour Force, in Alakh N. Sharma and Seema Singh (eds.) *Women and Work* (1993).

[9] Jeemol Unni, Gender and Informality in Labour Market in South Asia XXXVI (26) *Econ. and Pol. Weekly*, 2360, 2374 (2001).

sectors/occupations that mirror the kind of work women do within the home – domestic work, and care work – that have lower wage levels than the occupations that are male dominated. Women who migrate across borders are also typically engaged in these very same jobs.

Studies have pointed out that apart from supply side reasons, there is growing demand for domestic services in the more developed countries in the world. The domestic nature of the work that renders it 'invisible' (noted earlier) also poses challenges to enforcement of rights of migrant in host countries.

Female migrants who leave their families behind are more likely to return than migrants who travel with their entire family. Returning migrants have sometimes been characterised as 'agents of development'. However, where their employment overseas was in the lowest skilled employment such a domestic work, their economic contribution to the sending countries economy upon return may not be very significant. However, this should not prevent us from noting the ripple effect such independent working women may make in more traditional societies upon their return.

Internal Migration

Rural to urban migration is a concern for many developing countries. Much of this migration is poverty-driven, and whole families migrate in search of work, becoming part of the growing urban poor, while living in precarious conditions. This is probably a bigger issue in India than in other countries in this region. Migration of women from rural to urban areas in search of work is noted in states such as Chhatisgarh, Jharkhand and Kerala. The latter usually deals with higher skilled female migration. India has a law in place to deal with inter-state migration, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 but the law does not deal with intra-state migration which is also a dominant form of internal migration. There is also the incidence of large scale internally displaced persons (IDPs) due to deforestation, inundation, environmental disasters, and riots and strife.

Effects of migration on women

In the case of female migrants, her image as a breadwinner would considerably enhance her 'bargaining position' within the family and society. Amartya Sen has pointed to the links between the wage earning capacity of women and her consequent status within the family.[10] Her position within the family involves both co-operation and conflict and thus her status outside

[10] See for instance A.K. Sen, Gender and Co-operative Conflict in Irene Tinker (ed.) *Persistent Inequalities: Women and World Development* (1990).

the home considerably increases her fall-back options and hence her bargaining position. On the other hand, there are studies, which point out the lack of care available for the family, particularly of the children left behind of such women migrants. Incidences of incest and neglect are reported. Unless the policy of sending women abroad is coupled with a conscious policy of the sending country that acknowledges its greater responsibility and role in providing support services for such families left behind, the burden of migration falls squarely on the family of the migrants while the benefits of remittances and foreign exchange are enjoyed by the State. These measures could include - providing support and child-care services priority to such children in admission in schools, counselling services etc.

However, in the case of women left behind by male migration, increased money may force the woman to conform to the notions of a chaste wife, or keep indoors as befits the wife of a (now) richer family.

Remittances

Remittance flows are now the second largest source, behind FDI of external funding for developing countries. India received the highest remittance, of USD 10 Billion in 2001.[11] In 2001, total (for all countries) worker remittance receipts stood at US$ 72.3 billion. Not only are they large, they seem more immune to economic cycles than FDI flows. In fact remittance flows tend to increase in times of economic hardship because families are dependent on them for their survival. The ILO estimates that remittances contribute more to Nepal's foreign exchange than manufacturing exports, tourism, foreign aid and other sources combined. The ILO studies reveal that remittances in Bangladesh account for more than half of the household income of families that receive them, with a high multiplier effect on consumption and GNP.[12]

Informal transfers through the *Hawala* or *Hundi* system are often used. The procedures of the formal banking system are seen to be long-winded, costly and offer poorer exchange rates than the informal systems. There is a need to provide cost-effective and safe banking channels through formal routes for money transfer home.

Money sent by women migrants' home is usually controlled by male members of the family. Her weaker position vis-à-vis property rights under personal/family laws get reinforced with her lack of control over remittances sent home. There is evidence to show that where women hold property in

[11] See UNESCO Information Kit on UN Convention on Migrants' Rights, July 1, 2003.
[12] See ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy Op. cit.* at 23-24.

their independent right, their status within the family improves and there is lessening of domestic violence faced by them. There is a need to ensure that assets purchased out of a woman's remittances are registered in her name instead of any other male member of the family.

Links between migration, irregular migration, smuggling and trafficking

According to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transitional Organised Crime (2000), the "smuggling of migrants" is the procurement of the illegal entry of a person into a State of which the person is not a national or a permanent resident, in order to obtain directly or indirectly, a financial or other material benefit.[13] Smugglers are thus termed 'extra-legal travel agents' to willing clients. Trafficking on the other hand involves the use of violence, coercion or deception to exploit workers. It need not involve crossing borders. Women here are victims and are not liable to criminal prosecution. There is also evidence to show that trafficked persons often work as bonded or forced labourers in agriculture and domestic service. This leads to excessive power of the employer over migrant workers. In the domestic workers case we have seen this results in limitations placed on movement, withholding of passport along with working long hours and non-payment of wages. It is also necessary to pay equal attention not only preventing and repatriating trafficked woman but also dealing with their rights in destination countries - the knotty issue of rights of commercial sex workers and how to cope with the threat of HIV/AIDS. It is estimated that almost five percent of internal migrant workers in India and China are HIV infected.[14] In fact the role played by the governments of sending countries in focusing on the welfare of their migrants workers overseas has greatly enhanced the position of such workers abroad vis-à-vis those countries that do not play such a role.[15] In the case of women workers their sexual and reproductive health should be a matter of first-rate concern for sending countries. Where such a role by the sending and receiving state is not present, women rely on their own community or caste or religious networks and access non-governmental assistance, if available.

[13] Art. 3.
[14] World Economic Forum 2003, cited in ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy op.cit.* at 66.
[15] See for example the comparison of Filipino workers overseas as compared to workers from Indonesia, Thailand and Vietnam. See Ashish Bose, Migrant Women Workers: Victims of Cross-Border Sex Terrorism in Asia, XXXVIII (9) *Econ. and Pol. Weekly* 868 (2003). Philippines has an elaborate regulatory mechanism in place to deal with women migrant workers. See their Labor Code, Migrant Workers Act 1995 and their several government agencies dealing with migration.

It has also been pointed out that the extent of the flows of irregular workers is a strong indication that the demand for regular migrant workers is not being matched by the supply.[16] Thus there is a close link between legal migration and irregular migration, and the migration procedures in country of origin, apart from the immigration procedures in the region countries. Thus, for countries in South-Asia which are the main sending countries or transit countries, a conscious policy of putting in place effective and migrant-friendly emigration polices would be a necessary step. This would also reduce irregular migration and trafficking, since they all form part of one continuum and policies and laws determine where a potential migrant would place himself or herself once a decision to migrate has been taken.

The ILO has noted the links between regular and irregular migration. "The extent of the flows of irregular workers is a strong indication that the demand for regular migrant workers is not being matched by the supply, with migrants serving as buffers between political demands and economic realities."[17] The ILO has made a link between trafficking and availability of employment. "The recent rise in trafficking may basically be attributed to imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside."[18]

As has been observed, "The complex web of factors that often underlie migration, especially in South Asia, make determination of voluntarism and coercion not a particularly useful approach".[19] There is therefore a difficulty in clearly demarcating political and economic migrants, i.e., refugees/ internally displaced persons and migrants. Take for instance the tens of thousands displaced from Nepal in the current round of violence and insurgency; viewing them as economic migrants would dis-entitle them to humanitarian aid and possible *refoulement* (repatriation of refugees under international humanitarian law).

II Need for a comprehensive policy

Contrary to popular perception, more than half the migration of persons is from one developing country to another, where wage differentials are not large. Many of these are likely to be irregular migrants. *The* ILO reports that the largest numbers of irregular migrants world-wide are likely

[16] ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy op.cit.* at 12.
[17] Ibid.
[18] ILO, *Stopping Forced Labour* 35 (2001).
[19] Rita Manchanda, Gender Conflict and Displacement: Contesting Infantilisation of Forced Migrant Women, XXXIX (37) *Econ. and Pol. Weekly* 4179, 4179 (2004). She points out that the 1951 Geneva Convention does not provide a separate category for women who suffer gender specific persecution or human rights violation in the form of domestic violence.

to be Nepalese and Bangladeshis in India.[20] There is thus a need for a cluster-based approach for dialogue to take place among affected countries in a region.

The International Organisation for Migration (IOM) has called for a 'cluster approach'. This refers to the need for sending, transit and receiving countries to work in a coherent and co-ordinated manner. Some of these could be the 5+5 dialogue[21] or bilateral agreements between countries of origin and transit of asylum seekers or migrants. One of the ways to manage this migration has been an attempt by receiving countries to focus on enhancing 'stay-at-home' development. Such an approach would link aid to development policies that encourage people to find jobs/livelihood in their home countries and to reduce emigration pressure or to develop alternatives to emigration. One of the problems with such an approach is that it runs counter to the internationally accepted right of all persons to emigrate. Article 13 of the Universal Declaration of Human Rights adopted by the General Assembly in 1948 states:

1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own and to return to his country. The fear of the influx of migrants who may cause unemployment in receiving countries, reduce wages or other social and cultural aspects of migration has to be balanced together with the rights of emigration.

There is also a need for greater efforts at multilateral and bilateral levels rather than unilateral efforts to manage migration. The ILO reports a surge in bilateral efforts at the current time. Already in 2004 a Global Commission on Migration comprising several counties, including India, has been set up, which was chaired by Switzerland and Sweden.[22] There is thus a need to a clearly enunciated integrated policy on all migration matters, with a promotional and welfare focus. Such a policy should be in consultation with employers' and workers' representative and other stakeholders

Links between migration and development

Bulk of the research on migration world-wide has focused on the concerns of receiving countries and the concerns of the Diaspora. Emigration

[20] ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy op.cit* at 12.
[21] Participants include Algeria, France, Italy, Libya, Malta, Mauritania, Morocco, Portugal, Spain and Tunisia that are five immigration and five emigration countries.
[22] See for instance the Barcelona Process and Puebla Process dealing with trafficking and migration, the Berne Initiative for migration governance etc. For details see, ILO, *Towards a Fair Deal for Migrant Workers in a Global Economy, op.cit* at 4, 133-34.

has been a relatively less researched subject. In fact it has been noted that much of focus in sending countries has dwelt on the 'brain drain' issues.[23] The link between migration and development assumes importance because of the manner in which migration is linked with the pattern of development in sending countries. Domestic policies that have lead to ruination of the agriculture and rural livelihoods have contributed to unemployment and poverty and the consequent migration to the cities. This has also triggered the supply driven mobility to seek employment across borders.

The impact of returnee migrants also impacts the development pattern of a sending country. Newer employment opportunities opened up in the country of origin by returning migrants or created by the remittances of migrants, may allow other family members to step out of typical caste based occupations or enhance their qualifications. The social effects of such migration thus have cascading effects going much beyond the migrant alone.[24]

Rights of migrants

Managing migration by the sending countries requires action at a variety of stages. The position of migrants at all stages – prior to departure, during, transit and at destination should be addressed.

The idea of decent work is central to setting the benchmark for labour standards of migrants. There are several ILO standards dealing with the issues of freedom of association, non-discrimination and freedom from forced labour, conditions of work, social security apart from specific instruments dealing with rights of migrant workers. The ILO Migration for Employment Convention (Revised) 1949 (No. 97) aimed to regulate migrant flows and coincided with an active role played by the State in organising (see the guest worker programme in West Germany in that period) and closely supervising recruitment, employment and return of migrants.[25] Yet as has been noted, in the past few decades, immigration flows have been unilaterally determined by destination countries, leaving source countries to manage the

[23] Xiang Biao, Towards an Emigration Study: A South Perspective XXXIX (34) *Econ. and Pol. Weekly* 3798, 3798 (2004). He notes however that colonial history of migration is very concerned with emigration matters.

[24] Xiang Biao *op. cit* at 3801 warns that remittances can also lead to the erosion of 'social capital' when the money is used back home only as a means of entertainment and leads to a culture of dependence. He also notes that the effects of migration may differ according to caste and religion – thus for Muslim migrants to the Gulf, their religious identity is often reinforced, while for Christian migrants from Kerala, international missionary networks worked in their favour.

[25] In addition see the Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143) and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in 1990, which entered into force in 2003.

emigration flows. The challenges of the current period have been characterised by the 'commercialisation of migration' through smuggling and trafficking and the employment of migrant workers in informal employment in destination countries posing challenges to the managing of migration and the rights of migrant workers.

There is need for a strong pro-active system run by the State for monitoring migration. Such a system should include - registering details of workers, potential employer, entering into model employment contract as a pre-requisite for emigration, limiting the fees charged by recruiter, providing skills training, making provision for the welfare of the family of the woman migrant, providing for control by woman over remittances discussed above could be some of its features.

Migrant workers experience the most unfavourable working conditions and also have the greatest difficulty in accessing any remedies – due to language, discrimination, and barriers to join trade unions among others. The presence of contractors and sub-contractors among migrant workers is another reason for their precarious condition. The increasing informality of employment relationships in the destination countries is an added factor. The law must ensure the rights of migrants based on the principle of equality and non-discrimination. Thus for instance simplified procedures to access the remedies provided under law should be provided. Migrants should be permitted to pursue a case against a recruiting agency or other parties within their home country even while employed overseas and strict rules of appearance should be relaxed. In case a returned migrant wishes to pursue a case against an erstwhile employer in the destination country, all possible assistance should be made available by the consulate.

For women workers, who are typically to be found in domestic work, agriculture (usually as seasonal migrant workers) and labour-intensive manufacturing, the specific problems of low or absence of unionisation in these sectors, vulnerability and invisibility add to the woes already faced by other male migrants. Homes and agriculture are usually sectors that are not covered by labour laws in most countries in the world. As a result even if a woman is to seek redress, she may find herself not covered by the labour laws of the destination country. Agriculture is also considered one of the three most hazardous industries by the ILO. Accidents involving machinery and poisoning by pesticides and agrochemicals are rampant. Migrant workers are usually unable to access health care in the destination country for a variety of reasons – lack of information, inability to take time off, lack of child-care or support systems. Other than this, the systems of health care

for temporary migrants may be not as broad as those available to citizens or permanent residents, making it relatively costly for the temporary migrant.

Migrant women workers face gender discrimination in wage payments even as compared to male migrants who perform the same job. The gender segregation of jobs together with lower wages adds to the picture of gender discrimination at the workplace that women face. Thus, in order to ensure easy access to justice, hot lines for women migrants, permitting NGOs or migrant associations to file group complaints on behalf of victims, protection of employment and work status during investigation needs to be ensured. Where a woman migrant has to return in distress conditions, counselling and rehabilitative facilities should be made available at State expense. A welfare fund could be created (that could be partly contributory and partly State funded) to assist such migrants who require emergency help and to disburse soft loans. In addition there is a need for sound and robust investment climate in receiving countries to put remittances to best use.

The ILO advocates the development of model contracts to govern the situation of migrant workers, *such as* article 22 of the Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons annexed to the Migration for Employment Recommendation (Revised) 1949 (No. 86). The ILO instruments relate to minimum standards of protection; the provision of correct information about conditions in the country of employment; measures to facilitate the adaptation of migrants to living and working conditions in the country of employment; special provision on mechanisms for the transfer of migrants' earning; employment opportunities; access to social services; medical services and reasonable housing; adoption of a policy to promote and guarantee equality of treatment and opportunity between regular status migrants and nationals in employment and occupation in the areas of access to employment remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes and access to legal proceedings. There is a need for countries concerned to ratify these standards and to effectively implement them.

There is a need for portability and export of social security benefits when the migrants return. Presently the Equality of Treatment (Social Security) Convention 1962 (No. 118) provides for equality of treatment but this is based on the principle of reciprocity. There is thus a need to have a system of maintaining 'acquired rights' in place on a universal basis. In fact difficulty in transferring social security benefits or earnings back to their home country, may compel the migrant to continue to live longer in the

destination country than planned. There is also the need to prevent abuses in the recruitment and placement of migrant workers through private employment agencies.[26]

III Conclusion

A safe migration policy is a matter of first-rate importance in a rapidly globalising world. There is a need for India to ratify the relevant UN and ILO instruments. It must be pointed out that the UN International Convention on the Elimination of all Forms of Racial Discrimination 1965 is one of the most widely ratified conventions, yet this does not deal with discrimination based on nationality and thus leaves migrant workers in several instances unprotected.

There is a need for a greater role of the government to manage safe migration. As far as possible many of the components of a worker-centric safe migration policy, particularly those concerning the rights of migrants at all stages of migration, should be embodied in legislation so that there is *an* access to legal and administrative remedies in case these rights are violated. A rights based regime is necessary to protect the interests of migrants.

[26] See Private Employment Agencies Convention 1997 (No. 181), which has important provisions concerning migrant workers. Certain forms of deductions by contractors would make it liable to be considered as forced labour according to the Committee of Experts. There is a need for the sending countries to have effective measures in place dealing with licensing requirements for contractors and monitoring the recruitment process at all stages.

MAHR IN MUSLIM FAMILY LAWS: AN EVALUATIVE CRITIQUE

*Tasneem Kausar**

I Introduction

THE LAST century has witnessed historically unparalleled uprising of women activism and feminism. These movements have found their place not only in the realm of academia but also in national and international politics, media and economics. The fruits of these world-wide women movements vary from country to country. Consequently, it is difficult to draw any general picture of the status of women achieved through these struggles. It is the religious, political, economic and social differences amongst the countries of the world that account for this discrepant development. Without compromising the responsibility of other factors, 'it is the religion Islam that has often been named as the main factor inhibiting the development of women's rights in Muslim countries.'[1] Islamic system and laws have been severely criticized as being harsh and discriminatory to women.[2] Amongst others, it has been the concept of '*mahr*' in Muslim family laws that have received special criticism by feminists. One might rightfully ask that what do women have to object against the rule of *mahr*? Since, it directly entitles them to receive a monetary benefit from their husbands; any remonstration against it appears misplaced and misconceived. However, as a part of jurisprudential inquiry launched upon the doctrines of Muslim family laws by western and Muslim feminists, the concept of *mahr* has been questioned and examined as one of the many, responsible for the unequal status of men and women within a Muslim marriage contract.[3] This article evaluates the concept of *mahr*, by stating the position within *Shari'ah* and by appraising the impact of right of *mahr* upon the social, legal and financial status of women. More importantly, this article will assess and respond to the stances taken by the critics of

* LL.B. (Pakistan College of Law), M.A. (University of Punjab), LL.M (Yale); *Associate Professor in Law*, Pakistan College of Law, Lahore.

[1] Leila P. Sayeh and Adrian M. Morse, Jr., "Islam and the Treatment of Women: An Incomplete Understanding of Gradualism", 30 *Tex Int'l L J* 311, 312.

[2] See for e.g., Judith Miller, "The Challenge of Radical Islam", FOREIGN AFF., Spring 1993, at 43; Manoucher Parvin, "On the Synergism of Gender and Class Exploitation: Theory and Practice Under Islamic Rule", 51 *Rev Soc Econ* 201 (1993); Martin Kramer, "Islam & the West Including Manhattan, Bombing of World Trade Center by Muslim Extremists", *Commentary*, Oct. 1993, at 33.

[3] See Adrien Katherine Wing, "Custom, Religion and Rights: The Future Legal Status of Palestinian Women", 35 *Harv Int'l LJ* 149, 188-89 (1994) (noting that Palestinian women's rights organizations are seeking to eliminate dower on the grounds that it is a 'burdensome custom' and therefore, inconsistent with the intifada's stated goal of improving women's status.). See also, *Annelies Moors, Women, Property and Islam* 91 (1995).

Muslim provision of *mahr*. The article is divided into five parts. After introduction in the first part, the second part briefly discusses the status of women in Islam and especially the rights bestowed upon them. The third part focuses upon the concept of *mahr* in Muslim family law. In this part, I have also analyzed the historical evolution of the institution of marital gift and a comparison has been drawn between the previous concepts of brideprice and dowry and the Islamic right of *mahr*. The fourth part entails the feminist denunciation of *mahr* as a protest against the traditional and transactional Muslim marriage paradigm. Further, it attempts to solve these ambiguities by presenting the Islamic stance upon these objections.

II Amelioration of the status of women by Islam: An overview

Though the history of women's treatment by western or eastern societies has never been one happy account,[4] still Islam as a religion has been particularly singled out, especially by the West for its behavior in relation to women.[5] It is only a recent phenomenon that western women have received their most basic rights, such as a right to higher education or right to own and appropriate property,[6] whereas these rights were granted to Muslim

[4] See, Encyclopedia Britannica, (11th Ed.), University Press Cambridge, England 1911, Vol.28 (noting the status of women in India, it states: 'In India, subjection was a cardinal principle. Day and night must women be held by their protectors in a state of dependence says Manu.' Describing the good wife, it mentions her as a woman whose mind, speech and body are kept in subjection, acquires high renown in this world, and, in the next, the same abode with her husband.); Encyclopedia Britannica, The Encyclopedia Britannica, Inc. Chicago, 1968, Vol. 23 (summarizing the legal status of women in the Roman civilization, it provides that even in historic times women was consider completely dependent. If married she and her property passed into the power of her husband....the wife was the purchased property of her husband and like a slave acquired only for his benefit. A woman could not exercise any civil or public office ...could not be a witness, surety or tutor, or curator; she could not adopt or make a will or contract. Among the Scandinavian races women were under perpetual tutelage, whether married or unmarried. As late as the Code of Christian V, at the end of the 17th century, it was enacted that if a woman married without the consent of her tutor she will be forfeited of her property.); John Stuart Mill, The Subjection of Women, (the author states: 'We are continually told that the civilization and Christianity have restored to the woman her just rights. Meanwhile the wife is the actual bondservant of her husband; no less so, as far as the legal obligation goes, than slaves commonly so called.').

[5] See, *supra* note 2. See also, Sayeh, *supra* note 1 at 312 (commenting that persecution of women has gone on throughout history and has only recently been diminished in some societies).

[6] See, Kathleen A. P. Miller, "The Other Side of the Coin: A Look at Islamic Law as Compared to Anglo-American Law—Do Muslim Women Really have Fewer Rights than American Women?" 16 *NY Int'l L Rev* 65, 72-(stating that until the late 19th century, in the U.S., the married women had no authority to hold her property.); See, *Henry Krause, Family Law in a Nutshell* 98-99 (1986)(discussing the importance of the Married Women's Property Acts); See, Jamal A. Badawi, "The Status of Women in Islam" at p.4, available at: http://www.islamfortoday.com/womenrightsbadawi.htm (last visited on 25th Jan. 2006.) (author notes that only around 1870 the situation started to improve for married women and they began to achieve their right to own property and to enter in the legal contracts.); see also, James r. Stoner, Jr., "Is Tradition Activist? The Common Law of the Family in the Liberal Constitutionalist World", 73 *U Colo L Rev* 1292, 1296-97.

women since the advent of Islam in the seventh century.[7] The purpose of this part of the article is to present the position of Islam as per the status and rights of women. This section is important because it will provide a policy of Islamic law especially relevant to the preferential interpretations of textual sources of Islamic *fiqh*, which are done in the next part of the article.[8]

The status of women in Islam is one of equality and honor. Where the Greeks had theories about women being 'misbegotten' and 'soulless,'[9] and Romans and Christians were blaming the sins of mankind on Eve,[10] Islam reached humanity with a 'fresh, noble and universal message.'[11] The fourth chapter of Quran, *Al Nisa'*, literally meaning 'the women,' opens with the verse that solves the myth of creation and brings women at par with men as far as the phenomenon of original conception was concerned. The verse reads: 'O mankind! Keep your duty to your Lord who created you from a single soul and from (that single soul) created its mate of the same kind and from them twain has spread a multitude of men and women.'[12] It is difficult to believe that there is any existing religious scripture that has ever dealt with the humanity of women from all aspects with such amazing brevity, eloquence, depth and originality as this divine decree of the Quran has done. This verse is even more important because it clarifies the status of a woman as a complete human being. Hence, the permission for her to share in the most unique event of cosmic reality: the creation of human being.

Stressing further upon the conception of human being, Quran says: 'And Allah has given you mates of your own nature, and has given you from your mates, children and grandchildren, and has made provision of good

[7] See generally, Noha Ragab, "The Record Set Straight: Women in Islam have Rights", available at: http://www.submission.org/noha.html (last visited on 25th Jan, 2006); See also, Miller, *supra* note 8, at 74 (stating that Muslim women received their rights in the 7th century A.D., while American women received most of their rights in the 19th and 20th centuries.).

[8] The textual sources of Islamic fiqh are exclusively comprised of Quran (God's revelation) and Sunnah or Hadith (the teachings and practice of Prophet Muhammad, may God be pleased with him).

[9] See, Anne Dickson, "Anatomy and Destiny: The Role of Biology in Plato's Views of Women", in Carold C. Gould and Marx W. Watofsky (eds.), Women and Philosophy toward a Theory of Liberation (1976); Julia Annas, *Plato's Republic and Feminism*, in OSBORNE (ED.), *Woman in Western Thought* 24-33; See, *Greek Philosophy on the Inferiority of Women*, available at: http://www.womenpriests.org/traditio/infe_gre.asp (last visited on 28 Jan, 2006).

[10] See generally, Karen Amrstrong, *The Gospel according to Woman: Christianity's Creation of the Sex War in the West*, (1986); see also, Nancy van Vuuren, *The Subversion of Women as Practiced by Churches, Witch-Hunters, and other Sexists*, 1988; see also, *Women in Islam vs. the Judeo-Christian Tradition*, available at: http://www.troid.org/IslamicInfo/Women in Islam/women.htm.

[11] See, Badawi, *supra* note 6, at p.5.

[12] The translation and explanation of the verses of the Holy Quran appearing in this essay have been taken from Abdullah Yusuf Ali, The Holy Quran: Text, Translation and Commentary, (Sh. Muhammad Ashraf Publishers & Booksellers, Lahore, 1988).

things for you.' This verse of the Quran sufficiently clarifies that the nature of woman is not different from that of a man. And that her creation has been purposeful and not the result of some defective pregnancy as was understood in Greek, Roman and Christian history.[13] Interestingly, the Quran did not stop there. It went a step further to redeem womankind from the eternal blame of the original sin. As against the biblical account,[14] the Quran present the story of Adam and Eve differently.[15] In the Quran, God never blames Eve and rather spoke about both being equally guilty.[16] The Quranic story is especially important since it does not present the world and its existence as a by-product of some sin. The creation of human being and this worldly life is granted a special status in the divine scheme. The human life is not a punishment for a sin. In accordance with the Quranic account, Adam and Eve, upon their repentance, were both forgiven.[17] The continuation of punishment after forgiveness would have hardly made any sense. Hence, man, or for that matter, human being is born into a natural state of purity and innocence.[18]

It was this spiritual elevation of women that became a precursor for their social, economic and political redemption in society. The concept of gender equality in Islam is one of its own kinds. Instead of presenting some straight-jacket equality, Islam has put forth the idea of qualitative equality. The Quran gave women: (1) legal status as persons, (2) the same religious duties as men, (3) the right to accept or deny marriage or to initiate divorce, (4) the right to receive education and to choose a profession, and (5) the right to inherit and manage property.[19] It is important to note that Islam acknowledges the core differences amongst men and women, and hence, women are granted rights of their own, that in many instances, do not apply *mutatis mutandis* to men.[20] In Islam, the spheres of potential capabilities of

[13] See, H. Ellerbe, *The Dark Side of Christian History* 136 (quoting St. Thomas Aquinas (1225 to 1274 CE): 'as regards the individual nature, woman is defective and misbegotten.....the production of woman comes from a defect in the active force or from some material indisposition, or even from some external influence upon pregnancy...) ; See, Aristotle, *Generation of Animals*, I, 728a, 82f; See also, M. Maloney, *The Arguments for Women's Difference in Classical Philosophy and Early Christianity*, 41-49.

[14] See, Genesis 3:12-13, 15-16.

[15] See, Al-Quran, 2:31-36, 7:19-25, 20:115-123. See Abu Ala al-Maudoodi, Tafheem al Quran (while commenting upon these above mentioned verses, the author holds that Quranic account of original sin is different from Judeo-Christian traditions.).

[16] However, there are Hadith available where Eve has been mentioned as responsible for the sin of Adam. But many jurists believe that such Hadith have been fabricated under the Judeo-Christian influence.

[17] See, Al-Quran, *supra* note 15.

[18] See, Hammudah Abdalati, *Islam in Focus* 32 (describing the man's state at birth).

[19] See generally, Badawi, *supra* note 6; see also, Interview with Deryl Davis, *The Role of Women in Islam, Religion and Ethics* 4 (May 10, 1992).

[20] See, Ruqaiyyah Waris Maqsood, *Islam, Culture and Women*, available at: http://www.islamfortoday.com/ruqaiyyah09.htm (last visited on 26th Jan, 2006).

men and women are equally important, if not exactly the same. Therefore, equality in Islam is evaluative and does not necessarily import 'similarity.'[21]

III The concept of *Mahr* in Muslim family laws

It is often remarked that there is no celibacy in Islam. Marriage in Islamic law is a commitment to life itself, to society and to the meaningful survival of the human race. The Quran clearly indicates that the marriage is sharing between the two halves of society, and it objectives include the emotional well-being and spiritual harmony of spouses.[22]

Marriage under Muslim law is governed by a *nikah*, a kind of marriage contract, consisting of a binding offer and acceptance that give rise to reciprocal rights and obligations. According to the Quran, a woman has an unfettered right to withhold her consent to any term in the marriage contract, including whether to marry the proferred groom in the first place. Beside all other provisions for her protection, it is specifically decreed that a woman has the full right to her *mahr*, a marriage gift presented to a wife by the husband upon marriage. This section of the paper will discuss the conceptual import of *mahr* in Islam.

A. *Historical Overview of Marriage Gift*

The tradition of a marriage gift has been one of the oldest in the history of family relations. It was customary in many cultures and societies[23] that some gift had to be presented at the time of marriage. Historically, those prevalent marriage gifts were of many different traditions. To name a few, there was a gift given to the groom by the family of a bride (*dowry*),[24] or a gift given to the family of a bride by the groom or his family (*brideprice*),[25] or a rather less known gift had been the present given to a wife by the husband.[26] Besides, being gifts given at the time of marriage, the other common factor amongst them was their customary nature. Although well-supported by practice and tradition, none of those gifts were absolutely mandatory to make. There was indeed in Roman law, a mandatory *donatio propter nuptias*,[27] a gift from the family of the husband to the wife, but it was only required as a reciprocal gift to the *dos*, a gift given by the wife or her family to the groom. In the absence of *dos*, no *donatio propter nuptias*

[21] See generally, Asghar Ali Engineer, *The Rights of Women in Islam* (1992).
[22] See, Al-Quran, Ch.30: 21.
[23] See, *Dower and Maintenance*, available at: http://www.al-islam.org/WomanRights/7.htm (last visited on 29 Jan, 2006).
[24] The tradition of dowry or *jahez*, belong to that category of marital gift.
[25] See, Asaf A.A. Fyzee, *Outlines of Muhammadan Law* 132, (Oxford University Press, 1999).
[26] See, *William Robertson Smith, Kinship and Marriage in early Arabia*, 93, (London, 1886).
[27] See, *Dower*, at: http://www.answers.com (last visited on 29 Jan, 2006).

was required. Furthermore, most of the marriage gifts were only prevalent amongst the aristocratic nobility[28] and were not deemed to be of general application.

Similarly, marriage gifts in the form of dowries were common in ancient Greece and Rome, and modern Europe. Its history can be traced back to the times of ancient near East civilization. The Code of Hammurabi had the provisions for both brideprice and dowry.[29] The presence of similar custom in Jewish religious law has been recorded by historians and anthropologists. Jewish law established an obligatory gift called *mohar*, to be given to wife by the husband.[30] The value of *mohar* amounted to 200 *dinars* in the case of a virgin bride and 100 *dinars* in the case of a widow or divorcee.[31] In addition to this, a husband also had to provide his wife with additional marriage gift, usually in the form of gold coins. Along with the gifts from the groom, the wife also received dowry from her natal family.[32] It will be important to note that there existed a custom of *mahr* in pre-Islamic Arabia, though in an informal manner, where wife's family was given a brideprice called *mahr*. One may conclude that roots of *mahr* lay in the Judaic provision of *mohar*.

Hence, in pre-Islamic Arabia also, different forms of marital gifts were present depending upon the kind of marriage arrangement.[33] Scholars have noted as many as five different forms of marriages in the tribal Arabia.[34] Not all the marriage agreements gave rise to a right of receiving marital gift.[35] However, to note a common practice of that time, most of the marital gifts were given by the groom to the father or family of the bride to compensate them for the loss of a daughter, or more precisely for the loss of a worker, of another helping hand in the family.[36] This kind of gift was

[28] See, Maristella Botticini and Aloysius Siow, "Why Dowries?" available at: http://www.economics.utoronto.ca/siow/papers/dowry.pdf (last visited on 5 Feb 2006); See also, "Elizabethan Wedding Customs" available at: http://www.william-shakespeare.info/elizabethan-wedding-customs.htm (last visited on 5 February, 2006).
[29] For extensive discussion upon the comparative history of dowry and brideprice see, Botticini and Siow, *supra* note 28, at 5-14.
[30] See, Mordechai Akiva Friedman, 1 *Jewish Marriage in Palestine: a Cairo Geniza Study* 285-286 (Tel Aviv, 1980)
[31] *Ibid.*
[32] *Ibid.*
[33] See, Smith, *supra* note 26,
[34] *Ibid.* See also, Sir Abdur Rahim, *Muhammadan Jurisprudence* 8 (Kausar Brothers, Lahore).
[35] *Id.* Rahim has noted a form of marriage named *shighar* where a man would give his daughter or sister in marriage to another in consideration of the latter giving his daughter or sister in marriage to the former. And none (wives as well as families) would receive any marital gift or dower or dowry.
[36] See, Fyzee, *supra* note 25, at 132.

known as *mahr*, payable to the father or brother of the bride.[37] The gift payable only to the wife was known as a *sadaq*.[38]

Along with the customs of giving marital gifts, there also existed customs to deprive the woman or her family from receiving any *sadaq* or *mahr*. One of them was the custom of inheriting conjugal rights. If a man died, his son or brother would inherit his conjugal rights, in respect of his wife, in the same way as he inherited his property. The son or the brother of the deceased had a right either to give the widow in marriage to another man and take her *mahr*, or to declare her his own wife against *sadaq* already paid to her by the deceased. Another obnoxious custom was that a man would marry a woman and even give her *sadaq*, but after losing interest in her he would tarnish her image, accuse her of adultery and demand the money back.[39]

It is noteworthy that the practice of giving a marital gift in Arabia revolved more around the concept of brideprice instead of a dowry. Although there was some mention of giving gifts to the wife by her family upon marriage, however, there was not enough evidence to suggest that those gifts were obligatory and were indirectly directed towards the husband.

The historical origin of the dowry system in India can be linked to the *brahama* marriages prevalent amongst the Hindus of the high caste in which the daughter was sent with a lavish dowry to the groom's house. Whereas, in the *asura* form of marriages amongst the lower caste Hindus, the brideprice was paid by the groom for marrying the bride.[40]

Along with specific customs in the form of dowry or brideprice, there also had been the practice of 'simultaneous gift giving.' This means that both groom and bride would receive a gift. The dowry and brideprice would take place together in a marriage arrangement. The examples of such simultaneous gift giving can be found occurring in the Sumerian, Assyrian and Babylonian civilizations, Greeks, Jews, late Roman empires, western Europe and Muslim Arabs.[41]

B. *The Concept of Mahr in Islamic Law*

Some conclusions can understandably be drawn from the last section. The concept of *mahr* was not originally conceived by Islamic law. There had been centuries old practice of marriage gifts which was transformed by

[37] *Ibid.*
[38] *Ibid.*
[39] See, Rahim, *supra* note 34, at 9.
[40] See generally, Mysore Narasimhachar Srinivas, *Some Reflections on Dowry*, (Oxford Press, 1984).
[41] See, Botticini and Siow, *supra* note 28, at 23.

the Quran into the Islamic concept of *mahr*. Probably, the Jewish principle of *mohar* was the prelude to the Islamic institution of *mahr*. It has been noted that the Arabs were exposed to monotheistic religions.[42] Judaism and Christianity existed amongst the population of southern Arabia. Therefore, it is not difficult to trace the roots of *mahr* to the Jewish *mohar*. However, the present form of *mahr*, owes its basis to the revelations contained in the Quran.

The Holy Quran ordains: 'And give the women (on marriage) their dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with good cheer.'[43] The Arabic expression used for *mahr* in this verse is '*sadaq*' which has been interpreted as free gift by Quranic scholars. The word *sadaq* has been derived from the source s-d-q, literally meaning truthfulness and sincerity. Thus, paying *sadaq* to a wife upon marriage is a mean to reflect the sincerity and truthfulness of intentions on the part of a husband. It is an expression of cordiality that must precede the beginning of a genial relationship. This point has been expressly mentioned by a number of commentaries of the Holy Qur'an.[44] The other expressions used for *mahr* in Quranic verses are *ajar*[45] (the reward) and *fariza*[46] (the obligation). The collective reading of all these expressions is reflective of the fact that *mahr* has been considered a gift and reward for the wife and an obligation for the husband.

Apart from literal interpretations and to understand '*mahr*' not as a word but a doctrine, a four-pronged analysis scheme[47] to explain the nature of marriage payments and transfers is used. These four social features to be considered are:

(i) 'the prevalence of dowries, bride prices (paid by the groom to the bride's family), or marriage gifts (from the groom to the bride herself),

(ii) the existence of individual property rights, which determines whether parents can transfer or bequeath property to their

[42] See, http://www.ucalgary.ca/applied_history/tutor/islam/beginnings (visited June 16, 2005)
[43] Al-Quran, Ch. 4:4.
[44] See, Abu Al-Qasim Mahmud Zamakhshari, Al-Kashshaf, Ch, 4:4; Raghib Isfahani, Al-Mufradat fi Gharib al-Qur'an 4:4 (saying that the dower has been called *saduqah* because it is a symbol of the sincerity of faith).
[45] Al-Quran, Ch. 4:20 (Wed them with their leave, and give them their dowers (*ajr*) according to what is reasonable.).
[46] Al-Quran, Ch.2:236 (There is no blame upon you if you divorce women before consummation of marriage or the fixation of dower. But must bestow (*fariza*) upon them a suitable gift.).
[47] See, Botticini and Siow, supra note 28 at 5.

children, and the laws and customs regarding inheritance (primogeniture, partible inheritance, exclusion of daughters from bequests),

(iii) the rules governing marriage (monogamy versus polygamy), and

(iv) the post-marital residential pattern (virilocal, uxorilocal, neolocal).'[48]

In regards to the first factor, it is useful to reiterate that the existing practice in the pre-Islamic Arabia was the customs of *mahr* and *sadaq*.[49] The society was more tilted towards the brideprice than dowries. However, women had no status and they were treated as chattels and objects. They had no property rights and could not inherit. The rules governing marriage were also not favorable to women. There was no bar upon polygamy and divorce. And at the same time, loose marriage-like relationships, prostitution and concubinage were also common. Lastly, the post-marital residential pattern was generally virilocal.[50] With this brief analysis I turn to religious doctrines of Islam. The concept of *mahr* in its present form was more an outcome of the religion than mere sociology of that time. Islam granted women rights to negotiate, consent and enter into agreements as a full legal person. She was given a right to hold and appropriate property and her property rights were not subjected to the supervision of her father, brother or for that matter her husband. This has been the policy of Islam, and from this point onwards, the Islamic *mahr* requires a policy-based interpretation. In connection to marriage, amongst others, the two rights given to women in Islam are: 1) the right to consent and, 2) the right to receive *mahr*. Interestingly, these two rights have been established against two very close male relations, the father and the husband. In most cases, her right to consent for a marriage stands juxtaposed to the right of her male guardian, generally the father to give her in marriage. Consequently, she was given the complete ownership of *mahr*, to ensure that a father or male guardian should not be left with a reason to interrupt the exercise of her right to consent. In the context of pre-Islamic customs of *sadaq* and *mahr*,[51] the Quranic verses are instructive.[52] The Quranic *mahr* is the exclusive property of the wife. Not only does a father have no claim to any part of the *mahr* of his daughter,

[48] *Ibid.*

[49] See, text accompanying footnotes 31-39.

[50] A virilocal marriage is the one in which the bride moves into the groom's household leaving her own. Against this pattern there are uxorilocal marriage which occurs when the groom moves into his bride's household. Neolocal de?nes those marriages in which the groom and the bride live with neither their families.

[51] Discussed in the last section of the article.

[52] See, fn. 43 & 44.

but it is also not permissible to include, in the marriage agreement, a condition that apart from *mahr* anything additional would be paid to the father or family of the wife. In other words, a father is not allowed to derive any financial gain out of the marriage of his daughter. Thus, the termination of a direct financial interest, of the father or other male guardian, otherwise vested in the marriage of a female.

The next part of this paradigm examines the issue of *mahr* in the context of married women. In pre-Islamic Arabia, as well as in many cultures, societies and religions, till as late as nineteenth century, women would lose their personal identity upon marriage. To mention one example, till the 1860s under the Common law upon marriage woman entered a condition called 'converture.'[53] According to the doctrine of converture, upon marriage a woman's existence was incorporated into that of her husband. The wife had no individual rights of her own, to the extent that her name was changed to indicate the new ownership. A wife could not own property, vote, obtain an education, or enter into any contract on her own. Now, this is rather one of the moderate examples of the treatment of married women. In contrast, the second tier of the doctrine of *mahr*, operates to protect the status of married women. A husband is required to make a gift to his wife, upon which she will have exclusive ownership. Hence, from the very onset of a marital relationship, the separate identity for the wife has been established. She has an existence apart from the husband. Her right to *mahr* and then exclusive ownership of *mahr* is a reinforcement of her separate status, as a complete and capable legal person.

Once it has established women as legal persons, the *mahr* works further to designate the respective economic burdens and benefits within an Islamic marriage. From its earliest, Islam has been jealously guarding the property rights of married women. There has been a complete consensus amongst all major *Imams* of *fiqh* that a woman can seek judicial cancellation of her marriage if her husband interrupts or affects her free exercise of property rights.[54] Now, though Islam has given complete economic independence to a woman,[55] and has allowed a husband no right in regard to her property, it has still retained the historical custom of *mahr*. This shows that, from the Islamic point of view, *mahr* is not paid to woman because the

[53] See, William Blackstone, *Commentaries on the Laws of England.* Coverture was a part of the common laws of England and the United States through out most of the 1800's. The U.S. Supreme Court upheld the idea of converture in the case of *Bradwell* v. *Illinois*, 1893.

[54] It has been also provided as a ground for seeking the dissolution of marriage in Dissolution of Muslim Marriage Act 1939.

[55] See Al-Quran, Ch. 4: 32 (saying: '*Men have a portion of what they have earned and women have a portion of what they have earned.*' In this verse the Holy Quran has recognized the title of both men and women to the fruits of their labor.)

husband subsequently utilizes her physical energy or exploits her economically. As already stated, the Holy Quran describes the *mahr* as a 'free gift.' The *mahr* has been retained as Islam requires men to undertake the responsibility of maintaining their wives. The obligation of *mahr* on the very onset of marriage reflects the skilful arrangement of marital responsibilities by Islamic law. Within marriage relationship, husbands have been assigned all the economic burdens and wives have been made recipients of economic benefits. One may argue this arrangement as unjust to men, however its equilibrium lies in the different roles performed by male and female. Though exceptions are possible, but generally the role of female in the society is such that she needs some deliverance from economic burdens. The *mahr* is a prologue of the fact that in Islamic marriage a husband has the responsibility to provide for the wife.

In the same context, another commonly stated stance has been to define *mahr* as a security for the wife against a husband's exercise of his right to divorce. It may be possible to argue that in some situations *mahr* ends up acting as a security against divorce; however it is not the case generally. *Mahr* can be a security against divorce, but only where *mahr* is made payable upon divorce i.e. *muwajjal*[56] and the amount of *mahr* is a really large sum. The philosophy of *mahr*, in fact, has been that of a gift. It has been inserted in the marriage to enhance mutual love and cordiality. Similarly, there have been instances recorded in *Hadith* where Prophet Muhammad (pbuh) fixed such a nominal *mahr*[57] that it could hardly be a security. Besides, this statement means that when the Holy Prophet fixed the dower of his own wives, he provided them with a security against himself. It is also evident from *hadith* that Prophet Muhammad (pbuh) was not in favor of fixing large amounts as *mahr* and many a time he counseled women to return their *mahr* as a gift to their husbands. Therefore, it is sounder to construe *mahr* as a gift than a security provision.

Furthermore, it has been a common trend, especially in the text books written in South Asia, to use the term 'dower' as a synonym of *mahr*. Though dower as a western concept is probably closest to *mahr*, however, both do not stand for the same thing.[58] Dower is a common law principle and an outcome of the ecclesiastical practice of exacting from the husband[59] at

[56] The form of *mahr* where its payment is postponed till the death of husband, divorce or happening of some other event. For further detail see Fyzee, *supra* note 25, at 136.

[57] In two such commonly known *hadith*, the fixed *mahr* was an iron ring and a pair of shoes.

[58] Richard Freeland, "The Islamic Institution of Mahr and American Law", 4 *Gonz J Int'l L* (2000-01).

[59] Though in some instances, the pre-nuptial dower contract can be against father or brother of the bride.

marriage a promise to endow his wife.[60] The provision of dower, however, was only effective at the death of a husband. It was primarily a right of a widow and in some cases of a divorcee to use a portion of their husband's estate to maintain themselves. This right was inducted into the European law[61] since women otherwise had no right to property and they could not inherit. Therefore, a provision for their support in the form of dower seemed necessary. The *mahr* is different from dower in at least two respects. First of all, the obligation of *mahr*, continues to exist during the life of a husband and in the situation of *mahr-i-muajjal*,[62] it is to be paid promptly at the demand of wife, whereas dower is only effective upon death or divorce. The payment of *mahr* in Islamic law can be postponed to some future time or event which may not necessarily be the divorce or death of a husband. Secondly, the *mahr* exists irrespective of the other property rights of women. Upon receiving *mahr-i-muwajjal*[63] after the death of her husband, she does not lose her right to inherit from the deceased husband. Hence, equating *mahr* to dower will, first, reduce the status of *mahr* since it stands for the recognition of women as individuals. And second, it will extend *mahr*'s scope upon the issues of maintenance, which are dealt under separate rules in Islamic *fiqh*.

IV The analysis of feminist denunciation of *Mahr*

This part of the article deals with the major criticisms levied against the concept of mahr in Muslim family laws. The censure of *mahr* has assumed varied positions, ranging from the western orientalist attacks,[64] to the application of the domination theory by feminists. It has been argued that *mahr* belongs to primitive times when men use to own women, and hence should be discarded as a remnant of uncivilized times.[65] Some have rejected *mahr* since it makes wife a subject of her husband. The following sections of this part will enumerate the major criticisms upon *mahr* and will evaluate the position of critics and Islamic theory. Moreover, my intention is

[60] For further reference see, Blackstone, *supra* note 53, Vol. II at 134.

[61] See, Henry Maine, *Ancient Law* 218 (3rd Amer. Ed, 1887). The general establishment of the principle of dower in the customary law of Western Europe can be traced to the influence of the Church, and to be included perhaps among its most arduous triumphs. In a French ordinance of 1214, and in the almost contemporaneous Magna Charta in 1215, dower is referred to. But it seems to have already become customary law in England. The object of both ordinance and charter was to regulate the amount of the dower where this was not the subject of voluntary arrangement.

[62] *Mahr* that is payable on the demand of wife.

[63] See, Fyzee, *supra* note 25, at 136.

[64] See, *Dower and Maintenance*, *supra* note 23.

[65] Heather Jacobson, "The Marriage Dower: Essential Guarantor of Women's Rights in the West Bank and Gaza Strip", 10 *Mich J Gender & Law* 143, 147.

not to present a response in the line of religious apology; rather, it is an effort to evaluate and examine an important provision of Muslim family laws.

A. *Criticisms upon the provision of Mahr in Muslim family law*

1. *First criticism: Mahr is a consideration of marriage*

The first objection raised against *mahr* is its assimilation with the concept of consideration as present in the law of contract. It has been argued invariably that *mahr* is analogous to the brideprice which gives a transactional shade to the Muslim marriage. It reduces the traditional marriage paradigm to a mere contract of sale, since in Islam there is no right to conjugality without paying *mahr*.[66]

2. *Second criticism: Mahr subjugates wife to the authority of husband*

It has been argued on the behalf of Muslim feminists that *mahr* is a custom that expects women to play a traditional role in society. According to them, the authoritative position of husband in a marital relationship is an effect of his responsibility to spend upon a wife. And since there is a similarity, even if a limited one, between marriage and sale, therefore, by paying *mahr* to wife, the husband construes as if he has ownership rights over the wife. By eliminating *mahr*, the feminists argue that the gender relations can be modernized and women can become equal partners in a marriage.[67] For modern Muslim feminists the *mahr* is a lynchpin in a decidedly un-modern marital relationship: the wife 'sells' sexual rights to the husband for *mahr*, and agrees to submit to his will with regards to her own public life in exchange for regular maintenance.[68]

3. *Third criticism: Mahr creates a relationship of dependence between husband and wife*

This objection upon the *mahr* takes a two-fold position. Firstly, it objects that the payment of *mahr* reflects the status of women as that of protected dependents.[69] Hence, a relationship of inequality is created between the husband and wife. Secondly, it is questioned that if man and

[66] In *Muhammadi* v. *Jamiluddin* PLD 1960 Karachi 663, it was held that the wife is under Muhammadan law entitled to refuse herself to her husband until the prompt dower is paid. See also *Nuruddin Ahmad* v. *Masuda Khanum*, PLD 1957 Dacca 242.

[67] See, Laila al-Zwaini, *International Institute for the Study of Islam in the Modern World Workshop Report, 2000*, available at: http://isim.leidenuniv.nl/newsletter/6/isim/3.html; See Wing, supra note 5 at 188-89.

[68] See, Moors, *supra* note 3, at 108-9.

[69] See, Jacobson, *supra* note 65, at 143.

woman enjoy all human and natural rights and the relations between them are based on justice and equity, then why men should be burdened with the responsibility of *mahr*?[70] Critics argue that during the period when woman had no right of holding property, and had no economic independence, the mahr was justified to a certain extent, but as Islam has given her economic independence, there is no justification for sustaining the custom of *mahr*.[71]

B. *Evaluating the provision of Mahr: A reply to critics*

This complete set of feminist criticism revolves around a single concept, and that is, *mahr* in marriage is the same as consideration in a contract. Moors while relating to the reaction of a Palestinian girl in the 1970s records: '[W]hen asked by her brother whether she wished to have a dower, [she] replied indignantly, 'Am I a donkey that he has to pay for me?'[72] Thus, to feminists *mahr* as the consideration part of marriage contract, first, objectifies women, then, subjugates them and finally, declare them protected dependents. In the context of this view, I will analyze first the relationship between *mahr* and consideration.

The basis of this integration of *mahr* and consideration lies in the theoretical equation drawn between the Muslim marriage and a civil contract. It has been unequivocally mentioned in almost all major Muslim family law treatises that Muslim marriage is a civil contract.[73] Even if one has to admit this mishomer, it can only be admitted to the extent of its legal connotation. Since there is a wide possibility of alteration in the terms and conditions of Muslim marriage, therefore, it has been conveniently designated the title of a civil contract. Since courts also had to deal with the enforceability of the *mahr* related conditions, they adopted the readily available concept of consideration that suitably fitted the contractual paradigm of Muslim marriage. This interchangeable use of consideration and *mahr* is, in fact, a conceptual transliteration of comparative domains. Here the concepts from one area of law are imported to others as synonyms of those concepts, which at least in this case, is not a correct approach. However, it must be noted that Muslim marriage is not a mere civil contract.[74] Rather, it has its peculiar religious and social dimensions[75] and so does have the concept of *mahr*. Therefore, when *Hedaya* mentioned *mahr* as a token of respect for wife,[76] it was

[70] See, *Dower and Maintenance*, *supra* note 23.

[71] *Ibid*.

[72] See, Moors, *supra* note 3, at 108.

[73] See, Faiz Badruddin Tyabji, *Principles of Muhammadan Law* 94, (Butterworths, 1919); Neille Baillie, *The Introduction of Muhammadan Law* (1874); Rahim, *supra* note 34, at 328.

[74] See, Fyzee, *supra* note 25, at 88.

[75] *Ibid* at 89; See generally, G.H. Stern, *Marriage in Early Islam* 104-8 (London:1939).

[76] Hamilton, Hedaya 44 (Indian edition, 2005).

probably meant in the social context of the institute of *mahr* showing worth and desirability of the wife.

Furthermore, the primary objection against this assimilation (of *mahr* with consideration) lies in the fact that it takes away the social and religious flavors of marital relationship, thus, reducing it to a legally acceptable form of prostitution. It is therefore, submitted that *mahr* in Islamic family laws is not an equivalent of consideration as used in the law of contracts. This stance can be established on at least four grounds. Firstly, if mahr is consideration, than technically it should be the constituting part of the contract, whereas it is not. It is widely agreed[77] that *mahr* is an essential incident of the Muslim marriage.[78] Whereas consideration is the component of a contract, *mahr* is rather an after-effect of the marriage contract.[79] It is for this reason that its mention in the marriage contract is not absolutely essential to the validity of a marriage. Even if the man has stipulated a special condition in marriage contract that there should be no *mahr*, he still will be liable to pay *mahr* to his wife.[80] Such is the effect of *mahr* in marriage.

Secondly, it is true that the conjugality is dependant upon the payment of *mahr*, but not because it is the consideration of connubial intercourse. Since, in Muslim marriage, the only positive duty upon a wife is to make herself available for the cohabitation therefore, in case of non-payment of *mahr*, her primary channel to enforce payment is to withhold her person from the husband. Besides, there are conflicting opinions in *fiqh* upon this point.[81] According to some, if wife has already admitted husband to sexual intercourse without payment of *mahr*, then she cannot refuse him afterwards upon the basis of non-payment.[82] Therefore, it is difficult to draw any general correlation between the non-payment of *mahr* and refusal to conjugality.

Thirdly, the obligation of mahr changes in the case of dissolution of marriage without consummation. The rules have been derived from the following two verses of Quran. The first verse says:

[77] See, David Pearl and Werner Menski, *Muslim Family Law* 190-91 (Brite Books, Lahore: 1999).

[78] *Hamira Bibi* v. *Zubaida Bibi*, (1915) 43 *LR IA* 294.

[79] See, Pearl and Menski, *supra* note 77, at 179.

[80] *Ibid* at 181; See also, Hamilton, *supra* note 76, at 8.

[81] For e.g. Imam Abu Hanifa argues that the wife can always refuse cohabitation until her claim of mahr is satisfied. However, the two disciples of Imam Abu Hanifa, Abu Yusuf and Shaybani disagree. According to them, the wife's right to refuse conjugality comes to an end as soon as marriage is consummated.

[82] See, Tyabji, *supra* note 73, at 181. However, in *Rahim Jan* v. *Muhammad*, PLD 1955 Lahore 122, it was held that consummation does not deprive the wife of her right to refuse conjugal relations if the prompt dower is not paid. For complete discussion on this case see Pearl & Menski, *supra* note 77, at 195-6.

> 'It is no sin for you if ye divorce women while yet ye have not touched them, nor appointed them a portion (*mahr*). Provide for them, the rich according to his means and the straitened according to his means, a fair provision. (This is) a bounden duty for those who do good.'[83]

And the next verse adds:

> 'If ye divorce them before ye have touched them and ye have appointed unto them a portion, then (pay the) half of that which ye appointed, unless they (the women) agree to forgo it, or he agreeth to forgo it in whose hand is the marriage tie. To forgo is nearer to piety. Forget not kindness among yourselves.'[84]

These verses of Quran clearly show that if a Muslim husband divorces his wife where no *mahr* has been fixed and no consummation has taken place, he is only required to make a suitable provision[85] for the divorced woman according to his own financial capacity. However, where *mahr* has been fixed and marriage has been dissolved by the husband without cohabitation, he shall have to pay half of the agreed amount as *mahr*.

Hence, the argument is simple. If *mahr* is the consideration of conjugality or surrender of a wife's person, then obligation to pay half of the fixed *mahr* in case of non-consummation does not fit in the contractual paradigm of this critique. Since a wife has not fulfilled her part of the contractual obligation, therefore, technically she cannot be entitled to receive any consideration. This requirement from a husband to pay half of the *mahr* to wife (where no cohabitation ever took place) clearly shows that *mahr* in Muslim marriage is not a mere consideration. In Quranic words, it is a 'free gift'[86] to a wife.

Lastly, the critics argue that since *mahr* is the consideration of a wife, therefore, as the price of a house, a garden or any property depends upon its size, beauty and usefulness, similarly the *mahr* varies according to a wife's beauty, education, familial status and wealth. First of all, there is almost no compulsive positive correlation between *mahr* and qualitative characteristics of a wife. A wife, who is outstanding in her beauty or status, may agree to enter a marriage contract upon a very nominal *mahr*. One such example has been the *mahr* of Fatima, the daughter of the Prophet (pbuh).[87]

[83] Al-Quran, Ch. II: 236.

[84] Al-Quran, Ch. II: 237.

[85] Such provision or gift given to wife upon divorce is called '*mutat*.' For detailed discussion upon *mutat* see *Mohammad Ahmed Khan* v. *Shah Bano Begum*, AIR 1985 SC 945.

[86] Al-Quran, Ch. 4: 4.

[87] See Ameer Ali, *Mahommedan Law*, Vol.II at 44 (Calcutta:1929).

Similarly, a woman of ordinary status and traits has all the right to demand a lavish *mahr*. Since *mahr* is not a price but a gift, therefore it has been left to the agreement and suitability of the parties. Secondly, this argument is mainly raised in the context of post-marital disagreement upon the *mahr* in situations where no *mahr* was fixed at the time of marriage. In such circumstances, *mahr* is decided in accordance with the principles of *mahr-e-misal*. Since, it is the duty of a judge or an arbitrator to decide that what should be the *mahr* of wife, therefore application of some objectivity has been allowed in this regard. However, the general rule is that the *mahr* of wife should be fixed with reference to the *mahr* of her female paternal relations (such as sisters and aunts) who are considered to be her equal. Since *mahr-e-misal* only accounts for a specific situation, therefore it is misleading to draw a general analogy upon it.

Thus, having sufficiently argued that it is erroneous to equate *mahr* with contractual considerations, the objections that *mahr* subjugates women and makes them dependent upon their husbands would be without much basis. Further, a direct answer to the issues raised in second and third criticism lies in the analysis of roles designated to the two genders under the Islamic scheme. Without suggesting gender stereotyping, and also acquiescing to the possibility of role-swapping, I would argue that the primary role of a man is to provide for his family. Islam bestows the financial responsibilities upon men and expects that financial benefits will flow from husband to wife and not vice versa. Therefore, this induction of *mahr* in Islamic marriage is symbolic of this scheme and its moral value is higher than its material value. The critics appear to misunderstand *mahr* as compensation paid to a wife for her being deprived of her economic rights or personal freedoms. The fact is otherwise. The husband has a duty to maintain his wife even if she works and earns independently. Therefore, instead of subjugating and making her dependent, *mahr* reinforces the economic rights of a wife within a marital relationship. Not only that, rather, it also enhances a wife's ability to bargain for desirable stipulations in her marriage contract specially those relating to *khula* and polygamy. In the case of an unpaid *mahr*, a wife can make a credible threat to her husband that she will sue for payment if her wish is not granted. Furthermore, researches have shown that working wives often enjoy greater autonomy because of the income they contribute to the household.[88] Thus, though Islam reserves *mahr* for the personal usage of a wife, however, the possibility of contributing that money towards the household would arguably increase wife's power in the marital relationship.

[88] Alean Al-Krenawi et al., "The Psychological Impact of Polygamous Marriages on Palestinian Women", *Journal of Women & Health* 1, 10-11 (2001).

V Conclusion

In this short article, an attempt to offer an evaluative critique of Islamic provision of *mahr* in the light of general policy of Islam towards women has been made. The emphasis has been specifically made upon the original and primary sources of Islam. It is worthwhile to note that one of the most outstanding efforts of Islam has been to bestow legal status and rights upon women. Though, since the downfall of Muslim civilization, such teachings and precepts of Islam have not been strictly adhered to by many people who profess to be Muslims. This has given rise to many misunderstandings and unjustified criticisms upon the Islamic decrees like *mahr* in family laws. The analysis of *mahr* offered in this article makes it clearer that denunciation of such an important provision can prevent Muslim women to take full advantage of the rights granted to them in Islam. This further indicates that there is a pressing need to make an original and unbiased study of the authentic sources of Islam.

SMOKING: LEGISLATIVE POLICY AND JUDICIAL APPROACH IN INDIA

S.N. Sharma[*]

I Introduction

IN RECENT years, awareness about the evil effects of smoking has considerably increased. Nowadays, efforts are being made to save even non smokers from involuntary exposure to tobacco-smoke. The courts have demonstrated exceptional judicial activism by asserting that smoking should be banned in public places.[1]

The Parliament has passed the Cigarettes and Other Tobacco Products (Prohibition of Advertisement & Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003. The Act defines smoking and also bans it in public places. Some exceptions have also been grafted in the Act. Tobacco products have been specified in the schedule of the Act.[2] International opinion is also developing against smoking. The Resolution of the 39th World Health Assembly, May 15, 1986 emphasized the necessity of providing effective protection to non-smokers from involuntary exposure to smoking and to save children and young people from tobacco addiction. Similarly, the Resolution of the 43rd World Health Assembly, May 17, 1990 urged the member states to plan legislations and other effective measures for protecting their citizens.[3]

Smoking is a bad habit which finally leads to various grave health problems to those who become addicted to it. The problem needs urgent attention. Law is considered to be an important instrument of social change and many social problems have been curbed by means of law. For example, the Juvenile Justice Act, 2000 takes care of juvenile delinquency. The Immoral Traffic (Prevention) Act, 1956 looks into the problem of prostitution. The menace of drugs is reduced by the Narcotic Drugs & Psychotropic Substances Act, 1985. Similarly, to curb the menace of smoking, laws have been passed from time to time. This paper attempts to find out the legislative policy and judicial approach on the subject of smoking.

* B.Sc., LL.B., LL.M. Ph.D. (B.H.U, Varanasi), Reader, Dept. of Laws, H.P. University, Shimla, 171005.

1 *Murli S. Deora* v *Union of India* AIR 2002 SC 40.

2 The Cigarettes & Other Tobacco Products (Prohibition of Advertisement & Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003.

3 *Ibid*

II Cigarette Smoking

Cigarette smoking is a social vice and keeping in view its heavy evil consequences smoking deserves to be evaporated. Thus, some general aspects for formulating strategy to tackle it deserve to be referred to.

A. Definitional Aspect

Cigarette is paper-wrapped roll of finely cut tobacco for smoking and modern cigarette tobacco is usually a milder type as compared to cigar tobacco.[4] In sixteenth century beggars in Seville picked up discarded cigar butts and rolled them in scrap of paper for smoking. The poor man's smokes were known as *cigarillos*. During Napoleonic wars, French and British troops became familiar with them and French named them as cigarettes. In the beginning, all cigarettes were made by hands but with the passage of time, sophistication came into being. In 1880, James A. Ransack was granted a U.S. patent for a cigarette machine and the Bonsack machine was imported to England in 1883.[5]

From history's point of view, in seventeenth century, the tobacco was brought in this country by Portuguese from America. Tobacco in India is known from 1605 and its cultivation began in 1610 in Ceylon. Like tobacco plant in India also came from America and Tobacco smoking became common with the introduction of the plant.[6] The forms in which tobacco is used presently, are, (a) cigars, (b) cigarettes, (c) bidies, (d) pipes (e) tobacco chewing, (f) tobacco eating and (g) licking and snuff taking. However, the Schedule attached to the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act., 2003[7] contains tobacco products which are cigarettes, cigars, cheroots, *Beedis*, cigarette tobacco, pipe tobacco and hookah tobacco, chewing tobacco, snuff, *Pan masala*, *Gutka*, tooth powder containing tobacco.[8] The Act of 2003 has also defined the term cigarette. The term 'cigarette' includes any roll of tobacco wrapped in paper or in any other substance not containing tobacco. It also includes any role of tobacco wrapped in any substance containing tobacco but it does not include *beedi*, cheroot and cigar.[9] It may be recalled that the same definition was offered in Section 2(b) of the Cigarettes (Regulation of Production, Supply & Distribution) Act, 1975, which has been repealed by the Act of 2003.

4 *Encyclopedia Britannica*, 318, 1966.

5 *Id.* at 318-319.

6 G.R. Madan, *Indian Social Problems: Social Disorganization and Reconstruction*, 192 (1993, 5th ed., repr 1998).

7 Hereafter, the Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and distribution) Act., 2003 has been referred as the Act of 2003.

8 See, Schedule attached to the Act of 2003.

9 See, s 3(b) of the Act of 2003.

B. Causes & Evil Effects

Keeping in view the unpopularity and disfavor by policy planners and legal prohibition on smoking in public places, it becomes necessary to find out the causes and effects of smoking.

(a) Causes

It is believed that cigarette smoking influences the activity of mind in certain respects. It acts as stimulant for involving narcotic substances, nicotine. It has mysterious influence on the activity of mind which leads to poet's inspiration, formation of political talent, creation of new ideas etc.[10].

It is also considered as panacea for many ailmentailments but it appears to carry false notion. Smoking behavior is due to physiological need. Norman W. Heimstra in "The Effects of Smoking on Mood Change" states the finding:

[T]he results showed no significant differences between smokers and non-smokers. However deprived smokers showed significantly more errors on the tracking and vigilance tasks than subjects in the other group.[11].

(b) Evil Effects

Smoking in general has adverse consequences of varied nature. It causes diseases, economic hardships, social problems and pollution.

(i) Medical Effect

Habitual or excessive cigarette smoking causes lung cancer and many other diseases, such as, heart disease, cancers of lung, pancreas, breast etc. circulatory ailment, cerebral hemorrhage, blindness, loss of sense of taste and smell, nervousness, respiratory diseases, nutritional defects, undesirable effects on glands etc.[12] The statement of objects and reasons of the Cigarette Act, 1975 stated.

Smoking of cigarettes is a harmful habit and in course of time can lead to grave health hazards. Researches carried out in various parts of the world have confirmed that there is a relationship between smoking of cigarettes and lung cancer; chronic bronchitis; certain diseases of the heart and arteries; cancer of bladder, prostrate, mouth, pharynx and esophagus; peptic ulcer, etc., are also reported to be among the ill effects of cigarette smoking.[13]

[10] See, *Supra* note 6.

[11] Norman W Heimstra, *The Effects of Smoking on Mood Change* in William L. Dunn, Jr (Ed.) *Smoking Behaviour: Motives and Incentives*, 200 (1973).

[12] See, *Supra* note 6 at 193.

[13] See, Statement of Objects & Reasons, The Cigarette (Regulation of Production, Supply & Distribution) Act, 1975.

(ii) Economic effects

Cigarette smoking is economically injurious to individual, family and nation. The claim that cigarette industry is prosperous and money minting business appears untrue if seen from larger point of view. Individual and family suffer because of the expenses incurred on tobacco or cigarettes and health problems which may otherwise be used for domestic purposes. Smoking causes loss of time, work and effort because of this habit of the people. Import of foreign brand cigarettes and tobacco is unnecessary burden on foreign exchange.

(iii) Social Effects

The use of tobacco is an expensive luxury and its evil effects generally occur among youth. Smoking is often associated with other bad habits, such as, gambling, drinking and undesirable social contacts; smoking and chewing provoke drunkenness.

(iv) Pollution

Smoking is greatest polluter as number of smokers is on increase. People smoke everywhere in homes, buses, trains, bus stands and other public places causing suffocation. Breathing becomes difficult. Smoker inhales voluntarily and others inhale involuntarily. Smoking also causes air pollution.

III Legislative Policy

Of the various forms of smoking, the popular forms are Bin and Cigarette. Till date, two main legislations have been passed. In 1975, the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975 (hereafter referred as the Act of 1975), was enacted. It has been repealed by the Cigarettes & Other Tobacco Products (Prohibition of Advertisement & Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

A. The Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975

In the statement of objects and reasons, it was stated that smoking of cigarettes was a harmful habit and in course of time could lead to grave health hazards. It enumerated various diseases of cigarette smoking as reason in the interest of general public that trade or commerce in and production, supply and distribution of cigarettes was not to be made unless the label bore the specified warning that "Cigarette smoking is injurious to health".

The Act of 1975 was a brief Act consisting of twenty-two sections only. Section 2 was a definition clause offering definitions of thirteen terms. Some

important terms defined by it were cigarette, production, saleand sale and specified warning. All these terms have been retained in the Act of 2003. Section 2(m) of the Act of 1975 stated.

"Specified warning" means the following warning namely, "Cigarette smoking is injurious to heath."[14]

Section 3 of the Act puts restrictions on trade, commerce, production supply and distribution of cigarettes by providing that every package of cigarettes or label must bear the specified warning.[15] There was heavy stress on the specified warning under the Act. Section 4 of the Act emphasized that the specified warning on a package of cigarettes should be legible, prominent, conspicuous and distinct. Even in advertisement the specified warning was to be included.[16] The specified warning was to be expressed in the language used on the package or label but in case of foreign language, it was to be expressed in English language.[17] No warning was according to the Act if letters used were less than three millimeters in size.[18] If the provisions of the Act were contravened, the packet was liable to confiscation. And if it was proved to the satisfaction of the court that the possessor of the package was not responsible, the court could pass order against the guilty as it might think fit.[19] Section 11 of Act empowered the court to give the owner option to pay in lieu of confiscation, such costs as it thought fit but not exceeding the value of the package. Section 12 provided that any person carrying on trade, commerce etc. without specified warning was liable to penalty not exceeding five times of the value of the package or one thousand rupees whichever was more. Section 17 of the Act provided that any person, selling, distributing, supplying etc. of any package of cigarettes which did not contain either on the package or on its label the specified warning, or advertising or taking part in advertisement which did not include specified warning "shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees or with both."[20] Offences under the Act were bailable and cognizable.[21] On the whole, the Act made positive approach to reduce the volume of cigarette smoking in society but in practice the warning that "cigarette smoking is injurious to health" could not deter the persons from cigarette smoking.

[14] See s 2(m), The Cigarette (Regulation of Production, Supply and Distribution) Act, 1975.
[15] *Id.* S.3
[16] *Id.* S.5
[17] *Id.* S.6
[18] *Id.* S.7
[19] *Id.* S.10
[20] *Id.* S. 17
[21] *Id.* S. 19

(B) The Cigarettes & Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003.

Thirty-ninth and Forty-third resolutions of World Health Assembly urging member states to extend effective protection to non smokers and risk groups comprising of pregnant women and children and Article 47 of the Constitution of India casting duty on state to improve public health are referred to in the preamble of the Act of 2003 for the comprehensive law on tobacco in public interest. Section 33 of the new Act has repealed the Act of 1975. The Act of 2003 consists of thirty-three sections whereas the predecessor Act consisted of twenty two sections. Section 3 of the new Act of 2003 offers definitions of sixteen terms whereas the old Act defined thirteen terms in Section 2. The three new terms included are public place, smoking and tobacco products.[22]

The definition of "cigarette" under the Act of 1975 as well as under the Act of 2003 is the same without any difference. Section 3(b) offers an inclusive definition of the term "Cigarette." It says

"Cigarette" includes—

(i) any roll of tobacco wrapped in paper or in any other substance not containing tobacco,

(ii) any roll of tobacco wrapped in any substance containing tobacco, which, by reason of its appearance, the type of tobacco used in the filter or its packaging and labeling is likely to be offered to, or purchased by consumers as cigarette, but does not include *beedi*, cheroot and cigar."[23]

Section 3(I) defines 'public place' as meaning any place to which the public have access, whether as of right or not. It includes auditorium, hospital buildings, railways waiting room, amusement centers, restaurants, public offices, court buildings, educational institutions, libraries, public conveyances and the like which are visited by general public but does not include any open place,[24] Section 2(p) says that "tobacco products" are the products specified in the schedule. The schedule mentions cigarettes, cigars, cheroots, *beedies*, cigarette tobacco, pipe tobacco and hookah tobacco, chewing tobacco, snuff, *pan-masala* or any chewing material having tobacco, *gutka* and tooth powder containing tobacco.

[22] S. 3(I), (n) and (p), The Act of 2003.
[23] *Id.* S. 3(b)
[24] The Supreme Court in *Murli S. Deora* v. *UOI.* AIR 2002 SC 40 banned smoking in public places, namely, auditorium, hospital buildings, health institutions, educational institutions, libraries, courts.

Section 4 of the Act says that no person shall smoke in public place but can do so in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and at the airports, a separate provision may be made for smoking area or zone. It is entirely a new provision. Section 5 of the Act prohibits advertisement of cigarettes and other tobacco products. No person engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise.[25] Section 6 of the Act makes an important provision that no person shall sell or permit sale of cigarette or any other tobacco product to any person who is under eighteen years of age or within one hundred yards of any educational institution. There are many provisions which also found place in the predecessor Act and only some changes have been introduced. The ambit of the Act has been broadened by the addition of "Other Tobacco Products".[26]

Departing from the provision in the earlier Act, Section 10 of the new Act does not fix the size of letters and figures of specified warning or indication and leaves it for the rules. The Act also authorizes the power of entry, search and seizure, and confiscation of package.[27] Section 20 of the Act provides punishment for failure to give specified warning, and nicotine and tar contents. The punishment for first conviction is imprisonment not exceeding two years or fine upto Rs. 5,000 or both. For second or subsequent conviction, the maximum punishment is five years and fine upto Rs. 10,000. Section 21 provides punishment for violating Section 4 of the Act.[28], which is fine upto Rs. 200. The offence is compoundable and triable summarily. Section 22 provides punishment for contravening Section 5 which makes provision for the prohibition of advertisement of cigarettes and tobacco products. The maximum punishment for first offence is two years imprisonment or fine upto Rs 2000 or both. For second or subsequent conviction, the maximum punishment is five years imprisonment or fine upto Rs. 2000 or both. Section 27 says that an offence punishable under this Act shall be bailable whereas Section 28 of the Act provides that an offence committed under Section 4 or Section 6 is compoundable for amount not exceeding two hundred rupees. Thus, the Act makes elaborate provisions to check cigarette smoking and other tobacco products. In order to curb social vice, the Act creates many offences.

IV Judicial Approach

Prior to the enactment of the Act of 2003, the courts addressed the problem of cigarette smoking and the judiciary adopted an antismoking approach.

[25] S. 5, The Act of 2003.
[26] *Id.*, Ss. 7, 8 and 9
[27] *Id.* Ss. 12, 13 and 17.
[28] S. 4 of the Act prohibits smoking in public places.

The Kerala High Court in *K. Ramkrishnan* v. *State of Kerala*[29] was seized with the matter in an original petition highlighting the dangers of passive smoking. It was prayed that smoking of tobacco in any form, whether in the form of cigarette, cigar, *beedies* or otherwise in public places was illegal, unconstitutional and violative of Article 21 of the Constitution. Justice Narayan Karup referred to the facts and figures to establish horrifying impact of smoking, active as well as passive, on society. He pointed out the various diseases, such as, cancer, pulmonary diseases, respiratory illness etc.[30] Pointing out the evil effects of smoking, he observed

> The dangers of passive smoking are real, broader than once believed and parallel those of direct smoke. It has long been established that smoking harms the health of those who smoke..... Passive smoking ranks behind direct smoking and alcohol as the third leading preventable cause of death.[31]

The court pointed out that Article 21 included within its scope the right to pollution free air and the right to decent environment. Maintenance of health and environment fell within the purview of Article 21 of the Constitution as it adversely affected the life by slow and insidious poisoning reducing the very life span itself. The Court held that public smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or otherwise was illegal, unconstitutional and violative of Article 21 of the Constitution of India. The Court also held that tobacco smoking in public places fell within the mischief of the penal provisions relating to "public nuisance" as contained in the Indian Penal Code and also the definition of "air pollution" as contained in statutes dealing with environment and the Air (Prevention and Control of Pollution) Act, 1981.[32] The Court also issued appropriate directions.

The matter of smoking was further examined by the Supreme Court in *Murli S. Deora* v. *Union of India*.[33] The court held that smoking was injurious to health and may affect the health of smokers as well as passive smokers. Pointing out the several diseases, which may be caused by smoking, the Court observed.

> The State of Rajasthan has claimed to have passed Act No. 14 of 2000 to provide for prohibition of smoking in place of public work or use and

[29] AIR 1999 Ker. 385; The bench comprised of AR. Lakshmanan and K Narayan Kurup, J.J. Justice K. Narayan Kurup wrote the opinion for the Court.
[30] *Id.* at 387-389.
[31] *Id.* at 390 (Original Emphasis).
[32] *Id.* at 398.
[33] AIR 2002 SC 40

in public service vehicles for that state. It is stated that in Delhi also there is prohibition of smoking in pubic places.[34]

In view of the adverse effect of smoking on smokers and passive smokers, the court directed and prohibited smoking in public places, namely, auditorium, hospital buildings, health institutions, educational institutions, libraries, court buildings, public office, public conveyances including Railways.

It is praiseworthy that judicial approach is explicit on the question of ban on smoking in public places, keeping in view the adverse socia-medical consequences.

V Conclusion

It is clear that the movement against smoking is gaining momentum day by day. The adverse medico-socio-legal consequences justify the creation of anti-smoking environment. There can be no cause justifying the cigarette smoking.

Cigarette smoking or tobacco is universally regarded as major health hazard and directly or indirectly is linked with many diseases, such as, lung cancer, chronic bronchitis, various diseases of heart, cancers, pulmonary diseases, cancers of different organs etc. Thus, movement against smoking needs to be strengthened further. And, it is testified by international efforts and national legislation on the subject.

Smoking is the area fully marked by legislative activism. For example, the Cigarettes (Regulation of Production, Supply & Distribution) Act, 1975 was enacted for putting restrictions on trade, commerce, supply and distribution of cigarettes and emphasized that specified warning, i.e. 'cigarette smoking is injurious to heath' must be given. However, the Act is repealed by the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003. The present Act is certainly an improvement over the earlier Act and has broadened its domain by including other Tobacco Products.

The field is also marked by exceptional judicial activism which is heavily leaned against smoking. It prohibits smoking in public places and has issued appropriate directions. It appears that there are two issues which need utmost attention. Firstly, smoking has been banned in pubic places due to adverse medical consequences. The question arises how it can be permitted in private places keeping in view adverse medico-environmental consequences. Secondly, there

[34] *Id.* at 41

should be strict enforcement of law if the smoking is to be curbed effectively. So far, the situation is far from satisfactory. However, the noteworthy healthy trend is that in recent years, there has been a rejuvenated and renewed attack on social vices i.e. legislative as well as judicial.

CROSS COUNTRY STUDY OF DECENTRALIZATION IN INDIA AND NEPAL

*Resham Raj Regmi**

I Introduction

WE ARE the successor of the governance system established in the philosophy of Kautilya's Arsthshastra in 3rd century BC. Kautilya practically enforced his theory of the social, political and economic structure of an ideal state and preserved it in the form of book.[1] The concept of *Ram Rajya* was there where every voice of people was heard and they are considered as source of power of state. The prominent ruler also used to claim that their authority is derived from the people and peoples will is supreme for them. Later, for the long time our society falls in the hand of unsuccessful and selfish leader who kept it in the dark ages. Different autocratic regimes were continued by different name in different part of this region. During the process of colonization East India Company integrated different states and starts its own regime. The Dark Age from the decentralization perspective was remaining continued till British time India[2] and *Rana* Regime in Nepal.[3] After getting independence India started to institutionalize democracy. Different democratic institutions were established and strengthened constitution adopted the concept of federalism which itself is the aspect of decentralization.[4] But in Nepal, practice is a bit different, when *Rana* regime was overthrow by the joint efforts of people and kings. The institutionalization of democracy was facing different blown up by the royalist and king himself. Maoists are also destroying the decentralized democratic institutions, which were established by the constitution of kingdom of Nepal 1990 from last one decade.

The decentralization of power from central to local levels is crucial for democratization, the promotion of equity and people's participation in development. Basically devolution of followings three powers is considered more important in the process of effective decentralization.

* Ph. D. Research Scholar, Faculty of Law, University Of Delhi, (LL.M. Tribhuvan University, Kathmandu, Nepal) mail regmirr@yahoo.co.in

[1] Collection Philosophy of Kuatilya in economy and politics is available in the form of book published by different publisher.

[2] Before independence all the power was centered in the representative of British Government to India and no society was authorized the power of self-governance.

[3] Before 1950 there was family autocracy, which led Nepal for more than hundred years with centralised mechanism of governance. No society was allowed to think independently and all formal and informal power was vested in the Prime Minister who was the Commander-in-Chief.

[4] See, Preamble of the Constitution of India.

- Political decentralization; it transfers policy and legislative powers from central government to autonomous, lower-level assemblies and local councils that have been democratically elected by their constituencies.
- Administrative decentralization; it places planning and implementation responsibility in the hands of locally situated civil servants and these local civil servants are under the jurisdiction of elected local governments.
- Fiscal decentralization; it accords substantial revenue and expenditure authority to intermediate and local governments.

Though rulers used to claim that people are the source of state power and each and every step moved by them are for the people. But when the time comes to really empower people by providing them the right to self-governance the hangover of past-centralized concepts comes in mind of our policy makers and leaders, which prevent them to work really for establishing democracy in local level. Because by the transfer of power they feel that they are curtailing their powers in centre. Whatever may be the attitude of leader, during last fifty years there were so many efforts started for the establishment of real democracy in local level. Certainly these efforts are fruitful and changing the attitude of the people but these is not sufficient. By the process of decentralization people not only get the opportunity to govern them but can develop their locality and reduce the backwardness and poverty, which they are facing.

Johannes Jütting *et al* write two motivating factors for decentralization:[5]

- Decentralization can lead to an increase in efficiency and
- Decentralization can lead to improved governance.

According to them these are traditionally adopted concept because other studies also proved that central state authority generally lack the time and knowledge to implements programs and policies which really reflects the need of people. H. Blair writes that decentralization enhance the accountability, especially the election of local officials by citizens, when accompanied by a strong legal framework, can create local accountability and thereby foster officials' legitimacy, bolstering citizen involvement and interest in politics, and deepening the democratic nature of institutions.[6]

[5] J.Jütting *et al*, *Decentralization and Poverty in Developing Countries: Exploring the Impact*(Working Paper No. 236, Research programme on: Social Institutions and Dialogue).

[6] H.Blair, "Participation and Accountability at the Periphery: Democratic Local Governance in Six Countries", *World Development* 21-39(2000 Vol. 28, No. 1).

There are so many studies, which proved the fact that decentralization helps to reduce the poverty in local level. The study by Von Braun and Grote seems to be the most advanced and in-depth treatment of the impact of decentralization on poverty. Based on a rigorous review of the literature and cross-country comparisons, the authors come to the conclusion that decentralization serves the poor, but only under specific conditions.[7] The authors recommend that these conditions should be analyzed within a framework that tackles political, fiscal and administrative decentralization simultaneously, while also taking into account different country specific conditions and different types of decentralization policies.[8]

Decentralization in Nepal

The efforts for decentralized governance in Nepal began in 1960s with the establishment of separate district, municipality and village level Panchayats. These Panchayats were elected local governance body and had the authority to formulate policy, undertake programmes and levy taxes. Before the promulgation of new Local Self Governance Act, 2055 Bs a number of issues relating to policy and processes of decentralization emerged and remained unresolved. The Constitution of the Kingdom of Nepal, 2047 Bs has aimed to develop Nepal as a welfare state in order to provide social, economic and political justice to all citizens. Constitution recognising decentralization as a state policy writes:[9]

> *The state shall maintain conditions suitable to the enjoyment of the fruits of democracy through wider participation of the people in the governance of the country and by way of decentralization.*

However the clear way of decentralization process is not defined in constitution but it intended to establish decentralized system of governance as one of the fundamental policies to achieve the objectives outlined in the constitution. Different Acts have been enacted so far on decentralization following the direction of the new Constitution: The Village Development Committee (VDC), Municipality and District Development Committee (DDC) Acts of 2048 Bs and the Local Self-Governance Act 2055 Bs. The former Acts were only the continuation of the earlier system with a different nomenclature while the later was designed in more comprehensive way. The Local Self-Governance Act has tried to answer most of the unresolved question of decentralization in Nepal from very long time. The report of the

[7] J.Von Braun and U. GROTE (2002), "Does Decentralization Serve the Poor?" *in* IMF ed., *Fiscal Decentralization* 92-119(2002: Routledge, Washington, D.C.).

[8] *Ibid.*

[9] Article 25 (4), Constitution of Kingdom of Nepal, 2047 Bs.

High Level Decentralization Coordination Committee 2053 Bs was the basis for introduction of later Act. The Local Self-Governance Act, 2055 Bs and Local Self Governance Rules, 2056 Bs has made broad based organizational structure, devolution of authorities, special provision to include women and disadvantaged communities, planned development process and judicial authorities to local bodies.

We can point out following points as main characteristics of this Act.[10]

- It is a unified act that defines the principles and policies of decentralization;
- It devolved wide sectoral authority to local governance bodies;
- It established a Decentralization Implementation and Monitoring Committee (DIMC) to monitor whether the objectives, policies and provisions are followed, and ensure they are followed;
- It also established a working committee to execute the directives of DIMC;
- It enabled the creation of a Local Government Finance Commission (LGFC);
- It made provision for revenue sharing between local and central government, and among local governance bodies;
- It made provision for 20 percent representation of women in local governance bodies and for the representation of deprived and disadvantaged groups;
- It provided for more accountable and transparent local governance bodies through councils of respective committee, committee systems, and audit committees;
- It expanded the taxation and service fee collection authority of local governance bodies and recognised some rights of them over natural resources;
- It made participatory bottom-up planning, periodic planning, resource mapping and establishment of an information centre compulsory for local governance bodies;

[10] For details, *see* Local Self Governance Act, 2055 Bs (Law Book Management Committee: Kathmandu).

- It ensure compulsory funding for local governance bodies by central government;
- It authorised DDCs to open sectoral units to take over the work of government line agencies and to hire their own professional staff; and
- It has recognised local governance bodies associations and made provisions for representation at DIMC.

This Act also defines the task of the central government and local governments, their limitations and responsibilities. Such as central government is responsible to coordinate to:

- Implement policy, co-ordinate and monitor decentralization through DIMC;
- Monitor and supervise local governance bodies;
- Build the capacity of local governance bodies;
- Provide financial resources and grants and depute secretary and other staff;
- Co-ordinate contact between ministries;
- Demarcate administrative boundaries and classify local governance bodies; and
- Support to election commission to hold elections and suspend or extend the tenure of representatives of local bodies;

And local governance bodies are responsible to:

- Deliver sectoral services such as education, health, and agriculture by establishing their own sectoral units;
- Prepare long and short-term local policies, plans and programmes;
- Co-ordinate and build partnerships with civil society in programme planning and service delivery; and
- Raise revenue from local taxation, fees and other sources.

II Structural framework

Three different bodies are recognized as local governance bodies' viz. Village Development Committee (VDC), Municipalities and District Development Committee (DDC) by this Act.[11] There are 3913 VDCs, 58 Municipalities including one Metro and three Sub-metros and 75 DDC. VDCs and Municipalities are the local unites for governance in village and urban area elected by popular election of respective jurisdiction.

[11] Section 2, Local Self-Governance Act, 2055 Bs.

Village development committee (VDC) / municipalities

All VDCs are divided into nine wards. Municipalities are divided into a minimum of nine wards but the maximum number is not specified.[12] Wards with locally elected committee are the smallest units of local governance. Each ward has a governance unit named Word Committee (WC) made up of the five elected members, one of which must be a woman.[13] VDC committees and municipal committees run local governance affairs. Village Councils (VCs) and Municipal Councils (MCs) meet bi-annually to approve or question VDC and municipality policies, programmes and budgets. VDC chairpersons, vice-chairpersons, ward members and Six persons including one woman nominated by the Village Council from amongst those social workers, socially and economically backward tribes and ethnic communities, down-trodden and indigenous people living within the village development area, belonging to the class whose representation in the Village Council does not exist. Municipalities also have similar structure in ward and municipal level leaded by Chairperson in word and Mayor in municipal. Municipal councils (MC) also have similar structure like (VC) but the number of nominated members is more and maximum number of nominated member in (MC) is twenty.

District development committee

His Majesty's Government may specify each District maintained under the Local Administration Act, 2028 Bs (1971) as the district development area. Presently there are 75 DDCs based on the administrative division of the countries represent their respective district elected by indirect election. Each district is divided into nine to seventeen Ilakas (areas), which cover clusters of VDCs and municipality. The elected members of the VDCs and Municipalities are the voter for DDC. Each district has a district council (DC), which serves the same role as VCs and MCs have in respective jurisdiction, and an executive committee (DDC). The DCs meet annually and are made up of Mayors and Deputy Mayors of municipalities, VDC Chairpersons and Vice-Chairpersons, DDC Chairpersons, Vice-Chairpersons and members, the district's MPs and six nominated members. Provision is also made for village, municipal and district executive bodies to nominate additional members of the weaker sections of society and of them one must be a woman.

[12] S. 5, *Ibid.*
[13] S. 7, *Ibid.*

III Fiscal Framework

The Local Self Governance Act and Rules has given local governance bodies some taxation and revenue authorities for example, to raise land and vehicle taxes; to charge fees for services, and to charge land revenue. DDCs are authorized to share revenue with government from for example, land registration, tourism, electricity and forest products and to market natural resources. However, the revenue collection areas remain weak because of overlapping authorities of line agencies of central government and local bodies. The local governance bodies have been given responsibility for delivering local services such as education and natural resource management but the finances for delivering these services are routed through the line agencies. The local bodies do receive grants from central government but these are grossly inadequate for them to properly carry out the functions expected of them. Nepalese local governance bodies receive less than four percent of the national budget and this proportion is decreasing because of present internal crises.

Poverty Reduction

The main priority of the Nepalese ninth plan was poverty reduction and it is same for present tenth plan. However, no clear linkage has been made between poverty reduction and decentralization. The Local Self Governance Act suggests that local bodies should allocate resources, prioritise those plans and programmes that contribute to employment generation, increase people's income and reduce poverty.

Local governance bodies have little understanding of the issues involved in poverty alleviation and the weak communication; coordination and interface between centre government and local bodies have hindered any efforts they have made. Local bodies are not provided with sufficient funding to take up poverty reduction programmes themselves and the government running anti-poverty programmes outside the local governance framework. It is only donor funded poverty reduction programmes that are run through local governance bodies. In this situation local bodies of unable to do more things for the reduction of poverty in countries like ours where resources are limited, peoples are unaware about the benefit if locally run programmes and those who are a wear don't have technical ideas and support to effectively implement it.

Present situation

After the enforcement of present constitution Nepalese people participated in the election of local bodies in two times. But after the termination of second terms of representatives' next election become impossible because of critical situation of law and order in the country created by Maoist terrorist activities. Uncertainty begins from that time. Though there was option to extend the term of existing representatives in law but government choose different way. By making amendment in Local Self-Governance Act, through Amendment Ordinance government provided power of local bodies to government employees. When this government was sacked by king and new government came in power the cadre of that party which is in power were nominated in local bodies. In 2004, this government also changed and power of local bodies went to the hand of government employees once again. In February 2005, king has taken power of central government in his hand and declared municipal election. Despite the boycott of mainstream political parties including Maoist the municipal election was held in 8th February 2006. The participation of people in this election was historically low in percentages. Election Commission in its statement after election stated that around 20 percent people participate in the election. But it was already informed to the general public that more then half of seats are remaining there without any candidacy. This fact proved that this election was only a drama to strengthen the royal regime ignoring all the democratic system and institutions aside.

Decentralization in India

"If my dream is fulfilled, and every one of the seven lakhs of villages becomes a well-living republic in which there are no illiterates, in which no one is idle for want of work, in which everyone is usefully occupied and has nourishing food, well-ventilated dwellings, and sufficient Khadi for covering the body, and in which all the villagers know and observe the laws of hygiene and sanitation."[14]

This is the spirit of Gandhi's concept of Swaraj (self governance), which leads movement for the independency against English regime in India. And after independence constitution adopted the concept of federalism, which is also the aspect of decentralization. So theoretically we can say that from very beginning Indian legal system adopted the concept of decentralization.

If we will go through the history we can find different institutions existing in local level with certain power of governance, which is traditionally recognized. But before 73rd and 74th amendment of the Constitution, the system of local governance was not formally regulated by specific Acts in

[14] R. Prabhu and UR Rao eds., *Village Republics: the Mind of Mahatma Gandhi*, cited in HRDC, *Decentralization in India, Challenges & Opportunities* 3 (Discussion Paper Series 1, United Nations Development Programme, New Delhi).

India except the provision of empowerment of state governments against central government by the Constitution.[15] But in state level there were some laws regarding local governance. Before constitutional recognition most of the local bodies were working social organisation after getting registration as societies under Societies Registration Act, 1860.

The Constitutional Amendments in 1992-93 have empowered Panchyats as local unit of state and are described as institutions of local self-government, and are expected to prepare plans for economic development and social justice. The *Adivasi* Act, 1996 provides powers of self-governance to the tribal communities living in 'Fifth Schedule' areas.

The 73rd Amendment added Parts IX provisions relating to Panchayats in Articles 243-243O and 74th Amendment added IX A relating to municipalities in Articles 243P – 243ZG of the Constitution. These Articles of the Constitution are in the nature of basic provisions supplemented by laws of the respective States, which define the details as to the powers and functions of the various organs. The 'Eleventh Schedule' of the 73rd Amendment identifies 29 areas over which Panchayats can legitimately have jurisdiction. Some of these are agriculture, minor irrigation, animal husbandry, fisheries, social forestry, small-scale industries, and implementation of land reforms – focus on particular sectors within the rural economy.

All States have enacted new Acts or incorporated changes in their existing Acts in conformity with this provision of the constitution. Following are considered as basic feature of the 73rd amendments in constitution.[16]

- Continuity: By providing for duration of 5 years for an elected Panchayat and re-election of Panchayats before expiry or within six months of their dissolution as well as non-interference by Courts in electoral matters, continuity of Panchayats has been ensured by the 73rd Amendment.
- Gram Sabhas: All States have provided that a Sarpanch/Mukhia/ Adhyaksha/Pradhan of the Gram Panchayat will convene a Gram Sabha, consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level at least twice a year. The following matters shall be placed before it by the Gram Panchayat :

[15] These two Amendments of the Constitution inserted part IX and IX A respectively to provide the constitution reorganized of local bodies and empower them as local units of decentralized governance.

[16] See *supra note* 15 at 8.

  - Annual Statement of accounts and audit report
  - Report on the administration of the previous year
  - Proposals for fresh taxation or for enhancement of existing taxes
  - Selection of schemes, beneficiaries and locations
- Three-tier System: A uniform structure of three tiers – at village, intermediate and district levels has been prescribed but the constitution and composition of Panchayats has been left to preferences of States subject to all seats being filled by elected persons from the respective territorial constituencies of the Panchayats.
- Reservation of Seats: Seats have been reserved for SC/ST in every Panchayat on the basis of proportional representation and such seats may be allotted by *rotation* to different constituencies in a Panchayat. Not less than one-third of the seats so reserved are further reserved for women belonging to SC/ST. Besides this, not less than one third of the total numbers of seats in a panchayat are reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat. A similar reservation for backward classes has been left to the discretion of States.
- Powers and Authority: It is noteworthy that the 73rd Amendment provides for States to endow the Panchayats with powers and authority *'to enable them to function as institutions of self-government'*. However, the functions of Panchayats Stated in the same Art 243G are in the nature of entrusted development functions: *"(a) preparation of plans for economic development and social justice and (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to matters listed in the Eleventh Schedule."*
- Election Commission: Governors of States are empowered by the 73rd Amendment to appoint State Election Commissioners and stipulate by rules the tenure and conditions of their service.
- Finance Commission: Governors of States are also empowered to constitute State Finance Commissions *to* review the financial position of the Panchayats and to make recommendations to the Governor.
- Audit of Accounts: Audit of Panchayats is to be provided for by the State Legislatures.

74th amendment of the constitution makes almost same types of provision for the Nagar Panchayats, Municipal Councils and Municipal Corporations. Certainly these urban bodies hold more effective power then village but the basis for this is the same the constitutional provision and state legislation.

Structural setup

If we take decentralization in macro level there are three tiers of governance in India viz. central government, state government and local government. And in micro level there is also three tier of governance system in local level viz. Gram Panchayats, Panchayat Samitis and Zila Parishads and in urban areas Nagar Panchayats, Municipal Councils and Municipal Corporations are there as primary local bodies for governance. Presently the concept of decentralization covers the later one. There are now approximately 250,000 Gram Panchayats, 6500 Panchayat Samitis and 500 Zila Parishads duly elected and governed by State legislation. To function effectively, these require rationalization of the district and sub-district administrative apparatus consistent with the State level conformity Acts. After the recent amendment of the Constitution it mandates that seats be reserved for SC\ST in every panchayat.[17] Clause (4) of the same Article directs that the offices of the chairperson in the panchayat at the village or any other level shall be reserved for the SC\ST and women in such manner as the state legislature may, by law, provide. Article 243G endow the Panchayats with such power and authority as may be necessary to enable them to function as institution of self-government.

The 74th Amendments of the constitution intended to strengthen the institution of municipal bodies so as to make them effective democratic institutions at the grass root level in urban areas. A Nagar Panchayat is to be established in a place in transition from rural to urban area, Municipal council to be established for a smaller urban area and Municipal Corporation for larger urban areas. All of these bodies are to be directly elected on the basis of adult franchise. And for this purpose each municipal area is divided in Ward (small territorial constituency). The representation of ST\SC and women are also ensured here. And state election commissions are there to conduct the election of these bodies in free and fair manner.

Fiscal Arrangements

Conceptually talking we can say that local bodies are independent in the matter of fiscal arrangement, planning and expenditure. Basically there are three main sources for Indian local governance bodies. Own resources

[17] Article 243-D (1), Constitution of India

through direct tax and income from owned or vested assets of local bodies; fees or assigned revenues like cesses/surcharges/share in taxes; and different types of grant from Central, State government and other institutions.

The powers, authority and responsibilities of the three levels of Panchayats and municipalities in financial matter are laid down in newly added Articles of constitutions and state law. State are authorised to determine the details about the financial authority of local bodies by making legislation.[18] Constitution leaves it in the discretion to the State in what is to be passed on to the Panchayats. That's why we found different arrangement in different state in this matter. Karnataka and Andhra Pradesh are a bit ahead then other state in the process of empowering local bodies. These two states are trying to provide more power for local self-governance bodies.

State Legislatures can grant powers to tax any of the tiers of Panchayats. Though State Legislations have provided for granting powers to tax or assign certain taxes to Local bodies. The largest number of charges and taxes are levy able at present by gram Panchayats and municipalities. Even where powers of levy are vested at Panchayat Samiti or Zila Parishad levels, actual collection is done by the lower bodies of local governance and the revenue passed on; in some cases, these revenues are shared by different local bodies.

Poverty Reduction

Decentralization is recognized as an effective means of development and poverty reduction because it provides opportunity to local people to select the necessary projects for them in local level and power to implement it. Studies of decentralization have shown that devolution of authority can enhance systems of local governance in a number of ways. Such as, the establishment and empowerment of local resource user groups (delegation or privatization) can improve the ways in which local people manage and use natural resources, thereby improving the resource base on which poor people are often disproportionately dependent. In India policy makers in both central and state level are trying to develop the local bodies responsible for this. Constitutional and legal amendments are going on but the result is not so satisfactory. There are so many constraints, which are contributing for this result. As Crook and Sverrisson's cross-country comparison concludes,[19]

[18] Art 243- H

[19] R.C.Crook and A.S.Sverrisson, *Decentralization and Poverty Alleviation in Developing Countries: A Comparative Analysis or, Is West Bengal Unique?* (2001 IDS Working Paper 130, Brighton).

The notion that there is a predictable or general link between decentralization of government and the development of more 'pro-poor' policies or poverty-alleviating outcomes clearly lacks any convincing evidence. Those who advocate decentralization on these grounds, at least, should be more cautious, which is not to say that there are not other important benefits, particularly in the field of participation and empowerment.

As per the warnings of these writers and our own unsatisfactory result show that there is need of being more cautious towards our policies which are based on the perception that if we will devolution the power to local governance bodies the poverty will start to decrease.

IV Conclusion

Instability and lack of commitment in central government is most crucial problem for Nepalese decentralisation. There is no institutional stability and even periodic election is not held. In this situation it is fruitless to talk about effective decentralisation. In India the local bodies are enjoying more stability in comparison to Nepal.

Unwillingness of the central/state government to devolution of real power to the local level is another problem in this regard. They feel that by the process of devolution they loose their power in centre.

Though the institution having constitutional power are also facing vulnerability in Nepal in this situation it is very difficult to say lack of constitutional protection is major problem for effective decentralisation but it is difficult to ignore this argument also. Certainly constitutional recognition empowers the local bodies as governance unit, which is lacking in Nepalese constitution. In India, before 73rd and 74th amendments of the constitution the situation was same but after it local bodies get constitutional identity. Though they get constitutional identity still they are depended heavily in state law. State can limit and provide the power to these bodies except the limitation made by constitution.

Confusion and overlap in power and responsibilities among the local bodies and Central governments line agencies is another problem in this regard. Clear demarcation of powers and limitations of all the participant of local governance and there relation with central government is necessary.

Weaker financial position and lack of resources is another problem for effective decentralisation. Because without strong financial capacity no body can do any thing which it wants to do. The local governance bodies of

our countries have to depend upon the grant of central government and in this condition it is very difficulty to maintain their independency.

Indifference caused by backwardness of people in the process of governance, domination of some elite family or group and lack of effective ideas to make accountable and responsible to the representative is another problem found in both countries.

It is necessary to implement effectively all the aspects of decentralisation so that people of local level can become able to understand there local problems, can determine their need, decide their priority and make efforts to reform it by their own strength and support of central government. These institutions need more independency in legal, functional and financial terms and technical support for the matters for any of the matter which they don't have manpower or idea. As we know that true devolution to local governments may be said to take place only when funds, functions and functionaries are transferred to the appropriate level of local government. Such a transfer has to be made in substance, not in written form only. And it has to go together only the mere transfer of funds without other changes may even worsen the situation.

HIV/AIDS PREVENTION & CREATING AWARENESS: ROLE OF MEDIA

*Jyoti Singh**

"When you are working to combat a disastrous and growing emergency, you should use every tool at your disposal. HIV/AIDS is the worst epidemic humanity has ever faced. It has spread further faster and with more catastrophic long –term effects than any other disease. Its impact has become a devastating obstacle to development. Broadcast medias have tremendous reach and influence, particularly with young people, who represent the future and who are the key to any successful fight against HIV/AIDS. We must seek to engage these powerful organizations as full partners in the fight to halt HIV/AIDS through awareness, prevention and education..."

-Kofi Annan, United Nnations Secretary-General

I Introduction

HOW VANQUISHED the mankind feels in front of virus that germinates Acquired Immuno Deficiency Syndrome (AIDS)? As AIDS is no longer a public health issue but has become a serious socio- economic & developmental concern, there is an immediate need to act with an utmost sense of urgency and sincerity. When a disease is a multifaceted malady which impacts and affects a society, remedies have to be multi pronged. More so, when the disease defies treatment, curbing its spread and curing the societal misconception about the disease has to be synchronous with efforts to identify treatment. Such can be the process to combat and control the menace of HIV/AIDS. Thus, media is one of the instrumentalities which facilitates and gives a directional thrust to the efforts to curb the disease if not to treat it. If medicine can treat HIV/AIDS, media is capable to prevent it with an ultimate goal to cure it through its capabilities to impart education through entertainment. An article[1] entitled "An innovative approach to reducing HIV/AIDS prevalence through targeted mass media communications in Mumbai, India" focuses on the need for dissemination of related information and realities pertaining to the epidemic so that the ignorance is replaced by awareness and then creating multiplier effects of awareness engulfing the wider cross sections of the society. The article states that India is poised on the precipice of devastating HIV/AIDS

* Research Scholar, Faculty of Law, University of Delhi, Delhi.

[1] Available at: http://www.estrategicmarketing.com/SmMay-Junc04/art7.html.

epidemic. Twenty years after the first case of AIDS was reported in India, it is now home to second largest number of HIV infected people in the world with around 5.1 million people as in 2003 being infected by the deadly disease[2]. Despite ardent efforts to proliferate awareness of HIV/AIDS being made by governmental and non-governmental agencies, the misconceptions relating to HIV/AIDS continue to outpace the efforts to educate people regarding the disease. Thus, with the passage of time role of media has become increasingly significant.

Task before visual and non-visual vehicles of media besides creating awareness and providing knowledge base about HIV/AIDS is also to remove the misconceptions about the transmission of the virus and the social ostracism of affected persons. Lack of information leads to denial and rejection of People Living With HIV/ AIDS (hereinafter referred to as PLWHA) at personal and societal levels as the mankind, at large have not yet realized that even they are carrying the risk of contracting HIV and thus AIDS is not an issue for 'others'. By and large members of the society are oblivious that every body is vulnerable but the misconception is that only those individuals who are immoral and societal deviant are HIV/AIDS affected. On one hand the stigma and discrimination attached to the disease may keep away from seeking information or help as they are likely to be outcast as infected and on the other hand, for some the belief that they cannot be infected, promotes denial and keep them away from the realties of the disease being allured by the false sense of security. All such issues are capable of being resolved when ignorance gives place to knowledge. Another misconception is that HIV/AIDS incidence is escalating in high-risk groups such as commercial sex workers (CSWs), and their clients but strangely enough all of us fall under the high risk groups as long as the restraints and precautions are accorded low priority.

While addressing the Media Leaders Summit on HIV/AIDS, the Prime Minister, Dr. Manmohan Singh stressed on strengthening the national AIDS control efforts as commitment of the National Common Minimum Programme. He emphasized the need for supplementing all such efforts with an active and avid participation from all sections of the society culminating in a mass movement for creating awareness of AIDS. He further stated that while focusing attention on research for finding a vaccine for this pandemic, no stone should be left unturned in preventing its occurrence by using media in an intelligent and creative manner. In the absence of a vaccine, the social vaccine of education and awareness is the only preventive tool

[2] See, http://www.unaids.org/en/.

we have. It is appropriately said that prevention begins with information. Media, which conveys information and moulds public opinion, must remain at the heart of our campaign to help people make informed choices.

Countries such as Thailand that have recorded declining trends of HIV/AIDS infection have demonstrated that this pandemic beats a retreat in the face of determined and sustained efforts in generating awareness among people, and empowering people with information to combat it effectively. Visibility in the media is an effective step towards creating greater awareness. Leaders of media, in cooperation with other segments of our polity and society, can play a significant role in educating public opinion.

In June 2001, at UN General Assembly Special Session on HIV/AIDS, the Heads of the State & Representatives of Governments, affirmed that *"Beyond the key role played by communities, strong partnerships among governments, the United Nations System...people living with AIDS and vulnerable group...the media, parliamentarians, foundations, community organizations and traditional leaders are important"* [3]

The media has the potential to create widespread awareness on HIV/AIDS, to promote the positive attitudes towards people living with HIV/AIDS, and influencing people to change high risk behaviour that make them vulnerable to the infection. It has a pivotal role to play in a fight against AIDS. It is a well known saying that "education is the vaccine against AIDS"

According to a survey conducted in India, 70% of Indians identified television as a primary source of information about HIV/AIDS. At the United Nations Assembly Special Session on HIV/AIDS in June 2001, it was agreed by the governments of the State that *"By 2005, ensure that 90%, and by 2010 , 95% of youth aged 15-24 have information, education, services and life skills that enable them to reduce their vulnerability to HIV infection"*.[4]

II Role of media

An effective media can raise the awareness level and can also bring about sustainable behaviour change thereby reducing vulnerability to the virus. Media is capable of performing the following roles in preventing HIV/AIDS:

a) *A channel for communication & discussion*: One of the roles of Media is to open the channels for communication and foster discussions about

[3] Declaration of Commitment on HIV/AIDS, adopted at the United Nations General Assembly Special Session on HIV/AIDS, 27 June 2001, New York, para. 32.
[4] *Id.* at 23.

HIV and interpersonal relations. Addressing HIV/AIDS in the entertainment programmes can have an enormous impact on the society at risk.

b) *A vehicle for creating a supportive and enabling environment:* Mass media can be instrumental in breaking the silence that envelopes the disease and in creating an encouraging behavior for combating with existing social norms and making positive changes in the society. For example, the Indian village, Lutsaan, turned its back on the dowry system after listening communally to Radio soap opera *Tinka Tinka Sukh* (Little steps for better life) aired on All India Radio.[5]

c) *Facilitator for removing stigma and discrimination attached with the disease*: HIV/AIDS afflicted individuals, besides the anatomical discomforts, undergo the mental suffering of stigma and discrimination at the hands of the society. A number of media campaigns have focused on the need to overcome prejudice and encourage solidarity with people infected/affected by virus. WHO has various extraordinary stories of HIV people who are not only fighting the virus but are also playing an integral role in prevention of AIDS.[6]

d) *A tool for creating a knowledge base for HIV/AIDS related services*: The collaborative efforts of all modes of media in association with NGOs, State organizations, and service providers have brought to the lime light the availability and source of beneficial services like counseling, testing and condom provisions, treatment and social care. The broadcasters and print media have a specific role to play as their efforts have tremendous recall value. For instance, The Kaiser Family Foundation in partnership with media companies have promoted dedicated toll free hotlines and has launched websites for educating the people about HIV/AIDS.

e) *Education through entertainment*: For creating an efficacious awareness about HIV/AIDS, the messages need to be informative, educative as well as entertaining as these are mutually exclusive. For instance, in 2002, Doordarshan, NACO and BBC World Service Trust joined hands in order to launch the country's mass media awareness programme about HIV/AIDS. The campaign was launched with an idea of spreading education in a more entertaining way with a popular interactive detective series Jasoos (Detective) Vijay, and a reality youth show *"Haath se Haath Milaa"*, which had won the prestigious Indian

[5] Available at: http://www.sahims.net/dolibrary/200401_January21%20Wed/ Global %20Media%20AIDS %20Initiative%20UNAIDS.pdf.
[6] Available at: http://www.who.int/hiv/photostories/en/index.html.

Television Awards, 2003. In November 2005, BBC World Service Trust in association with Doordarshan and NACO were running India's largest HIV/AIDS awareness mass media campaign. In an interview Richard Gere, AIDS activist and famous actor,[7] admitted that most public service announcements are unsuccessful as they are not entertaining. The education of HIV/AIDS has to be spread as if we are selling the product. Thus, a holistic approach for dealing with the emotional, psychological and physical realities is to be adopted. The Heroes Project is a public education initiative launched by Richard Gere and Parmeshwar Godrej to work with Indian media companies and leaders to develop coordinated public education campaigns on HIV/AIDS. It is supported with a grant from the Avahan Initiative of the Bill & Melinda Gates Foundation and by the Henry J. Kaiser Family Foundation which provide technical and substantive expertise to the project. Heroes project[8] which hosts HIV/AIDS awareness show with SUN TV creates a mega platform, bringing together the South Indian Entertainment fraternity in an effort to draw public attention to the issues of HIV/AIDS. Even Star Celebrities are playing an important role. An Actress, Prachi Rathore, has been awarded with Special Max Stardust award, 2005[9] for her contribution towards creating awareness about HIV/AIDS in Rajasthan. Movies like *'My Brother Nikil'* and *'Phir Milenge'* are an attempt in educating people with entertainment.

f) Mainstreaming: Broadcasters are mainstreaming the HIV issue across a number of programmes, ensuring that the message permeates a diverse range of output, not just outlets and public service messages dedicated specifically to the issue. The fact that virus could affect all sections of the society is reinforced in such a way that many people who might not pay attention to a traditional AIDS campaign or who do not choose to watch AIDS programming, are exposed to HIV/AIDS messages. A coordinated, multifaceted campaign has greater impact than a single programme. Documentaries, new items, concerts, public service announcements, competitions, hotlines, books and websites can be linked together to reinforce awareness, information and messages about HIV related attitude and behaviour.

g) Putting HIV/AIDS on the news agenda and encouraging leaders to participate: In recent years several leading broadcasters from around the world have found innovative ways to report on the epidemic. The

[7] Available at: http://www.youandaids.org/Interview/Richard%20Gere/index.asp.
[8] Available at: http://www.heroesprojectindia.org.
[9] Available at: http://in.movies.yahoo.com/060117/24/621dj.html.

more the leaders see about HIV in news the greater the resources they invest in anti-AIDS strategies, which in turn lead to increased media coverage of the issue and helps to sustain public awareness which again has an impact on leaders' priorities.

h) Sharing resources and pooling material: Several campaigns were successful as they fully utilized the opportunity of pooling the available resources with others by sharing expertise and material. As a part of the compaign the trust produced weekly, youth focused reality television show *Haath se Haath Milaa* wherein the *yuva* stars traveled across the country to spread awareness about HIV/AIDS.[10]

i) Capacity building: Successful partnerships need not be with other media outlets. Alliances of NGOs, government departments and foundations can bring significant benefit for both the parties. For instance, as a result of the *KNOW HIV/AIDS* partnership, the Kaiser Family Foundation have offered the broadcasters expertise in terms of pinpointing key messages, giving up to date information and building HIV knowledge with creative media teams.

j) Media as an institution of oversight, restraint and collaborative efforts: Media can render yeoman's service in providing accurate and correct news coverage of HIV/AIDSS, facilitate eliciting and generating public response to state sponsored efforts. Such efforts have the potentials to awaken social and political leaders to review their strategies and take mid course corrections in regard to policy concerning HIV/AIDS.

In such a process, the media has the potential to influence public opinion and attitudes about HIV/AIDS, including attitudes towards people living with HIV/AIDS. An analysis of media coverage and public opinion over several decades concluded that there is a strong relationship between them. When the media focuses on a particular issue, there is a higher degree of public awareness and support to tackle that issue. Attitudes affect how people respond to HIV/AIDS and how people with HIV/AIDS are treated or cared for by their peers, employers, families, communities, the health care system and the justice dispensing system.

Media too have the capability to bring about transformation in the thinking pattern of the society in respect of PLWHA and thus sowing the seeds of attitudinal changes. Media can be a great facilitator for the preventing process while educating the need for a healthy behaviour towards those individuals most vulnerable to HIV/AIDS and those individuals affected by it.

[10] Available at: http://sify.com/movies/bollywood/fullstory.php?id=14022815.

III The Tasks Ahead

The importance of and the need for the participation of media in fighting AIDS has been time and again felt by the governmental and NGOs. On the inauguration of a seminar organized by Sachetana, an NGO, the convener of the programme and a well known journalist Rahul Deo[11] commented that media could play a motivational role to free the society of myths and misconceptions attached to HIV/AIDS. "Every society is vulnerable to infection. While organising similar seminars in Jaipur, Bhopal, Dehradun and Raipur, we realised that even the policy makers and legislators were not fully acquainted with facts about HIV/AIDS. It was under this backdrop that Sanchetana decided to hold seminars for media persons all over the country," he explained. Rahul Deo further obligated the media to be careful while reporting on HIV/AIDS as the affected person bears a strong social stigma. Navin Joshi, another senior journalist, also demanded urgent attention in dissolving the social stigma related to it.

In a two day seminar organized by Sachetana and supported by Udayan Sharma Foundation, NACO and Samyak, senior journalist Sunita Aron said the old and stagnant statistics cannot be published time and again and suggested the state authorities to revise their records and come out with more details about the quality and nature of life of those who were highly vulnerable and also provide success stories of those carrying on with life despite being HIV positive. Thus, keeping in mind its crucial role in combating HIV/AIDS, media needs to be extra cautious while reporting and there is an urgent need for it to change the way it reports on HIV/AIDS.

To address the HIV/AIDS crisis facing the nation, the first-ever India Media Leaders Summit on HIV/AIDS was convened by the Ministry of Information & Broadcasting, the Ministry of Health & Family Welfare, and the Heroes Project in partnership with the Kaiser Family Foundation and Avahan Initiative of the Bill & Melinda Gates Foundation on 6 January 2005 in New Delhi. Twenty five top executives from the leading media companies across India met the Prime Minister, Dr. Manmohan Singh to discuss what they could do to address the growing epidemic in India. The media leaders and the government[12] unanimously proposed a plan to use their resources to propagate information about prevention of HIV and to help combat AIDS related stigma and discrimination. The Prime Minister, in his speech at "Media Leaders Summit on HIV/AIDS",[13] spoke,

[11] Available at: http://cities.expressindia.com/fullstory.php?newsid=160989.
[12] "Media and government plans to address HIV/AIDS in India", EHM News Bureau - New Delhi.
[13] Available at: http://www.heroesprojectindia.org/events/ev_pmsummit.htm.

"I am happy to associate myself with the Indian Media Leaders Summit on HIV/AIDS. I believe this meeting is a sequel to the Global Media Initiative hosted by the United Nations Secretary General, Mr. Kofi Annan in January 2004 in New York. It is an important milestone in our fight against the AIDS pandemic. The world has come to recognise this as a global threat to humanity. However, like so many other such threats that mankind has battled, I am confident that we shall overcome this one too but it will require massive efforts on the part of Government, media and all actors in civil society.

In this campaign the media plays an important and determining role in educating the public, creating awareness among them and transmitting crucial information so that people become aware, remain alert and take measures to prevent its occurrence. We all know that information is power, and that awareness therefore empowers. We are meeting here today to help ensure that AIDS awareness becomes an integral part of mainstream media and that it is able to reach out to the people through its tremendous creative and communicating power.

Many decades ago Mahatma Gandhi started publishing the Indian Opinion, a fortnightly newspaper, to educate people about the rules of health and hygiene so that they could follow them and keep themselves free from disease. It is interesting and instructive to recall Mahatma Gandhi's thoughts as written in the Indian Opinion when Plague occurred in Johannesburg in 1905. Posing the question, 'What is the duty of Press on such occasions?' Gandhiji wrote that media has the crucial responsibility to report incidents of Plague as fast as possible, inform people to prepare themselves to face the situation, focus attention on the factors behind the appearance of disease, critically comment on lapses which might have contributed to the emergence and spread of plague and educate people on the issue of maintaining their surroundings clean so that the disease could be prevented.

I believe that in organizing this Media Summit on HIV/AIDS, you are all deriving inspiration from this Gandhian approach. I am glad that the Ministries of Information & Broadcasting and Health & Family Welfare have teamed up with Non-Governmental Organisations like the Richard Gere Foundation to organize this Media Leaders' Summit".

While concluding his speech, the PM proposed, "First, lead by example and lead from the front. Your behaviour needs to change first, before you seek behavioural changes in others. Second, inform your friends and empower

them, so that they can make safe choices and correct behaviour. Third, promise to uphold the dignity of every Indian living with HIV in our country by love, affection, care and social support."

According to UNAIDS and the WHO, as many as two-thirds of new HIV infections projected to occur globally by 2010 could be averted with more effective prevention and public education efforts. The practical and fastest way in which one can change anything is through media. India has the largest and powerful media group which pledged its participation in the nation wide HIV/AIDS awareness campaign. Media leaders made commitments to use their collective communication expertise and resources to reach people, especially the youth, with information about how to prevent HIV and help combat AIDS related stigma and discrimination. The wide ranging initiatives are evocative of the concern being expressed the world over.

In January of 2003 at United Nation's headquarters, Secretary General Kofi Annan brought together media leaders from around the world to focus attention on the media's role in fighting HIV/AIDS. Launched at the meeting was the Global Media AIDS Initiative, a joint effort of the United Nations, UNAIDS and the Kaiser Family Foundation, to encourage media organizations to devote resources to getting out information about HIV/AIDS. In addition to activities in India, Global Media AIDS Initiative-supported efforts are also underway in Russia, Indonesia, China, the United States and elsewhere in the world.

The main factor behind the multiplication of HIV/AIDS is that about fifty percent of PLWHA are not even aware about the disease. The power of media is tremendous as media cannot only break the silence but can also educate the people and can launch a war against the stigma, discrimination and taboo attached with the disease by encouraging the people to openly discuss about AIDS. [14]

An effective media coverage personalizes the HIV issue, encourage people to interact and share their views which in turn prompts the government to prioritise the HIV/AIDS issue in the social and political agenda. The reporting of the hidden HIV cases from the remote places of the country, instances of poor medical treatment provided to PLWHA, instances of stigma and discrimination attached with the disease, shapes the beliefs of the people, influences the attitudes of the people and the response of the government. An effective media coverage enforces the element of accountability and a

[14] Available at: http://www.youandaids.org/fFeatures/MediainNepal.asp.

sense of responsibly that encourages people to raise their voice. Media combats the disease through public education and awareness as the disease is not only a battle against a virus but is also a battle against the stigma, discrimination, cultural taboo and the ill conceived ideas of people.

Media is contributing in a global fight against HIV/AIDS as it plays an essential role in reversing the progression of HIV/AIDS. Though media has enormous potential to undertake the challenge of fighting with AIDS but to perform its responsibility with utmost efficiency requires the clear understanding of the challenge and the obstacles to spread the education about AIDS. Media can make a difference in fulfilling its responsibilities by giving the epidemic prominent news coverage, dedicating airtime/space to HIV/AIDS public service messages, including AIDS storyline in existing programmes, supporting the broadcasting of the HIV/AIDS special programming and making public service messages and original programming available to other outlets on a right –free basis.[15]

As AIDS is a global catastrophe, an issue with economic, social and security implications. media have an important role to play in raising awareness, combating "compassion fatigue" and focusing attention on what is being done and what more must be done. It is no longer some one else's problem. It is the life and death challenge of our times and we are all affected even if we are not all infected.[16] Media should understand its role and should refrain from reporting exaggerated and distorted facts as the same can criminalize the disease.[17]

In fighting the menace of HIV/AIDS, media is doing an impressive work but much more is required to be done. The task at hand requires vision, dedication and above all the creative programming that truly engages audiences with riveted attention. Broadcasters can talk to listeners and viewers about HIV and can elicit their views. They can build alliances and partnerships. They can put pressure on the powerful to take the disease seriously and give people the information that they need to protect themselves. Let us hope that media continues to play a key role in reversing the progression of HIV.

[15] Available at: http://www.eldis.org/static/DOC14652.htm.
[16] Available at: http://www.mediachanel.org/views/dissectoraids.shtml.
[17] Shevory Thomas C., *Notorious HIV: Media Spectacle of Nushwan Williams*, 214, University of Minnesota Press.

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 : BALANCING GENDER EQUATIONS

*Aditi Choudhary**

I Introduction

DOMESTIC VIOLENCE means violence within the family. The term domestic violence though sounds gender neutral, it is generally used to label crimes committed by males against females who are related to them through blood, law or intimacy. The United Nations Declaration on the Elimination of Violence Against Women, 1993 defines violence occurring in the family as encompassing, but not being limited to "physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation".[1] Domestic violence is a malice widely prevalent, transcending boundaries, religions, cultures and income groups, but has remained largely invisible in the public domain because of it being accepted by our society as an inevitable part of gender relations[2].

The forms of domestic violence may vary but the underlying purpose is common i.e. to maintain male dominance within the patriarchal setup. This violence manifests itself interalia as cruelty (mental and physical) by the husband or his relatives, dowry death, abetment to suicide and marital rape. Domestic Violence can be dealt with as a criminal offence under the existing heads of crimes of dowry death, abetment to suicide, hurt, cruelty, wrongful restraint wrongful confinement, rape under the Indian Penal Code (IPC), as also under the laws relating to *sati*, dowry, immoral traffic, female foeticide etc. Domestic violence relating to dowry, sati and female foeticide are culture specific to India. Under most of the personal laws domestic violence provides a ground (cruelty) for divorce and judicial separation. It was with the introduction of Section 498A[3] in the IPC by the Criminal Law (Amendment) Act, 1983, that domestic violence was recognised as a specific criminal offence.

* Lecturer, Law Center-I, Faculty of Law, University of Delhi.

[1] Art.2, The United Nations Declaration on the Elimination of Violence Against Women, 1993.

[2] The National Family Health Survey of 1998-99 conducted by the International Institute for Population Sciences found that 56 per cent of women in India accept wife beatings as justified (p.72). http://www.nfhsindia.org/data/india/indch3.pdf.

[3] This section deals with cruelty by a husband or his family towards a married woman.

The statistics on domestic violence expose the widespread nature of the problem[4]. A study carried out by the International Centre for Research on Women in 2004 found that 40 per cent of Indian women faced some form of domestic violence.[5]. A study, "Section 498A, IPC : Used or Misused?" conducted by the Delhi-based Centre for Social Research (released on August 30, 2005) found that close to five crore women in India suffer violence in their homes and only 0.1 per cent of them ever pick up the courage to report the abuse The study revealed a general tendency to avoid seeking redress among the victims of domestic violence and if the victim decides that she wants to take action against her husband or his relatives, she is always advised to reconcile the matter at every stage, according to the study.[6]

Although remedies in civil and criminal law did exist[7], there were still certain issues that went unaddressed. There was felt wanting, a need for providing a remedy by way of a comprehensive legislation dealing with the problem of domestic violence under civil law. A law was needed to address situations of disharmony in the family where the situation had not reached a stage where either separation or divorce was inevitable. Also situations where the aggrieved woman for some reason did not want to initiate criminal proceedings against her perpetrator but nevertheless wanted his action restrained. There was a need to provide a remedy under the civil law which would give the abused woman an alternative remedy whereby she could insulate herself from violence without being deprived of the basic necessities of life and without disintegrating her family. It is with these objectives that the Protection of Women From Domestic Violence Act, 2005 (hereinafter referred to as the Act) has been enacted. The legislation aims at providing for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto[8]. It aims at empowering women. It seeks to protect women from all forms of domestic violence and check harassment and exploitation by family members or relatives.

[4] The National Crime Records Bureau records that in 2003 there were 6208 incidents of dowry death in the country and 50703 incidents of cruelty by husband and relatives. http://ncrb.nic.in/crime2003/cii-2003/Table_%205.2.pdf.

[5] Available at http://www.telegraphindia .com/1050703/asp/look/story_4938002.asp.

[6] http://www.csrindia.org/Events_Seminars_Dialogue_Conferences/498A-30th%20August,%202005/Final %20Seminar%20Report.pdf.

[7] The State of Maharashtra enacted the Maharashtra Protection of Women Act, 1994. The Act interalia provides for the constitution of a Reconciliation Cell for reconciliation between the parties, appointment of "*Lok Mitra*" for collection of information about incidents of crime and violence against women in a particular area and appointment of special executive magistrates. It does not provide for any civil remedy.

[8] Objective as mentioned in the Act.

II Background of the Act

The Act is the result of the initiative taken by women's organizations. The Government, women activist lawyers and NGO's had been working (for more than a decade) for making possible a legislation on domestic violence. The Lawyers Collective, an NGO working in the field of human rights, drafted a model law on domestic violence in 1992 which was widely circulated. In 1994, the National Commission for Women set up a Committee to look at this law. It then drafted a proposed law to safeguard women from domestic violence. Thereafter in 1999, the Women's Rights Initiative of the Lawyers Collective (LCWRI), drafted the Domestic Violence to Women (Prevention) Bill in consultation with various women's groups. This Bill was drafted in accordance with the U.N. Framework for Model Legislation on Domestic Violence and had the wide support of the women's movement to its major provisions. After much pressure from the women's groups, the Government of India introduced a Bill on domestic violence in the Lok Sabha, titled the Protection From Domestic Violence Bill.2001. This Bill invited sharp criticism from the women's movement. Activists felt that this Bill if passed and implemented might turn out to be very dangerous in its implications for women facing domestic violence. The passage of this bill was stalled because of the wide spread protest of women's organizations against the narrow definition of domestic violence, the 'self defence' plea in it, mandatory counseling for both- victim and abuser, so also its omission of the right of the aggrieved woman to the continued occupation of the matrimonial home. The LCWRI submitted a model draft in 2003 which was more in tandem with the 'demands' of women's groups.

After the lapse of three bills, it was finally the Protection of Women from Domestic violence Bill, 2005 (Bill No. 116 of 2005) which culminated in the present Act. The Act symbolizes India's commitment under the UN Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and its acceptance of the recognition of women's rights as human rights that was included in the Vienna Accord 1994 and the Beijing Women's Conference 1995.

III Who is an "aggrieved person"?

Section 2 (a) defines an aggrieved person as "any woman who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent." Respondent here means any adult male person who is or has been in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought relief. And in the case of an aggrieved wife or

female living in a relationship in the nature of marriage respondent can be a male or female relative of the husband or male partner.

The criteria of an aggrieved person under the Act is the existence of a relationship between the victim and the perpetrator. The nature of relationship is qualified as a "domestic relationship". Domestic relationship means a relationship between two persons who live together in a shared household or have lived together in a shared household. And such living together is at a time when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family[9] Therefore the two requirements are firstly that the aggrieved person is related to the respondent by blood, marriage, relationship akin to marriage or adoption and secondly that she should be living or had lived with the respondent in a shared household. In defining "domestic relationship" by focusing on those who share a household the Act moves to a concept of "family" more inclusive than the existing concept of family.[10]

Since the definition of aggrieved person includes women in relationships in the nature of marriage, the wider term shared household is used instead of matrimonial home. The respondent may be a male or female. Shared household means a household where the person aggrieved lives or has lived at any stage in a domestic relationship either singly or along with the respondent and includes a household whether owned or tenanted either jointly by the aggrieved person and the respondent or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right , title , interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.[11] The aggrieved person may be of any age group. Under the Act sisters, widows, mothers, single women living with the abuser are entitled to legal protection. Also not only females in the nuclear family set up but also joint family set up are covered.

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[9] S. 2 (f), Protection of Women From Domestic Violence Act, 2005.

[10] Indira Jaising, "Home is where the law is", The Indian Express, 08 September 2005. http://www.indianexpress.com/archive_frame.php.

[11] *Supra* note 9, S. 2(s).

IV What is domestic violence?

Unlike the previous Bills[12], the Act defines domestic violence in a more wholesome and comprehensive manner. The definition of domestic violence in the Act symbolizes how constant lobbying by women's organizations and NGO's can result in more meaningful legislation being passed at the end of the day.

The Act more or less adopts the definition given in the model draft Bill submitted to the Government by the LCWRI in 2003. The definition not only covers any act or omission or commission but also the conduct of the respondent where such act, omission, commission or conduct has the following effects[13]:

- harms or injures or endangers the health, safety, life, limb, or well-being whether mental or physical of the aggrieved person or tends to do so. And includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;
- harasses, harms, injures or endangers the aggrieved person with the purpose of coercing her or her relative to meet the demand of dowry or other property;
- has the effect of threatening the aggrieved person or her relative by any conduct mentioned above;
- otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Physical abuse is defined in the Act[14] as any act or conduct which is of such a nature as to-

- cause bodily pain, harm, or danger to life, limb or health or
- impair the health or development of the aggrieved person
- amounts to assault, criminal intimidation and criminal force.

[12] The Protection from Domestic violence Bill, 2002, gave a very short definition of domestic violence that was found lacking in many respects. It defined domestic violence as "any conduct of the respondent shall constitute domestic violence if he-
(a) habitually assaults or makes the life of the aggrieved person miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment; or
(b) forces the aggrieved person to lead an immoral life; or
(c) otherwise injures or harms the aggrieved person."
The definition further provided that where the respondent injured or harmed the aggrieved person it would not amount to domestic violence if the pursuit of course of conduct by the respondent was reasonable for the protection of himself or of property. This definition was found to be inadequate and not one covering all possible kinds of violence.

[13] *Supra* note 9, S. 3.

[14] *Id.*, Explanation I to S. 3

The definition is wide and includes within its ambit threats that amount to assault and criminal intimidation.

Sexual abuse is defined[15] as any conduct of a sexual nature that abuses, degrades, humiliates, or otherwise violates the dignity of women. Although the definition does not specifically mention marital rape, the offence of marital rape qualifies as sexual abuse under the definition. In the light of the partial condonation of this offence by the criminal law of the land which only acknowledges the offence in certain situations (where the wife is below 15 years of age or is living separately under a decree of separation or custom or usage) The recognition of marital rape as sexual abuse would give respite to the wronged woman. The area of marital rape has been taboo for law to address because of patriarchal considerations which have dictated the law in the arena of sexual offences. But here the bold definition of sexual abuse is signifying the crumbling of the patriarchal bastion. Recognising marital rape as a form of domestic violence and providing a remedy under civil law would hopefully be the starting point of a debate on whether the law should be content in treating this form of violence as a civil wrong only.

Verbal and emotional abuse is defined[16] as inclusive of firstly insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child and secondly repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

Economic abuse includes[17] firstly, the deprivation of economic or financial resources to which the aggrieved person is legally entitled or requires out of necessity and includes payment of rental related to shared household and maintenance; secondly, the disposal of household effects or alienation of other assets or property in which the aggrieved person has an interest or is legally entitled to use; thirdly, the prohibition or restriction to continued access to resources or facilities which the aggrieved person is using or enjoying by virtue of the domestic relationship including access to the shared household.

V Mechanism under the Act

(A) Protection officers

The Act provides for the appointment of Protection officers (PO). They are to be appointed by the State Government[18] and are deemed to be

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] *Id.*, S. 2(n)

public servants[19] and are to be under the control and supervision of the Magistrate. The terms and conditions of service and the number of PO to be appointed in each State are left to be decided by the State itself[20]. The Act requires that the PO shall as far as possible be women.[21] The duty of the PO includes –

- in case where an incident of domestic violence takes place or is reported, to inform the aggrieved person of the various reliefs she is entitled to, like a protection order or residence order and the availability of service providers so also her right to legal aid and to file a complaint under Section 498-A Indian Penal Code[22];
- to arrange for shelter if the need be, for the aggrieved person in the shelter home[23]
- to get the aggrieved person medically examined in case of such need and forward copies of the medical report to the Police Station and the Magistrate;[24]
- assist the Magistrate in the discharge of his functions under this act;[25]
- on receiving a complaint he has to make a domestic incident report[26] to the Magistrate and send copies of the report to the concerned police station and service providers in that area;[27]
- make an application on behalf of the aggrieved person for issuance of a Protection Order;[28]
- ensuring that the aggrieved person is provided legal aid;[29]
- to ensure that orders like that of monetary relief are complied with and executed.[30]

Other than these prescribed duties the PO is required to perform such other duties that may be imposed on her by the Magistrate and the Government.[31]

[19] *Id.*, S. 30
[20] *Id.*, S. 8(1)&(3)
[21] *Id.*, S. 8(2)
[22] *Id.*, S. 5
[23] *Id.*, S. 6 and S. 9(f)
[24] *Id.*, S. 9(g)
[25] *Id.*, S. 8(1)
[26] *Id.*, S.2(e)
[27] *Id.*,S.9(b)
[28] *Id.*,S.9(c)
[29] *Id.*,S.9(d)
[30] *Id.*,S.9(h)
[31] *Id.*,S.9(2)

(B) Service provider

The Act lays down the role of service providers[32] for the implementation of the Act. Service provider under the Act means any voluntary association registered under the Societies Registration Act, 1860 or a company registered under the Companies Act, 1956 or any other law, formed with the objective of protecting the rights and interests of women by any lawful means like providing legal aid, medical or financial assistance etc. It is required to register itself with the State Government as a service provider for the purposes of the Act.[33] Its powers include[34] -

- to record the domestic incident report if the aggrieved person wants and forward a copy of it to the PO and the Magistrate concerned;
- get the aggrieved person medically examined and forward a copy of the medical report to the PO and police station concerned;
- ensure that the aggrieved person is provided shelter in a shelter home, if she wants it and forward the report of such lodging to the police station;
- give counseling to the respondent or aggrieved person either singly or jointly at any stage of the proceedings when ever the Magistrate directs. [35]

To ensure the smooth functioning of the Act the service provider has been granted legal immunity for anything done in good faith in exercise of powers or discharging of functions under the Act.[36] Legal immunity is also extended to the PO[37] So also legal immunity has been given to persons informing in good faith acts of domestic violence to the PO[38] This because it is felt that the nature of the function of the service providers and PO is such that there is a high likelihood of them being sued. Also the Act casts a duty on shelter homes[39] and medical facilities[40] to provide shelter and medical aid to the aggrieved person when called upon to do so. Duties have also been cast upon the Central and State Governments to give wide publicity to the provisions of the Act, sensitization and awareness training of police, judicial and other government officers on issues addressed by the Act.[41]

[32] *Id.*, Sec 2(r)
[33] *Id.*, S. 10(1)
[34] *Id.*, S. 10(2)
[35] *Id.*, S. 14(1)
[36] *Id.*, S.10(2)
[37] *Id.*, S. 34
[38] *Id.*, S. 4
[39] *Id.*, S. 6
[40] *Id.*, S.7
[41] *Id.*, S. 11

(C) Magistrates

The Judicial Magistrate of the first class or Metropolitan Magistrate exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place, is the competent authority empowered by the Act to deal with complaints of domestic violence under the Act.[42]

VI Reliefs available under the Act

The Act has given the Magistrate a wide range of powers. The Magistrate can pass the following kinds of orders-

1] **Protection Order-** Where the Magistrate after hearing the parties is prima facie satisfied that domestic violence has taken place or is likely to take place she may pass an order prohibiting the respondent from doing interalia the following[43] -

- committing, aiding or abetting the commission of acts of domestic violence;
- entering any place frequented by the aggrieved person like her place of employment, school etc;
- attempting to communicate with the aggrieved person;
- alienating any assets or property (including stridhan), operating bank lockers or bank accounts used or held by both the parties jointly or singly by the respondent;
- causing violence to the dependents, relatives or other persons giving assistance from domestic violence to the aggrieved person.

2] **Residence order-** The Act ensures to every woman in a domestic relationship the right to reside in the shared household whether of not she has any right, title or beneficial interest in the same (not with standing anything contained in any other law for the time being in force).[44] The Magistrate, on being satisfied that domestic violence has taken place, can pass a residence order which includes the following[45] -

- restraining the respondent from dispossessing or disturbing the possession of the aggrieved person form the shared household whether or not the respondent has a legal or equitable interest in the shared household;

[42] *Id.*, S. 2(i)
[43] *Id.*, S. 18
[44] *Id.*, S. 17
[45] *Id.*, S. 19

- directing the respondent to remove himself (female respondents are not covered) from the shared household;
- restraining the respondent or any of his relatives from entering the portion the shared household in which the aggrieved person reside;.
- restraining the respondent from alienating or disposing off the shared household or encumbering the same;
- restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate;
- directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same;
- any other order deemed necessary for the safety of the of the aggrieved person or her child;
- while ordering any of the above the Magistrate may order the officer in charge of the nearest police station to give protection to the aggrieved person and help implement the order;
- direct the respondent to return to the aggrieved person her *stridhan* or any other property or valuable security to which she is entitled.

This order is extremely helpful as most of the abused women in marital relationships suffer the abuse silently because they face the threat of being rendered homeless and destitute.

3] **Monetary relief-** The Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person or her child as a result of domestic violence, such relief may include compensating loss of earnings, medical expenses, loss caused due to damage of property in control of the aggrieved person and maintenance for the aggrieved person or her children.[46] In case the respondent fails to make payment as ordered by the Magistrate the Magistrate may direct the employer or debtor of the respondent to directly pay to the aggrieved person portion of the salary or debt due.[47]

4] **Custody orders-** The Act allows the Magistrate at any stage of the hearing of an application for any relief under the Act to grant temporary custody of the child or children to the aggrieved persons specifying the

[46] *Id.*, S. 20(1)
[47] *Id.*, S. 20(6).

visitation rights of the respondent. Where the Magistrate is of the opinion that any visit of the respondent may be harmful for the child the Magistrate shall refuse visitation rights.[48] Child here means any person below the age of eighteen years and includes an adopted, step or foster child.[49]

5] **Compensation orders**- The Act empowers the Magistrate to pass compensation orders directing the respondent to pay compensation and damages for injuries both physical, mental and emotional caused by the acts of domestic violence committed by the respondent.[50]

The above relief can either be sought by filing an application before the Magistrate and can also be sought in any legal proceedings before the civil, criminal or family court in addition to and along with any other relief that the aggrieved person may seek against the respondent.[51] For instance where the bail application of the respondent is being heard in a case under Section 498A the aggrieved person can ask for any of the above mentioned orders to be passed also. It is not that before the enactment of this Act women could not avail of these relief under the already existing laws, but for getting such relief she would have to go before different forums and the task would be a tough one in terms of time and resources spent. But after the enactment of the Act an aggrieved person can seek all the remedies before a single forum.

VII Procedure

The aggrieved person, PO or any other person on behalf of the aggrieved person can present an application to the Magistrate for seeking any of the above mentioned reliefs.[52] The Magistrate is required to fix the first date of hearing ordinarily not beyond three days from the receipt of the application by the court.[53] And he is required to dispose of every application within a period of sixty days from the date of its first hearing.[54] Notice of the date of hearing is to be given by the Magistrate to the PO who shall get it served on the respondent or any other person.[55] The Magistrate may at any stage of the proceedings direct the respondent or the aggrieved person, either singly or jointly, to undergo counseling with any member of a service provider qualified and experienced in counseling.[56] In any of the proceedings

[48] *Id.*, S. 21
[49] *Id.*, S. 2(h)
[50] *Id.*, S. 22
[51] *Id.*, S. 26
[52] *Id.*, S. 12 (1)
[53] *Id.*, S. 12 (4)
[54] *Id.*, S. 12 (5)
[55] *Id.*, S. 13(1)
[56] *Id.*, S. 14 (1)

under the Act the Magistrate may secure the services of any person, preferably a woman family welfare expert for the purpose of assisting him in the discharge of his functions.[57]

The Magistrate is empowered to pass such interim orders as he deems just and proper on the basis of the affidavit of the aggrieved person.[58] The Magistrate, where he has passed any order under the Act, is required to order that a copy of such order shall be given free of cost to the parties to the application, the police officer in charge of the police station which has jurisdiction in the matter, and the service provider.[59] This is to facilitate the implementation of the Magistrate's order in an expedient manner.

The Magistrate can conduct the proceedings in-camera having regard to the circumstances of the case and the desire of the parties.[60] It is in the interest of the aggrieved persons that in-camera proceedings have not been made mandatory because it has been found that in-camera trials in most rape cases are helping abusers more than the complainants as the abused woman is mostly left alone in court with only their lawyers to support. Appeal against the order of the Magistrate lies to the Court of Sessions.[61]

VIII Penalties under the Act

The Act mentions two penalties: firstly in case of breach of the protection or interim protection order, secondly where there is failure or refusal on the part of the PO to discharge his duties without sufficient cause. The breach of the protection order or interim protection order by the respondent is a cognizable and non-bailable offence under the Act[62] and is punishable with imprisonment up to one year or with fine up to twenty thousand rupees or both[63]. Where the PO fails or refuses to discharge his duties as directed by the Magistrate in the protection order without sufficient cause then the punishment prescribed is the same as stated above.[64]

IX Apprehension about the Act

The major apprehension about the Act is with regard to it meeting the same fate as previous legislations aiming at gender justice. Apprehensions are that it may be abused like Section 498A IPC by urban women and would be meaningless to rural women who have no access to courts. Although

[57] *Id.*, S. 15
[58] *Id.*, S. 23
[59] *Id.* S. 24
[60] *Id.*, S. 16
[61] *Id.*, S.29
[62] *Id.*, S.32
[63] *Id.*, S.31
[64] *Id.*, S.33

there is no paucity of legislations for empowering women, getting them implemented in their true spirit and making them relevant to the lives of women has proved challenging especially in rural areas. This is mainly because sufficient attention has not been paid towards monitoring the impact of such legislation, enacted at the behest of women's groups. The pro-women legislations of the Eighties — amendments to rape and anti-dowry laws as well as the Family Courts Act provide glaring examples of this trend. For instance even two decades after the enactment of the Family Court Act, around 18 states and Union Territories have failed to set up the institution of family courts. Critics argue that if marriage counsellors or conciliators who were appointed under the Family Courts Acts failed to bring respite to women, what is the guarantee that the office of a PO will function with greater efficiency and gender sensitivity?[65]

For the effective implementation of the Act, the state governments would have to set up yet another supportive mechanism, the office of the PO. The PO is entrusted with the duty of assisting the magistrate in the discharge of his duties. Considering the number of magistrates' courts, the number of protection officers would be huge. It is feared that this would be further bureaucratizing and overburdening the lower rung of the state bureaucracy. Also it is apprehended that the overburdened Magistrate's Court which deals mainly with criminal matters like bails, cognizance of offences and trial of petty crimes may not be competent to switch over to claims of a civil nature and issue injunctions, protection and maintenance orders.[66]

The success of the Act greatly depends on the role played by POs. As their responsibility under the Act is tremendous it is important that the State Government appoints persons who are well skilled, trained for the job and qualified. A proper infrastructure would be required to support them by way of proper offices, staff to assist and funds at their disposal. Also there is a need for them to go out in the field, be accessible and have an interaction with the community in general, so that aggrieved persons or others come forward and inform them about incidents of domestic violence and on getting such information they can act accordingly. This is important, in view of the hesitation women have in reporting incidents of domestic violence. Also the purpose of the Act would be defeated if there is improper sensitization of POs, police, counselors, lawyers and the judiciary will also be required to make the Act effective.

[65] Flavia Agnes, "How to implement the Domestic Violence Act", The Asian Age India, 19 September 2005. http:www.asianage.com/?INA=2:175:175:181600

[66] *Ibid.*

It is felt that the Act is not being just, to the tormented mother-in-law or sister-in-law where the perpetrator is the daughter-in-law, as it does not permit filing of such complaints. This is because, under the Act, the definition of "respondent" only includes adult male persons, husbands or their relatives. Also having despite its enormous scope, the Act does not cover those relationships where the parties have not lived together e.g. long term dating couples living separately and same sex relationships.[67]

Apprehensions are that the definitions of emotional and economic abuse are very wide and all manner of subjective expectation of the applicant can be read into them. In addition, the Act is also deficient in not providing sufficient deterrents by way of penalty to prevent and punish false complaints.[68] This becomes important in the wake of reports on the abuse of Section 498A IPC.

The definition of aggrieved person enables a woman in a live in relationship to claim the same rights and protection as the legally wedded wife. This equating of rights would amount to implicitly granting recognition to such relationships and this it is felt will be "opening up floodgates of sexual promiscuity and redeem Hindu marriages out of the yokes of monogamy" It is apprehended that problems would arise when the right of residence of a legally married wife clashes with the right of a so-called "immoral and promiscuous" woman and it will be at that moment when we will be forced to confront our own notions of sexual morality.[69]

X Achievements

With the enactment of the Criminal Law (Amendment) Act, 1983 and the introduction of Section 498A in the Indian Penal Code, domestic violence came to be inextricably linked with dowry harassment. This linking of domestic violence to dowry restricted the beneficial ambit of Section 489A. By placing dowry violence on a special pedestal, the routine and day-to-day violence faced by women across class, community was denied recognition. The police refused to register a "simple" case of domestic violence as according to them, this did not amount to cruelty under S.498A of IPC. In order to access the criminal justice system, violence faced by women within homes had to be superficially and falsely attributed to dowry. With the Act, victims will now be able access the legal system without having to plead dowry related harassment. The Act acknowledges that domestic violence is

[67] Abhishek Singhvi, "Thrash it out again", Hindustan Times, 21 September 2005. http://www.hindustantimes.com/news/181_1496008

[68] *Ibid.*

[69] Flavia Agnes, "Some reflections on the Protection of Women from Domestic Violence Act", The Asian Age India, 21 September 2005. http:www.asianage.com/?INA=2:175:175:181600

a widely prevalent and universal problem of power relationships than the culture specific phenomenon called "dowry death." It marks a departure from the penal provisions which hinged on stringent punishments and arrests without warrant to positive civil rights of protection and injunction.[70]

The new statute provides recognition to the problem faced by millions of women in our country and will lead to a greater awareness of this issue among the executive and judiciary. A judge called upon to provide relief to a woman under the new Act is not just bound by the provisions of the Act but the ideological framework which underscores the enactment. With gender sensitization woman approaching the court for these reliefs will no longer be examined through biased lenses.[71]

The Act goes further than the traditional understanding of domestic violence as being not only, actual or threatened, physical maltreatment, but sexual, verbal or psychological abuse as well. Women mostly tolerate domestic violence silently because they have no separate alternate accommodation to stay in or no independent financial resources to support them or they fear that they would lose the custody of their children. The Act takes care of all three compulsions and provides for the remedy of residence order, monetary relief and custody order. The custody order will help in situations where the woman is blackmailed into exchanging her right to property and *stridhan* for the custody of her children. These provisions are significant in that they recognize women's right to a violence-free life, and offer the right to stay in the matrimonial home or shared household, while still ensuring safety through protection orders and protection officers and enabling her to have the custody of her children. The right to shared residence recognizes the right of a woman to property may not be in terms of ownership but definitely in terms of right to residence. This clause has a dual purpose, firstly to prevent destitution of women and secondly to empower them by ensuring their protection from violence in the home.[72] This is all the more significant in the absence of the right of women to matrimonial property. The right to reside in the household is one right that has never been explicitly spelt out in any law before.[73] The inclusion of dowry harassment is also an important aspect of the Act.

Presently cases of domestic violence under the criminal law are handled and investigated by police officers. The Act provides for the

[70] *Ibid.*
[71] *Ibid.*
[72] Rajeshwari Sunder Rajan, "Rethinking Law and Violence: The Domestic Violence (Prevention) Bill in India, 2002", No.3, Gender and History, Vol. 16, 774, November 2004.
[73] *Supra* note 10.

appointment of protection officers appointed by the State and most of whom would be women, such protection officers will hopefully be more responsive and sensitive to the needs of abused women than the police is in most such cases.

The territorial jurisdiction clause of the Act is wide enough to take into consideration cases where the aggrieved person may move out of the scene of domestic violence and may take refuge elsewhere. Under the Act the Judicial Magistrate of the First Class where she temporarily resides also has been made a competent court. This will facilitate the aggrieved person to contest the case.

Although critics of the Act feel that allowing outsiders to intervene in the affairs of the marital home would further complicate matters. Cynics feel that the Act like other laws to help women in distress would not be successful as women in distress do not want to seek help of the legal system. They feel that the Act would be misused like Section 498-A IPC and would lead to an increase in divorce cases. Also that the definition of domestic violence being so wide every second adult male in the Indian society would qualify as a "respondent" under the Act, there would be increase of litigation and increase in the number of divorce cases. These fears are baseless and even if some do come true this would be a very small price that we will be paying to compensate the women of India who have been silently suffering domestic violence for centuries. Whatever the fears the fact is that "the social context of India justifies this kind of surgical legislative intervention"[74].

Unlike the Bill of 2002, which provided for mandatory counseling of the victim along with the respondent, the Act does not make counseling mandatory but leaves it to the discretion of the Magistrate to direct counseling of the parties either jointly or singly and for this purpose the services of a qualified service provider are to be obtained. Counseling through the direction of the court would help in changing the attitude of society towards counseling as a means of overcoming marital problems and overcoming the inhibition of discussing family problems with family experts which would help in the preservation of marriages. The provision of counseling by trained counselors will definitely go a long way in correcting abusive behavior of the respondent and will help reduce the frequency of such cases.

In nuclear families living in urban areas where families are isolated from each other and community hardly has any role to play in resolving family problems the role of the counselor is crucial for correcting abusive

[74] *Supra* note 59.

behavior and resolve marital discord. But what becomes more important is that the counseling agencies in turn are themselves gender sensitized and play a positive role of gender sensitizing the victim and the abuser. The victims need to be educated not to take the suffering of violence as a matter of destiny and as a part of the package deal of marriage. The abuser needs to be educated that women cannot be taken for granted; they are equal citizens endowed with equal human rights as men and that the State is there to protect their rights. Also the provision of the Magistrate taking the assistance of family welfare experts in assisting him in discharging his functions[75] will go a long way in helping settle cases of domestic violence in a more amicable manner.

Critics feel that the Act is not being just to the tormented mother-in-law or sister-in-law where the perpetrator is the daughter-in-law as it does not permit filing of such complaints. The Act enables the wife or the female living in a relationship in the nature of marriage, to file a complaint against any relative of the husband or the male partner, while it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner. This criteria of "respondent" is in the interest of wives and female partners where in a patriarchal society like ours, allowing cases to be filed against the wife would have lead to a gross misuse of the law since false counter cases could be filed against a wife because the husband's family not only sympathizes with him but often also participates in perpetuating acts of violence within the home. The comprehensive definition of aggrieved person enables more and more women in domestic relationships who are abused to take recourse to law and assert their right to be free from violence.

Unlike the Bill of 2002, the Act of 2005 is not hypocritical and addresses social realties, its scope is wide, it not only covers women in valid marriages but also women in relationships in the nature of marriage. It is the latter section of women whom society ignores because of the tag of immorality attached to their illegal status. The Act of 2005, here looks at the issue of domestic violence as a human rights issue of the right of a woman to lead a dignified existence and does not differentiate between women victims on the ground of legality of their relationship. The Act will definitely challenge sexual puritanism in legal forums when the rights of the 'other woman' are enforced.

[75] S.15.

XI Concluding remarks

It needs to be recognized that violence against women is a manifestation of historically unequal power relations between men and women, which has led to domination over and discrimination against women by men. It has prevented the full advancement of women. In addition, violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared to men.[76] The inferior status accorded to women in the patriarchal set up is responsible for the high rate of domestic violence. Women are taken for granted and their suffering treated as natural. It is about time women should be acknowledged as equal citizens and bearer of human rights.

The Act helps to demolish the private- public divide in laws relating to family and gender. It acknowledges a social wrong that has for long been socially endorsed. It acknowledges that the home can be a site of violence against women where the State needs to intervene and shall intervene. The Act definitely provides a better alternative to tackling of domestic violence (especially in terms of relief to the victim). The various remedial orders under the Act will help in the social and economic empowerment of women. It will provide respite to millions of women who suffer silently, acts of domestic violence (silence being justified at times "for the sake of family honour").

The Act is a comprehensive legislation which has to be welcomed for its progressive spirit and content. It helps India fulfill its international commitments under CEDAW. It is a social welfare legislation enacted not only for the sake of women but for the progress of the society as a whole. No society can claim to be developed and civilized which breeds the collective culture of silence and tolerance to domestic violence. Also no society can be just which denies women their basic human rights. Apprehensions apart, the proper implementation of the Act would definitely arrest the rising graph of domestic violence in the country.

[76] *Supra* note 1.

IS THERE ANY RELATIONSHIP BETWEEN ENVIRONMENTAL CRISIS VIZ. AIR POLLUTION AND NATURE OF PRODUCTIVE TECHNOLOGY?

*Mononita Kundu Das**

I Introduction

THERE IS a close relationship between man and environment and when we talk of environmental protection, it must be relative to the needs of man in time and space. Today we talk of environmental protection because it is this environment which fulfils our physical requirements. Our total dependency on environment is the most important reason as to why at present we are so much concerned with the different kinds of threat which looms on our environment. The question arises as to how these threats have originated. These threats are the direct result of massive industrialization, mechanization, motorization and chemecalisation of agriculture. Precisely we can say that man is polluting his life sustaining supply of air, food and water at a very fast pace.

There is a traditional reluctance for the regulation of consumption and population. So, it is critical to understand how far technology can take us towards sustainable development. One of the major challenges that the world is facing today is population explosion. This population explosion has a negative effect on sustainable development. The term sustainable has originated from the Latin word 'sustinere' which means 'to hold up'. The World Commission on Environment and Development established by the U.N. General Assembly in December 1983 was chaired by the then Norweigian Prime Minister G.H.Brundtland and the report of this Commission was released in 1987, which made it clear that the existing patterns of development are not sustainable. This commission defined the term "sustainable development" as the development, which meets the needs and aspirations of the present without compromising the ability of the future generations to meet their needs.[1] The objectives of sustainable development are as follows:

1. To follow the path of development.
2. To use the renewable nautral resources in such a way that their rate of regeneration is always in excess to their rate of use.

* Faculty of Law, National Law University, Jodhpur, Rajasthan, India.

[1] Brundtland.G.H. (chairman), "Our Common Future" Report of the proceeding of the World Commission on Environment and Deveopment (WCED) 1987.

3. To use the non-renewable resources in a sparing and responsible manner and ceaselessly work to find substitutes for them.[2]

The environmental crisis, which we are facing today, is due to various types developments. But development is inevitable; therefore, we should pursue sustainable development.

II Promises of technology

Now the question that comes to the forefront is that what are the promises of 'Technology'? Today, the climate for innovation seems uniquely rich, poised between technological revolutions in progress and others just emerging. If environmental goals are integrated into these innovations, the transition to a sustainable future will be cost effective and long lasting. Enormous improvements in the quality of the global environment could be made with existing technologies, often at no, or small, additional cost. In agriculture, for example, alternative practices that exploit natural cycles and inter-relations while decreasing reliance on off-farm inputs such as synthetic fertilizers can drastically reduce environmental damage. Increasingly, these practices are also being recognized as economically competitive with conventional input-intensive farming systems.

The term "information technology" encompassing developments as diverse as real time monitoring of effluent streams, computer controlled manufacturing, software development, and chemical and biological sensors, undoubtedly cover the broadest range of potentially important new technologies. All these technologies could have an enormous impact on pollution prevention and control.

III Globalization of technology

Globalization means removal of national barriers to information, investment, and trade. Science and technology have become highly internationalized. Technological innovations in environmental protection emerge primarily in the industrialized countries with the infrastructure and resource to conduct the necessary and development. The costs of purchasing and implementing these new technologies can be prohibitive for developing countries. As a result international environmental treaties now commonly include provisions of technology transfer and technological assistance from developed to developing countries. The provisions generally obligate developed countries to transfer environment friendly technologies to developing countries on "fair and most favorable" terms. Technology is diffusing internationally

[2] S.P.Mittal, "Towards Sustainable Development", Kurukshetra, 42, Feb 2000.

with growing speed and it means that environmental problems of global scope can call forth technological responses in equal scope.

IV The role of law in technological development

It is critical to understand the role law can play in developing, promoting, and distributing environmental technology to meet tomorrow's demands. Technology transfer requirements are also a critical part of many specific international environmental treaties. Although it is not clear to what extent these provisions are enforceable, there is general agreement that technology transfer is a necessary concession from the industrialized North to gain developing countries' participation in and implementation of global environmental treaties.

Of course, through certain types of standards the law can also create strong incentives for technological innovation. By setting standards and deadlines to to be met, without identifying the specific types of technology that must be adopted, the law can create greater flexibility and reward those entrepreneurs who discover less expensive technologies for meeting the standards. In some instances, the law can set "technology forcing" standards at a level beyond what current proven technologies can meet. In this way, every industry player is required to change technologies or production processes to achieve environmental goals. This "technology forcing" approach has been used only rarely at the international level, most notably in the Montreal Protocol regime, where certain ozone destroying substances were phased out before substitutes had been developed for all of the substances' uses. Technology forcing has been more common at the national level. Technology forcing regulation can spark a flurry of research and development activity as industry looks for profitable ways to meet the regulatory standard. For example, in the 1970 Amendments to the Clean Air Act, Congress imposed numerical standard for fuel efficiency and auto emissions that could not be met by existing technology, together with stiff penalties for failure to meet the standards. The 1970 Amendments covered critical pollutants such as hydrocarbons, carbon monoxide and nitrogen oxide; other pollutants and stricter standards were added in subsequent amendments in 1977 and 1990, Clean Air Act § 202, 42 U.S.C. § 7521 (1970).[3]

[3] § 202. Emission standards for new motor vehicles:
(a) Except as otherwise provided in subsection (b) of this section
(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. * * *

These standards were very stringent, requiring a 90% reduction in emissions in only five years. Indeed, automakers proved unable to meet them.[4] In the same period, emissions of carbon monoxide and other compounds were cut roughly in half. Although the initial targets in the Clean Air Act were not met, the law was nevertheless considered a success in reducing automobile air emissions.

In general, government has a key role in technology development and distribution, acting as a catalyst and amplifying the conditions that encourage age innovation. Government also must develop strict environmental regulations, which "drive" the development of the technology market. A progressive regulatory approach to environmental problems can have long term benefits for a country's economy.

V Profits of technology

Technological innovation for sustainable development offers great potential for profit. The opportunities arise out of the critical role new technologies will play in reducing the impact on the global environment to sustainable levels while still allowing economic development. The market for environmental goods, services, and technologies is already substantial. It is nearly $200 billion in sales annually in developed countries alone and is expected to increase rapidly, both in developed and newly industrialized countries. This view is supported by Stuart Hart in his article in the *Harvard Business Review* wherein he states that

> *"the achievement of sustainability will mean billions of dollars in products, services, and technologies that barely exist today. Whereas yesterday's businesses were often oblivious to their negative impact on the environment, ... increasingly, companies will be selling solutions to the world's environmental problems."*[5]

VI Sources and effects of environmental pollution

Environmental degradation or pollution is a complex phenomenon with

(2) Any regulation [so prescribed] shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.
(b)(1)(A) The regulations under subsection (a) applicable to emissions of carbon monoxide and hydrocarbons from light duty vehicles. . manufactured during or after model year 1975 shall contain standards which require a reduction of at least 90 per centum from emissions. .. allowable under this section [from] ... engines manufactured in model year 1970.

[4] Hydrocarbon emissions were reduced by only 25% between 1970 and 1975. By 1987, however, a 97% percent reduction in hydrocarbon emissions had been achieved.

[5] Stuart L. Hart, "Strategies for a Sustainable World", *Harvard Business Review*, 67, Jan.-Feb. 1997.

interlocking economic, scientific, political and legal aspects. Our lack of knowledge of fundamental aspects of physical, chemical and biological functioning of the biosphere and the 'multiplicity of pollutants varying in their composition, behaviour, the manner of their entry into the environment makes identification of sources and effects of pollution a difficult, complex and subtle task. The sources of pollution are many, sometimes common and over lapping. The effects also range from immediate to long term or commutative or from local to global.

Pollution is derived from the Latin word 'Pollutes', which means defiled. The concept of pollution has come to play a crucial role in environmental law, for it forms the starting point for regulation of the act of pollution and for determining the liability for damages caused by the act of pollution. Despite its legal significance it is a stark fact that 'pollution is a word whose precise meaning in law (particularly in International law) is not easy to discern.' Hence, no precise or complete definition of environmental pollution exists in law. We find diverse descriptions resting on subjective and objective judgments in legal literature defining pollution to describe different levels and kinds of man induced changes in the natural world. For instance environmental pollution has been expressed as "anything released into environment which impairs or degrades it." Thus, we can say that environmental pollution is the unfavorable alteration of our surrounding, wholly or largely as a by-product of man's action, through direct or indirect effects of changes in energy patterns, radiation levels, chemicals, physical and biological conditions so as to harmfully affect the quality of human life, cause effects on other animals and plants, and cultural and aesthetic assets.

In India, statutory definition of environmental pollution is provided in Sec. 2(c) of Environmental (Protection) Act, 1986 (hereinafter referred as EPA) in an exhaustive form. According to Sec. 2(c) EPA, environmental pollution "means the presence in the environment of any environmental pollutant." Exhaustive definition of 'environmental pollutant' and an inclusive definition of 'environment' are separately provided in Sec. 2(b) and (a) respectively. Environmental Pollutant, according to Sec. 2(b) 'means any solid, liquid or gaseous substance present in such concentration as may or tend to be injurious to environment'. While as per Sec. 2(a), environment "includes water, air, land and inter-relationship which exists among and between water, air, land and human being, other living creatures, plants, micro-organism and property." The definition of environmental pollution as given in EPA, though subject to certain limitations is wide and comprehensive in its scope at least for the legal regulation of industrial pollution and hazardous substances and is best possible in view of the difficulties involved in defining

a general term like pollution.

Air pollution

Major cities of the world are plagued with smoke or other kinds of pollution. Air pollution is an old problem and we have realized it with the growth and expansion of industries, urbanization and population growth. Pollution of air means unwanted introduction of substances into the atmosphere that are either foreign to it or are in quantities exceeding their natural concentrations. There are three types of air pollution. First, Personal Air Pollution, which refers to exposure by an individual himself to pollutants such as dust, fumes and gases. The most common instance of such type is cigarette smoking. Second, Occupational Air Pollution that refers to exposures of individual to potentially harmful concentration of air pollutants in their working environment and thirdly, Community Air Pollution which is the most complex and involves a varied assessment of pollution sources, contaminants, meteorological factors and wide diversity of adverse social, economic and health effects. In India, Section 2(b) of the Air (Prevention & Control of Pollution) Act 1981, defines air pollution as 'the presence in the atmosphere of any air pollutants'. Further, Section 2(a) of the same Act says that air pollutant means "any solid, liquid or gaseous substances including noise present in the atmosphere in such concentration as may or tend to be injurious to human beings or other living creatures or plants or property or environment".

Effects of air pollution

The undesirable consequences of air pollution cover a very wide spectrum ranging from material damage to personal discomfort and illness. Though, the stress is visible, but we still are in the infancy of understanding the full effects of atmospheric pollution. True evaluation of effects of air pollutant is a difficult and complex task, for the effects depend upon a number of variables such as the nature, concentration, dispersal, and synergistic interaction of air pollutants. However, the ill- effects that are of immediate concern are those that do, or may, in future, influence man's health, his well being and his enjoyment of the world as we know it, without undue alteration of biological or physical systems. The following are the common effects of air pollution:

(1) Effects on Climatic Conditions and General Environment: Air pollution has immense impact on the quality of regional as well as the global ecological system. Effects and the changes brought about in regional environmental systems by concentration of air pollutants from large pollution sources are

now well documented. Increased precipitation, smog, storms, increased acidity of rain droplets are reportedly ascribed to air pollution. It is apprehended that some types of pollution emissions may trigger important changes in the operation of planetary ecological system. The build up of large quantities of green house gases such as carbondioxide, methane, ozone, nitrous oxide and chlorinated hydrocarbons etc. in the atmosphere could raise global temperatures as these gases trap the low energy radiations emitted from the earth's surface,. And if unchecked it will significantly change global weather pattern in the near future. The global impact of these changes could be very large and devastating such as flooding of coastal cities, destruction of agricultural areas and marine life in many countries.

Changes in the upper atmosphere, i.e. stratosphere are also being feared. Though the effects of the concentration of air pollutants in the higher atmosphere, i.e. stratosphere are not fully known presently but there are several possibilities that can be predicted. One such possibility is the depletion of protective shield called as 'ozone layer.' Scientists believe that increased concentration of water vapours, carbondioxide, oxides of nitrogen and sulphur, chlorofluorocarbons compounds from supersonic air crafts, surface transportation, aerosol sprays and refrigeration, etc. due to their longer endurance, peculiar condition in stratosphere and photochemical action, deplete the ozone layer. A continuing deterioration of earth's ozone shield would expose human beings to increased ultraviolet radiation causing skin cancers. It would kill many plant species and reduce yields of many crops. There are already reports of ozone thinning over Northern hemisphere and ozone hole over Antarctica. The reports if are true and truth in the ozone depletion theory authentically proved, it will be catastrophic for life on the earth.

(2) Effects on Human Health and Safety: A clear cut cause and effect relationship between air pollution and human health has not been established as yet. As Dr. Irving J. Selikoff, called by some, the father of pollution health effects rightly puts "Air pollution is modem man's wolf at the door... we don't really know what many of the substances in the air do to people. It may take 50 years to know that."[6] However, there has been a growing body of medical opinion, which indicates that air pollution together with cigarette smoking contributes to increase in death rate, morbidity and earlier onset of respiratory diseases. The determination of health effects of air pollution is a difficult task. The specific concentration at which a contaminant will damage health depends on how the word 'health' is defined, the nature of the

[6] Quoted by Noel Grove, "An air of uncertainity," *Span*, 48, March 1988.

contaminant, and length of time the air containing them gets breathed or comes in contact with the receptor.

(3) Effects on plants and animals: Air pollution has been found to affect plants to varying degrees. At the lowest levels, i.e., below the threshold there have not been noticed effects, such as visible damage, cumulative chronic effects, genetic effects or gradual changes in the composition of the plant community. However, even at this level air pollutants could be sorted in the plants and introduced into the food chain, affecting animals, which eat the plant.

(4) Socio-economic effects: Individuals and society suffer a direct cost as a result of effects of air pollution on plants, animals, property and human health. The costs generally include following:

(a) Monetary losses due to illness and death and incidental loss resulting from abstention from work and decreased productivity.

(b) Increase of travel costs and time of travel due to reduced visibility, together with the increased risk of accidental injury in travel because of decreased visibility.

(c) Increase of cost of artificial illumination.

(d) Repair of damage to buildings and other structures.

(e) Losses due to damage to crops and vegetation.

Effective control of air pollution has many social benefits. Clean air not only means reduction in many costs but a healthier and brighter environment.

VII Nature of modern technology

The nature of productive technology in recent years is closely related to the environmental crisis. Commoner maintains that sweeping transformations of productive technology since World War II ... productive technologies with intense impacts on environment have displaced less destructive ones. This factor has been largely responsible for the generation of synthetic and non-biodegradable substances such as plastics, chemical nitrogen fertilizers, synthetic detergents, synthetic fibers, big cars, petrochemical and other environmentally injurious industries and 'disposable culture.' Thus, environmental crisis is the inevitable result of a counter ecological pattern of productive growth. Ecologically benign technologies did and do exist but they are not utilized, for they are considered inconsistent with the short-term interests of private profit maximisation.

VIII Conclusion

All the factors discussed above have a great impact on man-resource-environment equilibrium. Present rates of population growth cannot continue because they are already placing increasingly greater demands on the planets' finite resources. The growing gap between the numbers and resources and diminishing marginal returns from resource are already becoming too obvious. Extravagant affluence is consuming far more and placing far greater pressure on natural resources. Economic growth and change of technology is causing planned obsolescence, pulling raw materials from natural resources, accelerating conversion of resources into wastes and pollution. Therefore, the impact of these factors has to be limited so as to maintain an ecological balance and conserve environment. The concern for protection and conservation of environment is not by any means simple. It does not remain confined to merely limiting to one factor. We must curb population growth, consumption patterns and preferences, economic growth for growth's sake and application of technology towards ill-considered goals.

GOOD GOVERNANCE VIS-A-VIS JUDICIAL ACTIVISM*

*P.S. LATHWAL**

GOVERNANCE IS not merely to maintain law and order; it is taking into account the basic needs of human beings and protecting their constitutional and other rights.[1] Generally speaking it is a shifting from the concept of laissez – faire to that of welfare state. Mere so for that purpose requirement is of good governance.

Practically good governance means proper implementation of government's programmes and policies to achieve the objectives behind theses. In our country we experience that the programmes and policies are (a) not implemented (b) if implemented they have totally counter productive results (c) if they are implemented; there is great inefficiency and delay in implementation. The reason behind it may be lack of accountability (responsibility for performance) – inefficiency, lack of transparency, delay in decision making process because of ineffective punishment procedure for those failing in performance of their duties etc. etc. The accountability is measured in terms of fulfilling the expectation of many in a democratic set up like ours.

Such system rests upon three instrumentalities viz. Legislature, Executive and Judiciary. These are created and derive power under the constitution. The ultimate value and operational purpose of the constitution and the instrument there under is to guarantee to all citizens the fundamental freedoms set out in the preamble and spell out in part III there of. To enact, amend and repeal the law, according to need of society, is under domain of legislature, Implementation of Act (law) is the task of executive, to run the affairs of the state in accordance with rule of law. The role of judiciary is to watch over the laws, that these are in proper spirit of the constitution and to issue commands essential for doing complete justice to establish welfare state.

But the legislatures, instead of performing the role assigned to them under our constitution, are becoming self-serving taking decisions contrary to national interest. They are more interested in governing than to legislate, that too, with no respect for rule of law. They amass wealth at the cost of needy and helpless society. Bureaucrats are their path makers for this

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• LL.M; Ph.D. Reader,Campus Law Centre,Faculty of Law,University of Delhi.

1 Kuldeep Nayar "Governance and the Police", *The Hindu* 10(Oct. 29, 2002).

purpose. These executives / civil servants whose duty is to implement law, only execute will/ whim of politicians and the legislators. They surrendered to their transfers only politicians reduced them to zero. Corruption has become rule of the day and administration of law and justice is threatened. Causalities are the rule of law and good governance creating national instability.

These flaws in governance resulted in inefficient and corrupt bureaucracy, criminalization of politics under performance of employees cost over runs and law returns on development programmes.

Investigating agencies had slept for years over a variety of cases relating to *hawala* transaction, forgery of documents to settle score with political rivals, kick backs in various deals and police excesses against the innocent or its inaction when state help was looked for. It created a new segment of PIL. The Supreme Court expanded its jurisdiction through it. The PIL is thereto provide to the people what always (in theory) belonged to them.

More over afraid of PIL, the government's proposal, to make any person, who approaches High Court or Supreme Court by way of PIL, to deposit a sum of Rs. 50,000 and 1 lakh, respectively, will be refunded if outcome went in his favour and confiscated if petition was not allowed i.e. imposing a kind of fees, is nothing but to make the system continuously subservient to money bags on alleged misuse of process of law.This step shall have to be discarded out rightly. Especially the judiciary shall have to come out to restrict government to follow such nonsense on the name of misuse of process of law (through PIL).[2]

The biggest misuse of process of law comes from the state. The state today has emerged as the biggest single litigant-from office of *Tehsildar* to District Courts and to the Supreme Court. The need is to check this gross misuse of state money by engaging a battalion / battery of lawyers to deny citizen his basic rights. The judiciary is no longer mere dispute- adjudicating agency. It has constitutional agenda for the confusing social order and to be *sentimental on the qui vive*.

"It is the constitutional duty of supreme court to keep the executive and the legislature with in the limits provided by the constitution", said CJI.[3] "The supreme court has to do its duty to interpret the law and the constitution. When there is a gap, when there is no law, till such time legislation is made,

[2] "Neck Jerk Reaction of a Government Unable to Put its own House in Order", *University Today* (1997 vol.17).

[3] "We are not Treading on Legislature , Executive : CJI", *The Hindu* 1(Nov. 27. 2005).

Courts have given certain directions. This is not legislating. Whenever there is lack of implementation of law, of course the judiciary cannot fold its hands: it is the duty of the court to enforce the law. 'Judicial activism' or ' judicial terrorism' is a misnomer." [4], the designate CJI presently responded to a question regarding judicial activism.

If court remained as impervious as the executive, how would we stop government against victimization of society due to its inaction or excesses? It is (PIL) a consequence of irresponsive government.[5] The setting, the inaction/excess or wrongs of government/bureaucrats, right is the constitutional duty of our judiciary, which is being termed as judicial activism.

"The activism" refers to the phenomenon of our courts dealing with issues, which they have traditionally not touched. This clarification becomes necessary because the term has been used loosely in recent months in the context of penal action taken by court against bureaucrats and police officers either for not complying with its order or for filing false affidavit.[6] Especially the 1996 will be remembered as the year of judicial activism in the history of free India. It does not mean that Indian judiciary was not active or non-active prior to 1996. The ground reality is that the 'Activism" of these 3 democratic organs is vested in our constitution and the jurisdiction, regarding activity- duty and rights, is well defined there in.

The judiciary has to respond (actively) when the other sister organs (executive and legislator) start malfunctioning become defunct at the cost of democracy. Because the democracy means not only rule of numbers but also rule of law[7] – the basic concept upon which judiciary rests to perform its constitutional duty.

Judicial activism is not a new phenomenon no matter its approach remained different in the past years. Since 1952, in its first phase, the emphasis remained upon protection of basic rights and that too of rich, wealthy affluent, *zamindars* and those of former king with special emphasis on their property rights.[8] There was a conflict between parliament and judiciary regarding their supremacy. During that period the judiciary interpreted constitution verbatim (word by word) instead of its liberal interpretation.

[4] "Judicial Activism is Misnomer" *The Hindu*11 (Oct. 21, 2005).

[5] *The Times of India*. 11 (Feb. 25, 1997).

[6] "Judicial activism- II", *The Times of India* 10 (Feb. 28, 1996).

[7] "Judicial activism: Future of institutional Autonomy", *The Times of India* 10(Dec. 11. 95).

[8] *Madras* v. *V.G. Row*[(1952) SCR 597. Secalso.*Dainik Tribune* 4 (Feb.13.1997).

In April 1973, the super session of Supreme Court J J. Shelat, Hedge and Grover was a blatant and outrageous attempt by government to undermine the independence and impartiality of judiciary.[9]

On June 12, 1975, taking a courageous step, justice Sinha of Allahabad High Court struck down the Parliamentary election of Mrs. Indira Gandhi. It caused imposition of emergency in free India. During the period the main propagators of judicial activism could not advocate fundamental rights in their judgements. Even creating of R. Tagore and Mahatma Gandhi were prohibited form publication and judiciary remained silent spectator.

Since Menaka Gandhi[10] the apex judiciary initiated the era of liberal interpretation of our constitution. Going beyond its procedural limit, the Supreme Court construed Art. 21 to include the right to pass port[11], right to livelihood,[12] right to shelter,[13] right to education,[14] right to clean environment[15] etc. within the ambit and scope of right to life and personal liberty.

But in *S P Gupta* v. *Union of India*[16] the judiciary itself accepted the domain of Executive/ government in power holding that power to appoint and transfer judges vests in the Prime Minister.[17]

Another landmark of judiciary started when it, treating-postcard as a writ petition under Article 32 in the public interest, waived the condition of *locus standi*.

Intervention of Apex Court since Bhagalpur police excesses and in cases of daily wage workers, bonded laborers, adhoc employee, against trafficking, handcuffing of under trials, environmental damage to rivers and monuments, poor sanitation, poor water supply, ill maintained roads, ill maintained blood banks, apathy toward road accident victims, have all been matters shocking judicial conscience. They could have been avoided had the authorities concerned, civic and state, performed their duties in right earnest.

However the concern of the judiciary has become a global phenomenon. In the evolution Indian courts are not unique. Activism has

[9] J.N. Panday. *Constitutional Law of India* 312(1992).
[10] *Maneka Gandhi* v. *U.O.I.* AIR 1978 SC 597.
[11] *Ibid.*
[12] *Olga Tellis* v. *Bombay Municipal Corporation* AIR 1986 SC 180.
[13] *Shanti Star Builders* v. *N.K.I. Tomato* AIR 1990 SC 630.
[14] *A.P.Unnikrishnan* v. *State of AP* AIR 1993 SC 2178.
[15] *Ratlam Municipality* v. *Vardhichand* AIR 1980 SC 1622.
[16] AIR 1982 SC 149.
[17] See also *Dainik Tribune Chandigarh* Issue 13, (1990).

been growing in the judiciary of other nations too. In 1954 the US Supreme Court outlawed racial bigotry in schools, rejecting the "separate but equal" pleas of the segregation. But thereafter American Courts grew more assertive on this issue. Ruling a few years later that public schools must ensure mixed class rooms even if in the process children of one race or the other had to be carried to a school right across a city to bring about a mixture. In the seventies, courageous rulings by Judge John Sirica in the *Water Gate* Case led to down fall of president Nixon.[18] Also, the Bangla Desh Supreme court invalidated a Constitutional amendment on the ground that it violated the basic structure of the Constitution.[19] The Supreme Court of Pakistan in Nawaz Sharif Case pronounced the dissolution of National Assembly to be unconstitutional.[20] The Nepal Supreme Court by a majority judgement ruled out the dissolution of parliament, by King on the basis of the Prime Minister's recommendation, unconstitutional because dissolution deprived the members of their constitutional right of voting on the no confidence motion.[21] Our own Supreme Court in *S.R.Bommai* case[22] invalidated three Presidential Proclamation dissolving State Assemblies.[23]

Justice Ahmedi rightly averred that there has been growing immense of frustration, as the incumbents of Parliament have become less responsive of the will of the people.[24] We witness lack of faith in democracy by our elected representatives themselves.A balance sheet to ,evidence it, is detailed here.

In 1990 Rs 8800 crores of Security Scandal that came to light in 1992, Sugar Scandal of 1994 putting loss up to 5,000crores, *hawala* case – involving allegation of payment of Rs. 65 crores to top politicians, Veterinary Scandal of Rs 200 crores in Assam and worth Rs. 950crores Animal Husbandry Scandal in Bihar, JMM bribery case of Rs. 3.5 crores to vote / support congress (ruling) party in parliamentary no confidence in 1993, Rs. 133 crores Urea Scandal where a dubious Turkish company did not supply iota of Urea to India in 1996, Enron Project Case , Uniform Scandal , Medicine purchase in Bihar, crores of stamps duty scam are in continuous to amaze people. In the Wheat Scandals in Haryana, the main accused is not yet arrested. *Taj* corridor matter and land scams in Delhi and UP astonished the nation.

[18] J.B.D' Seuza "Taking the Law into Their Hands", *The Times of India* 19 (Dec. 1996).
[19] "Judicial Activism, Pollution and Wedding", *The Times of India* 11 (September 15, 95).
[20] *Ibid.*
[21] *Ibid.*
[22] *S.R. Bommai & others* v. *UOI* and others JT 1994 (2) SC 215.
[23] *Ibid.*
[24] "Judicial Activism –1" *The Times of India* 10 (Feb 27.1996) .

It all reveals that over the past five years the country has witnessed prodigious acts of financial misappropriation, Executive and legislators are party to it.

The serious concern of our judiciary invoked the doctrine of "Public Trust" to impose penalties and set aside the benefits distributed by certain minister (in LPG, Petrol pump and house accommodation allotment) to themselves or their near and dear.[25] The CBI's investigation from *hawala* onward is on process. The supreme court has to monitor these scams- many have gone scot-free.[26]

It is clear that when persistent dereliction of constitutional obligation and gross violation of human rights are brought to its notice, the judiciary can neither prevaricate nor procrastinate. It must respond.[27]

The judiciary may ever step its limits and at times fail to guard against the danger of *populis*. In a society where freedom suffers from atrophy some of risks have to be taken. The rich and the mighty do not need fundamental rights. They can manage for themselves. Thanks to Supreme Court role in PIL, fundamental rights have become living reality at least for some indigent and oppressed Indians. The most heartening feature is that the court has started "taking human suffering seriously". If be govt. by judiciary- so be it. The people of India, the butcher, the baker and the candlestick maker are not complaining[28] and our judiciary had earned name and fame for its impartial role – as an important pillar of democracy.

The Supreme Court drawing inspiration from Art. 142 of the constitution (enforcement of decrees endorsers of the supreme court and order as to discovery) is heading to be the strongest constitution something not envisaged by the founding fathers of our constitution.[29]

Serious concern of Supreme Court in Bhopal disaster for Medical and for Poor in construction of hospital,[30] to distribute Rs. 1503 crores at on earliest best to victims survivors and imprisonment to Shri Vasudeva, IAS officer of Karnataka State, for owing responsibility of his master politicians

[25] *Legal News and Views* 28(1997 vol.2,No.3).
[26] On 27-9-04 that to grant sanction for Prosecution because of irregularities, favoritism and arbitrary allotments- Home Ministry decided against prosecution of Satish Sharma. *The Hindu* (September 28, 2005).
[27] Soli Sorabjee- "Taking Suffering Seriously", *The Times of India* (Dec. 10, 1995).
[28] *Ibid.*
[29] *The Times of India*,2 (Sept.15, 1995).
[30] "Supreme Court Gone for Issue to Issue" *The Times of India*11, (Dec. 11, 95).

for the reason best known to him (where court thus could not reach the real culprit.)[31] one day symbolic imprisonment to Sh. Kalyan Singh Ex.-CM of UP in *Ayodhaya* case[32] - are praise worthy. Thus to punish a person/party to administrative slackness/ ill intention, however senior he may be, is good illustration for those who only cares for the will of their master politicians/ disobey the courts' order.

However in *Hawala* and other scams the fear is expressed that the alleged accused will go scot free because till now no politicians, how much corrupt he is, has been put behind bars. Involvement of T.T. Krishnamaschari in Mundra Insurance Fraud and that of Sh. Antulay (Ex. C.M. Mahashtra) in raising illegal funds on the P.M.'s name received public attention in the past. But they were never arrested. Under the direction of the Supreme Court, the CBI proceeded actively with investigation but never opposed anticipatory bail in any case.

Strong judiciary is the requirement but the dire need is to ensure the system of checks and balance. Vigilant machinery, to save democratic institution is desirable. Otherwise socio-economic welfare will become a far cry and activism/ over activism will remain a forbidden fruit for unprivileged, downtrodden, ignorant and illiterate people.[33] NGO/ Social action spirited people can play important role for the survival of the system. It should be named a mass movement to fight, against evils eroding the society, to improve the situation.

No doubt judiciary deserves appreciation in relation to protection of human rights, maintenance of environmental standard and campaign against corruption. If executive is party to it (corruption) and misuse of public office, judiciary can set it right. If legislators enact law, its fairness and reasonableness can be judged by it. What will be the remedy when judiciary stars lacking on dispensation of justice. Here idea is not to criticize judiciary.

In the words[34] of Justice Verma J.S. (designate CJ of SCI) " these days we are telling every one what they should do. But who is to tell us. We have the task of enforcing the rule of law. But does that exempt and even exonerate us form following it?" i.e. the judges too need to conduct themselves so as to be completely above approach. The larger than life role of the judiciary performing currently requires that there be not the slightest suspicion about its conduct.[35]

[31] *Dainik Tribune* 4 (Nov. 1, 1995,Chandigarh).
[32] *The Times of India* 11 (Dec. 11, 95).
[33] See also *PUDR* v. *UOI* AIR 1982 SC 1473, 1478.
[34] PIL is a consequence of unresponsive GOVT. *The Times of India*, 11 (Feb 25 1997).
[35] "Courting Controversy", *The Times of India* 10 (Feb.25,1997) .

In this regard the following factors shall have to be taken in consideration:

Questionable decision:

Clean chit to Jagna Nath Misra , declaring Bhajan Lal innocent , in corruption case and pronouncement of court in favor of Antulay[36] are nothing but questionable decisions affecting the image of judiciary. Receiving monetary benefits for judicial pronouncements, rendering blatantly dishonest judgement, hobnobbing with political personalities and obviously favouring the governments and thereby losing all sense of propriety[37] and judicial discretion to grant bail are some of features pointing towards judicial in discipline, unbecoming conduct, corruption in the judicial system. Judiciary the only hope for our sustenance shall have to come out of such allegations to avoid chaos in the society. Mr. Palkiwala expressed his opinion that these guilty of wrong doing on the bench, are seldom held accountable.[38] Apart form such events, the justice imparting institutions moving towards its downfall- yes every system crumbles through a process of deterioration and so it may happen with judiciary. Certainly executive is party to it along with legislature.

The judges, accepting gratification to deliver judgment of one's favour cause undue delay, keep decisions pending till they are obliged directly or indirectly.[39] Resignation of justice S.K. Desai of Bombay High court in 1990 on allegations of judicial corruption and transfer of some of judges (V.S Katwal, M.P. Kema, Sharad Manohar and Guttal) on the same pretext[40] on a move by Advocates of Mumbai back in 1990 are the cases of corruption and misdemeanor in judiciary.

Justice V. Bahuguna had to offer his resignation when he was threatened to be prosecuted on the allegation of possession of large sums offered as bribes. He, as an advocate in Jain Sudha Vanaspati case, obtained questionable order form the court of justice K.N.Singh, before his appointment. He came to be appointed as a judge with full knowledge of his questionable activities.[41]

Case of Justice A.M. Bhattacharjee, C.J. of Bomaby High Court is of recent years when Bombay lawyers effectively force him to resign

[36] *Ibid.*
[37] *The Times of India*, (April 16, 1995).
[38] "Judiciary on Trial" , *The Times of India*,10(April 27,1995).
[39] "Judges Held on Graft Charges", *The Times of India*,4 (July 16,1994).
[40] "Judges should be Accountable Too", *The Times of India 13* (Oct. 17, 1996).
[41] *The Lawyers Collective* 28 (1995 vol.10).

following an admission of accepting 80,000 dollars as royalty for overseas publication of his book, "Muslim law in India"[42]

Reduction of sentence by Supreme Court, on a man convicted of rape, on the ground that women was of easy virtue/ a fallen women nothing but lowering the moral stature of judiciary.[43]

Politics also have shown its colours on (mis) happening/ event connected with judiciary. Efforts to impeach justice Rama Swami, former judge of Supreme court, following allegations of corruption were not successful. Is protection of J. Rama Swami not something discourageous to those (judges) who proved him guilty? Despite proved charges of misconduct against him, Jayalalita's Government, in Tamil Nadu, after his premature retirement, has appointed him Chairman of Law Commission.[44]

Travesty of judicial discretion:

Grant of bail to Animal Skin smuggler, Veerappan, despite his involvement in about series of serious cases, on 17-7-95 involving 30,000 skins over a variety of wild animal,[45] to Sudhakaran, Congress MLA from Kerala involved in murderous attack on CPI legislature from Delhi court on July, 6[46] and to Sushil Sharma main accused in Tandoor Kand by Madras court and at the same time refusal of Medical care to late Rajan Pillai in Tihar Jail[47] all are of utter dismay and disgust that none else but judiciary will have to own responsibility for its costly mistake.

The concession of granting bail in non-bailable offence be exercised in the interest of justice and in accordance with the established principles of law.[48] But the system of bails operates very harsh against the poor and it is only the rich who are able to take advantage of it.[49]

Judicial interference in Executive/ legislative functioning

Certainly instances are there when bureaucracy many time ignored the problems when judiciary in such cases come to rescue through PIL. However several times, judicial interference in executive functioning create problems of its own kind. For example, once Mr. Ved Marvah, Delhi Police Chief (the then) ordered the closing of cabaret dance for breaching the

[42] *The Times of India*,13 (Oct. 17, 1996).
[43] "Judging the Judiciary", *The Times of India*,8 (July 15, 1995) .
[44] "How Judicial Activism in Our Judiciary", Special report, *Times of India* 17 (July 16, 95).
[45] The Times of India 10 (Sept.13,1995).
[46] *Ibid.*
[47] *The Times of India* 17 (July 16, 1995).
[48] *Ibid.*
[49] *The Times of India* 10 (Sept. 13 1995) .

obscenity rules and also becoming meeting place for criminals, the High Court vetoed the order saying that cabaret dancing was an artistic expression and police were not the people to judge such form.[50]

Direction to the Union Government and Parliament, to enact Uniform Civil Code, by the Supreme Court is direct entry into the domain of legislature. As judicial activism is one thing , such (arbitrary) decision-making is quite another.[51]

The judiciary in Babri Masjid matter and Kaveri water dispute etc. should not have agreed to handle it.[52] All these affects image of judiciary.

Recently judgement delivered by the Supreme Court on increasing retirement age of judges in the subordinate court and also laying down the terms and conditions of their service is the domain of legislators and the state government. There is nothing wrong if judiciary is active, but it should be extremely guarded about its own jurisdiction.[53]

The unprecedented, rather sudden and coordinated decision move of 21 judges of Punjab and Haryana High Court going on leave *enmasse* which were the appearance of flash strike, has focused public attention that brought judicial work to a near halt is lowering prestige of judiciary.

The immediate cause for the synchronized move to paralyze the high court was apparently a notice served by the chief justice, B.K. Roy on two fellow judges seeking an explanation for their acceptance of honorary membership in a controversial golf club over which a case is pending in the High Court.[54] The issue rages serious questions of judicial accountability against the protest absent and choosing wrong issue to register it. The higher judiciary has ruled on more than one occasion that strikes that result in the parlaysis of courts are illegal; ironically one of the high court judges who took part in the mass leave protest delivered a judgment two years ago declaring such strikes as " wholly unjustified"[55]

What the country lacks is an effective mechanism to hold the higher judiciary accountable in a steady, sustained way for its conduct and performance, when even parliament is accountable.

The self-regulatory and non- enforceable code of conduct for judges has proved to be ineffective.

[50] "Is Judiciary Encroaching on Legislature", *The Times of India* 3 (Nov. 15 , 1994).
[51] *The Times of India* (July 10,1995).
[52] *The Times of India* 2 (Oct 27, 1996) .
[53] *The Times of India* 2 (Oct. 27, 1996) .
[54] "By Your Leave", *The Hindu* 10 (April 22, 2004).
[55] *Ibid.*

Then how to discipline errant members of the judiciary- who violate the universally accepted values of judicial life?

There are inherent weaknesses in the system. "Providing better incentives to judicial officers to attract talent will be one way of strengthening system." Justice RC Lahoti said in an interview to the Hindu.[56]

A casual aberration of one or two black sheep does not mean the judiciary is corrupt. These can be taken care of, he averted while responding to the incident pertaining to the issuance of arrest warrants against the President and the CJI by a court in Ahmedabad allegedly on payment of money.

He did not subscribe to the view that the CJI did not have enough power to discipline erring judges in the context of on mass leave by judges of the Punjab and Haryana High court.

Justice Lahoti said " The CJI being the head of the judicial family, has the moral authority and enough powers and that authority has to be promptly, effectively and meaningfully exercised before the situation goes out of control."[57]

Now the questions arises does the CJ of High Court or CJI[58] have any power to discipline a judge. The simple answer is no. Only impeachment can be used against a judge which, now a days, is an impractical weapon. As media cannot criticize judiciary, Advocates can not pass resolution against a judge as suggested by CJI, then what is the way out left to correct an 'errant judge'. Then how will you disclose corruption in judiciary is stature of judiciary higher[59] than that of democratic republic in India? The lack of accountability in judiciary is not because of power of contempt of court vested in it but because of the reason that there is not practical procedure to hold accountable a judge because of his misconduct.

Once CJI, the then, J. Bharucha officially declared[60] that 20% judges are corrupt in higher judiciary . As they are provided protection at three levels-

- There is not practical procedure to remove corrupt judges in India
- There is not right/ authority available to enquire about the charges if level against the judge.

[56] *The Hindu* (May 22, 2004) .
[57] "Strengthening Judicial System My Priority" Lahoti, *The Hindu* (May 29, 2004).
[58] *The Times of India* 13 (Oct.12,1996) .
[59] *Dainik Bhaskar* 6 (September 7, 2005).
[60] *Ibid.*

- Power vested with the court/ judges to initiate contempt proceeding against whom who level charges against judges

At least contempt proceeding should be restricted in cases of true statement. It needs to be amended.

Nowhere in the world is the Supreme Court as powerful as in India. The powers of courts in England to interpret law are not without limitations unlike the higher courts in India. Senate appoints the judges of U.S. Supreme Court after nomination by the executive. In India, on the other hand, judges appoint other judges.[61]

For administration of Justice, judge should not only be fair and objective but they have to bear in mind social, economic and political objectives of society and to implement them for its better perspective. They are not bound to adhere to the philosophy of ruling party.

C.J. Chhagla, C.J. Gajnder Gadkar, J. Tarkunda and Justice K. Iyer were having public service background but their contribution is accepted in social engineering and improving the image of the institution. When the State is at the verge of vanishing, judiciary is only a ray of hope. Thus judges and lawyers both require to be disciplined in the interest of justice. Lawyers of today are judges of tomorrow. The wheel of justice only runs with fair play.

A legal miscarriage of justice may be set at right, a moral miscarriage of justice can never be. What is morally wrong cannot be legally right.[62] King Luthar has rightly said, " Morality can not be legislated but behaviors can be regulate".[63] Every one must act according to Dharma (under concept of Rule of Law) to ensure human rights to all and for largest good of masses. ' Dharma protects those who protect it, those who destroy Dharama got destroyed.[64] Especially the justice-imparting agency should come out of all suspicions of impropriety and corruption besides brilliance and politeness. They must have one standard of honesty, justice, integrity and uprightness to remain trustworthy.[65] Those who preach justice must do justice. Justice, must not only be done, it must appear to have been done.

If judiciary wishes to retain public trust, it will have to devise some solutions to this vexed issue / to take effective action against errant judges. The conduct of the judge should be free from impropriety, fearless of other

[61] "Parliament is not Subordinate to Judiciary", *The Times of India* 2 (Oct. 27 1996).
[62] "Why not a Code of Conduct for Judiciary As Well", *Legal News and Views* (1995 vol 9).
[63] *The Times of India* 10 (May 11, 1995).
[64] *Manu VIII*- 15.
[65] See also, *Dainik Bhaskar* 11 (January 17, 05).

power centers- economic or political as well as free form class bias. To protect the independence of judiciary, accountability of judges shall have to be ensured.

While expressing concern over growing incidents of corruption in judiciary our Prime Minister rightly said, it is for judiciary to do "soul searching" to bring accountability and transparency in its functioning. A mechanism of accountability conceived and implemented by judiciary itself is the surest way to ensure judicial independence, Dr. Singh added emphasizing for quick solution to protest it as delay will jeopardize the integrity and efficiency of judicial institution.[66]

"Question marks, have been placed on the credibility of the judiciary at time on account of some aberration which are not the product of the system but are individual in nature and isolated cases," while warning against corruption or indolence in system, CJI said in his key note address.[67]

Accountability of the judiciary

There seems to be some confusion in the thinking about the accountability of the judiciary in a parliamentary system of government. While the judiciary cannot be said to be accountable to any other organ of government, like the legislature or the executive, there can be no doubt about the fact that it is accountable to the people of the country.

" We are accountable to the constitution and the oath we take" while answering a question about corruption and accountability justice Y.K. Sabharwal (designate CJI) said in an interview.[68] Refuting the charges that 'judiciary does not represent the will of the people, the CJI said " when the supreme court declares that executive and the legislature has exceeded its limits and crossed province the judgment is a decision on behalf of " We, the people of India," to whom the legislature and the executive are accountable[69] The oath that the judge takes on assuming office says that he will faithfully and to the best of his ability, knowledge and judgement, perform his duties without fear or favour, affection or ill-will and that he will uphold the constitution and the law. This is on the oath committing the judge to both efficiency and integrity in the discharge of his duties and if he proves to be inefficient or dishonest, he is betraying the oath he has taken. The weakness lies in the lack of appropriate arrangements for enforcing conformity to the oath and through the oath, accountability to the people.

[66] *The Hindu* 11 (Sept. 20, 2004).
[67] *Ibid.*
[68] "Judicial Activism is a Misnomer", *The Hindu* 11 (October 21, 2005).
[69] The Hindu 1 (Nov. 27, 2005).

According to the Constitution, a judge of the Supreme court or High court can be removed from office only through a process of impeachment, that is by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of the House and by a majority of not less than two thirds of the members of that house present and voting on the ground of misbehavior or incapacity. Under this provision, it is difficult to remove a judge who has been found to be grossly inefficient. Even when gross misbehavior involving corruption has been established, experience has shown that the constitutional provisions to remove a judge are quite impractical and the corrupt judges can, therefore get away without any punishment.

If accountability of the judges to their oath of efficiency and integrity is to be enforced, the only remedy will be to leave this responsibility to the judges themselves without having to go through the wholly unworkable procedure of impeachment through the parliament. A panel of three or five senior- most judges of the Supreme Court should be given the authority to judge the judges.

There should be greater frankness and transparency in a democracy in dealing with misbehaviors or inefficiency of the judges. People seem to be very reluctant to express their views on such issues on the ground of respect for the institution of judiciary. Irresponsible statements about misbehaviors or inefficiency should certainly be discouraged and even punished, but if person who know the facts directly and well choose to remain silent, it will lonely serve to shield the corrupt and the inefficient. Many Eminent jurist has strongly pleaded for more openness and transparency in dealing with corruption among judges. H.M. Seervai the well known jurist, said: " when judicial corruption exists (referring to India), it is subject of rumor or gossip, but not of public discussion or debates. Men seem to act on the maxim: ' Speak about it often, write about it never"'

Instances of corruption and inefficiency inhigher judiciary may be relatively on small scale but there is little point in not recognizing that the problem exists and that it has to be tackled through effective procedures.[70]

Conclusion

The most powerful national judiciary in the world is internationally respected for its inventive creativity; it is beset with problems apart from the huge backlog of cases.[71] Providing disposal, there is the increasing

[70] "Fifty Years of Indian Parliament" *JIPS* 144 (2002 vol.27).

[71] Even in P&H High court 2 lacs 44 thousand and 100 cases are pending in June 2002. *Ministry of Law and Justice Annual Report 2003 – 04*. Dainik Bhaskar 4 (Nov. 25, 2005)

problems of corruption India simply does not possess the effective means to deal with corrupt judges. The lower judiciary comes under the superintendence of the High court which discipline subordinate judges- not always fairly.

How is judicial indiscipline, unbecoming conduct and corruption in higher judiciary, comprising the high court and supreme court judges, to be dealt with, when process of impeachment is proved to be failure in the past Supreme Court judges are subject only to peer or impeachment.

The bill for a constitutional commission for appointment, transfer and performance of judges is a necessity of time. It is before Parliament. The commission may draw a code of ethics for judges of Supreme Court and high court. The commission has been vested with power to inquire *suo moto* or on a complaint or a reference into cases of misconduct or such deviant behavior of a judge other than those calling for his removal and advise CJI or CJ of High court appropriately after such inquiry- But scope of appointment, recommendation is not specified, except to the extent that the removal of judge is not with in the purview of the commission's function.

Let us hope and wish the select committee of Parliament, before which it is now pending, will make meaningful democratic changes. In the following issues when the complaint may be against CJ himself, then who will hold the inquiry, the bill is blank on this point. Another point too like venue of inquiry exclusion of media from undue publicity once commission is in succession of matter-are judges, whose children in practice, liable to be transferred lest a racket should spoil its repute of sun stroke judges. How about judges who never pronounce judgement or take unpardonably long gestation for pronouncing judgments in cases heard earlier. Home work need to done before launching on so great an issue or National Judicial Commission-entire bar is ignored in the present scheme of bill[72]

It is a welcome step to set up a truly independent and autonomous National judicial commission to deal with errant judges effectively and for appointment, transfer and removal of High Court and Supreme Court judges. This will guarantee greater accountability and transparency within the higher judiciary.[73]

A common man approach to NJC with legal authority and functional transparency will add grace to it. Thus the committee on judicial accountability will have to take care to whom to include in it as Presiding officer / member

[72] "National Judicial Commission"- Justice Krishna Iyer, *The Hindu* (Oct. 20, 03).

[73] *The Hindu* 13 (Oct. 16, 2004).

when process of impeachment has miserably failed and increasingly the power of contempt has been used to gag the media to prevent public discussion of judiciary wrong doing[74]

However the bill introduced for the above said purpose in parliament in 2003 for 98th constitution amendment for judges (i) transfer and appointment (ii) to prepare moral conduct, could not be passed because of dissolution of Parliament.[75] Now judges inquiry bill 2005 speaks to establish National Judicial council without any amendment in constitution to regulate the procedure for investigation and proof of misbehavior or incapacity of a judge, to bring more judicial accountability and better transparency in deliverance of justice. The object of this bill is to make high court and Supreme Court judges accountable for their actions including corruption and incapacity. The council is empowered to issue from time to time a code consisting of guidelines for the conduct and behavior of judges. The code will provide for annual disclosure of their assets and liabilities to the CJI or CJI of High court as the case may be.[76] Doubts are expressed whether it will serve the desired purpose without making any amendment in the constitution.

It is high time to amend constitution of impeachment purposes to account for judicial officer violating public faith. Because if public faith is betrayed, it will lead to despotism, which posterity will not forgive?[77]

Kautilya places the conduct for judges under a discipline of highest order. He recommends fine and dismissal both for offence committed by judges.[78]

It is rightly said by Howard T. Markey,[79] Judges cannot, (all above) solve all the problems of the people. Judiciary can administer the justice but cannot govern. If justice is delivered its execution lies on the sincerity of the government / executive (where it (government) has failed in its constitutional duty).

So the justice imparting institution shall have to come out of witness box when the legal professional / judges themselves point out wide spread corruption in it irrespective of the fact that its independence is maintained

[74] *Ibid.*
[75] *Dainik Bhaskar* 6 (September 15, 2005).
[76] "Bill to Make Judges More Accountable" , *The Hindu* 14 (July1, 2005).
[77] "Judicial Activism & Social Change"(Speech delivered by Justice A.S.Anand in the National Seminar organized by Law Department University of Jammu – Jammu Tavi Feb.14-17,1987).
[78] "The Dharmic Law Institutional Protection of Rights", *The Times of India* 10 (May 6, 1995).
[79] Chief Judge-Court of Appeal Federal Circuit, U.S.A.

under constitution for administration of free and fair justice.[80] Yes, our judiciary is facing problem of its own kind because of shortage of judges and delay in filling of long pending vacancies in the courts. These are over burdened with the arrears of cases. The increase in PIL led to greater participation of the courts in all aspects of life. Growing industrialization, population explosion followed by urbanization, consumerism, tremendous advances in information technology and globalization of economy have given rise to social and legal issues. The task of judicial institution is growing to be challenging.[81]

Certainly our strong and independent judiciary is facing this challenge judiciously. Rightly the advocates, judges and general public had a role in maintaining the independence of judiciary. The executive should have no influence over it (judiciary).[82] The government must also think over this apex issue for expeditious disposal of cases.

Activism is the requirement of the day but over/excess activism brings bitter taste. Still we shall have to appreciate it to bring governance under rule of law in spite of threat form every nook and corner under our democratic system. Perspectives are better if all these 3 sister organs complement and supplement each other instead of finding faults. It is possible if healthy criticism of their functioning, by media, advocates and public, is taken in right sprit. A prosperous and trustworthy system evolved through standard of honesty, justice, integrity and uprightness, timeliness, politeness, ethicality and transparency etc are rolled in to one as accountability. Because accountability and a transparency are the hallmarks of good governance and modern societies.

In governmental set up these can deliver the goods if enforced and made interested to work culture. Good governance is a strategic amalgamation of having a responsible legislature executive and the judiciary- three wings of state. In the modern context the mandate of good governance dictates action by organs of state on predictable rule of law to promote social good.

Question is who will do it and under what mechanism? We are to ponder over it lest we should be late because after attaining Swaraj (Self rule) , we need to have Suraj (good governance).[83]

[80] See Art.121-Restriction on discussion in Parliament in respect of conduct of Judge of H.C. or S.C; Art.129 S.C. Power to punish for contempt of it; Art. 138-Enlargement of Jurisdiction of S.C; Art.215 H.C. Power to punish for contempt of itself; and Art.229 Appointments of Officers and Services.
[81] "Executive , Judiciary Must be Independent", CJ ,*The Hindu* 7 (Nov. 15, 2005)
[82] *Ibid.*
[83] E-governance Center of Excellence Oracle & HP India.

ROLE OF HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW IN HARMONISATION OF RULES RELATING TO ONLINE CONTRACTS

Poonam Dass[*]

I Introduction

ONLINE CONTRACTS are made in borderless environment. The fact that they operate in a global environment means a question will arise in the event of dispute as to where that dispute should be resolved (jurisdiction), what law will be applied to resolve the disputes and whether the resulting judgments will be enforceable outside the country where it is granted. These are determined according to rules of private international law which are different for different States.

In contractual disputes, the Indian courts can assume jurisdiction if the defendant resides or carries on business or personally works for gain or where cause of action wholly or party arises in India[1]. Hence, over a non resident e-business, Indian courts can assume jurisdiction if cause of action arises in India. Once an e-business creates a website it has a continuous online presence in every state and foreign country, where an end user can access the internet. This poses a threat to the jurisdictional importance to state and national borders. An e-business can be subject to jurisdiction in every country in case if dispute arises out of contractual relationship. If the goods/services are provided offline and the contract is made online, then the jurisdiction can be determined with respect place of business of defendant or the place of performance of contract. However, in case of online supply of goods/services like software's, movies, and payment being made online, it is difficult to locate and identify parties as the place of performance will be cyberspace.

The law applicable to such contractual disputes involving foreign element is proper law of contract. If the agreement stipulates the applicable law, it will be proper law of contract, otherwise the proper law will be the law with which the transaction has its closest and most real connection.[2] It is difficult to determine proper law if all the elements of contract take place in cyberspace. Similarly Indian courts will not recognize or enforce a foreign judgment if it is not pronounced by Court of competent jurisdiction; or was not on merits; or incorrect view of international law; or refused to recognize

* Lecturer, Law Center-I, Faculty of Law, University of Delhi.

1 S.20, Civil Procedure Code, 1908.

2 *Rabindra* v. *LIC* AIR 1964 Cal 141.

the law of the state in cases in which such law is applicable; judgment obtained one opposed to natural justice, obtained by fraud or claim founded on a breach of any law in force in the state[3]. This also poses a threat to e-businesses that judgment if obtained may not be recognized or enforced in the concerned State.

II Position in the US and EU

In the US, the jurisdiction is exercised extraterritorially on the non resident defendant on the basis of traditional jurisdictional rules viz. General jurisdiction[4] or Specific jurisdiction[5] In the Internet related contractual disputes courts have generally exercised specific jurisdiction on the basis of minimum contacts with the US territory concerned.[6] The forum selection clause mentioned in standard form contracts have also been upheld in US provided the clause is reasonable and fair[7]. Apart from that even the choice of forum clauses in clickwrap consumer contracts have been upheld in number of cases.[8]

3 S. 13, Civil Procedure Code, 1908.

4 In case where the defendant's contact with the forum State is systematic and continuous enough, that the defendants might reasonably anticipate defending any type of jurisdiction, the state may exercise general jurisdiction over such a defendant.

5 In 1945, the US Supreme Court in the landmark case *International Shoe Company* v *Washington State* 326 US 310 stated that to exercise personal jurisdiction over non-resident defendant there must exist at least 'minimum contacts' with the US territory concerned. These contacts must be such that the maintenance of suit does not offend traditional notions of fair play and substantial justice. It should meet the test of constitutional fairness under the due process clause of 14th Amendment. In addition, US Courts require that defendant's conduct and connections with the forum State be such that he should reasonably anticipate being hauled into court there.
Existence of the required minimum contacts is determined under three part test viz,:
1) The defendant must purposefully direct his activities or consummate some transaction with the forum State or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum State and thereby invokes the benefits and protection of its laws.
2) The claim must be one arising out of or related to defendant's forum related activities.
3) The exercise of jurisdiction must comport with fair play and substantial justice i.e. it must be reasonable.
Following *International Shoe case*, various States enacted long arm statutes, authorizing jurisdiction over non-residents in specific circumstances.

6 *Burger King Corp* v. *Rudzewicz* 471 US 462 (1985); *Compuserve* v *Patterson* 89 F.3d 1257 (6th Cir. 1996); *Digital Equipment Corp.* v. *Altavista Technology Inc.*, 56 Cal. App 4th 1342, 66 Cal. Rptr. 2d 399 (1997).

7 *Jacobson* v. *Mailboxes Etc USA Inc* 419 Maas. 572 (1995).

8 *Compuserve* v. *Patterson* 89 F.3d 1257 (6th Cir. 1996); *Groff* v. *American Online, Inc.* 1998 WL 307001 (R.I. Super. May 27, 1998); *Caspi* v. *The Microsoft Network, L.L.C.* 732 A.2d 528 (N.J. App. Div. 1999); *American Online Inc* v. *Booker* 781 So. 2d 423 (Fla. 2001 Ct. App.); *Celmins* v. *America Online Inc* 748 So. 2d 1041 (Fla. 1999 Ct. App.); *Rudder* v. *Microsoft Corp* 1999 Carswell Ont. 3195 (WL) (Ontario Super. Ct. Justice Oct 8, 1999); *Hotmail Corp.* v. *Van$ Money Pie, Inc.* 1998 WL 388389 (N.D. Cal) Rice Denice T., *Jurisdiction over Internet Disputes : Different Perspectives under American and European Law*, ABA Section on International Law & Practice, Annual Spring Meeting, New York. City, May 8, 2002, pp.43-44. available at http://www.howardrice.com/uploads/content/jurisdiction_internet.pdf.

With respect to law applicable the US Restatement (Second) of Conflict of Laws provides that contractual choice of law clauses will control unless selected forum has no substantial relationship to the parties or transaction and is not otherwise reasonable.[9] However, when the two States are governed by UN Convention on Law Applicable to International Sales of Goods (CISG), the CISG will apply[10]. CISG doesn't apply to sale of goods to consumers. As regards enforcement of judicial decrees of another country, in United States the recognition and enforcement of foreign judgments is governed by local domestic law and the principles of comity, reciprocity and *res judicata*. A final judgment obtained through sound procedures in a foreign country is generally conclusive as to its merits unless (1) the foreign court lacked jurisdiction over the subject matter or the person of the defendant; (2) the judgment was fraudulently obtained; or (3) enforcement of the judgment would offend the public policy of the state in which enforcement is sought.[11]

The jurisdiction in EU States is governed by Brussels Convention[12] and Lugano Convention[13] which requires the defendant to be sued in the State of its domicile [14]. However, the specific jurisdiction rules allow in matters relating to contracts to sue in courts in the place of performance of obligation concerned[15]. The Conventions give recognition to jurisdiction agreements if it fulfills the requirements of Article 17[16]. For consumer contracts, the convention requires the consumer to be sued in State where the consumer is domiciled [17] and consumer can bring proceedings in the State of its domicile on satisfaction of Article 15 of EC Regulation[18] i.e. the contract is concluded with a person who pursues commercial or professional

[9] S. 186-188 US Restatement (Second) of Conflict of Laws.

[10] CISG governs formation of sales contracts and rights and obligations of the parties that arise from such contracts. National laws govern other contractual consideration. The CISG provides substantive rules to govern a contract.

[11] *Ackermann* v. *Levine* 788 F.2d 830, 54 USLW 2523. United States Court of Appeals, Decided April 7, 1986.

[12] See http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_brux-textes.htm.

[13] See http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_lug-textes.htm.

[14] Article 2 Brussels Convention. Subject to the provision of this convention, person domiciled in a contracting State shall, whatever their nationality, be sued in the courts of that State.

[15] *Id* Article 5(1) – in matters relating to contract in courts in the place of performance of obligation in question.

[16] *Id* Article 17 The requirements are 1) that the agreement shall be in writing or evidenced in writing or 2) in a form which accords with practices established between the parties or 3) in international trade or commerce in a form which accords with a usage of certain dignity.

[17] *Id* Article 14.

[18] (EC) No 44/2001 of 22.12.00 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters , Section 4-Jurisdiction over consumer contracts-Article 15 – 1. In matters relating to a contract concluded by a person, the consumer, for the purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of the Article 5, if:

activities in the State of consumers domicile and by any means directs such activities to that State or to several States including that State and contract falls within the scope of such activities.

With respect to choice of law, Rome Convention[19] is applicable in contractual cases. The convention provides that contract shall be governed by the law chosen by the parties[20] and in absence of express choice it is governed by the law of the country with which it is mostly connected.[21] With respect to consumer contract the convention provides that choice of law made by parties shall not result in depriving the consumer of protection afforded to him by the mandatory rules of the law of the country in which the consumer has habitual residence, if in that country the conclusion of contract was preceded by a specific invitation addressed to him or by advertising, and consumer had taken in that country all necessary steps on his part for the conclusion of contract.[22] In absence of any choice, in

a) it is a contract for the sale of goods on instalment credit terms; or
b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
c) in all other cases, the contract has been concluded with a person who ~~persues~~pursues commercial or professional activities in the member State of the consumer's domicile or, by any means, directs such activities to that member State or to several States including that Member State, and the contract falls within the scope of such activities.
2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.
This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for the continuation of travel and accommodation.

[19] See http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

[20] Article 3(1).

[21] Article 4(1).

[22] Article 5-Certain consumer contracts.
1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.
2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or - if the other party or his agent received the consumer's order in that country, or - if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.
3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.
4. This Article shall not apply to: (a) a contract of carriage; (b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.
5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

accordance with Article 3 it will be governed by law of the country in which consumer has habitual residence. This will subject e-businesses to number of jurisdictions. Further, the Rome Convention does not provide answer to law applicable to online supply of goods or services. Recognition and Enforcement of foreign judgementsjudgments in EU is governed by Brussels and Lagano Convention. The Contracting States have to recogniserecognize and enforce such judgementsjudgments except on grounds mentioned in Article 27[23]

Thus, the parties to online contractual disputes will be subjected to different rules relating to jurisdiction, choice of law and enforcement of foreign judgementsjudgments. Certain efforts have been made by Hague Conference on Private International Law to bring uniformity by framing draft rules. The recommendations have also been made by various other agencies to provide the solution to the problem.

III Hague Conference on Private International Law

In order to deal with issues of jurisdiction, recognition and enforcement of foreign judgements relating to online contracts, the Hague Conference on Private International Law has prepared two draft conventions:

1. Draft convention on jurisdiction and enforcement of foreign judgements in Civil and commercial matters adopted on 30.11.99, and
2. Draft Convention on exclusive choice of Court jurisdiction applicable to international cases to the exclusive choice of Court agreement conducted in civil and commercial matters adopted in April, 2004.

[23] Article 27 -A judgment shall not be recognized:
1. if such recognition is contrary to public policy in the State in which recognition is sought;
2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defense ;
3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;
4. if the court of the State of origin, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State;
5. if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the State addressed.

The first convention applies to both Business to Business (B2B) and Business to Consumer (B2C) Contracts. Article 6 of the convention proposed rules of international jurisdiction applicable in matter of business to business contracts[24]. The party can bring action in courts of the State in which goods are supplied or services were provided and in matters related to both the supply of goods and or services, place where performance of the principal obligation took in whole or in part. Article 4 of the convention provides for the validity of choice of courts clauses on fulfillment of certain conditions i.e. agreement should be in writing or entered by any other means of communications which renders information accessible so as to be usable for subsequent reference, or in accordance with usage which is regularly observed by the parties; in accordance with the usage of which the parties were ought to have been aware and which is regularly observed by the parties to the contracts of the same nature, in the particular trade or commerce concerned.

The discussion on electronic commerce and International jurisdiction which took place in Ottawa on 28th February to March 1, 2000[25], it was agreed that B2B contracts concluded online and performed offline, Article 6 can be used and no special provision is required. With regard to contracts concluded and performed online, the subject matter exchanged is information and Article 6 is not suitable in transition of such kind. Proposal was made that place of performance or place of delivery of information, or drafting could be made according to Article 15.4 of 1996 UNCITRAL Model on E-Commerce i.e. place of business of defendant or in absence of place of business, place of its habitual residence.

With respect to identification and location of parties the line of approach was:-

1. Maximum use should be made of freedom of contract (party autonomy), the operation of future rules should be based on statements made by the parties to the contract.

[24] Article 6 – Contracts – A plaintiff may bring an action in contract in the courts of the state in which –
a) in matters relating to supply of goods, the goods were supplied in whole or in part;
b) in matters relating to the provision of services, the services were provided in whole or in part;
c) in matters relating both to the supply of goods and the provisions of services, performance of the principal obligation tool place in whole or in part.

[25] Preliminary document No. 12 of August 2000 – Electronic Commerce and International Jurisdiction, Ottawa, 28th February to March 2000 prepared by Catherine Kessendjian, available at www.hcch.net.

2. If the provider of service wantprovider of service wants to know in advance, which Court may have jurisdiction to settle any dispute with his co-contractor, ask him details of his location and identify in order to be able to rely on the provision in the convention.

3. The co-contractor will then be bound by the information he supplies concerning his identity and location; in the sense that jurisdictional rule will apply in respect of information.

4. In case of difficulty (false information), error or lack of information the provision in the convention will no longer apply. The Court must refrain from exercising jurisdiction under Article 22,[26] if found that the co-contractor has made statement which do not correspond to the facts, and was made solely to confer jurisdiction on the courts of the particular state.

Article 7 applies to business to Consumer Contracts: The claim against consumer can be brought before the courts of the State of the habitual residence of consumer. The consumer can bring the claim in the courts of the state in which it is habitually resident. The consumer can file a case only if, (i) the conclusion of the consumer contract must have been linked to that activities of the business in the state of consumer's residence, or directed at the state in particular by soliciting business through means of publicity (2) the consumer has taken necessary steps to conclude the contract in his state of residence.[27]

[26] Article 22 – (1) – In exceptional circumstance, when the jurisdiction of the Court seised is not founded on an exclusive choice of Court agreement valid under Article 4, 8 or 12, the Court may, on application by a party, suspend its proceeding if in that case it is clearly in appropriate for that Court to exercise jurisdiction and if a Court of another state has jurisdiction and is clearly more appropriate to resolve the dispute: Such application must he made no later than at the time of the first defense on the merits.

[27] Article 7 – Contracts concluded by consumers – 1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the state in which it is habitually resident, if : a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that state., in particular in soliciting business through means of publicity, and b) the consumer has taken the necessary steps for the conclusion of the contract in that State.
2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of consumer.
3. the parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of courts:
a) if such agreement is entered into after the dispute has arisen
b) to the extent only that it allows the consumer to bring proceeding in another Court.

In Ottawa meeting it was discussed that if the placing of material on an Internet site is regarded as advertising by the business, the first condition will always be met. As regards second condition, the present day means of communication enable a consumer to conclude contract in a place other than his habitual residence but this do not carry any special implication for the purpose of deciding which courts have jurisdiction. Para 2 Art.7 says that the claim against a consumer may only be brought by a person who entered into the contract in course of its trade or profession before the courts of the state of the habitual residence of the consumer. This para raises the relative strength of the parties to the contract, because in an electronic world, business may very well be a very small one. The para (3) deals with choice of Court clause. It was suggested in the meeting that consumer who is fully informed of his rights, could decide to forego the protection available under Article 7 and opt instead for a choice of Court. It was also suggested that choice of Court would be valid if the State of the consumer's habitual residence accepted that as valid.

If default jurisdiction is kept as consumer habitual residence, then again the question of identification and location of parties would arise and the consumer could be required to identify his habitual residence in order to bring the jurisdictional rule into play. An idea was put forward in the meeting, that if an enterprise targets consumers in a particular country, it would be consistent to decide that the courts of that country have jurisdiction for the consumers residing in its territory. However, this development was criticized by some experts.

Article 9 provides that a plaintiff may bring an action in courts of a State in which a branch, agency or any other establishment is situated or where the defendant has carried on regular commercial activity by other means, provided that the dispute relates directly to the activity of that branch, agency or establishment or to that regular commercial activity. The discussion at Ottawa produced a consensus that an internet site itself cannot constitute a branch office or establishment. Article 18 prohibits assumption of jurisdiction on certain grounds. An idea was put forward that Art. 18 should exclude ground of jurisdiction based solely on the accessibility of site.

With respect to recognition and enforcement of foreign judgments Article 25 and 26 provides that a final judgment in civil and commercial matters of the Court of competent jurisdiction will be accorded recognition and it may also be enforced. The recognition or enforcement of the judgment may be refused if: (1) proceedings between same parties having same subject matter is pending before a Court of the State addressed, if first seised

according to Article 21 i.e. *lis pendens*, (ii) judgment is inconsistent with a judgment rendered, either in the State addressed or in another state, provided that in the latter case the judgment is capable of being recognized or enforced in the state addressed; (iii) judgment is incompatible with the fundamental principles of the State addressed, including the right of each party to be heard by an impartial or independent Court; (iv) defendant not given notice of proceedings; (v) judgment is obtained by fraud in connection with the matter of procedure or (vi) judgment is violative of public policy.

The second draft convention on exclusive choice of Court agreements will apply to the Business to Business contracts in civil and commercial matters.[28] It excludes consumer contracts. Scope of the convention is to make exclusive choice of Court agreement, as effective as possible in context of international business the convention imposes obligation on the courts of the Member States, that the chosen Court must be obliged to hear the disputes.[29] Article 4(2) precludes resort to the doctrine of *forum non conveniens or lis pendens*. Article 4(3) provides that it will give affect to the internal allocation of jurisdiction among the courts of a contracting states unless the parties designated a specific Court. Eg.-agreement refers to Court of Netherlands or a Court of a State of New – Jersey there is no reason why the normal rules in the internal allocation of jurisdiction question should not apply. Under Article 5 all others courts must be obliged to decline jurisdiction except on any of the grounds mentioned in Article 7(a) to (e)[30]. The judgment given by chosen Court must be recognized and enforced by the courts in other countries. Article 3 provides that there has to be exclusive choice of Court agreement which specifically provides that the Court of one contracting State to the exclusion of other courts have jurisdiction, and agreement must be in writing, or by any other means of communication which renders the information accessible so as to be usable for subsequent reference.[31] This clause is intended to cover electronic means of data transmission or storage provided that the data is retrievable so that it can be

[28] Article 1.

[29] Article 4.

[30] Article 7 – Obligations of a Court not chosen – If the parties have entered into an exclusive choice of Court agreement, any Court in a contracting state other than, that of the chosen Court shall suspend or dismiss proceedings unless –
a) The agreement is null and void under the law of the State of the chosen Court;
b) A party lacked the capacity to enter into the agreement under the law of the state of the Court seized;
c) Giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to the fundamental principles of public policy of the state of the Court seized;
d) For exceptional reasons the agreement cannot reasonably be performed; or
e) The chosen Court has decided not to hear the case [except where it has transferred the case to another Court of the same state as permitted by Article 5, paragraph 3 (b)].

[31] Article 3(1) (c) (b).

referred to future occasions. It covers e-mail or fax – such agreement is independent of other terms of contract, and its validity cannot be contested on the ground that the contract is not valid.

As regards the place of residence of entity, other than natural person, the convention provides that the place will be a) where its has its statutory seat, b) under whose law its was incorporated or formed, c) where it has its central administration, or d) where its has its principle place of business.[32]

Article 7 provides that the judgment given by Court designated in an exclusive choice of Court agreement, has to be enforced and recognized except when the agreement was null and void under the law of the State of the chosen Court ; party lacked capacity to enter into agreement proceedings not notified to defendant; judgment obtained by fraud; or violation of public policy.

IV Recommendations of American Bar Association and Kent Law Jurisdiction Project[33]

It gave six jurisdictional default rules regarding consumer contracts.

1. Personal or perspective jurisdiction should and not be asserted based solely on the accessibility in the State of a passive website that does not target the State.
2. Both personal and perspective jurisdiction should apply to a website content provider or application service provider ["sponsor"] in a jurisdiction assuming there is no enforceable contractual choice of law and forum, if:
   i. The sponsor is a habitual resident of that jurisdiction
   ii. The sponsor 'target' that jurisdiction and the claim arises out of the content of the site, or
   iii. The dispute arises out of a transaction generated through a website or service that does not target any specific jurisdiction, but is interactive and can be fairly considered to knowingly engage in business transactions there.

[32] Article 4(2).

[33] *Supra* note 8 Denice Rice T. citing *Achieving Legal and business Order in Cyberspace: Jurisdictional Issues Created by the internet* [report by the American Bar association ("ABA") Jurisdiction in Cyberspace Project, ABA Annual Meeting in London July 17, 2000] reprinted in 55 *Bus. Law* 1801 (2000).

3. Consumers (purchasers) and sponsors (sellers) should be encouraged to identify, with adequate prominence and specificity, the jurisdiction in which they habitually reside.

4. Sponsors should be encouraged to indicate the jurisdictional target(s) of their sites and services either by: (a) defining the express content of the site or service, or listing destinations targeted or not targeted; and (b) by deciding whether or not to engage in transactions with those who access the site or service.

5. Good faith efforts to prevent access by users to a site or service through the use of disclosures, disclaimers, software and other technological blocking or screening mechanisms should insulate the sponsor from assertions of jurisdiction.

6. Personal and/or perspective and /or tax jurisdiction should not be exercised merely because it is permissible under principles of international law. Rather, the application of such jurisdiction should take into account:

   (i) the interests of other States in the application of their law and the extent to which laws are in conflict;

   (ii) the degree to which application of a State's own law will impede free flow of electronic commerce;

   (iii) whether the regulatory or tax benefits to be gained through the assertion of jurisdiction are sufficiently material to warrant the additional burden on global commerce that it will impose; and

   (iv) principles recognized under national abstention doctrines, such as forum non conveniens, where the interests of justice or convenience of the parties or witnesses point to a different place as the most appropriate one for the resolution of a dispute.

As regards contractual choice of law and forum, the following three principles should apply between buyers and sellers:

a) Absent fraud or related abuses, forum selection and choice of law contract provisions could be enforced in business to business electronic commerce transactions.

b) In business to consumer contracts, courts should enforce mandatory and non binding arbitration clauses where sponsors have opted to use them, and should permit the development of a "law merchant" in exchange for:

   (i) the sponsor's agreement to permit enforcement of any resulting final award or judgment; and

   (ii) the user's acceptance of an adequately disclosed choice of forum and choice of law clauses.

c) Jurisdictional choices should be enforced where the consumer demonstrably bargained with the seller, or the choice of the consumer to enter into the contract was based on the use of a programmed consumer's bot[34] deployed by or on behalf of the consumer and whose programming included such terms as the nature of the protections sought, the extent to which such protections are enforceable and other factors that could determine whether the user should enter into the contract.

V International Chamber Of Commerce (ICC) E-Commerce Project On Jurisdiction And Applicable Law In E-Commerce

ICC gave its recommendation on online transaction and consumer protection in context of jurisdiction and applicable law. In this it said that one should avoid expansive jurisdictional claims, by applying principles of country of origin (country of e-business) and party autonomy.

It said country of destination (where business is directed) approach as given by EU Directive will lead every small e-business to jurisdictional claims anywhere in the world where the website could be accessed thereby leading to uncertainties in law. For avoiding such claims ICC has suggested.

1) Party Autonomy: A primary goal of commercial law is to develop legal certainty for transacting parties. ICC supports freedom of contract as general principle that should drive decisions regarding choice of law and forum. As the basis for all commercial laws, contracts embody private agreement between parties; formalizing their intent to be bound by the terms of the contact as if these werewas the law between them.

[34] A consumer's bot be defined as one to which no criteria were applied except those explicitly specified by the consumer , i.e., a "fiduciary" bot.

However, in context of B2C disputes governments must place limits on conditions or private agreement in heavily regulated sectors, such as banking and investments. Courts and regulators may also override the terms of private agreements that appear to result from fraud or deceptive practices, ICC encourages governments to keep these limits on the applicability of party autonomy to a minimum. However, where a compelling and well defined public policy objective dictates such a limitation, ICC urges governments to indicate the circumstances in which they intend to apply local regulations to cross-border e-commerce and to work towards a common approach in defining fraudulent practices in B2C transactions.

2) Country of origin: Application of the country of origin principle is preferable and most workable solutions. However ICC recognizes that there is a subset of consumer transactions in heavily regulated industries where, due to compelling public policy reasons, regulations have been developed to provide specific redress and information be made available to the consumer in his or her country of residence. As a commitment to consumer protection and empowerment is shared by business and governments, application of the "country of origin principle should not be read to undermine such regulations. Nevertheless ICC encourages government to reassess such regulations so as to identify their utility in a global marketing place.

It was suggested that choice, self regulation, and country of origin are the preferable or workable solutions.

VI Conclusion

In B2B contracts the emphasis of Hague Conference is on freedom of contract and party autonomy and in absence of forum clause the jurisdiction should be the place of performance, when contracts are performed offline and made online. If contract is performed online, the draft is silent and the suggestion in Ottawa meeting was place of business or habitual residence of defendant. In B2C contracts convention provides that the claim can be brought where the consumer habitually resides. The consumer can bring the claim in its State of residence, if the e-business targets that State through publicity and consumer has taken necessary steps to conclude the contract in his State of residence.

The American Bar Association jurisdiction project recommends that jurisdiction should not be assumed solely on accessibility of site and in absence of contractual choice of law or forum jurisdiction can be assumed of a place

where sponsor is habitual resident or sponsor targets that jurisdiction , or if sponsor do not target the any specific jurisdiction, at least the site is interactive, but emphasisesemphasizes that sponsor should indicate target jurisdictions, and choice of forum & choice of law provisions should be enforced in B2B contracts. The recommendations of ICC are party autonomy and jurisdiction could be assumed where the seller resides or else the small businesses will be subjected to number of jurisdictions.

The issue of jurisdiction relating to contracts performed online is still unsettled and solution suggested is place of business or habitual residence of defendant. This further requires information relating to location of parties and trusted third parties to authenticate the information. An online consumer is placed in better position than an e-business and subjecting small e-businesses to several jurisdictions and laws of various countries will be unjustified. A small e-business should have an option of commencing action in place where he carries on business or is habitual resident or the other solution is, jurisdiction should be assumed if the website is interactive.

Unless the choice of law is mentioned in contracts made and performed online, the proper law will be the law of place which is most substantially connected with the transaction, which is difficult to determine as all the elements of contract take place in cyberspace. Further the e-businesses will be in dilemma whether the judgementjudgment obtained will be recognisedrecognized and enforced by the concerned State.

Hence the reliance on contractual agreement will promote e-commerce, and encourage predictability for all parties concerned and will protect commercially reasonable expectations of both businesses and consumers. This will also promote small online businesses.

WILD LIFE CONSERVATION AND FOREST RIGHTS BILL, 2005: QUESTION OF COMPETING CLAIMS

Manju Arora Relan[*]

A COUPLET in the *'Atharva-Veda* says:

> *"Whatever I take from the Earth- may that have quick growth again. O Purifier, may we not injure the vitals of the heart".*

The theme of environmental conservation, therefore, persisted even more than five thousand years ago in our country [1]

The concept of protected areas (PAs) for the conservation of wild species of fauna and flora is not a new one for India. Literature written in India thousands of years ago, mentions 'sacred groves' where all life forms were protected. Emperor Ashoka who ruled in the third century B.C. set up sanctuaries for wild animals. This was perhaps the first governmental decree that concerned protection of animals.[2] Indian royalty and then the Moghuls also reserved areas although mainly for hunting purposes. Game reserves were established during the British colonial period too. Interestingly, many a British Officers who started as avid sportsmen turned conservationists and encouraged the establishment of 'protected areas'. In 1936 India's first national park, named after Sir Malcolm Hailey, then Governor of the United Provinces was established. In 1957 it was renamed Corbett National Park in memory of the legendary hunter-naturalist Jim Corbett.[3]

Each time areas were protected, though it was for different reasons. Certain areas have been reserved and protected over centuries- for religious and cultural reasons. Rulers have in the past, protected large tracts of land to provide refuge to species useful to them, e.g. elephants because they were important for warfare. Royalty also protected areas to serve as hunting grounds or sometimes even for the sheer aesthetic value of the areas. At the turn of the century, the 'scientific' aspect of conservation was emphasized. This may have resulted from scientific surveys/studies that indicated that there was a fear of losing certain species like the tiger if protection was not provided to prey species and the habitat. Despite this wildlife in India suffered due to a tremendous loss of habitat.

* Lecturer, Law Centre-I, Faculty of Law. University of Delhi, Delhi.

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3 Singh, B., "Corbett National Park" in Israel, S. and Sinclair, T. (eds.) *Indian Wildlife – Sri Lanka and Nepal* 195-204 (Singapore: APA Production, 1987).

I The problem

The on going debate about the justification, planning and management of India's wildlife protected area between the wildlife conservationists and human rights advocates overlooks the fact that wildlife and local communities are today equally threatened and have a common adversary in elitist state policies.

One argument is in favour of preservation of wild animals and plants. It states that in order to protect the vanishing biodiversity of India at least a small part (4%) of the country should be set aside free of all human activity for wild animals and plants. There is another contrasting argument, which states that a poor country like ours cannot afford the luxury of keeping thousands of square kilometers of land under forests and wildlife sanctuaries at the cost of millions of people. But whether it is wildlife or communities both are facing extinction.

The provisions to eliminate human intervention within national parks and sanctuaries operate harshly against, forest communities, one of the poorest politically weakest constituencies in India. It is estimated that there are nearly 5000 villages in protected areas with a population of about 250,000.[4] Tribal activists argue against protected areas because they deprive forest dwellers of access to common property resources, uproot communities, halt development activities and heighten tensions between local residents and the wildlife bureaucracy. Severing forest dwellers from their traditional access to forest produce 'criminalizes' honest citizens who have little choice but to tap the forests for fodder, fuel, food and minor forest produce. Conservationists sympathize with this view, but justify the extension of the national park and sanctuary network because of the degraded condition of our forests. They argue that the best-preserved wildernesses in India are within the national park and sanctuaries. Imperfect as the Wild Life Protection Act 1972 is, it offers a proven legal framework to preserve our vanishing natural heritage. The task of balancing these competing interests was very judicially settled by the Supreme Court in *Pradeep Kishan V/S Union of India*[5] and *Animal and Environment Legal Defence Fund V/S Union of India*[6].The Supreme Court in both these cases emphasized the protection of forest but not at the cost of poor tribal people. Therefore, in both the cases Court first asked about rehabilitation of poor tribal people

4 Divan, S. and Rosencranz, A., *Environmental Law and Policy in India* 335 (Oxford University Press, 2001).

5 AIR 1996 SC 2040.

6 AIR 1997 SC 1071.

and then constitution of any area as protected area meant for conservation of biodiversity.

> Forests help in maintaining the ecological balance. They shelter wild animals, preserve gene pools and protect tribal people. Besides this, forests bring revenue to the state, supply raw material to industries and act as a source of fuel and fodder.

II The historical genesis of conservation law and policy

During the pre-British period in India, the main charge on the forests was the needs of the local people for their use only. At that time there was only customary regulations on people's rights over forests and forest produce[7]. The religio –cultural norms and customary regulations were the 'laws' regulating exploitation of forest resources by the local people. These 'normative laws' are still found in many places in India. In the Western Ghats, temple forests are the finest surviving examples of tropical evergreen forest diversity[8]. They escaped the axe because they are preserved in the name of gods and goddesses of local origin. Conservation of natural resources and wild species is embedded in the Indian culture.

After the advent of the British, industrial and commercial interests were charged on the forests. The forests were viewed as revenue generating resources and valuable contributors to the industrial revolution in Europe. As a result, laws were enacted to protect forests from local interests entrusting the state with the legal authority to exploit forests and forest resources. To this effect, the first Forest Act was formulated in 1865, which was modified and re-enacted in 1878 and 1927. All these Acts declared forests as state property, and extinguished the traditional rights of the local people[9].

After independence there was some rethinking on the issue of forest policy. The new national forest policy was issued as a Government of India Resolution in 1952. It was declared that the forest policy should be based on paramount 'national needs'. "National needs" were defined in terms of industrial and commercial development, which would strengthen the national economy. 'National needs' did not include the needs of the poor local

[7] Kulkarni S. "The Forest Policy and Forest Bill: A Critique and Suggestions for Change", in Fernandes, W. and Kulkarni, S., *Towards a New Forest Policy: People's Rights and Environmental Need* 84 (1983).

[8] Lohar, S., "Serving the Western Ghats" XI *Sanctuary Asia* No. 6, 1991.

[9] Kannan, K.P. "Forestry legislation in India: Its Evolution in the Light of the Forest Bill, 1980", in Fernandes, W. and Kulkarni, S., (eds.), *Towards a new Forest Policy: People's Rights and Environmental Needs* 76 (1983).

populace substantially dependent on the forests for their sustenance. *Adivasis* living in and around forests were discouraged from using forest. The government tried to obtain more and more revenue from the forests and for that purpose forests were diverted for the use of industries.

The National Commission on Agriculture (1976)[10] too undermined the sustenance value of the forests for the tribals. The Commission did not treat the *Adivasis* need for timber for houses, for leaves used for thatching, for fruits, flowers and roots used as food, for seeds collected from forests to extract edible oil[11]. The National Commission further said that the tribals "rights and privileges" have brought destruction to the forests and so it is necessary to reverse the process[12]. The Forest Bill 1980 is mainly on the recommendations of the National Commission on Agriculture.[13]

In nutshell, after independence, a very important natural resource, i.e. forest was nationalized. All the forest policies, which have been formulated and promulgated since then, undermined the symbiotic relationship between the tribals and forests and overlooked their customary rights[14]. Barring the National Forest Policy 1988, in all other policies the thrust has been to conserve the forests excluding the people and completely undermining their historical linkage with and essential stakes in the forests.

In order to avert the crisis and to save the earth and the human civilization from heading towards a catastrophe, various efforts were made both at the global and national level. As a part of such efforts in the first half of 20th century, the very idea of conscious conservation of natural resources and areas vital to the long-term progress and sustenance of human society through systematic intervention was conceived. However, conservation of natural areas and wild species has a very long history.

However, the philosophy behind these early conservation concepts is different from that of the modern concept of national park and sanctuary. The former philosophy was primarily based on recreation and entertainment of the ruling class whereas the later is much more wider and advocates comprehensive development of human society through conservation of natural resources, and their sustainable development. The modern concept of national park and sanctuary is based on this wider philosophy and backed by state laws.

[10] *Report on the National Commission on Agriculture*, 1976, Part-IX 'Forestry', GOI, Ministry of Agriculture & Irrigation, New Delhi, at 32-33.

[11] *Ibid.*

[12] *Supra* Note 7, at p90.

[13] *Id.* at 91.

[14] *Ibid.*

India became a part of the global effort of conservation of wild species and biological diversity and adopted the concepts of wildlife sanctuary and national park. The first park, Corbett National Park in India came into being in 1935. While the government takes the credit for setting up a large network of protected areas, the local people living in and around these protected areas are relentlessly waging struggles against these protected areas some time leading to eruption of violence and overt conflict between the park management and the local communities.

Events related to Second World War saw a greatly heightened attack on wildlife habitats, so that as soon as India gained independence, there was considerable pressure from naturalists to take urgent conservation steps. India's first Prime Minister Jawaharlal Nehru, himself a keen naturalist set up the Indian Board for Wildlife (IBWL) in 1952. Till 1952 the management of wildlife in India consisted of no more than regulation of *Shikar*. It was with the formation of Indian Board for Wildlife in Mysore in 1952 that wildlife preservation and management begun on a serious footing in India. The Board was given the task of devising ways and means of wildlife conservation through various legislative and practical methods, including the banning of shooting of several species. The IBWL is today the main advisory body to the government on wildlife conservation.

But the most important step was to come only in 1972, when the Wild Life Protection Act,1972 was promulgated and extended to all the states of the country. A series of national programme, notably Project Tiger, were also launched towards the protection of specific habitats and threatened species. State governments rapidly expanded their network of Protected areas under the WLPA. The Wild Life (Protection) Act of 1972 provides the statutory framework for protecting wild animals, plants and their habitats. The Act adopts a two-pronged conservation strategy: specified endangered species are protected regardless of location, and all species are protected in designated areas, called sanctuaries and national parks.

In *State of Bihar v Murad Ali Khan,*[15] the Supreme Court allowed the state government's appeals and restored the orders of the magistrate taking cognizance of offences under the Wild Life Act. The accusation against the respondents was that they had shot and killed an elephant in the Kundurugutu Range Forest and had removed its ivory tusks. In its judgment, the Supreme Court explained the object of the Wild Life Act:

[15] AIR 1989 SC 1.

> "The policy and object of the Wild Life laws have a long history and are the result of an increasing awareness of the compelling need to restore the serious ecological imbalance introduced by the depredations inflicted on nature by man. The state to which the ecological imbalances and the consequent environmental damage have reached is so alarming that unless immediate, determined and effective steps were taken, the damage might become irreversible. The preservation of the fauna and flora, some species of which are getting extinct at an alarming rate, has been a great and urgent necessity for the survival of humanity and these laws reflect... a grave situation emerging from a long history of callous insensitiveness to the enormity of the risks to mankind that go with the deterioration of environment... Environmentalist's conception of the ecological balance in nature is based on the fundamental concept that nature is 'a series of complex biotic communities of which a man is an inter-dependent part' and that it should not be given to a part to trespass and diminish the whole. The largest single factor in the depletion of the wealth of animal life in nature has been the 'civilized man' operating directly through excessive commercial hunting or more disastrously, indirectly through invading or destroying natural habitats."[16]

A significant step towards wildlife conservation was taken in 1982 with the drawing up of the National Wildlife Action Plan (NWAP).

Protected areas, such as National Park and wildlife reserves or sanctuaries have long been recognized as playing a crucial role in conserving biological diversity. But the establishment of a protected area often places restrictions on the use of the area's resources by local people. Residents often perceive protected areas as restricting their rights and ability to earn a living. This situation has frequently led to conflicts with Park managers and to 'illegal' and 'destructive' encroachment.

It is an undeniable fact that 'conscious conservation' of natural resources is essential at this juncture of development of human society to arrest the fast pace of their degradation and depletion. The World's biological resources-its species, habitats, and eco-systems are under threat from growing populations, unsustainable consumption patterns, pollution, wasteful resource use, and global change. By damaging the highly diverse ecosystems that support the world's species, we alter hydrological cycles and climate

[16] *Id.* at 3, 4.

and degrade soil-building and pollutant-absorbing mechanisms[17]. It is definite that if the current process of degradation and depletion goes unhindered the existence of the planet and human society will be in jeopardy soon. The problem is ubiquitous and as serious in the developing countries as in the developed countries. It is essential to set aside some land, preferably 5% to be preserved 'free of all human activities. It is essential for India of the future to retain representative patches of fauna & flora in their original state. Total environmental preservation in few selected areas is very essential for conservation. While numbers of protected areas have expanded considerably, there is little disagreement on one basic point; they are in peril. Encroachment by various industrial and commercial interests on their borders and even within their precincts is not new but it has grown rapidly. The rights of the future generations and of non-human inhabitants of the planet are under threat from the pressing human demands of present day.

Increase in population of people, their total dependence on the biodiversity of forests, wetlands, grasslands and natural ecosystems result in damage to natural ecosystems. If the population of people inside forest area grows beyond the carrying capacity of protected area and in case where there is an inevitable clash between the survival of a species or unique habitat and the continued existence of human settlement, resettlement is very essential. But there is lack of national policy on resettlement and rehabilitation with regard to protected areas therefore, where displacement is very essential then it must be participatory and must be done with a comprehensive Resettlement and Rehabilitation package which is to be designed with the affected population involving NGOs and independent experts. Need of the hour is total rehabilitation.

The crucial questions which arise here; why there is a contradiction between the local people and conservation of 'people's interest' and 'wildlife interests'? Is the contradiction inevitable? In other words, do the local communities essentially have to sacrifice their traditional rights and the sources of livelihood for the long-term interest of conservation? Is it ethical that in a poor country like ours, where a large section of rural population are substantially dependent on their surrounding natural resources for their sustenance, any conservation strategy should deprive them of their crucial resources without giving them alternatives?

Decisions to restrict or stop certain human activities have often been taken arbitrarily without any proper assessment of their impact on the ecosystem or its wildlife, and without any clear statement of the

[17] *The World Resource Institute. World Resources*, 1991-93, (Oxford University Press, 1992).

conservationist objective sought to be achieved. Undoubtedly, most of these decisions are taken with the best of intentions. Undoubtedly, also in many cases they are justified, as human pressures in several areas cause serious damage. However, even in such cases the high-handed manner in which restrictions are imposed and the almost universal absence of suitable alternatives being provided has led to avoidable suffering and tension.

III Impact of protected areas on people

I. Imposed displacement of tribal people from national parks, core zones of sanctuaries or special conservation areas like tiger reserves are taking place. But relocation of these communities is always poorly carried out. There is a general failure to properly rehabilitate displaced people. Thus displacement without proper rehabilitation leads to sufferings and tensions for tribal communities.

II. The more common impact has been the curtailment or extinguishing of local community land and forest rights, or access to natural resources inside PAs. This has had a direct impact on their survival and livelihood base, for even basic inputs like cooking energy and fodder for livestock have become hard to obtain. Traditional activities have suddenly become 'illegal' and villagers report considerable harassment and bribe taking by forest staff. To add insult to injury, villagers have rarely been explained the reasons for this curtailment of rights, and viable alternatives have rarely been provided. Recent amendments to the WLPA have further curtailed local community activities, by prohibiting all activities causing damage to the habitat of a sanctuary. One immediate effect of this was that some state governments severely restricted or banned collection of non-timber forest produce from PAs. The 1991amendment also made easier the final notification of parks and sanctuaries which were declared on Reserve Forest (RF) land, on the assumption that local rights would have been dealt with when the RF was declared. Though 1991 amendment provides for harmonizing the need of tribal and other forest dwellers with the conservation and protection of wildlife.[18] The 2003 amendment provides for representation of scheduled tribes in state board for wildlife.[19]

III. The protection offered by PAs and the WLPA has resulted in an increase in the population of some species (elephant, wild boar, nilgai, tigers, lions, leopards, bears) in some areas. This results in a 'spill-

[18] S. 8(cc) of WLPA, 1972.
[19] S. 6(e) of WLPA, 1972.

over' of animals unable to find adequate food and territory, or of those who actually prefer human-made habitats like fields. The result; direct human-animal encounters leading to human injury and death, livestock lifting, crop raiding, and property destruction. Crop damage by species like wild boar and nilgai is so widespread that some states haves declared them vermin or ordered their elimination from areas of high damage.

In this situation, a feeling of hostility amongst local communities has quite naturally built up. In an increasing number of areas this has manifested itself in the form of physical clashes between villagers and wildlife staff or other state forces, physical damage to habitats by irate villagers, poaching or support to outside poachers, and even demands for denotification. The discontent is often voiced in the most destructive of ways, e.g., the widespread incidences of fire in several protected areas.

This conflict is one of the most serious threats faced by our protected areas and the biological and cultural diversity they contain. A protection strategy, which alienates local communities, is unjust to them and disrespectful of their fundamental rights, also shortsighted for wildlife conservation.

The park-people relationship is, of course, by no means one-sided. Increasingly local communities are putting excessive pressure on natural habitats, or becoming conduits to serve urban and commercial demands. The mass ritual hunting carried out by some communities and the indiscriminate hunting of mammals and birds by some north-eastern tribes, are causing irreversible decline in wildlife species. Ecologists have also pointed out that local resource use is no longer sustainable, because their populations or that of their livestock has risen, or because their demands have gone up in response to urban consumerist values. The irreversible degradation as a result is boomeranging on these communities themselves. The most striking example of this is change in the nomadic life style of *Gujjar* tribe living in *PRNP*[20]. Earlier *Gujjars* used to stay from late autumn through to spring in Shivaliks in *PRNP*. During summer they migrate north to the alpine pastures to spend the summer and the rainy season. Thus, they used to utilize to the maximum both the eco-system for feeding their herds. These *Gujjars* over a period of time became settled in *PRNP* and now don't migrate upwards during summer season. Throughout the year they remain in the *PRNP*. Thus once a sustainable lifestyle has become highly unsustainable resulting into the shrinkage of forest cover and wildlife species.

[20] Proposed Rajaji National Park.

The issue of people and protected areas should be considered in totality and judged upon individual merits of each case. Where the people are themselves ready to move out of the protected area because of social and other constrains, they should be properly rehabilitated, as it would be in the interest of forest and people, any listless approach in providing these persons, with suitable alternative would rather harm the object of resolving the conflict. Where there was an inevitable clash between the survival of species and continued existence of human settlement, resettlement and rehabilitation may be necessary.

IV The causes of problem

The main causative factors of the problem in reference are located mainly in three areas, i.e., law and policies, management and development. Present set of laws meant for creation and management of protected area in our country are responsible for the emergence of the problems. Existing laws are not only ambiguous or beyond the comprehension of illiterate and ignorant local people, but also inappropriate to our indigenous conditions, where a large section of people draw their sustenance from the natural resources in areas which are declared protected. Furthermore, the laws deprive local inhabitants of their traditional privileges and customary rights and, often then not, displace them from their ancestral homeland. These laws and policies and working plans related to national parks and sanctuaries are full of flaws. The laws which were framed by the British are still in vogue and they have been made stricter further. One-sided approach of the government to conservation, complete negligence of forest dwellers rights in case of conservation, and lack of coordination and gap of communication among various government departments have aggravated the problem.

The laws and policies related to national parks and sanctuaries are formulated at the centre but implemented by the states, which created a lot of confusion and problems. The one-sided and shortsighted approach of the government has disturbed the peaceful mutual relations among forest dwellers, wild animals and forests. The approach of the government has been anti-poor but pro-rich. The prevailing practice protects only the interest of the wildlife undermining the interest of the marginalized and pauperized sections of the people.

Another major cause of the problem is related to management of protected areas, which is a very complex problem in itself. Again the whole management system of protected areas is also based on one-sided approach. Wildlife interest is accorded primacy over people interests, the basic survival interest of the local people. The most crucial issue related to management

is absence of local people's participation. The local dwellers are neither involved in the management nor are they allowed to use the resources, which they have been doing for generations. The management operates on the perception that the local people are the main enemies of the forest. Hence the management bureaucracy behaves in a despotic way considering responsibility to fence of the protected areas from the people. Suppression of the people by the local forest officials has aggravated the problem. The traditional knowledge of the people with respect to conservation is discarded as scientifically irrelevant. Hence, one finds very glaring chasm between the people and management bureaucracy in their mutual interaction and understanding. Furthermore, management does not intend to compensate the loss of the people in any form.

Another area where lies the cause of the problem, is improper rehabilitation and development of the forest dwellers and other communities dependent on the surrounding natural resources that are protected in the form of National Parks and Sanctuaries. By sheer spatial location of forest dwellers, they remain as peripheral groups and out of periphery of official development. Even after six decades of independence, these groups are still leading hard and miserable life and languishing in perennial penury. Their agriculture is dependent on monsoon and based on outdated, unprotected techniques. No education and health facility by the state is provided to them. Lack of education, awareness and alternative employment opportunities make exclusive protection an antagonistic concept and a survival question for the local people. The rehabilitation plans and compensation schemes are not adequate and are full of flaws.

V Background of Forest Rights Bill

Rather than improving, the situation of advasis has worsened in recent time. During the last three years, systematic "eviction drives" have been conducted all over the country by the forest department to remove so-called "encroachers" from forest land. Making matters worse, judicial pronouncements under the ongoing T.N.Godavarman Thirumulkpad V/S Union of India[21] have extended the Forest Conservation Act's ambit even to lands yet to be finally notified under the Indian Forest Act,1927 and to all lands conforming to the 'dictionary definition forest' irrespective of ownership. Besides staying regularization of even eligible pre-1980 encroachments and de-reservation of forest land or protected areas (irrespective of whether these have been finally notified after due settlement of rights), the Supreme Court has also banned the "removal of dead, diseased,

[21] AIR 1997 SC 1228.

dying or wind fallen trees, drift wood and grasses, etc" from all national park (NP) and wildlife sanctuaries (WLS).[22] Ministry of Environment and Forest and the central empowered committee (CEC) set up by the Supreme Court interpreted this to mean that 'no rights can be exercised' in PAs and have banned the collection and sale of all non-timber forest produce (NTFP) from them. This is when preliminary notifications declaring only the government's intention of constituting them as NP or WLS have been issued in most cases and people have legally admitted rights in many. In one stroke, between three to four million of the poorest people living inside protected areas (PAs) have been deprived access to a critical source of survival income without any scientific study indicating that such collection is indeed harmful to wildlife habitat. In Orissa's forest belts, already infamous for its starvation deaths, people are being driven to giving up their children in bondage and resorting to large-scale distress migration. The Supreme Court has shown scant regard to the consequences of its sweeping orders, effectively rewriting the law, for the survival livelihoods of forest-dwelling communities.

The last straw came with MoEF's circular of May 3, 2002 asking all states and UTs to evict all forest 'encroachers' within five months based on misinterpretation of another court order. These eviction drives were triggered by an order dated May 3, 2002, whereby the inspector general of forests instructed state governments "to evict the ineligible encroachers and all post-1980 encroachers from forest lands in a time bound manner." Diverse coercive means were employed, from setting fire to houses or destroying standing crops to molesting women, trampling people's dwellings with elephants, and even firing. These atrocities are a grim reminder of similar agonies that have been the lot of *adivasis* faced in India for the last 200 years. History-ruthless and unrepentant – seems to be only repeating itself.[23] The spate of brutal evictions across the country, in Assam and Maharashtra with the use of elephants to destroy huts and crops of impoverished tribals during a drought year, led to an uproar of protests. The MoEF was compelled to issue a clarification order in October 2002 that the 1990 circulars[24] remained valid and that not all forest-dwellers were encroachers. Despite this, as the MoEF admitted in Parliament on August 16, 2004, between May 2002 and August 2004 alone evictions were carried out from 1.52 lakh hectares.[25]

In February 2004, before parliamentary elections were held,the MoEF issued two new circulars: one titled "Regularisation of the rights of the tribals

[22] AIR 1998 SC 769.
[23] Bhatia, Bela "Competing Concerns", XL *EPW*, 47, at 4891, (2005).
[24] *Infra* note 30
[25] Sarin, Madhu, "Scheduled Tribes Bill, 2005:A comment", XL *EPW*, 21, at 2132, (2005).

on the forest lands" which extended the date for regularization of encroachments by tribals to December 1993 (instead of October 1980 under the FCA) and the other was titled 'Stepping up of process for conversion of forest villages into revenue villages'. These were promptly stayed by the Supreme Court. In an affidavit filed in the court to get the stay vacated, the MoEF finally admitted that during the consolidation of forest, "the rural people, especially tribals who have been living in the forests since time immemorial, were deprived of their traditional rights and livelihood and consequently, these tribals have become encroachers in the eyes of law"and that "it should be understood clearly that the lands occupied by the tribals in forest areas do not have any forest vegetation". It further asserted that its February circular "do not relate to encroachers, but to remedy a serious historical injustice. It will also significantly lead to better forest conservation". In now opposing the Bill as a threat to the country's forest over, the MoEF is clearly contradicting itself.[26]

The court has refused to vacate the stay and the MoEF has backtracked and informed the court that October 1980 would remain the cut-off date for regularization of pre-1980 occupations. In the tussle over the cut-off date for regularization, the state's own culpability in failing to settle forest-dwellers' rights for a quarter of a century (in fact since independence) and the injustice done to those who have been evicted and displaced during this long period, is seldom discussed.

With the UPA government's Common Minimum Programme stating that evictions would be stopped, on December 21, 2004, the MoEF issued a letter to all states/UTs to stop evictions of forest-dwellers till their rights had been settled. Even this has had no effect. In April 2005 itself, 180 huts were burned in MP, in one case after pulling out a pregnant woman in labour who delivered her child in the open. Several cases filed in the Jabalpur High Court list horrendous FD (Forest Department) atrocities during such operations.[27]

In this background at a high level meeting it was held on January 19, 2005, the Prime Minister decided that the Scheduled Tribes and Forest-Dwellers (Recognition of Forest Rights) Bill should be drafted and tabled in the budget session of parliament. The task of drafting the Bill was assigned to the Ministry of Tribal Affairs (MoTA) instead of the MoEF as senior officials argued that tribals could not be expected to get justice within the framework of forestry laws. Contrary to MoEF's claims of being sidelined

[26] *Ibid.*
[27] *Ibid.*

in the Bill's drafting, the director- general of forests was a member of the technical support group (TSG) constituted by MoTA, along with representatives of other ministries to help it draft the Bill. Unfortunately, under instructions from higher levels, non-tribal forest-dwellers were subsequently excluded from the Bill's purview.

VI Forest Rights Bill, 2005

Mass eviction of tribals led to a promise made in the Common Minimum Programme of the UPA government, "Eviction of tribal communities and other forest-dwelling communities from forest areas will be discontinued". In pursuance of this commitment, the Ministry of Tribal Affairs (MoTA) prepared a legislation to "protect" the *adivasis* from forced evictions.

The aim of the Bill is to give legal entitlements to forest land that the *adivasis* may have been cultivating for long, as well as over forest rights such as grazing rights and access to minor forest produce. For instance, the Bill will give *adivasis* titles to forest land they have been cultivating since 1980, up to 2.5 hectares per nuclear family. Similarly, the Bill will give *adivasis* secure entitlements to minor forest produce such as fuelwood, bamboo, honey, gum, mahua, tendu patta, roots and tubers. Other forest rights covered by Bill include right to nistar (collection of forest products for subsistence needs), the right to conversion of "forest villages" into revenue village, the right of settlement of old habitations, community rights to intellectual property related to forest biodiversity and cultural diversity, and "any other traditional right customarily enjoyed by the forest –dwelling scheduled tribes... excluding the right to hunting".[28]

A unique feature of the Bill is that the rights of *adivasis* go with responsibilities of conserving the forests and protection of wildlife. The Bill also seeks to end the exploitative hold of the forest department over the *adivasis* by recognizing the gram sabha as the authority to recognize and verify claims.[29]

VII Objectives of the Bill

Recognizing the inseparability between forest-dwelling tribal people and forests, and their conservation ethos, the Bill aims to rectify the historical injustice done to tribal people in the consolidation of state forests during the colonial and post-independence periods. The Bill is "to recognize and vest the (listed) forest rights and occupation in forest land in forest-dwelling

[28] *Id.*, Clause 3.
[29] *Id.*, Clause 4.

scheduled tribes who have been residing in such forests for generations but whose rights could not be recorded". The vested rights shall become legally enforceable.[30]

The rights shall include "responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance", thereby strengthening the conservation regime while ensuring livelihood and food security of the forest-dwelling scheduled tribes. Tenurial security and clarity of rights should make STs primary stakeholders in combining conservation with sustainable use.

The 13 listed 'forest rights' which may be vested include rights to land under individual or communal occupation for habitation or self cultivation; customary community lands for usufructs and grazing including the right to protect, regenerate and / or conserve or manage them; settlement of disputed claims, pattas/leases and conversion of forest villages to revenue villages (as per the 1990 circulars).[31] They also include rights over minor forest produce, intellectual property rights on traditional knowledge and habitat and habitation rights of primitive tribal groups and pre-agricultural communities.

Exercise of the rights shall be limited to subsistence and livelihood purposes only and not for exclusive commercial use.[32] Vesting of private land rights for pre-1980 occupations shall have an upper limit of 2.5 hectares per nuclear family even if they are in occupation of more land.[33] These rights shall be heritable but no alienable.[34]

VIII Intended beneficiaries

Forest rights under the Bill are to be vested 'only in those forest-dwelling scheduled tribes who are living in the areas in which they are scheduled and in occupation of land since before October 25, 1980'.[35]

[30] *Id.*, Clause 3.

[31] Circular No 13-1/90-FP of the Government of India, Ministry of Environment and Forest, Department of Environment, Forests and Wildlife dated September 18, 1990 addressed to the secretaries of forest department of all states/union territories. The six circulars under this were:
FP (1) Review of encroachments on forest land.
FP (2) Review of disputed claims over forest land, arising out of forest settlement.
FP (3) Disputes regarding pattas/leases/grants involving forest land.
FP (4) Elimination of intermediaries and payment of fair wages to the labourers on forestry works.
FP (5) Conversion of forest villages into revenue villages and settlement of other old habitations.
FP (6) Payment of compensation for loss of life and property due to predation/depradation by wild animals.

[32] Clause 4(6)(i).

[33] *Id.*, Clause 4(5)(i).

[34] *Id.*, Clause 4(3).

[35] *Id.*, Clause 4(1).

These provisions have created legitimate concerns about the unjustified exclusion of otherwise equally eligible non-tribal as well as tribal forest-dwellers under existing policy, and tensions and divisions this may generate. Not all tribes have been 'scheduled' and many STs may no longer be living where they were scheduled in the early 1950s. Even by conservative official estimates, by 1990 alone, over 6.4 million tribals had been displaced without any rehabilitation by development projects and the creation of PAs. Many who became involuntary forest 'encroachers' due to forcible displacement will be excluded on either the 1980 cut-off date basis or due to no longer being where they were scheduled. The Bill will thus not rectify the double 'historical injustice' they have been victim of. The MoEF's 1990 circulars are more inclusive than the Bill and may still provide respite to those left out.

In contrast to (typically non-tribal) individual settlement officers who have played havoc in the past by transferring tribal lands to non-tribals during settlements, the Bill vests authority in the gram sabha to initiate action for determining and recording the forest rights that may be vested. This is to be done in well-attended open meetings to ensure transparency and accountability and to protect the non-literate from the tyranny of paper work and bureaucratic procedures. Critics argue that gram sabhas are not necessarily democratic. While this may hold true in some situations, it will surely be more democratic than the bureaucracy, which has failed to act at all for 25 years.

Subdivisional and district level committees with multi-stakeholder representation shall resolve inter and intra-village conflicts and hear appeals against gram sabha decisions. The record of rights shall be maintained by the gram sabha to ensure that the present secrecy of official records is not used to disempower people yet gain. A state level committee shall monitor the process and submit its reports and recommendations to the Ministry of Tribal Affairs, the nodal agency.[36]

IX Offences and penalties

Violations of forest rights conferred under the Bill in contravenion of any of its provisions shall be punishable with a fine (for which the Law Ministry seems to have inserted an unrealistic upper limit of Rs. 1,000, which needs to be removed). Repeat offenders can have their rights de-recognised.[37] Unsustainable forest use, destruction of wildlife, forests or

[36] *Id.*, Clause 6 & 7.

[37] *Id.*, Clause 8.

biodiversity as well as felling of trees for commercial use are offences under the Bill.[38] The gram sabha shall have the authority to regulate use of community forests, punish offenders and inform the forest department of serious offences it cannot handle. All authorities or their individual members (including gram sabhas) under the Bill guilty of contravening its provisions shall be liable to punishment with imprisonment up to 30 days or a fine or both.[39] Scheduled Tribe has been given a right to approach the court after giving a sixty days notice to state monitoring committee (SMC), if SMC has not taken any action.[40]

X Relationship with existing laws

Save as otherwise provided in the Bill, the provisions of the Bill "shall be in addition to and not in derogation of the provisions of any other law for the time being in force".

The MoEF has reacted to the MoTA's (Ministry of Trial Affairs) being empowered with jurisdiction over forest lands as defined by the Bill's provisions like a panicky landlord fearing the loss of some of his holdings. The MoTA was made the nodal agency for implementing the Bill because it has the mandate to work for tribal welfare. Had the MoEF displayed its professed sensitivity to tribal rights over the years, such a Bill would not have been drafted. The vanishing of tigers from Sariska makes it clear that the bureaucracy cannot protect wildlife on it's own.

But one very important reality is apparent that there exist a symbiotic relationship between forest and people. Thus without being antagonistic to each other, the MoEF and the MoTA should work together to rectify the historical injustice done to the tribal people. Both ministries have to work hand in hand to uplift the status of tribals, it may be by making amendments in the existing forest and wildlife laws or by enacting forest right Bill with suitable amendments to protect India's vanishing biodiversity.

XI Shortcomings of the Bill

There are many loop holes in the existing Bill,as highlighted hereunder:

Non-tribal forest-dwellers: One major flaw of the Bill is that it is restricted to *adivasis* (more precisely scheduled tribes) and does not apply to other forest-dwellers. Life in the forests is harsh for *adivasis* and non-*adivasis*

[38] *Id.*, Clause 8(i)(ii)(iii)& (iv).
[39] *Id.*, Clause 9.
[40] *Id.*, Clause 10.

alike and there is no reason to discriminate between the two. The real distinction that needs to be made is between those who are in the forests for survival and livelihood reasons and those who are there for commercial purposes and for making profit. It is the latter category that needs to be prevented from gaining access to forests. This is the real fight.

Non-scheduled adivasi communities: There is also an issue of fairness amongst adivasi communities. Some adivasi communities do not figure in the list of scheduled tribes in a particular state. For example, Lambadas are considered a scheduled tribe in Andhra Pradesh but not in Maharashta. There is no reason why the Forest Rights Bill should give a different treatment to the same adivasi community in two different states simply because it figures in the list of scheduled tribes in one state and not the other.

Migrated *Adivasis*: In order to cope with their distress, *adivasis* have often migrated to, and even settled in, far-off places. These "dispersed" *adivasis* ought to be eligible for rights to the land which they had traditionally inhabited and cultivated. However, there is no provision for this in the Bill.

Treatment of non-eligible persons: The Bill gives little protection to *adivasis* and other forest-dwellers who started cultivating after the 1980 cut-off date. All it says is: "Save as otherwise provided, no member of a forest-dwelling scheduled tribes shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete in such manner as may be prescribed ".[41] Aside from failing to clarify the conditions under which people may be displaced, this provides no guarantee that displaced persons will get an adequate resettlement package, and be treated in a fair and humane manner.

The land question: The Bill prescribes 2.5 hectares as the upper limit of forest land that an *adivasis* nuclear family may be given. This ceiling is much below the existing land ceiling in most states. It is not clear why *adivasis* should be subject to lower ceiling. It would make better sense to lift the present ceiling of 2.5 hectares and instead stipulate that an *adivasis* nuclear family can own land (forest and revenue) up to the prescribed ceiling in the particular state.

There are other land-related gaps in the Bill. For instance, there is no provision for the restoration of tribal land acquired through illegal or unfair means. This type of land alienation has occurred on a large scale in many parts of the country including in scheduled areas in spite of various laws and policies aimed at protecting the *adivasis* from such exploitation. In order for

[41] Clause 4 (4) of Forest Rights Bill 2005.

such provisions to be effective an important supporting stipulation that the Bill needs to make is that all land records in the scheduled areas should be up- dated and transparent. This will be necessary to monitor future misappropriations as well as help in restoring tribal land that has already been alienated. Similarly, there are no special provisions for tribal communities with a tradition of collective ownership of land (e.g. in parts of Arunachal Pradesh).

Women's land rights: The Bill also needs improvement from the point of view of gender equality in land rights. The Bill does not define the term "nuclear family". It seems to endorse the standard definition of a nuclear family as husband, wife and their children. Accordingly, the Bill states that land titles "shall be registered jointly in the name of the male member and his spouse".[42] Thus at present, the land rights of single-headed households have gone unacknowledged. Since the Bill explicitly mentions the male member it can be assumed that even if he does not have a spouse, his land right may still be protected. But the converse may not be true: the right of households headed by single women (e.g. widow) are unclear. Further, it is not clear how a widow living (say) with her married son and his nuclear family would be counted as including two nuclear families, or as a single nuclear family.

Role of the gram sabha: The Bill states[43] that "the gram sabha shall be the authority to initiate any action for determining the extent of forest rights that may be given to the forest-dwelling scheduled tribes within the local limits of its jurisdiction". However, it is not clear from the Bill where the actual decision for "determining the extent of forest rights" actually resides. Clause 6 essentially states that a subdivisional level committee "shall examine the decision by the gram sabha", and that a district level committee shall give "final approval" to the record of forest rights prepared by the subdivisional level committee. Further, the composition of these committees is left to be prescribed by the government in the rules. In short, the actual powers of the gram sabha, and the relation of the gram sabha to other authorities, are far from clear.

Cut off date: An important short coming of the Bill is that the 1980 "cut off date" is too conservable. The Bill will likely award temporary rights to tribals living inside protected area – especially national parks and wildlife sanctuaries for a period of two years (temporary patta) putting the onus of relocation and resettlement on the government. This issue is very contentions – wildlife

[42] *Id.*, Clause 4 (5)(ii).
[43] *Id.*, Clause 6(1).

conservationist demand no right be allowed inside protected areas, while the tribal right campaigners want full land tenure in protected area.

XII Conservation and Tribal Rights Bill, 2005

There are a few specific point to be considered regarding effect of tribal Bill, in it present formulation on conservation. First it is imperative to acknowledge that the recognition of adivasi rights and the conservation of wildlife are both important but separate goals. The pursuit of one certainly has important implementation for the other. But, it is unwise, to assume that both goals can be fully achieved using the same legal means, be it by a passing the tribal Bill into law, or by better implementing the Wildlife Act. While the Wildlife Act was always meant to recognize and settle the rights of forest dwellers, in practice, it has been used largely as a blunt instrument to coerce them. It is entirely possible that the tribal Bill could tomorrow become a similar blunt instrument with which to coerce wildlife.

Second, a constructive view of the Bill as a means to empower oppressed *adivasis* is absolutely necessary, but it is as important not to get rosy-eyed and romantic about what the recognition of rights, as specifically laid out in the Bill, could do for conseqrvation. It is incorrect and dangerous to presume, as the Bill does, that adivasi cultures and societies do not compromise, but invariably aid conservation goals. Serious research in many indigenous societies and ecosystems across India and elsewhere has established that indigenous land and resource use practices can be significantly damaging to wildlife conservation. This is not to underplay the important role these communities could potentially play in assisting wildlife conservation. But to push the tribal Bill through on a belief that adivasi lifestyles have low impact and wild-life-friendly is to ignore accumulating data to the contrary. If the rights of *adivasis* over forest land are to be recognized, it must be done with the explicit understanding that they too, like other communities, can adversely affect wildlife and build safeguards against it.

Third, although the need for the Bill is well rooted in reason, facts are glaringly absent. Advocates of the proposed Bill have claimed that most of the land to which the Bill will apply are recorded as forests, but in reality contain only cultivation. The Forest Survey of India's State of Forest Report – 2003 itself shows up a stunning discrepancy of over 90,000 sq km between the forest areas reported by the ministry of agriculture and the ministry of environment and forests. To this day, there are no reliable estimates of the numbers of families who will be beneficiaries of this legislation. There is no census of families resident within wildlife reserves, or estimates of the

recorded forest land under human occupation. It is indeed disturbing to contemplate a law without reliable assessments of its scope and reach on the ground. Therefore, it must be made an important priority to gather reliable field data on these aspects before proceeding with the legislation.[44]

Fourth, the Bill broadly proposes to recognize two kinds of rights, the first of which is right of *adivasis* over land where they currently reside. This is in congruence with the Wildlife Act, which requires that the rights of forest dwellers be recognized and settled adequately in the process of rendering national park inviolable. This has not been undertaken in most national parks is another matter altogether. There have also been suggestions that the rights of *adivasis* residing in wildlife reserves be recognized on lands outside the reserves, or that they be provided temporary pattas for lands in wildlife reserves to be exchangeable for lands outside reserves. For either of these suggestions to be tenable, relocation from wildlife reserves would have to be enforced on *adivasis*. This is totally against the declared policy of the Ministry of Environment and Forests, which requires that relocations be based completely on the consent of residents.[45] And legally, it is rather meaningless to discuss consent unless it is founded on a secure right. There has also been considerable panic among conservationists that the tribal Bill proposes an open-ended distribution of 2.5 hectares of forestland, including in wildlife reserves, even if they resided in wildlife reserves.

Fifth, apart from land rights, the Bill also proposes to vest in the *adivasis* the right to resources in the forest. This is a provision that poses a very serious threat particularly in the context of wildlife reserves. Monitoring the exercise of rights over land is a relatively straightforward matter, whereas the exercise of rights of resource use rights is far harder to monitor. Research that has carefully examined the effects of chronic resource-use on fragile wildlife has shown that the impacts can be insidious. The failure of the Bill to spatially define and bound areas over which an *adivasi* family may exercise its rights over resources is worrying. Together with the Bill's inability to define key terms like "biodiversity", "resources", "legitimate livelihood needs" among others, such use rights could easily precipitate intense harvest of many species and integral habitat resources without technically violating any provision of the Bill. At the same time, many forms of resource-use from forests including wildlife reserves are the basis of *adivasi* livelihoods. Therefore, a reasonable compromise could be for the Bill to determine

[44] Madhusudan, M.D., "Of Rights and Wrongs: Wildlife Conservation and Tribal Bill", *EPW*, 4894, (2005).

[45] Draft National Policy for Rehabilitation of Persons displaced as a consequence of acquisition of land, 1994.

resource- use rights but exclude exercise of resource use rights within wildlife reserve.

XIII Conclusion

If the Bill wants to achieve its aims without compromising conservation, it is necessary that conservationists be serious about creating inviolate spaces for wildlife and the responsible government agencies independently push for a well-reasoned implementation of the Wildlife Act, in letter and spirit. While it is all very well to recognize rights of *adivasis* in wildlife reserves as well, it would still not fully address the issues of residence and resource-uses by non-*adivasi* communities, which is a serious conservation issue in parks. This, again, will need to be done under the purview of the Wildlife Act. Given the government's inaction in this regard over the last three decades, it is unreasonable to suppose that the government, by itself, has the motivation, skills, sensitivity and urgency to purpose, negotiate and implement schemes of voluntary relocation from protected areas. There is need to build a larger and more constructive role for civil society groups representing the interests of both humans and wildlife in this important process.

Even as academics and activists on both sides debate the issues, one thing is becoming increasingly clear. Whether there will be a law that recognizes the forest rights of *adivasis* and whether it will apply to wildlife reserve is a question that will ultimately be answered in the political arena and not in seminar rooms. Given the government's serious commitment to the Bill and support to it from every major political party, the Bill would seem well on its way to becoming law. Still, it is important for political parties to devise their stand on the Bill, being fully aware not only of the injustice against *adivasis* that the Bill seeks to correct, but also adverse effect on wildlife in correcting injustice in the manner proposed by the Bill.

The extinction of tigers from Sariska and Kailadevi reserves has shown that the Government agencies and wildlife conservationists, as the only privileged custodians of our wildlife do not come with assured conservation success. For wildlife conservation to remain a serious priority in our democratic set-up, there is no option but for conservationists to start building a wider political base. This will not happen until we move beyond the shallow but rigid view that conservation problems – be it poaching, livestock grazing, or fuel-wood extraction- are merely acts of felony, and start grappling with their deeper social and political roots. To do this, we must shed our blinkers, understand not with the competing livelihood needs

of people, and engage more intelligently with the way politics will ultimately reconcile the two.

Many tribal groups have always resided in forests. Yet, these eco-system people never had any use of personal land rights on the forests patches they occupied temporarily. Even when they settled within cleared forest patches, they had little use for any land rights as all their sustenance and cultural needs was primarily derived from the forest around them, and not land. Vesting tribals with the land rights threatens exactly that: force a change in the distinct forest based culture of the ecosystem people. Past experience has shown that vesting land rights in relocation and rehabilitation schemes have not worked well as these wildlife people lack agricultural skill. The eco-system people, as well as the wild animals do not need external advocacy, lobbying or pity they have their own customary laws; evolved over the centuries, these laws respect the nature's norms and ways, including the wildlife.

The framers of Indian forest policy and laws, both in pre and post independence era unfortunately failed to account for the needs of eco-system people. The Indian Forest Act is basically an instrument to regulate, harvest and transport of forest produce and to prohibit its unauthorized removal. In addition, it creates a forest estate, consolidated by the state for 'Public good' in the form of reserved, protected and village forests. Had a right of residence and freedom of traditional forest product usage been provided to the forest dwellers by the IFA and later by the Wildlife Protection Act, issues such as correcting colonial injustices by providing land rights to forest dwellers, which the tribal forest rights Bill seeks would never have arisen.

A best way is to add provisions to existing forest and wildlife laws that will provide forest dwelling tribals with security of residence and assure them the use of traditional forest products. The tribals once assured of a dignified and rightful living within forests, the only home that they have ever known, would provide good security to forests. This would be in sharp contrast to the situation today when perplexed by alien laws and hounded in their own homes, tribals often become a poacher's accomplice for a pittance.

THE UPHILL TASK OF MOVING FROM PROPERTY TO PERSONHOOD

*Sunanda Bharti**

IT IS indeed curious to note that 'legal personality of animals' is a subject of study in jurisprudence wherein analyses and comparisons are intricately drawn between animals and humans, only to discover and conclude that animals are no legal persons at all; that most of the legal systems, including India, neither assume nor confer legal personality in respect of animals.

Before the irrational and apparently whimsical basis behind the current scenario is dissected, some light must be thrown on what is meant by 'legal personality'. In simple terms, and amongst other things, the expression refers to an entity that is the subject holder of legal rights and bound by the correlative legal duties—the correlation as given and understood through the Hohfeldian thesis[1]. Natural persons, that is, normal human beings, are the prime claimants of legal personality because of certain inherent traits, viz, the will and capacity to act on their own, power of expression etc. So, regarding these natural persons, that is 'us', the legal systems throughout the world have no issues at all in *assuming* legal personality. This is the non-controversial position with respect to legal personality.

We, being the fortunate keepers of certain traits unique to mankind are legal persons *ab initio and per-se*. Law does not have to *confer* personality on us, unlike in the case of an idol[2], an unborn child[3] and a corporation[4]. The latter are the examples of a few entities that require concession[5] in the form of conferment or grant of personality as certain theories of legal personality have put[6]. In these cases, in the name of legal

* Lecturer, Law Centre-I, Faculty of Law, University of Delhi.

1 The analysis of rights in the wider sense (as referring to rights strictu sensu, liberties, immunities and power) and the correlatives reached its culmination with the work of Hohfeld. See, Hohfeld, *Fundamental Legal Conceptions*, (1923).

2 See, *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* [1925] LR 52 Ind App 245, discussed by PW Duff, 3 *Camb LJ* (1927), 42. In this case, it was put that 'the will of the idol in regard to the location must be respected'. Normally, this will would be interpreted by the guardian but the law would interfere if the guardian did not act in the interests of the idol, that is, presumably after consulting the interests of the worshippers.

3 For instance, s. 20 of the Hindu Succession Act, 1956 lays down that a child who was in the womb at the time of death of the intestate and who is subsequently born alive, has the same right of inheritance, as if he was already born when propositus died. This, the unborn is the subject of legal rights.

4 'Besides men or natural persons, the law knows as subjects of proprietary rights, certain fictitious, artificial or juristic persons, as one species of its class it knows the corporation': Savigny.
'Corporations are invisible, intangible and existing only in contemplation of the Law': Lord Coke in *Dartmouth College* v. *Woodward* 4 Wheat 518 at page 636.

5 As for the concession theory, see, George Whitecross Paton, *A Text Book of Jurisprudence* 413 (IV ed., 1974).

6 *Id.* at 407-419.

reasoning and administration of justice, law employs a certain fiction and grants legal personality to a non-human entity. Animals, however, have been consciously avoided from this category. Two reasons may be cited for this exclusion. The first reason revolves around the popular debate that since animals—'lower animals' as ancient jurists would like to put it[7] (as human beings are superior animals)—lack the abovementioned human traits; that animals essentially are irrational beasts which lack reasoning and logical faculties and thus the question of conferring legal personality to them does not arise at all.

The second reason being the already recognized, institutionalized and well-established-through-the-ages status of 'lower animals'. They are/ have been considered as objects and not subjects of rights and duties. They are, in law as it stands today, 'things' or 'chattel' over which we have rights and towards which we have a duty to take care. The sentiment popular with many of us is that they (animals) should be happy with their property status and stop haggling for greater concessions.

The basis of this paper is to ascertain through logical arguments and reasonable analysis the strengths and weaknesses of these two reasons, the preference being skewed in favor of the latter.

To begin with, the intellectual dementia appears particularly appalling when pages after pages are written about the unlikelihood of conferment of legal personality on animals as they lack the traits that persons-properly-so-called inherently possess. For instance, they (animals) lack rationality. Steven Wise, the Harvard Professor and one of the foremost animal law experts, in his book 'Rattling the Cage'[8] also succumbs to the same consciousness when he argues in favor of granting personhood to at least certain non-human primates who are evolutionarily closest to 'us'. This obsession with taking and treating human likeness as the basis for granting personality to animals is beyond reason. If attribution of legal personality can be purely a work of fiction (as in case of an idol, a corporation or a charitable fund etc), why can't the same logic, if any, be applied in case of animals as well? Why is it that one tends to grope for a human link and akin-ness when it comes to 'lower animals'? Animals are different from human beings, but, can they be disallowed something simply under the ostensible garb that they do not exhibit complex reasoning and superior intelligence? When other entities have been conferred with personality without being judged on this criterion, why is it that a special need is felt whenever the case of granting legal personality to animals is put forth?

[7] Austin, for instance, uses the expression 'lower animals' while giving the types of absolute duties.
[8] Stephen M.Wise, *Rattling the cage, Towards Legal Rights for Animals* (Perseus Books).

It is worth noting that there does not exist any point of commonality between the non-human entities that have been granted personality by the Indian Legal System for various purposes. Paton, infact, asserts that the quest to discover any common essence which unifies all the entities on which legal personality has been conferred itself is outside the scope of jurisprudence; perhaps because there *is* no common thread running through these entities[9]. Another rather amusing fact is that none of the legal theories concerning personality[10], manage to explain why certain entities are treated 'as if'[11] they are persons—why only those entities and not others; for instance, why idols, corporations and funds and not animals?

Since theories fail to explain the 'why' and the jurists also suggest that the query is beyond jurisprudence, it would be safe to assume that as of date, animals, to be treated as legal persons, do not have to fulfill any particular/common criteria.

Idols, corporations and funds do not bear any direct resemblance to human beings, yet they are legal persons on one pretext or the other; while animals have been consistently denied the status—why?[12] This question is a bit difficult to answer but can and must be attempted nonetheless, as it might be academically relevant. If some logic is applied to reality, '*convenience*' seems to be the only criteria that has been and is followed in granting legal personhood to certain non-human entities.

The apparently popular subterfuge that has been traditionally employed to deny personality to animals is their lack of human trait/s. This argument or 'logic' has been rendered hollow already (see above). Now, we come to the real reason/s behind the legal indifference/denial. The reasons are as follows:

(a) ***It suits us to deny them personality***: For after all, other non-human entities have been given personality because the State stands to gain/benefit revenue-wise or management-wise (for instance, in case of an idol and corporation respectively). In case of animals, granting them legal personality would entail humungous legislative efforts and require colossal post legislative

[9] *Supra* note 5, at 408-409.
[10] *Supra* note 6.
[11] RWM Dias, *Jurisprudence* 268 (V Ed.1985).
[12] Paton also appears to agree when he says that 'legal personality refers to a device by which the law creates or recognizes units to which it ascribes certain powers and capacities...it says that certain things shall be units for the purpose of the law and that such unit shall possess the capacity of being parties to the claim-duty/power-liability relationships'. Thus, the basis of conferment, the 'why' part has been safely omitted by law. The deliberate omission of animals from personhood becomes clear when Paton (though in a different context) says that 'though it might sound absurd, but it is not impossible for the law to accord legal personality to trees, sticks or stones'.

management of implications. In the absence of any apparent gain, it is convenient for us to tread the beaten path and take them as objects and not subjects of legal rights. It must be put here that though re-defining and re-structuring the concept of property and legal persons would require incremental and grand-scale changes in the existing law, does this mean that we should be opposed to improving the lot of other species with whom we coexist and who also have a claim over the planets' resources? It is for us—the superior species, to come up with a responsible answer to this relevant question.

(b) ***In order to retain our superiority***: Another reason behind our denial and indifference could be that it gives us a chance to gloat over and reinforce our superiority and age-old dominion over animals. Treating animals as property has so deeply ingrained the human consciousness on account of centuries of undisputed and uninterrupted rule over animals that humans have become averse to even reasonable improvements of their lot, for the fear of being dislodged from that elevated pedestal.

Denying legal personality to animals ensures our dominion over them and gives us a freedom to maltreat them, without inviting much penal sanctions[13].

Also, if personality is attributed to animals, they are likely to evoke and invoke greater societal/community sympathy in court battles. So, we fear that once made equal to man (human beings as such), by the power of legal personality, they (animals) might become a threat to our status.

Regarding this point, it is necessary to mention that the intention is not to counter the notion of 'superiority' that human beings have been nurturing since times immemorial; for it would mean asserting something absurd against the inevitable. On this planet and at least to date, sapiens remain the undisputed superior. In what respects they are 'superior' needs no elaboration and thus, should be considered as understood.

Humans have immense power as a species and what needs to be understood is that with great power comes great responsibility. It is for us, who claim to be superior, to guard the interests of other species. Convenience (in not granting legal personhood to animals) must be abandoned in favor of compassion and humanity—a virtue truly unique to mankind and alien to beasts. Laws should also reflect this aspect. Presently, though animals have been accommodated in many respects, by and large the legal regime remains primarily for the benefit of human beings. The legislations[14], proceed on the

[13] Ss. 428, and 429, Indian Penal Code 1860.

[14] As we would see later in this paper.

notion that only those animals deserve protection, which are either useful or amusing to human beings.

It is asserted that we *can* grant legal personality to animals through fiction while retaining our superior status at the same time, if the tag is all that relevant. To conclude this point, it is understood that legal personality cannot be taken as attributed to non-human entities in the same sense and degree as it is assumed in case of human beings/natural persons, because the nature of the two differ drastically. Thus, animals also need not display any human traits or akin-to human-characteristics to be eligible for legal personality (as emphasized elsewhere in the paper).

Similarly, just as corporations have only as much personality as the law imputes to them by fiction; it is possible, by all means, to attribute a restricted personality on animals as well[15]. They can have some measure of personality, just sufficient for them to eke out a decent survival amidst the human sea; just enough to ensure that their interests are not intentionally ignored, maliciously trampled and consistently abused. The personality so attributed should allow them to vindicate their rights against the superior species, that is, 'us'.

(c) ***Warped understanding of the concept of standing***: Another reason, the third one, on why personhood has been consistently denied to animals is because of a warped understanding of the concept of standing.

It is often believed and argued by a set of people that granting legal personality to animals would be legally impossible or meaningless at any rate, as they would not be able to assert the rights so granted in the court of law. It is true that animals cannot generally be plaintiffs in a lawsuit, but since when did membership to particular specie become a criterion to institute lawsuits? Both an idol and a fund[16] require human agents to carry out the activities incidental to litigation. Why can't then such an agent be employed to vindicate animals' rights?[17]

Another issue related to standing is that the grant of legal personality would result in one animal asserting against another animal (i.e. person) the right to, say, live! This can be tackled easily, and infact would be taken care of automatically, if the personality attributed to animals is restricted in the sense explained in the above paragraphs—that is, by confining attribution in

[15] *Supra* note 5, at 393.

[16] These entities are recognized as legal persons for different purposes by the Indian Legal System.

[17] The author emphasizes that it is not the lack of standing for assertion of legal rights that would be a consequential problem (if any problem arises at all post the grant of personhood to animals), but it is inability of animals to fulfill legal duties (or the inability of the representative human agent in making the Principal discharge its legal obligations) that might pose some difficulties.

such a sense that rights can be asserted primarily against human beings, them being the major unnatural and avoidable interference to their survival[18].

If a mathematical formula is introduced into jurisprudential reasoning, then to say that grant of personhood to animals would result in one animal filing a lawsuit against the other sounds absolutely logical and inescapable. But, the point is that law is not all mathematical logic, it has to be reasonable as well. Reasonability suggests that one would have to ignore and exclude inter-species brutality of the animal world from the purview of legal personality. In short, the legal system would have to devise ways and chart out an arrangement whereby the interests of social and lower animals are harmonized. Even if law remains primarily for human beings, which in all likelihood it would, but manages to accommodate animal interests optimally and *honestly*; it would be a laudable effort. Taking an extreme view in this regard would be catastrophic, no doubt.

(d) ***Age old emphasis on legal duties***: Fourth reason why animals have been denied legal personality by the legal systems is the age-old emphasis on absolute duties[19].

Austin suggested that animals cannot be holders of rights and duties—they are entities towards whichhuman beings, owe an absolute duty. These are duties that do not have any correlative advantage in the form rights in others corresponding to them.

Though when he gave the concept of absolute duties, he did not have legal duties in mind[20], yet, in the modern era, many such duties have been pulled into the legal net by being elevated to the status of legal duties. In-so-far as the Indian Legal System is concerned, all the anti cruelty provisions and statutes concerning animals are an open manifestation of these legal duties. However, they are legal duties for the benefit of animals and not *towards* animals in the strict Hohfeldian sense. This is because the corresponding legal right is not held by animals in these cases. The repository of that legal right is some other representative entity through whom the benefit would ultimately flow in favor of the animals (as would be seen later through a tabular analysis on the basis of the Hohfeldian thesis).

So, those who are fixated with this concept of duties towards animals continue to deny them acceptance as entities worthy of possessing legal rights.

[18] For jungle beasts, killing or attacking each other to satisfy their hunger and establish superiority through display of brute force is something natural and thus, unavoidable—our legal system needs to 'factor-in' this aspect, while granting legal personality to animals.

[19] See C. K. Allen, *Legal Duties* 156; See also, *supra* note 5, at 294.

[20] *Supra* note 5, at 294 to 297.

It is certainly laudable that humankind has acted responsibly by legalizing certain duties that benefit animals by instituting anti cruelty provisions, but such attempts at revolutionizing social values concerning animals need teeth to be effective. Grant of legal personhood would entail making animals' subjects of legal rights and duties and would enable the social revolution gather the requisite momentum.

(e) ***Opiniated mindsets***: The final reason that may be cited on why animals have been denied legal personality is related to the fourth and it is: opiniated minds.

Every time the legal system is on the threshold of a renaissance in expanding the kitty of non-human legal persons, we tend to throw up reasons on why it is feasible *not* to do so. This blind aversion curbs all legal improvisation. This is also the reason why animals have failed to get their status altered from property to persons.

Before this paper reaches its conclusion, it is important to put in a few lines about the current status of animals in the Indian legal system. It appears necessary because certain issues like 'anti cruelty laws' and the penalty provisions tend to create confusion and spread the notion that animals are already the holders of legal rights, in the sense that they have a legal right not to be treated in a cruel manner. If we follow the Hohfeldian thesis, we would realize that it is not so. For the sake of understanding, the statutes/legislations that speak of directly/indirectly preventing cruelty towards animals or protecting animals have been classified.

They are:

(a) The Criminal laws, which, in the case of India, would primarily be the Indian Penal Code 1860: the main substantive criminal legislation of the country;

(b) Tort Laws; and

(c) The Special Statutes like the Prevention of Cruelty towards Animals Act 1960, the Wildlife Protection Act 1971 et al.

If cruelty against animals is a provision under the Criminal Laws, animals are not the repository of legal rights—the *State* is:

(+) Claim in the State ("you must obey my prescription")	⟷	(-) Liberty in the human subject (cannot display "I may/may not")
↕	⤫	↕
(+) Duty in the human subject	⟷	(-) No Claim in the State

Since State is the sole master of criminal prosecution, one party, in any criminal matter, has to be the State. The State, hence, has the legal right to demand adherence to its prescription. It can display the behavior 'you must'—that is 'You must follow my prescription'. Against this, subjects are under a correlative and corresponding duty to abide by the prescription.

If cruelty against animals comes under the Law of Torts, then, in all probabilities, the tortfeasor owes a legal duty (to pay damages) towards the owner of that animal (in case of a pet animal). The owner can display the behavior 'you must' that is, 'you must pay damages to me on account of the injury suffered by me via my animal/pet. The table would be as follows:

(+) Claim in the owner ("you must pay damages to me")	⟷	(-) Liberty tortfeasor (cannot display "I may/ may not")
↕	⤫	↕
(+) Duty in the tortfeasor to pay damages	⟷	(-) No Claim in the owner of pet

If however, the animal is a stray, the community at large may be said to have a legal right to vindicate the stand of the stray animal, which, according to Salmond should be treated as a member of the community as a whole[21]. The table in this case would be as follows:

[21] Salmond on Jurisprudence 300 (XII Ed., 1966).

(+) Claim in the community ("you must pay damages for causing injury to a member")	⟷	(-) Liberty tortfeasor (cannot display "I may/ may not")
↕	⤫	↕
(+) Duty in the tortfeasor to pay damages	⟷	(-) No Claim in the community

Claim in the community may manifest through public interest litigations as has been well established in India through the case of Shriram Fertilizers (1987-SC)[22]

It is worth noting that in all the three tables above, no legal duty is owed *towards* the animal as such, and there vests no legal right in them.

Coming to the special laws—Art 48A of the Indian Constitution directs the State to make efforts towards protecting and improving the environment and safeguarding the forest and wildlife of the country[23]. The above mentioned special laws are a result of those efforts only. Under these laws, the parent Act itself has appointed an administrative body to carry out the purpose of the legislation. Thus, there vests a legal right in that authority to demand adherence to a particular conduct corresponding to which there exists a legal duty in the public at large to do or abstain from doing something.

To sum up, we do not owe any legal duty 'towards' animals. In other words, they are not holders of legal rights, for that is a privilege exclusively reserved for legal persons.

The widespread notion is that by strengthening the anti cruelty laws, animal rights would become meaningful. This is not true, as animals, in this country at least, are not the repository of any legal rights. If laws enacted to prevent abuse and cruelty are strengthened, the animals *do* stand to benefit, no doubt, but they do not stand to take even a small step towards legal personhood. At the most, these anti-cruelty legislations reflect the extent to

[22] See, *MC Mehta* v. *Union of India* AIR 1987 SC 1086.
[23] Art. 48A, The Constitution of India.

which humankind has been willing to accommodate the lower species or the extent to which it has agreed to put restraints upon itself.

To conclude, the question whether animals should enjoy legal personality or not needs to be answered in the affirmative. With a lot of good work being done to improve the living conditions of animals (working or wild), the time is just ripe for these not so social animals to demand some substantive gains. In order to foster a change, we not only require a compassionate Legislature, but also need to overhaul certain viewpoints through a social revolution and an open minded judiciary.

Finally, those who still discard the idea of granting legal personality to animals as musings of a dreamy academician, fit only for class-room teaching, there is only one thing remaining to be said: "Some minds are like concrete: thoroughly mixed up and permanently set".

HUMAN RIGHTS OF THE AGED*

"THE MARK of the noble society is not found in how it protects the powerful, but how it protects the vulnerable."[1]

Ageism is one means by which the human rights of older persons are denied or violated. Negative stereotypes and denigration of older individuals can translate into lack of societal concern for older persons, risk of marginalization and denial of equality of access to opportunities, resources and entitlements. Age discrimination in the workplace can lead to the exclusion of older workers in formal employment. Cultural values regarding age and sex influence the degree of discrimination against older persons in social, economic, political and community life. Legal and justice systems may or may not succeed in resisting countervailing pressures to protect the rights of older persons.

Old Age: Pivotal Position

"In Africa, it is said that when an old man dies, a library disappears. This reminds us of the vital role older persons play as intermediaries between the past, the present and the future; of the veritable lifeline they provide in society. Without the knowledge and wisdom of the old, the young would never know where they come from or where they belong. But in order for the old to have a shared language with the young, they must have the opportunity to continue learning throughout life."[2]

Dynamics of Modern Society and Position of the Old

Today, human society is being "restructured" by three simultaneous processes: globalization, urbanization and population ageing. Developing countries, once again, are being hit hardest. The process of population ageing in developing countries will bring with it new challenges that are different from those confronted by developed countries. And within the group of developing countries, there are also commonalities and differences among regions and circumstances, including economic conditions, cultural traditions, family structure, the effects of widespread armed conflict, natural disasters, patterns of migration, refugee populations, catastrophic disease such as the HIV/AIDS pandemic, and even national laws. Thee factors that contribute

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* Prepared by Dr. Queeny Pradhan Singh, Lecturer, Guru Gobind Singh Indraprastha University and assisted by Ms Priti Ramani, IV year student, School of Law and Legal Studies, Guru Gobind Singh Indraprastha University

1 O Darloura, "Reforming the Ghanian local security system: Prospects and Challenges", in *Journal of Cross Cultural Gerontology*, p.2.2.

2 United Nations Secretary-General Kofi Annan

to the urgency of the process are the portion of the world's population living in developing countries, the widespread poverty that persists there, and the rapid pace at which the ageing process is taking place.

Most of the older population is still living in rural areas. But it can be explained: many young adults migrate to urban areas for economic reasons, leaving older persons behind; many older migrants who are leaving the workforce in urban areas often return to rural areas, and the HIV/AIDS pandemic strikes hardest at young adults.

Developing countries are facing a two-fold challenge: they must continue the process of development, which includes growing economies, providing education, and protecting human rights, at the same time that they must prepare for the ageing of their populations. And the process is expected to proceed much more quickly - in fact, startlingly so - in developing countries than it did in the industrialized world.

Other transforming processes are taking place in developing countries that could further threaten the "secure ageing" of most the world's older persons in the decades ahead. In addition to migration and urbanization, the shift from extended to smaller, mobile families and the lack of access to technology that can promote independence, such as information and communications technology, and other socio-economic changes can further marginalize older persons from the mainstream of development, robbing them of their purposeful economic and social roles and weakening their traditional sources of support.

Recognizing the problem: Definition and contextualization

In the absence of an accepted universal definition, existing definitions of abuse of older persons reflect distinctions between acceptable and unacceptable interpersonal and communal behaviour in different societies. Perceptions and definitions of abuse of older persons and violence vary between groups across and within societies. One definition of abuse of older persons, which seeks to take variation into account, reads: "a single or repeated act, or lack of appropriate action occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person". Such an approach to the definition of abuse of older persons has gained ground over the last 20 years.

Violation of Human Rights: Typologies

A typology that has similarly gained ground in the study of abuse of older persons identifies four categories of abuse: (a) physical abuse; (b) emotional abuse; (c) financial exploitation; and (d) neglect, as follows:

Physical abuse refers to single acts that may be repetitive, or to enduring acts. Enduring acts include inappropriate restraint or confinement, which causes pain or bodily harm. The consequences of physical abuse include physical indicators of abuse and visible psychological manifestations, such as diminished mobility, confusion and other altered behaviour.

Emotional or psychological abuse, or chronic verbal aggression, includes words and interaction that denigrate older individuals, are hurtful and diminish their identity, dignity and self-worth. This abuse is characterized by (a) lack of respect for the older person's privacy and belongings; (b)lack of consideration for his/her wishes; (c) denial of access to significant persons; and (d) failure to meet the person's health and social needs. Indicators of emotional abuse can include severe psychological manifestations including fear, poor ability to make decisions, apathy, withdrawal and depression.

Financial exploitation, or material abuse includes (a) the illegal or improper use, or misappropriation of an older person's property and/or finances; (b) forced changes to his/her will and other legal documents; (c) denial of right of access to and control over personal funds; and (d) financial scams and fraudulent schemes.

Neglect, is lack of action to meet an older individual's needs, by (a) not providing adequate food, clean clothing, a safe, comfortable place to live, good health care and personal hygiene; (b) denying the person social contacts; (c) not providing assistive devices, if needed; and (d) failing to prevent physical harm and to provide needed supervision. The carer may fail to provide necessities because of lack of information, skills, interest or resources. Indicators of neglect include a range of physical symptoms of poor well-being such as pallor, dry lips, weight loss, dirty clothes, shivering, lack of assistive devices, poor bodily hygiene, incontinence, skin and mouth sores and physical and mental deterioration. Neglect can also be associated with confinement and inappropriately heavy use of medication.

Self-neglect is identified, in some expanded typologies, as a set of behaviours that threaten the health or safety of an older person, such as a physical and/or cognitive impairment, and that lead to limited capacity for self-care and healthseeking activities. Depression and living in squalor can be indicators of self-neglect. Other types of abuse grouped within the foregoing categories, or viewed as variations of those categories include:

Sexual abuse, which is non-consensual sexual contact that ranges from violent rape to indecent assault and sexual harassment by caretakers. Sexual abuse is particularly vicious if the victim cannot communicate well, or is

physically and/or environmentally unable to protect him-/herself. Sexual assault is usually categorized under physical abuse.

Spousal abuse can entail physical, emotional and sexual abuse, financial exploitation and neglect in a life-long or recent partnership.

Medication abuse refers to the misuse of medication and prescriptions, deliberately or accidentally, by not providing needed medication, or by administering medication in dosages that sedate or cause bodily harm to the older person.

Further specific forms of abuse can also be identified in the scientific literature on the subject:

Abandonment, or desertion of older persons by individuals who are responsible or have assumed responsibility for their care.

Loss of respect, perceived by older persons in behaviour that is disrespectful, dishonouring or insulting.

Systemic abuse refers to the marginalization of older persons in institutions, or by social and economic policies and their implementation, and leads to inequitable resource allocation and discrimination in service provision and delivery.

Economic violence to gain control over older individuals' assets can, in some contexts, be aggravated by economic, social and political structures that condone or indirectly encourage the violence. Older persons are at risk of economic violence due to physical weakness and lack of ability to resist violence. Where they have assets of importance to a household's welfare, such as pension income or ownership of a house, they may be pressured to forego their rights to the assets. Instances of rape have been reported to force women to relinquish assets, as well as instances of expropriation and banishment of widows from the family home.

Scapegoating describes instances where older people (usually women) are identified and blamed for ills befalling the community, including drought, flood or epidemic deaths. Incidents have been reported where women have been ostracized, tortured, maimed or even killed if they fail to flee the community. In so fleeing, these individuals may lose their immobile assets.

Social or domestic violence towards older persons occurs in the context of a breakdown in social relations between an older person and his/her family, or of family disharmony. The extent to which it occurs is influenced by socio-

cultural norms of acceptable behaviour, the primacy of family values and valuation of ageing in the society.

Community violence affects older persons through generalized feelings of fear, which increase their overall sense of insecurity, as well as through direct violence. Criminal violence, including common assault, robbery, rape, vandalism, delinquency, drug-related violence and gang warfare can influence households and communities by inhibiting members' access to basic services, health care and socializing, as well as by direct victimization.

Political violence and armed conflict affect older persons directly and through forced displacement. The special needs of displaced older persons are rarely provided for in humanitarian relief plans. In refugee camps, older persons may be marginalized in food and health care distribution.

HIV/AIDS-related violence can occur in countries affected by the pandemic, where older women are commonly burdened with care giving responsibilities for dying relatives as well as orphaned children. The stigma associated with HIV/AIDS can socially isolate members of affected households.

Historical Background

Abuse of older persons has gained public attention since the early 1980s. Growing attention to human rights and increasing awareness of the rights of older men and women have led to viewing abuse of older persons as a human rights issue. This framework is appropriate to: (a) draw attention to the political issues of abuse of older persons and discrimination; (b)challenge the abuse of economic and social means and entitlements of older persons; and (c) consider effective responses to abuse and violence.

The Universal Declaration of Human Rights sets out core entitlements of all human beings in the civil, political, social, economic and cultural spheres. This instrument provides the moral basis for a wide range of international legislation.

The International Plan of Action on Ageing, adopted at the first World Assembly on Ageing in Vienna in 1982, outlined the rights of older persons. Furthermore, the United Nations Principles for Older Persons elaborated their rights in matters of independence, participation, care, self-fulfilment and dignity. In 1995, in its General Comment No. 6 on the implementation of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights drew the attention of Member States to the situation of older persons and guided State parties to

a better understanding of their obligations to older persons when implementing the provisions of the Covenant.48. Commitments and guiding principles have also been adopted in United Nations conferences and summits with particular reference to advancing the rights of older persons, including the Copenhagen Declaration and Programme of Action of the World Summit for Social Development, 1995, the Beijing Declaration and the Platform for Action of the Fourth World Conference on Women, 1995, the Further Initiatives for Social Development of the twenty-fourth special session of the United Nations General Assembly, and the United Nations Millennium Declaration adopted at the United Nations Millennium Summit in 2000. Poverty can exacerbate denial of basic human rights as well as limit choices and opportunities for a tolerable life. In many societies, older persons comprise a disproportionate number of the poor and of the poorest among the poor. Hence poverty eradication and reduction of violence are complementary human rights goals in many regions, and important components of human development.

Human Rights Concerns for the Aged

Special attention must be paid to the following aspects:

AGEING AND POVERTY

The living conditions of the elderly in the developing and under-developed countries are currently characterized by the extreme poverty in which they live and which is transmitted to subsequent generations. They are affected by situations of social exclusion, lack of opportunities to participate in development activities, extremely limited access to health care, non-existence or minimal development of pension systems, scarcity in the social service networks, housing that fails to meet minimum conditions of dignity.

The numerous and often silenced conflicts of arms, the spread of diseases such as AIDS, famines and natural disasters have a particular impact on older people.

With their expertise and skills, the elderly contribute to the alleviation of the effects of armed conflicts and humanitarian crises, yet they are not sufficiently recognized and their specific needs are not taken into account by national and international organizations.

Relatives, who have traditionally played a supporting role in aiding the elderly are now also immersed in conditions of poverty and have themselves severe difficulties in adequately fulfilling this role of carers.

Despite their efforts, the associations of older people and NGOs cannot call on the support and recognition of government and multilateral institutions for the development of their programmes and activities.

International finance institutions do not acknowledge the important contribution made by the elderly to the development of their families and communities and so impose conditions on economic aid to these countries such as the implementation of strict cutbacks in the already scantily-funded instruments of social protection. The governments become accomplices or passively acquiesce to these demands.

The requirements of the privatization of Social Security systems imply a source of discrimination for the elderly in developing countries.

The burden of paying foreign debt prevents countries from devoting economic resources to the development of social welfare policies for older groups in the population. Poverty-reduction programmes do not include the elderly, even though the numbers of old people in situations of poverty are increasing.

The United Nations proposal from three decades ago now that developed countries should allocate 0.7% of their GDP to development co-operation programmes is today implemented by only three states. It is also of grave concern that the annual credits announced or committed each year often end up unspent or in a minimal percentage.

The elderly have a great capacity for initiative in organizing themselves into groups and networks, but their lack of awareness of their rights and poor educational level together with situations of poverty and social exclusion prevent these rights from being fulfilled.

GENDER AND AGEING

Elderly women must be given special protection in order to defend their rights. They suffer from shortfalls in multiple respects: lower income levels, greater disability, more solitude, less access to education, culture and leisure. Their participation in decision-taking processes is still today very limited.

But above all, they take on the tasks of caring for members of their families, even at an advanced age, thus constituting in most of the world's countries the sole source of care provision in situations of illness or disability. The consequences of war, tumults and diseases such as HIV/AIDS have led to the existence of thousands of grandmothers acting as carers and

surrogate mothers. Breaches of rights and situations of violence and abuse occur in three discrimination contexts: gender, age and poverty.

The elderly women in developing countries are particularly prone to the effects of this situation, made all the more acute by their greater social exclusion due to a life of gender inequality, their greater longevity in comparison with men and their loneliness through widowhood in a majority of cases.

SOCIAL WELFARE

The ageing of the population implied by the enormous progress in the development of peoples all over the world represents an important challenge for public policies and social welfare systems in order to allow the elderly to continue to participate for as long as possible in society and to have available services that are affordable, appropriate and adapted to their requirements.

The rights forming the basic pillars of social protection are, among others: the right to a retirement with sufficient income to ensure security and dignity in their remaining life; access to health and social care services ensuring their personal independence and quality of life; social inclusion; effective integration in society.

Families in all their varied formulas continue to be central to the quality of life of older people. The changing patterns in family life as a result of immigration, urbanization, increased numbers of women on the job market and other economic and environmental processes must be taken into account by the authorities in order to provide adequate support resources for families, so that family support complements and does not replace public services.

Governments must assume responsibility for the balance between self-aid, informal support systems and professional care. Long-term care must contemplate a wide range of community, social and health services.

Special attention must be paid to the most fragile and vulnerable members of the elderly population, those in situations of poverty or suffering a situation of dependence.

HEALTH

Ageing must not be synonymous with declining health. Nonetheless, the living conditions of many elderly people and most particularly women contribute to a deterioration in their health. For this reason, health is one of the basic concerns of the elderly.

The undoubted advances in health improvement cannot hide the fact that the elderly do not have access to health care in many places. Many elderly people are discriminated in their right to health protection and cannot enjoy the fruits of scientific advance.

PARTICIPATION

Elderly people are active members of society and make many contributions, often less visible ones. Participation is a key factor for social development and it is therefore necessary to promote creatively those initiatives that stimulate activity by the elderly in rural and urban settings.

The barriers to participation are many and varied. It is very important to be aware of the perceptions that older people have about their abilities, as well as the information they have with respect to how they can participate.

Insofar as ageing is a process that concerns all generations, the participation of the elderly must contemplate all of the topics of interest to the community, thus applying an inter-generational perspective.

In both developed and developing countries, the elderly have expertise that can be shared with younger generations, thus allowing them to act as the link between the past and the present. They therefore constitute a key resource for giving continuity to cultural values and for preserving the diversity of cultural identities.

SECURITY, CONSUMPTION AND ENVIRONMENT

In order to achieve an active and healthy ageing process, older people need to live their day-to-day lives in safety and security. This concept comprises both their subjective perception and the material aspects favouring their sense of protection (housing, food, economic resources, access to health and social services, personal protection).

The mechanisms to create favourable settings for the elderly must take into account all areas of life. To this end, it is necessary to provide ease of access to their environment and facilitate their ability to remain in the areas where they choose to live.

The development of new technologies, which have to provide a positive support for the elderly, are nonetheless generating a new social divide, as they are at the moment inaccessible for the vast majority of elderly people in developing countries.

Measures intended to improve the conditions of everyday life represent a great incentive for industry, the market in general and the generation of employment. But they also constitute a challenge for governments, local and national administrations and their representatives as well as for all institutions.

LEGISLATIVE PROVISIONS FOR AGED IN INDIA

In some countries, awareness of abuse of older persons and changing social policy have led to the enactment of new legislation to criminalize the abuse of older persons and to increase penalties for certain crimes against older persons. In some cases, regulations and policies have been adopted to supplement state laws and to establish enforcement systems. In other countries, there is thus far little or no legislation designed specifically to protect older persons from abuse. Mechanisms to protect older persons also may include charters of rights and responsibilities of residents in care facilities and contracts between residents and care/service providers. Advocacy services and structures such as commissions on ageing provide assistance in addressing grievances.

In some countries where there is legislation to protect older persons from abuse, application of the legislation is not systematic. Professionals may not invoke the legal system to provide redress, or to punish abusers, or may use the legal system only when there is incontrovertible evidence of abuse. Nevertheless, legal structures to penalize violence, that can address the mistreatment of older persons, are important to uphold. In some countries, professionals such as physicians, social workers and nurses are legally required to report cases of suspected abuse of older persons, neglect or exploitation. The effectiveness of mandatory reporting to respond to and deter abuse of older persons is in dispute for several reasons.

Professionals are reluctant to report cases, resulting in low compliance. Some argue that the autonomy of older persons is jeopardized, or that mandatory reporting creates expectations and a demand for health and social services or other resources that communities may be unable to meet. It is also recognized that in situations in which an older person is suffering mental ill-health and is in need of assessment, resort to the law may be contraindicated.

In India, there are a few legislative measures for the security of the aged. The Constitution of India in its Directive Principles recognizes the care of the Elderly under Article 41. The Hindu Adoptions and Maintenance Act, 1955 under Section 20 (3) provides for the maintenance of aged parents.

Section 125 (1)(d) of the Criminal Procedure Code also provides for the maintenance of the parents. However, these legislative provisions are a small drop in ocean in front of the vast population of the aged.

Implementation of Human Rights

We begin this section with a brief discussion of the final declaration and recommendations of the world NGO Forum on ageing held in Madrid from April 5th-9th 2002. The elderly population in developed countries represents nearly 20% of the entire population and future trends will bring it close to 25%. In the developing and under-developed countries, this figures exceeds 10% and is expected to grow to close to 20% in the coming decades.

Despite this background, in numerous states the elderly suffer from critical situations of poverty and social exclusion, do not enjoy appropriate living conditions and constitute an "invisible" group for governments and international institutions and, in the most developed countries, despite the social advances and improvements achieved so far, they are still afflicted by considerable shortcomings and do not receive the recognition which they deserve on the basis of their population significance.

The Universal Declarations and International Conventions on Human Rights do not include any specific prohibition whatsoever of age discrimination. Nonetheless, this is a situation suffered by old people throughout the world in multiple circumstances: severe economic difficulties, limitations on access to health services, lack of social services, considerable shortcomings in housing and living conditions, exclusion from culture and education, inappropriate treatment, scant participation in social and political life.

The human rights of the elderly are not recognized in many parts of the world. That is why this Forum, as a priority issue, calls for the full and strict application of the Declaration of Human Rights, recalling that it must be enforced for all citizens, regardless of age. The full inclusion of older people in the social and economic life of their respective societies, the putting to use of their capacity and experience and the defense of their rights against any form of discrimination constitute an essential aspiration of the Forum on Ageing.

In addition, the social conquest represented by the fact that many millions of people now reach extreme old age obliges us to provide special respect and protection for certain aspects directly linked with the ageing of the population as part and parcel of the rights of the elderly.

In developed settings, a variety of responses have been developed to address the various types of abuse of older persons, including public awareness programmes, new legislation, judicial action and intervention and prevention programmes. Similar responses have been implemented in some less developed settings, although, due to resource constraints, less extensively.

Generally, response to the abuse of older persons has been aimed at raising awareness and understanding of abuse of older persons, promoting respect and dignity for older persons and, thereby, protecting older persons' rights. Specific measures include regulation of care, better identification of cases, care and treatment planning. Such measures also seek to foster collaboration between response agencies and to encourage research.

Principles called on to guide intervention include ethical concerns, human rights and values of freedom, autonomy, justice, accountability, privacy, respect and dignity, depending on the setting. Legal and judicial systems, social and human development policies and professional and service agencies are mobilized in the service of intervention. Community efforts, neighbourhood and informal support networks are increasingly involved in the fight against abuse of older persons, broadening the effort of families and individuals. First October is celebrated as the International Old Peoples' Day. Delhi Police officials personally visit the old people under their police station with flowers and cards.

The need to raise public awareness of abuse of older persons is reflected in the wide media coverage given to serious acts of abuse and cases of scandalous neglect. The media have played a critical role in bringing attention and stimulating attendant policy response to the abuse of older persons. The content of awareness and education programmes has adopted a human rights approach in very recent years. In many colleges and Universities in India, National Service Scheme takes up projects wherein students visit the Old Peoples' Home to become sensitive to their problems. Otherwise efforts to increase awareness include information and education sessions, programmes to support older persons and their advocates to enforce rights and to halt abuse and strategies to plan for the future protection of vulnerable older persons.

Lawyers, politicians, law enforcement officers, social workers and other professionals have been targeted by educational programmes to equip them in the assessment and detection of abuse and neglect for effective intervention. Materials have been developed to assist them in this effort. These include screening tools to identify abusive and potentially abusive situations, protocols for referral and intervention and training resource kits

for service providers. Handbooks have been useful for caregivers to assess risks for abuse and to identify community resources for assistance. Information dissemination has increased through fact sheets, training videos and CD-ROMs and directories of help resources and web sites.

National telephone help-lines have been established or set up as demonstration projects in a number of countries to educate callers on the abuse of older persons and on available resources, and to refer them to help agencies. Non-governmental organizations also offer awareness and education programmes in a number of settings. Community development programmes that address needs and concerns of older persons have also helped to raise awareness and to educate the general public about abuse.

The Social Security measures undertaken by the Indian government through various pension schemes cover only a small section of the aged population. In 1999, the Ministry for Social Justice and Empowerment commissioned a critical report named Project OASIS. It recommends establishment of a pension over agency, which would cover more than 300 million old people. OASIS is aimed at looking after the old people from the unorganized sector. The recommendations are yet to be implemented.

Methodology for Human Rights Education

Intervention strategies and programmes can also be designed and implemented in various settings in which violence and abuse occur, to remedy mistreatment or to prevent abuse.

Intervention in institutional settings includes official response mechanisms to address reports of abuse and neglect of residents, such as formal inquiries and study ommissions. Certification of providers, establishment of standards of care and of staffing requirements as well as periodic inspections of residential care facilities are mandated in some settings, although implementation has been of variable quality. Advocacy plays an important role in educating the public and policy makers about conditions in institutional facilities.

Resident councils, family committees and ombudsman programmes are other mechanisms to maintain the attention of management on care issues. The success of intervention programmes in institutional settings has been found to depend on the commitment of management to quality care, good working conditions and creative problem-solving. Criteria for the recruitment of staff that exclude candidates for previous records of abuse and select candidates for empathy towards older persons and for ability to handle stress and conflict can play an important role.

In some community-based settings, intervention includes provision of shelter and related social services to victims of abuse. Volunteer services, neighbourhood networks, community-based support groups, faith based organizations and family support programmes have also been active in support of older victims of abuse. This support may include, inter alia, formal services provided in the home, adult day-care facilities and respite care programmes. In a few settings, places of refuge and emergency shelters have been established for urgent cases.

Since extending support to the elderly is a social problem, it is the duty of the society to inculcate moral values and obligations among the younger generations not to discard their elders mercilessly and to support their elders. Through parables, fables and folk lore, young children could be impressed upon and sensitized to the problems of the aged. At College level, NSS, as mentioned above, has encouraged visit to Old Peoples' Homes. The College students could be encouraged to promote awareness about the vulnerability and plight of old people by performance of street plays. In India, vast majority of old people in rural areas are illiterate and they are not aware of the various schemes introduced for their benefit, it is obligatory for the social workers and other concerned individuals to impart such information far and wide.[3]

[3] "Old Age A Curse!: Dearth of Enabling Laws to Protect This Vulnerable Group", in A.I.R., 2003, p.106.

BALANCING BETWEEN SPEEDIER AND FAIR JUSTICE

*Neera Bharioke**

I Introduction

ARBITRATION IS an alternate mechanism for resolution of disputes wherein disputes are referred to domestic tribunals and disputes are settled with the assistance of a third person, generally of parties own choice who is familiar with the nature of the dispute and the context in which such disputes normally arise. It ensures efficient and speedy trial giving finality to decisions, keeping in view the interests involved and the contextual realities.

The Arbitration and Conciliation Act, 1996, (the Act) is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration adopted by the UNCITRAL in 1985. The provisions of the Act have minimized the supervisory role of the Courts by putting restrictions on the Courts from intervening during the course of arbitral proceedings. The final arbitral award passed is enforceable as a decree of the Court[1].

The Act gives freedom to the parties, subject to minimal restrictions, in carrying out the obligations under the arbitration agreement. Arbitration requires at least one or any odd number of arbitrators. The role of the arbitrator in arbitral proceedings is to adjudicate upon the disputes referred to him by perusal of evidence and pleadings of the parties. The arbitrator has also to ensure that the party to the dispute does not argue its case outside the pleadings or on basis of documents which are not a part of evidence. Sections 12 and 13 have been enacted to ensure that the arbitrators should be impartial and disinterested.

However, the Act, (though based on UNCITRAL Model Law), has made a departure from the corresponding provision in the UNCITRAL Model Law. Due to this departure, there is no judicial remedy or any institutional device for the removal of a biased arbitrator. The absence of a provision for removal of a biased arbitrator pits against the two basic canons of natural justice, namely, one cannot be a judge of his own cause and secondly, justice must not only be done but must also seem to be done.

* Lecturer, Law Centre-I, Faculty of Law, University of Delhi.

[1] See, the Arbitration and Conciliation Act 1996, s Section 36

II Challenge Procedure under Arbitration and Conciliation Act, 1996

Section 12 of the Arbitration and Conciliation Act, 1996 (henceforth, 'the Act') lays down the grounds for challenge and it runs as follows:

Section 12: Grounds for Challenge.: (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

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

(3) An arbitrator may be challenged only if:

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

(b) he does not possess the qualifications agreed to by the parties.

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

Thus, Section 12(1) casts a duty upon the arbitrator to disclose at the earliest any circumstances likely to give rise to justifiable doubts as to his independence or impartiality when he is approached in connection with his possible appointment as an arbitrator and Section 12(2) governs the situation when a person is appointed an arbitrator without first approaching him. The duty of disclosure continues throughout the arbitral proceedings. The disclosure has to be in writing.

Section 13 of the Act lays down the procedure for challenging an arbitrator and it reads as:

Section 13 Challenge Procedure.: (1) Subject to subsection (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in subsection (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in subsection (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under section 13 (2) withdraws from his office, or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

Section 12 lays down the grounds on which an arbitrator may be challenged while section 13 deals with the procedure for challenging an arbitrator. The parties have been given a liberty to agree on the procedure for challenging the arbitrator, subject to sub-section (4). Sub-section (4) provides that if the challenge is unsuccessful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. After the award had been made, the party challenging the arbitrator can make an application for setting aside the award in accordance with section 34 of the Act[2].

III Provisions in UNCITRAL Model Law corresponding to sections 12 Andand 13 of the Act

As already stated, the Indian Act, that is, Arbitration and Conciliation Act, 1996 The Act has used adopted the 'UNCITRAL Model Law' as a model, with certain modifications. (Model Law). A significant feature of the Act is that the role of the courts, under the Act, is even more limited than

[2] Grounds for setting aside an award under section 34 are if a party to the agreement was under some incapacity; or the agreement was not valid under the law to which the parties have submitted it or under the law for the time being in force; or that there was lack of proper notice of appointment of arbitrator, or of proceedings, or the party was otherwise unable to present his case; or the award dealt with a dispute not contemplated by or not falling within the terms of the submission; or the composition of the tribunal or the procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Part I of the Act from which the parties could not derogate or such agreement was not in accordance with that part In addition, the court can set aside the award if the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or if the award is in conflict with the public policy of India.

that envisaged under the Model Law [3]. But for the present purpose, it becomes important to compare the provisions of the Act relating to a biased arbitrator with the corresponding provisions under the Model Law.

Section 12 of the Act is a verbatim reproduction of the Article 12 of the Model Law and thus has not been reproduced to avoid un-necessary repetition.it is unnecessary to refer to that. Section Clauses (1) and (2) of the Article 13 of the Model Law provide for a challenge to an arbitrator on the ground of 'justifiable doubts as to his impartiality or independence and for an opportunity to the concerned arbitrator to withdraw and failing that, to the arbitral tribunal to decide on the challenge. Subsections (1), (2) and (3) of section 12 the Act has identical provisions. But However, the the Indian Act makes a deviation from this point.

Clause (3) of Article 13 of the Model Law provides to the party failing in its challenge before the arbitral tribunal an additional and effective remedy i.e. the remedy before the court or other authority specified in Article 6 of the Model Law. Such a provision is missing in the Indian legislation. Rather, in a bid to expedite the arbitration and prevent any diversionary procedures being launched in the court, sub section (4) authorizes the arbitral tribunal to complete the arbitral process without any impediment and to make an arbitral award, thus surpassing even the model law in its desire to cut out curial delays or institutional examinations.

Article 13 (3) of the Model Law allows the arbitral tribunal, including the challenged arbitrator to continue the arbitral proceedings and make an award while the challenge is pending before the Court or other authority specified in Article 6 of the Model Law. Thus section 13 of the Model Law strikes a balance between the need to expedite justice as well as the need of imparting justice in a just manner.

The provisions of section 13 of the Act would only come to rescue a party when an arbitrator himself withdraws from the arbitral proceedings, which is clearly a ceremonial provision. There is every chance of the arbitrator continuing with the arbitral proceedings and to make for himself the way for continuing and completing the arbitral proceedings leaving the challenging party high and dry.

[3] Model Law Law, on which it the Indian legislation is based is based was envisaged in the context of international commercial arbitration but the Act treats the model as equally appropriate for domestic arbitration. This scheme eliminates a dichotomy in the Act between the law applicable to domestic arbitration and that applicable to international commercial arbitration.

Empowering an arbitrator, who is not inclined to withdraw, to decide on the challenge of his own independence and conduct, is a gross and apparent injustice to the aggrieved party. In the case of Model Law, the mere availability of the provision of appeal under Article 13 (3) deters the biased arbitrator and thus checks and safeguards the interests of the aggrieved party. Thus, empowerment of the arbitral tribunal to decide the challenge is neutralized or balanced by Article 13 (3). But the Indian Act has no such corresponding provision, thus leavingwhich leaves the aggrieved party to suffer at the hands of a biased arbitrator.

An aggrieved party can knock at the doors of the justice but only after the arbitral tribunal makes an award and that too only on the grounds enumerated in section 34 of the Act[4]. Thus, there is practically no control over a biased arbitrator under the provisions of the Act, unless the biased arbitrator himself opts to withdraw from the arbitral proceedings. The evident partiality or the use of undue means by the arbitrator vitiates the whole arbitral proceedings.

Section 13 of the Act gives right to the aggrieved party to challenge the authority of the defaulting arbitrator in case he does not so disclose. The purpose behind giving such a right to the party is that he can rectify the mistake committed by him in the choice of the arbitrator, attributable to ignorance of the wary circumstances about the arbitrator[5]. This is a valuable right to ensure to the party the fairness of the arbitral proceedings as well as to ensure that arbitral proceedings will culminate in a fair and just decision.

If the arbitrator does not so disclose and the party to the arbitral proceedings discovers it at a later stage, objections are bound to be raised to the continuation of that person as an arbitrator. Further however, since, in the meantime the matter would have leaped ahead and the parties too might have spent substantial time and money, . But the bias of the arbitrator in the matter might vitiates the whole proceedings.

It is true, that section 13 (3) of the Act puts an embargo on the arbitral tribunal to proceed with the matter till the arbitral tribunal decides on the challenge. But, in In the desire to expedite arbitration and prevent the parties from adopting the dilatory tactics of going to the court to halt the arbitral proceedings, the Act has provided that a challenge such as that an arbitrator is biased that alleges bias in the arbitrator will have to be made to

[4] None of which provides for challenging the award on the ground that the arbitrator is a biased person.

[5] Sunil Gupta, No Power to Remove a Biased Arbitrator under the New Arbitration Act of India, (2000) 3 SCC (J), at p 2

the same arbitrator, whose bias is alleged. If he is the sole arbitrator or even if he happens to be one of the members in the arbitral Tribunal, even then the challenge will be decided by the members of the tribunal, including the member challenged. The possibility of him being excluded or expelled from the arbitral proceedings is negligible. One cannot expect an arbitrator, against whom bias has been alleged, who refuses to withdraw from the arbitral proceedings, to decide in favourfavor of the challenge. Rather Hence, the the provision of section 13 (3) asking the arbitral tribunal to decide the challenge, is meaningless and illogical, suffering from injustice and unfairness.

It violates basic principles of natural justice which require that no man should be a judge of his own cause and further that the justice must not only be done but also seems to be done.

Under section 13, unless the arbitrator himself withdraws or the other party agrees to the challenge, the arbitral tribunal has to decide on the challenge. There is hardly any possibility of an arbitrator himself withdrawing from the arbitration, more so in cases where he does not himself disclose rather the party discovers about the circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Arbitration is chosen as a forum for dispute settlement by the parties not only for saving their time and money but also for its fairness and effectiveness. One big advantage of the arbitral proceedings is that the parties retain control of their dispute resolving process. It is important to understand that retaining control does not mean they control the adjudicating authority or a system. But, at the same time, the arbitrator is expected to be a man of integrity and a bias, . Any adverse discovery at a later stage if discovered at a later stage, adds fuel to the fire. Such a discovery It not only taints the whole proceedings leading to unpleasantness and non-co-operation by the aggrieved party, thus it also ruling rules out the out the possibility of parties placing faith in the mechanism of arbitration as a tool of imparting justice in future[6].

The Provision provision of Section 13(4), allowing an arbitrator to continue the arbitral proceedings and make an arbitral award, after deciding the challenge raised by the party to the dispute further imparts injustice as the Act provides neither any remedy in the form of appeal nor sets up any appellate institution where the aggrieved party can plead his cause.[7] The outcome of such a forced arbitral proceedings which is thrust upon him, is in

[6] Neera Bharihoke, The Procedure for Removal of a Biased Arbitrator Under Arbitration and Conciliation Act, 1996: The Said and The Unsaid, Nyayakiran, Delhi Legal Services Authority Official Newsletter, Issue 3, at P 38.

[7] Milon K. Banerjee, *Arbitration v. Litigation iIn Alternative Dispute Resolution*, 83 (2002), eds.P. C. Rao and W. Sheffield, at p 83.

all likelihood going to be unfair and unjust to him the party, as the feeling of ill will in the arbitrator against a party who challenged his appointment cannot be lost sight of.

The only remedy available to the aggrieved party, whose challenge is rejected, is to make an application for setting aside the award, in accordance with section 34. Grounds for setting aside an award in section 34 are enumerated in the earlier part of this paper but none of the grounds given in section 34 the section provides for the setting aside of the arbitral award on the ground that it has been passed by a biased arbitrator.

Impartiality is an integral part of fairness and justice but none of the provisions in the Act touch upon it. The provisions of section 13(4) that if the challenge against the arbitrator is not successful, the aggrieved party has no immediate remedy, and the arbitral tribunal shall continue with its arbitral proceedings and make an arbitral award, was examined by the High Court of Andhra Pradesh High court and has been held to be constitutionally valid[8].

IV An aaccidental error or a calculated calculated move?

Factors Responsible For Enactment of the Arbitration and Conciliation Act, 1996

The law of arbitration in India relating to domestic arbitration was governed by the Arbitration Act, 1940 and relating to international arbitration by the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961.

The Arbitration and Conciliation Act, 1996 replaced three statutes, namely namely:

(a) the Indian Arbitration Act, 1940, based on the English Arbitration Act, 1934, ;

(b) The Arbitration (Protocol and Convention) Act, 1937, based on the General Protocol, 1923; and

(c) the Foreign Awards (Recognition and Enforcement) Act, 1961, based on the New York Convention on Recogniti and Enforcement of Foreign Arbitral Tribunals, 1958 the Geneva Convention on the Execution of Foreign Ar Awards, 1927.

[8] M. Mohan Reddy v. Union of India 2000(1) Arb LR 39 (AP).

Several factors contributed to the need of a comprehensive new legislation to remove the deficiencies of the Arbitration Act, 1940(Act of 1940). The Arbitration Act, 1940 did not deal with foreign awards The English Arbitration Act, 1934 on which the Act of 1940 was based, had been replaced by the English Arbitration Act, 1950, which in turn was amended by the Arbitration Act, 1975 and the Arbitration Act, 1979, to keep pace with the developments in the field of arbitration, but the Indian Act[9] had remained unchanged.

The 1940 Act had become outdated. In *State of Kerala v. Joseph Anchilose*[10], the widespread abuse of arbitral processes was taken note of and the High Court of Kerala underlined the need for evolving effective safeguards to arrest such abuses. Arbitrations were taking place under judicial supervision to ensure their fairness and effectiveness. The arbitral proceedings under the Act of 1940 took on all the undesirable characteristics of judicial proceedings, especially with respect to delay and complexity. The judiciary in India could intervene in arbitral proceedings on many grounds. The Act of 1940 had become increasingly outmoded and discredited. In *M/s Guru Nanak Foundation v. M/s Rattan Singh and Co.*[11], the Supreme Court observed:

> Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings are conducted and without an exception, challenged in Courts, hasproceedings are conducted and without an exception, challenged in Courts, have made lawyers laugh and legal philosophers weep. Experience shows and law reports have beean ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forums chosen by the parties for expeditious disposal of their disputes, has by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity.

In *Food Corporation of India v. Joginderpal Mohinderpal*[12], the Supreme Court reiterated the need for reforms in the Act of 1940.

[9] Act of 1940.
[10] AIR 1990 Kerala 101.
[11] AIR 1981 SC 2075.
[12] AIR 1989 CS 1263.

The Public Accounts Committee of the Lok Sabha had also commented adversely on the working of the Act of 1940[13]. Its complaints mainly related to the long delays that took place in the completion of the arbitral proceedings, more so through the intervention of the Courts. Seventy Sixth Report of The Law Commission of India, in its 76th report, also recommended the need for a new Arbitration Act. The Malimath Committee[14] as also the Law Commission also recommended a number of alternative modes such as arbitration, conciliation and mediation to expedite dispute resolution. The Government of India also felt that the Act of 1940 needed to be reformed for effective implementation of the economic reforms to meet the demand of the business community in India and investors abroad[15]...

Further, the United Nations Commission on International Trade Law (UNCITRAL) adopted, in 1985, the Model Law on International Commercial ArbitratioArbitration. It had earlier adopted in 1980 UNCITRAL Conciliation Rules. Both the Model Law and Conciliation Rules were recommended by the General Assembly of the United Nations for adoption by all the countries in international commercial arbitration and international commercial conciliation.

And thus tThe Act of 1940 was thus was replaced by the Arbitration and Conciliation Act, 1996. The basic reason for the enactment of the Act was to expedite the completion of arbitral proceedings with minimal intervention of Courts. The intervention of Courts, allowed at various stages by the Act of 1940, was a major hindrance in the effective implementation of the Act and that was sought to be removed in the new enactment. The Act provides for only two occasions when the parties can approach the court at pre-arbitral award stage, namely, for seeking interim measures of protection before or during arbitral proceedings and to decide on the question of termination of the mandate of the arbitrator. The reduction of scope of seeking court intervention is aimed to prevent the delay in the completion of the arbitral proceedings.

It is submitted however, that the The ground of correction of errors of law should not have been deleted. Further, the issue of deciding the

[13] *210th Report of PAC*, 137 (1975-76) (5th Lok Sabha), at p 137, *9th Report of PAC*, 201-202, (1977-78) (6th Lok Sabha), at p 201-202.
[14] The Arrears Committee, 1990 appointed in view of the arrears of cases in courts.
[15] 76th Report of Law Commission of India on the Act of 1940 as well as the representations from, among others, the Indian Society of Arbitrators, the Indian Council of Arbitrators, the Confederation of Indian Industries, the ASSOCHAM, all suggested for a new Act in place of the Act of a1940 in stead of amending the Act of 1940.

existence of a bias in an arbitrator is an issue of fact which could have been decided by an institution set up under the Act. The institution, so set up, need not have been a court. A question of fact could be decided by the person chairing such an institution or by any person authorized by him for this particular purpose, which need not necessarily have the legal knowledge. This could have avoided the intervention of Court and thereby the resultant delay. But in the zeal of expediting the completion of arbitral proceedings, legislature has made a blunder by providing an ineffectual and meaningless remedy under section 13 to deal with a biased arbitrator.[16]

V Concluding remarks

A remarkable feature of the Arbitration and Conciliation Act of 1996 is that parties to the arbitration agreement have been provided with autonomy and freedom throughout the various provisions of the Act in form of expressions like 'parties are free to agree', 'with the agreement of the parties', "unless otherwise agreed by the parties', subject to fundamental requirements of fairness and justice. Highest faith should be shown by the arbitrator and he must disclose to the parties all facts which are likely or calculated to bias him in any way in favourfavor of one or the other party. Faith in the mechanism of arbitration will be reposed by the parties only if there is a trusting atmosphere. There is a need to include safeguards in the Act to ensure that the dispute is resolved amicably by a disinterested, impartial and neutral person.

Arbitrators should not only be doing justice between the parties, but also be creating sense that justice appears to have been done. The Act was enacted to provide procedural flexibility, to save valuable time and money and to avoid the stress of a conventional trial. Under the Act, arbitral award has achieved finality which is not open to challenge and thereby shortening the time factor in arbitrations by enacting section 34 and section 36. But the Act has by-passed the important principle under which every judicial or quasi-judicial decision should be capable of being disputed in at least one appeal or forum.

Considering the scheme of the Act, there is no provision in the Act either for revoking the authority of an arbitrator by the Court or for removal of an arbitrator by the Court on the ground of bias by the arbitrator. The Act has made a deliberate departure from the corresponding provisions of the Model Law in its zeal of expediting justice. Speedier justice has to be balanced against the fair justice and that can be ensured only when the arbitrator

[16] *Supra* Note 6, at P 41.

resolving the dispute is independent and unbiased. Thus, there is a need to provide for some judicial remedy or institutional device for the removal of a biased arbitrator either corresponding to sub section (3) of Article 13 of Model Law or by the parties themselves in their arbitration agreement.

BALANCING COMPETING VALUES – DEVELOPMENT V. ENVIRONMENT: A COMMENT ON *INTELLECTUALS FORUM TIRUPATHI* V. *STATE OF A.P*[1].

I Factual back ground

THE SUPREME Court in *Intellectuals Forum Tirupathi* v. *State of A.P* (here-in after referred as *Intellectuals case*) has delivered a momentous judgement having a bearing on the environmental constitutionalism and principle of sustainable development. The judgment strikes a balance between developmental needs and environmental values having due regard to the present day socio-economic condition which the society faces.

The set of facts in the *Intellectuals case* relates to the preservation of and restoration of statute quo ante of two tanks, called 'Avilala Tank' and 'Peruru Tank' situated in suburbs of Tirupathi, historical in nature, being in existence since the time of Srikrishnadevaraya, The Great, 1500 A.D. The grievance of Intellectuals Forum, the appellants, a group of socially spirited citizens was that the Division Bench of the High Court of Andhra Pradesh did not consider in the right perspective the call for judicial remedy despite there being overwhelming evidence of the tanks which were being put to use not only for irrigation purpose but also as lakes furthering percolation to improve the ground water table, thus serving the needs of the people in and around these tanks. These tanks were the natural resources of the area, to be used for public benefit. The High Court gave precedence to the economic growth by completely ignoring the importance and primary attached to the protection of environment and valuable and most cherished fresh water resources. The High Court justified the decision of State of A.P, the respondents, to alienate the tank bed lands in favour of governmental agencies i.e. Tirumula Tirupathi Devasthanam (TTD) and A.P. Housing Board to build the proposed residential flats, institutions as well as infrastructure facilities for valuable consideration. The appellants approached the Apex Court for appropriate relief.

II Questions of law and judicial response

A reading of the Supreme Court decision reveals the following issues for in-depth consideration –

(a) Duty of the state to protect natural resources vis-à-vis constitutional provisions.

[1] AIR 2006 SC 1350.

(b) The classic conflict between preservation of environment and developmental needs.

(c) Resolving the above-mentioned conflict through the concept of Sustainable Development.

The Court while answering these issues has demonstrated exemplary activism by recognizing certain fundamental norms that are part of Indian environmental jurisprudence. These norms have to be applied in full force for protecting the natural resources of our country.

With regard to the *first issue*, the Supreme Court has categorically stated that there is a responsibility bestowed upon the Government to protect and preserve the environment. The constitutional imperatives embodied in Articles 48 A[2] and 51 A (g)[3] cast a duty upon the state and citizen to improve the environment. These two Articles are not only fundamental in the governance of the country but must be applied by the state in making laws and understanding the scope and purport of the fundamental rights guaranteed under Article 14[4] and 21[5] of the Constitution of India. It may be mentioned here that by making such statement, the court has raised environmental concerns to the dignity of fundamental rights in such a manner that the same are enforceable by writ petition under Articles 32 and 226 of the Constitution.[6]

At the same time, the Apex Court has fortified the Doctrine of Public Trust and Principle of Intergenerational Equity as an important aspect of state power, to be used to interpret every constitutional duty and to ensure full accountability in all spheres of state activity relating to development and management of natural resources.

The doctrine of public trust basic premise is that certain natural resources are impressed with a trust for the public enjoyment and benefit. The government has a duty to act as trustee in regard to these resources and the courts have an obligation to ensure that the government and its agencies fulfill this duty[7]. The public trust doctrine originated in Roman

[2] Art. 48 A states that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

[3] Art. 51 A (g) states that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.

[4] Art. 14 states that State shall not deny to any person equality before the law equal protection of the laws within the territory of India.

[5] Art. 21 states no person shall be deprived of his life or personal liberty except according to procedure established by law..

[6] See Javaid Talib, "Constitutionalising the problem of environment" 48 *JILI* 530 (2005).

[7] Stevens, "The Public Trust : A Sovereign's Ancient Prerogative becomes the People's Environmental Right", 14 *U.C. Davis L. Rev.* 195 (1980).

law which considered "air, running water, the sea and with it the shares of the sea" as *res communes omnium,* the common property of all.[8] The modern revival of this traditional doctrine took place in America. In the landmark case, *Illinois Central Railroad* v. *Illinois*[9], the court opined:

The bed or soil of navigable waters is held by the people of the state in their character as sovereign, in trust for public uses, for which they are adapted (...) the State holds the title to the bed of navigable waters upon a public trust, and no alienation or disposition of such property by the state, which does not recognize and is not in execution of this trust is permissible.

The Supreme Court of California in the case of *National Andobon Society* v. *Superior Court of Alpine Country*[10], also known as *Mono Lake case*, has summed up the doctrine as:

Thus the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshland and tidelands, surrendering the right only in those rare-cases when the abandonment of the right is consistent, with the purposes of the trust.

In India, the doctrine in its present form, was incorporated in environmental law in *M.C. Mehta* v. *Kamal Nath*[11], where Kuldip Singh J., writing for the majority held:

(our legal system) includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. (...) The State as a trustee is under the legal duty to protect the natural resources.

Similarly, in *MI Builders Pvt Ltd.* v. *Radhey Shyam Sahu*[12], the Supreme Court upheld the doctrine of public trust as a part environmental jurisprudence. Referring to the academic literature[13], the court quoted that the idea of public trusteeship rests upon three related principles.[14] Firstly, certain interests like the air and sea have such importance to the citizenry that it would be unwise to make them the subject of private ownership.

[8] Coquillettee, "Mosses from an old Marse; Another Look at some historic Property Cases about the Environment", 64 *Cornell L. Rev.* 801 (1979).
[9] 146 U.S. 387 (1892).
[10] 33 Cal 419 (SC of California).
[11] (1997) 1 SCC 388.
[12] (1999) 6 SCC 464.
[13] Peter Abrahams Goldfarb, *Environmental Law and Policy; Nature, Law and Society,* American Case Book Series (1992).
[14] P Leelakrishnan, *Environmental Law Case Book*, 285 (2004).

Secondly, they should be made freely available to the entire citizenry without regard to economic status. Thirdly, it is the principle purpose of the government to promote the general public rather than to redistribute public goods from broad public use to restrict private benefit.

In the same view, Prof. Joseph L. Sax, whose article on this topic is considered to be an authority[15] opines that three types of restrictions on governmental authority are often thought to be imposed by the public trust; first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by general public, second the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.

A perusal of the above-mentioned judgments and literature reflects that the doctrine can be articulated from two angles, affirmative and negatory. Affirmative angle provides the principal duty of the State, as trustee of public resources, is to use the trust *corpus* for the benefit of the public and to protect it. Formulated from a negatory angle, the doctrine does not exactly prohibit the alienation of the property held as public trust; however, it places the governmental conduct under a high degree of judicial scrutiny when it attempts to restrict the free use of resources by general public. Thus, the state as a trustee of natural resources has more demanding responsibility to act in good faith, prudently, diligently and loyally and must take the most beneficial action. Failure to do, gives rights to the beneficiary i.e. any citizen to challenge the action before the court of law.

In addition, the public trust resources have to be utilized in a manner consistent with the principle of intergenerational equity. Intergenerational equity implies intergenerational fairness and mandates that the present generation should not look at the earth and its resources as mere investment opportunity but as a trust passed on to them by ancestors, to be enjoyed and passed on to the future generations for their use[16]. Several international conventions and treaties have recognized this principle[17]. It assumes relevance in the context of public trust doctrine for it establishes that the state as a trustee has a duty towards al beneficiaries of the trust, present

[15] Joseph L. Sax, " The Public Trust doctrine in Natural Resource Law: Effective Judicial Intervention", 68 *Mich L. Rev* 471 (1970).
[16] Gurdip Singh, *Environmental Law in India* 22 (2005).
[17] United Nations Charter, 1945, Preamble; International Covenant on Civil and Political Rights, 1966, Preamble; UN Conference on Human Environment, Stockholm 1972, Preamble; UN Conference on Environment and Development, Brazil 1992, Principle 3.

and future[18]. So in every decision with regard to a natural resource use, the interest of future beneficiaries must be adequately considered.

It is submitted that the Supreme Court, in *Intellectuals Case* has once again reaffirmed its commitment in interpreting the constitutional provisions and their offshoots in a manner where the issue of environment receives the highest attention. In the instant case, the court has stated that tanks are an important part of environment of area. The Government is responsible to protect and preserve historical tanks qua concept of public trust doctrine and intergenerational equity[19]. Tank is a communal property and the State authorities are trustee to hold and manage such properties for the benefits of the community. They cannot be allowed to commit any act or omission which will infringe the right of the community and alienate the property to any other person or body[20]. Ironically, the Government itself alienated the natural resource to other governmental agencies and not to third party for valuable consideration in order to construct houses and other infrastructure facilities.

Time and again, the courts have been faced the *second issue* i.e. the conflict between the needs of environmental protection against the demands of economic and social development. It is neither feasible nor practical to have a negative approach toward development process on one hand and environmental issues on the other hand. No precise answer can be given for this ticklish question. However the judiciary has attempted to understand and analyze this conflict by recognizing the importance of competing claims in a manner where both can co-exist without compromising with each other. For instance, in the case of *People United for Better Living in Calcutta* v. *State of West Bengal*[21], the court stated:

It is true that in a developing country there shall have to be developments, but that development shall have to be in closet possible harmony with environment, as otherwise there would be development but no environment, which would result in total devastation, though, however, may not be felt in present but at some future point of time, but then it would be too late in the day to control and improve the environment. In fact, there has to be a proper balance between the development and environment so that both can co-exist without offering the other.[22]

[18] Lavanyya Rajamani, "Doctrine of Public Trust: A Tool to Ensure Effective State Management of Natural Resources", 38 *JILI* 80 (1996).
[19] *Supra* note 1, para 65.
[20] *Ibid*, para 82.
[21] AIR 1993 Cal 215.
[22] *Ibid*, at 217.

A similar view was taken in *Indian Council for Enviro-Legal Action* v. *Union of India,*[23] where the court said:

While economic development should not be allowed to take place at the cost of ecology or by causing widespread environmental destruction and violation: at the same time the destruction and violation; at the same time the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment should go hand in hand, in other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuing the protection of environment.[24]

Again, in the case of *Essar Oil* v. *Halar Utkarsh Samiti,*[25] it was held:

This, therefore, is the sole aim, namely, to balance economic and social needs on the one hand with environmental considerations on the other. But in a sense all development is an environmental threat. Indeed, the very existence of humanity and the rapid increase in population together with the consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, filling up of lakes and the pollution of water resources and the very air that we breathe. However, there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since no one can be sacrificed at the altar of the other.[26]

In the *Intellectuals case*, the Apex Court was faced with competing claims from both the parties. The appellants alleged environmental degradation of tanks and tank bed lands where as the respondents asserted the urgent need of development in the form of proposed housing schemes and other infrastructure facilities. The court recognized the importance of both the values and was of the view that harmony must coexist between the two for sustainability.

To resolve this conflict, the court applied the concept of Sustainable Development in a pragmatic manner – the *third issue* for consideration. The term sustainable development simply means integration of developmental and environmental imperatives.

[23] 1996 (5) SCC 281.
[24] *Ibid*, para 31.
[25] 2004 (2) SCC 392.
[26] *Ibid*, para 27.

The conceptualization of the concept of sustainable development can be found in international conventions and treaties. Principle 13 of the Stockholm Declaration 1972[27] states in order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population". The most commonly accepted definition has been proposed in Brundtland Report[28]. According to this Report, sustainable development is the "development that meets the needs of the present generation without compromising on the ability of the future generation to meet their own needs". The emphasis is placed on integration of economics and ecology at all levels. Similarly, the Earth Summit[29] in Principle 4 states "in order to achieve sustainable development, environmental protection shall constitute an integrate part of the development process and cannot be considered in isolation from it".

The judiciary in India has applied the principle of sustainable development in series of cases. In *Tamil Nadu Tanneries Case*[30]. Kuldip Singh J., held sustainable development is a balancing concept between development and ecology and has been accepted as a part of customary international law. In *A.P. Pollution Control Board II* v. *Prof. M.V. Nayudu (Retd.)*[31] the apex court reiterated the principle of sustainable development by taking help from international convention[32] and decisions[33]. Jagannadha Rao J., speaking for the court, adopted the principle of sustainable development as a basic principle of sustainable development as a basic principle of environmental law in India. Again, in *Goa Foundation* v. *Diksha Holdings Pvt. Ltd.*[34], the court restated the principle that "there should be a proper balance between the protection of environment and the development process... there shall have to do both development and proper environment and as such, a balance has to be found out and administrative actions ought to proceed in accordance therewith and not de'hors the same". The concept also finds support in the decision of *Narmada Bachao Andolan* v. *Union of India*[35] and *M.C.Mehta* v. *Union of India*[36], where the court has opined

[27] UN Conference on Human Environment, Stockholm 1972.
[28] *Our Common Future – The World Commission on Environment and Development* 43 (1987).
[29] UN Conference on Environment and Development, 1992.
[30] *Vellore Citizen Welfare Forum* v. *Union of India* AIR 1996 SC 2715.
[31] (2001) 2 SCC 62.
[32] *Supra* note 29.
[33] *Portugal* v. *F.C. Council* 3 CMLR 331 (1997); *Yanomani Indians* v. *Brazil* 33 ILM 173 (1994); *Minors Opasa* v. *Deptt. of Environment and Natural Resources* 7615 OEA/SCRLV/2/66 (1985).
[34] (2001) 2 SCC 97 at 108.
[35] (2002) 10 SCC 664.
[36] AIR 2002 SC 1696.

that one of the principles underlying environmental law is that of sustainable development that requires development to take place which is ecologically sustainable. It may be pointed out here that the judicial decisions establish sustainable development as a part of environmental jurisprudence to ensure proper balancing but they hardly give material guidance to ensure proper balancing. Every case is judged in the light of its own facts and circumstance. Some cases give priority to human needs where as the others support developmental issues.

In the present case, once again, the court has reaffirmed the principle of sustainable development and tried to find a balance between environmental degradation and developmental needs. On one hand, were the tank beds being put in use for irrigation, drinking purpose and being used as percolation tanks to improve the ground water table and quality of underground water in the neighboring areas and many villages including Tirupathi town; on the other side were the constructional and developmental activities in the form of proposed housing accommodation to provide shelter to ever-growing population, migrants from rural areas, pilgrims and tourists in Tirupathi town. The court by looking into the ground realities, held that the right to shelter does not seem to be so pressing under the present circumstances so as to outweigh all environmental considerations – the logic being, if the proposed constructions are not carried on, it seemed unlikely that anyone will be left homeless or without their basic needs for shelter".[37] Merely asserting an intention for development would not be enough to sanction the destruction of local ecological resources[38]. The court ordered no further construction would be allowed in the area that may lead to concretization the ground surface. Not only this, the court expressed its anguish, the way much of the natural resources of tanks had been lost due to persistent developmental activities over a long time. It was of the view that alternative strategies must be adopted to revive the tanks. Accordingly, the court ordered for roof top rainwater harvesting for houses already constructed, abstraction from ground water to be completely banned, no bore well/ tube well for any purpose to be allowed in the area. The order passed by the learned court clearly indicates that the court gave due regard to the particular circumstances of the case, surrounding realities including the potential for successful implementation and the likelihood and degree of response from the agencies on which the implementation would depend. Thus need for applying the principle of sustainable development has once again been reinforced in order to secure the common future of the present and future generations.

[37] *Supra* note 1, para 84.
[38] *Ibid.* para 67.

III Conclusion

To sum up, the judgment in *Intellectuals case* has asserted that the need for environmental protection and conservation of natural resources cannot be ignored in the grab of economic growth and development. The focus must be on 'sustainability' – a synthesis of development and environmental values. The old notion that development and environment values are antithesis of each other has totally become redundant in twenty first century; in fact, both values are complimentary and mutually supportive of each other.

The objective of the concept of sustainable development stems from the need to promote harmony among human beings and between humanity and nature. The principles of public trust doctrine and inter-generational equity serve as tools to ensure effective state management of natural resources in such a way that present as well as future generations are aware of them equally.

When applying these principles, the courts should issue directions only after assessing the ground realities and analyzing the prospects of their being successfully implemented. Both certainity of substance and certainity of directions are indispensable requirements in the development of environmental jurisprudence. It invests the judiciary with credibility that commands public confidence in its power of legitimacy. Thus the honourable judges in the present case have tried to do the most it can to promote sustainable development and passed orders that are judicially manageable so that their execution is guaranteed.

Gitanjali Nain Gill*

* Reader, Campus Law Centre, Faculty of Law, University of Delhi, Delhi-110 007.

LEGAL ASPECTS OF MANAGING EMPLOYEE RELATIONS (2005). By A.B. Chowdhury. Eastern Law House, Kolkata. Pp. 60+ 551. Price not given.

Historically the role of employees and their contribution in the productive process has been of major significance in the process of managing industries. However, in the modern times, the change in high levels of technology has necessitated the importance of very skilled, highly technical and qualified employees in the production process. Such atmosphere in the modern industries requires high level of managing human resources, with the varied and specialized jobs. And thus managing employees and industrial relations in industries is a highly complicated process requiring technical expertise to handle them. And in this atmosphere not merely business experts or general managers, technical managers out also the legal management of human recourses has become very significant.

The present work[1] under review deals with the legal aspects of managing complicated affairs in industries. Having worked as a General Manager (Legal) with the Hindustan Lever Limited for a sufficiently long period the author has written the present work more with the management approach rather than completely as a lawyer unlike the famous work of O.P. Malhotra. Therefore he has thought it fit to write on concerning various topics on the subject rather than giving a complete section wise commentary on the Industrial Disputes Act.

The author starts his book with a chapter on Generation of Employment and quotes Dr. S.P. Gupta[2] who suggested that in order to target ten million employment opportunities per year over the tenth plan period the existing labour law "[u]nfortunately, these provisions, which are meant to protect employment, might have actually served to discourage growth of employment. The inability to shed labour in times of difficulty encourages entrepreneurs to avoid hiring labour"[3]. The reviewer also believes that if we really want to generate higher GDP in India we require huge FDIs for the purposes of adequate capital investment. The FDIs will not increase substantially unless a new look and a fresh thought is given to the labour policies and laws for the industrial development. The chapter continues discussion various important concepts like industry under s.2(j), workman under s.2(s) of ID Act and contractor under s. 2(c) Contract Labour Act and has rightly drawn attention to the concept of employment in industrial law as stated by the Supreme Court in *Uptron India Ltd.* v. *Shammi Bhan*[4] has four ingredients as under:

[1] Hereinafter referred to as Choydhury's *Managing Employee Relations*
[2] Planning Commission, Government of India, May 2002 (p. 89)
[3] Quoted in Chowdhary's *Managing Employee Relations*, p. 1
[4] (1998) 6 SCC 538

(1) Management/employer who engages the service of the workmen.

(2) Employee/workmen, i.e., a person who works for wages,

(3) The contract of employment, i.e., the terms and condition upon which a workman agrees to work in consideration of wages, and

(4) General principles of Contract Act are applicable in industrial employment but the relationship so created is partly contractual and partly non-contractual and governed by various legislations such as Industrial Employment (Standing Orders) Act 1946, Payment of Wages Act etc.

On the question of the termination of the employees he has rightly pointed out the decision of the Supreme Court in *Oswal Pressure Die Casting Industry, Faridabad* v. *Presiding Officer*[5] that a court cannot sit in judgment over the question of the suitability of the employee and it is not necessary to show all kinds of reports on the question of efficiency and suitability unless it is a *mala fide* termination. However, the author has rightly stated that for practical considerations it is advisable that the employer should maintain internal records assessing the work of the workmen at periodic intervals during the probation period, so as to avoid the accusation of the termination being arbitrary, *mala fide* or by way of victimization.

The author in chapter two discusses with the help of the case law of the Supreme Court of the High Courts the process, procedure and the method of resolution of industrial disputes under the industrial Disputes Act. The discussion includes the resolution of disputes by labour courts and industrial tribunal, conciliation by conciliation officer and conciliation boards and the role of collective bargaining and the consequent settlements which are legally binding under the Industrial Disputes Act. And it has been highlighted properly by the author that the settlement entered before the conciliation is binding on all the workmen irrespective of whether they are the members of the union or not[6].

In chapter three the author proceeds with the law on industrial actions of strikes and lockouts by the workmen and the management. He has elaborated various actions on the part of the workmen like strike, shouting slogans in the work premises, putting up defamatory posters, wearing black badges, sabotage, resorting to violent behaviour at the shop floor, damaging machinery, material, stocks etc. and go slow. He has also pointed out the implications of the collective action on the part of the workmen resulting in the obligations of the management as to how they ought to deal with such collective action as manager of an industrial

[5] (1998) 3 SCC 225
[6] *Association of Chemical Workers* v. *Wahid Ali (1980) I LLJ 276*

establishment.[7] On the question whether right to strike is a fundamental right, he has cited properly the case of *T.K Rangarajan* v. *Government of Tamil Nadu*[8] where basically three questions were raised:

1. Is there a fundamental right to go on strike?
2. Is there a legal/statutory right to go on strike?
3. Is there moral or equitable justification?

And the Supreme Court answered all the three questions in negative. However the workmen who are governed by the Industrial Disputes Act, while they do not have a fundamental right to go on strike they have a legal right to go on strike. Though the workmen can go on strike if there is a moral or equitable justification for going on strike.

The author further discusses the statutory impediments in matters of dealing with non-viability of the enterprise. For various reasons it may become unviable to run the establishment profitably as some of the new industries may be set up with modern machinery resulting in cheaper and better quality of manufactured goods. In such situations the management may be forced to lay off or retrench the employees or totally close the establishment. In his own style as the legal manager he has discussed the legal implications of the non-viability issues. In this connection he has appropriately pointed out the Supreme Court judgment in the case of *D. Marco Polo & Company (P) Limited* v. *Their Employees Union*[9] where it was held that the management or the employer has the right to reorganize his business for the reasons of economy and convenience.[10]

In chapter five the author discusses the legal implications of protection against change in terms and conditions of service of workmen under the Industrial Disputes Act. Under s. 9A of the Industrial Disputes Act, no employer who proposes any change in the conditions of service applicable to any workman with respect to any matter specified in the Fourth Schedule shall effect such change without a notice to the concerned workman. The real object and the purpose of enacting s. 9A requiring notice seems to be to afford an opportunity to the workmen to consider the effect of the proposed change and if necessary to represent their view on the proposal. Such consultation further serves to stimulate a feeling of common joint interest in the management and the workmen in the industrial progress and increased productivity.[11]

[7] Chowdhury's *Managing Employee Relations*, Pp. 217-240
[8] (2003) IIILLJ 275 (SC)
[9] (1958) II LLJ 492
[10] Quoted in Chowdhury's *Managing Employee Relations*, P., 284-285
[11] *Tata Iron & Steel Company Limited* v. *The Workmen*, (1972) II LLJ 259(SC)

The author also discusses in detail the speedy remedy of recovery of money due to a workman by virtue of an award of settlement as provided under s.33C of the Industrial Disputes Act. In this regard a Division Bench of the Gujrat High Court in *Natwarlal Amritpal Shah* v. *Employees State Insurance Scheme*[12] held that in the absence of any provision prescribing time limit, an application of the workman for recovery of legitimate claim cannot be frustrated on the ground of delay. He has also discussed in detail the legal requirements of discipline management by clarifying as to what constitutes a misconduct, investigating into a misconduct, framing of the charge-sheet, suspension of a workman and how to conduct a domestic enquiry with proper recording of evidence, properly writing an enquiry report and how to impose punishment on the delinquent workman. For the benefit of the managers in the industrial establishments he has also given formats for efficient working of the human resource department like draft of letter for temporary appointment, draft of letter for appointment of probationers/ trainee, draft of letter for confirmation of appointment, draft to charge-sheet and show-cause notice, draft of notice for committing go-slow and so on.

On the whole the book has been written in a simple language and is a useful work more for the managers of industrial establishments than for law practitioners. However, the students of labour law, management and industrial relations can use it for their pursuits. It is noted that the price of the book has not been given by the publishers on the book cover. The book may be kept in the law and management libraries.

*Harish Chander**

[12] (2002) 92 FLR 753

* B.A. (Hons.), M.A., LL.B. (Delhi), Academic Postgraduate Diploma in Law (London), LL.M. (London), Ph.D. (Delhi), Professor of Law, LC II, Faculty of Law, University of Delhi

MAJUMDAR'S LAWS RELATING TO NOTICES, SEVENTH EDITION, AJIT K. SEN GUPTA EASTERN LAW HOUSE (PUBLICATION) TOTAL NO. OF PAGES 847, PRICE Rs. 480/-

The book under review is a very elaborate and lucid work. It is one of the exclusive work, which one rarely finds among legal collections on the subject. According to Collin's Dictionary[1] 'notice means an announcement or warning in advance that you are going to do something or that something is going to happen. Notice is not only useful for legal professional equally useful for the common man, in day to day life. Now a days notice has attained much importance particularly after the recent pronouncement of Hon'ble Supreme Court in Salem Advocate Bar Association, Tamil Nadu vs. Union of India,[2] where in the apex court has held that the object underlying issuance of a notice is to curtail the litigation. It was further held by the Hon'ble Court that wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such, a notice, but it is further necessary to properly deal with all material points and issues raised in the notice. It was further held that in large number of cases either the notice is not replied or reply filed, but is very vague and it results in giving rise to avoidable litigation and heavy expense and cost to exchequer as well. It was held[3] that provisions in CPC or any other similar legislations cast an implied duty on all concerned governments and States and statutory authorities to send appropriate reply to such notices and directed that all governments, Centre or State or other authorities shall nominate an officer, who shall be made responsible to ensure that replies to notice under Section 80 CPC or similar provisions are sent within the period stipulated in a particular legislation and the replies shall be sent after due application of mind and if the court find the reply to be vague and has been sent without proper application of mind, the court shall award heavy cost against the government and it was further directed that the cost should be recovered from the concerned officer.

The entire manuscript of the book is divided into three parts. Part I covers first 10 chapters, and deals with general observations on laws relating to notices - their definition and purpose, their classes and requirements, their service, and such other broad features.

The general concept of notice, discussed in Chapter – I, gives a bird's eye view of general ideal of notice to the reader. The classification of various notices like oral, written mandatory and statutory notice as given in the chapter – II is highly appreciated.

In further chapters in Part – I, the service of notice, the capacity to issue a notice the capacity to accept notice, and the question as to whether stamp duty on notices is required etc are very valuable to a person, who deals with notice in any aspect.

Part II is devoted to notices coming under various legislations with reference to laws governing those. The case laws discussed in the chapters would be highly beneficial as from time-to-time the courts give interpretation on the various aspects of the notice and which is equally important as the provisions in the law. Almost all the notices which are usually covered in day-today life has covered in this part under separate chapter like notices under separate chapters like notices under Code of Civil Procedure 1908, notices under Railways Act 1989, notices under Negotiable Instruments Act 1881, notices under Indian Partnership Act, 1932, notices under Companies Act, 1956, notices under the Consumer Protection Act 1986 etc. The author has also given the model forms of notices, with each chapter which is worth mentioning.

The Part – III contains model forms of notices for various miscellaneous notices. The Index given at the end of the book is highly useful and it is precise to the point.

The book acts has a good and faithful friend for Law student, lawyers, judges and specially to a common man.

Chandra Shekhar*

[1] Collins Coluild English Language Dictionary, Seventh Impression 1996.
[2] 2005 (6) Scale 26.
[3] Ibid at Para 41.
* Visiting Faculty; Faculty of Law, University of Delhi And Central Govt. Counsel, High Court of Delhi

Dr. Avtar Singh, LAW OF ARBRITATION AND CONCILIATION [MADHYASTHAM, SULAH EVAM ANUKALPI VIVAD NIPTAN VIDHI] (Hindi Edition) Third Ed. 2005. Publisher: Eastern Book Company, Lucknow. Price Rs.195.

Dr. AVTAR Singh, the patented name of the author having to his credit dozens of commentaries in the field of law does not require any introduction. The learned author is known for his simplicity in analysing law, keeping in view budding but fertile mind of the students. Most of his 'Student Editions' are in paperbacks, which are not only easy to handle but also known for their economics.

This time Law of Arbitration and Conciliation (Hindi edition) has been revised for the third time within a short span of five years, as the first appeared in 2000 whereas this third edition under review is of 2005, which by itself shows the demand of this work in the market. Though the book was first published in English edition in 1981, to my knowledge, it took almost 20 years to translate the same in Hindi.

In between these two Editions namely of Hindi and of English, the law of arbitration has also undergone radical changes. Whatever it may be, at least finally a book in Hindi has been made available by the learned author and in addition, three quick editions have also been delivered which by itself shows a great success and does not require any corroboration.

This edition under review has been engrafted keeping in view the Arbitration and Conciliation Act 1996. Quick but careful glance reveals that exhaustive case law analysis has been given, may be more than one thousand cases have been referred to; which would show the depth of case law analysis.

The book has been divided in five parts beside the introduction to the subject. First part deals with domestic arbitration and second part is attributed to foreign awards and their enforcement. Third Part has been devoted to conciliation and fourth and fifth parts are attributed to residuary provisions and alternate dispute redressal. Though the present work is done in the form of chapters as against section wise commentary, yet careful view of the same would reveal that chronology of statutory sections has also not been disturbed which is a marvellous achievement.

Though each part of this book and each chapter thereof has been drafted meticulously, special and important provisions thereof have been drafted with special circumspectation, insight and industry so that the book primarily being meant for students can be of great help to not only those who practice law but

also all of them whose duty, it is to enforce the same. References in this regard may be made to some important sections 8,9,11,12,31,33 & 34.

I am forced to congratulate the distinguished author and the publisher for their outstanding achievement, which is very common to both of them and I feel the book is worth keeping in all the libraries to enable the students who would like to pursue the law of Arbitration & Conciliation in Hindi Medium.

*Baldev Ranjan**

* Lecturer (Part-time), Campus Law Centre, Faculty of Law, University of Delhi.

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