FORM IV

Statement of Ownership and other particulars about the ***Delhi Law Review***

Place of Publication	Facutly of Law University of Delhi Delhi – 110 007
Language	English
Periodicity	Annual
Printer's Name, Nationality and Address	Sudhir Printers, Indian 151, Deshbandhu Gupta Market Karol Bagh, New Delhi – 110 005
Publisher's Name, Nationality and Address	S. N. Singh, Indian Head & Dean Faculty of Law University of Delhi Delhi – 110 007
Editor's Name, Nationality and Address	S. N. Singh, Indian Head & Dean Faculty of Law University of Delhi Delhi – 110 007
Owner's Name	Faculty of Law University of Delhi Delhi – 110 007

I, S. N. Singh, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
S. N. Singh

Dated: September 30, 2007

DELHI LAW REVIEW
VOLUME XXVIII-XXIX: 2006-07

Mode of Citation: XXVIII-XXIX DLR (2006-07)

Faculty of Law
Chhatra Marg
University of Delhi
Delhi – 110 007
Phone: +91 11 27667843, 27667725/ Extn. 1510
Fax: +91 11 27666350
Email: dean_law@du.ac.in
Website:
http://www.du.ac.in/show_department.html?department_id=Law

Annual subscription:
Rs. 150/- (Domestic); US $ 20 (Overseas)

Back volumes of Delhi Law Review from Vol. I (1972) to Vol. XXVII (2005) are available @ Rs. 150/- (Domestic) and US $ 20 (overseas) each (subject to availability).

Published by the Faculty of Law, University of Delhi, Delhi–110 007 and printed at Sudhir Printers, 151, Deshbandhu Gupta Market, Karol Bagh, New Delhi – 110005. Phone 23522683, 23628595, Mob. 9810334493

DELHI LAW REVIEW

VOLUME XXIII-XXIX: 2006-07

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From the Editor's Desk

Faculty of Law, University of Delhi established in 1924 has long sought to train lawyers "to create and use law as an instrument of social change" and has focused on active learning by students through the use of case method in teaching law.[1] Towards this end the Faculty and its Centres have also been running various legal aid programmes since the 1970s as a labour of love of all the teachers and students who have volunteered for such work. The Faculty with the help of student and teacher volunteers has provided legal aid in the beggar's court and the juvenile court, conducted numerous legal literacy camps in rural villages around Delhi, helped prisoners languishing in Tihar jail in Delhi for long periods of time despite bail orders or even when charged with petty offences, held and participated in Lok Adalats, generated legal literacy materials and spread legal literacy through street plays and other audio-visual programmes. These programmes have enriched students' learning, generated awareness of societal problems in the budding lawyers, exposed them to the difficulties and discrimination faced by poor and uneducated persons and sensitised them to the problem of access to justice of various groups in the society. At the same time these programmes have also proved to be useful and helpful to poor persons who are at the receiving end of the legal system. In the recent past, students have also penned down their experiences in such programmes in the form of two small books, namely, JOY OF FIRST RELEASE[2] and WINDS OF CHANGE.[3]

With this long known commitment of the Faculty of Law to issues of social justice and legal aid, it is not surprising that the DELHI LAW REVIEW attracts many articles on these subjects. At the same time it attracts scholarly writings on the current issues facing the legal community. Each year the REVIEW attracts articles from scholars in India and abroad. This year is no exception. This issue contains contributions from India, Bangladesh, United Kingdom, Russia, and Australia dealing with a range of topics.

While the papers contained in this issue cover a variety of subjects, a majority of them analyse the issues of social justice, namely, the ways and means to promote access to law. Kamala Sankaran examines the role of legal education in promoting

[1] http://www.du.ac.in/show_department.html?department_id=Law

[2] A Campus Law Centre Students Initiative, Gathered from Experience of the Voluntary Legal Service Activities in Tihar Jail and the Primary Courts in Delhi. Pilot Project for Law Students Voluntary Prison Services 2000-2001, Campus Law Centre, Faculty of Law, University of Delhi. (Undated).

[3] Compilation of Legal Aid Experiences 2002-2003, Law Centre-I, Faculty of Law, University of Delhi (2003).

access to justice. Richard Grimes, Mostafa Mahmud Naser and Ajay Pandey make a case for introduction of clinical legal education in UK, Bangladesh and India respectively, by examining the developments in different parts of the world, functioning and experiences from existing legal aid clinics, and also focusing on the funding required for such clinics. While Harmeet Singh Sandhu focuses on the issues raised in and about public interest litigation, Sujith Koonan traces the trajectory and scope of state compensation in case of human rights violations. The concern of social justice is also reflected in the comment by Jitendra Misra on the *M. Nagaraj* case. In view of the continuing discussion for changes needed in legal education, these articles are very contemporary, useful, and constructive.

Conceptual issues relating to the legal status of a foetus and the legal nature of the Organization for Security and Cooperation in Europe as an international organisation have also been dwelt upon by Sunanda Bharti and Ruslan Garipov respectively. Sunanda has analysed the legal provisions and judicial decisions in the US, UK and India to show that the feotus has been worse off in the mother's womb if it suffers injury before birth though changes are now taking place to recognise rights of the unborn child. Ruslan examines various international instruments and authoritative texts to assert that OSCE possesses legal personality and is subject of international law. Measures for implementation of the International Convention on Biological Diversity taken by Australia have been analysed by Kamal Puri and P.S. Nerwal has examined the Indian experience in relation to International Regulations on Persistent Organic Pollutants. Both Conventions are subject of present-day concern and these papers offer useful experiences and critical appraisal of implementation processes in the two areas.

Recent events and developments of importance in the legal sphere have also been included in this issue. Anupam Jha critically analyses the establishment and functioning of the Iraqi Special Tribunal resulting in the execution of Saddam Hussain. Lovely Dasgupta has looked at the newly developing area of sports broadcasting including the PIL in the Supreme Court on the failure of Doordarshan to secure the broadcasting rights for cricket matches. The new dimensions of the law relating to obscenity in the era of Internet have been probed by Talat Fatima. In this phase of expanding business opportunities, the issue of bouncing of cheques has acquired a lot more importance than was the case in the past and Lalitha Sreenath and M.R. Sreenath examine the law on the subject. Ten years since the passing of the Indian Arbitration and Conciliation Act and the present discussion surrounding

amendments in the Act have spurred V.S. Jaya and Vishnu Konoorayar to examine the relevance of the due process requirements in the law and practice relating to arbitration. The minimal number of women in criminal justice administration has attracted many scholars to write on female criminality and Meera Kaura grapples with the various explanations given to explain offences by women including murder of husbands or partners by battered women and relates these to the facts and figures of crime by women in India.

As in the past, this issue also contains the book reviews of twelve books which we hope will help the readers to decide on procuring those volumes for their libraries at home or work.

Three of our retired colleagues passed away in the year 2006, namely, Prof. P. S. Sangal (born 1934 – joined 1968 – resigned 1996), Prof. Hoti Prasad (born 1938 – joined 1971 – retired 2003), and Mr. S.K. Aggarwal (born 1942 – joined 1971 – retired 2004). The faculty remembers their contributions with gratitude. Prof. Harish Chandra and Mr. T.D. Sethi retired in 2006.

I am grateful to the current Dean, Prof. S.N. Singh and the previous Dean, Prof. Nomita Aggarwal for the support provided in bringing out this issue. I take this opportunity to thank my colleagues, Prof. Gurdip Singh Bahri, Prof. J.L. Kaul, Prof. S.C. Raina, Prof. Poonam Saxena, Prof. Kamala Sankaran, Dr. Geetanjali Nain Gill, Dr. B.T. Kaul and Mr. A.K. Batra who along with the members of the editorial board constituted the Board of Referees, for their assistance in selecting the papers for publication and their suggestions for improvements of papers where required. I am very thankful to my colleagues, Dr. Kiran Gupta, Dr. Raman Mittal, Dr. Poonam Dass, Ms. Meena S. Panickar and Mr. L. Pushpa Kumar, the members of the editorial board for extending unstinted support and co-operation throughout and for doing the arduous editorial work with utmost patience and efficiency. I am thankful to Ms. Sumohini for her assistance in copy editing and proof reading. I also want to put on record the able assistance volunteered by Mr. Abhijeet Singh, a student of LL.B. 2nd year and our appreciation of his meticulous work in bringing uniformity in the footnotes. I am sure that more students will volunteer in future to share this responsibility. I thank Mr. Dhirendra and Mrs. Bhatia in the Dean's office too for the patient and efficient secretarial support. Receipt of contributions from so many scholars from other countries is a reflection of the prestigious place DELHI LAW REVIEW enjoys among the global legal fraternity and I express my thanks to the contributors from India and abroad for their articles reflecting their research and hard work and

commitment to bring social change and awareness. I do hope that DLR will continue to attract legal scholarship from within and outside the faculty of law.

In the end I take full responsibility for any mistakes that may have still remained despite my endeavour to make it error free. I, on behalf of the editorial board members, place this issue in the hands of the readers and will be happy to receive their views and suggestions for its improvement in the future. The views expressed in the journal are those of the authors and do not necessarily reflect the opinion of the Editorial Board or the Faculty of Law.

Delhi

September 26, 2007 Ved Kumari

IN MEMORIAM

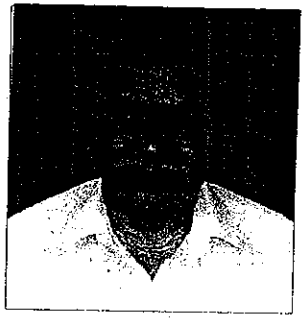
Prof. P.S. Sangal
(15.04.1934-04.08.2006)

Prof. Parmatma Sharan Sangal pursued his studies at the University of Allahabad from where he did B.Sc., LL.B., LL.M and Ph.D in Company Law.

He joined the Faculty of Law, University of Allahabad, as Lecturer in 1959. He joined the University of Delhi, Faculty, as a Reader in 1968 and was promoted as Professor in 1983. He was Professor-in-Charge, Campus Law Centre from 1982 to 1984 and Dean, Faculty of Law, from 1989-1992. He was a visiting Professor at the National University of Malaysia for four months.

He taught Company Law, Taxation and Law of International Trade to LL.B. and LL.M students. He supervised a number of dissertations for the LL.M. degree and over a dozen theses for Ph.D. He also attended a number of national and international seminars, conferences and symposia. He published three books and 44 research papers and articles in national and international journals.

IN MEMORIAM



Prof. Hoti Prasad
(12.01.1938-18.08.2006)

Prof. Hoti Prasad passed his B.A in 1959 and LL.B. in 1965 from Agra University. He obtained the degree of LL.M. in 1968 and Ph.D. in 1975 from University of Delhi. He worked in MMH College, Ghaziabad, Kurukshetra University and M.D. University, Rohtak. He joined the Faculty of Law, University of Delhi in 1971 and became a Reader in 1984. He was promoted as Professor in 1990. He published more than 26 articles and a book, *Company Winding Up: Law and Procedure*.

Mr. S.K. Aggarwal
(14.05.1942-16.04.2006)

Shri Surinder Kumar Aggarwal did his LL.B. and LL.M. from the University of Delhi in 1966 and 1968, respectively. He was Research Associate at Indian Law Institute in 1963. He was appointed as Lecturer in University of Delhi (Law Centre-I) in 1971. His specialization was Labour Laws and Taxation. He was promoted as Reader in 1984 and retried in 2004.

REVIEWING LEGAL EDUCATION – WHAT DO WE WANT FROM OUR FUTURE LAWYERS AND HOW DO WE GET IT?

Richard Grimes[*] *and Colleen Smith*[**]

'Come on Cath, he's a lawyer, he ain't the one for ya... '.[1]

I. INTRODUCTION[2]

Who is bothered by how lawyers get to be practitioners and what their knowledge, skills and value bases are? We suggest that quite a few are (or should be) concerned.

Let us begin with *clients*. Those using legal services have a direct interest in the competence and aptitude of their legal representatives. Many who are excluded from the legal process, be it for lack of funds, awareness of rights or absence of faith in the legal process, might also be interested in the right circumstances.[3] Whether a client consults a lawyer because he or she needs a will drafting, wants to move house, seeks compensation for an injury suffered or has been charged with a criminal offence, the lawyer, the client may expect, is likely to meet certain professional and ethical standards. The lawyer of course may not end up litigating a case for the client. The issue at stake might be resolved through skilful negotiation or mediation. In any event the ability of the lawyer to guide the client through the options open to him or her is, for the consumer of the service, a key expectation.

So who else is concerned? The prospective lawyer surely? At the outset of their careers, *students* who study law at university or college and/or perhaps through a form of apprenticeship, have ideals in terms of their prospects as eventual practitioners (or heavens forbid, teachers). The relevance of their education, both theoretical and practical, as well as the length, cost and quality of

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[*] Richard Grimes is an independent consultant specialising in experiential methods of legal education. He was, until 2006, Professor and Director of the Centre for Pro Bono Services and Clinical Education at The College of Law of England and Wales. He has practised, taught and published widely in the UK and overseas and is committed to access to justice through active learning.

[**] Colleen Smith is Principal Lecturer and Acting Head of Law in the School of Social Sciences at Sheffield Hallam University. She has for the past 12 years been closely involved with the University's in-house, law clinic, which runs as a full-fledged solicitors' practice.

[1] *Bad Liver and a Broken Heart* in ASYLUM RECORDS, a music album of singer/songwriter Tom Waits (1976).

[2] This article started life based on a paper given at the International Journal of Clinical Legal Education conference held in Melbourne in July 2005. The article was completed after the workshop and incorporates many of the contributions made there. Since initially submitted for publication there have been significant developments in vocational legal education in the UK and the article has been updated to reflect that. We are grateful to the referees whose comments assisted us in the redraft. We would also like to thank Becky Parker at The College of Law who helped with the final editing of the article.

[3] For more on issues surrounding unmet need and access to justice and for an interesting comparison over the years represented (but with striking similarities and themes), see, Bankowski and Mungham, IMAGES OF LAW (1976); Thomas (*ed*), LAW IN THE BALANCE (1982); Smith *et al*, A STRATEGY FOR JUSTICE (1992).

it must be a concern. Students want to be reassured that what they are studying will equip them to become able professionals within a manageable framework.

The list of stakeholders in this discussion of course does not end there. The *legal profession* has traditionally (at least so far as the UK is concerned) taken a direct role in the regulation and, in part, provision of legal education and, for a considerable period, provided the overtly vocational courses that were a pre-requisite for admission.[4] In England and Wales, the General Council of the Bar (the regulatory and representative body for barristers) and the Law Society (the equivalent for solicitors) currently share a common set of requirements and standards for the undergraduate or 'academic' stage of legal education.[5]

Employers have a vested interest too. Much has been written on the employability of graduates generally and the link between the content and form of academic study and the needs of industry and commerce in particular.[6] Apart from the need to supply the profession with competent (if inexperienced) practitioners, prospective employers will be on the look out for staff that have the legal and transferable skills relevant to the job market.

There is also a *governmental* agenda. The massive expansion in the UK of the undergraduate student market has had a dramatic impact on the graduate numbers in law and in other disciplines. Much has been heard under the present Labour government of the need for 'joined-up' thinking – linking the various departmental briefs with day-to-day activity. A clear example of this can be found in the Department of Education and Skills inclusion of citizenship as part of the National Curriculum for the 11 – 16 year olds.[7] The importance of having a legally literate society is now recognised at governmental level (it has been part of many activists' aspiration for decades[8]) and lawyers have a key role in addressing rights (and responsibility) awareness as a precursor to access to justice.[9]

The *wider public* may also have reason to take more than a passing interest in legal education. Apart from individual concerns as actual or potential clients of lawyers, members of the public are presumably concerned that the legal profession, as a whole, strives for and reaches requisite professional standards.

[4] Manchester, MODERN LEGAL HISTORY, Chapter 3 (1980).

[5] And contained in the Joint Statement of the Law Society and General Council of the Bar prerequisites for qualifying law degrees.

[6] See, for example the issues highlighted in the DEARING REPORT, National Commission of Inquiry into Higher Education, HMSO (1997).

[7] For an interesting article on the link between citizenship as part of the curriculum and legal literacy more generally, see, the article by Mace in 10 TEACHING CITIZENSHIP 1 (Spring 2005).

[8] For research that provides an insight into the work of England's first law centre, (addressing both casework and a 'campaigning' role for legal service providers). See, Byles and Morris, UNMET NEED (1977).

[9] See, TOWARDS A NATIONAL STRATEGY FOR PUBLIC LEGAL EDUCATION, Advice Services Alliance, Citizenship Foundation and Legal Action Group (2004). See also, SUMMARY OF RESPONSES TO DISCUSSION PAPER (2005) by the same group.

We suggest, therefore, that the stakeholders identified have a common interest in both the quality of legal service available and in the education that forms the foundation for such provision.

In this article we will attempt to identify what it is that makes for a 'good' lawyer and how legal education might be shaped, in terms of form and content, to produce the desired outcome.

We maintain that to meet the expectations of all interested parties newly qualified lawyers should have a sufficient grasp of the relevant knowledge, skills and values to enable them to meet the many and varied needs of their clients. At the point of qualification a lawyer should be able to apply these facets of competence to produce appropriate and sustainable results for their clients in whatever dispute or transaction that may be involved.

The learning process through which this overall position may be achieved has been described in detail elsewhere.[10] The key stages in this process, in ascending order of depth of learning, are termed by Bloom *et al* as:

- knowledge
- comprehension
- application
- analysis
- synthesis
- evaluation

It is our view that a (law) student is significantly disadvantaged if he or she is denied the opportunity of applying theory to practice and of having the chance to take apart that experience and reflect on the lessons to be learnt from that process - what happened and why, what might have happened and what would be done differently another time. Learning from experience of course will happen on a regular basis during one's working life. Is it not a missed opportunity to introduce that possibility outside of the formal educational stage of professional development?

We start from the position that application of knowledge, skills and values are central in learning and that the vehicle through which this can be directed and managed in terms of legal education is in a clinical or 'hands-on' setting. By this we mean the chance to use real or simulated case material under the supervision of professionally qualified staff who can ensure, in the case of live-client work, that professional practice standards and that the educational experience is maximised for the student.

This article looks at the future of legal education in England and Wales and further a-field in a clinical context. We look in particular at perceptions of what

[10] Perhaps the most comprehensive account of the learning process and the incremental nature of learning can be found in Bloom's TAXONOMY, often now cited by proponents of the virtues of learning outcomes – See, Bloom *et al*, TAXONOMY OF EDUCATIONAL OBJECTIVES (1956).

legal education should aspire to from an international perspective and at two particular examples of clinical practice that illustrate how the aspirations identified can be achieved. We examine the implications of using a clinical approach to study, particularly the cost of doing so.

In all we aim to show that studying law through clinical and reflective practice goes some (considerable) way to meeting the expectations contained in stakeholder agendas.

First we look at the debate in England and Wales[11] on the future of legal education and then we extend the discussion to include other jurisdictions. We then concentrate on the extent to which clinical legal education addresses identified needs.

II. THE TRAINING FRAMEWORK REVIEW (TFR)

In this section we look at the current and on-going debate in the England and Wales on the future of legal education. We think that there are useful indicators here as to the direction being taken by the regulatory bodies, government and law schools and have meaning beyond the domestic jurisdiction.

The domestic Law Society and the newly created Solicitors' Regulation Authority (the regulatory bodies for solicitors in England and Wales) have, over the past two years, been conducting consultations and reviews into the form and content of legal education[12] and the structure and accountability of the legal profession.[13] The Law Society has issued two consultative papers on possible routes for qualification as a solicitor – one preceding the work of an in-house investigation into legal education and the other following the initial report back and recommendations from this working group.

This new framework has yet to be finalised. However, it is clear from the second consultative paper and subsequent utterances, that the Law Society remains committed to a period of 'learning in practice'. This goes beyond mere exposure to legal practice experience and requires that 'trainees, working under the supervision of a solicitor, would be required to reflect upon, develop and apply knowledge, understanding and skills in a practice environment.'[14]

Under current proposals, trainees will have to produce evidence of achievement against identified goals – known as 'day 1 outcomes'. In addition, all trainees will be required to pass external assessment(s) taken after a period of work-based training.[15]

[11] For those unfamiliar with legal education in the UK, significantly different legal systems operate in Scotland and in Northern Ireland, hence, the focus here is on England and Wales.

[12] TRAINING FRAMEWORK REVIEW (2004) and QUALIFYING AS A SOLICITOR – A FRAMEWORK FOR THE FUTURE (2005), consultation papers by Law Society.

[13] Clementi, REPORT OF THE REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES (December 2004).

[14] *Supra* n. 12, QUALIFYING AS A SOLICITOR – A FRAMEWORK FOR THE FUTURE, para 59.

[15] *Id.* Recommendation 9.

Law Society Learning in Practice outcomes (as they are more properly known) are specified as follows in the March 2005 consultation para 62 (emphasis added):

- demonstrate *appropriate behaviour and integrity* in a range of situations
- demonstrate the *capacity to deal sensitively and effectively with clients, colleagues and others from a range of social, economic and ethnic backgrounds, identifying* and responding positively and appropriately to *issues of culture and disability* that might affect communication techniques and influence a client's objectives
- apply techniques to *communicate effectively* with clients, colleagues and members of other professions
- *recognise clients'* financial, commercial and personal *constraints and priorities*
- effectively approach *problem solving*
- effectively use current *technologies* and strategies to *store, retrieve and analyse information and to undertake factual and legal research*
- demonstrate an *appreciation of the commercial environment* of legal practice, including the market for legal services
- *recognise and resolve ethical dilemmas*
- use *risk management* skills
- *recognise personal and professional strengths and weaknesses*, to identify the limits of personal knowledge and skill and to develop strategies that will enhance their personal performance
- *manage their personal workload* and manage efficiently and concurrently a number of client matters
- *work as* part of *a team.*[16]

The TFR process has, so far, taken into account several reports from independent consultants. If our purpose in this paper is to promote further debate on the future of legal education and the role of 'hands-on, reflective, learning within it, brief mention of the conclusions of these may guide discussion. Two themes emerge in these reports:

- the importance of professionally appropriate educational development – evidenced by a 'learning' portfolio[17]
- the possibility (and even desirability) of multi-route qualification.[18]

[16] We would like to thank Hugh Brayne, independent consultant, for his assistance with this section of the paper.

[17] Grace, Thomas and Butcher (2004) and Webb, Maugham and Purcell (2004), consultants reports commissioned by Law Society.

There is, we suggest, a tension between these two concepts with the imagination and innovation implicit in the first being tempered and even compromised by pressure for the cheapest and speediest option for qualification suggested by the second.

Since writing the first version of this paper the Law Society has made a dramatic shift in its approach. Responses to the initial TFR report were, in the main, unsupportive, criticising the recommendations as unhelpful or unworkable. This resistance was lead by law schools and backed by much of the practising legal profession. The former were, understandably, uncomfortable with any proposed change to a mandatory degree or vocational course and the latter could not see the sense in liberalising provision and were against wholesale change in the apprenticeship stage (which the larger law firms effectively pay the cost of). As we have seen there was also division within the group responsible for conducting the TFR itself. This situation lead the Law Society to disband the TFR committee and to issue a consultative paper entitled: *A new framework for work-based learning* in 2006, which takes a very different, albeit outcome-based, approach.

This consultation paper suggests a new model for gaining the requisite practical experience that is tied to the 'day one outcomes' contained in the TFR but relies on a series of reviews (four), no less than four months apart, together with completion of a reflective portfolio that would be assessed either by independent assessors or through accredited institutions. The portfolio would have to evidence compliance with the day one outcomes before a candidate could be considered to have reached the point of competence for qualification purposes.

There is no evidence that the existing training contract structure is failing to meet such desired outcomes (although research in Australia suggests a significant variance in the quality of the training contract experience between different providers).[19] Whilst there may be a compelling argument that compliance with day one outcomes should be established whatever route to qualification is taken, in the absence of evidence to show that those undertaking training contracts are failing to meet this standard, law firms are unlikely to welcome any change to the qualification rules. Indeed it is difficult to imagine any law firm being enthusiastic for change that would involve a more time and resource consuming compliance regime.

Much of the Law Society's reasoning behind the changes suggested in the consultation paper is perhaps inspired not by any perceived weakness in the current training contract regime as such, but more by the fact that so many students cannot secure a training contract – with clear diversity, equality and cost

[18] Although the dangers implicit in this are highlighted by the minority report of the TFR group (Hardee and Knott (2004) contained in the main recommendation report and in a further consultants' report Johnson and Bone (2004).)

[19] De Groot, PRODUCING A COMPETENT LAWYER, Center for Legal Education (1995).

implications. There is also the overarching need to link competence and professionalism with measurable outcomes.[20]

Whilst the final shape of legal education in England and Wales, therefore, remains uncertain it seems highly probable that the existing structure (of an academic stage,[21] followed by an overtly, skills-based vocational programme[22] and ending with a term of apprenticeship[23]) will, almost certainly, no longer be the sole route for qualification. If a student can establish that he or she meets the outcomes, evidenced by reliable and robust assessment, that person should be able to qualify as a practitioner.

Much remains to be decided however. Could, for example, a person who can pass the assessment be admitted to the profession regardless of the route that they have taken to that point? Will reliance on end-point assessment produce a crammer mentality with scant regard paid to the process of learning (rather than the product of it as tested on one particular day)? To what extent would these developments complement or undermine the profession's commitment to continuing professional development or life-long learning? Who will the assessors be? Will there be a centralised 'bar' exam?

The TFR and subsequent consultation on work-based learning have, in our view, opened the door for the integration of clinical legal education. As we shall see in Section IV clinics already exist in around half of UK law schools and are extensively found in other jurisdictions.

How do these developments compare with the structure of legal education further a-field?

III. LEGAL EDUCATION IN OTHER JURISDICTIONS

If a complex situation can be summarised in just one sentence legal education world-wide consists of an 'academic stage' followed in some instances by an overtly vocational period of practice and/or study.

[20] In LAW SOCIETY GAZETTE 18 (26 October 2006) the Chair of the Law Society Regulation Board, Peter Williamson, said, "Education and training are the bedrocks of the profession ...(ensuring)... that solicitors join the profession with the knowledge, skills and attitudes required for a lifetime of ethical, competent practice."

[21] 'Academic' in this context means a course of study leading to a qualifying law degree (approved by Law Society and Bar Council) – usually a programme lasting a minimum of 3 academic years, or for non-law graduates, a conversion course covering basic legal principles and core subjects normally delivered over one academic year (full-time) or 2 years (part-time).

[22] Currently in England and Wales all aspirant solicitors and barristers must undertake an approved programme known as the Legal Practice Course (for solicitors) and the Bar Vocational Course (for barristers). Typically these run for one academic year (full-time study) or 2 years (part-time).

[23] For those intending to be admitted as a solicitor the apprenticeship is usually for a 2 years (and known as a training contract) and for those intending to practice as barristers the period is one year (and known as pupillage). Both require the candidate to work under the supervision of a qualified and experienced practitioner and to show they have undertaken specified tasks in specific subject areas. The situation in Scotland and Northern Ireland is somewhat different and is not covered in this paper. Many of the issues, however, raised by the Training Framework Review, especially the outcomes that might be expected of a newly qualified lawyer are, we suggest, of relevance to other jurisdictions both within and beyond the UK.

As has been seen, in the UK the academic and vocational stages are currently compulsory (although the TFR may change some of this) and the latter includes a period of apprenticeship that follows on from but is otherwise unlinked to the periods spent in more formal study.

In the USA, law schools are attended by graduates who enter legal practice directly from this point after passing a State bar examination. Many undertake clinical work whilst at law school but other than that have no pre-qualification practice experience.

In Australia practice varies from state to state and includes a mix of 'academic' and 'vocational' study and work. Clinics are widespread amongst Australian law schools although by no means compulsory.

In continental Europe the general pattern is for law students to attend university and enter legal practice on satisfying national bar examination requirements. Clinics are rarely found in Western Europe outside of the UK, Holland and Scandinavia. In the East, notably in Russia and other countries that were part of the old Soviet Bloc, clinics are more prevalent, often supported by aid from US foundations and US clinicians.

In countries that have had a colonial history legal education often reflects that background reproducing (for better or worse) the colonial power's legal education structure. Clinics are, however, widespread and well developed – often being the only means that the indigenous and impecunious population can access any legal services. This is particularly the case in parts of South and Central America and in sub-Saharan Africa (notably South Africa).

Returning to the debate - in order to address the questions 'what do we want from our lawyers and how do we get it?' the bones of this discussion were laid bare at the International Clinical Legal Education Conference in Melbourne in July 2005. To ensure the necessary interaction the paper was presented as summary of ideas coupled with discussion through simulated stakeholder groups. 'Represented' were: clients, law students, law school teachers and management, the practising profession, other employers, and government. Also represented were delegates from 15 different jurisdictions. The responses of each stakeholder group were as follows:

Clients – the general agreement of this interest group was that lawyers should be professionally competent, ethically sound, trustworthy, dependable, efficient, client-centred, accessible (in terms of physical availability and cost), and value for money. Services delivered by students under supervision were seen to be perfectly acceptable as in the style of a 'teaching hospital'.

Students – the expectations here centred understandably on the route to qualification rather than service delivery. The demand was for a quick and affordable education system that produced rounded lawyers who were technically able, publicly minded, and professionally skilled. The emphasis was

said by this group to be on a holistic education that addressed knowledge, skills and values within a 'justice' context.

Law schools – the agenda for the education providers overlapped to an extent with both the client and student needs with an emphasis on affordability (for student and law school), on quality (of educational provision and student-focused outcomes) and on the importance of research being carried out in a realistically funded environment. The importance of clinic both in terms of educational value and public (if limited) legal service provision was stressed. The worth of experiential learning and the demand for legal service did, however, give rise to a potential tension for the provider. Any clinical programme must be supervised to a professionally expected standard and must be sustainable both educationally and professionally.

The legal profession – the law firms called for a skilled and competent workforce, who are educationally sound (both in terms of general and law-specific knowledge) ethically conscious and commercially aware. The need was for newly qualified lawyers who could 'hit the ground running' and who were worldly-wise. The non-law firm employers also added that the knowledge and skills brought by law school graduates should be transferable to a multitude of work place settings.

Government – the pubic sector saw law schools as an important component of legal service provision without the state abdicating responsibility for funding public legal services (legal aid). The involvement of law students in legal service provision had many potential benefits to students, clients, law schools, government and the public alike. If properly funded and supervised clinics were a 'win/win' situation. Mention was also made of the landmark decision in the case of *Morgenbesser* and the transferability of legal practice experience within a European context.[24]

Following on from what in effect was a statement of the vested interests of each of the stakeholder group the discussion moved on to the pros and cons of the English TFR and its relevance to legal educators generally. In a nutshell these were seen to be as follows:

Pros – possibly cheaper and quicker route to qualification with 'hands-on' or clinical activity directly relevant to the work-based ethic of the TFR.

Cons – danger of instilling a 'crammer' mentality amongst students with emphasis on product rather than process. Proposals were not seen to be well thought through, especially on assessment.

The stakeholders generally agreed that the TFR could bring much needed changes to legal education in England and by implication could inform

[24] *Christine Morgenbesser* v. *Consiglio dell'Ordine degli avvocati di Genova.* ECJ Case C-313/01 13 November 2003 para 67 "It is ... the duty of the competent authority to examine... whether, and to what extent, the knowledge certified by the diploma granted in another Member State and the qualifications or professional experience obtained there, together with the experience obtained in the Member State in which the candidate seeks enrolment, must be regarded as satisfying, even partially, the conditions required for access to the activity concerned."

discussion in other jurisdictions. The difficulty, however, of law schools getting more heavily involved in legal service provision was that client demand may dictate the nature of the service competing and possibly compromising the educational objectives of law schools. To this end if law schools were to be involved in service provision a carefully worded protocol was needed to ensure that the educational aim was not lost, that law school's complemented other service providers and the government was not 'let off the hook' in terms of the state's responsibility to finance an effective public legal service. A draft protocol agreed by the Attorney General's Pro Bono Co-ordinating Committee in the UK is available from LawWorks.[25]

IV. LAW SCHOOLS PROVISION 'AT HOME'

Teaching in UK law schools has, so long as this has been found in the domain of universities and colleges, largely been delivered through lectures, and tutorials followed by various forms of summative assessment.[26] As far as can be deducted (for there appears to be no discernable theoretical base providing a rationale for traditional forms of law teaching, other than adherence, in spirit at least, to the Socratic method) the lecture is supposed to impart knowledge, the tutorial to allow for discussion and questioning and the coursework or examination to test understanding.

With few exceptions, learning through direct experience of the practice of law has played virtually no role in legal education in the UK in living memory, save for what happens during the discrete apprenticeship stage served after time spent in law school. This position is in principle little different in other jurisdictions in both the civil and common law worlds. This contrasts profoundly with legal education prior to the law school involvement when teaching, such as we would recognise it, was entirely practice based.

Compare this with how students and teachers in other 'vocational' disciplines approach their studies. For medics, learning through contact with patients followed by discussions with qualified supervisors based on that experience has formed (and continues to form) a significant part of the educational process.[27] Similarly science students can be found learning through controlled experiments in the laboratory. How else might an aspirant linguist or computer analyst learn without access to those who speak the language or without being able to turn on a computer and make it work?

Learning by structured experience and reflection on the experience permeates learning in many professions and trades – except it seems in law. There are of course notable exceptions. Much has been written on the history of

[25] www.lawworks.org.uk.

[26] Ironically, given the context of this paper and the audience it is intended for, legal education was historically gained 'on the job' – See, *supra* n. 4.

[27] The extent to which 'hands-on' or 'clinical' approaches to study takes place does vary considerably from university to university but the majority use the teaching hospital as a base for medical school.

clinical education in the USA, UK and elsewhere.[28] Relatively recent research suggests that interest in law schools in the UK in clinical legal education has grown over the past 5 years. Whilst a hard core of universities and colleges in the higher education sector have been running clinics, more now are either doing so or intend to do so.[29]

Two case studies may assist here to demonstrate the nature, extent and potential of clinical legal education. They are taken from our direct experience. It might assist those unfamiliar with the terminology to know that we use the following definitions in the context of the rest of this article:

Pro bono – work carried out by lawyers without charge, or at a subsidised cost, for those unable or otherwise unlikely to be able to access legal services.

Clinical legal education – a method of teaching and learning through which students assume responsibility, under supervision, for real or simulated legal casework, coupled with the opportunity for the students to reflect on that experience in discussion with co-students and teaching staff.

Clinics – bodies providing a legal service, located within the law school or in the form of organisations outside of the law school (for example in legal practice or in the not for profit sector) where clinical legal education is practised. Clinics are more often than not pro bono in nature.

A. Sheffield Hallam University Law Clinic

Sheffield Hallam University (SHU) Law Clinic opened its doors in February 1993. The Law Clinic offers pro bono advice and assistance to clients on a range of legal matters, *inter alia,* consumer, personal injury, housing, landlord and tenant, family and property.

The SHU Law Clinic is an assessed model as part of the law degree programme at SHU, it is optional and students can elect it in either their second or third year of study. Places on the law clinic are limited to 36 students; this is mainly because of the supervision requirements and, at present, lack of physical space.

Thirty-six students are selected, having had to write a 500-word essay on what they expect to gain from taking the elective. Students are then grouped in firms of 6 students and each student has a supervisor.[30] Prior to the commencement of the course students attend two half-day induction sessions,

[28] For the history of clinic in the USA, see, Schrag and Meltsner, REFLECTIONS ON CLINICAL LEGAL EDUCATION (1998). The UK's history (with comparisons drawn with the situation in the USA and elsewhere) is set out in Brayne, Duncan and Grimes, CLINICAL LEGAL EDUCATION – ACTIVE LEARNING IN YOUR LAW SCHOOL (1998).

[29] Browne, A SURVEY OF PRO BONO ACTIVITY BY STUDENTS IN LAW SCHOOLS IN ENGLAND AND WALES, SPBG (2000). Subsequent surveys have been carried out in 2003 and 2006 and show a steady increase in pro bono and clinical work in universities and colleges. See, *infra* ns. 57 and 58.

[30] The Law Clinic supervisors are legally qualified, at present one is a barrister and the other two are qualified solicitors. Firm sizes are kept small so close supervision of the students' work can be undertaken, thus maintaining quality and standards - essential when one's practising certificate is at stake!

whereby students get to know each other and the law clinic supervisors, and are introduced to the concept of clinical legal education. At the end of the induction course students are asked to sign a 'contract' to agree to certain terms and conditions by which the law clinic operates. This is to highlight to the students that they will have to undertake a serious commitment to the work in the law clinic, to their clients, to their supervisors, to each other and, ultimately, to themselves. Once the course commences each firm meets weekly with their supervisor to discuss the caseload. Also any ethical, social, political issues connected with the cases are discussed to place the law in context.[31] Students are encouraged to work autonomously and in their teams. The supervisor does not direct their work, but much guidance and constant feedback on their work is given to students by their supervisor to provide a 'safety net'.

Clients of the law clinic are mainly SHU staff and students along with clients referred to the law clinic from outside organisations (mainly employment cases). The work the student does is closely monitored and controlled by the supervisors, in that there are certain cases the law clinic will not embark upon, for example urgent cases: *'I'm being deported tomorrow can you help?'* or ones containing high financial sums. It is believed to take on such cases may not necessarily be appropriate for the students or clinic to handle and, more importantly may not in the best interest of the clients.

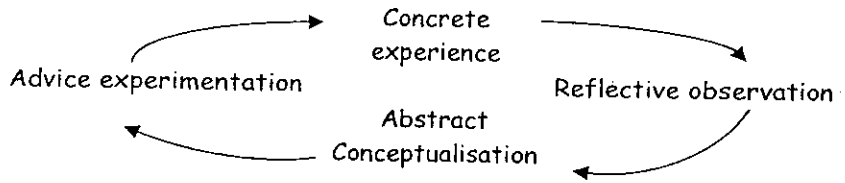
The supervisors also guide the number of cases students work on, although the students are consulted at every stage. In over twelve years experience of clinical legal education at SHU, we have learned that 'less' can often mean 'more'. If students are working on a large number of cases, the cases are merely 'processed' and the deep learning experience for the students does not take place. It is preferable, therefore, to work on fewer cases but work in depth on each case. This is a much more satisfying educational experience for the student and the client, who will be getting a 'Rolls Royce' service.[32] Although it could be argued that we are not fulfilling our pro bono commitment of meeting the unmet need of Sheffield for those requiring legal services, it is maintained that as an 'academic' course, our priority is to fulfil the educational needs of our students, however, once an individual becomes our client our commitment to him/her is paramount. The tension between the educational aim and legal service need is real and expectations on both sides must be carefully managed to ensure delivery of either or both to the requisite professional standard.

[31] Quote from a student of Law Clinic: 'The most important aspect I have learned from the Law Clinic is the role of the legal profession in society, that the law is about real people and their problems. This is difficult to learn from the usual work in a law degree, as in reading and learning textbook cases and statutes it is easy to forget that the cases involve real people. This aspect became especially apparent when a client with an employment case was unsure as to whether to proceed with the tribunal application. I could not understand why she felt like this because, as we are a free service, I felt she had nothing to lose. I had never before considered the client's feelings of having to face the opposition in court and, after having been unfairly treated, risk further disappointment in losing.'

[32] In 1995/96, 24 students in the Law Clinic worked on 54 cases, in 2003/04, 36 students worked on 24 cases.

In addition to working on the cases and the weekly firm meetings, weekly workshops are held covering legal and transferable skills. There is also a programme of court visits and guest speakers to add interest to the module and to also embed the University's employability framework.[33]

The law clinic module is assessed partly by assessment of the students' performance in the law clinic and partly by a written case study, where the students write an in-depth analysis of one of the cases they have been working on. Throughout the course and as part of the assessment, we strongly encourage the students to become reflective learners and to constantly evaluate themselves and their work. The learning experience in the law clinic is very much modelled on the Kolb Experiential Learning Cycle, as represented as follows[34]



The move towards reflective learning has allegedly been compulsory throughout all undergraduate teaching since 2005.[35]

On a related point, by September 2005 state funded or validated higher education institutions in the UK will be required by the domestic Quality Assurance Agency to have implemented progress files which enable them to confirm students' record of achievement. Progress Files (PF's) and their constituent parts: Personal Development Planning (PDP), are high on the Higher Education agenda within the UK. This move replaces the idea of the 'enlightened student' with that of 'autonomous/self directed/flexible lifelong learners.'[36] Barnett[37] argues that we are experiencing 'a pedagogical displacement in which the weight of the pedagogical challenge is shifted from the presentation of disciplinary culture to an interest in the self generational capacities of students'.

[33] SHU Employability Framework provides a definition of employability and outlines those features of a course which contribute to enhancing students' employability.

[34] Kolb, EXPERIENTIAL LEARNING (1984) which in our view sets out a valuable and visual description of the adult learning process.

[35] POLICY STATEMENT ON A PROGRESS FILE FOR HIGHER EDUCATION. The Quality Assurance Agency for Higher Education (2005).

[36] Edwards and Usher, GLOBALISATION PEDAGOGY: SPACE, PLACE IDENTITY (2000).

[37] Barnett, BEYOND ALL REASON: LIVING WITH IDEOLOGY (2003).

Therefore, Progress Files and PDP can be viewed as being the vehicle by which these changes are being made.

The DFES/UUK guidance *Progress Files and Managing Own Learning*[38] identifies three strands to the learner's self-review:

- Process skills - e.g. reviewing/assessing, target-setting, planning, recording, presenting
- Thinking skills - e.g., information processing, reasoning, enquiring, being creative, evaluating
- Interpersonal skills and personal qualities - e.g., communicating, negotiating, being enterprising, networking, being motivated.

Because of the pressing need of the implementation of PDP and PF's, higher education institutions in the UK have to seriously consider how these are going to be incorporated into their programmes and what the effect may be. Guides have been written on PDP.[39] Guide 1, for example, emphasises the 'importance of improving students' understanding of how they are learning, of enabling students to reflect critically and become more independent, as well as encouraging students to consider actively their academic, extracurricular activity and career opportunities'.[40]

Is this not what higher education should be about anyway? What the PDP system is doing is making explicit what should be implicit in any higher education programme. To legal education clinicians this concept of reflective and independent learning is nothing new; it is at the very heart of clinical legal education. As Clegg states, "This strikes me as very much what PDP is trying to accomplish, a way of producing a person with the capacity to reflect on their own learning and achievement, and to plan for their own personal educational and career development."[41]

Progress Files and Personal Development Planning are the 'buzz' words at the moment echoing down many university corridors, much ink is being expended on implementation, how the system will work in practice and the ever growing pedagogic debate, and how both academics and students engage in this process. The danger is that the process may be done for the sake of it just because it is mandatory, instead of academics and students engaging for clear pedagogic reasons. As Clegg has highlighted "The sorts of 'reflection' or 'review' that might be produced under these circumstances are likely to be *formulaic simulacra* of reflection unless we have good understanding of when, how and

[38] For more details see, www.dfes.gov.uk.
[39] GUIDE FOR BUSY ACADEMICS. The Generic Centre of the Learning and Teaching Support Network (2002).
[40] *Id.* at 1.
[41] Clegg, *Critical Readings: Progress Files and the Production of the Autonomous Learner*, 9 (3) TEACHING IN HIGHER EDUCATION 294 (2004).

where reflection might be useful, and, of course, the corollary, when, where and how it might not."[42]

B. The College of Law of England and Wales

The Sheffield Hallam (SHU) model is a powerful demonstration of what can be achieved with a cohort of students doing intensive work over an academic year. Resourcing such an initiative is, however, cost-intensive and in this instance caters for relatively small student numbers.[43]

By way of both complement and contrast at The College of Law a somewhat different clinical approach has been adopted. The rationale for this is dictated by the nature of the college's programmes (overtly vocational and intensive), the numbers of students wanting and expecting to get a 'hands-on' learning experience,[44] and the fact that students pay significant sums for the privilege of undertaking this stage of their legal education.

In order to cater for the student demand (around one half of the college's annual intake of 5,000, who register for the Legal Practice course and Bar Vocational course, elect to take part in clinical and pro bono work). The college has had to develop a wide range of clinical activity and to ration the student involvement so that the experience is spread across the year amongst all those who want to take part.

The college has four models of clinical activity:

- *In-house Legal Advice Centres* (LACs) – where students, under supervision from professionally qualified staff, provide written legal advice to members of the public (the advice will, if appropriate, include referral if further assistance is needed).
- *A Tribunal Representation Service* (TRS) – an extension of the first model to include representation before selected tribunals including in employment, housing, education, social security and immigration/asylum cases.
- *Placement Clinics* (PC's) - with students working as volunteers for other legal service providers including in the private, governmental and not for profit sectors.
- A legal literacy or *Street Law* programme – through which community groups work with college staff and students on customised and interactive material addressing rights and responsibilities in a legal context – tailor-made public legal education.

Each of the models described above share identical foundations:

[42] *Ibid.*
[43] The cost of providing supervisory and administrative staff and meeting office related expenses at SHU is in the region of £60,000. With 26 students taking part in the SHU clinic each year this gives a cost per student of £1,666.
[44] The College's pro bono and clinical budget is around £1million per year and participating student numbers are in the region of 2,200, giving a unit cost of just over £450.

- the pedagogic aims and operational 'rules' are set out in a dedicated handbook for each
- students (and in the case of placement clinics and *Street Law*, external participants) are inducted in the workings of each clinic and the professional and personal requirements and expectations applicable
- case and student progress are closely monitored throughout the clinic activity by appropriately qualified staff (barristers, solicitors and office managers)
- evaluation sessions are held during each clinic and at the end of the student's time in that clinic
- students are guaranteed at least one case or project to work on and this typically takes 5–6 weeks of intensive effort. Students may be offered further opportunities to do clinical work but this depends on whether cases are available and whether all students who want to have had the chance to take part
- the link between experiential learning and pro bono work is central to The College's mission in part to support student learning, in part to encourage professional responsibility and in part to help address unmet legal needs. For Bar students the clinic can form part of their assessed work, counting as a fully weighted elective. For students studying to be solicitors the clinics are voluntary and a certificate of satisfactory completion is awarded following the conclusion of their case. Students taking the college's conversion course (for non-law graduates) get an endorsement on their results transcript if they take part in any of the clinics. Students who opt to take the college's Public Legal Service 'pathway' as part of the Legal Practice course will take part in clinical work as an integral component of their studies.

The college works in partnership with a wide range of bodies and organisations in the governmental, legal practice, business and not for profit sectors, in order to create the opportunities for student participation and to supplement and complement other legal service provision.

If the fundamental aim of clinic is to improve the quality of student learning through hands-on experience, the subject matter of the cases handled is of little educational relevance. The college's clinical work, however, is carried out in a pro bono context. This emphasis is designed to ensure that services are targeted at those who most need them given that the educational benefit remains regardless of the nature of the workload. In co-operation with other service providers and the umbrella group – the Community Legal Services Partnership – The college's clinical models endeavour to address needs that are otherwise unmet.

Currently, a team of 32 dedicated professional staff supervise and manage the college's *pro bono* work. Each centre (the college has 5 sites in Birmingham,

Chester, Guildford, London and York) offers a clinical programme although provision does vary from location to location to reflect local needs and resources. Each centre has an advisory panel that meets regularly to review the college's pro bono activity.

The emphasis of the clinical programme is rule, skill and value focused. Students are expected to demonstrate a legally precise, procedurally accurate and professionally appropriate understanding of their cases and to exercise a range of lawyering skills (from the overt – such as legal research, interviewing, drafting and advocacy, to the 'softer' skills – including problem solving, team work and office management).

All aspects of the students' work are supervised by qualified lawyers the majority of whom are employed in-house but some of whom come from private practice. The college carries professional indemnity insurance and holds the Legal Services Commission's Quality Mark.

How effective is this work? In comparison with the SHU model the college's clinical programme is on a much larger scale although the student involvement in it is for over a much shorter period. It is interesting, therefore, to consider whether these quantitative contrasts make any appreciable difference to the quality of provision – from professional service and educational perspectives.

It is beyond the scope of this paper to embark on an empirical analysis but suffice it to say that the feedback received from students, clients and supervisors all appears to indicate high levels of satisfaction from all perspectives. The only negative tones tend to come from students caught in mid case – the going is tough for a few weeks – and from the occasional client who does not like the outcome – they may get advice they do not like or they may not be successful in the tribunal.

As in the SHU case study comments from the college's clinic students are widely appreciative and often reveal a depth of understanding that goes to the core of legal education. Clinic students invariably demonstrate an ability to think through substantive issues in a way that shows both a theoretical and practical grasp of law and the legal system.

As indicated above, there are an increasing number of law clinics in UK law schools. Several deserve mention including the long-established clinics at the universities of Kent and Northumbria and Warwick and more recently at Derby, de Montfort, Manchester and West of England. There are several groups that promote and support clinical work in law schools including the Clinical Legal Education Organisation (CLEO) LawWorks, the UK Centre for Legal Education (UKCLE) and the Attorney General's Pro Bono Co-ordinating Committee.[45]

V. The Role of Clinical Legal Education in Shaping Lawyers

Against this backdrop what does clinical legal education have to offer and how do the benefits of hands-on study address the stakeholder agenda?

[45] For more information see, the website: www.probonouk.net and in particular the law schools section. This includes recent research on clinical activity in selected law schools.

The TFR review documentation recognises the potential that a clinical approach to study may have, specifically, under the heading 'recognising learning through clinical legal education and pro bono work', the Law Society's consultative paper states:

> Pathways that included significant elements of clinical legal education pro bono work might provide valuable learning opportunities and help to prepare students for practice.
>
> A number of undergraduate programmes in law now provide students with opportunities to undertake legal practice under supervision. This might be in a law office attached to the university, through a *pro bono* scheme or by way of 'sandwich' placements.
>
> Although the value of such an experience is generally accepted, there is currently little opportunity for such learning to be recognised in the qualification scheme. However, in a new scheme in which achievement of learning outcomes was the key focus, proper credit could be given towards the qualification for learning through clinical legal education, *pro bono* or placement work.[46]

These comments could be equally applied to the range of clinical and *pro bono* opportunities found on graduate and overtly vocational courses such as run at the College of Law, City University and University of Northumbria.

In a similarly fundamental review of legal education in the USA clinic was seen as a means of applying theory to practice and requiring students to deal with the skills and values central to the practice of law.[47]

In Australia the potential for law clinics to serve both educational and client needs has long been accepted.[48]

There is a wealth of published material on the perceived pedagogic benefits of clinical legal education, much of which comes from the USA. Authors write of the educational value to the student in terms of substantive law,[49] procedural issues,[50] lawyering skills (notably legal research, interviewing, advocacy, legal writing and dispute resolution),[51] transferable skills (in particular problem solving, team work and communication skills)[52] and professional values and ethics.[53]

At clinic conferences there is anecdotal comment aplenty from law teachers, students and occasionally clients on the importance of clinic in the learning process. This evidence as to the clinics' value may not be backed up by empirical research but is so commonly cited that we suggest it is significant. The frequency of comments on the importance of clinic in the educational process is perhaps attributable to two factors.

The methodology used in clinical education stands in sharp contrast to most other forms of tuition that students encounter. For many this is the first time that the student has been asked to (and given the responsibility for) taking a pro-active role in the teaching process. For most the nearest they come to active involvement is a short contribution in a seminar or tutorial setting. There is seldom, if ever the chance to reconsider matters discussed in small group sessions as the timetable has moved on to other topics. The next encounter the students have of demonstrating (let alone developing) their understanding of a particular point may well be in the unforgiving setting of the examination room. Is it, therefore, little wonder that students regularly report that studying using a clinic model is the best thing they have done so far at law school?[54]

The clinical approach to study also encourages students to engage in reflection and to give and receive feedback at regular intervals throughout a given clinic module. Staff and students in law clinics are used to analysing their experiences and sharing their views.

Whilst we maintain that this is evidence of value we accept that as it originates from the participants that it is subjective. However, the frequency and consistency of responses does suggest credibility.

In 1995 a small, and until now unpublished, study was carried out at the Sheffield Hallam clinic.[55] It looked at 3 different cohorts of students across 3 years of study – those that took the clinic option in year 2 or 3 of their law degree, those that did not chose to take the clinic and those that wanted to take the elective but were not selected.[56] The study looked at the first year results of the students (where clinic is not studied) and then compared the academic performances of each grouping in the following 2 years. In summary the study found:

[46] TRAINING FRAMEWORK REVIEW, Consultation Paper by Law Society 28 (2003).
[47] LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, (The MacCrate Report) ABA (1992).
[48] Rice and Coss, A GUIDE TO IMPLEMENTING CLINICAL TEACHING METHOD IN THE LAW SCHOOL CURRICULUM, Centre for Legal Education (1996).
[49] *Student-Centred Learning and the Clinic* in CLINICAL LEGAL EDUCATION – ACTIVE LEARNING IN YOUR LAW SCHOOL, *supra* n. 28.
[50] *Scenes from a Clinic* in REFLECTIONS ON CLINICAL LEGAL EDUCATION, *supra* n. 28.
[51] Chapter 3, *Lawyer-Client Communication* and Chapter 5, *Advocacy in the Legal System* in Hurder *et al (ed)*, CLINICAL ANTHOLOGY – READINGS FOR LIVE-CLIENT CLINICS (1997).

[52] Cruickshank, *Problem-based Learning in Legal Education* in Webb and Maughan (*eds*), TEACHING LAWYERS' SKILLS (1996). A useful comparative contribution can be found in Giddings, *Clinical Legal Education in Australia: A Historical Perspective*, 3 IJCLE 7 (2003).
[53] Chapter 2, *Professionalism: Ethics And Values*, *supra* n. 51; Noone and Dickson, *Teaching Towards A New Professionalism: Challenging Law Students to Become Ethical Lawyers* in 127 LEGAL ETHICS (2001).
[54] For one student who shall remain nameless it was apparently the best thing he had ever done.
[55] Cracknell *et al*, WHAT IS THE CLINIC WORTH? (1995).
[56] At the time of the study the clinic elective was limited to 24 students. The elective was always substantially oversubscribed with in excess of 50 students applying to take part. In order to be transparent and fair the clinic students were selected by ballot.

- that students who opted to take the clinic elective in their final year marginally out-performed the final year students who did not – this could, in part, be explained by the fact that clinic students tended to score highly in the clinic elective (the clinic module was moderated both internally and externally and the high marks returned were found to be justified).
- the performances of students who took the clinic elective in year 2 significantly outperformed those students who did not, when in their final year of study – the difference was approximately one grade.
- when broken down into individual modules the clinic students showed significant improvement in academic performance when studying land law (a final year and, by reputation, a notoriously difficult subject) compared with those who did not do the clinic. A significant amount of the clinic workload was housing cases.
- interestingly, those students who wanted to do clinic but who were not selected to do so marginally under-performed compared with students who did not do clinic and who did not chose to do so and significantly under-performed compared with the clinic students.

We accept that the study was probably too small to be statistically significant (just 24 clinic students in any one year) and we also concede that many factors could be used to explain the results – including the fact that one might expect a general improvement in grades as students move through their studies (on the basis that they become more proficient doing more of the same). The study also did not track students' progress beyond their undergraduate study. It would be interesting to find out whether the clinic students continued to improve in their theoretical understanding and in their skills base.

The results, however, dated and qualified are, we suggest, valuable to the extent that they show the quality of work produced by clinic students and implicitly the value of a clinical methodology as part of the overall approach to learning and teaching in the law school.

So how does this tie in with the TFR, day one outcomes and the requirements of students, law schools, clients, the legal profession and various other interested parties? Without repeating the demands of the relevant stakeholders each appears to want a level of understanding of knowledge, skills and values that enables professional standards to be met and clients'/students' goals to be achieved, in an economically and socially realistic context.

Does current law school practice achieve this? Discontent with the current legal education system in England and Wales suggest otherwise. A central theme of the TFR is that the requisite outcomes may be achieved through a variety of possible routes. Those that support this break with the current rigid qualification requirements see the outcomes approach as a way of breaking free of prescriptive courses and high costs. Those against see the dangers in a possible 'crammer' mentality and a threat to standards if outcomes are assessed at a fixed point. Those involved in clinical legal education make the point that the methodology

used directly addresses the outcomes sought and the practical context in which the clinic operates. Clinic would have its place in the existing structure and in one likely to result from the TFR.

The attitude of law schools in the UK and abroad has, we suggest, changed noticeably over the past 5 years. There is now a much wider appreciation of a clinical approach to study as evidenced by the number of law schools running law clinics and the number indicating their interest in doing so. In the UK, in 2003, according to the Solicitors' Pro Bono Group, just over 25% of law schools in the UK offered *pro bono* clinics (with a further 25% intending to do so).[57] By 2006 this number had more than doubled with 53% involved in pro bono activity, a further 12% intending to get involved within a year and another 8% thinking about doing so.[58] If those numbers came to fruition over 60 law schools in the UK would have *pro bono* clinics. That is likely to have significant implications in terms of educational provision and impact on legal service delivery. This brings us to two consequential issues:

- if clinics are to expand what will be the likely cost to set up and run them, and
- what are the implications of law schools becoming involved as legal service providers?

VI. The Cost of Clinic

There are considerable differences between university clinic programmes in terms of size, scope and resource needs. Some operate on a shoestring with staff time offered on a voluntary basis and other costs either absorbed by the law school, shared with other partners or paid for by participants themselves. Where resources are needed these may be in cash or kind (law firms will often donate staff time to help with supervision or administration). Funding may come from specific grants (for example teaching innovation monies from the Higher Education Funding Council in England), from Legal Service Commission contracts, from the lottery funds, from commercial sponsors or through charitable foundations. There are contrasting benefits and challenges in securing monies from 'hard' (that is internal) and 'soft' (external) sources.

Set out below is a full-cost 'budget'. It is based on the minimum resource base to provide for a professional service[59] and is designed to accommodate 100 law students and serve 50 clients in the academic year. It should be used for

[57] Whitman and Akoto, A Survey of Pro Bono at Law Schools and Universities, SPBG (2003).
[58] Grimes and Musgrove, Law Works Students Project Pro Bono – The Next Generation (2006).
[59] Those interested in what is needed for a clinic to meet the professional practice requirements in England and Wales might find the Model Standards for Live-Client Clinics - A Clinical Legal Education Organisation (CLEO) document, useful. Available from Philip Plowden, philip.plowden@tinn.ac.uk.

illustrative purposes only for many of the costs listed in it might be dealt with other than by a cash reserve.[60]

Example of clinic budget

Objective – to run an in-house legal advice clinic at a university for 2nd and 3rd-year LLB students

Item	*Cost*
Professionally qualified supervisor(s) (1.0 fte (full time equivalent)) with 25% on-cost	£40,000
Part time administrator (0.5 fte) with 25% on-costs	£12,000
Overheads (light, heat, IT, stationary, phone, publicity practising certificate(s)	£4,000
Total	*£56,000*

This budget does not include a costing for premises. In our experience the least problematic part of setting up a clinic is finding suitable rooms. Often this is one resource the law school will readily provide and if needs be a tutor's room can be used (providing client confidentiality can be preserved). If the law school has no accommodation it may be possible to use premises in the community. Also we have not included the expense of indemnity insurance. Again our experience is that this can be agreed at no cost – advising the law schools insurers of the existence of the scheme and giving an undertaking not to handle clients' money and to ensure that all work is professionally supervised satisfies most insurers. If professional indemnity cover has to be paid for the cost in the UK is typically £2–3,000 a year.

By way of contrast a 'full-bloodied' clinical experience can be obtained beyond the confines of an in-house legal advice centre. It may be a clinic run in partnership with another advice group. It may be a placement with an existing legal service provider such as a law centre. It could be on a *Streetlaw* programme where students under supervision become interactive law teachers themselves and teach others about rights and responsibilities. Where the clinical activity falls short of full representation the degree of supervision required is drastically reduced making the experience less resource intensive although, if professionally delivered no less valuable a learning experience and no less important a public service. For a description of a wide range of different clinical models one may look at the UKCLE report.[61]

[60] For those interested in different clinic models (many of which can be delivered from a significantly reduced cost base) we suggest Brayne and Grimes, MAPPING BEST PRACTICE IN CLINICAL LEGAL EDUCATION, *UKCLE* (2005) available at: www.probonouk.net and www.warwick.ac.uk (follow link for UKCLE).

[61] *Ibid.*

VII. THE WAY FORWARD

In England and Wales we are at a crossroads for legal education provision. There are now opportunities to reshape what we want from our lawyers and how to get it.

As is often the case the will for interfering with the *status quo* may be weak. Few relish change. There is, however, a strong case to be made for dismantling, at least in part, what we currently have. The artificial distinction between the so-called 'academic' and 'vocational' stages is at best unhelpful. The progress from here to an apprenticeship may address the need for work-based opportunities but as research has shown the actual qualitative experience of trainee lawyers varies considerably.[62] It surely makes sense to link the stages so that students gain the theoretical and practical insights in a planned way throughout their legal education rather than co-incidentally and at certain points. Reliance on an end-point bar examination (as has been suggested in the TFR) hardly supports the concept of life-long learning and suggests that education is in danger of being seen as a product rather than a process.

Clinical legal education offers something regardless of one's views on the TFR:

- it is a holistic approach to study
- it deals directly with the letter of the law, the processes associated with the law, with the skills that lawyers have to be able to use and with the professional standards lawyers are expected to conform to
- it operates in the context of real-life where problems need workable solutions rather than technical answers
- it can complement more traditional means of learning especially where material from clinics is fed back into the curriculum. Why create fictitious material for examination and discussion when (subject to respecting confidentiality, of course) there is a wealth of real casework just waiting to be used
- (if you accept the research findings in this paper and the comments of just about every clinic student) it is a highly effective teaching and learning methodology

As we have seen clinic does come at a cost. Whilst there are many ways to address the resource issue one change would make clinic possible at every law school that wished to do so. If the UK's university principal funders were to accept that law is not a subject that can (or ought) to be studied in the vacuum of the lecture theatre the banding of law students could be altered. A shift in banding to put law students on a par with those studying geography (based on the rationale that both need to do 'field work' as an integral part of their studies), for example, would generate sufficient funds to enable every university to set up a clinic. Across the UK we are looking at no more than £5 million to make that

[62] De Groot, PRODUCING A COMPETENT LAWYER, Center for Legal Education (1995).

possible. Such a move could be limited to those law schools willing to set up clinics, which on current figures would cost no more than £3million. If law students were banded as medical students, we could begin to talk of law schools equivalent to the best teaching hospitals, with the prospect of fundamentally changing the base for public legal service provision, especially in conjunction with those that oversee public funding provision for legal services.

We appreciate that this line of argument may face opposition and indeed a number of law schools in any event would not want to engage in clinical legal education. There are, however, enough tried and tested examples of clinical programmes both in the UK and further a-field to warrant serious consideration of these suggestions.

In the end the TFR may come and go as reviews have before it[63] leaving the legal profession little changed as a result, or as Mick Jagger once pouted, "We may not get what we want but we might just get what we need."[64] However, if we do not engage at this stage in the debate on how we are going to ensure that we do get the lawyers we want or need, it seems inevitable that we will lose the opportunity to make lasting changes. We suggest that clinics are a 'win/win' situation. If adequately funded and professionally supervised students, clients, the profession and a range of other stakeholders stand to gain considerably. The annual cost of enabling this to happen is in the long-term modest – about the amount someone wins on the Lottery in the UK each week.

In composing the final draft of this paper we have tried to take on board the experiences and comments of a wide range of teachers, practitioners and students from both the civil and common law worlds. Their views were remarkably similar even with the considerable cultural diversity represented, which compounds our view that legal education – come what may – needs clinic.

[63] See, for example, Ormrod, REPORT OF THE ROYAL COMMISSION ON LEGAL SERVICES, Vol. I Cmnd. 7648 (London HMSO) (1971) and Benson, REPORT OF THE COMMITTEE ON LEGAL EDUCATION. Cmnd 4595 (London HMSO) (1979).

[64] Jagger and Richards, *You Can't Always Get What You Want*, the song from Decca (1969).

AUSTRALIA'S INITIATIVES TO REALISE THE OBJECTIVES OF THE CONVENTION ON BIOLOGICAL DIVERSITY

*Kamal Puri**

I. INTRODUCTION[1]

The preservation, protection and sustainable use of genetic resources including traditional knowledge, innovations and practices of indigenous peoples are of key significance to all humanity. The sustainable and responsible use of genetic resources plays a critical role in our health care, food security, culture, religion, identity, environment, sustainable development and trade.

However, this valuable asset is at risk in many parts of the world. It is frequently claimed that biological diversity and traditional knowledge are appropriated and worse patented by commercial raiders who have scant regard to the long-term consequences and with few or none of the benefits being shared with the legitimate stakeholders. It is further alleged that either no agreements are entered into with the traditional owners or such agreements do not fulfil the Convention on Biological Diversity's (CBD) criteria of prior informed consent and sharing benefits fairly and equitably.

How can the cultural and intellectual property rights of the holders of such rights be protected when, say medicinal knowledge, is used, appropriated, adapted, and patented by researchers and industry with the backing of a commercial entity to create modern drugs?

The CBD brought genetic resources formally under national sovereignty. Its three objectives are (i) conservation of biological diversity, (ii) sustainable use of its components, and (iii) fair and equitable sharing of the benefits arising from the use of genetic resources. The Convention calls for member nations to act on these objectives. Further, it makes access to genetic resources subject to the prior informed consent of the state.

Is the prior informed consent of indigenous peoples and local communities a legal requirement for use of genetic resources and/or associated traditional knowledge? This paper does not intend to perpetuate the rhetoric of prior informed consent, mutually agreed terms, self-determination, active protection of cultural systems, and equitable benefit sharing. Instead, it attempts to deal with this issue head on to examine the procedures that have been devised for gaining prior informed consent. In this process, it examines the differences between the

* Director, Intellectual Property Commercialisation Unit, Queensland Department of Primary Industries & Fisheries, Professor of Law, Queensland University of Technology, Brisbane, Australia (Kamal.Puri@dpi.qld.gov.au).

[1] This is a revised version of the paper that was first published as a monograph entitled, *Accessing Genetic Resources by Japanese Private Industry under the Convention on Biological Diversity Regime with Particular Reference to Australia*, REPORT OF THE 2006 FY INDUSTRIAL PROPERTY RESEARCH PROMOTION PROJECT, entrusted by the Japan Patent Office, Institute of Intellectual Property, March 2007. The author would like to convey his sincere and grateful thanks to Japan's Institute of Intellectual Property for inviting him to undertake this research project.

common law concept of free consent and the CBD concept of prior informed consent. It also comments on the interface between the CBD and the patent law.

The second part of the paper covers the legislative developments in Australia, especially in Queensland, dealing with access to biological resources. The State of Queensland, which is the richest state in biological resources in Australia, has taken a lead role in laying down the principles and procedures for facilitating access to biological material in a responsible and systematic way by enacting the Biodiscovery Act, 2004.

II. KEY TENETS OF THE CONVENTION ON BIOLOGICAL DIVERSITY

The expression "biodiversity" means the variety of life. It was coined in 1986. It is a short form of, and synonymous w , "biological diversity." The Convention on Biological Diversity[2] is about life on earth.[3] The Convention entered into force on December 29, 1993.[4]

Article 2 of the CBD defines "biological diversity" to mean:

> the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

"Biological diversity" encompasses two related concepts: genetic diversity (the magnitude of genetic variability within species) and ecological diversity (the number of species in a community of organisms).[5]

Until the CBD came into effect, genetic resources were generally treated as the "common heritage of mankind" and their use for new products was largely undertaken with scant regard to the communities from where the materials were sourced. Major discoveries based on natural resources (often involving the use of indigenous traditional knowledge) resulted in no benefits flowing back to the country or community providing that material.

One such example is the well-known antibiotic "Erythromycin," which was originally derived from a Philippine soil sample. Another example is the anti-rejection drug "Cyclosporin A," which was developed from a soil fungus from a nature reserve in what is now Norway's Hardangarvidda National Park. In 1997, sales revenue for Cyclosporin-based products amounted to US$1.2 billion.[6] Norway got no share in this.

[2] The full text of the Convention is available at http://www.biodiv.org/convention/convention.shtml (hereinafter referred to as the "CBD"). Accessed on June 24, 2007.

[3] Message of Dr. Ahmed Djoghlaf, Executive Secretary of the CBD dated January 3, 2006, available at http://www.biodiv.org/doc/press/2006/pr-2006-01-2010-en.pdf. Accessed on June 24, 2007.

[4] The CBD opened for signature on June 5, 1992 at the UN Conference on Environment and Development (the Rio de Janeiro "Earth Summit").

[5] In terms of the diversity between species, so far about 1.75 million species have been identified, with estimates of the total number of species ranging from three to 100 million.

[6] S. Laird (*ed*), BIODIVERSITY AND TRADITIONAL KNOWLEDGE 163 (2002) cited in http://www.deh.gov.au/biodiversity/science/access/nca/understanding.html#natural. Accessed on June 24, 2007.

With the ratification of the CBD in 1993 came the end of the "common heritage of mankind" doctrine. The CBD affirmed member nations' sovereign rights over their natural biological resources, including genetic resources.[7] Under the Convention, in return for facilitating access to biological material, member nations are entitled to a fair and equitable share of the benefits that flow from the commercial exploitation of those resources. This is the third of the three objectives of the Convention and it has proved to be the most tricky to implement.[8]

Nevertheless, member nations continue to place great significance on finding a way to establish an international market in the commercialisation of genetic resources under the CBD. This urgency is best understood by reference to the economic value of biodiversity to industry. For example, in 1998 the value of sales of pharmaceutical products derived from genetic resources alone was US$75 billion - out of total sales of US$300 billion.[9] Most of these products were developed from materials collected before the CBD came into force or before member states began to implement the CBD's regulatory frameworks.[10]

III. BONN GUIDELINES

Although the CBD came into effect late in 1993, its provisions did not become operational until the adoption of the Bonn Guidelines on Access to Genetic Resources and the fair and equitable sharing of benefits arising out of their utilization.[11] These were adopted by the Conference of the Parties (COP)[12] at its sixth meeting held in The Hague in April 2002.

The Bonn Guidelines are a most important step to assist all parties to prepare access and benefit-sharing strategies, and to understand the steps involved in gaining access to genetic resources and sharing benefits. However, as the title indicates, they are guidelines of voluntary nature. Bonn Guidelines, therefore,

[7] See, Art. 3 of the CBD that relevantly states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources ...." This principle is reinforced by Art. 15.1, which provides: "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation." See, *supra* n. 2.

[8] Art. 1 of the CBD states the objectives thus: "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources." See, *supra* n. 2.

[9] *Supra* n. 6 at 246-247.

[10] The CBD has made a considerable headway since coming into force in 1993 - 192 decisions have been adopted, a strategic plan has been put in place and seven thematic work programs, covering all the major ecosystems, have been formulated. See, the opening address by Mr. Ahmed Djoghlaf, Executive Secretary of the CBD at the 8th COP in Curitiba, Brazil, March 20-31, 2006, available at http://www.biodiv.org/doc/meetings/cop/cop-08/official/cop-08-31-en.pdf. Accessed on June 24, 2007.

[11] Available at http://www.biodiv.org/doc/publications/cbd-bonn-gdls-en.pdf. Accessed on June 24, 2007.

[12] The Conference of the Parties or COP is the governing body of the Convention, and advances implementation of the Convention through the decisions it takes at its periodic meetings.

lack legal enforcement, although they do carry considerable weight, at least in the moral sense, because 180 countries unanimously adopted them.

One of the major contributions of the Bonn Guidelines is that they establish a clear framework for accessing genetic resources to ensure fair and equitable sharing of benefits. In particular, the Guidelines contain detailed and practical information relating to procedures for obtaining prior informed consent.[13]

IV. AUSTRALIA'S RESPONSE TO THE CBD

Australia is classified as only one of 12 megadiverse countries and Queensland is Australia's richest State in terms of biodiversity.[14]

The Commonwealth Government of Australia ratified the CBD on June 18, 1993. Australia is committed to conserving biodiversity, sustainable use of its components and equitable sharing of benefits derived from its use. Australia has also embraced the Bonn Guidelines.[15] In doing so Australia distinguishes between commercial and non-commercial scientific research.

The Commonwealth of Australia enacted the Environment Protection and Biodiversity Conservation Act, 1999 (EPBC Act).[16] The EPBC Act protects the environment, particularly in matters of national significance. A significant portion of Australia's biodiversity is found on publicly owned lands or waters, and is often represented within its system of protected areas. The EPBC Act streamlines environmental assessment and approvals process, protects biodiversity and integrates management of important natural and cultural places. The Act came into force on July 17, 2000.

Australia's pragmatic approach to implementing the CBD's Bonn Guidelines is reflected in the national agreement entitled the Nationally Consistent Approach for Access to and Utilisation of Australia's Native Genetic and Biochemical Resources (NCA).[17]

All nine Australian governments[18] agreed to this policy on October 11, 2002 to form the basis for Australia's implementation of the Bonn Guidelines.

[13] These will be analysed below in the section relating to prior informed consent.

[14] Foreword, *Queensland Biodiversity Policy Framework: Sustaining our Natural Wealth*, available at http://www.epa.qld.gov.au/publications/p01072aa.pdf/Qld_biodiversity_framework.pdf. Accessed on June 24, 2007. Australia has a small population of over 20 million spread over a vast continent. Australia's land mass and seas extend from the tropics to the Antarctic with more than 8 million square kilometres of land and a marine area of similar size, see, http://www.biodiv.org/doc/meetings/abs/abswg-03/information/abswg-03-inf-01-add1-en.pdf. Accessed on June 24, 2007.

[15] *Supra* n. 11.

[16] Available at http://www.frli.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/E169E81913E19C6ACA25726B001C7FA4/$file/EnvProtBioDivCons99Vol1WD02.doc. Accessed on June 24, 2007.

[17] Available at http://www.deh.gov.au/biodiversity/science/access/nca/pubs/understanding.pdf. Accessed on June 24, 2007.

[18] Countries with federal structures of government such as Australia face very specific challenges when introducing national access laws. Australia's nine governments comprise of six State, two Territory and federal government.

Australia's approach is guided by the needs of a federal structure, existing international agreements, domestic legislation, the realities of contemporary scientific research and Australia's market-based, developed economy which has a strong stakeholder voice in decision-making.

The important initiatives taken by the Commonwealth of Australia's Department of Environment and Heritage, as lead agency for the CBD implementation, include the following:

(i) Playing a significant role in international negotiations leading to the development and adoption by the CBD of world's best practice guidelines for access to genetic resources;

(ii) Developing a legal framework to manage access and use of genetic resources in Commonwealth areas. This was introduced by regulations under Section 301 of the EPBC Act;[19]

(iii) Integrating management of genetic resources into Australia's National Biotechnology Strategy; and

(iv) Working with Australian State and Territory Governments and with other relevant Commonwealth departments and agencies to establish a common approach to genetic resource management.

V. INDIGENOUS BIODIVERSITY KNOWLEDGE

It is important to recall that the Preamble to the CBD states, inter alia:

> Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.[20]

Further, Article 8(j) of the CBD requires each Contracting Party, subject to its national laws to:

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[21]

[19] Available at http://www.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/. Accessed on June 24, 2007.

[20] *Supra* n. 2.

[21] Other articles of the CBD that allude to indigenous traditional knowledge are: Article 10 (c), which talks about protecting and encouraging customary use of biological resources in accordance with traditional cultural practices ; Article 17.2 suggests that exchange of information relevant to the conservation and sustainable use of biological diversity should include, *inter alia*, indigenous and traditional knowledge; and Article 18.4 refers to cooperation for the development and use of technologies, the inclusion of indigenous and traditional technologies relevant to the pursuit of the objectives of the Convention, see, *supra* n. 2.

Evidence of prior informed consent and benefit sharing seems to be a key requirement before giving permission to use biological resources.[22] However, neither the CBD nor the Bonn Guidelines makes it clear whether the prior informed consent of indigenous and local communities is a legal prerequisite for use of genetic resources and/or associated traditional knowledge. There is, therefore, some ambivalence as to how the intellectual property rights of the holders of traditional knowledge should be protected when the scientific community or a commercial entity produces a product, say a new drug.

The CBD's doctrine of "prior informed consent" is of vital relevance in the context of aboriginal peoples' vast resources of traditional knowledge because of gross disparity in their capability to negotiate a benefit sharing agreement with Research and Development and commercial entities. Regrettably, however, examples abound across the globe of commercial exploitation of traditional, indigenous knowledge which are totally devoid of prior informed consent, e.g., commercialisation of Smokebush's anti-HIV properties, Basmati rice, Neem, Kava, to name a few. Few or none of the benefits has been shared with traditional knowledge holders.[23]

There is a common perception that in most cases knowledge of traditional medicine originates in developing countries and is appropriated, adapted, utilised and patented by scientists and industry in developed countries, with little or no compensation to the custodians of this knowledge and without their prior informed consent.

In recent years, the protection of traditional knowledge, the innovations and practices of indigenous and traditional medicine and the equitable sharing of benefits have received increasing attention, and they are being discussed in many international forums, e.g., WIPO and regional organisations such as the South Pacific Communities (SPC).

A. Position in Australia

Australia's aborigines have close association with biological diversity. In order to achieve this, it is imperative that traditional knowledge is used with the cooperation and express approval of the holders of that knowledge and on mutually agreed terms which are judged as fair and equitable.

The NCA[24] explicitly recognises the obligations set out in the National Strategy for the Conservation of Australia's Biological Diversity. It ensures that using traditional biological knowledge in scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners

[22] See generally, B. Tobin, *Certificates of Origin: A Role for IPR Regimes in Securing Prior Informed Consent* in J. Mugabe *et al (eds)*, ACCESS TO GENETIC RESOURCES: STRATEGIES FOR SHARING BENEFITS 329-340 (1997).

[23] See generally, K. Puri, *The Aboriginal Peoples of Australia* in INTÉRÊT CULTUREL ET MONDIALIALISATION 249 (2004) and *Indigenous Knowledge and Intellectual Property Rights – The Interface* in P.N. Thomas & J. Servaes (*eds*), INTELLECTUAL PROPERTY RIGHTS AND COMMUNICATIONS IN ASIA: CONFLICTING TRADITIONS 116 (2006).

[24] Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources. See, *supra* n. 17.

of that knowledge, and that collection and use of that knowledge results in social and economic benefits to the traditional owners.

Accordingly, the NCA provides as a principle that governments ensure that the use of traditional knowledge is undertaken with the cooperation and approval of the holders of that knowledge and on mutually agreed terms. In addition, the NCA provides that any framework must be developed in consultation with indigenous peoples.

Importantly, the State of Queensland has gone further than any other Australian jurisdiction to ensure that benefits arising from biodiscovery flow on to traditional knowledge holders. The Code of Ethical Practice for Biotechnology in Queensland states:

> Where in the course of biodiscovery and research we obtain and use traditional knowledge from indigenous persons or communities, we will negotiate reasonable benefit sharing arrangements with these persons and communities.[25]

During consultation on the Queensland Biodiscovery Policy Discussion Paper, some indigenous groups raised the issue of protecting traditional knowledge using a system of law similar to the existing intellectual property regime. Similar interest in the relationship of traditional knowledge to intellectual property has resulted in the World Intellectual Property Organisation (WIPO) examining the interaction between genetic resources, traditional knowledge and folklore with conventional intellectual property systems.

VI. SUSTAINABLE USE[26]

Ecologically sustainable development is "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased."[27] Ecologically sustainable use of natural resources means "use of the natural resources within their capacity to sustain natural processes while maintaining the life-support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations."[28]

[25] Art. 11, available at http://www.sd.qld.gov.au/dsdweb/v3/guis/templates/content/gui_cue_menu.cfm?id=7145. Accessed on June 24, 2007.

[26] The concept of "sustainable use" was introduced in 1987 by the Brundtland Commission, formally called the World Commission on Environment and *Development* (WCED), named after its Chair Gro Harlem Brundtland. The Commission, created in 1983, was charged with the task of addressing growing concern "about the accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social development." In establishing the commission, the UN General Assembly recognised that environmental problems were global in nature and determined that it was in the common interest of all nations to establish policies for sustainable development.

[27] See, *National Strategy for Ecologically Sustainable Development*, available at www.deh.gov.au/esd/national/nsesd/strategy.

[28] See, ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (Australia), *supra* n. 19.

Due to the rapid growth of world population, conservation and sustainable use of biological diversity have attained critical importance to meet the food, health and other essential needs. The methods and processes for the utilisation of biodiversity in order to achieve sustainable use could be by means of institutionalisation of knowledge backed up by appropriate legislation.[29]

In Japan the national strategy covers governmental measures relating to the conservation of biological diversity and the sustainable use of its components. In addition, it defines the direction for cooperation and support for respective entities such as local governments and private organisations in order to promote the activities of these entities.[30]

The sustainable use can mean different things to different people.[31] Under the CBD, the sustainable use of the components of biological diversity appears frequently in the text of the Convention. Article 2 provides the following definition of sustainable use:

Sustainable use means the use of the components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.[32]

The expression "components of biological diversity" is not itself defined. However, Annex I of the Convention makes a threefold distinction between ecosystems and habitats, species and communities, and genomes and genes.[33] This schema is often treated as identifying the three main components of biological diversity. As a result, sustainable use, as understood in the context of the CBD, is about the use of ecosystems, species and genetic material.[34]

According to Jon M. Hutton and Nigel Leader-Williams,[35] the definition of "sustainable use" is significant for two reasons. Firstly, the words *"in a way"* and *"at a rate"* mainly encompass the search for biological sustainability in order that species and ecosystems are available for use over a long-term. Secondly, the definition is not confined to any particular form of use, but rather

[29] There is a need for congruence in policies and laws at all levels of governance.

[30] THE FIRST NATIONAL REPORT UNDER THE CONVENTION ON BIOLOGICAL DIVERSITY, *Basis of Measures for Conservation and Sustainable Use*, Chapter 3, Ministry of the Environment, Government of Japan, 1997 available at www.env.go.jp/en/nature/biodiv/fnr/contents3.html.

[31] See, Jon Hutton, WHAT SUSTAINABLE USE IS, AND WHAT IT IS NOT, Africa Conservation Forums (2005), available at http://www.africanconservation.org/dcforum/DCForumID21/140.html. Accessed on June 24, 2007.

[32] Art. 10 (a) to (c) of the CBD imposes certain general obligations concerning the sustainable use of biological diversity.

[33] Barney Dickson, *Four Key Concepts in the CBD's Sustainable Use Goal and Sub-targets*, Sustainable Use Indicator Workshop, 16-17 January 2006, available at http://www.iucn.org/themes/ssc/susg/docs/ Dickson4keyconcepts.pdf. Accessed on June 24, 2007.

[34] *UNEP Countdown 2010, Introduction to Sustainable Use.. Issue Based Modules for Coherent Implementation of Biodiversity Convention*, available at http://svs-unepibmdb.net/?q=node/275. Accessed on June 24, 2007.

[35] Jon Hutton and Nigel Leader-Williams, *Sustainable Use and Incentive-driven Conservation: Realigning Humans and Conservation Interests*, 37 ORYX: THE INTERNATIONAL JOURNAL OF CONSERVATION 2 at 216 (2003).

embraces all forms of use. Consequently, the CBD considers that sustainable use is about managing any use of wild species and ecosystems so that it falls within biologically sustainable limits. It is suggested that the definition neutralises three common confusions about sustainable use, namely, that it is only about consumptive use, that it necessarily involves local communities, and that it is necessarily about creating incentives and turning use into a conservation tool.[36]

VII. WHAT IS PRIOR INFORMED CONSENT?

Prior informed consent is a process. The state, private owners, or local and indigenous communities, as appropriate, after having received the requisite information, consent to allow access to their biological resources or associated intangible components under mutually agreed conditions.[37]

The concept of prior informed consent emanates from Article 15.5 of the CBD, which provides:

Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources...[38]

Further, Article 15.7 introduces the allied concept of fair and equitable sharing of the results of R&D and the benefits arising from the commercial and other uses of genetic resources with the Contracting Party that has provided such resources.[39]

Researchers and commercial entities desirous of accessing the knowledge of indigenous peoples or a local community must, therefore, previously seek approval of the knowledge holders or owners and pay for it. In order to authorise access, enough information should be provided to indigenous communities about the purposes, risks and implications of the activities that are intended to be carried out.

Authorisation for research is different from authorization for commercial exploitation. For the former, prior informed consent is required, for the latter, in addition to prior informed consent, a licensing agreement must also be obtained.[40]

A. Two Questions

The concept of "prior informed consent" raises two tricky questions: what constitutes "informed" consent and whose consent the above CBD's provisions envisage?

[36] J.G. Robinson, *Evolving Understanding of Sustainable Use* in H.A. van der Linde and H.M. Danskin (*eds*), ENHANCING SUSTAINABILITY: RESOURCES FOR OUR FUTURE 3-6 (1998) cited in Jon Hutton and Nigel Leader-Williams, *supra* n. 31 at 216.

[37] M. Umaña, *A Sui Generis System for Protecting Traditional Knowledge Under the CBD: The Official Position of the Government of Costa Rica* at 213-214, available at http://www.unctad.org/en/docs/ditcted10_en.pdf. Accessed on June 24, 2007.

[38] See, *supra* n. 2.

[39] *Ibid.*

[40] See, A.M. Pacon, *The Peruvian Proposal for Protection of Traditional Knowledge* at 177, available at http://www.unctad.org/en/docs/ditcted10_en.pdf. Accessed on June 24, 2007.

As regards the second question, a strict reading of the CBD provisions suggests that it is the "Contracting Party" whose consent is counted on, which means the consent of the member state. However, that is unlikely to be the intent of the provisions because there is no apparent need to provide the extra safeguard of "informed" consent to a contracting member state. The latter is presumably well informed and well resourced to obtain independent legal advice before giving out consent. In stark contrast to the indigenous and local communities, member states do not hold the position of a party with weaker bargaining position. As regards the indigenous and local communities, there is a great disparity in their capacity to negotiate an agreement to share benefits on mutually agreed terms. It is because of this ambivalence that there is frequent reference made to the consent of holders/owners of genetic resources and associated traditional knowledge. The Australian and Queensland legislation discussed in this paper are important examples of removing this ambivalence. It is submitted that there is an urgent need for this issue to be clarified worldwide.

It is probably because of this uncertainty that the concept of "prior informed consent" has not been analyzed effectively in academic writings and international fora. Nor has it achieved its intended, albeit unarticulated, purpose. Unfortunately, the WTO's Trade-related Aspects of Intellectual Property Rights (TRIPS)[41] Agreement is silent on this subject. It is not surprising, therefore, that developing countries are frequently putting forward proposals to introduce a requirement in patent applications regarding disclosure of the source of origin of genetic resources and traditional knowledge as well as evidence of prior informed consent and benefit sharing.

The concept has three constituents that are independent of each other, *viz.*, "prior", "informed" and "consent." The word "prior" entails two things: (i) the informed consent must be obtained before the genetic resources are collected and used; and (ii) the consent must be recorded in writing.

The CBD does not make an explicit reference to the writing requirement through a legislative oversight. Otherwise, it will be most difficult, if not impossible, to prove that the consent was informed without there being a written record. A written record should be about the purpose, risks and implications of the R&D and commercialisation activity that is intended to be carried out by the entity seeking consent.

B. Informed Consent v. *Free Consent under Contract Law*

The doctrine of informed consent should be distinguished from the general doctrine of contractual free consent, which applies to agreements. The consent standard in a contract is only that the person understands, in general terms, the nature of and purpose of the intended transaction and the consent is not affected by any of the vitiating factors, *viz.*, coercion, undue influence, fraud, mistake, and misrepresentation.

[41] Available at http://www.wto.org/english/docs_e/legal_e/27-trips.doc. Accessed on June 24, 2007.

In the case of informed consent, however, a higher standard of consent is intended. Otherwise, the qualifier "informed" would be meaningless. To satisfy the existence of informed consent, causation must be shown—that, had the party been made aware of the risk, they would not have proceeded with the transaction.

Informed consent envisions that the consent is based upon a full and complete appreciation and understanding of the facts and implications of an action. The party giving consent not only needs to have all of their faculties intact, but must also be thoroughly conversant with all the pros and cons of the business deal. Unlike a normal commercial-contractual scenario, where many times consent may be implied within the usual subtleties of human communication, rather than having explicitly negotiated verbal or written consent, "informed" consent entails an obligation to explain the transaction in the most explicable manner.

The doctrine of "informed" consent is analogous to professional negligence and strict liability prescribing that all significant risks must be disclosed as well as risks that would be of particular relevance to the party whose consent is being sought. This approach combines an objective (the reasonable person) and subjective (this particular party) approach.

Informed consent is thus the process by which a fully informed stakeholder can participate in choices about their ownership of biological material. It originates from the legal and ethical rights a stakeholder has to direct what happens to the biodiversity and from the ethical duty of the entity seeking consent to convey full consequences of R&D and eventual commercialisation.

C. Important elements of Informed Consent

Informed consent normally includes a discussion of the following elements:

- Nature of the decision or procedure;
- Reasonable alternatives to the proposed involvement;
- Relevant risks, benefits, and uncertainties related to each alternative;
- Assessment of consent giver's understanding; and
- Acceptance of the involvement by the party giving consent.

In order for the consent to be valid, the party giving consent must be considered competent to make the decision at hand and the consent must be voluntary. It is easy for coercive situations to arise when indigenous people are involved. The latter often feel powerless and vulnerable.

Voluntary consent can be ensured if the entity seeking consent makes it clear that the indigenous holders of traditional knowledge are participating in a decision, not merely signing on the dotted lines. With this understanding, the informed consent process should be seen as an invitation to them to participate in their cultural care decisions. The researchers and commercial entities are also generally obligated to provide a recommendation and share their reasoning process with the indigenous people. Comprehension on the part of the latter is

equally as important as the information provided. Consequently, the discussion should be carried on in layperson's terms and the indigenous party's understanding should be assessed along the way.

D. What should an agreement exuding prior informed consent contain?

Section 36 of the Bonn Guidelines specifies in sufficient detail the information necessary for the competent authority to determine whether access to a genetic resource should be granted.[42] However, as stated previously in this paper, this structure is more suitable where the party whose "prior informed consent" is being sought is a non-government body, e.g., owner/holders of genetic resources and associated traditional knowledge.[43]

It is encouraging to note an explicit reference to indigenous and local communities in the consultation process.[44] Unfortunately, however, the Bonn Guidelines stop short of providing that any access granted without the indigenous and local communities' consent would be deemed invalid and in breach of the principle of and requirement for prior informed consent.

VIII. DISCLOSURE OF SOURCE OF ORIGIN IN PATENT APPLICATIONS

At present, there is no requirement in many industrialised nations (e.g., Japan) for patent applications to disclose the source of origin of genetic resources and traditional knowledge used in the invention. The situation is exacerbated because Japan,[45] like the US[46] does not recognise undocumented traditional knowledge in another country as prior art. This has the consequence of making it possible in these countries to reformulate the relevant traditional knowledge in the sense of presenting it in a more "scientific" way and obtaining a patent.[47]

[42] See, *supra* n. 11.

[43] See, text following *supra* n. 35.

[44] See, for example, s. 26 (d), the BONN GUIDELINES, *supra* n. 11.

[45] S. 29 of Japan's PATENT LAW (Law No. 121 of April 13, 1959, as amended) entitled, "Patentability of Inventions" relevantly states:
(1)Any person who has made an invention which is industrially applicable may obtain a patent therefor, except in the case of the following inventions:
(i)inventions which were publicly known in Japan prior to the filing of the patent application;
(ii)inventions which were publicly worked in Japan prior to the filing of the patent application;
(iii) Inventions which were described in a publication distributed in Japan or elsewhere prior to the filing of the patent application.

[46] See, 35 U.S. Code §102, entitled, "Conditions for patentability; novelty and loss of right to patent" which relevantly states:
A person shall be entitled to a patent unless -
(a) the invention was known or used by others in this country, or patented or *described in a printed publication in this or a foreign country*, before the invention thereof by the applicant for patent, or
(b) the invention was patented or *described in a printed publication in this or a foreign country* or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States (emphasis supplied).

[47] G. Dutfield, *Developing and Implementing National Systems for Protecting Traditional Knowledge: Experiences in Selected Developing Countries* in S. Twarog & P. Kapoor (*eds*), PROTECTING AND PROMOTING TRADITIONAL KNOWLEDGE SYSTEMS, NATIONAL EXPERIENCES AND INTERNATIONAL DIMENSIONS 145 (2004), available at http://www.unctad.org/en/docs/ditcted10_en.pdf. Accessed on June 24, 2007.

A. The CBD and the TRIPS Agreement

The CBD recognises the sovereign right of nations over their biological resources. On the other hand, the TRIPS Agreement treats intellectual property rights as private rights. There is a need to harmonise the different approaches of the CBD and TRIPS by extending the reach of Article 29 of the TRIPS Agreement,[48] which, in the case of patent applications, requires disclosure of genetic resources and traditional knowledge used in inventions for which intellectual property rights are claimed. This could help prevent inappropriate patents and facilitate benefit sharing.[49]

Initially, the focus has been on measures to prevent misappropriation of traditional knowledge. To this end, developing countries have repeatedly sought to amend the TRIPS Agreement so that applications for patents relating to either biological materials or traditional knowledge would provide, as a condition to acquiring patent rights:

(a) Disclosure of the source and country of origin of the biological resource and of the traditional knowledge used in the invention;

(b) Evidence of prior informed consent through approval of authorities under the relevant national regimes; and

(c) Evidence of fair and equitable benefit sharing under the national regime of the country of origin.

This would provide a legally binding defensive protection against unwarranted patents based on misappropriation of genetic resources and traditional knowledge, and would facilitate benefit sharing. It has also been suggested that in the medium term, this could be complemented by other measures, such as searchable databases of traditional knowledge in the public domain to assist patent examiners in determining the existence of prior art.[50]

B. The CBD and Disclosure of origin proposal

Article 16.5 of the CBD reads as follows:

5. The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention,

[48] Art. 29 of the TRIPS Agreement provides: "Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention...." The text of the TRIPS Agreement is available at http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm. Accessed on June 24, 2007.

[49] Note that the fifth Conference of the Parties (COP) to the CBD invited relevant international organizations, including WIPO, to analyse issues of intellectual property rights, "including the provision of information on the origin of genetic resources, if known, when submitting applications for intellectual property rights, including patents." Available at http://www.biodiv.org/decisions/default.aspx?m=COP-05&id=7168&lg=0. Accessed on June 24, 2007.

[50] For an in-depth analysis of this and related issues, see G. Dutfield, *supra* n. 47 at 141. See, A. Kaushik, *Protecting Traditional Knowledge. Innovations and Practices: The Indian Experience* where the author refers to the proposal by India to require patent applicants to disclose the source of origin of the biological material utilised in their invention under the TRIPS Agreement and they should also be required to obtain the prior informed consent of the country of origin. *Id.* at 86.

shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.[51]

It is unfortunate that despite various decisions made by the Conference of the Parties (COP) to the CBD, there remains a disagreement as to how to ensure that the CBD and the patent law operate in harmony with each other and the patent law does not run counter to the objectives of the CBD, as mandated by paragraph 5 of Article 16.

The COP has repeatedly stressed the need to ensure consistency in implementing the CBD and the WTO Agreements, including the TRIPS Agreement, in order to promote increased mutual support and integration of biological diversity concerns and the protection of intellectual property rights. In Decision IV/15, the COP specifically invited the WTO to consider how to achieve these objectives in light of Article 16, paragraph 5 of the CBD, taking into account the planned review of Article 27.3 (b) in 1999 of the TRIPS Agreement. Again, in Decision V/16 and in Decision V/26B, paragraph 1, the COP reaffirmed the importance of *sui generis* and other systems for protecting the traditional knowledge of indigenous and local communities and ensuring the equitable sharing of benefits arising from its use. The COP also requested that the Executive Secretary transmit these decisions and its findings to the secretariats of WTO and WIPO. Again, in Decision V/26B, paragraph 2, the COP invited the WTO to acknowledge relevant provisions of the CBD, to take into account the fact that they are related to the provisions of the TRIPS Agreement, and to explore this relationship further.[52]

IX. IMPORTANT DEVELOPMENTS IN QUEENSLAND, AUSTRALIA: BIODISCOVERY ACT 2004[53]

A. Meaning of "biodiscovery"

Biodiscovery is the search for active compounds in plants, animals and micro-organisms that can be developed into commercial products. Biodiscovery involves the collection and screening of small quantities of living or dead native biological material, including plants, algae, animals, fungi and micro organisms.

[51] See, *supra* n. 2.

[52] See, *Note by the Executive Secretariat of the Convention on Biological Diversity*, *supra* n. 47.

[53] Available at http://www.findlaw.com.au/Legislation/docs/55412.pdf. Accessed on June 24, 2007. See also, BIOLOGICAL RESOURCES ACT 2006 (Northern Territory) which came into force with effect from February 14, 2007. The object of the latter legislation is to facilitate bioprospecting in the Northern Territory by promoting the conservation of biological resources and the ecologically sustainable use of those biological resources. Like the Queensland statute, the NT Act establishes an access regime in order to give certainty and minimise administrative cost for research and commercial entities to engage in bioprospecting in the Territory. The Act establishes a contractual framework for benefit-sharing agreements to be entered into between bioprospectors and resources access providers for the use of Territory's biological resources to ensure the equitable sharing of benefits arising from the use of those biological resources for biodiscovery. One significant difference from the Queensland legislation is that the NT Act explicitly recognises the special knowledge held by indigenous peoples about those biological resources.

to identify bioactive compounds that may be used for commercial applications such as pharmaceuticals and insecticides.[54]

Biodiscovery activity denotes commercialisation of native biological material or a product of biodiscovery research.[55]

B. Background to the Biodiscovery Act, 2004

The CBD requires countries to develop and implement strategies for the conservation of biological diversity and the sustainable use of its components. In 2004, the State of Queensland enacted the Biodiscovery Act in order to fulfil its responsibilities under the CBD and to give legislative effect to those responsibilities.

The law was passed to give effect to Article 15 to the extent it relates to biological resources in Queensland.[56] The system established by the Act is in accordance with Queensland's obligations under Australia's *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* as adopted by the Natural Resources Management Ministerial Council on 11th October 2002.[57]

The Biodiscovery Act, 2004 together with the *Code of Ethical Practice for Biotechnology in Queensland*[58] ensures strong regulatory oversight within a clear and inclusive process. The Act facilitates access to and the use of Queensland biodiversity for biodiscovery by minimising duplication of regulation, while ensuring consistency with Australia's international obligations and providing a model for a nationally consistent approach to biodiscovery regulation.[59]

Prior to the 2004 Act, multiple approvals were required from multiple agencies. Moreover, access to biological resources was not permitted for some species or for particular localities containing important genetic reservoirs of the State's biodiversity. Nor was there any legislative authority within the State to require a commercial entity undertaking biodiscovery on native biological resources sourced from Queensland to enter into a benefit sharing agreement.

The Act develops a streamlined and uniform approach regarding access to the Queensland's biological resources for biodiscovery, in a way that will benefit State's community, economy and environment. The need for new legislation

[54] See, http://www.epa.qld.gov.au/ecoaccess/biodiscovery/. Accessed on June 24, 2007. Section 5 of the COMPLIANCE CODE FOR TAKING NATIVE BIOLOGICAL MATERIAL UNDER A COLLECTION AUTHORITY (the Code) specifies what can be collected. Taxa that cannot be taken are listed as restricted in Section 3.5 of the Code.

[55] "Biodiscovery research" involves the analysis of molecular, biochemical or genetic information about native biological material for commercializing (i.e., using for gain) the material (Schedule to the Act).

[56] It may be recalled that Article 15 of CBD recognizes the sovereign rights of the States over their natural resources and the States' authority to decide access to genetic resources, including the fair and equitable sharing of benefits gained from the access. See, *supra* n. 2.

[57] See, *supra* n. 17.

[58] Available at http://www.sd.qld.gov.au/dsdweb/v3/guis/templates/content/gui_cue_menu.cfm?id=7145. Accessed on June 24, 2007.

[59] Speech by Honourable Minister Tony McGrady extracted from HANSARD, Tuesday, May 18, 2004.

stemmed from the inconsistencies and inadequacies of existing laws governing access to Queensland's significant and unique biodiversity.

C. Scope of the Act

The Act establishes an administrative machinery to regulate comprehensively the collection of native biological material on all Queensland land[60] and waters[61] used for the purpose of biodiscovery. It establishes a regulatory framework for identifying and using State native biological resources in a sustainable[62] way for biodiscovery. It also stipulates a contractual framework for benefit sharing agreements to be entered into for the use of native biological resources. The Act further creates a compliance code and collection protocols for using native biological resources and ensures appropriate monitoring and enforcement of compliance with the Act.

In contrast to the cognate federal law, *viz.*, the Environment Protection and Biodiversity Conservation Act 1999,[63] the Queensland Act does not apply to collecting for biodiscovery on freehold lands (including indigenously owned land) or scientific research for non-biodiscovery purposes.[64] These activities will continue to be managed by other permit types under the Nature Conservation Act 1992 (Qld). The Biodiscovery Act, 2004 does not apply retrospectively.

D. Purposes of the Act

The main purposes of the Biodiscovery Act, 2004 (Queensland) are to:

(i) provide sustainable access by commercial parties[65] to minimal quantities[66] of native biological resources in Queensland for biodiscovery;

(ii) encourage the development of value added biodiscovery within the State;

[60] State land is all land in Queensland other than freehold land, free holding leases or land subject to a native title determination granting rights of exclusive possession. It includes national parks, road reserves and state forests.

[61] Queensland waters are all waters within the limits of the State or coastal waters including water reserves and marine parks.

[62] "Sustainability" is not defined in the Schedule to the Act, but the concept has been derived from the World Commission on Environment and Development's Report entitled, OUR COMMON FUTURE (1987), also known as the BRUNDTLAND REPORT, where it was stated that "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." See further, http://www.oecdobserver.org/news/fullstory.php/aid/780/Sustainable_development:_Our_common_future.html. Accessed on June 24, 2007.

[63] See, *supra* n. 19.

[64] It is noteworthy that under the federal law, THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999, the property rights of the owners of indigenous owned land in federal areas are explicitly protected. All benefits negotiated by them will be theirs - the federal government will take none.

[65] These are compendiously referred to in the Act as "biodiscovery entities" and include any company, partnership, sole trader, institution or research organisation involved in biodiscovery research or commercialisation of native biological material.

[66] Minimum quantity is defined in the Schedule to the Act as the minimum material reasonably required for laboratory-based bjodiscovery research and which will cause no more than a minor impact on the biological diversity of the State land or water from which the material was taken.

(iii) ensure that the State obtains a fair and equitable share in the benefits of biodiscovery for the benefit of all persons in the State; and

(iv) enhance knowledge of the State's biological diversity, promoting conservation and sustainable use of these resources.[67]

The Act seeks to achieve the above purposes through the following two means:

1. Permitting regime involving a single Biodiscovery Collection Authority; and

2. Benefit sharing regime based on contractual Benefit Sharing Agreements.

The Act requires any person, organisation or institute seeking to undertake biodiscovery using native biological material sourced from State lands or waters to agree to share any benefits with the State.

The Act does not alter any access rights of landowners or alter existing intellectual property rights that may be generated in the course of biodiscovery. The State will not be a party to, nor will it broker such agreements.

E. Collection Authority (Licence) to collect native biological material

The Act establishes a detailed procedure for granting a licence (referred to as "collection authority") to a commercial entity[68] to collect and use native biological material for biodiscovery purposes. The prescribed form should be accompanied by the applicant's proposed or approved biodiscovery plan and should contain precise description of the type of material to be used together with the period for which the licence or collection authority is sought. The maximum period for which a licence can be granted is three years. The Biodiscovery Collection Authority is administered by the Environmental Protection Authority (EPA).

Upon the grant of a licence, a benefit sharing agreement must be entered into within a year with the State of Queensland through its Department of State Development. If a benefit sharing agreement were not executed within that period, the licence would lapse.[69]

The licensee is not permitted to take any material unless a benefit sharing agreement is in force. A licence cannot be transferred or renewed. It may, however, be suspended, amended or cancelled. It is noteworthy that a licence may be refused even if a benefit sharing agreement or approved biodiscovery plan is in force concerning the material that is the subject matter of the application. The Act also provides for the establishment of a Collection Authority public register that is maintained by EPA.

[67] S. 3 (1), the BIODISCOVERY ACT, 2004 (Queensland)
"Entity" includes a person and an unincorporated body, as defined in the ACTS INTERPRETATION ACT, 1954 (Queensland).

[69] S. 16, THE BIODISCOVERY ACT, 2004 (Queensland).

The licence applies across Queensland to all native biological material on all land tenures. The licensed organisation has the right to exclusively use samples collected for research and commercialisation, but does not give organisations an exclusive right to a species or an area.

Biodiscovery entities are also expected to subscribe to the *Code of Ethical Practice for Biotechnology in Queensland.*[70] Registration under the Code is currently voluntary for most private biodiscovery organisations.

F. Who can Apply for a Licence or Collection Authority?

Persons or corporations engaged in commercialisation of native biological material or those involved in biodiscovery research,[71] or in the products of biodiscovery research can apply for a licence. Licence holders and/or their agents must be competent and possess the necessary certification, licences, training, skills, experience, equipment and qualifications to collect biodiscovery material. The holder of the licence and/or their agents may collect only from areas specified in the licence. Further, applicants must have at least A$10 million public liability insurance that is valid for biodiscovery collection in Queensland for the duration of the collection activities.

G. Identification of native biological material and giving of samples to State

The licensee must, as soon as practicable after collecting a sample of native biological material, label that material and keep it appropriately labelled for the full term of the licence. The label should be identified by the licence or biodiscovery collection authority's number, the date of collection, the scientific classification of the material and the geographical location from which the material was collected.

The intention behind this requirement is to establish a reliable tracking system.[72] In addition, the Act requires lodgement of samples of the material with the Queensland Museum (for animal material) or the Queensland Herbarium (for plant material) or another agency for other native biological material (e.g., microorganisms, fungi).[73]

H. Benefit sharing agreement[74]

The Queensland Department of State Development administers and executes the benefit sharing arrangements and approves the biodiscovery plans required by the Act. All benefit sharing agreements must include a Biodiscovery Plan outlining the commercial entity's approach to biodiscovery research and commercialisation, protection of intellectual property, and benefits to be delivered. Benefit sharing agreements are legally binding contracts with recourse to the Queensland Courts if disputes were to arise.

[70] See, *supra* n. 58.
[71] Biodiscovery research denotes the analysis of molecular, biochemical or genetic information about native biological material for commercialising the material.
[72] S. 29.
[73] Ss. 30 and 31. Note there is another provision (s. 32) requiring submission of material disposal reports.
[74] S. 33.

The Act includes provisions to manage failure to comply with reporting requirements, including failure to report the results of biodiscovery research, development and commercialisation activities undertaken. Under a benefit sharing agreement with the State, the biodiscovery entity must comply with the Code of Ethical Practice for Biotechnology in Queensland.[75]

Private land holders and determined native titleholders with rights of exclusive possession may also negotiate benefit-sharing arrangements as part of access arrangements, if desired. For collections on State land or in State waters, an executed benefit sharing agreement is a trigger that activates a Biodiscovery Collection Authority, enabling approved collection activities to commence. Entities that already have an executed benefit sharing agreement with the State are not required to renegotiate.

Before a benefit sharing agreement is entered into between a commercial entity and the State, the former must get its biodiscovery plan approved by the State in the prescribed manner, giving full details of the proposed activities and the benefits of biodiscovery the entity reasonably considers it will provide to the State under a benefit sharing agreement.[76]

The Act requires a Register of benefit sharing agreements containing names of commercial entities, date, term and other particulars of the agreement, the details of which may be made available to the public.

Commercial entities are obliged to keep records of results of biodiscovery research and accounts necessary for working out monies payable to the State for 30 years after the record or document is created. This requirement also applies to the entity's successors and assigns.[77] The 30-year period is included to reflect the often long time lag between collection and initial research and development of a viable product.

I. How to apply for a Licence (or a Collection Authority)

A completed collection authority biodiscovery application[78] should be submitted to the Environmental Protection Authority (EPA) together with the requisite information, including the proposed or approved biodiscovery plan.[79] No fees are currently payable for making an application for a licence.

The Guidelines state that it takes up to 40 days to process an application, during which time further information may be requested to finalise the application. One of the major considerations in assessing the applications is to

[75] *Supra* n. 72.
[76] See, S. 37 for details that the biodiscovery plan must provide.
[77] S. 43.
[78] Available at http://www.epa.qld.gov.au/publications/p01688aa.doc/Collection_authority_biodiscovery.doc. Accessed on June 24, 2007.
[79] The guidelines for completing an application form for a collection authority (biodiscovery) is available at

http://www.epa.qld.gov.au/publications/p01686aa.pdf/Completing_an_application_form_for_a_collection_authority_biodiversity.pdf. Accessed on June 24, 2007.

ensure that the proposed collection activity for biodiscovery are sustainable, and have only minor and inconsequential impact on the environment from which the material is taken.

X. Conclusion and Recommendations

Gaining access to genetic resources is of particular interest to biotechnology and pharmaceutical companies, biological and taxonomic research organisations, venture capital and investment funds, conservation, and environment groups. Commercial entities in the developed world, with their advanced technology have a strong interest in accessing genetic resources in harmony with the provisions of the CBD. As revealed by the Japan Bioindustry Association survey,[80] private industry lacks clear appreciation of the workings of the CBD and the associated Bonn Guidelines. Nevertheless, the industry has a strong desire to access genetic resources in an appropriate manner as per the letter and spirit of the CBD.

Sustainable use entails sensible use of living or biological resources, such as animals, plants, micro-organism, etc., that are capable of being replenished by natural ecological cycles or sound management practices in a relatively short time provided they are not over-harvested. If biological resources are consumed at a rate that exceeds their natural rate of replacement, the standing stock will diminish and eventually run out. By means of both industrialisation and urbanisation, humanity's great demand for natural resources especially biological resources and their large-scale exploitation and consumption has resulted in the weakening, deterioration and exhaustion of these resources. Besides, not only the reduction in amount of the biological resources that are of concern, but the diminution of their variety, which is vital for evolution, and for maintaining the life-sustaining systems of the biosphere, is also causing concern at both national and international levels.[81]

There is undoubtedly an urgent need for a structured education and awareness program covering the CBD, Bonn Guidelines and the interface between the CBD and the patent law. It is recommended that national symposiums should be organised annually in developed countries to debate the issues and challenges facing the private industry in accessing genetic resources. Consideration should also be given to reform the patent law by requiring applicants to file a statutory declaration regarding the source of invention.

Education and public awareness programs on sustainable use should be implemented and more effective methods of communications should be developed between and among stakeholders and managers in order to ensure that people are aware of the connectivity between different parts of biological diversity, its relevance to human life, and the effects of uses. It is also important

[80] Program for the Promotion of Access to Genetic Resources based on the Convention on Biological Diversity, Report (2004) (Unpublished report compiled by the Japan Bioindustry Association, March 2005).

[81] Agenda for Change 21, *Convention on Biological Diversity*, available at http://www.iisd.org/rio+5/agenda/biodiversity.htm#top. Accessed on June 24, 2007.

diversity, its relevance to human life, and the effects of uses. It is also important to educate people on the relationship of sustainable use and the other two objectives of the Convention.[82] An important way to achieve sustainable use of biological diversity would be to have in place effective means for communications between all stakeholders. Such communications will also facilitate availability of the best (and new) information about the resource.

The CBD, therefore, provides for the adoption of economically and socially sound incentive measures, such as proper pricing of biological resources and the use of tradable rights in their management. Such measures can be an effective means of encouraging their conservation and sustainable use.[83] According to a recent paper, [84] well-designed incentive programs to support biodiversity conservation and the sustainable use of biological resources are important tools on private property and can be supported by legislation when necessary. For example, the Conservation Land Tax Incentive Program currently provides tax relief to individual private landowners and non-profit charitable organizations who agree to protect the significant natural heritage values of their properties.[85] In December 2004, the Ontario government announced that this incentive program would be expanded to make additional categories of land eligible for the tax exemption. Furthermore, the Managed Forest Tax Incentive Program (MFTIP) encourages private landowners, through a reduction in property tax, to conserve and manage their forest land sustainably. In December 2004, the Ontario government also announced the establishment of a committee to provide advice on a new assessment method (similar to the approach used for farmlands) for application to forest properties enrolled in MFTIP.[86]

One of the major difficulties confronting private industry is the lack of a central agency and practical framework in order to access genetic diversity. The situation is exacerbated when one takes into account the fact that the chance of a new product based on natural genetic resources reaching the market is extremely low: about 1 to 10,000 to 100,000 samples. Furthermore, the progression from research and development to commercialisation is often very expensive and dilatory.

It is submitted that Queensland's Biodiscovery legislation highlights options for other jurisdictions, including the Commonwealth of Australia, in the

[82] The other two objectives are the conservation of biological diversity and the fair and equitable sharing of benefits arising out of the use of genetic resources.

[83] J.G. Robinson, *Using 'Sustainable Use' Approaches to Conserve Exploited Populations* in J.D. Reynolds et al (*eds*), Conservation of Exploited Species 485-498 (2001), cited in Jon Hutton and Nigel Leader-Williams *supra* n. 31 at 216.

[84] Protecting What Sustains Us: Ontario's Biodiversity Strategy 26 (2005), available at http://www.mnr.gov.on.ca/mnr/pubs/biodiversity/OBS_english.pdf. Accessed on June 24, 2007.

[85] *Ibid.*

[86] *Ibid.*

to access biological material from a bounteous resource without having to confront burdensome regulatory impediments such as cost, delay, uncertainty, duplication and complexity.

LA FEMME FATALE: TOWARDS AN UNDERSTANDING AND DEFENCE OF WOMEN OFFENDERS

Meera Kaura[*]

I. INTRODUCTION

The complex issue of "women's criminality" is less explored and perhaps less understood in India. Empirical research conducted by Ahuja[1] in late 1960's did spark a momentum that extinguished in a few decades. There is, at least, some research conducted by sociologists, criminologists and psychologists.[2] But, as one penetrates into the legal profession, there has been very minimal research about women offenders.

This paper is an attempt to understand the cause(s) of women's criminality and the nature of offences committed by them by reference to the existing theories that explain anti social behaviour in women, some case law and statistical information. The last part of this paper seeks to introduce the psychological and/or social defences of 'PMS Syndrome', 'battered women', 'diminished responsibility', 'learned helplessness', and 'cultural defence' already explored around the world.

II. THEORIES EXPLAINING WOMEN'S CRIMINALITY

Sociologists, psychologists and criminologists have provided various theories explaining women's criminality. To begin with, many theorists explain it by way of biological determination.[3] The biological approach adopted by Lombroso attempted to explain women's criminality against the backdrop of men's criminality. The crimes committed by men and their biological constitution served as the yardstick to measure women's criminality.[4]

Such a theory does not take into account the social, cultural, political and economic factors, which result in women's criminality. Thus, it fails to answer the questions pertaining to the cause(s) of such crime.[5] Also, Lombroso did not

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* Advocate, Delhi. LL.M. student, Faculty of Graduate and Post Doctoral Studies, University of Ottawa, Canada. meerakaura@gmail.com

1 Ram Ahuja, FEMALE OFFENDERS IN INDIA (1969).

2 Ram Ahuja, *Female Crime: A New Theoretical Perspective* in Leelamma Devasia & V.V. Devasia (*eds*), FEMALE CRIMINALS AND FEMALE VICTIMS: AN INDIAN PERSPECTIVE, 41 (1989). The author tells about research conducted by scholars from Andhra Pradesh, Poona, Lucknow, Gorakhpur, Jamia Milia and Banasthali Vidyapith, etc.

3 Cesare Lombroso and William Ferrero, THE FEMALE OFFENDER (1993). See also, Cowie *et al*, DELINQUENCY IN GIRLS (1968). Most Indian studies on female criminality rely on these deterministic theories like, U.P. Singh *et al*, *Extraversion, Neuroticism and Criminality*, XLVI (2) INDIAN JOURNAL OF SOCIAL WORK (1985).

4 *Id*. C. Lombroso. Lombroso found less degenerative physical characteristics among women than men. According to him, women were biologically more primitive than men. He further classified them as "born criminal" type, "occasional criminal," "hysterical offender" and offender committing "crimes of passion." Though women were less likely to fall in the category of "born criminal" types than "occasional criminal," but once they fell under the former category they were worse than men.

5 See, W.I. Thomas, UNADJUSTED GIRL (1930). His theory embraces socio-cultural, physiological and psychological factors but ignores economic factors. Also see, Otto Pollock, THE CRIMINALITY

elaborate on the nature of offences committed by these women. It is imperative to understand 'what they did' in order to find out 'why they did so'.

Otto Pollock blamed underreporting, lower detection rates of female offenders due to the 'masked' character of their criminality and leniency shown by police and courts for the statistical low figures of crime committed by women.[6] Women, according to him, were deceitful beings who attacked their close relatives, such as children, husbands, family members, and lovers, etc.[7] His reasoning turned a blind eye to the actual discrepancy between the crimes committed by men and women.

Feminists argue that most of the criminological theories are androcentric, that is, made by men on their own assumptions of social life.[8] These androcentric theories fail to take into account a variety of factors underlying women's criminality, such as young women fleeing abusive homes, experiencing domestic abuse as adults,[9] physical and sexual abuse during childhood,[10] broken homes or family disruption,[11] institutional rearing,[12] lack of adequate planning for work,[13] satisfactory employment. Research shows that a large portion of women's criminality is connected to victimization, abuse, addiction to alcohol, or other drugs and poverty.[14]

OF WOMEN (1961). Though, both of them stressed on importance of circumstantial factors, their perception of women's criminality remained sexist and stereotypical. See, Frances Heidensohn, *The Deviance of Women: A Critique and an Enquiry*, 19 (2) BRITISH JOURNAL OF SOCIOLOGY (1968) and Hoffman-Bustamente D., *The Nature of Female Criminality*, 8 (2) ISSUES OF CRIMINOLOGY (1973), who offer an explanation of women's criminality in terms of the social differentiation of gender roles. See, Freda Alder, SISTERS IN CRIME : THE RISE OF THE NEW FEMALE CRIMINAL (1975) and Freda Alder, *The Interaction between Women's Emancipation and Female Criminality: A Cross Cultural Perspective*, 5 (2) INTERNATIONAL JOURNAL OF CRIMINOLOGY AND PENOLOGY (1997), who tried to explain women behaviour becoming more 'masculine' with the women's emancipation; Dorie Klein, *The Etiology of Female Crime: A Review of Literature* in Susan K. Datesman and Frank R. Scarpitti (*eds*), WOMEN, CRIME AND JUSTICE (1973).

[6] *Id.* Otto Pollock.

[7] *Ibid.*

[8] Michael D. Reisig *et al*, *Assessing Recidivism Risk Across Female Pathways to Crime*, 23 (3) JUSTICE QUARTERLY 5 (2006); J. BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME AND JUSTICE (2001); M. Chesney-Lind, *Girls' Crime and a Woman's Place: Towards a Feminist Model of Female Delinquency*, 35 CRIME AND DELINQUENCY 5-29 (1989); S. Simpson, *Feminist Theory, Crime and Justice*, 27 CRIMINOLOGY 605-31 (1989).

[9] *Ibid:* Michael D. Reisig and K. Daly, *Women's Pathways to Felony Courts: Feminist Theories of Lawbreaking and Problems of Representation*, 2 SOUTHERN CALIFORNIA REVIEW OF LAW AND WOMEN'S STUDIES 11-52 (1992).

[10] Research shows that this affects a large proportion of women offenders and it also results in recidivism. *Id.* K. Daly; D. Hubbard and T.C. Pratt, *A Meta-Analysis of the Predictors of Delinquency among Girls*, 34 JOURNAL OF OFFENDER REHABILITATION 1-13 (2002); B. Owen and B. Bloom, *Profiling Women Prisoners: Findings from National Surveys and a California Sample*, 75 THE PRISON JOURNAL 165-185 (1995); *Id.* at 5-8.

[11] Julie Messer *et al*, *Precursors and Correlates of Criminal Behaviour in Women*, 14 CRIMINAL BEHAVIOUR AND MENTAL HEALTH 98 (2004).

[12] *Id.* at 99.

[13] *Ibid.*

[14] S.S. Covington, *Creating Gender Responsive Programs: The Next Step for Women's Services*, 61

Misra and Gautam assume that the problem of women's criminality is a result of rapid transformation of the society from past tradition to modernity.[15] This rapid transformation requires a great amount of adjustment from individuals. It requires re-orientation and change of values in day today interactions. This is true for most post- colonial nations where the discrepancy between the cultural goals and institutional means leads to frustration and aggression. The socio-cultural expectations from women continue to suppress them while the new development agenda of 'women empowerment' leads to frustration. Some of the crimes committed by women may be explained by this very disjuncture of frustration aggression theory as propagated by Freud and Dollard. According to this theory, frustration can explain aggression and other defensive reactions, while its source may lie within the personality or in the environment.

Some authors blame the premenstrual period for women's criminality.[16] According to them, hormonal changes during this period cause irritation, lethargy, depression and water retention, thus leading to ill temperament, impatience, emotional derangement and violent behaviour. Singh tries to explain women's use of violence against their family members by blaming menstruation cycle of women, clearly ignoring "multiple dynamics played in the household."[17] This has the effect of reducing women's use of violence to a "momentary reaction to their menstrual cycle,"[18] thus ignoring her response to end a long existing abuse by partner or a family member. Such a theory also fails to explain the crimes committed by elderly mothers-in-law, who are not menstruating anymore, and, who kill their daughters-in-law.[19]

One of the theories explaining women's criminality is that of increased equality of gender by Freda Alder.[20] Thus, "when women are provided with opportunities traditionally reserved for men, their attempts to gain equal status will encompass both deviancy and conformity with community norms".[21]

In the same breath, some authors maintain that in countries where women have higher social status and levels of education and are exposed to opportunities to engage in the crimes that have traditionally been committed by men, they will

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CORRECTIONS TODAY 85-87 (2001); *supra* n. 8, Michael D. Reisig at 5-8.

[15] L.S. Misra and B.D.S. Gautam, *Female Criminality - Causes and Consequences*, SOUVENIR READINGS IN CRIMINOLOGY (1982).

[16] K. Dalton, THE MENSTRUAL CYCLE (1959); K. Dalton, *The Premenstrual Syndrome*, 48 (5) PROC ROY SOC MOD 337; S. Singh and A. Singh, *The Relationship between Premenstrual Tension and Murder*, INDIAN JOURNAL OF CRIMINOLOGY (1979).

[17] *Id.* S. Singh and A. Singh; Suvarna Cherukuri, *Women in Prison: Their Crimes, Punishment and Indian Reality*, Abstract of the Ph. D. Thesis, Department of Sociology, Anthropology and Social Work College of Arts and Sciences, Kansas State University, Manhattan, Kansas 16 (2003).

[18] *Id.* Suvarna Cherukuri.

[19] *Ibid.*

[20] *Supra* n. 5, Freda Alder.

[21] Sukumar Bose and Kamal Mukherji, *Female Criminality: A Psychological Analysis with Special Emphasis on West Bengal Incidents* in Leelamma Devasia, *supra* n. 2 at 85.

be incarcerated at higher rates."[22] Thus, factors like lack of education, less economic development, etc., that, we believe, give rise to criminality in India, lead to an increased crime rate in developed countries. This should imply that as an economy develops, the nature of crimes committed by women would change.

It may be useful to look at Sutherland's Differential Association Theory, which stresses upon the fact that criminal behaviour is learnt in the interaction with other persons.[23] It may be quite useful to explain delinquency in youth. But, whether it would be useful to explain crimes committed by some of the women in the rural areas in India, who have little or no interaction with the outside world, is a tricky question. It may be answered to some extent by Cohen's theory of value orientation, where the individuals belonging to lower class reject the middle class values and participate in anti-social behaviour to deal with their status issues,[24] or by radical theory propagated by Quinney, according to which, women who become aware of the gender bias existing in society are more likely to indulge in crimes like robbery and burglary.[25] But, it does not necessarily mean that all economically marginalized women or all women who become aware of the gender bias resort to anti-social behaviour. To this, Cloward and Ohlin may have argued that it depends on availability of illegitimate opportunity, i.e. the relationship between crime and opportunity for obtaining desired results by illegitimate means.[26] Whereas Freud's understanding of women's criminality is based on 'penis envy' or 'masculinity complex'. Women who understand and overcome the 'penis envy' and internalize societal perceptions of feminity are 'normal' whereas those who don't are likely to engage in criminal behaviour.[27]

Thus, no single theory can offer an explanation about women's criminality, when the reasons of committing different crimes by different individuals (women) are unique to the peculiar facts and circumstances of the case. It may offer us a general picture as to why women belonging to a particular community/region are more likely to commit crimes, but it can never explain *in toto*. A multidisciplinary approach is, thus, needed to understand 'crime', whether committed by men or women.[28] The coexistence of disciplines of psychology,[29]

[22] Heather Heitfield and Rita J. Simon, *Women in Prison: A Comparative Assessment*, 53 GENDER ISSUES 58 (2002).
[23] E.H. Sutherland and D.R. Cressey, PRINICPLES OF CRIMINOLOGY (1965).
[24] A. Cohen, DEVIANCE AND CONTROL (1966).
[25] R. Quinney, CLASS, STATE AND CRIME (1977).
[26] R. Cloward and L. Ohlin, DELINQUENCY AND OPPORTUNITY (1960).
[27] *Supra* n. 5, Dorie Klein.
[28] K.P. Krishna, *Murderer and Her Victim* in Leelamma Devasia, *supra* n. 2 at 108. The author opines that the problem of women's involvement in heinous crimes like murder should be analyzed from a multidisciplinary angles.
[29] Some studies have focused on relationship between psychotism, neuroticism and criminality. For example, R.A. Yadav, *Women Who Kill*, 3 INDIAN JOURNAL OF PSYCHOLOGY 121-23 (1979) and A. Singh, *Personality of Female Murderers*, 9 (2) INDIAN JOURNAL OF CRIMINOLOGY (1980); *supra* n. 17, Suvarna Cherukuri 14-5. As Cherukuri notes, a mere psychological analysis without contextualising women's criminality can not explain many offences committed by women. It is not a defective personality syndrome or some 'neurotic traits' that leads women into prostitution, but it has more to do with her economic marginalization.

sociology, anthropology, etc., along with criminology may explain the cause of women's criminality without decontextualizing it. Marxist analysis may further reveal the plight of the twice-victimized women, explaining the impact of the interplay between class relations and gender.[30] With due respect, I would like to differ from some prominent scholars, who believe that women's criminality can be explained in terms of "one broad theoretical context" whereas different approaches may be needed to explain criminality amongst men.[31] It is suggested that the primary cause of women's criminality is *family maladjustment* and a theoretical model, which focuses on 'strength of character', 'role conflict', 'opportunity' and 'totality of situation' in the family may be useful to explain crime in women. Thus, a woman's to get her husband's love, affection and attention and in-laws' support and care, and has illicit relations with someone else will lead to criminality. Further, it would depend on her strength of character as to whether she would commit murder or whether she would commit suicide, or elope with her lover or continue to live in that family.[32] This patriarchal Indian model fails to consider crimes outside family, such as prostitution, pimping, managing brothels under special laws, property and other offences under the Indian Penal Code (IPC). A woman offender caught between the intersection of home and the world comes across as a domestic product who would not have committed offences if there was *family adjustment* after her marriage and/or if she did not have another lover. However, in the latter situations, it may happen that a woman may murder her husband if he discovers about her relationship.[33] In the alternative, she will have to face the wrath of her husband, who is more likely to kill his wife or her lover.[34] This behaviour is attributed more to societal intolerance to 'infidelity' of women or her exercise of choice in choosing a partner than *family maladjustment*. It reinforces the stereotypical image of women as virtuous wives, daughters, sisters and mothers.

III. NATURE OF CRIME

Statistics are never the true indicators of crime, though they try to portray a near to truth picture. However, they cannot be ignored altogether if one has to understand the existing situation and the ongoing trends with respect to the problem at hand. *Crime in India*[35] sets out some information pertaining to the crimes committed by women. The percentage of crimes committed by women under the IPC seems quite insignificant at a cursory glance, in comparison with

[30] *Id.* Suvarna Cherukuri at 17: See also, Frances Heidensohn (*ed*), GENDER AND JUSTICE: NEW CONCEPTS AND APPROACHES 520 (2007).
[31] *Supra* n. 2 at 52.
[32] *Ibid.*
[33] See, for example, *Smt. Mangalabai w/o Vijaysingh Patil* v. *State of Maharashtra*, (2002) 104 Bom LR 86.
[34] This is a leading case where the husband killed his wife's lover and the lawyer proposed an innovative approach of taking the defence of provocation. *K.M. Nanavati* v. *State*, AIR 1962 SC 605. There are numerous cases where the husbands have killed their wives or wives' lovers.
[35] National Crime Records Bureau, CRIME IN INDIA, Ministry of Home Affairs, Delhi.

that committed by men, i.e., 5.6% in 2003,[36] 5.8% in 2004,[37] and 5.8% in 2005.[38]

It is interesting to note that, of these women offenders, 22.5% women are arrested under the offence of cruelty by husband and relatives in 2005[39] and 22.1% in 2004[40]; and, 22.4% women are arrested for causing dowry deaths in 2005[41] and 22.9% in 2004[42]; 7.1% are arrested on account of kidnapping and abduction of women and girls in 2004[43] and 2005.[44] At the same time, however, National Crime Record Bureau (NCRB) does not give a detailed description of other offences such as murder, theft, burglaries, vagrancy, cheating, dacoity, hurt, breach of trust, etc. It only lists the crime committed by women against women, thereby ignoring the other classes of crimes. A detailed description of offences committed by women between 1979-1983 reveals that 16.6 % were convicted for thefts, 5.9 % for burglaries, 29.3% for riots, 3.2% for murders, 2% for kidnapping, 7% for cheating, 4% for dacoity and 4% for breach of trust.[45] Thus, according to NCRB reporting for 2004 and 2005, nearly 50% of crimes committed by women are directed against women. But, little is known about the remaining 50% of crimes. It is difficult to determine from a cumulative picture about the nature of crimes committed.

Under Special Laws, out of 4.4% in 2005, most women were arrested under Immoral Traffic (Prevention) Act (72%), followed by Registration of Foreigners Act (27.1%).[46] In 2004, out of 3.2%, most women were arrested under Immoral Traffic (Prevention) Act (72.5%), followed by Indecent Representation of Women (P) Act (39.8%), Child Marriage Restraint Act (24.8%), Prohibition Act (21.9%), Registration of Foreigners Act (17.9%), Indian Passport Act (17.4%) and Dowry Prohibition Act (16.9%).[47]

There has been less research and analysis about the crimes committed by women in India because, "(i) Statistically, women are too few; (ii) they are socially marginal; and (iii) the criminal justice system that has power to handle them discourages awkward rethinks and reviews arising from scholarly interventions that reject older theoretical formulations and practices."[48] This partly explains the reason as to why NCRB has conveniently ignored to explain about remaining 50% of the offences committed by women.

In the absence of any other reliable statistics, the committee report on

[36] *Id.* (2003).
[37] *Id.* (2004).
[38] *Id.* (2005).
[39] *Ibid.*
[40] *Supra* n. 37.
[41] *Supra* n. 38.
[42] *Supra* n. 37.
[43] *Ibid.*
[44] *Supra* n. 38.
[45] As per the Bureau of Police Research and Development, CRIME IN INDIA (1973).
[46] *Supra* n. 38.
[47] *Supra* n. 37.
[48] R. Shankardass, PUNISHMENT AND THE PRISON (2000).

women in detention presented by the Ministry of Home Affairs and the Ministry of Women and Child Development is useful to understand women's criminality.[49] Even though they are stale by a decade, nevertheless, they give a clear picture of convicted women inmates in India and could be used to compare the current trends as depicted by NCRB.

Quite contrary to the notion of only 'insignificant' property crimes committed by women, the highest number of IPC crimes committed by women fall under the category of 'murder', followed by culpable homicide not amounting to murder by convicted women. So far as S.L.L offences are concerned, there are high number of offences committed under N.D.P.S Act, Arms Act, Excise Act, Prohibition Act, Immoral traffic Prevention Act and Dowry Prohibition Act. These statistics do not, however, give any details about the victims of the crime. More awareness about the victims of crimes of murder, attempt to commit homicide and culpable homicide not amounting to murder, may lead to the emergence of new theories and defences to explain women's criminality. For example, the crimes committed by women against their husbands or in- laws in general, may be explained by 'battered women' syndrome, 'learned helplessness', 'diminished responsibility' as a part of the defence of killing in self defence or provocation. At the same time, crimes committed by women against their daughter(s)-in-law reveal how these women are the victims of the patriarchal social order.[50] India has witnessed many incidents of bride-killing by the in-laws (women) of the victim.[51] In domestic violence situations, in-laws usually

[49] Committee on Empowerment of Women, *Women in Detention*. Annexure VII, VIII. 3rd Report (2001-2002), Ministry of Home Affairs and Ministry of Human Resource Development, Department of Women and Child Development, available at http://164.100.24.208/ls/committeeR/Empowerment/3rd/ANNEXUREII.htm. Accessed on February 25, 2007.

[50] The idea of being a victim even while committing crimes against other women has also been endorsed by Cherukuri, *supra* n. 17 at 209, when she raises the question as to whether these women were victims of culture, e.g., culture of dowry in the patriarchal society. Though I am not going to address the issue of a possibility of cultural defence for these women, at this point of time, but a possibility of 'cultural defence' does exist and it has gained some ground, especially in US, with exemplary cases like *State* v. *Aphaylath*, 502, N.Y. 1986; *People v. Kimura*, LA SUPER CT 1985; *People* v. *Wu*, 286 CAL RPTR 868 (Cal Ct App 1991); *People* v. *Kong Moua*, no. 315972, CAL SUPER CT 1985; *People* v. *Romero*, 69 CAL AP 4TH 846 (Cal Ct App 1999); *State* v. *Kargar*, 679 A 2d 81 (Me 1996). While most of these cases involved men taking cultural defences except for the *Kimura Case*, this line of thinking opens new horizons for a unique kind of defence, which will not only help women in their defence but also solve the problem of the traditional criminal justice system's (common law) impersonal and cold approach to the crime and the offender. See Meera Kaura and Manu Aggarwal, *Mediation in Penal Law*, 1 DELHI LAW REVIEW: STUDENTS EDITION 15 (2005-2006).

[51] A. Abraham, *Case Studies from the Women's Centre, Bombay* in Mr. Krishnaraj (*ed*), WOMEN AND VIOLENCE: A COUNTRY REPORT 60-90, Bombay, India: SNDT Women's University, Research Centre for Women's Studies (1991). See, Marilyn Fernandez, *Domestic Violence by Extended Family Members in India: Interplay of Gender and Generation*, 12 (3) JOURNAL OF INTER-PERSONAL VIOLENCE 445 (1997); See, *Mamta* v. *State of Punjab*, II (2003) DMC 365, where the mother-in- law aided other men of the family to cause a dowry death; *Smt. Ratnavva and Ors.* v. *State by Betageri Police*, II (2002) DMC 42, where mother-in-law and sister-in-law burnt the daughter-in-law; *Nagina Khatoon and Ors.* v. *State of Bihar*, II (2003) DMC 583; *Shantabai* v. *State of MP*, I (2003) DMC 529.

perpetrate violence against the woman with the consent of the husband. The denominational power in the whole scenario is the 'husband' and women derive their power because of their relation to the male and his support in carrying out his wishes. The concept of 'patriarchal bargain' sheds some light on why women oppress other women.[52] In other words, it is the false illusion of power created by the patriarchs of the family, which alludes these women to believe that they have a shared 'power' and 'control' over other women, that leads women to commit violence against other women in the family. Statistics published by NCRB in 2004 and 2005 show a trend of increase in crimes committed by women against women[53] and the 'crime of prostitution'.

Women's criminality has quite often been measured and explained in respect of their sexuality. For example, Cherukuri notes the remark of a police officer about Phoolan Devi, where he said that "for every man this girl has killed, she has slept with two. Sometimes, she sleeps with them first, before she bumps them off,"[54] and raises an important question as to whether "similar information on sexuality would be deemed important in the case of a male murderer."[55]

Expression of women's sexuality is suppressed and labelled as a crime, whether it was done by an act of choice or owing to economic marginalization. Even in the prisons, there is an attempt by the prison officials to control and regulate women's sexuality in order to prevent 'homosexuality' in prisons.[56]

Much more about women's criminality in India can be understood if the statistics collecting bodies also enumerate upon age, social background (castes), economic background, victims, residence or region they come from, *modus operandi* (role played by the instigator or assistance),[57] etc. Also, it would be good if there was an explanation about crimes of rape perpetrated by women, 1 convicted and 42 undertrial in the 1998 Report. As any person would understand by a bare reading of S. 375 Indian Penal Code, 1860, a crime of rape is perpetrated by a man against a woman. In the light of this, statistics of crime of rape by women pose serious issues. Were they perpetrators of this crime against some other women or men? Or were they victims? Or were they accomplices? If they were perpetrators, this may lead theorists to explore another aspect of women's criminality. For example, psychological theorists may seek to apply Freud's 'penis envy' to explain that these offences were committed to show their 'power'.[58] If they were accomplices, how can they be charged with rape? But, if

[52] Mudita Rastogi and Paul Therly, *Dowry and its Link to Violence against Women in India: Feminist Psychological Perspectives*, 17(1) TRAUMA, VIOLENCE AND ABUSE 71-4 (2006).
[53] Sometimes women commit crimes against other women, who are their husband's second wives or lovers. See, *State of Karnataka* v. *Smt. Akkamahdevi*, 2005 CRI LJ 703.
[54] http://www.theatlantic.com/issues/96nov/bandit/bandit.htm. Acessed on May 27, 2007.
[55] *Supra* n. 17 at 211, Suvarna Cherukuri.
[56] *Id.* at 212.
[57] Stephen Norland and Neal Shover, *Gender Roles and Female Criminality: Some Critical Comments*, 15 (1) CRIMINOLOGY 96 (1977).
[58] This is not the author's personal view. It is just an example of how various theorists may try to explain the situation.

they are neither, it is for the government authorities to answer as to why these women have been detained or convicted or charged.

IV. Is There A Difference Between the Crimes Committed by Men and Women?

Feminists have answered this question in affirmative.[59] Conventionally, women have been considered as more law abiding than men and more specialized in the crimes that they commit.[60] Men were usually subjected to officials' action on the ground of theft, where as women's criminality caught officials' attention due to "sexual misconduct, ungovernability or running away from home."[61] Men offend at a higher rate than women for most of the crimes except prostitution. The gender gap in crime is highest for the serious crime and least for the less serious forms of law breaking such as minor property crimes.[62]

However, Pollock argued that if the crimes actually committed by women were exposed, the crime rate would be the same as men.[63] Likewise some theorists[64] blame "indulgent criminal codes towards certain female behaviour,"[65] "a different and more indulgent attitude of judges towards women", "the underhand practice of women to act as instigators or mediators of criminal offences", and "prostitution as a surrogate of crimes against property."[66]

In order to explain the difference one needs to find out as to whether there exists a category of 'women specific crimes'.[67] Some authors try to explain the difference as a result of differential sex role expectations, sex differences in socialization patterns and application of social control, differential opportunities

[59] Anthony Maden, *Are Women Different?*, 9 INTERNATIONAL REVIEW OF PSYCHIATRY 243 (1997).
[60] *Supra* n. 57 at 88.
[61] *Supra* n. 57 at 89.
[62] Darrell Steffensmeier and Emilie Allan, *Gender and Crime: Towards a Gendered Theory of Female Offending*, 22 ANNU REV SOCIOL 460 (1996).
[63] *Supra* n. 5, Otto Pollock.
[64] Simonetta Bisi, *Female Criminality and Gender Difference*, 12 (1) INTERNATIONAL REVIEW OF SOCIOLOGY 25 (2002). Bisi summarizes the stances advanced by other theorists about women's criminality.
[65] *Id.* at 25-6. Bisi argues that the very description of punishable behaviours was compiled by men. So consciously or unconsciously, the tendency is to punish those actions that cause damage to men's interests. For example, in some jurisdictions, prostitution is not considered an offence whereas adultery committed by wife is. The judges also endorses this patriarchal attitude, women although guilty are treated with 'paternal benevolence and indulgence'.
[66] It may be interesting to note that 'prostitution' still forms part of female delinquency and thus punishable in many jurisdictions. A prostitute may be penalized for offering her body whereas a man taking her services is not. With the modern technology taking its toll over the masses, the market for pornography and exotic dancers will rise. Every individual who is watching pornographic CDs, websites, etc., is equally responsible for increased intake of women into flesh trade. Should the consumers also be not labelled 'criminals'?
[67] B.K. Nagla, *Women and Crime* in Leelamma Devasia, *supra* n. 2 at 66. The author uses the term 'female specific crimes'. I have replaced female with 'women'. He uses it in the context of crimes committed against women, but I have used it as denoting the crimes committed by women.

to engage in crime and physical attributes[68] which are required to commit some kinds of crime.[69] Even if they commit heinous crimes, they try to use the least amount of violence.[70] Thus, gender differences can only be understood in the context of gender roles in the society.[71]

Feminists reject the use of the same sets of propositions to explain criminality among both men and women.[72] The context of offending differ for women and men. For example, in the United States, a greater proportion of women commit simple assault (72%) than men (55%).[73] A study done by Triplett and Myers[74] shows that men are more likely to use a weapon or beat their victims whereas women are more likely to use guns when they commit crimes against men,[75] especially in the case of murders and robberies.[76] This may not, however, hold true for women criminals in India, given the fact that access to guns, etc., is not easy. But, owing to the biological composition, men are more likely to beat their wives or to use a weapon, whereas women are more likely to use a weapon or seek someone's assistance to carry out the crime.

One of the problems in gender based offending comparisons is that women tend to commit different offences from men and offend less often."[77] For example, unlike men, they rarely attack or assault individuals during the course of thefts or burglaries.[78] Women's criminality is more often believed to be centred around her family, relatives,[79] friends, neighbours than men's criminality.[80] For example, the research conducted by Ahuja reveals that in 77% cases, the victim was the member of the offender's family. Of this 77%, in 92.2% cases, the victim was the member of respondent's family of procreation and only in 7.8% cases, was the victim a member of the family of orientation.[81] Women are more likely to use violence in response to physical, sexual or emotional

[68] Some authors are of the view that the women, owing to their physical inferiority, i.e., biological composition tend to commit less violent crimes and crimes, that require less force. See S. Venugopal Rao, *Female Criminality*, SOUVENIR READINGS IN CRIMINOLOGY (1982); *Id.* at 75.

[69] *Supra* n. 2 at 42; *supra* n. 64 at 31-2; *supra* n. 5, Freda Alder.

[70] Even in the United States, women tend to commit non violent offences. *Supra* n. 57 at 89.

[71] *Supra* n. 59 at 244; A. Jones, WOMEN WHO KILL (1991).

[72] *Supra* n. 8, J. Belknap; M. Chesney-Lind at 5-8; Michael D. Reisig.

[73] PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS and WOMEN OFFENDERS, Bureau of Justice Statistics, US Department of Justice (1999); *Id.* Michael D. Reisig.

[74] R. Triplett and L.B. Myers, *Evaluating Contextual Patterns of Delinquency: Gender-Based Differences*, 12 JUSTICE QUARTERLY 59-84 (1995); *Id.* Michael D. Reisig.

[75] B. Koons-Witt & P.J. Schram, *The Prevalence and Nature of Violent Offending by Females*, 31 JOURNAL OF CRIMINAL JUSTICE 361-371 (2003); *Id.* Michael D. Reisig.

[76] *Supra* n. 57 at 93.

[77] *Supra* n. 59 at 244.

[78] *Supra* n. 57 at 93. However, there are cases like *Surodhani Roy* v. *State of W.B.*, 2004 (4) CHN 205, where theft also involves killing.

[79] *Supra* n. 57 at 89.

[80] *Supra* n. 74. Variation in offending is apparent in more violent crimes and it reduces as we move on to less serious crimes. *Supra* n. 73, Bureau of Justice Statistics. Bureau of Justice Statistics, in its study, revealed that approximately 62% violent women offender victimized someone known to them as compared to only 36% men offenders; *supra* n. 8 Michael D. Reisig at 5-8.

[81] *Supra* n. 2 at 46.

abuse.[82] Their criminality is often linked to their victimization. For example, Joycelyn Pollack notes that, "[w]omen who killed spouses...had routinely and systematically [been] beaten...over a number of years [and] have been punished with convictions and prison sentences, even [in instances when] ...the attack came during or immediately after an attack by husbands."[83] In other cases, women are not instigators of the crime, but only accessories.[84] They help men to carry out the crimes.[85] They rarely assault healthy and alert men themselves. They would assault when a man was asleep or drunk or made their attacks with the help of another person.[86]

Motive behind the crime is another difference in the two genders, especially in relation to theft. For example, "men embezzlers steal from their employers to maintain their status, whereas women convicted of similar offences report that they did so to meet financial needs of intimate partners, family members, and friends."[87]

Thus women enter the criminal justice system with special needs like psychological, medical and financial problems, which set them apart from men offenders.[88] Another difference is with respect to criminal careers; women's criminal career both begin and peak a little earlier than those of males; they are far less likely to repeat their violent offences and they are more likely to desist from further violence.[89]

While there are a lot of differences in both, they share some similarities as well. One of these similarities is the social background of these men and women

[82] K.A. Farr, *Classification of Female Inmates: Moving Forward*, 46 CRIME AND DELINQUENCY 5 (2000); *supra* n. 62 at 479. Steffensmeier and Allan suggest, on lines of Dobash *et al*, that "compared to men, women are far more likely to kill only after a prolonged period of abuse, when they are in fear for their lives and have exhausted all alternatives."

[83] J.M. Pollack, *Gender, Justice and Social Control: A Historical Perspective* in A.V. Merlo & J.M. Pollack (*eds*), WOMEN, LAW AND SOCIAL CONTROL 19 (1995).

[84] T. Brennan, *Institutional Classification of Females: Problems and Some Proposals for Reform* in R.T. Zaplin (*ed*), FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 179-204 (1998); *supra* n. 8 Michael D. Reisig at 5-8.

[85] See *Smt. Panchi and Others* v. *State of Rajasthan*, 2003 CRI LJ 712; *Chandradevi* v. *State of TN*, Criminal Appeal Nos. 895, 896 and 897 of 1997 and Criminal M.P. Nos. 780 to 782 of 1998, and decided on 12.12.2002, where one Divya Devi was abetting the crime of rape against 13 girls in one ashram by one swami. As per the evidence she was herself involved in the sexual activity with the swami and abetted in his offence of rape against other girls and also in murder of a man called Ravi.

[86] *Supra* n. 57 at 93.

[87] K. Daly, *Gender and Varieties of White Collar Crime*, 27 (4) CRIMINOLOGY 769 at 787 (1989); D. Zietz, WOMEN WHO EMBEZZLE OR DEFRAUD: A STUDY OF CONVICTED FELONS (1981); *supra* n. 8 Michael D. Reisig at 5-8; J.Hagan, CRIME AND DISREPUTE (1994), on the same lines, suggests that 'it is external conditions, environmental situations of inequality and social exclusion that lead women to commit minor property crimes...'.

[88] J. Austin *et al*, FEMALE OFFENDERS IN THE COMMUNITY: AN ANALYSIS OF INNOVATIVE STRATEGIES AND PROGRAMS 3-4 (1992); B. Bloom *et al*, *Women Offenders and Gendered Effects of Public Policy*, 21 REVIEW OF POLICY RESEARCH 31-38 (2004); *supra* n. 8 at 5-8, Michael D. Reisig.

[89] *Supra* n. 62 at 464.

offenders.[90] Groups or societies that have higher rate of crimes committed by men also have higher rate of crimes committed by women and the same is the case for a lesser rate within that group or community.[91] Statistically, when the female rates for a given group are regressed on the male rates, the results for most comparisons do not differ significantly.[92] This suggests that rate of crime committed by women responds to the same social and legal forces as those committed by men, independent of any conditions unique to men and women.[93] However, these studies were conducted in other countries and may not show the same results in India.

V. WOMEN WHO KILL: UNDERSTANDING AND PLAUSIBLE DEFENCES

Women offenders, especially the ones involved in homicide are viewed with scepticism. While some are thought to be insane, psychopaths, ill, etc., on account of medical conditions, others who reject the social order or social roles imposed on them are considered rebellious. One of the earliest examples is the *Borough Case* (1854) in UK, where a woman slashed the throats of her six children and then made an unsuccessful attempt to kill herself. The issue at the trial was whether she was legally responsible for the murders. Her counsel presented that it was owing to "some mysterious agency" that she committed this offence as she attempted to kill herself the very next moment. As a result, the jurors did not believe her to be 'mistress of her actions'.[94] The sudden impulse to kill her children and herself resulted from the legal separation, which was filed by her husband. Thus, media tried to view it as a revengeful act against her husband, without understanding as we can legitimately expect in English Victorian age, her mental state as a result of such separation. Since then, Victorian women were more likely than men to be acquitted on the grounds of "insanity", even though crimes committed by them were the same as those committed by men.[95] Insanity came to be identified with women criminals and they were more readily accepted and declared to be insane.[96] Consequently, women's criminality was an outcome of certain 'bio-psychological traits:

[90] *Id.* at 465; M. Chesney-Lind & R. Sheldon, GIRLS, DELINQUENCY AND JUVENILE JUSTICE (1992); D. Denno, *Gender, Crime and Criminal Law Defences*, 85 (1) J CRIM LAW CRIMINOLGY 80-180 (1994); D. Steffensmeier and E. Allan, *Gender, Age and Crime* in J. Sheley (*ed*), HANDBOOK OF CONTEMPORARY CRIMINOLOGY (1995).

[91] *Supra* n. 62.

[92] *Ibid*; D. Steffensmeier & C. Striefel, *Time Series Analysis of Female-to-Male Arrests for Property Crimes, 1960-1985: A Test for Alternative Explanations*, 9 JUSTICE QUARTERLY 78-103 (1992).

[93] *Ibid.* Darrell Steffensmeier and Emilie Allan, *Gender and Crime: Towards a Gendered Theory of Female Offending*, 22 ANNUAL SURVEY OF SOCIOLOGY (1996), available at http://www.questia.com/googleScholar.qst;jsessionid=GnJMkyKV1BVQ23gTWR3qTfydSQ22GJTnys74Q2WwJ5H14CDZQyvQ!2060927175?docId=5000416440. Accessed on January 24, 2007. H. Boritch and J. Hagan, *A Century of Crime in Toronto: Gender, Class and Patterns of Social Control, 1859-1955* 28 CRIMINOLOGY 601-26 (1990).

[94] Jill Newton Ainsley, *Some Mysterious Agency: Women, Violent Crime, and the 'Insanity' Acquittal in Victorian Court Room*, XXXV CANADIAN JOURNAL OF HISTORY 2 (2000).

[95] *Id.* at 3.

[96] E. Showalter, THE FEMALE MALADY: WOMEN, MADNESS AND ENGLISH CULTURE 1830-90 (1985).

weakness, limited self-consciousness, and incapacity of choice'.[97] Thus, a pathological condition, an alteration of personality and a masculine tendency were the situations in which women could commit crimes.[98]

In India, women like *Gyarsibai,*[99] are weighed on the scale of culpability only to be labelled criminals. Her children died as she jumped into the well due to the "continuous bickering" of her sister-in-law. Dixit J. observed that:

> Every sane person — and in this case we are bound to take it that the appellant was sane — is presumed to have some knowledge of the nature of his act. This knowledge is not negatived by any mental condition short of insanity.[100]

Similarly, in *Emperor* v. *Mt. Dhirajia,*[101] it was held that the act of jumping into a well with her children was clearly done with the knowledge that it must in all probability cause the death of her children. The standard for attribution of knowledge and sanity is that of a "reasonable man". Thus, anything short of medical 'insanity' would not avail the advantage of insanity defence. It is important to understand a woman's actions from a "reasonable woman's" perspective especially when these women are battered and their actions can be explained in the context of domestic violence or abuse faced by them. They attempt to kill themselves or their children or their abusers in order to put an end to the persistent violence. Patriarchal system may, then, ask that why she did not leave him or move to another place. Ved Kumari has answered this question as follows:

> Moving out of an unhappy marriage is an option from a male perspective. There is complete absence of any psychological and physical support structure for women in such an eventuality. Women experience many more unending and insurmountable problems rather than the end of their problems by moving out.[102]

However, in a recent decision of the Madras High Court, *Mrs. Ismail Beebi v. State,*[103] where the woman threw her one child in the well and was stopped before she could throw the other one, Court took into account that she was deserted by her husband and being poverty stricken she was unable to maintain herself and the two kids. The court, while feeling sympathetic, referred the case to the Governor of Tamilnadu for remission of her sentence.

Courts, usually, do not acknowledge that a woman killed her relatives due to the persistent domestic violence that she encountered. Domestic violence is not even a mitigating factor while determining the sentence.[104] This leaves out a

[97] *Supra* n. 64 at 24.

[98] *Ibid.*

[99] *Gyarsibai* v. *State*, AIR 1953 MB 61.

[100] *Id.* at 62.

[101] *Emperor* v. *Mt. Dhirajia*, AIR 1940 All 486.

[102] Ved Kumari, *Gender Analysis of the Indian Penal Code* in Amita Dhanda & Archana Parashar, (*eds*), ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 139-60 (1999).

[103] 2005 Cri LJ 3570.

[104] There are no principles of sentencing specifically laid down by law. However, judges are to apply

plethora of cases where women killed on account of being "battered" or were in a state of "learnt helplessness", or suffered from "diminished responsibility", "PMS syndrome", etc., which may form partial defences to support an available defences of "self defence", "provocation", duress, etc. These defences cannot be exclusively explained but they often intermingle with each other to arrive at the intended outcomes. In most of the cases, more than one defence may need to be taken.

These defences may serve either of the two purposes – acquittal or mitigation of the sentence. For example, according to California Rules of Court, mitigating circumstances may be considered for the purpose of sentencing for manslaughter, where "the defendant suffered from repeated or continuous physical, sexual or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of defendant's child; and the facts concerning the abuse do not amount to a defence."[105] In Kentucky, a proof to the effect that one is a victim of domestic violence and abuse has the effect of removing parole ineligibility that is otherwise imposed on someone who is guilty of manslaughter.[106]

This *PMS syndrome* defence tries to explain the act of a woman in terms of the irritability by showing a relation between criminality and symptoms of Premenstrual and menstrual periods. The probable symptoms could be - headaches, increased aggression, irritability, edema, psychiatric symptoms and suicide attempts. Sometimes this defence is included in *diminished responsibility* defence. Sometimes it takes the form of Post Partum psychosis and non-psychotic post partum depression. These terms can be better defined by people in the medical profession and this is where, expert evidence may have a very dominant role to play. The weight that expert opinions merit is not recognized at the moment. However, the use of this defence may have the effect of reducing a woman's reasonable response to a medical condition.

Battered Woman Syndrome defence requires that the woman claiming this defence should be a battered woman. A battered woman can be defined as one "in an intimate relationship with a man who repeatedly subjects ... her to forceful physical and or psychological abuse."[107] Battered Woman Syndrome is a sub category of *Post Traumatic Stress Disorder, which* is a collection of thoughts, feelings and actions that logically follow a frightening experience that one, expects could be repeated.[108] It is to be understood that battering is not merely an act of physical violence and is capable of embracing other kinds of violence and abuse. Such violence or abuse is of a continuous nature or repeatedly happens in

their own discretion to facts of a case. Unlike, countries like Canada, US, Australia where domestic violence is considered as a mitigating factor in cases involving homicides.

[105] Rule 423 (a), WEST'S ANNOTATED CALIFORNIA CODES, CALIFORNIA RULES OF COURT.

[106] Rule 439.3401 (4), KENTUCKY REVISED STATUTES.

[107] *Supra* n. 90; D. Denno at 80; Lenore E. Walker, THE BATTERED WOMAN SYNDROME 203 (1984).

[108] Lenore E. Walker, *The Battered Woman Syndrome and Self Defence*. 6 NOTRE DAME J L ETHICS & PUB POL'Y 321, 327 (1992).

ordinary course of things. In other words, a single act of violence may not constitute battering.[109] Dr. Lenore Walker, a clinical psychologist, advances a cycle theory to define 'battered women'. According to her, there are three distinct phases associated in a recurring cycle. In the first phase, i.e., "tension building", there is gradual escalation of tension which can be evident by name calling, physical or psychological abuse. The woman tries to plead and calm the abuser down. In the second phase, i.e., "acute battering incident", the woman withdraws after exhausting her strategies to calm him down and the abuser moves more aggressively towards her. This phase witnesses an uncontrollable discharge of tensions. There are times, when she can actually predict how, why and what kind of abuse awaits her. In the third phase, i.e., "loving contrition", the abuser/batterer may try to apologize by showing acts of kindness and remorse and the victim is led to believe that things may change for better. But this cycle repeats itself soon. According to Dr. Walker, a woman who has undergone this cycle twice can be called as a "battered woman". However, even in clinical psychology things are evolving and it is no longer a requirement for a woman to fulfil the cycle twice. It would largely depend upon the facts and circumstances of the case and upon the statement of the expert evidence. The need for expert evidence, i.e., evidence of a clinical or forensic psychiatrist has been very adequately summarized by *R.* v. *Lavallee.*[110] The expert evidence enables the lay man, court's staff, lawyers and judges to understand battered wife syndrome (in case of Jury trials) and helps to resolve their doubts as to why the battered woman remained in a battering relationship, reasonableness of the apprehension of death or grievous injury, reasonableness of her belief that killing her batterer was the only way to save her life.[111]

Though, we do not have jury system in India, but the absence of the same places a greater responsibility on the judiciary to decide in a manner most consistent with what the society members would consider just and reasonable. Also, not all or many judges have any training in clinical or forensic psychology. It is, thus, imperative to consider expert evidence presented by licensed or recognized practitioners.

The mere fact that she was a battered woman is not a defence in itself. If she acted in self- defence or provocation, the threat or fear that she was facing need not be 'imminent'. 'Imminence' could be justified in cases where there is a sudden altercation between two men, but in the case of women, the last threat or the continuous threat to her life, in the context of the persistent violence she has been facing, will qualify as the threat being 'imminent' and her apprehension of death being 'reasonable'. Since it is the woman who has been living in an abusive relationship, it is she who knows when would a person react or when his threat was a promise and that he had the means to carry out his threat.[112]

[109] *Supra* n. 107.

[110] *R.* v. *Lavallee*, [1990] 1 SCR 852 [Canada].

[111] *Ibid.*

[112] *R.* v. *Malott*, [1998] 1 SCR 123 [Canada].

Seligman's theory of "*learnt helplessness*" also strengthens the defences of self- defence, provocation, etc.[113] This is again a psychological term to describe the state of mind of an individual who undergoes psychological, physical stresses or both. It may usually help to explain as to why the woman did not move out of the relationship and to explain why she took an extreme step of killing her husband. This can usually aid a plea based on self defence of a battered woman to explain why she did not move out of the relationship, e.g., why she did not take divorce, or go to her parents' house, or complain to the police, or contact women organizations for shelter, etc. It is relevant to note here that the state of mind of the woman is such that she believes that nothing would be able to help her. There is no way she can escape the regular violence. This usually happens when the state fails to protect, family does not come to help, etc. In certain circumstances, women cannot even dare to lodge a complaint to the police, as they are scared of the wrath they may have to face if the case is unsuccessful. In such a state of mind, as a battered woman, if she kills her husband, she does so for the sake of protecting her person or her children from further abuse or violence. Thus, the theory of learnt helplessness as applied to battered women helps to explain how battered women become psychologically victimized in the relationship, utilizing "survival" techniques as opposed to "escape" skills.[114] As *Walker* notes later, that the term's original meaning is not being 'helpless' but rather 'having lost the ability to predict that what you do will make a particular outcome occur'.[115] A defence based on provocation in such cases may be slightly weaker than a plea based on self defence. A classic example of successful defence of provocation coupled with learned helplessness and diminished responsibility is the UK case of *R.* v. *Kiranjit Ahluwalia.*[116]

[113] Martin E.P. Selisman, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH (1975). This theory was developed by experimenting on dogs by trapping them in cages and administration of random shocks from which they could not escape. Over the time, these dogs would not attempt to leave the cage when shocks were administered even when they could escape. The dogs showed no motivation to alter their situation after learning that they had no control over the shocks. In case of women, this condition can be defined as "psychological paralysis". "That is, given the situation, yet unpredictable nature of the violence, the woman is eventually reduced to a state of 'perpetual' fear and perceives that there is little she can do to alter the situation". Regina A. Schuller, *Expert Evidence and Its Impact on the Juror's Decisions in Homicide Trials Involving Battered Women*, 10 DUKE J GENDER L & POL'Y 231 (2003).

[114] *Id.* Regina A. Schuller.

[115] Lenore E A. Walker, *Assessment of Abusive Spousal Relationships* in Florence W. Kaslow (*ed*), HANDBOOK OF RELATIONAL DIAGNOSIS AND DYSFUNCTIONAL FAMILY THERAPY 338 at 344 (1996).

[116] [1992] 4 All ER 889. Kiranjit Ahluwalia entered into an arranged marriage and suffered years of abuse from her husband. In May 1989 she threw petrol into his bedroom and set it alight. Her husband died six days later of his burns. She was convicted of murder and appealed against her conviction. The first ground of appeal was that the judge wrongly directed the jury that a plea of provocation depended on establishing a 'sudden' loss of self-control; the second was that he failed to take into account that the defendant was suffering from 'battered woman syndrome', producing a state of 'learnt helplessness'. The successful ground of appeal was the third. Medical evidence available but not used at the first trial showed that the defendant was suffering from a major depressive disorder; this could have provided the basis for a successful plea of diminished responsibility. The conviction was quashed and a retrial ordered. See also, the most celebrated individual case is that of *Sara Thornton*, whose defence counsel argued without success that a long history of violence by her husband amounted to provocation, even when the defendant delayed her attack until her victim was asleep for reasons of self-preservation (*R.* v. *Thornton, UK,* 1991). Referred from 9 *International Review of Psychiatry* 243-248 (1997).

One of the problems in taking these defences and calling experts on record to give their testimony is that it would have the effect of reducing the social problem of battering to some psychological disorder.[117] In other words, these women may be viewed as 'insane' or 'abnormal' and passive recipients of violence. Thus, any woman who does not fit the ideal image of the battered woman will not able to plead a defence of being battered successfully in the courts. However, it will be important for psychiatrists to bring about the surrounding circumstances in his/her testimony and present the case - not as a psychological disorder but of a social condition.

In the end I would like to comment on the concept of *cultural defence.*[118] In the Indian context, since colonization, speedy urbanization and development has led to a diaspora of people, there can be many distinctions drawn between citizens on various levels, such as, belief systems, culture, values, language, caste, creed, etc. The culture, values and belief systems of these people are different from the people staying in Metropolitan areas. Their experiences are different and so are their needs from the criminal justice system. However, the Courts are determined to apply a straight-jacket formula to all of them on the basis of "formal equality" argument. For example, in a recent case of *State* v. *Shaqila and Ors.*,[119] where a woman acted on the premise of "primitive belief" that killing a child would make a barren woman fertile, was convicted of murder. With due respect to rhetoric on *Ahimsa* by Hon'ble Justice Pasayat, the court looked at her action very incredibly:

> 2nd October ... advocated doctrine of "Ahimsa". Instead of a joyful day... An innocent child who had not even celebrated three birthdays was sacrificed so that a barren woman can get a child; *an act of abhorrence difficult to conceive. This primitive belief is unthinkable in the modern jet set twentieth century*...The act is to say the least diabolic in its conception and cruel in its execution.[120]

The court took into account that Shaqila masterminded the killing of the child as a sacrifice, commonly known as "Totka", so that her barren daughter could conceive. In the evidence, certain articles used for the said totka were found, e.g., underwear of the deceased girl as her personal belongings were used to conduct totka on her, bottle, earthen lamp, half burnt cotton wick, piece of newspaper, *patashas*, rice grain and clove. Then, court further went on say in Shaqila Case that:

> The reason for taking life of innocent and helpless child and that

[117] *Supra* n. 113, Regina A. Schuller at 1244.

[118] *Supra* n. 66. A cultural defence may be advanced in a lot of cases involving witchcraft, voodoo and cannibalism.

[119] 2000 (55) DRJ 713.

[120] *Ibid.* Emphasis added.

> too with the primitive idea that it would make a barren woman fertile, in the twentieth century to say the least is very cruel and cold-blooded act. It is almost like a situation that a child is sacrificed so that parents of that child become childless and another couple is blessed with a child. We do not find any mitigating circumstance.[121]

In this case, her misplaced belief system could be considered as a mitigating factor. The evidence clearly showed that she believed what she was doing would result in her daughter bearing a child. Imagine a situation, where she would have just killed the child for family animosity or if that was an illegitimate child of her husband, we may have tried to understand the latter situation and sympathize with her, and the court would not have considered it as a "rarest of rare case" resulting in death penalty. But, here, a victim of her belief system, even if wrong, is sentenced to death. Witchcraft has been held to be a cultural offence by prominent authors.[122] If such defences were allowed in India, this will give some chance to the people belonging to minority culture to raise the defences, which may seem "unthinkable" to the people belonging to the dominant culture.

Another example would be that of prohibition of dowry. Government has been trying to eliminate this practice by imposing legal sanctions, but the problem seems to be on a rise.[123] As Jeroen very aptly observes:

[T]he laws concerning the dowry passed by the Indian Government seem to clash with the cultural practice of a considerable part of the Indian population .... This nevertheless shows that a clash of cultural norms does not only take place in the case of immigration, or when legal norms are imposed by colonisers. A cultural gap between the ruling elite and a part of the population can just as well be the cause of this kind of legal clash of cultures.[124]

Thus, the criminal law jurisprudence should evolve to embrace such innovative defences, which favour women who have been victims of circumstances, or belief systems.

VI. CONCLUSION

Criminality in women can, thus, be attributed to various factors - affected marital life,[125] political factors,[126] social forces, economic factors,[127] education,[128]

[121] *Ibid.*

[122] See Jeroen Van Broeck, *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, 9[3] (1) EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 4 (2001); D.S. Clark, *Witchcraft and Legal Pluralism: The Case of Celimo Miquirucama*, 15 TULSA LAW JOURNAL 679-98 (1980); A. Minnaar and M. Wentzel, *Taking on Culture: Witchpurging in Northern Province*, 7 CRIME AND CONFLICT 20-3 (1996).

[123] As previously stated that Crime in India statistics reveal that almost 50% of crimes are committed by women against women and almost 22% forms the crimes committed by women for Dowry.

[124] *Supra* n. 120 at 6, Jeroen Van Broeck.

[125] *Supra* n. 2 at 43- 44. The author's study of 325 offenders from states of Rajasthan, Punjab and Madhya Pradesh revealed that 76% offenders were married as opposed to 73% as per All India Statistics. The mean age at the time of commitment of crime was found to be 28.7 years and median was 26.1 years. At that time, mean age at the beginning of marital life was 17.4 years. On the basis of this, the author concluded that a disturbed marital life, where there are maladjustment

and residence in a particular region.[129] In addition to these, in Indian context, societal hierarchies, like the caste system, immediate cultural context along with tools of expression and suppression in it, sexuality and family structure are important factors that result in women's criminality.[130] Many authors have argued that women's criminality must be viewed and understood in context,[131] and even the prison programming, etc., must take into account the contextual variables.[132]

To understand women's experiences as an offender in the criminal justice system, law should embrace the theories of sociology, psychology and anthropology. No single theory can help understand the nature of women's criminality and it is thus important to take a cumulative picture depending on the facts and circumstances of the case. This may require calling for expert opinions and expert witnesses more often. States should make effort to make this available to women taking help of the legal aid clinics.

There is, still, scope of introducing more gender oriented defences to protect the interests of the most vulnerable section of the society. The starting point of any defence could be statistical information coupled with the facts of a case. For example, a research conducted in Canada revealed that majority of women prisoners had a longstanding history of physical and sexual abuse.[133] Similarly, sociologists, criminologists or legal academicians in India may embark to explore whether such a situation exists in the case of Indian women offenders.

The judiciary, lawyers and legislators need to be more sensitive to the issues relating to women and should pave the way for innovative psychological and sociological defences to help women who are the victims of the circumstances. As a matter of practice, it should be the defence of self-defence coupled with battered wife syndrome that should be given priority over other defences as it confers rationality to the action of the woman, whereas provocation coupled with learnt helplessness or diminished responsibility reduces her action to a state of mind. The use of such defences in India may generate debates about the difference between self-preservation and self defence and opponents may claim that provision of self defence does not aim at protecting an individual from an anticipatory attack. However, expert and other evidence could assist in showing the reasonableness of the fear/apprehension of such attack and probability of the

problems with respect to interpersonal relations, forces women to indulge in deviant behaviour.

[126] Kyllie Agllias, *Women in Corrections: A Call to Social Work*, 57 (4) AUSTRALIAN SOCIAL WORK 333 (2004).

[127] *Supra* n. 2 at 44.

[128] *Supra* n. 11 at 97- 98. *Ibid.* The author's study indicates that 79% of women criminals are illiterate.

[129] *Id.* Ram Ahuja at 45. The author studied the difference between crime committed by women belonging to rural and urban areas. While 76.5% of the offenders belonged to rural areas, more crimes were committed in urban areas.

[130] *Supra* n. 17 at 3, Suvarna Cherukuri.

[131] *Ibid.*

[132] Susan Marcus-Mandoza and Erin Wright, *Decontextualising Female Criminality: Treating Abused Women in Prison in the United States*, 14 (2) FEMINISM AND PSYCHOLOGY 253 (2004).

[133] Elizabeth Comack, *New Possibilities for a Feminism 'in' Criminology? From Dualism to Diversity*, 131 CANADIAN JOURNAL OF CRIMINOLOGY 161 at 162-163 (1999).

attack depending on the frequency of violence suffered by the woman at the hands of the abuser. Such a case would require the judges to define "imminence", "reasonable apprehension", etc., from a battered woman's perspective even though such terms have not been defined in the Indian Penal Code, 1860.

There is a strong need to look for alternatives to the traditional criminal justice system[134] and incarceration. It is argued that "incarceration fails to address, or even exacerbate the problems women were facing prior to incarceration."[135] Reformation and rehabilitation should be the sentencing policy for women and juvenile as opposed to punitive treatment.

[134] See Meera Kaura and Manu Aggarwal, *supra* n. 50.

[135] *Supra* n. 126 at 333; E. Baldry, *Convicted Women: Before and After Prison*, 8 (3) CURRENT ISSUES IN CRIMINAL JUSTICE 275-286 (1997); Davies & Cook, *Women, Imprisonment and Post Release Mortality*, 14 JUST POLICY: A JOURNAL OF AUSTRALIAN SOCIAL POLICY 15-21 (1998); J. Martin, *Mental Health Needs of Women Prisoners: Policy Implications*, 18 JUST POLICY: A JOURNAL OF AUSTRALIAN SOCIAL POLICY 32-40 (2000).

PROMOTING HUMAN RIGHTS IN INDIA THROUGH LAW SCHOOL HUMAN RIGHTS CLINICS

Ajay Pandey[*]

I. INTRODUCTION

The international community aspires to secure "all human rights to all".[1] Such a lofty mission requires gigantic efforts to succeed. Protection and promotion of human rights form the bases of peace and security in the world.[2] Therefore, every individual and every organ of society has the responsibility to promote human rights through teaching and education and strive to achieve their effective observance.[3] India shares this global responsibility and manifests it by, *inter alia*, ratifying the two most important international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR);[4] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[5]

Above all, the Constitution of India guarantees human rights by way of its provisions on Fundamental Rights and the Directive Principles of State Policy. India also has several forums including the Supreme Court, the High Courts, and the National Human Rights Commission committed to the cause of human rights. Thus, India has a very strong platform to fulfil the objective of international human rights regime. However, the challenges of meeting these objectives are manifold. The need for human rights education, training, sensitization, legal action, and developing an overall culture of human rights explains some of these challenges. India requires legally trained, sensitive, and qualitative resource persons to respond to these needs.

Clinical legal education (CLE) is a practical way of teaching lawyering skills to law students and developing in them a perspective for social justice.[6] Thus, by establishing law school human rights clinics (LSHRC), India can prepare a cadre of well trained and socially committed lawyers to fulfil the objectives of the

[*] Associate Editor, LEGAL NEWS AND VIEWS and Research Associate, Human Rights and Law Unit, Indian Social Institute, New Delhi.

This paper is a revised version of a part of the author's LL.M. thesis, PROTECTING AND PROMOTING HUMAN RIGHTS IN INDIA THROUGH LAW SCHOOL HUMAN RIGHTS CLINICS, written during the academic year 2005-2006 at the Vanderbilt University Law School. Professor Frank S. Bloch served as his thesis advisor. The author would like to thank Professor Ved Kumari for her suggestion to revise the paper in exploring the relevance of Law School Human Rights Clinics in the context of the four compulsory practical papers prescribed by the Bar Council of India for a bachelor's degree in law.

[1] UN Secretary General's message on the 50th anniversary of UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR) (Dec 10, 1997).

[2] *Id. Preamble*, UDHR. THE CHARTER OF THE UNITED NATIONS also shares the same sentiment.

[3] *Id.* UDHR.

[4] INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. Res. 2200A (XXI), 21 UN GAOR SUPP. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171, entered into force March 23, 1976.

[5] INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1966), 993 UNTS 3, entered into force Jan. 3, 1976.

[6] See for objectives of CLE, Wizner; Wilson; and Dubin, *infra* n. 14.

human rights regime. Additionally, in LSHRCs India will have vibrant and youthful centres working for human rights and supporting existing human rights forums in their work. The students of the clinic will work for the practical realization of human rights at the grassroots and, thus, will particularly strengthen the human rights movement at that level. Students' work in the community will sensitize them to the needs of the poor and will enable them to analyze the role of law in fulfilling them. This will also prompt the students to advocate legal reforms.

CLE in India is "firmly rooted in and closely tied to the legal aid movement."[7] The concept of legal aid in India is linked to India's larger goal of social justice.[8] Therefore, CLE in India, essentially, shares the concerns of social justice. India's human rights regime also strives to fulfil the objectives of social justice. Social justice, thus, is a common link between human rights and CLE in India.

The CLE movement in India has now created an atmosphere to develop full-fledged law school clinics in the country.[9] Establishment of more and more national law school universities;[10] introduction of compulsory practical papers in the legal curriculum;[11] and the institution of Fulbright-Vanderbilt fellowship for an LL.M. in clinical legal education[12] are some of the most important developments leading to a proper environment for the institution of legal clinics in India. With the introduction of four compulsory papers in the curricula for a bachelor's degree in law, the Bar Council of India has made it mandatory for every law school in India to ensure that such degree is not given without the student completing these papers through practical learning.

However, the ineligibility of law teachers and law students to appear in courts on behalf of clients severely restricts the scope of clinical legal education in India.[13] Therefore, there is an urgent need to look for alternatives and to make

[7] Frank S. Bloch and Iqbal S. Ishar, *Legal Aid, Public Service and Clinical Legal Education: Future Directions from India and the United States*, 12 MICH J INT'L L 92 at 94 (1990).

[8] The Preamble to India's Constitution declares social justice as a major national goal.

[9] See, Frank S. Bloch and M. R. K. Prasad, *Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States*, 13 CLINICAL L REVIEW 165 (2006).

[10] To achieve excellence in legal education, India has, so far, established ten national law schools: National Law School of India University, Bangalore; West Bengal National University of Juridical Science, Calcutta; NALSAR University of Law, Hyderabad; National Law Institute University, Bhopal; National Law University, Jodhpur; Hidayatulla National Law University, Raipur; Gujarat National Law University, Gandhi Nagar, Gujarat; National Institute for Advanced Legal Studies in Kochi, Kerala; Chanakya National Law School University, Patna; and Lohia Vidhi Vishwavidyalaya, Lucknow.

[11] The four compulsory practical papers of 100 marks each are: 1. Moot Court, Pre-trial Preparations and Participation in Pre-trial Proceedings; 2. Drafting, Pleading and Conveyancing; 3. Professional Ethics, Accountancy for Lawyers and Bar Bench Relations; and 4. Public Interest Lawyering, Legal Aid and Para-legal Services.

[12] The Vanderbilt-Fulbright Fellowship is awarded to one Indian law graduate every year to pursue an LL.M. in CLE at the Vanderbilt University Law School.

[13] Frank and Ishar, *supra* n.7 at 119. THE ADVOCATES ACT entitles only advocates to practice the profession of law. See, S. 29, THE ADVOCATES ACT, 1961.

innovations. This paper addresses both of these concerns. It shows that the students in human rights law clinics can practice human rights lawyering through various available human rights forums. This paper also submits that LSHRCs will cover a substantive part of the syllabus of the four compulsory papers. However, such submission does not form a part of the main objectives of the paper.

The first part, the main part, of this paper discusses characteristics of human rights clinics; the second part identifies some work for LSHRCs in India; and the third part concludes that instituting law school human rights clinics in India will strengthen the clinical legal education movement and will develop a culture of human rights in the country.

II. CHARACTERISTICS OF LSHRC

An understanding of the essential functions of human rights clinics is critical in developing LSHRCs in India. This part, therefore, is concerned with discussing characteristics of an LSHRC. Two questions are basic to this discussion: (1) what is human rights lawyering; and (2) what should be the features of LSHRCs to reflect aspects of human rights lawyering? The answers to these questions overlap, as will be seen in the discussion that follows here. In identifying characteristics of human rights clinics, this discussion draws mainly from the experiences of some law school human rights clinics in the United States. Many requirements of human rights lawyering are similar to those of social justice lawyering. This part, therefore, draws some examples of the requirements of social justice lawyering and concludes that LSHRCs are marked by their focus on different and creative lawyering.

Before discussing features of human rights clinics, it is pertinent here to clarify that although human rights clinics have some unique features, they do have some essential components of clinical legal education.[14] These components include the two most prominent objectives of clinical legal education, *viz.*, development of lawyering skills and social justice orientation.[15] Some other such components include clinical course being a faculty supervised, credit bearing experiential learning course. Carrillo's definition of a human rights clinic reflects these components. Thus, a human rights clinic is "a law school-based, credit-bearing course or program that combines clinical methodology around skills and

[14] For components of clinical legal education, see, Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L REV (1929,1930, April, 2002); and Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN ST INT'L L REV 421 at 423 (Winter 2004). Further, for a discussion on social justice mission of CLE in historical context see, Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L REV 1461 at 1496 (July-August,1998).

[15] There may be disagreement on pedagogical objectives of clinical teaching, however, "all of the pedagogical objectives described by clinicians further two key components of the mission of clinical legal education: (1) the skills training mission - including personal and professional responsibility – and (2) the social justice mission – teaching students about serving the needs of the poor and access to justice." Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L REV 307 at 309-10 (2001).

values training with live case-project work, all or most of which takes place in the human rights context."[16]

Most human rights clinics in the United States have existed only for about a decade. They are relatively new entities with no commonly acceptable definition.[17] While the exteriors of a human rights clinic are the same as those of any law school clinic, some of their interiors are marked by certain features of human rights lawyering.[18] However, all these interiors are not exclusive to human rights clinics; many of them reflect elements of 'different lawyering'.[19] A narration of the work of St. Mary's International Human Rights Clinic (IHRC) by Dubin lists many features of human rights clinics:

> The IHRC also balances its individual client asylum cases with larger law reform projects that focus more directly on the application of international human rights law and international institutions. Students are instructed in the multifaceted and interdisciplinary skills and techniques of international human rights lawyering to induce compliance with the human rights norms of various treaties and international instruments. Their work involves: documenting, reporting and pressuring governments to change abusive practices; engaging in international and domestic legal research and analysis to demonstrate why the law requires particular actions; recommending specific changes in law, policies, or practices to bring government into accord with human rights requirements; developing community education campaigns to help people understand what their rights are and how to exercise them; bringing abuses to the attention of the international institutions such as the United Nations and the Inter-American Commission on Human Rights; and litigation in domestic and international courts.[20]

[16] Carrillo, *infra* n. 18 at 533-34.

[17] Carrillo, *id.* at 531.

[18] Some features of human rights lawyering are discussed in Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J INT'L L (2003); Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM HUM RTS L REV 527 (2004); and Johanna Bond, *The Global Classroom: International Human Rights Fact-finding as Clinical Method*, 28 WM MITCHELL L REV 317 (2001).

[19] Many authors have emphasized the need for lawyers to explore and innovate ways to bring in social change. For example, Johnson argues that "advocates of social change, especially those trained in law should not expect too much reform from the courtrooms. They instead should consider how traditional legal action might complement and encourage – not replace – community activism and political involvement. Put simply, an exclusive focus on litigation will not accomplish fully the desired objective." Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to do?* 5 MICH J RACE & L 201, 205 (1999). Similarly, Villazoe makes a case for 'community lawyering', see, Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 NYUJ LEGIS & PUB POL'Y 35 (2004-2005); and Quigley advocates 'empowerment lawyering', see, William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO NUL REV 455 (1994).

[20] Dubin, *supra* n. 14 at 1496.

Thus, features of a human rights clinic include: unique clients; varied law and multiple fora; education and community organizing; collaboration, networking, and interdisciplinary approach; documentation, research and report writing; fact-finding and investigation; empathy; and policy initiatives.[21]

A. Unique Clientele

Perhaps the most striking feature distinguishing human rights clinics from the traditional clinics is their clients. Unlike general individual client-centred clinical programmes, human rights clinics have unique clientele. The clients of human rights clinics include human rights issues, norms, principles and NGOs.[22] Human rights clinics need not even have a direct contact with individual clients.[23] When human rights clinics work for NGOs, there may not even be a lawyer-client relationship between them. 'Partnership' is a more appropriate term to describe their relationship.[24] Thus, having an individual client is not a requirement of law school human rights clinics.

B. Varied Law and Multiple Fora

Human rights lawyering interacts with varied law and multiple fora. This diversity owes much to aspirations which are synonymous with human rights.[25] The UDHR and the ensuing human rights treaties contain provisions relating to almost every aspect of human existence.[26] Thus, from the right to life to the right to freedom of movement; from the right to education to the right to siesta; from the right to health to the right to a safe environment; from the right to legal aid to the right to freedom of speech; and from the right to development to the right to food and safe drinking water are included in the regime of human rights. Moreover, the right to equality puts all human beings on par for enjoyment of human rights. In addition, there are specific provisions for several different

[21] 'Global Rights,' a human rights advocacy group engaged in, *inter alia*, training lawyers for human rights lawyering recognizes "innovative litigation strategies," "community education and mobilization," "research," and "legislative advocacy," as features of human rights lawyering. 'Global Rights' believes that by applying these methods, lawyers have a greater impact on the development of society and the facilitation of community involvement in justice issues. See http://www.globalrights.org/site/PageServer?pagename=wwd_index_50. Accessed on April 20, 2007.

[22] *Supra* n. 18, Hurwitz at 533; Bond at 341-342.

[23] *Id.* Hurwitz at 533.

[24] *Ibid.*

[25] Indeed, the United Nations believes that human beings can only live their full life in the light of human rights. Therefore, on the fiftieth anniversary of the UNIVERSAL DECLARATION OF HUMAN RIGHTS, the Secretary General of the United Nations announced that to secure 'all human rights to all' is an aspiration of the United Nations.

[26] Together, the UDHR and the two Covenants (ICCPR, and the ICESCR) form the International Bill of Rights, and are thus, the most important and basic international human rights instruments.

categories of people. They include provisions on the rights of the child[27] and on women's rights.[28] Thus:

> The concept of human rights has greatly expanded beyond the traditional, western framework of civil and political rights to include non-conventional dimensions of economic and social rights – such as development, poverty, health, labour relations, and the politics of gender, indigeneity, disability and sexuality. With this dynamic set of substantive concerns, human rights practice uses varied law.[29]

Human rights lawyering has multiple fora. While these fora include both formal civil and criminal courts, there are several other bodies that are parts of these fora. They "include ad hoc tribunals, treaty regimes, domestic and regional legislatures, intergovernmental assemblies (e.g., the United Nations, the World Trade Organisation, and the Organisation for Security and Cooperation in Europe); the offices of and conferences of non-governmental organisations (NGOs); corporate meetings; and also the media and public opinion."[30] The International Women's Human Rights Clinic (IWHRC) at the Georgetown Law School gives students the opportunity to work with United Nations organizations and non-governmental organisations in Africa, Latin America, and the Middle East.[31] The work at the human rights clinic at the Yale Law School includes, *inter alia*, advising non-governmental organisations about using various international mechanisms to address human rights issues; and advocacy before international and regional human rights bodies.[32]

C. Education and Community Organizing

On the importance of human rights education, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, stated:

> The World Conference on Human Rights reaffirms that States are duty-bound, as stipulated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and in other international human rights instruments, to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasizes the importance of incorporating the subject of human rights education programmes and calls upon States to do so. ... Therefore, education on human rights and the dissemination of proper information,

[27] See, THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC), G.A. *Res.* 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, entered into force Sept. 2, 1990.

[28] See, THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW), G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 513, entered into force Sept. 3, 1981.

[29] *Supra* n. 18, Hurwitz at 513.

[30] *Ibid.*

[31] See, http://www.law.georgetown.edu/clinics/iwhrc/index.html#intro. Accessed on April 20, 2007.

[32] See. http://www.law.yale.edu/intellectuallife/lowensteinclinic.htm. Accessed on April 20, 2007.

> both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals without distinction of any kind such as race, sex, language or religion, and this should be integrated in the education policies at the national as well as international levels.[33]

Pursuant to the Vienna Declaration's emphasis on human rights education, the United Nations declared the ten-year period beginning on January 1, 1995 as the 'United Nations Decade for Human Rights Education'.[34] The United Nations resolution emphasised that:

> [H]uman rights education should involve more than the provision of information and should constitute a comprehensive life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies.[35]

Thus, the UN's efforts on human rights not only underscore the importance of human rights education but point at evolving other methods of involving and sensitizing people in human rights. Community organising, training and sensitisation can be seen as concomitant to achieving the objective of human rights education. Human rights lawyering needs to employ these methods to make rights real for people.[36] Thus, human rights advocacy includes public education, influencing public opinion, and campaigns on behalf of individuals and particular norms.[37]

The IWHRC emphasises on education programs. With an objective to raise public awareness on women's human rights, IWHRC's 'International Women's Human Rights Speaker Series' arranges six special lectures and/or films during the academic year.[38] As an example of the importance the IWHRC gives to public education it organized a public education program on the completion of a project in Poland to raise awareness within the law school and local communities on women's human rights in Poland.[39]

Clinic's work in the community empowers people and facilitates their participation in governmental decision making.[40] Through their work in the community, the students realise the need to reform the legal system and they develop "a heightened social consciousness and an enhanced sense of professional responsibility."[41] Jane Aiken asserts that "[e]xposure to the lives of

[33] VIENNA DECLARATION AND PROGRAMME OF ACTION, United Nations General Assembly Resolution A/CONF.157/23, paragraph 33 (12 July 1993).

[34] See, United Nations General Assembly Resolution A/Res/49/184.

[35] *Ibid.*

[36] *Supra* n. 18, Hurwitz at 516.

[37] *Id.* at 517.

[38] See, http://www.law.georgetown.edu/clinics/iwhrc/programs.html#clinical. Accessed on April 20, 2007.

[39] *Supra* n. 18, Bond at 327.

[40] Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN ENVTL LJ 3 at 56 (1995).

[41] *Id.* Babcock at 52.

the poor helps me and my students learn the ways in which legal power is distributed and exercised in American society – to what ends and in whose interests."[42] This leads to the conclusion that students' exposure to the community will provoke them to commit themselves to justice. Hence, exposing the students to the community can be one way for a clinician to act as a 'provocateur of justice'.[43]

Aspects of community organising and community lawyering can be learnt from the experience of community development and community lawyering clinics and can be replicated to develop human rights law clinics. For example, in the Community Lawyering Clinic at the New Mexico University, the students were asked to engage in community education project as part of their professional responsibility.[44] For this project, *inter alia*, the students prepared educational materials and conducted educational meetings and workshops.[45]

D. Fact-Finding/Investigation

Bond argues that "fact-finding as a clinical teaching method accomplishes many of the pedagogical goals normally associated with clinics, including coverage of social justice education, systemic legal problems, empathetic lawyering, issues of difference and privilege, sound legal judgement, collaboration and inter-disciplinary approaches to legal problems."[46] Thus, fact-finding exercise results in meeting the two primary Menkel-Meadow goals of teaching, the "micro" and "macro" aspects of lawyering.[47]

Through fact-finding exercises students not only learn and develop human rights lawyering skills, they also develop sensitivity for human rights needs of different groups of society. Their interaction with community and various actors from different fields helps them develop collaborative skills. Fact-finding exercises also help build community awareness on human rights issues. In fact, many of the features of human rights lawyering are interrelated. In the Georgetown Clinic's fact-finding mission in Poland, the students spent first few weeks researching various aspects of women's human rights violation situation in Poland.[48] When the students arrived in Poland, they collaborated and worked with Polish NGOs and the representatives of Minnesota Advocates. After their return from Poland, the students began writing the report. The students also organized a public education event on women's human rights in Poland. Thus, fact-finding

[42] Jane Harris Aiken, *Access to Justice: The Social Responsibility of Lawyers*, 16 Wash U JL & Pol'y, 81 at 85 (2004).

[43] See, Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L REV 287 (2001). Aiken aspires to be a provocateur for justice. According to her, "[a] provocateur is one who instigates, a person who inspires others to action. A provocateur for justice actively imbues her students with a lifelong learning about justice, prompts them to name injustice, to recognize the role they may play in the perpetuation of injustice and to work toward a legal solution to that injustice."

[44] See, Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L REV 315-16 (2001).

[45] *Id.* at 316.

[46] *Supra* n. 18, Bond at 327.

[47] *Id.* at 328.

[48] *Id.* at 326.

exercise includes, *inter alia*, research, collaboration, report writing and also public education.

E. Collaboration, Networking and Interdisciplinary Approach

Clinicians have long recognized the value of interdisciplinary and collaborative approaches to solving problems.[49] To advance legal services to the poor, clinic students have been collaborating and establishing relationships with local lawyers and community-based legal aid programs since the 'informal epoch' (pre 1970) of clinical legal education.[50] Collaborative work and interdisciplinary approach play a vital role to fill the gaps which cannot be filled by legal remedies.[51] A clinic's collaboration with a social worker serves some aspects of its quest to interact and serve the clients in a better way.[52] In an interdisciplinary collaboration, "the client gets the best of both worlds. Two professionals with a wealth of skills address community needs in the fullest way, and clients benefit from both perspectives and skills brought to bear on the problems presented, both legal and non-legal."[53] One benefit for the clinic in collaborating and networking with other groups, who work with the same clients, is the opportunity of critiquing each other's work to serve the clients in a better way.[54] Collaboration with groups and agencies in society also helps a clinic with case referrals.[55] For an effective collaboration, interdisciplinary work requires a number of skills.[56] According to Weinstein, these are: Communication skills; Knowledge of non-legal resources; Awareness of self and others; Understanding and appreciation of

[49] *Id.* at 338-339.

[50] Louise G. Trubek, *U.S. Legal Education and the Legal Services for the Indigent: A Historical and Personal Perspective*, 5 MD J CONTEMP LEGAL ISSUES 382 (1994).

[51] Martha Minow, *Lawyering for Human Dignity*, 11 AM UJ GENDER SOC POL'Y & L 143 at 159 (2002).

[52] For example, the Vanderbilt University Law Clinic has a social worker who works with the community and also the clinic. She is also a psychotherapist and takes care of many psychological problems of clients, a remedy which cannot come through legal action.

[53] Rose Voyvodic and Mary Medcalf, *Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor*, 14 WASH U JL & POL'Y 101 at 122 (2004).

[54] Kimberly E. O'Leary, *Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics*, 11 CLINICAL L REV 335, 353 (2005).

[55] For example, cases are referred to the Vanderbilt Legal Clinic from a number of different organizations. The Civil Practice Clinic gets most of its cases from the Legal Aid Society of Middle Tennessee and the Cumberlands; most cases for the Child and Family Law Policy Clinic come from the Juvenile Court of Davidson County and some from organizations concerned with children's issues; the Criminal Practice Clinic gets cases from the Public Defender's Office or through appointments by local federal and state courts; the Domestic Violence Clinic gets cases mainly from the Mary Parrish Center for Victims of Domestic & Sexual Violence; and cases to the Community and Economic Development Clinic are referred to from the mayor's office of neighbourhoods and other non-profit organizations. See, CLINICAL PROGRAM HANDBOOK, prepared by the faculty and staff of the Vanderbilt Legal Clinic (2006).

[56] Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH L REV 319 at 335 (1999).

group process; and Leadership skills.[57] LSHRCs need to focus on these skills given the dynamic nature of human rights lawyering.

F. Report-writing and Documentation

Report-writing and documentation are another set of features which further add to the diverse work which human rights clinics undertake. Generally, report-writing follows fact-finding and ultimately culminates into documentation. Law school clinics use report-writing and documentation as means to further the cause of protection and promotion of human rights. Investigation; report-writing on human rights situations; and preparation of policy papers for use in advocacy are some of the features of the human rights clinic at the Yale Law School.[58]

While clinics' documentation can be used as evidence and basis for future legal action or other advocacy purposes, their current reports can be shared with the media to achieve at least two objectives. First, publication of report in the media highlights the issue in question and thus garners public support and puts pressure on the authorities to take warranted action in a human rights violation/negation situation.[59] Secondly, media publicity also helps generate mass awareness on human rights.[60] In fact, as another benefit of this activity, law school clinics get publicity for their work and win community's confidence in them.

G. Empathy

Empathy is a requirement for human rights lawyering, as it is in all social justice advocacies.[61] Empathetic lawyering requires the ability in the lawyer to view the legal system through the client's eyes and appreciate her needs and circumstances. Empathy is a set of virtues which a human rights lawyer must possess. I personally felt the need for empathetic lawyering while I worked for my clinical course. This clinical course related to social justice advocacy and had some similarities with human rights clinics, at least in the context of empathetic lawyering. My experience in the clinical course drove me to conclude that a lawyer may be required to perform varied functions from being a friend to a nurse. Also, in all circumstances, a lawyer has to have patience, more so in cases involving the poor, the destitute and the infirm. A lawyer is the first and the most

[57] *Id.* at 335-340. Weinstein states that legal education does not inculcate in students most of the skills required for interdisciplinary work.

[58] See, http://www.law.yale.edu/intellectuallife/lowensteinclinic.htm. Accessed on April 20, 2007.

[59] For example, students at the Yale Law School Clinic, during the course of pursuing a law suit on behalf of homeless families, wrote op-ed pieces for local newspapers and called press conferences along with lobbying state legislatures to get the then existing housing policies changed. See, Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L REV 327 at 334 (2001).

[60] I, personally, have had the experience of writing press releases for local newspapers and witnessing their benefits for human rights advocacy. I used to regularly write press releases during my work with a grassroots human rights organization in India, "Antim Naagrik". These press releases were written on behalf of the organization on human rights situation at the local level. The media was very cooperative in publishing them as they were getting useful material to publish. This activity was quite helpful in educating people on human rights and lobbying support for them.

[61] *Supra* n. 18, Hurwitz at 522.

formidable link to justice. If this link is devoid of patience, can there be a hope for lesser-privileged seekers of justice?[62]

It is difficult to learn empathy in a classroom. The best way to develop it is through working with clients.[63] For example, at the Yale Law School Clinic, during the preparation for a law suit on behalf of nearly a thousand families facing eviction, some law students took care of client's children, while others worked on developing the case.[64] In another instance, the students spent a night with homeless people, in winter, at the New Haven train station before arguing against the proposed police action against homeless people.[65] Thus, a human rights clinic requires the students to practice humane and compassionate lawyering. Humane lawyering is an integrated approach of therapeutic jurisprudence.[66] Hence, human rights clinics share some features of therapeutic jurisprudence.

H. Policy Initiatives

Discussing a human rights approach to advocacy, Hurwitz emphasises the need to change not only laws but also social structures that cause injustices.[67] Thus, she points out at policy level initiative as part of human rights advocacy. The kind of policy initiatives undertaken by human rights clinics can be understood from the work the IWHRC does or has done in this regard. The IWHRC drafted proposed domestic violence legislation for both Ghana and Uganda; developed and proposed a scheme for property control and ownership during marriages and at divorce; developed legislation banning polygamy and bride price in Uganda; and drafted proposed employment discrimination legislation to address workplace problems like sexual harassment.[68]

[62] In my clinic course at the Vanderbilt University Law School, I had the privilege of representing a social security claimant, a homeless person, before the Administrative Law Judge. This client would often not come in time – even not come at all on a scheduled appointment day. He would often remain incommunicado. Sometimes he would come much earlier than the scheduled appointment. I had no choice but to somehow adjust to his schedule. In this process I learnt a great deal of patience and also learnt to relate to people who are situated in difficult circumstances.

[63] *Supra* n. 18, Bond at 333.

[64] See, Stephen Wizner. *Beyond Skills Training*. 7 CLINICAL L REV 327 at 334 (2001).

[65] *Id.* at 335. Through field projects and classroom discussion, the Human Rights Clinic at the Yale Law School encourages students to develop sensitivity to human rights issues. See, http://www.law.yale.edu/intellectuallife/lowensteinclinic.htm. Accessed on April 20, 2007.

[66] See, Leslie Larkin Cooney, *Heart and Soul: A New Rhythm for Clinical Externships*, 17 ST. THOMAS L REV 407 at 411(2005). "Therapeutic Jurisprudence has been defined as the study of the law's role as a "therapeutic agent." This description has evolved from the understanding that the law, its rules, and procedures, have both therapeutic and anti-therapeutic effects on one's mental health." Cooney argues that interpersonal skills, such as empathy, are necessary for creative lawyering. However, Cooney maintains, that "in the typical law school class empathy is not something to be tolerated; professors frequently reinforce the notion that feelings get in the way of analysis and should be discarded, or at least suppressed." Introduction to therapeutic jurisprudence will not only develop interpersonal skills in students, but will also give validation to the importance of such skills.

[67] *Supra* n. 18, Hurwitz at 517.

[68] See, http://www.law.georgetown.edu/clinics/iwhrc/index.html#intro. Accessed on April 20, 2007.

Thus, an LSHRC shares essential features of any law school clinic and major objectives of clinical legal education. It shares much in common with features of social justice advocacy. Thus, its proclivity is towards the social justice objective of clinical legal education. The dynamic nature of human rights field requires a human rights clinic to adopt different and creative lawyering strategies. Diverse requirements of human rights lawyering make it difficult to have a single definition of human rights clinic. Additionally, because of relatively recent origin of human rights clinics and their scant existence, clinicians have not had sufficient opportunity to develop literature on them. Therefore, features of social justice advocacy clinics help in understanding characteristics of human rights clinics.

III. Scope of Work for LSHRCs in India

This part, through some examples, identifies some scope of work that LSHRCs in India can be involved in. The first five sections in this part discuss aspects related to (i) the fora, clients and entities with whom law school human rights clinics can collaborate; (ii) literacy, training/sensitization; (iii) fact-finding and investigation; (iv) documentation, research, report-writing and writing of press-releases; and (v) policy initiatives. The last section, briefly submits that an LSHRC can meet the requirements of a substantive part of the four compulsory papers.

A. Fora, Clients and Collaboration

Some of the most prominent fora for human rights activism include the Supreme Court; High Courts; National Human Rights Commission (NHRC); State Human Rights Commissions (SHRC); District Human Rights Courts (DHRC); National Commission for Women (NCW); The National Commission for Protection of Child Rights (NCPCR) and other institutions to be established under the Commissions for Protection of Child Rights Act, 2005; Juvenile Justice Boards and Child Welfare Committees; and Legal Services Authorities at various levels.

In addition to individuals and groups of individuals, the main clients of law school clinics will include NGOs and issues of human rights.[69] Some NGOs working in bigger cities have the lawyers working with them to take care of legal and related issues that they need to do their work.[70] However, many others, especially those who work at the grassroots, lack such expertise. Law school clinics can help arm such NGOs with required inputs. Government agencies can also rely on law school clinics to help them carry out their responsibilities on human rights. Since human rights clinics do not necessarily have to rely on

[69] Some human rights issues on which India's National Human Rights Commission works include: the right to food; the right to health; child labour; rights of the disabled; HIV/AIDS; trafficking in women and children; sexual harassment of women at work place; and manual scavenging. See, http://nhrc.nic.in. Accessed on April 20, 2007. In addition, there is a range of other issues on which human rights NGOs work in India. They include: the right to housing; the right to water; the right to development; and the right to information.

[70] For example, NGOs like Commonwealth Human Rights Initiative, Human Rights Law Network and Lawyers Collective.

individual clients, human rights clinics in India will not face the problem of not having clients or work.

LSHRCs can collaborate with various government and non-government human rights organisations. In addition, they can also collaborate with other similar clinics in the United States which are working globally on human rights issues.[71]

B. Literacy, Training and Sensitization

For human rights literacy, training and sensitization programs, law school clinics can collaborate with Legal Services Authorities, NHRC and NCW. All of these agencies have provisions for supporting such programs. Legal services authorities conduct community legal awareness programs. The National Legal Services Authority has also launched the National Legal Literacy Mission 2005-2010. The NHRC has a mandate to carry out literacy, training and sensitization programs. The NCW has programs for community legal literacy.[72] More recently, it has launched, '*Chalo Gaon Ki Ore*', a grassroots literacy program on various aspects of women's human rights.[73] These agencies also provide funds to support their programs. Law school clinics can collaborate with these agencies and support their programs and at the same time generate work for themselves. Collaborating with these agencies will also help clinics with financial support.

In addition, clinics can also initiate their own programs to educate, sensitize and train various sections of society on human rights needs. These programs will aim at generating community awareness, training of activists, and sensitization of police, judicial officers and lawyers. Law school clinics can act as human rights lighthouse in areas of their coverage. As lighthouse, clinics can enlighten communities on their human rights and thus empower them. Also, they can shun ambiguities on human rights and thus help human rights protection agencies, particularly police, in taking informed and right actions. Thus, clinics can provide a platform to constantly guide communities, law enforcement and other related agencies involved in day-to-day human rights issues.

C. Fact-finding/Investigation

There are at least two ways in which law school clinics can contribute in fact-finding and investigation aspects of human rights lawyering. First, they can do it themselves and secondly, they can do it in collaboration with the NHRC. Clinics can themselves take up fact-finding and investigation of human rights violation situations either on the requirement of a client or on their own. If there is no client, clinics can still take up fact-finding and investigation of incidences of human rights violations on noticing them in the media.

[71] For example, the Lowenstein International Human Rights Clinic at the Yale Law School collaborated with the Indian NGO, Lawyers Collective, to work on its project on human rights aspects of HIV/AIDS. See, *supra* n. 18, Hurwitz at 533.

[72] See, http://ncw.nic.in/Legal%20Awareness%20Programme.pdf. Accessed on April 20, 2007.

[73] See, http://ncw.nic.in/Chalo%20Gao%20Ki%20Ore.pdf. Accessed on April 25, 2007.

The NHRC is training human rights activists in fact-finding and investigation techniques throughout the country.[74] It requires trainers and also organizations to give momentum and formidable support to its efforts. Law school clinics can be the most appropriate institutions to fulfil these needs. They can collaborate with the NHRC in training their students on the techniques of fact-finding and investigation. Subsequently, these trained law students can act as trainers to further prepare more and more trained people to investigate cases of human rights violation.

D. Documentation, Research, Report-writing and Writing of Press-releases

Law school clinics can develop documentation on human rights issues. This will help students in researching human rights issues, in identifying issues and in writing reports and press-releases. Clinics can also help their clients with this documentation. Documentation will also help law school clinics as evidence to support their representation before various human rights fora.

Law school clinics can conduct research on local human rights issues and publish their reports on them. These research and reports can be used for various purposes including submissions before different fora and as a basis for legal actions. They can also be of immense help to law school clinics in taking a stand on policy interventions. Clinics can take up such research for themselves or on behalf of their clients.

Writing of press releases is an activity which will help law school clinics in focusing on issues and in generating public awareness on them. Through press-releases, clinics can propagate the correct position on human rights issues and educate various stake-holders – police, judiciary and media – accordingly. This activity will not only help develop a culture of human rights but will also popularize law school clinics and consequently strengthen the CLE movement.

E. Policy Initiatives

Policy making in a democracy demands peoples' participation. In India, suggestions are invited from general public when a policy is formulated. Law school clinics can participate in this process and make their submissions and depositions on various aspects of human rights.

Clinics can also make their interventions in matters related to India's accession to Human Rights treaties. For example, India has signed the Convention against Torture (CAT), however, it has not ratified it even though the NHRC has made recommendation to the government for its ratification.[75] Law school clinics can join with the NHRC in consolidating the demand for the ratification of the treaty. They can collect evidence to substantiate their demand.

[74] The NHRC and the British Council in India have initiated human rights investigation and fact-finding training programs for preparing resource persons throughout India to help promote human rights through fact-finding and investigation techniques. Later, the NHRC collaborated with the Indian Social Institute and has organized a number of fact-finding and investigation training programs in the country.

[75] India signed the CAT in 1997 and since then its ratification is pending.

This will also require considerable research on human rights issues from law school clinics.

Functioning of DHRCs is another area wherein law school clinics can intervene to benefit the regime of human rights. Ten States have established DHRCs[76] but there is a lot of ambiguity as regards their composition and functioning. NHRC has made its own proposal for the effective realization of these bodies. However, even the NHRC's proposal is inadequate. NHRC has its limitations and needs support in formulating and carrying forward policy level initiatives. Law school clinics can have a role here. They can research the issue and suggest effective policy changes on proper functioning of DHRCs. They will have the capacity and will be in a better position to analyse various aspects of DHRCs' functioning than the people sitting in the NHRC at the national capital. Also, since the Protection of Human Rights Act is silent on SHRCs' functions, law school clinics can make their intervention in getting their functions defined. Similar kinds of initiatives are required to strengthen the institutions created through the Commissions for Protection of Child Rights Act, 2005.

F. LSHRCs and the Four Practical Papers

Legal education in India does not restrict itself only to teaching the courses prescribed by the Bar Council of India. In addition to teaching the prescribed compulsory subjects, law schools offer a number of new and socially relevant law subjects to prepare the students to successfully meet the challenges that newer developments pose to the regime of rule of law. An LSHRC, in addition to strengthening the regime of human tights and meeting the larger objectives of CLE, also covers substantive part of the syllabus of the four compulsory practical papers. To fulfil the requirement of the first paper, the students in the LSHRC will organise and participate in a moot court involving a human rights case. They will, in the process of moot court, learn pre-trial preparation and finally will participate in trial proceedings, preferably in a human rights court. Through this exercise the students will not only work for their first compulsory paper and learn several aspects of human rights lawyering, they will also educate and inform the functioning of human rights courts in respective districts.

LSHRC's work requires considerable amount of legal research and writing. Thus, an LSHRC's work naturally meets many requirements of the second paper, 'Drafting, Pleading and Conveyancing.' Some parts of the syllabus of the third paper, 'Professional Ethics, Accountancy for Lawyers and Bar-Bench Relations,' may not be directly related to the work of an LSHRC. However, those aspects may be included in the clinic to fulfil all the requirements of the third paper. Finally, the fourth paper, 'Public Interest Lawyering, Legal Aid and Para-legal Services,' is directly related to the work of an LSHRC. The fourth paper requires the students to work in programmes like Lok Adalats, Legal Aid Camps, Legal

[76] These states are: Assam, Andhra Pradesh, Sikkim, Tamil Nadu, Uttar Pradesh, Meghalaya, Himachal Pradesh, Goa, Madhya Pradesh and Tripura. See, NATIONAL HUMAN RIGHTS COMMISSION ANNUAL REPORT 16 (2001-2002).

Literacy and Para-legal Trainings, all of which are also essential and important elements of an LSHRC.

IV. CONCLUSION

Thus, establishing LSHRCs in India is easy and affordable, given the conducive environment and possibilities of institutional support. Through these clinics, law schools will not only work for the protection and promotion of human rights, they will achieve the twin objectives of CLE. Clinical legal education, at least in some form, is set to become an essential feature of law schools in India. Seen in this narrow sense, an LSHRC will serve much of the purpose of the four compulsory practical papers prescribed by the Bar Council of India. However, the formation and functioning of law school clinics in India will need constant guidance and support. Scarcity of resources and clinicians and ineligibility of law teachers and students to practice law will continue to plague Indian law schools' quest for a full-fledged clinic unless they look for alternatives and make innovations.

Human rights law is a well developed and popular law subject in India. It is not very difficult to find law teachers who can teach human rights law courses. India has many human rights fora where law school clinics can practice and learn aspects of human rights lawyering. LSHRCs will strengthen the clinical legal education movement and the human rights movement in India. Active involvement of law students in human rights work will develop a culture of human rights in the country. In addition, these clinics will strengthen the justice delivery mechanism in the country by preparing better skilled and qualitative lawyers.

INTERNATIONAL REGULATIONS ON PERSISTENT ORGANIC POLLUTANTS AND INDIAN EXPERIENCE

*P.S. Nerwal**

I. INTRODUCTION

The man-made miracle synthetic chemicals developed to control disease, to combat insect pests, and to provide comfort and convenience in daily life have caused and continue to cause a serious damage to the health of wildlife and people.[1] The unique dangers posed by one group of chemicals called Persistent Organic Pollutants, known as POPs, have become a pressing concern. These carbon based compounds or mixtures have caused all pervasive and global contamination now. Severity of the problem has forced the international community to negotiate a global POPs treaty for successful, safe, viable and sustainable alternatives to POPs.[2] To understand different types of driving forces of POPs it is necessary to evaluate international regulations and agreements for management of POPs, compare with Indian initiatives, suggest priority areas for India for learning from international experience and suggest changes in the legislation to fill the gaps, if any, in the existing regulations and Indian laws.

II. NATURE AND CHARACTERISTICS OF THE POPS

POPs are organic substances that possess toxic characteristics which are persistent, bioaccumulate, prone to long-range transboundary transport and deposition and are likely to cause significant adverse effects on human health or environment near to and distant from their sources.[3] These chemical substances, industrial chemicals and unwanted by-products of industrial processes or combustion persist in the environment, bioaccumulate and magnify in the food web.[4] Threat to the environment is global due to their capacity to long-range transport to regions where they have never been used or produced.[5] POPs pose a particular hazard because of their toxicity to animals and people, their persistence in the environment, and in the fatty tissues of living organisms. They are common contaminants of fish, dairy products, eggs,[6] and other foods around

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

[1] See, Rachel Carson, *Silent Spring*, (2006) available at www.fws.gov/northeast/rachelcarson. Accessed on June 30, 2006; See also, Theo Colborn *et al, Our Stolen Future* (1996) available at www.oustolenfuture.org. Accessed on February 20, 2007; Carl F Cranor, *Regulating Toxic Substances, A Philosophy of Science and Law*, 6 HARVARD JOURNAL OF LAW AND TECHNOLOGY 435 (1993).

[2] Brandy E. Fisher, *Most Unwanted: Persistent Organic Pollutants*, 107 ENVIRONMENTAL HEALTH PERSPECTIVES 1 (1999).

[3] Art. 1.7, AARHUS PROTOCOL ON PERSISTENT ORGANIC POLLUTANTS (1992).

[4] *Id.* Preamble.

[5] David J. Tenenbaum, *Northern Perspective*, 106 ENVIRONMENTAL HEALTH PERSPECTIVES 2 (1998).

[6] *Eggs in India Carry High Levels of Dioxins*, TIMES OF INDIA, New Delhi, 18th Oct, 2005. See also, Ronald A. Christaldi, *Dying from Dioxin: A Citizen's Guide to Reclaiming Our Health and Rebuilding Democracy (1995) by Lois Marie Gibbs (eds)*, 11 JOURNAL OF LAND USE AND ENVIRONMENTAL LAW 467 (1996).

the world. POPs in the human body fat cause serious health problems including reproductive and developmental problems, cancer, and immune system disruption.

POPs include many pesticides, dioxins, furans, and PCBs. Because of their tendency to accumulate in fatty tissue, many are found in significant quantities in human breast milk.[7] Many are mobilized during pregnancy when fat reserves are depleted, and subsequently find their way through the placenta to the newly developing fetus. They cause disruption of endocrine systems,[8] suppression of immune system functions, and carcinogenic traits. These cause long-term, irreversible effects on the development of fetuses[9] and can damage reproductive and immune systems of both exposed individuals and their offspring. Their acute adverse effects result from accidental exposure or ingestion and even from long-term, low-level exposure. They break down very slowly and remain in the environment for long. While the risk level varies from one Persitent Organic Pollutant to the other, they all share highly toxic properties.[10] Their four main traits are toxicity; persistence, potential for long range transport and bio-accumulation in living tissues.

Some developed countries continue to produce POPs and chemicals for export to developing countries despite a ban on their own domestic use and efforts to reduce and eliminate their releases.[11] The developing countries still produce and use POPs in agriculture and vector and disease control. Stockpiles of unwanted POPs exist in many parts of the world. Some equipment like electrical transformers and capacitors contain POPs. These chemicals end up in rivers and oceans and waves carry them far to other countries.[12] They are linked to myriad effects of low sperm counts, infertility, genital deformities, and harmonically triggered human cancers, neurological disorders in children and developmental and reproductive problems in wildlife.[13]

[7] Preamble, STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS (2001).

[8] See, Jason W. Birkett, *Endocrine Disruptors and Sludge Treatment Processes*, 111 ENVIRONMENTAL HEALTH PERSPECTIVES 10 (2003).

[9] M.V. Cherkasova, *POPs and the New Insight into Environment Related Diseases*, available at www.accord.cis.lead.org. Accessed on February 10, 2006.

[10] Available at www.unido.org. Accessed on February 25, 2006; *See also*, UNEP; *Ridding the World of POPs: A Guide to the Stockholm Convention on POPs*, available at www.POPs.int. Accessed on December 27, 2006.

[11] K. Madhava Sarma, *Persistent Organic Pollutants: The New Danger*, available at www.indeconomist.com. Accessed on October 18, 2005.

[12] *Background Document on Chemicals, Northern Perspectives*, Center for International Environmental Law (Oct. 2005) See also, *POPs in Polar Bears: Organochlorine Affects Bone Density*, 112 ENVIRONMENTAL HEALTH PERSPECTIVES 17 (2004).

[13] USEPA: *POPS - A Global Issue, A Global Response*, available at www.epa.gov/oia. Accessed on October 18, 2005. See also, *Male Fertility: Sperm Abnormalities in Men Exposed to PCBs and PCDFs*, 111 ENVIRONMENTAL HEALTH PERSPECTIVES 12 (2003).

POPs are ubiquitous, found in the most remote areas, and remain in the environment even at extremely low levels.[14] Convection currents carry them to colder regions, like Himalayas, to persist for longer periods and to re-enter the ecosystem through rivers.[15] They travel within the environmental region mainly through fresh water systems, atmospheric and marine currents. From agricultural fields and industrial waste they are transported by absorption with sediment and organic matter in streams leaving a certain amount in the water. These enter the food chain through fish raised in contaminated water bodies and by direct consumption of such water. Air transport can occur through precipitation and movement of dust particles with absorbed POPs. Most inflows into the marine environment occur due to the river-flows. It also occurs due to direct discharges into the sea, ship traffic, ship scrapping and through the atmospheric route.

POPs entering the environment go to places far from their point of origin[16] in a number of 'hops' through evaporation, transport and condensation at lower temperatures. This phenomenon is called the "grasshopper effect".[17] They can become widely dispersed in a matter of days or weeks on air currents, and more slowly in rivers and ocean currents. The Arctic,[18] Antarctic and mountain areas represent the ultimate fate of these chemicals. They concentrate in living organisms through the process of "bio-accumulation"[19] and magnify through "bio-magnification".[20] Humans can be exposed to them through diet, occupational accidents and the environment.[21] Even their low exposure can cause cancer and reproductive disorders, damage the nervous and immune systems, and interfere with infant and child development.

POPs have point and non-point sources.[22] Point sources include the form of manufacturing and stockpiles of obsolete, unwanted or date-expired pesticides. The use of pesticides, causing crop run-offs or leaching into ground water, and DDT in malaria control constitutes non-point sources. The beauty products

[14] Marc Pallemarts, TOXICS AND TRANSNATIONAL LAW: INTERNATIONAL AND ENVIRONMENTAL REGULATION OF TOXIC SUBSTANCES AS LEGAL SYMBOLISM (2003).

[15] Papiya Sarkar, *The Persistent Peril, DDT Found in Blood in Himachal Pradesh, India*, and *Fighting the Menace of POPs*, available at www.toxicslink.org. Accessed on March 25, 2007.

[16] Available at www.ienearth.org/POPs.arctic. Accessed on December 23, 2005. See also, Centre for International Environmental Law, *US Ratification of the Stockholm Convention: Analysis of Pending POPs Legislation*, March 13, 2006 Update.

[17] See, George W. Lucier, *Book Review - Arnold Schechter and Thomas A. Gasiewicz (eds), DIOXINS AND HEALTH (2nd ed 2003)*, 111 (12) ENVIRONMENTAL HEALTH PERSPECTIVES A670 (September 2003).

[18] *Supra* n.7, Preamble.

[19] Available at www.chem.unep.ch. Accessed on April 15, 2007. See also, *Children's Health: Time Trends of Persistent Organic Pollutants and Heavy Metals in Umbilical Chord Blood of Inuit Infants Born in Nunavik between 1994 and 2001*, 111 ENVIRONMENTAL HEALTH PERSPECTIVES 13 (2003).

[20] *Supra* n. 15.

[21] 113 ENVIRONMENTAL HEALTH PERSPECTIVES 3 (2005): See also, *When Pregnant Moms Eat Fish, Kids do Better*, available at www.NewsMax.com. Accessed on February 19, 2006.

[22] Tina Sarkar, *Stockholm POPs Convention - Overview & Status of US Ratification and Implementation*, available at www.toxicslink.org. Accessed on March 25, 2007.

render the pregnant women and fetus to risk, as their harmful phthalates content,[23] pass down to the fetus and cause infertility and reproductive problems.[24] Solid and medical wastes and hazardous wastes are also source of POPs.[25] Mosquito repellents also produce POPs due to release of formaldehyde on burning. Children are vulnerable to air pollutants; drinking water, food and land contaminants; pesticides in plastic toys;[26] and tobacco smoke due to their smaller lungs and less developed immune systems and may contribute to developmental, learning and behavioral disabilities among them.[27] POPs can also render even the vaccines ineffective.[28]

III. MANAGEMENT OF POPS - A PROBLEM

The acute problem of POPs relates to management of their existing stockpiles and stopping their further creation. First problem involves identification of the stockpiles, taking inventories, assessing adverse effects and their disposal. Developing scientific and technological knowledge to check their future generation relates to the other. Developing the alternatives to POPs and conducting scientific and technological research requires a specific plan of action and huge resources. There is inadequate awareness on POPs hazards, alternatives and current uses, and the regulations to manage their use. United States alone, for example, has over 400,000 cancer deaths annually, of which sizeable percentage are due to workplace exposure to carcinogens.[29] Waste incineration is a major source of unintentional creation. Industries still use polluting processes. E-waste has now become a major source of toxic chemicals.[30] International community has since woken up and developed an international legal framework[31] for regulation of POPs.

South Asia, with rapid urbanization and waste generation,[32] is the current hotspot for toxics and is just not yet ready to face the situation. Instances of dumping of hazardous waste and the harmful effects thereof, including deaths,

[23] See, Todd Stedeford *et al*, *Environmental Quality and Health: Got Merc? Regulating Mitigating and Litigating Mercury Levels for the Fish We Eat*, 20 JOURNAL OF LAND USE 2 (2005).

[24] Jerry Phelps, *DDT and DDE: Effect on Second Generation Time of Pregnancies*, 111 ENVIRONMENTAL HEALTH PERSPECTIVES A759 (2003).

[25] On Sep. 11, 2001, the burning at 1800° F of WTC debris of asbestos, concrete, computers, carpeting, furniture, etc., created a gaseous cloud of potentially toxic dust. Exposure to asbestos, PCBs, dioxins, lead and other metals was hazardous to the firemen and other workers and also to the children in nearby schools. Luz Claudio, *Environmental Aftermath*, 109 ENVIRONMENTAL HEALTH PERSPECTIVES A529 (2001).

[26] Susan L. Cutter, HAZARDS, VULNERABILITY AND ENVIRONMENTAL JUSTICE 57-64 (2007).

[27] *Ibid.* See also, *Supra* n. 23.

[28] *Exposure to POPs like PCBs Causes Decreased Antibody Production in Children*, CSE NEWS BULLETIN, Feb 15, 2007.

[29] 113 ENVIRONMENTAL HEALTH PERSPECTIVES 3 (2005).

[30] *Upgrading to an iPod: E-waste is Becoming One of the Major Environmental Issues of Our Time*, THE HINDU, New Delhi, 21st Nov 2005. See also, Charles W. Schmidt, *Unfair Trade: E-Waste in Africa; Spheres of Influence*, 114 ENVIRONMENTAL HEALTH PERSPECTIVES 232 (2006).

[31] THE STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS (2001) adopted by the UN.

[32] *India Next Global Hotspot for Toxics*, TIMES OF INDIA, New Delhi, 21st Nov 2005 available at www.toxicslink.org. Accessed on March 25, 2007.

abound.[33] Huge accumulation of stockpiles of hazardous substances and wastes contain POPs. The regulatory systems are inadequate to protect public health and the environment from harm caused by chemical exposures and accidents. The chemicals management capacity of most developing countries is either rudimentary or non-existent. Frequent mishandling, misuse, and improper disposal of hazardous chemicals cause high exposures to people and environment, poisonings, toxic spills and accidents.[34] Developed world also has the mismanagement problem, especially by industries that operate in or near economically disadvantaged and minority communities. The constant, low-level chemical exposure of people from ordinary foods, building materials, carpets and wall coverings, hospital supplies, cosmetics, electronics, and agricultural chemicals is also serious. The chemicals-producing industries generally deny the relationship between low-level exposure and harms to human health. But the steady rise of breast, prostate and other cancers, autism and learning disabilities, reproductive abnormalities and genetic mutations with inter-generational effect is alarming. Yet, it is still widely believed that chemicals are innocent until proven guilty. People have false belief that governments are ensuring safety from chemicals used.[35] Regulators still insist on certainty about an unacceptable risk of a chemical to health or the environment. Exposures are most insidious in children whose developing bodies are especially vulnerable and in women of child-bearing age who unwittingly pass on a toxic legacy to their offspring.[36]

IV. PERSISTENT ORGANIC POLLUTANTS: INTERNATIONAL REGULATIONS

In the pre-Stockholm era, extending to 1968, the landmark Trail Smelter Arbitration awarded damages to United States for air pollution originating in Canada.[37] A wave of public concern about the environment in Europe and North America beginning in the 1960s[38] peaked during the early 1970s. Dispersion of DDT and other toxic substances through ecosystems, radioactive contamination from the testing of nuclear weapons and damage to forests and aquatic life from acid deposition[39] required urgent attention. The law prohibiting dumping of wastes at sea emerged during this period. The subsequent period unto 1987 witnessed the growth of environmental law in the spirit of the Stockholm Declaration 1972. The Rio era, starting with the Brundtland Report, set the stage for the Earth Summit and Agenda 21 in 1992. These sources of soft environmental law[40] enabled the Basel Convention 1989 and the POPs

[33] *Environment Foes may Face Jail in EU*, THE TIMES OF INDIA, New Delhi, February 12, 2007.

[34] See also, *China Toxic Slick, Tones of Chemical Flowed into the Songhua River in China Polluting the Water with Benzene Affecting 3.8 Million People*, THE TIMES OF INDIA, New Delhi, Nov 26, 2005.

[35] *A Forecast for U.S. Reform of Chemicals Policy*, Centre for International Environmental Law presented at ChemCon (2006).

[36] *Supra* n. 22, available at www.toxicslink.org. Accessed on 25 March 2007.

[37] See, Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCL*, 14 NYU ENVIRONMENTAL LAW JOURNAL 236 (2006).

[38] *Supra* ns. 1 and 14.

[39] See, Donella H. Meadows *et al*, THE LIMITS TO GROWTH: THE 30 YEARS UPDATE (2005).

[40] Norman J. Vig (*ed*), THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 103 (2006).

Convention 2001 as the legal instruments to tackle the specific problems of hazardous wastes and toxics trade.

A. UN Conference on Human Environment, 1972: The Stockholm Declaration

The Stockholm Declaration proclaimed that the natural and man-made aspects of environment are essential to man's well-being and enjoyment of basic human rights, the right to life itself.[41] The fundamental right to freedom, equality and adequate conditions of life needs an environment of a quality that permits a life of dignity. Man has a solemn responsibility to protect and improve the environment for present and future generations.[42] Major environmental damage is caused generally by industrial and technological development.[43] The 'assimilative capacity' rule[44] assumes that scientific knowledge and means would be available to enable the environment to assimilate adverse impacts of pollutants; and relevant technical expertise and sufficient time would also be available to predict and prevent the environmental harm. But the states should take possible steps to prevent pollution by hazardous substances harmful to human health, living resources and marine life.[45] They should use science and technology to identify, avoid and control environmental risks and solve the environmental problems for the common good of mankind.[46] The moral high ground adopted by the declaration and the problem of toxics pollution led the UNEP to take steps for prevention of marine pollution from land based sources, protection of the stratospheric ozone layer, and the handling and disposal of toxic wastes.[47]

B. World Charter for Nature, 1982

The World Charter declares that every form of life is unique; human life and nature deserve respect and be guided by a moral code of conduct. Man's needs should be met only by ensuring the proper functioning of natural systems making it an integral part of planning process of social and economic development activities. The activities harmful to nature should be controlled by use of best available technologies to minimize significant risks to nature or other adverse impacts.[48] Moving from the 'assimilative capacity' approach to the 'precautionary approach'[49] it stated that the activities which are likely to cause irreversible damage to nature and the discharge of pollutants into natural system should be avoided. Discharge of pollutants like radioactive or toxic wastes into

[41] Proclamation 1, STOCKHOLM DECLARATION ON THE HUMAN ENVIRONMENT (1972).
[42] *Id.* Principle 1.
[43] *Id.* Proclamation 4.
[44] *Id.* Principle 6.
[45] *Id.* Principle 7.
[46] *Id.* Principle 18.
[47] *Supra* n. 40 at 38.
[48] Principle 11, WORLD CHARTER FOR NATURE (1982).
[49] Principle 15, RIO DECLARATION ON THE ENVIRONMENT AND DEVELOPMENT (1992).

natural systems should be avoided and preferably treated at source.[50] The states, individuals and other institutions should protect and conserve nature in areas beyond their national jurisdiction also.[51]

C. The Rio Declaration on Environment and Development, 1992

The Earth Summit proclaimed that human beings, being at the centre of concerns for sustainable development, are entitled to 'a healthy and productive life in harmony with nature'.[52] The concept of 'common but differentiated responsibilities'[53] combines the common responsibility of states to protect certain environmental resources, their individual circumstances and contribution to environmental problems and ability to prevent, reduce and control the threat.[54] The states should adopt the 'precautionary approach' as per 'their capabilities', to 'prevent environmental degradation'.[55] They should enforce the 'polluter pays principle'[56] to force the polluter to bear the cost of pollution in public interest without distorting international trade and investment. They should not cause damage to the environment of other states or areas beyond their national jurisdiction.[57] The concept of intergenerational equity[58] obligates the states to ensure access to information on environment including hazardous materials and activities in their communities'.[59] Global environmental issue with transboundary impacts should normally be based on an international consensus.[60] States should develop liability and compensation regimes for the victims of pollution and other adverse effects of environmental damage caused by activities within their jurisdiction or control or beyond their jurisdiction.[61] The Rio Declaration reinforces the Brundtland Commission's report, OUR COMMON FUTURE, for its recognition that poverty and under-development were important causes of environmental degradation[62] in developing countries.

D. Agenda 21

This plan of action urged the states to develop and implement policies which, among others, target effective reproductive and children health care[63] and take preventive measures reckoning with urban health hazards and risks from environmental pollution.[64] The states should reduce the use of chemical

[50] *Supra* n. 48, Principle 12.
[51] *Id.* Principle 21.
[52] *Supra* n. 49. Principle 1.
[53] *Id.* Principle 7.
[54] *Supra* n. 40 at 129.
[55] *Supra* n. 49.
[56] *Id.* Principle 16.
[57] *Id.* Principle 2.
[58] *Id.* Principle 3.
[59] *Id.* Principle 10.
[60] *Id.* Principle 12.
[61] *Id.* Principle 13.
[62] *Adverse Effects of Pesticides and Chemicals*, available at www.ourstolenfuture.org. Accessed on February 20, 2007
[63] Agenda 21: Chapter 5, Section 1, Social and Economic Dimensions.
[64] *Id.* Chapter 6, S. 1, Social and Economic Dimensions.

pesticides, prevent the spread of diseases and toxins and develop methods especially those resistant to pesticides and treatment of organic chemical wastes.[65] They should apply 'polluter pays principle' and use economic incentives to reduce or eliminate discharges of synthetic chemicals; control and reduce toxic waste discharges; and stop ocean dumping and incineration of hazardous waste at sea.[66] They should use less or non-chemical technologies, review the use of outdated pesticides, develop alternatives, and adopt chemical-hazard labeling and prior information system to control the export of banned or restricted chemicals.[67] They should resort to environmentally sound management of hazardous wastes[68] and transfer environmentally sound technologies to the developing countries and encourage research and development of such technologies and management systems.[69] For sustainable agriculture, the farmers should be encouraged to make most efficient use of chemicals.[70] Ocean dumping and incineration of hazardous wastes at sea should be stopped.[71] Agenda 21 advocates the wide-spread use of recycling, capture, and use of factory wastes.

E. Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, 1989

The Basel Convention 1989 obligates that hazardous waste trade takes place only after the recipient country has been informed of a proposed transfer of hazardous waste substances and gives its approval.[72] The hazardous wastes, a major source of toxic chemicals, should be treated and disposed of as close to the source of generation as possible and in an environmentally sound manner.[73] States should follow a prior informed consent procedure for trans-boundary movement of hazardous wastes. This requires increasingly sophisticated technology to track exports and imports of controlled items.[74] The export of such wastes to countries that are not equipped to deal with the same should not be permitted.

Wastes are substances or objects which are disposed of, or are intended to be disposed of, or are required to be disposed of by the provisions of national

[65] *Id.* Chapter 16, S. 2, Conservation and Management of Resources.
[66] *Id.* Chapter 17, S. 2.
[67] *Id.* Chapter 19, S. 2.
[68] *Id.* Chapter 20, S. 2.
[69] *Id.* Chapter 34, S. 4, Means of Implementation.
[70] *Id.* Chapter 32, S. 3, Strengthening the Role of Major Groups.
[71] *Supra* n. 63.
[72] *Supra* n. 40 at 39.
[73] See generally, T.R. Subramanya, *Legal Control of Transboundary Movement of Hazardous Substances: North South Issues and a Model for Reform*, 34 INDIAN JOURNAL OF INTERNATIONAL LAW 40 (1994); Shikhar Ranjan, *Legal Control of Transboundary Movements of Hazardous Wastes into India, An Evaluation*, 41 INDIAN JOURNAL OF INTERNATIONAL LAW 45 (2001); Hao-Nian Q. Vu, *The Law of Treaties and Export of Hazardous Wastes*, 12 UCLA JOURNAL OF ENVIRONMENTAL LAW AND POLICY 389 (1994).
[74] *Supra* n. 40 at 108.

legislation.[75] The Hazardous Wastes are those 'wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III'.[76] The wastes defined or considered to be hazardous wastes by the domestic legislation of the party of export, import or transits are also subject to the provisions of the Convention.[77] The normal wastes of the ships and the radioactive wastes are covered by other international instruments. Other wastes[78] comprise wastes collected from households and residues arising from the incineration of household wastes etc. The Convention does not specifically refer to POPs though some of their source compounds are covered and if such substances and their wastes do not contain any of the characteristics[79] of Annex III the provisions do not apply.

The states are obliged to prohibit the export without consent if proper disposal facilities do not exist with the importing party.[80] The movement of hazardous wastes can take place between and through the parties,[81] and through a non-party state if the prior consent procedure is followed.[82] Any violation of the consent procedure or consent obtained through fraud, misrepresentation or falsification of documents, etc., or for dumping, is illegal traffic. The exporting party is bound to take back or otherwise dispose of such traffic in an environmentally sound manner within 30 days.[83] Such wastes should be re-exported if the disposal is not feasible in environmentally sound manner within 90 days.[84] Since re-export may be impracticable or prohibitively expensive, implementation of this provision is problematic unless executed with international cooperation.[85] The Convention can also be flouted by bilateral, multilateral and regional agreements, signed before or after the Convention if such movements are compatible with the environmentally sound management of hazardous and other wastes.[86] A protocol for liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes should be adopted.[87]

The Convention did not specifically regulate transboundary movements of POPs if done in any form other than the wastes. It did not provide any enforcement mechanism and left the matter of liability and compensation to be addressed by the parties to the Convention at a future date. Dissatisfied with the

[75] Art. 2.1, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL (1989).
[76] *Id.* Art. 1.1 (a).
[77] *Id.* Art. 1.1 (b).
[78] *Id.* Art. 1.2.
[79] Hazardous substances and wastes emitting toxic gases, etc.
[80] *Supra* n:75, Art. 4.
[81] *Id.* Art. 6.
[82] *Id.* Art. 7.
[83] *Id.* Art. 9.
[84] *Id.* Art. 8.
[85] *Id.* Art. 10.
[86] *Id.* Art. 11.
[87] *Id.* Art. 12.

Convention and wanting a complete ban on hazardous waste movements, the African states enacted the Bamako Convention,[88] declaring the import of such wastes into Africa a crime. The Basel Ban[89] amendment prohibited the movements to other than OECD and EC countries.

F. The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, 1999

Rio Declaration and Basel Convention directed that adequate and prompt compensation be provided for the damage, caused by an accident due to the transboundary movement of hazardous wastes.[90] The liability under the Protocol is either 'strict'[91] or 'fault-based'.[92] The strict liability is on the exporter or the importer who notifies the movement till possession is handed over to the disposer or alternate possessor. Fault-based liability arises out of the contract for any act or omission resulting in damage. Compensation may vary if the party suffering damage has contributed to the damage.[93] The scope of the protocol is limited as it provides redressal only for damage caused by an accident due to the transboundary movement of hazardous wastes and will not have any effect on domestic legislation on liability and compensation. The claim is admissible within ten years from the 'date of incident'[94] and if normally filed within five years. The Basel Protocol, liability being incident based, serves as guidance for developing a liability and compensation regime for damage to health, environment and plant life by the POPs.

G. Geneva Convention on Long-range Trans-boundary Air Pollution (CLRTAP) 1979

CLRTAP was the first legally binding instrument to deal with problems of air pollution on a regional basis. The Protocol on Persistent Organic Pollutants 1998 was adopted in Aarhus to control, reduce or eliminate any discharges, emissions and losses of POPs.[95] Certain pesticides and chemicals contribute to air pollution and generation of POPs.[96] The Protocol seeks to outright eliminate[97] the production and use of such chemicals and severely restricts the use of DDT, HCH and PCBs and bans the wastes of certain products. The emissions of dioxins, furans, PAHs and HCBs are to be reduced below a particular level. It lays down specific limit values for the incineration of municipal, hazardous and medical waste. The states should take measures for elimination, restriction on

[88] BOMAKO CONVENTION ON THE TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES WITHIN AFRICA (1991).
[89] *Supra* n.75, Art. 4A.
[90] Art. 1, THE BASEL PROTOCOL ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL (1999).
[91] *Id.* Art. 4.
[92] *Id.* Art. 5.
[93] *Id.* Art. 9.
[94] *Id.* Art. 13.
[95] *Supra* n. 3, Art. 2.
[96] *Id.* Preamble.
[97] *Id.* Art. 3.

use, and reduction of POPs emissions to the environment from sixteen selected substances according to agreed risk criteria on POPs' transboundary transport in European domain. The parties should adopt the precautionary approach by taking measures to anticipate, prevent or minimize emissions of the POPs. Though the Protocol was the first attempt to contain the menace of the POPs, its scope was limited in application to European Union only. However, it appointed an Implementation Committee to conduct reviews and submit reports.[98]

H. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

In 1998, governments adopted a legally binding Prior Informed Consent (PIC) Procedure for certain hazardous chemicals and pesticides in international trade. The Basel Convention laid down a mandatory PIC procedure for the hazardous wastes, including that of pesticides and chemicals, in international trade. The former provided the importing countries with the tools and information to identify potential hazards and exclude chemicals they cannot manage safely. It promotes their safe use through labeling standards, technical assistance and other forms of support and assures that exporters comply with the requirements. It seeks to promote shared responsibility by providing prior information for taking a decision.[99] It applies to banned or severally restricted chemicals and hazardous pesticide formulations; but excludes certain chemical substances used in reasonable quantities, not harmful to human health and environment, for personal use or for research and analysis.[100] It directs the states to establish and strengthen their national infrastructures and institutions to promote chemical safety and promote voluntary agreements and take any other stringent measures in the interest of protection of human health and the environment.[101] The states should develop a compliance mechanism to avoid non compliance.[102] It also obligates the parties to appoint a Chemicals Review Committee[103] for inclusion[104] and or removal[105] of more chemicals and pesticides to/from concerned annexes.

I. The Stockholm Convention on POPs, 2001

The Stockholm Convention, adopting a precautionary approach, is to protect human health and environment from POPs.[106] It directs the states to take measures to reduce or eliminate intentional[107] production and use of chemicals listed in Annex A and restrict production and use of the chemicals listed in

[98] *Id.* Art. 11.
[99] Art. 1, THE ROTTERDAM CONVENTION ON THE PRIOR INFORMED CONSENT PROCEDURE FOR CERTAIN CHEMICALS AND PESTICIDES IN INTERNATIONAL TRADE (1998).
[100] *Id.* Art. 3.
[101] *Id.* Art. 15.
[102] *Id.* Art. 16.
[103] *Id.* Art. 18.
[104] *Id.* Art. 7.
[105] *Id.* Art. 9.
[106] *Supra* n. 7, Art. 1.
[107] *Id.* Art. 3.

Annex B. States should ensure that such a chemical is imported only for the purpose of environmentally sound disposal or use permitted to a party. It obligates them to take measures to reduce or eliminate releases from unintentional production[108] of chemicals listed in Annex C. It bans eight pesticides immediately, prohibits the production of PCBs and starting with high-volume equipment, aims to achieve a PCB phase out by 2025. DDT use should be limited while setting a long-term goal of its elimination. Strong action should be taken to minimize the release of POPs, like dioxin, with the aim of their ultimate elimination where feasible. It requires the states to identify the stockpiles of chemicals and their wastes and manage them in a safe, efficient and environmentally sound manner.[109] It emphasizes the importance of the 'common but differentiated responsibilities' of the States, the 'Polluter Pays Principle', and developing and using environmentally sound alternative processes and chemicals adopting a precautionary approach.

• The treaty establishes a scientific POPs Review Committee[110] to evaluate additional chemicals - based on the criteria of toxicity, persistence, bio-accumulation, and long-range transport - for inclusion in the treaty in the future. The national regulations should prevent changes in industrial materials, processes, and products that can create POPs. The states should develop National Implementation Plans for POPs sustainable development[111] and information exchange mechanisms,[112] generate public awareness and education,[113] encourage R&D and monitoring mechanisms[114] and provide technical[115] and financial[116] assistance to developing countries. It also prescribes an interim financial arrangement to be handled by the Global Environmental Facility. The effectiveness of Convention is to be evaluated periodically and a mechanism should be developed to deal with non-compliance with its provisions.[117]

POPs, the 'dirty dozen',[118] are listed in the Convention for immediate elimination or reduction of their production and use. Grant of 'specific' exemption to a chemical, in certain cases, is possible for a country to continue to use a POPs chemical for a phase-out period to allow countries to eliminate production and use, as substitutes are phased in.[119] Restricted ongoing use of DDT in disease vector/malaria control is permitted if the producer and user of DDT observes WHO recommendations and guidelines, and only if locally safe,

[108] *Id.* Art. 5.
[109] *Id.* Art. 6.
[110] *Id.* Art. 8.
[111] *Id.* Art. 7.
[112] *Id.* Art. 9.
[113] *Id.* Art. 10.
[114] *Id.* Art. 11.
[115] *Id.* Art. 12.
[116] *Id.* Art. 13.
[117] *Id.* Art. 17.
[118] *Persistent Organic Pollutant: The Dirty Dozen*, available at http://www.biodiversity.nl/pops.htm. Accessed on May 31, 2006.
[119] *Supra* n. 106, Art. 4.

effective and affordable alternatives are not available. It imposes an outright ban on eight pesticides[120] and establishes a long-term goal of eliminating DDT. It establishes the means and mechanisms to assist developing counties to eliminate POPs and would channel funds and technical assistance from developed countries to their less developed partners for enabling them to take effective action. As a precaution states should identify and act against chemicals with POPs characteristics, and lack of full scientific certainty shall not prevent it from being included in the list of POPs.[121]

Though thousands of toxic and hazardous chemical products are developed and released to the environment regularly, the Convention has targeted only some of them. The complete elimination of all of them would take years, even if further production is stopped forthwith, and tackling the existing chemicals alone is a daunting task. It acts against only the individual chemicals and neglects the combined effects of more than one chemical. But different chemicals reveal complex interactions, and typical exposures involve several hundred chemicals simultaneously.[122] No new chemical has so far been included though there are several candidates, as the inclusion of more chemicals is a time consuming and tedious process. Conference of Plenipotentiaries (COP) 2 decided to defer the consideration of liability and redress until after completion of the procedures and mechanisms for determining non-compliance. The development of innovative technologies generally requires enormous funding. Rigorous scientific endeavors are necessary to develop safer, effective and non-persistent substitutes and mitigation of adverse health effects of all POPs and chemicals with similar properties. However, the Convention is a significant international initiative to mitigate harm to human health and the environment from POPs and related chemicals.

J. FAO-WHO Codex Alimentarius Commission

Consumers now assert their right to food to be safe, of good quality and suitable for consumption. Outbreaks of food-borne illness can damage trade and tourism leading to loss of earnings, unemployment and litigation. Sanitary and Phytosanitary (SPS) Agreement has formally recognized that international standards, guidelines and recommendations, including the Codex Alimentarius, as reference points for facilitating international trade and resolving trade disputes in international law. Maximum Residue Limits (MRLs) for residues of pesticides or veterinary drugs in foods are examples of standards dealing with only one characteristic. There are Codex general standards for food additives and contaminants and toxins in foods that contain both general and commodity wise specific provisions. International guidelines laid down by Codex Alimentarius Commission for assessing and managing health risks posed by pesticides call for safety assessments to be conducted to ensure food safety. It compiles the

[120] Aldrin, endrin, dieldrin, chlordane, heptachlor, hcbs, mirex, and toxaphene.
[121] *Supra* n.106, Art. 8.7 (a).
[122] *Supra* n.1.

standards, codes of practice, guidelines and recommendations that constitute Codex Alimentarius.

The SPS and the Technical Barrier to Trade (TBT) Agreements encourage the international harmonization of food standards. SPS Agreement advises the member states to take non-discriminatory measures to protect human, animal or plant life or health based on scientific principles and evidence.[123] The TBT Agreement seeks to ensure that technical regulations and standards, including packaging, marking, and labeling requirements, and analytical procedures for assessing conformity with technical regulations and standards do not create unnecessary obstacles to trade. For want of proper standards it is not certain as to whether the food we eat is safe. It could have been contaminated by the fertilizer or pesticides, or during transport, or could have heavy metal deposition due to pollution. Food adulteration is a process whereby the quality of the commodity gets reduced through the addition of a baser substance and/or removal of vital elements. It may be noted that there is the emphasis on 'adulteration' and no thought about 'contamination'.

V. POPS PROBLEM IN INDIA

In India, Pakistan, Nepal and Bangladesh locally banned or severely restricted pesticides are freely available. Even the people selling these chemicals may not be aware of the restrictions. Some of the chemicals meant for a particular use may also be diverted for use on crops or in homes or in business. Some developed nations, backed by multilateral financial institutions, promote expansion of POPs producing technologies such as incinerators, waste-to-energy, and PVC manufacturing plants and export dirty technologies. In the Indian context, the POPs problem is magnified by lack of awareness and absence of suitable protection mechanisms while handling them. POPs exposure is a constant phenomenon here through food, water, accidents and occupational environments. The industries have either not installed the necessary equipment or, if installed, it is not working. Hospitals with bed strength of 50 and above are required to install incinerators and most of them flout the requisite norms.[124] They still incinerate plastic wastes in absence of access to non-burn alternatives to medical waste disposal. Dioxins, one of the most poisonous chemicals, have been found with levels much higher than the safe limit in food samples of eggs, butter and fish. DDT detected in the blood of people from cold climes of Himachal Pradesh reveals its illegal use in agriculture.[125]

Burning of un-segregated waste containing PVC is a common practice in India producing dioxins. Finding alternatives is a technological and financial challenge. The knowledge about other chemicals is limited and the synergistic

[123] Art. 2.2, AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES (1995).
[124] *Research Foundation for Science, Technology and Natural Resource Policy* v. *Union of India and Others*, 5 SCALE 495 (1996).
[125] *Supra* n. 12.

effects of POPs are still under scientific investigation. POPs wastes, including stockpiles, are yet to be identified and managed in a manner protective of human health and environment. In Asia, the stockpiles of obsolete pesticides exist and POPs continue to be manufactured, stored, used and traded freely. Electrical equipment, such as transformers containing Polychlorinated Byphenyles, are indiscriminately disposed into the waste system in India. The quantum of industrial waste, smoke and other pollutants are the maximum on the Indian subcontinent.[126]

POPs have been detected in various foodstuffs in the South-Asian region, including in oils, spices and meat products. Aldrin, Dieldrin, DDT and Heptachlor continue to show up in food despite being banned or regulated.[127] India is among the three remaining known producers of DDT, other two being Mexic , and China. The trade in POPs despite the ban indicates the continued existence of possible hotspots in India in terms of production and storage facilities. A large amount of DDT meant for malaria control is used in agriculture unauthorizedly through pilferage. Similar is the case of Hexachlorobenzene Byphenyles. Chlordane has been imported in India subsequent to its ban and POPs are also exported by India to many countries. The continuing production and trade of these chemicals goes unabated.

Biomass and backyard burning are large source of POPs. Burning pollutes the air with dioxin and other harmful toxins such as mercury and lead. There is lack of facilities and capabilities to deal with POPs, especially dioxins and furans for want of any POPs regime.[128] The management of waste from immunization, like that of auto disposable syringes, is a serious public health issue. Mercury present in sphygmo-manometers and thermometers pose a threat to the healthcare as it is usually handled without any protective gear and is disposed of without proper segregation leading to its entry in the food chain. Dry cell batteries, a category of hazardous waste, have been imported into India. These land up in dump yards that are not equipped to contain harmful effects. The decommissioned ships have been broken on the beaches of South Asian countries such as Bangladesh, Pakistan, and India where impoverished laborers toil in horrific conditions being exposed to cancer causing chemicals.[129] Ship-breaking activities, a source of employment and very lucrative to ship breakers, concentrated in Alang area on the west coast of India, had many serious health issues for the workers due to exposure to asbestos and paints.[130] The old ships coming to India for breaking without proper clearances and cleaning of the hazardous materials like PCBs is illegal.[131]

[126] Ravi Agarwal *et al*, POPS IN SOUTH ASIA: STATUS AND ENVIRONMENTAL HEALTH IMPACTS 17 at 21 and 24 (2004).
[127] *Ibid.*
[128] *Supra* n. 7.
[129] TOXIC TRADE NEWS, Feb 15, 2006, available at www.ban.org. Accessed on September 15, 2006.
[130] *Id.* Workers at Alang show symptoms of asbestosis.
[131] *Supra* n. 129.

Potential hotspots exist in closed factory premises which still house stocks of manufactured chemicals contaminating the environment around such sites. Unscientific and unsafe repacking of chemical waste, inside the now abandoned Carbide factory by the agency authorized to do the job by the State Pollution Control Board has been noticed. The bags used for repacking of hazardous wastes were actually meant to hold plastic chips and their use for packing plastic waste was in gross violation of international safety standards. It was feared that the technology used for disposal of toxic waste for Carbide site would create bigger environmental problem. It was suggested that the toxic waste should be shipped to United States at the expense of Dow Chemicals, the present owner of Union Carbide. This shows that the Bhopal disaster story still continues to haunt India and be a nightmare for the victims.[132]

The Hazardous Substances Management Division of the Ministry of Environment and Forests (MOEF) is the focal point for international environment agreements, namely the Basel Convention, POPs Convention, and Rotterdam Convention. The overall implementation of the Hazardous Waste Rules lies with the Division. MOEF is responsible to subject the industries to the most stringent public disclosure rules regarding emissions, processes, raw materials and hazardous potential and mitigation scenarios and encouraging the processes that use the most energy-efficient and environmentally safe technologies. Use of technologies or processes that generate endocrine disrupting chemicals or persistent organic pollutants is not permitted. Nor are they permitted to generate products whose final disposal would poison the environment with such chemicals or pollutants.

VI. POPS: INDIAN LAW AND JUDICIAL RESPONSE

The term 'environment'[133] includes water, air, and land and the inter-relationship that exists among and between water, air and land and human beings, other living creature, plants, micro-organisms and property. 'Environment pollution' means the 'presence in the environment of any environment pollutant'[134] and includes solid, liquid and gaseous substances. The definition does not refer to the absence, or decrease in concentration, or non-availability of a non-pollutant that results in pollution. If oxygen is withdrawn from the environment in quantities detrimental to the environment, it results in pollution. This is how the organic pollution occurs. Organic wastes from paper pulp plant into a river without proper treatment may lead to severe pollution. Organisms can also be pollutants. Presence or absence of any particular organism in such quantity so as to destroy the ecosystem or food cycle causes pollution.[135] The Environment (Protection) Act requires that, for safe handling of hazardous substances and preventing accidents, 'no person shall handle or cause to be

[132] *Protest over Unsafe Repacking of Toxic Waste - Inside the Abandoned Union Carbide Factory*. TIMES OF INDIA, NEW DELHI, November 17, 2005.
[133] S. 2 (a), THE ENVIRONMENT (PROTECTION) ACT, 1986.
[134] *Id.* S. 2.(c).
[135] Gurdip Singh, ENVIRONMENTAL LAW IN INDIA 125 (2005).

handled any hazardous substance except in accordance with such procedure and after complying with safeguards as may be prescribed'.[136] Handling, 'in relation to any substance means the manufacture, processing, treatment, packaging, storage, transportation, use, collection, destruction, conversion, offering for sale, transfer or the like of substances.'[137] Rules exist for the regulation of hazardous chemicals, the hazardous waste, hazardous micro-organisms, genetically engineered organisms or cells and chemical accidents. Legal provisions exist for strict control measures on chemical poisons under the Insecticides Act, 1968 and the Insecticides Rules 1971[138]; the Poison Act, 1990 and the Hazardous Chemicals Rules, 1989. To limit the discharge of pollutants into water and the air, standards have been laid down under the relevant Acts. Despite the numerous legislations, several cases of leakage of poisonous gases have occurred in India.[139]

Indian judiciary has held 'precautionary principle' and 'polluter pays principle' to be sound principles of law in India.[140] The former lays down the responsibility for preventive action when there is reason to believe that harm is likely to be caused by human activity. It suggests that whenever there is scientific uncertainty about the safety or potentiality of serious harm from chemicals or technologies, manufacturers or decision makers shall do everything possible to prevent harm to humans and the environment. Absolute safety to humans and the environment is required of any technology under the precautionary principle which replaces the 'assimilative capacity principle'.[141] The emphasis has shifted[142] from assimilative capacity to precaution so that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing cost-effective measures to prevent environmental degradation."[143]

Supreme Court of India examined the question of setting up of prawn farms on the coastal areas.[144] To maintain the very crowded shrimp population and attain higher production efficiency, artificial feed, chemical additives, and antibiotics were used. The traditional method, though sustainable and not harmful to environment and ecology, was not used. The Court held that such farms could not be permitted without passing through a strict environmental test which should take into account the inter-generational equity and compensation for those who are affected and prejudiced. The highly polluting effluents discharged by commercial shrimp culture farms are covered by the definition of

[136] S. 8, ENVIRONMENT ACT.
[137] *Id.* S. 2 (d).
[138] In Shyam Divan and Armin Rosencranz, ENVIRONMENTAL LAW AND POLICY IN INDIA, CASES, MATERIALS AND STATUTES 65 (2002) the authors said, "Regulation of pesticides use was ineffective."
[139] *Ibid.*
[140] *Supra* n. 135 at 155 and 160.
[141] *Id. at 28.*
[142] *Supra* n. 48.
[143] *Supra* n. 49.
[144] *S. Jagannath* v. *Union of India*, AIR 1997 SC 811.

'environmental pollutant', 'environmental pollution' and 'hazardous substance' under the Act[145] and also come within the meaning of 'hazardous waste'.[146] Sludge arising from treatment of waste waters containing heavy metals, toxic organics, oils, emulsions and spent chemicals and incineration ash was covered by the schedule of the rules. Rule 5(4)[147] makes it obligatory for every occupier generating hazardous wastes, or an occupier possessing appropriate facilities, technical capabilities and equipment to handle hazardous waste safely to obtain authorization from the concerned State Pollution Control Board.

Supreme Court observed[148] that the 'uncertainty' of scientific proof and its changing frontiers from time to time has led to great changes in environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. In the *Tanneries Case*[149] the court referring to these changes stated that the 'precautionary principle', the 'polluter-pays principle' and the special concept of 'onus of proof' now govern the law in our country. The burden of proof is now on the developer or industrialist who is proposing to alter the status quo. These principles, already implied in the various environmental statutes and accepted as part of the customary international law, should be accepted as part of our domestic law. The court directed that the authority to be appointed under the Public Liability Insurance Act, 1991 (PLIA) shall implement these.[150]

Shortly after the *Bhopal Gas Leak Case*[151] the rule of 'absolute liability', was accepted in the *Shriram Gas Leak Case.*[152] The Supreme Court observed that the rule in *Rylands* v. *Fletcher* evolved in the 19th century with the normal exceptions is not adequate for evolving a standard of liability consistent with modern day requirements. The absolute liability standard ensures that the polluter could not escape liability in case of a chemical accident and is not subject to any of the exceptions operating under the rule in *Rylands* v. *Fletcher*. After the enactment of PLIA, the principle has since received legislative approval[153] as the 'no-fault liability' does not recognize the exceptions of tortious strict liability; and applied for relocation or closure of hazardous industries and for enforcing the liability to secure damages to the person affected by such leakage of liquid or gas. The rule was extended without limitation by the National Environment Tribunal Act, 1995 to all cases where death or injury to a

[145] S. 2 (e), ENVIRONMENT (PROTECTION) ACT, 1986.
[146] Rule 3 (14) (a), THE HAZARDOUS WASTE (MANAGEMENT AND HANDLING) RULES (1989).
[147] *Id.* Rule 5 (4).
[148] *AP Pollution Board* v. *M.V. Nayudu*, AIR 1999 SC 812.
[149] *Vellore Citizens' Welfare Forum* v. *Union of India and Others (Tamil Nadu Tanneries Case)*, 1996 (5) SCC 647; AIR 1996 SC 2715.
[150] S. 3, THE PUBLIC LIABILITY INSURANCE ACT, 1991 (PLIA).
[151] *Union Carbide Corporation* v. *Union of India*, AIR 1990 SC 273; and *Bhopal Review Case*, AIR 1992 SC 248.
[152] *M.C. Mehta* v. *Union of India*, (*Shriram Gas Leak Case*), AIR 1987 SC 965 at 982, 1086 and 1099.
[153] *Supra* n. 150.

person, other than a workman, or damage to any property or the environment is caused by an accident involving a hazardous substance.

An enterprise engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. In case of escape of toxic gas causing harm to the surrounding areas and people, such industry is absolutely liable regardless of whether it is carried on carefully or not. Such an enterprise is under obligation to absorb the cost of any accident arising on account of such activity as an appropriate items of its overheads. Here the emphasis is on reimbursement of the cost of harm caused by an accident due to the presence of inherently hazardous activity. However, in case of POPs an accident may not occur and damage may be caused by a slow process which may extend not only to days or months but also to several years and it may be difficult to conclusively enforce the liability.

The 'polluter pays principle' was applied in *Bichhri Case*[154] to fasten liability for defraying the costs of remedial measures. In this case, Supreme Court examined the liability of the private companies manufacturing hazardous and dangerous chemicals. Release of enormous quantities of highly toxic effluents, iron based and gypsum based untreated toxic sludge thrown by the chemical companies in the open percolated deep into the bowels of the earth and polluted the aquifers and the sub-terranean supply of water. The water in the wells and streams turned dark and dirty, rendering it unfit for human consumption, or for the cattle to drink, or for irrigating the land. This resulted in disease, death and disaster in the village and surrounding areas.[155] The polluting industries were held absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water. The polluter is liable to pay the cost of remediation of the damaged environment and compensate the individual sufferers. But it does not mean that industry may first create the pollution and then pay for it. The principle evolved by the Supreme Court was an indirect recognition and application of the polluter pays principle.[156] This is relevant for the POPs where it is difficult to identify the polluter and ascertain the quantum of damage because a harmful product might be produced several years before its harm becomes visible.

In the *Taj Trapezium Case*,[157] the foundries, chemical/hazardous industries and refineries at Mathura along with brick-kiln units and vehicular traffic, were polluting the air around Taj Mahal. The white marble of the historic monument was getting yellowed and blackened in places. The emissions generated by the

[154] *Indian Council for Enviro-Legal Action and Others* v. *Union of India and Others (Bichhri Case)*, (1996) 3 SCC 212; AIR 1996 SC 1446.
[155] *Supra* n. 135 at 61.
[156] Dinesh Kumar, *Evolving Principle of Polluter-Pays in Environmental Jurisprudence*, X-XI NATIONAL CAPITAL LAW JOURNAL 260 (2005-2006).
[157] *M.C. Mehta* v. *Union of India*, AIR 1997 SC 734 at 763.

coke/coal consuming industries had the damaging effect on the Taj and the people living around the Taj Trapezium Zone. Supreme Court held that the emissions were violating the right of the people to live and were damaging the prestigious monument, and directed the industries to change over from coke/coal to natural gas as industrial fuel. Otherwise, these should stop functioning, relocate and pay compensatory benefits to their workers as victims. In another case the motel[158] doing various constructions on the riverbed and the banks of the river, was found discharging untreated effluents into the river Beas. Supreme Court held that any disturbance of the basic environmental elements, namely, air, water and soil, which were necessary for life, would be hazardous to life under Article 32 of the Constitution of India; pollution was a civil wrong and a tort committed against the community as a whole. The polluter has to pay damages or compensation for restoration of the environment and ecology and those who suffered loss due to his acts. Such person can also be held liable to pay exemplary damages as a deterrent for others not to cause pollution in any manner.

In the *Hot Mix Plants Case*,[159] the request was for installation of such plants near the IGI airport for resurfacing the airport runways. The emissions from the Plant contained particulate matter and sulphur dioxide besides toxic/carcinogenic hydrocarbons like benzene, formaldehyde, anthracene and toxic metals like lead, arsenic, mercury and cadmium. It also could emit large quantities of dust and polyaromatic hydrocarbons (PAHs), exposure to which could cause lung and other cancers. The Court recognised that maintaining the bitumen temperature at 120^0 C at the time of application was not possible if brought from a distance of more than five kilometers and hence, allowed this hazardous activity for a temporary period to be carried on at a distance of about three kilometers from the populated area in the interest of sustainable development. In the *Vellore Case*,[160] the court held that the concept of sustainable development has been accepted as a part of the customary international law. The concept of intergenerational equity requires that the generation and use of POPs should be stopped not only in the interest of present but also for the future generations.

In *Research Foundation Case*,[161] Supreme Court referring to the decision in other cases,[162] held that illegal importers of hazardous waste-oil were absolutely liable to pay the cost of destroying the said oil. Dealing with the import containers of waste oil with a presence of PCBs up to 50 ppm, the Apex Court affirmed the 'no fault' liability rule.[163] Though the Basel Convention permitted a toleration level to that extent yet the domestic legislation can make its own rules. It concluded that in the garb of furnace oil, hazardous waste has been imported;

[158] *M.C. Mehta* v. *Kamal Nath*, AIR 2000 SC 1997.
[159] *Supra* n. 157.
[160] *Supra* n. 149.
[161] *Research Foundation for Science Technology and Natural Resources Policy* v. *Union of India and Another*, 1997 (5) SCALE 495; 1999 (1) SCC 223, 2003 (9) SCALE 303.
[162] *Supra* ns. 148 and 149.
[163] *Supra* n. 161.

some of which exploded and the contents spread in the area, created fire hazard and caused grave damage to the environment. The precautionary principle was fully applicable and the hazardous waste imported should be destroyed to avoid any damage to environment. Referring briefly to the POPs, it declared that hazardous substances having PCBs were a threat to environment and should be destroyed by incineration under the supervision of the monitoring committee[164] in a manner that it did not create POPs. A national policy on landfills sites should be developed on the lines of developed countries. However, most of the polluters, who imported the oil on false documentation, were not easily identifiable and traceable to pay for the pollution. Besides, even the illegal traffic cannot be practically returned to the place of its origin.

In hazardous industries the workers who contact serious occupational diseases resulting in serious damage or even death are compensated for injury or death caused during employment only. Payment of compensation in the context of cancer or asbestosis contacted by the workers in the asbestos industry after retirement was examined.[165] Compensation was payable for contacting occupational diseases not only to the workers whose symptoms were visible during the employment but also to those who developed the symptoms after retirement. But the aggrieved cannot establish the absence of reasonable care or foreseability as the industry alone has the resources to discover and guard against hazards or dangers. The instances of harm caused by asbestos and other harmful chemicals to the ship breaking industry workers in Alang, are numerous. The 'absolute liability' principle is applicable in all cases of harmful effect of the hazardous toxic substances threatening the right to live a healthy and meaningful life. There are certain things that a civilized society simply cannot permit to be done to its members, even if they are compensated for their resulting losses".[166] Supreme Court has, therefore, developed an indigenous compensatory jurisprudence.

In case of POPs it may not be possible to identify the polluter to make him liable and the physical harm caused may be medically unascertainable. Even the doctors or nurses or the hospitals may be potentially liable. Without identification of the guilty it may not be possible to fix the liability.[167] However, the burden of proof would shift to the defendants or producers of the product if a causal relationship of a toxic substance to the disease contacted is established. Some producers of asbestos have been held jointly and severely liable for injuries sustained by a plaintiff because of prolonged exposure to the defendants'

[164] Supreme Court Monitoring Committee on Hazardous Wastes Management.
[165] *Consumer Education and Research Center (CERC)* v. *Union of India*, AIR 1995 SC 922; *See*, Ken Rivlin & Jamaica D. Potts, *Not so Fast: The Sealed Air Asbestos Settlement and Methods of Risk Management in the Acquisition of Companies with Asbestos Liabilities*, 11 NYU ENVIRONMENTAL LAW JOURNAL 626 (2003).
[166] *The Bhopal Compensation Case*, AIR 1990 SC 273 at 283.
[167] Francis E. McGovern, *Toxic Substances Litigation in the South Circuit*, 16 (2) UNIVERSITY OF RICHMOND LAW REVIEW 265 (1982).

asbestos.[168] The absolute liability principle making the producer of the pollution liable also includes the extended responsibility for safe disposal of the waste products so as to avoid any harm to health and environment. It is the responsibility of the producer to take care that the asbestos waste is also disposed of in an environmentally sound manner. Under this principle, the producer is liable to internalize the cost of pollution on account of the product in the spirit of polluter pays principle. He should know the problem likely to be created by such waste and be ready to pay for any damage caused to health, environment and plant or animal life on account of such waste.

VII. Conclusion And Suggestions

POPs problem is grave, complicated and expensive. The global treaty discourages developed countries from promoting and exporting POPs-generating technologies, processes and materials to developing nations. They should assist them in developing and implementing alternative destruction methods and technologies which do not generate POPs. A liability and compensation regime for damage caused to health and environment by the POPs should be developed at the earliest. The Indian industry, initially hesitant in supporting the country ratifying the POPs treaty, is duty-bound to phase-out the manufacture of substances mentioned in the Stockholm Convention. It should promote the use of cleaner and more efficient processes to reduce unintentional production of POPs. Development of safer chemical and non-chemical alternatives will require time, money and training. Municipal and other hazardous wastes should be reduced and recycled by use of cleaner production techniques. Coupled with a specific legislation, there is a need to educate and create awareness about POPs. Sufficient evidence exists to justify a series of steps in research, public policy and personal safeguards and lower the exposure to harmful chemicals as rapidly as possible.[169] The disposal of huge global obsolete stock requires billions of dollars and a coordinated action by international and regional agencies.[170] The UNIDO and UNEP have taken some initiatives. United States through its Superfund law has achieved considerable success in identification and remediation of the hazardous waste sites containing the enormous amount of POPs. European Union has developed its own set of regulatory action plan for chemicals and pesticides in general and POPs in particular. Developing countries can actively participate in the UNEP process to eliminate, seek safer alternatives and prevent creation of new POPs. In the long term, however, prevention is the most effective way to deal with the problem of POPs. As India opens its markets to the world, it should at least demand a clean technology and develop projects eligible for funding through the UN agencies.

[168] *Id.* at 299.
[169] Available at www.ourstolenfuture.org. Accessed on February 20, 2007.
[170] *Supra* n.10, available at www.unido.org. Accessed on February 25, 2007.

STATE COMPENSATION FOR HUMAN RIGHT VIOLATIONS: UNVEILING THE TRAJECTORY AND SCOPE

Sujith Koonan[*]

I. Introduction

The concept of human right addresses mainly the state-individual relationship. Conceptually, the notion of human right demands and suggests a minimum fairness in its relationship with the individual citizens. The human right law, therefore, prescribes certain standards to be followed by the state. It can be assumed that the normative contents of the human right law evolved because of the worst instances of human right violations before and during the Second World War. It is in this background that the Universal Declaration of Human Rights, 1948 has been evolved to persuade the states to adopt its principles. The human right law has travelled far from this beginning and developed as a separate branch of study, becoming the subject of hot debate and discussions all over the world.

The human right law enumerates several rights of the individuals. The existence of right implies remedy. Traditionally, the notion of human right is a claim of individual against his own state. It implies that the potential violator of human rights would be the state acting through the agents like police, security wings, etc. Therefore, the remedies prescribed under the human right law are generally against the state.

The traditional remedies available to an individual against the state for human rights violations are declaratory in nature, as in the form of writs against the state to refrain from interference with the individual human rights. This remedy may be effective for preventing the human right violations in advance or continuation of the violation but is inefficient and inappropriate in cases of violation of life and liberty. The remedy of state compensation is prescribed expressly and impliedly in various international and regional human right instruments. It has also been incorporated in various domestic legal systems as a Constitutional right or statutory right.

However, the concept of state compensation has not yet developed fully. It is suffering due to lack of good theoretical background and a well-defined meaning. There are lots of pro and anti arguments, both legal as well as moral, around the concept of state compensation. This paper examines the trajectory and scope of the development of the remedy of state compensation for human right violations in the light of experiences from the Common law system (US and UK), Continental system (France) and the development of the concept in International Human Rights Law. The paper also examines the rationale behind the remedy of state compensation for human rights violations.

[*] Research Associate, International Environmental Law Research Centre (IELRC), New Delhi.

II. Sovereign Immunity To State Liability: Tracing The Trajectory

A wrong committed by an individual results in punishment at the hands of the state. If someone on behalf of the state commits a similar wrong, no such liability arises. State is considered as immune in this respect. It is the state that makes the law and administers justice but simultaneously, it is not bound by the law. These are considered as the unique functions of the state and the state enjoys special privilege and immunity from all sorts of legal proceedings. The immunity of the state from the liability is rooted in the concept of "sovereign immunity". Accordingly, no individual can file suits against the sovereign. The victims of human right violations have often been denied remedy on the ground of sovereign immunity. This defense has existed and exists even now to some extent as an iron curtain, restricting or prohibiting the individual from seeking remedy for the violation of individual rights against the state. This part of the paper explains the origin of the concept of sovereign immunity and its eventual transformation into state liability. The remedy of state compensation depends upon how and to what extent the legal system appreciates the concept of state liability. Hence, tracing of the route of development of state liability is very relevant in the context of state compensation for human rights violations.

A. *Concept of Sovereign Immunity and its Historical Background*

Though it is difficult to trace out the origin of the doctrine of sovereign immunity, it is believed that the concept evolved as part of the English feudal system.[1] In the feudal system each Lord constituted a Court for his subjects but he himself was never subjected to that Court. He was only subjected to the Courts constituted by the Lords of higher strata. This hierarchy ultimately ended in the King. Since there was no system above the King in the realm, the King was immune from all sorts of proceedings.

The principle of "sovereign immunity" existed all over the world, especially in common law countries.[2] This was mainly based upon two principles:

a. *Rex non protest peccare*,[3]

b. The rule of procedural law that the King could not be sued in his own Court.

It is an ancient and fundamental principle of the common law that the King can do no wrong. Its true meaning is that the sovereign individually and personally is independent of and is not amenable to any other earthly power or jurisdiction and that anything amiss in the condition of public affairs is not to be imputed to the King, to render him personally answerable to his people.[4] The

[1] Somerwell, *State as a Defendant*, 33 AUSTRALIAN LAW JOURNAL 148 (1959).
[2] G.P. Verma, STATE LIABILITY IN INDIA: RETROSPECTS AND PROSPECTS (1993).
[3] The maxim means that King can do no wrong.
[4] Herbert Broom, A SELECTION OF LEGAL MAXIMS 21 (1993).

King had absolute immunity in the United Kingdom and could not be sued for any act or wrong committed by his servants in the course of their employment.[5]

Moreover, the position of the King was considered as sacred and it was presumed that neither the King could do any wrong nor could he even authorize any wrong.[6] Based on this presumption the King was considered as completely immune from all liability and suits.[7] The inviolability of the King was considered essential to the existence of his power as the supreme magistrate.

These privileges originally personal to the King, survived the establishment of the Constitutional monarchy. Its result was that these privileges started to apply to the King as the personification of the state as well as to the King in Person.[8] Even the principle of vicarious liability was not applicable to the King.[9] In early times, this immunity was available to the high officials also who were immune from liability for the acts done in their official capacity, even though it was done without any order from the King though this defense was considered as the King's privilege, which he could wave.[10] As a result, state as an entity was immune from all sorts of liability. Hence, in practice, there was no remedy available for the individuals against the state. This resulted in denying the individuals the opportunity to claim remedy against the state for the violation of human rights.

The concept of sovereign immunity was not free from criticisms. Lord Somerwell had opined that, "although the King could not be sued he was not regarded as above the law in the sense in which a school master is above the rules he makes for his boys".[11] Further, Field J. said that, "it is a familiar doctrine of common law that the sovereign cannot be sued in his own Court without his consent. The doctrine rests upon the reasons of public policy, convenience and the danger which follow from any different rule."[12] Hence, it is clear that the immunity of sovereign was followed due to convenience and public policy. At the same time, there existed an 'inbuilt restriction' based on the principle of rule of law. It means that the immunity granted because of convenience does not give the power to the King (the state in the modern context) to override the rule of law.

The rule of law doctrine demands and suggests a government according to law. It means that the state is not above law. Hence, the government and the public authorities require the authority of law for any action, especially if the action is likely to interfere with human rights. Any deviation from the legal

[5] *Supra* n. 2 at 24.
[6] Borchard, *Governmental Liability in Tort*, 34 YALE LAW JOURNAL 4 (1924); *see* also, W. Wordsworth, A HISTORY OF ENGLISH LAW 42-44 (1996).
[7] H. Street, *Crown Proceedings Act*, 11 MODERN LAW REVIEW 129 (1948).
[8] J.A.G. Griffith & H. Street, PRINCIPLES OF ADMINISTRATIVE LAW 246 (1973).
[9] *Ibid.*
[10] *Supra* n. 1 at 151.
[11] *Id.* at 148.
[12] *Ibid.*

authority will result in legal sanction including the liability to compensate the victim whose rights have been infringed.[13] It can be assumed that the principle of rule of law has influenced considerably in the development of the concept of state liability.

B. Evolution of State Liability

The transformation from sovereign immunity to state responsibility has been very gradual. The concept of human rights as a separate branch came into the scene only in the middle of the 20th century. Therefore, the trajectory of evolution of state compensation traces the transformation from state immunity to state liability under the guise of tortious principles. The concept has been concretised subsequently due to the emergence of human rights jurisprudence. This transformation is analysed in an integrated comparative manner.

The bold concept of sovereign immunity has been relaxed through various devises. For instance, in the UK, the Petition of Rights, Crown Proceedings Act, Human Rights Act, etc., are the landmarks to be discussed. At the same time in the US, the 11th and 14th Constitutional Amendments, Federal Tort Claims Act (FTCA) 1946, etc., are considered the turning points in the trajectory of state liability. The development of administrative law as a separate branch of law in French legal system also provide a firm background. Hence, these three systems are selected to explain the position in common law and continental or civil law system.

Common Law Position

As mentioned above, the sovereign immunity developed as a part of feudal system in the UK. A major change from the tradition of sovereign immunity occurred through the Petition of Right in 1628.[14] Petition of Right recognized and approved the rights and liberties of the citizens against the King. It also approved the essence of *Magna Carta* expressly. In a way, the Petition of Right demanded a standard of 'reasonableness and fairness' from the state (Crown) in its relationship with the citizens.

The general procedure followed in the Petition of Rights was that whenever a petition was submitted before the King, a special commission was issued by the Chancery to investigate the case. If the findings of the Commission revealed a case between the crown and his subjects, the King would refer it to the common law side of the chancery or to the King's Bench to decide the matter. The petition of right procedure was available for the recovery of land and other property from the Crown, for damages for breach of contract, and in some other cases. However, this remedy was not available for the claims in tort.

[13] E.C.S. Wade & G.G. Philips, CONSTITUTIONAL AND ADMINISTRATIVE LAW 91 (1989).

[14] Charles I's parliament in four years met on 17 March 1628 and immediately started discussing the recent grievances against the way in which the King had treated them. The Common leader Sir Edward Coke, a lawyer, came up with the Petition of Rights...a statement of person's fundamental rights the King should honour. The King reluctantly accepted it.

The exclusion of tortious claim from enforcement through Petition of Right resulted in freeing the Crown from almost all liabilities for human rights violations. Hence, the only process available for the citizens was to sue the individual officers. Gradually the Crown adopted the practice of accepting the moral responsibility for the tort of its servants and paying damages out of the public fund.[15] The practice was that the King would stand behind the servant. If the injured person was successful in suing the servant of the King, the King would satisfy the judgement.[16] The servant against whom the suit was filed was considered as the defendant nominated by the Crown. This fiction of 'nominated defendant' was later disapproved by the House of Lords in *Adams* v. *Naylor*.[17]

The liability of the state for tort committed by its officials became part of the legal system by the enactment of the Crown Proceedings Act, 1947. The Crown Proceedings Act, 1947 revolutionised the law by making the Crown liable to be sued in the Court in the same way as an ordinary individual.[18] The Act gave the general right to sue the Crown in cases wherein any person sustained injury as a result of tort committed by the state officials. Section 2 made it very clear that Crown was liable for the tort committed by its servants.[19] Hence, the Crown Proceedings Act, 1947 established the principle that the Crown was subject to the same liability in tort as if it was a private person of full age and capacity.

The UK legal system started to recognise the state liability through the Petition of Right and the Crown Proceedings Act. The royal immunities, both substantial and procedural, which originated in feudal background as a prerogative personal to the King, gave way to some extent to royal responsibility. The concept of state liability evolved in common law as part of tortious remedy under civil law. The concept entered into the field of human rights mainly through the European Convention on Human Rights [ECHR] 1950.[20] As part of obligation under the ECHR, Human Rights Act, 1998 was enacted to deal with the violations of human rights in England. The underlying principles of the Act regarding the remedy of state compensation are discussed in Part 3.

The US position differs slightly from that of the UK because of the presence of the written Constitution and the enumerated individual rights. The sovereign

[15] *Ibid.*

[16] J. Munkman, DAMAGES FOR PERSONAL INJURIES AND DEATH 62 (1985).

[17] [1946] 2 All ER 241. In this case, two boys entered into the minefield for collecting their ball. They sustained injury due to the explosion of the mine. Action for damages was brought against the servant who was nominated by the Crown. The House of Lords held that minefield was in the occupation of the Crown and not the nominated servant. It was further held that "the Court before such a case comes have to decide it as between parties before them and have nothing to do with the fact that the Crown stands behind the defendant".

[18] CROWN PROCEEDINGS ACT, 1947, Preamble states, "An Act to amend the law relating to civil liabilities and rights of the Crown and to civil proceedings by and against Crown, to amend the law relating to the civil liberties of the persons other than the Crown in certain cases involving the affairs or property of the Crown."

[19] *Id.* S. 2 (1) (a).

[20] Art. 1 of the Convention clearly put the responsibility on contracting parties to secure the rights and freedoms defined in the Convention.

immunity was not there in the US Constitution in the beginning[21] and was incorporated later by the Eleventh amendment.[22] After the Eleventh amendment, the concept of sovereign immunity was upheld in several cases. For instance, Marshall C.J. held that: "universally received opinion is that no suit can be commenced or presented against the United States, that the Judiciary Acts does not authorize such suits".[23] Further in *Hill* v. *U.S.*[24] Supreme Court stated that: "no maxim is thought to be better established or more universally assented to than that which ordains that a sovereign or a government representing the sovereign cannot ex-delicto be amenable to its own creatures or agents employed under its own authority."[25]

Doctrine of sovereign immunity prevailed over state responsibility up to the middle of the 19th century. During that time, judicial reaction was also in that direction. Later, the US Supreme Court played an activist's role in evolving the concept of state liability for human rights violations. This progress was in the light of the "due process clause" as introduced by the Fourteenth Amendment.[26] US Supreme Court stressed the drawback of the concept of sovereign immunity in *Will* v. *Mitchigan Dept. of Police*[27], wherein it was held that the doctrine of "sovereign immunity" rested on the fictional premise that "King can do no wrong". Gradually, the Court recognized and upheld the state liability in the light of due process clause.[28] The rationality of applying the doctrine of sovereign immunity has been questioned by many.[29]

Continental (Civil) legal system

Modern France was born through the Revolution of 1789. In pre-revolutionary period, the King had an unquestionable authority and France

[21] US CONSTITUTION, Art. III, S. 2 (1): "The judicial power shall extend to all cases in law and equity arising under this Constitution to controversies to which the United States shall be a party, to controversies between two or more states, between a state and citizen of another state, between citizens of different states .... And between a state or the citizens thereof and foreign states' citizens or subjects"

[22] *Id.* Eleventh Amendment (1798): "The judicial power of the US shall not be construed to extend to all cases in law and equity, commenced or prosecuted against one of the United States by citizen of another state, or by citizens or subjects of any foreign state."

[23] *Cohens* v. *Virginia*, 5 L Ed 257 (1821).

[24] 50 US (9 How) 386 (1850) at 389 as cited in *supra* n. 2.

[25] *Ibid.* Same principle was reiterated in *Gibbons* v. *US*, 19 L Ed 453 (1868) and *Siren* v. *US*, 74 US (7 Wall) 152 (1868).

[26] US CONSTITUTION, Fourteenth Amendment (1868): "No state shall abridge the privileges or immunities of citizens of US, nor any state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of laws."

[27] 105 L Ed 2d 45 (1989).

[28] See, *Henry Harper* v. *Virginia Dept. of Taxation*, 125 L Ed 2d 74 (1993); *William Millicken* v. *Ronald Bradly*, 53 L Ed 2d 745 (1977) at 765; *James Monroe* v. *Frank Pope*, 5 L Ed 2d 492 (1961) at 496-497; *Mc. Kesson Corporation* v. *Division of Alcoholic Beverages and Tobacco*, 110 L Ed 2d 17 (1990).

[29] *Supra* n. 2, G.P.Verma at 68; see also *supra* n. 1; Carlos M. Vasquo, *Sovereign Immunity, Due Process and Alden Trilogy*, 109 YALE LAW JOURNAL 1927 (2000).

denied state liability in common with the rest of the European countries. Even though the French revolution of 1789 dethroned the King and abolished old Courts and many other things, the principle of state immunity continued. No Courts were allowed to interfere with the administration and the citizens had no remedy if their claim was against the state, or any department, or any other authority of the state.[30]

The Constitution of Fifth Republic, 1958 made a considerable change in the situation. As a result, a rigid separation between executive and legislature was introduced. This separation of powers became the real foundation of the concept of state liability in France. As a result of separation of powers, two authorities were established, *Conseil d' Etat* and *Cour de Cassation*. The former was to exercise jurisdiction over administrative action and the latter was to exercise private jurisdiction over individuals. Any dispute between these two authorities with respect to jurisdiction was settled by *Tribunal des Conflicts*.

Conseil d' Etat evolved two principles as the foundation of state responsibility. The first one was that of *Legalite*. It meant that the state was subject to law and state must act in accordance with law. The second principle was that of *Responabilite*. It meant that the administration was liable to any citizen for any injury caused due to unlawful activities of the state.

As part of its function, *Conseil d'Etat* established a special branch or tribunal to deal with the claims. This tribunal followed its own procedure apart from the procedure followed by the ordinary courts. The judges who decided the claim were independent and irremovable by the executive. A strong system of administrative courts developed in French legal system in which a citizen could appear in person for remedy against any unlawful act of the state.

Unlike in the UK and the US, the French system developed the liabilities of the state based upon the principle of fault and risk. According to the theory of fault, the liability of state arises only when a fault occurs on the part of the state resulting in injury to any person. Theory of risk is a general principle of liability without fault. It means that the activities of state may sometimes constitute the risk. If the risk materializes and causes injury to any individual, the state has the duty or liability to indemnify the victim.[31]

The French legal system has developed its own principles to evolve the concept of state responsibility. Borchard in relation to the French system strongly argued against the adoption of the concept of sovereign immunity that prevailed in the name of convenience and good governance.[32] In the French system the doctrine of sovereign immunity or the state irresponsibility was replaced by the principle of state liability in all cases where a citizen suffered injury by administrative action. Introduction of ECHR 1950 made a drastic change in the

[30] L.N. Brown & J.F. Garner, FRENCH ADMINISTRATIVE LAW (1983).

[31] *Ibid.*

[32] *Supra* n. 6.

concept of state liability throughout Europe. The ECHR resulted in the disappearance of the principle of sovereignty to a great extent in the European legal systems.[33] This legal transformation acted as a strong basement for further development of human rights law and subsequent emergence of state compensation as a remedy for the violation of human rights.

III. State Compensation: A Comparative Analysis

State compensation as a remedy for human right violations works differently in different legal systems. For instance, it works in a statutory framework in the UK and on the basis of Constitutional rights in the US and India. This part analyses the working of the principles underlying state compensation in the US, the UK and India.

A. US Position

The US Constitution provides sufficient protection to the individual fundamental rights from unnecessary state interferences. The due process clause introduced by the Fourteenth amendment to the Constitution specifically guarantees that the life, liberty and property of an individual shall not be taken away without due process of law. The Constitution requires the state to be reasonable, just and fair in interfering with the guaranteed individual rights. This protection empowers the individual to approach the Court against the state's unjustified and unreasonable interferences. State compensation as a remedy has been read in the Constitution by the judiciary by playing its activist role. A few decisions are analyzed here in this context.

In *Anti-Fascist Committee Case*[34] the Court expressly stated that the government should be fair in its action towards the individual rights. In case of any unfair action by the state, the Constitution provided adequate remedy including compensation. This approach had been taken in a plethora of cases expressly conveying that the violation of fundamental rights was not cost free and the state did not have an advantage to abridge the individual rights unreasonably.

The scope of the state compensation has been more elaborately discussed in *Bivens Case*.[35] In this case, the federal narcotic officials entered the plaintiff's house without warrant and used unnecessary force for conducting search in his apartment. Plaintiff was arrested for alleged violation of narcotic laws. The act of officials was challenged as violation of due process and the plaintiff sought compensation. It was held that the very essence of liberty consisted of the right of every individual to claim protection of laws whenever he received an injury. It

[33] It was held in the introduction of the ECHR, "As the Government of European countries which are like minded and have a common heritage of political tradition, ideals, freedom, and rule of law to take first step for the collective enforcement of certain of the rights stated in the Universal Declaration".

[34] *Anti-Fascist Committee* v. *Mc Grath*, 95 L Ed 817 (1951).

[35] *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 29 L Ed 2d 619 (1971).

was further held that the victim was entitled to receive damages in terms of money for any injury he suffered because of the misconduct of the state officials.

The rationale of making the state liable for human right violations was further discussed in *Carson v. Green*,[36] wherein a person was found dead in the prison. His mother alleged that it was due to the misconduct of the prison officials. The Court discussed the deterrent effect of state compensation and held that the fixation of financial liability upon the state would make the government more careful and such a liability would compel the government to exercise the supervisory control over its officials more efficiently. At the same time, the concerned individual official who acted beyond his authority and against the law would face the disciplinary action including the risk of loss of employment. The Court emphasised more on the victim's cause of action against the state and the right to state compensation.

The question whether the violation of Constitutional rights itself results in a cause of action for compensation cropped up in *Carey v. Piphus*.[37] It was discussed that every deprivation of the Constitutional right could be presumed to cause some injury. Therefore, it was not necessary to prove a compensable injury. The only thing that needed to be proved was the violation of right. It was also argued that the due process clause was not merely for protecting individual's life, liberty and property, but it also guaranteed the 'feeling of just treatment' by the government. Even though no injury was caused as a result of violation of rights, it could be presumed that the concerned individual had been denied the guaranteed 'feeling of just treatment'.[38]

The principles reflected in the above case laws are that any unjustified interference with the guaranteed Constitutional right is not cost free. The state is legally liable to protect the rights. If the state itself violates the rights, it is a grave instance of illegality and the victim is entitled to remedy including state compensation. The US judiciary has applied this principle of state liability and the remedy of state compensation for human rights violations in catena of cases.[39]

[36] *Carson* v. *Green*, 64 L Ed 2d 15 (1980).

[37] *Carey* v. *Piphus*, 55 L Ed 2d 252 (1979).

[38] It may be noted that the US Court has deviated from this approach on certain occasions. For instance, in *Florida Prepaid Post Secondary Expenses Board* v. *College Sav. Bank*, 119 S Ct 2199 (1999), the Court denied the remedy by relying upon the doctrine of sovereign immunity and held that the state could not be sued without consent. Such decisions are criticised as the US Court had rejected the doctrine long before. It is also argued that the Constitutional remedy of state compensation for deprival of life, liberty and property should always outweigh the interest in protecting the state treasury.

[39] See, for instance: *Alabama* v. *Garret*, 121 S Ct 955 (2001); *Henry Harper* v. *Virginia Department of Taxation*, 125 L Ed 2d 74 (1993); *Mc Kesson Corporation* v. *Division of Alcoholic Beverages and Tobacco*, 110 L Ed 2d 17 (1990); *William Millicken* v. *Ronald Bradley*, 53 L Ed 2d 745 (1977).

B. UK Position

There was no specific legal framework in the UK addressing the human right principles and standards for the state to be followed apart from the tort law principles until the Human Rights Act, 1998 (hereafter 'the HRA').[40] The HRA contains the current legal framework and this section analyses the underlying principles and scope of state compensation under it.

The HRA makes relevant parts of the ECHR ("Convention rights") directly enforceable in domestic courts for the first time. Articles 2-12 and 14-18 of ECHR and Articles 1-3 of the First Protocol are included in Schedule 1 of the HRA. As such, the principal civil and political rights (freedom from torture and slavery, the rights to a fair trial, property, education, privacy, free speech and association, and the right to participate in elections) may be vindicated before any domestic court by way of direct action or defence.

The principal mechanism for protecting human rights in most international legal instruments is the declaration but the ECHR has always held out the additional possibility of financial compensation for a breach of its provisions in Article 41, which provides: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

The HRA seeks to give effect to this principle by means of Section 8:

> "8. - (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court, which has the power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other Court), and
>
> (b) the consequences of any decision (of that or any other Court) in respect of that act, the Court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

[40] THE HUMAN RIGHTS ACT received royal assent on 9 November 1998. The Act came into force on 2 October 2000. For more details on the whole framework of the Act, see, A GUIDE TO HUMAN RIGHTS ACT 1998 (3rd Ed 2006) available at http://www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf. Accessed on March 7, 2007).

> (4) In determining- (a) whether to award damages, or b) the amount of an award, the Court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

A number of points are clear from these words. First, an award of damages may only follow a finding that a public authority has acted in breach of Convention rights according to section 6 (1) of the HRA. Second, the court has the discretion whether or not to award damages. Therefore, unlike the position under domestic tort law, damages are not available as of right. Third, damages will only be awarded where they are *"necessary"* to provide just satisfaction. Fourth, the court must be guided by the principles established by the European Court of Human Rights (ECtHR).

The early decisions under the HRA did not contain any lengthy analysis of the doctrinal basis for awarding damages under Section 8 but two matters of general importance which did emerge. First, it was legitimate for the courts to have regard to the level of awards which might be made by the Ombudsmen in addition to those awarded by the courts in analogous situations and second, that awards should not be so low that they would diminish respect for the policy underlying the HRA.[41]

More recently, higher courts have suggested a framework within which the damages claims under the Act should be assessed. The leading authority is the decision of the Court of Appeal in *Anufrijeva* v. *Southward London Borough Council.*[42] The case concerned a series of claims brought by a number of asylum seekers alleging that their rights under Article 8 had been violated by the failure to provide adequate support for them and their families and/or delays in the processing of their asylum claims. The Court of Appeal decided that it was not appropriate to award damages even though it accepted that the conduct complained of could amount in some cases to a breach of Convention rights.

This case sets out the following general guidance:

> (i) damages play a less prominent role in actions based on breaches of Convention rights than in private law claims and the most important aspect of a claim under the HRA will usually be to bring the breach of Convention rights to an end;
>
> (ii) claims under the HRA will often be conveniently brought by way of judicial review although the Administrative Court will not normally concern itself with the disputed issues of fact and has limited experience in awarding damages;
>
> (iii) exemplary damages will not be awarded;

[41] *R (Bernard)* v. *Enfield London Borough Council,* (2002) EWHC 2287 (Admin): [2003] HRLR 4. In this case, the court awarded £10,000 to a severely disabled and doubly incontinent woman and her husband where they had been left in entirely unsuitable accommodation for two years.

[42] (2003) EWCA Civ 1406: 2204 QB 1124.

(iv) in deciding whether to award damages and, if so, how much, balance is to be struck between the interests of the victim and those of the public as a whole. This balance is necessary to reflect the interest of the public in the continued funding of the relevant public service;

(v) the approach of the domestic courts should be no less liberal than that of the Strasbourg otherwise one of the purposes of the HRA will be defeated;

(vi) Courts should adopt a broad-brush approach without a close examination of the authorities or an extensive examination of the facts;

(vii) within the court's broad equitable approach, the scale and manner of the violation may be taken into account;

(viii) the Court should have regard to comparable figures awarded for torts as reflected in the guidelines issued by the Judicial Studies Board, the Criminal Injuries Compensation Board and by the Parliamentary and Local Government Ombudsman.

The Court also gave the following general case management guidance:

(a) the courts should look critically at any attempt to obtain damages for breach of the HRA by any procedure other than judicial review;

(b) although a claim for damages alone cannot be brought in the Administrative Court, the court will entertain such a claim under the HRA;

(c) the judge of the Administrative Court should ask the claimant to explain why they should not pursue another avenue of complaint before seeking permission for judicial review;

(d) if there is a legitimate claim for other relief, the court should consider deferring consideration of the damages claim until the other matters are resolved; and

(e) the parties will be expected to justify citing more than three authorities and the hearing on damages should be limited to half a day.

To these principles, the House of Lords has recently added in *R (Greenfield)* v. *Secretary of State for the Home Department* (concerning a challenge to a period of additional detention awarded to a prisoner in breach of the guarantee of a fair and impartial determination of a criminal charge under Article 6).[43] Lord Bingham's speech includes the following:

[43] (2005) UKHL 14: (2005) 1 WLR 673.

(i) the HRA is not a tort statute and has different and broader objects. Even where the finding of a violation is not sufficient to provide just satisfaction, such a finding will be an important part of the remedy and that the Court should have regard to the ECtHR's unwillingness to speculate on whether a breach of Article 6 made a difference to the outcome of the case;

(ii) damages need not be awarded to encourage high standards of compliance by member states since they are already bound to do so in international law. However, it may be different if there is felt to be a need to encourage individual officials or classes of officials;

(iii) domestic courts are obliged to have regard to the Strasbourg principles in relation to quantum as well as when deciding whether or not an award is appropriate and to have regard to the fact that awards for anxiety and frustration were rare and modest; and

(iv) awards by a domestic court ought not to be more generous than those awarded in Strasbourg.

A combined reading of the provisions of the HRA and the judicial interpretations reveals that principles have been set out which consider the state compensation as the 'last option'. The finding of the breach of convention right itself is considered as 'just satisfaction' of the underlying principle of remedy in the Act. This shows an existing reluctance towards the remedy of state compensation in practice.

C. Indian Scenario

India also followed the common law tradition of sovereign immunity for a long time. Although the right to Constitutional remedy is a fundamental right under the Indian Constitution, the right to state compensation is not a part of it explicitly. The remedy of state compensation has been included as part of the Constitutional remedy by the judiciary. Hence, the case law analysis is enough to explain the Indian scenario. Since there is plethora of literature on the Indian legal position, this section points out the main developments briefly.

In India, there are no express provisions, Constitutional or statutory, dealing with state liability or the remedy of state compensation for human rights violations. Article 300 of the Indian Constitution deals with the possibility of suing the state for the tortious acts of the state officials.[44] But the Constitution

[44] CONSTITUTION OF INDIA, Art. 300 (1) reads as: "The government of India may sue or be sued by the name of Union of India and the Government of State may sue or be sued by the name of state and may, subject to any provisions which may be made by Act of Parliament or of the legislature of such state enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding provinces or the corresponding Indian states might have sued or been sued if this Constitution had not been enacted".

envisages requirement of a statute for creating such liability. It means that the state liability can be created only through express statutory provisions. Unfortunately, there is no such statute in India.

Hence, as long as Parliament or the state legislature does not legislate in the matter, the liability of the union or state government is to be determined with reference to the law as it stood at the commencement of the Constitution.[45] As a result India has followed the principle of "state immunity" as it existed in the common law system as evolved in *P & O Steam Navigation Co.* v. *Secretary of State*.[46] In this case, the court made a distinction between sovereign and non-sovereign functions and held that the state was liable only in cases of non-sovereign functions. It made the state completely immune from all tortious acts, which came within the category of 'sovereign functions'.

The Supreme Court of India followed the same principle in *Kasturilal* v. *State of U.P.*[47] In this case a person was arrested for carrying allegedly stolen gold. Ultimately, he was released but the gold seized from him was not returned to him. It was lost in the police custody. It was held that the tortious act of a police officer comes within the purview of the concept of sovereign functions. The Court went even further and held that any act done under statutory authority is immune from all sorts of proceedings.[48] The *Kasturilal Case* made all exercise of powers immune from liability, in the absence of a statute creating liability upon the state as required by the Constitution. The result was nothing but absolute immunity.

The liability of the state for human rights violation as it stands now is the creation of later decisions. *Rudul Shah* v. *State of Bihar*[49] is often considered as the first case in which the Supreme Court held the state liable for human rights violations by its officials. In this case, a person was continuously held in jail for several years even after the acquittal order. It was held that the traditional declaratory remedies were insufficient and the court ordered state compensation as the only possible remedy to the victim.[50] The precedent of *Rudul Shah Case* was followed by the Indian Supreme Court subsequently in many cases to order the government to pay compensation for illegal detention,[51] custodial torture,[52] rape,[53] etc.

A theoretical basis for the state liability for the human rights violations was evolved in *Nilabati Behera* v. *State of Orissa*.[54] Here the Supreme Court of India

[45] D.D. Basu, SHORTER CONSTITUTION OF INDIA 1259-1260 (2001).
[46] (1861) 5 BOM HCR APP 1 as cited in *infra* n. 80 at 1259.
[47] AIR 1965 SC 1039.
[48] *Id.* at 1048.
[49] (1983) 4 SCC 141.
[50] *Id.* at 148-149.
[51] *Susheela* v. *State of Karnataka*, 1991 CRI LJ 2675.
[52] *Khatri* v. *State of Bihar*, AIR 1981 SC 928.
[53] *Chairman Railway Board* v. *Chandrimadas*, (2000) 2 SCC 465.
[54] (1993) 2 SCC 746.

introduced the concept of 'public law remedy' and held that this remedy required adequate redressal to the victims of human rights violations by the state. The power to award the state compensation under public law remedy was incorporated by the court into the writ jurisdiction under Article 32.[55] The Supreme Court also made it very clear that the defence of sovereign act has no application in public law remedy.[56]

Hence, in India the judicial response has created the responsibility on the state to provide compensation for human rights violations but a specific legislation, as the Supreme Court of India mentioned a few decades ago in *Kasturilal Case* is still lacking. An explicit provision through a statute would alone bring the desired results of proper enforcement of human rights and the affirmative state responsibility towards the protection of human rights.

IV. INTERNATIONAL HUMAN RIGHTS LAW JURISPRUDENCE

A. International Human Rights Law

International law has been defined as the branch of law that deals with relation of states, i.e., law regulating mutual relations of states.[57] The orthodox positive doctrine affirms that only states are the subjects of international law. There is hot debate in the field of public international law surrounding the issue whether individual is a subject matter of international law or not. Philip C. Jessup has criticized the positivist definition as one weakness of international law, wherein individuals are only 'objects' and not subjects of international law.[58] According to Andrew Clapham, the origin of this attitude of international law (individual as a subject) can be traced to the Nuremberg trial,[59] and its latest development is reflected in the Rome Statute of International Criminal Court.[60] In this context Andrew Clapham says, " it is worth stating that in the context of international human rights law, private bodies and individuals have 'rights and duties' and must be considered, to some extent as subjects of international law".[61]

Modern international law directly interferes with the relationship between the state and its subjects. It allows the citizens to proceed to international bodies against the state for enforcing their fundamental rights.[62] European system has gone further by establishing the European Court of Human Rights as an

[55] *Id.* at 763.
[56] *Id.* at 761.
[57] E. Lauterpacht, INTERNATIONAL LAW: COLLECTED PAPERS OF H. LAUTERPACHT (1975).
[58] Philip C. Jessup, *Responsibility of States for Injuries to Individuals* 46 COLUMBIA LAW REVIEW 903 (1946).
[59] Andrew Clapham, *Issues of Complexity, Complicity, and Complimentarity: From Nuremberg Trial to the Dawn of the New International Court* in Philip Sands (*ed*), FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE (2003).
[60] ROME STATUTE OF INTERNATIONAL CRIMINAL COURT, Art. 85 states: "Any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."
[61] Andrew Clapham, HUMAN RIGHTS IN PRIVATE SPHERE (1993).
[62] ICCPR, First Protocol, 1976.

enforcement mechanism above the domestic legal system for the enforcement of human rights. Hence, the individual is permitted to approach the HCtHR against his state for enforcing his rights guaranteed by the ECHR.[63] Almost similar recognition is given to the individuals under the Inter-American system also.[64]

Traditional remedies as evolved in international human rights law are declaratory in nature, which might be effective in stopping the continuance of the violation of the rights, but are insufficient to redress the impact of violations. The International Human Rights Law recognizes that in some cases state compensation is the only remedy. International Covenant on Civil and Political Rights also expressly recognizes this principle. It provides that the state should give compensation to the victims of unlawful arrest and detention.[65] Here it is assumed that the violation of human rights itself results in a cause of action for state compensation. This principle is also reflected in the American Convention on Human Rights, 1969,[66] the European Convention, 1950,[67] and the Torture Convention, 1984.[68]

The role of United Nations Organization in evolving the principle of state liability is very important. The UN has recognized it through a number of specific instruments addressing the state liability and the state compensation. U.N. Declaration on Basic Principle of Justice for Victims of Crime and Abuse of Power, 1985 clearly recognizes the liability of the state to provide compensation to victims of human rights violations.[69] Again, through a declaration, the UN has established that the states are bound to protect the human rights of individuals.[70] In case of violation of any rights or freedom, the individual has the right to approach the national authority and obtain a decision providing redress including compensation.[71]

International human rights law recognizes the remedy of state compensation but lacks a strict implementation mechanism. The implementation depends upon how far the state parties incorporate the concept into their domestic legal system. It has already been explained that the remedy of state compensation does not deliver satisfying results in most legal systems. An exception to this criticism is

[63] EUROPEAN CONVENTION ON HUMAN RIGHTS, 1950, Protocol 9.
[64] Art. 44 of the AMERICAN CONVENTION ON HUMAN RIGHTS 1968, reads: "Any person or group of persons or any non-governmental entity legally recognized in one or more member states of organization, may lodge petitions with the Commission containing denunciation or complaints of violation of this Convention by a state party."
[65] INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966, Art. 9 (5).
[66] Art. 10.
[67] Art. 5 (5).
[68] Art. 14 (1).
[69] Art. 11 reads: "Where public official or other agents acting in an official or quasi official capacity have violated national criminal laws, the victim should receive restitution from the state whose officials or agents were responsible for the harm inflicted."
[70] UN DECLARATION ON THE RIGHTS AND RESPONSIBILITY OF INDIVIDUALS, GROUPS, OR ORGANS OF THE SOCIETY TO PROMOTE AND PROTECT UNIVERSALLY RECOGNIZED HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 1999.
[71] *Id.* Art. 9.

the implementation mechanism under ECHR. Hence, an analysis of the principles and practices evolved by the ECtHR working at Strasbourgh follows in the next section.

B. Strasbourg Jurisprudence: A Working Model?

Article 41 of the ECHR expressly respects the domestic law. The Strasbourg Court awards damages only if the remedies available under the domestic law are insufficient. The term 'just satisfaction' under article 41 gives wide discretionary power to the ECtHR. The Strasbourg jurisprudence gives emphasis not on providing a mechanism to enrich the successful applicant but on its role in creating binding human rights standards.[72]

The ECtHR follows the principle of *restitution in integrum* to award state compensation. The object of the principle is to restore the position of the victim as it was prior to the violation. This principle in strict sense cannot be applied to all instances of human rights violations. The consequences of breach of human rights cannot be redressed by monetary compensation. The ECtHR itself acknowledges that no conceivable system of law can wipe out entirely the consequences of the breach of violation of human rights.[73] The underlying hypothesis seems to be that violation of a human right is due to either state action or inaction, therefore, the victim should at least be compensated giving the message that violation of human rights is not cost free.

By following this principle the ECtHR has awarded compensation in a number of instances of violation of life and personal liberty. In *Young, James and Webster* v. *UK*,[74] the applicants were dismissed by their employee, a public company, for refusing to join the trade union. The Court held it as the violation of personal liberty and awarded damages. In another case,[75] the applicant was arrested and imprisoned for 14 days. He was not produced before the proper judicial authority. The appellant was in a bad stage of paralysis. The dispute was whether paralysis had been caused by the ill treatment of the officials. The Court held that the government should have conducted an enquiry to decide whether the applicant had been subjected to ill treatment or not. The failure to conduct the enquiry was identified as the violation of Convention right and held the applicant entitled to compensation. The Strasbourg Court has applied this jurisprudence in many cases and awarded damages.[76]

Unlike the above-mentioned cases, there are instances wherein the Court has held that the finding of breach of Convention right itself amounts to 'just satisfaction'. For instance in *Golder's Case*[77] the applicant, a prisoner, was not

[72] See, Karen Reid, A PRACTIONER'S GUIDE TO EUROPEAN CONVENTION ON HUMAN RIGHTS (1998).
[73] *De Wilde and Ors.* v. *Belgium*, 1 EHRR 438 (1979).
[74] 5 EHRR 1 (1983).
[75] *Aksoy* v. *Turkey*, 23 EHRR 553 (1997).
[76] See, for details, *H* v. *France*, 12 EHRR 74 (1990); *Aydin* v. *Turkey*, 25 EHRR 251 (1998); *Vanderlee* v. *Netherlands*, 12 EHRR 134 (1990); *Olssen* v. *Sweden*, 17 EHRR 134 (1994).
[77] *Golder* v. *UK*, 1 EHRR 524 (1979).

allowed to contact his solicitor. The Court found it as the violation of convention right but compensation was not awarded. The Court stated: "...in the circumstances of the case it is not necessary to afford to the applicant any just satisfaction other than that resulting from the finding of a violation of right".

Even though the ECtHR has awarded compensation in a number of instances, it is difficult to set out any clear principles consistently followed by the ECtHR. Commenting on the Strasbourg jurisprudence, the UK Law Commission stated:

> It is rare to find a reasoned decision articulating principles on which a remedy is afforded. One former judge of the European Court of Human Rights privately states: 'We have no principles'. Another judge responds, 'We have principles, we just do not apply them.'[78]

Hence, it is very difficult to elucidate some concrete principles from Strasbourg jurisprudence to point out as model for other legal systems.

V. RATIONALE FOR STATE COMPENSATION

A. Public-Private Law Debate

It is true that the international human rights law and a few national legal systems suggest and support the remedy of state compensation for human rights violations but there exist conflicting theories to build state liability. One argument is to extend the common law principle of liability to the state-citizen relationship.[79] The other argument is the development of the principles as part of the public law to deal with the state-individual relationship. The later argument is mainly based on the development and success of the French administrative law.

The theoretical basis for this principle can be traced back to Dicey's proposition of rule of law. Dicey's second proposition of rule of law provides that, "every man, whatever his rank, or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals."[80] It means that every official, from prime minister to the constable or collector of taxes, is as responsible for any act done without a legal justification as any other citizen is. Hence, Dicey's principle can be interpreted to mean that the law is as applicable to the state as to its subjects. Dicey's rule of law suggests and demands a state according to the law. State is, like any other individual, under the law. Therefore, it can be assumed that the state is duty bound to provide remedy, including compensation, for the human rights violations done by its officials.

[78] DAMAGES UNDER THE HUMAN RIGHTS ACT 1998 (Law Commission Report No 266, para 3.12.)
[79] The tort law as developed under the common law prescribes a standard of 'duty to take care' in the relationship between individuals. Whenever any injury is caused to any person due to the lack of duty to take care, the liability falls upon the defaultant.
[80] A.V. Dicey, INTRODUCTION TO THE STUDY OF LAW OF CONSTITUTION 189 (1920).

Kelsen has also demonstrated that the organization of state is essentially the same as that of a corporation.[81] The corporation's memorandum and articles of association provide the rules, which confer an authority upon certain individuals, the shareholders, or directors to perform acts that the law attributes to the corporation. The case of state is similar where rule of law confers authority upon individuals, usually the officials, to perform acts that the law will attribute to the state. Hence, Kelsen's theory supports the view that the state can be held responsible in contract and tort just like any other individual. The state can act only through human servants or agents exactly like a corporation. Therefore, there is no difficulty as such to extend the doctrine of agency and vicarious liability by or against the state to make it liable for and bound by the act of its servants or agents.

In considering the concept and application of state immunity, Kelsen points out that it is unthinkable that a state is governed by no law; at the very least there must be rule of law defining which acts of the individual employee are to be attributed to the state.[82] It can also be accepted that the state, which makes the statute may itself be bound by those statutes; and it is accepted that state, which by its courts settles the disputes may itself be bound by the judicial decrees; and it is accepted that state may be subject of proprietary, contractual and tortious rights and duties. In short, it is accepted that the state is a legal person.[83] Moreover, the different sets of laws for the state and private persons are contrary to step by step unfolding of legal norms from the ultimate 'grundnorm'.[84]

Hence, Dicey's proposition of rule of law and Kelsen's theory support the view that there is no need for a separate branch of law called public law to regulate relationship between state and its subjects. However, this view is often criticized by the thinkers that these theories were propounded without taking into account the development and success of French administrative law.[85] This branch of law has proved to be a success in protecting the life and liberty of individuals against the state. Several scholars share the view that the relationship between the state and the subjects is different from the relationship between the subjects, and they should be governed by different sets of laws. Some others are of the opinion that private law has evolved and modulated to deal with completely different problems and its attitude and approach is entirely different. Therefore, incorporation of governmental liability into the mould of private law will lead to contradictory, harsh and capricious results.[86]

On the other hand it is argued that the state undertakes several functions in the interest of the public. State's actions require special status and significance. If the state and its subjects are considered on the same footing, it will defeat the

[81] Kelsen, GENERAL THEORY OF LAW AND STATE part I, Chap. 9 (1945).
[82] Hans Kelsen, PURE THEORY OF LAW 32 (1970).
[83] Peter W. Hogg, LIABILITY OF CROWN 9 (1971).
[84] *Supra* n. 82.
[85] Friedman, LAW IN CHANGING SOCIETY 379 (1964).
[86] Benjifield and Whitmore, AUSTRALIAN ADMINISTRATIVE LAW 292 (1966).

purpose of state function itself. It is in this background that Friedman pointed out that there was need for the common law to develop a separate branch of law called public law of tort and of contract, not as a mere appendix to private law.[87]

Even though there are contradictory theories with regard to the basis of governmental liability, it is admitted that there exists governmental liability to give compensation to the victims of human rights violations. These theories can be used as a basis to say that state, which is acting through individual officers, is accountable and responsible to its subjects. It cannot claim absolute immunity. Absolute immunity is against the concept of justice and human rights. Whether state liability is to be regulated and determined by public law or private law needs to be discussed theoretically in detail.

B. Utilitarian and Moral Arguments

Apart from the justifications based on the concept and development of human rights law and the theories of eminent jurists like Dicey, Friedman, etc., there are some moral and utilitarian arguments in favour of state compensation for human rights violations.[88]

Modern welfare state is involved in almost all areas of its individual citizens. Traditionally it was a police state. In the police state, the function of the state was limited to the maintenance of law and order situations. Now the state has become the dominant factor in the social and economic life of individual. It intervenes with health care system, acts as banker, controls transport, communication, electric projects, etc. It is presumed that all such activities of state are for the benefit of the society. The chances of state-individual interaction are more in discharging the duties of the welfare state. Hence, the importance of remedies against the state is high.

The human right law demands the state to be 'just, fair and reasonable' when it deals with the human rights of individuals. It is argued that the existence of remedy against the state would induce the state to comply with the standard of 'just, fair and reasonable'. The remedy of state compensation would encourage the government to take greater care whenever the actions of the state are likely to interfere with human rights. The compensation regime should inspire the state to exercise proper monitoring over its officials.

The state compensation regime would also act as a social insurance. The state acts for and on behalf of the state. The benefit of state action goes to the public at large. Therefore, it can be argued that the negative consequences caused to individuals by state action should also be shared by the public. It is not fair to leave the victims to suffer the adverse consequences. Friedman stated the same

[87] *Supra* n. 85 at 303.

[88] Howard Master has put forward these arguments in the context of the state compensation for wrongfully convicted persons. See, Howard S. Master, *Revisiting the Takings-Based Arguments for Compensating the Wrongfully Convicted*, 60 NYU ANNUAL SURVEY OF AMERICAN LAW 97 (2004).

idea in the following words: "The prejudice caused to the private person is a kind of public charge, which should not rest with one or small number of persons affected by the public measure."[89] Borchard also shared this opinion and stated that greater efficiency and justice would be attained by accompanying power with responsibility. It would respond more satisfactorily to a public sense of justice if losses inflicted on the individual by the wrongful acts of agents of the community are distributed to the community as a whole rather than allowed to rest upon the unfortunate victim alone.[90]

Some advocates for state compensation argue on the basis of victim compensation as recognized by many legal systems. Bernard uses the universal availability of crime victim compensation schemes and stated that: "if the governments are morally obliged to compensate individuals harmed by criminals without any direct involvement of government in inflicting the harm, then they certainly should be morally obliged as well to compensate wrongfully convicted individuals harmed directly by their criminal justice systems".[91] This argument counter-claims that providing compensation to victims of human rights violations is not feasible as it misallocates the public fund. Some thinkers also argue for the expansion of eminent domain principle as a basis for state compensation and claim that eminent domain principle should support provision of a remedy for the wrongfully convicted on the ground that as the government must compensate when it takes property, it cannot have the power to take the liberty of wrongfully convicting with impunity.[92]

In spite of all these arguments and the developments under the common law and Constitutional tort doctrines, there is no consensus upon this issue and they have proved to be incapable of providing state compensation meaningfully.[93] However, it is an undeniable fact that the development of human rights jurisprudence has influenced the acceptance of the view that compensation should be provided for curtailing liberty and loss caused by maladministration.[94]

VI. CONCLUSION

It is undeniable that the state is authorized to use organized force. However, it is meant for the protection of life and liberty of individuals and maintenance of peace and order in society. Hence, it should not result in denial of life or liberty. If an act of state results in human rights violations, the state is under legal obligation to provide remedies including compensation. It can be said that the state becomes a state under rule of law only if sufficient remedy is available to the individuals against the state and its agencies.

[89] *Supra* n. 85 at 412-413.

[90] *Supra* n. 6.

[91] Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U CHI L SCH ROUNDTABLE 73, 93-94 (1999).

[92] See, *supra* n. 88 at 117.

[93] See, *supra* n. 91 at 86-101.

[94] Duncan Fairgieve, STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY (2003).

The state liability to give compensation can also be justified based on the principle of justice and equality. It is always assumed that the state is working out of public fund and for the benefit and welfare of the public. If there is any risk in the discharge of these duties, it shall be borne by the public. Injury to private person arises often from actions taken in the public interest. This is based upon the principle of justice that the benefit of public administration is distributed among public equally. Likewise any consequences arising out of this public administration should be suffered by public equally. Hence, state compensation to the victim as a remedy shall be borne by the members of the public as a whole. It is not practically possible to collect fund from each member of the society. Hence, state as an agency of public is liable to give compensation.

Moreover, democratic ideal of justice must rest on the three foundations; equality, liberty and ultimate control of government by the people. Here the word liberty means certain rights of personal freedom, which must be secure from interference by the government. If the state powers are unquestionable, or if there is no remedy for individual against state, the word liberty will lose its significance and meaning. This is against the basic premise of ideal of justice. Therefore, the acts of state and other prerogatives, which are above judicial scrutiny, are all detractions from the principle of equality. It has also been established that rule of law principle also recognizes claim of individuals against the state.

The principle of justice, rule of law and the notion of human rights provide theoretical support for the remedy of state compensation. Nevertheless, in practice the remedy works in the form of an underdeveloped abstract principle. The legal system in which the remedy of state compensation has been provided expressly, works in an inconsistent manner. For instance, under European Convention and under the Human Rights Act of England, the Court has taken different views. In a few cases, the court awarded damages, whereas in other cases the court considered the finding of violation of human rights as the sufficient remedy. The legal system where the remedy had been evolved as a result of judicial interpretation (for instance the state compensation under Indian Constitution) has been invoked very rarely. Therefore, it is necessary to stipulate the right to state compensation, at least for grave violations such as custodial rape, torture, etc., where the traditional remedies is insufficient as an express substantive right. Otherwise the remedy would depend upon the judicial mercy or the capacity of the victim to take the matter to higher judiciary. This may leave most of the victims of human rights violation without any remedy.

It is true that compensation in cases of human rights violations is the second best remedy. The most effective is the prevention of violation. Nevertheless, once the violation has occurred, the whole existing remedy except monetary compensation is meaningless so far as the victim is concerned. Hence, it can be said in conclusion that violation of rights should be prevented by the state. If that is not possible, the victim should, at least be compensated for the damage caused by the violation.

SPORTS BROADCASTING IN INDIA - TOWARDS AN INTEGRATED LEGAL FRAMEWORK

Lovely Dasgupta[*]

The World Cup's organisers and sponsors would have heaved a sigh of relief after Bermuda opted to bowl first on winning the toss.[1]

I. INTRODUCTION

Sports have come a long way to become an institutionalized means of mass entertainment. From an activity arousing only passing interest among governments,[2] it has been transformed into a media spectacle, commanding audiences in the sizes of millions and media contracts for billions of dollars.[3] The audiovisual media, the television in particular, is responsible for this transformation. Television has revolutionized the manner in which sports are watched. Any game or sporting event of any stature, taking place in any part of the world is broadcasted over the audiovisual media.

This intervention of television has benefited both sides. The sports organizers have got a forum for exhibiting their events due to the wide reach of the television. The resultant effect is the generation of increased revenues and the evolution of marketable players. Thus sports like football and one-day cricket matches generate billions of dollars worth of business for the television industry. In return the sports governing bodies are able to bargain for broadcasting contracts worth billions of dollars. This money benefits sports bodies and structures. Local clubs, domestic tournaments, and the national teams are thereby provided with adequate finances to build a strong pool of players.

The supply of good players in turn helps to build strong teams. The presence of strong teams ensures competitive domestic contests as well as champion national teams. A good national side means that the competition at the international level will be of the highest standard. High standard competition in turn leads to exciting games and attracts spectators to the stadium. This also means that there will be a significant number of people who would be deprived of accessibility due to non-availability of tickets. They will then provide a market to the television media, ready to be capitalized. Television thus helps in democratization of sports viewing. The sporting events have become more

[*] LL.M., M. Phil., Lecturer, NUJS, Kolkata.

[1] Indranil Mazumdar's Report on India's record breaking win over Bermuda in the Cricket World Cup, 2007 played in the West Indies. THE TELEGRAPH, Tuesday, 20th March 2007.

[2] This statement holds true in respect of the modern Olympic movement, which attracted the attention of governments when it became evident that success in the arena enhanced national identity and stature. For a scholarly account on the relation between sport and politics see, Barrie Houlihan, SPORT POLICY AND POLITICS- A COMPARATIVE ANALYSIS (1997). See also, David Fraser & Kathryn McMahon, *When Too Much Sport is Barely Enough: Broadcasting Regulation and National Identity*, 1 (3) ENTERTAINMENT LAW (2002).

[3] See, Lawrence A Wenner (*ed*), MEDIA SPORT (2003).

accessible to a wider audience. This cyclical process thus appears to be healthy for both the game as well as the television industry.

Another positive aspect of media-sports partnership is that it is financially beneficial for the players. They are provided with opportunities to earn money. This is in addition to the monetary incentives that their club gives or the pay packet that is provided by their sports governing bodies. Thus the players can enter into sponsorship deals with various companies and be their brand ambassadors. This gives them further incentive to improve their performance on the field.

In the whole process, however, sports have got commercialized and commodified. The leading reason for this transformation of sports from a practice to a spectacle is the symbiotic relationship existing between the audiovisual media and sports. For example, Rupert Murdoch, the world famous media grandee, reaffirms this mutual dependence by describing the audiovisual sports as "[the] News Corporation's battering ram into new markets".[4] Another western media corporation calls television sports as the "universal glue for global content".[5]

The potency of the television and sports combination has generated controversies, precipitating judicial intervention. The audiovisual sports has equally troubled the minds of the legislators and the academics. As a result, in the jurisdictions like the United States (US), the United Kingdom (UK), and the Eurapeon Union (EU), there abounds literature on the legal issues that dog sports broadcasting. The 1995 *Hero Cup Case* established sports broadcasting as an area demanding in-depth legal research and discussion within the Indian context. In particular, the *Hero Cup Case* accentuated the imperativeness of devising the norms assuring public accessibility to the sports broadcasts. The subsequent disputes further reiterate this need.[6]

Hence for India there are lessons that can be learnt from the abovementioned three jurisdictions. This article, therefore, proposes the argument that in the light of the commercialization and commodification of sports, adequate norms to regulate the expanding area of sports broadcasting by means of an appropriate legal framework are necessary in the present Indian context. The analyses begin with an overview of the media sport and the accompanying legal framework within the US, the UK and the EU. The focus then shifts to the Indian scenario, where an attempt is made to point out the conflict areas. The article concludes with suggestions as to the possible solutions to the existing sports broadcasting disputes that appear to have become a routine affair in our country.

[4] *Supra* n. 2.
[5] *Ibid.*
[6] See, e.g., *TEN Sports* v. *Citizen Consumer and Civic Action Group and Others*, (2004) 5 SCC 351; *M/s. ZEE Telefilms Ltd. & Anr* v. *Union of India & Ors*, (2005) 4 SCC 649.

II. MEDIA SPORTS AND LAW WITHIN THE US, THE UK AND THE EU

Within the US the success of National Football League (NFL) and National Basket Ball Association (NBA) can be cited as the best examples of audiovisual media and sport partnership.[7] The NFL, for example, pioneered the idea of selling a single nationally televised package.[8] The fact that all of these broadcast packages were sold on an exclusive basis built an enormous and reliable national audience, which in turn ensured a market for the advertisers.[9] However these exclusive selling agreements soon attracted the provisions of the US anti-competitive law (also called the anti-trust law). The US court nullified the NFL's attempt at collective selling of the broadcasting rights on the ground that such an arrangement violated the anti-trust law.[10]

The case involved a challenge to Article X of the NFL by-laws as illegal under the Sherman Act, 15 U.S.C., Section 1. The court concluded that any restriction through the collective sale agreement violates the Sherman Act to the extent that it is unreasonable. The court thus applied the reason test to analyze the compatibility of Article X with the Sherman Act. Importantly the court emphasized on the unique character of professional football. As per the court, professional football "[l]ike other professional sports which are organized on a league basis ... has problems which no other business has."[11] The NFL television policies found themselves remaining under the scrutiny of this case.

Subsequently, the NFL returned to the same federal courthouse to test its joint selling agreement with CBS.[12] The court found that the agreement violates the terms of its prior decree. This judgment further threatened to weaken the existing sports-media relationship. These developments caused the NFL to lobby with the Congress leading to the enactment of the Sports Broadcasting Act, 1961 (SB Act).[13] The SB Act grants limited anti-trust exemption to professional sports league for the purpose of collective selling of television rights.[14] The anti-trust exemption, however, is not applicable to amateur sports.[15]

[7] See generally, Alan Fecteau, *Network Blackouts: Old Law Meets New Technology with the Advent of the Satellite Dish*, 5 MARQ SPORTS LJ 221 (1995).
[8] *Ibid.*
[9] *Ibid.*
[10] *United States* v. *National Football League*, 116 F SUPP 319 (1953); US DIST LEXIS 2218.
[11] *Ibid.*
[12] See, *United States* v. *National Football League*, 196 F SUPP 445 (1961).
[13] 15 USC 32 (1961).
[14] To quote from S. 1291 "The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730) [15 USC 12], or in the Federal Trade Commission Act, as amended (38 Stat. 717) (15 USC 41 et esq., shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income

In the UK the media sport partnership is primarily concentrated around football. English football is probably one of the most widely known commodities, consumed world wide through the medium of television.[16] One of the effects of this commercialism has been the intervention of law.[17] Largely the issues concerning the right of the public to access sports broadcast vs. the commercial interests of the sports organizer and the broadcaster continue to trouble the state institutions in the UK.

A balance is sought to be achieved under Part IV of the Broadcasting Act, 1996, which lists sporting programmes of national significance or the 'crown jewels' that have to be compulsorily shown on the free television. The current list includes the Olympic games, the Grand National, the Wimbledon finals and Six Nations Rugby matches. The list operates on a two-tier basis of Group A and B events. The broadcast rights to Group A events can only be made available on a non-exclusive basis. Exclusive rights to events in Group B are permitted if other television broadcasters are providing supplementary coverage such as full or partially delayed coverage.

Section 101 provides that a broadcaster in one category may not without the consent of the Independent Television Commission (ITC) broadcast a listed event unless one in the other category also broadcasts it. Section 104 (1) requires the ITC to draw up a code of guidance as to the matters, which it will take into account in determining whether or not to give consent to a pay television broadcaster. In 1997 the ITC published a Code laying down the norms for regulating the broadcast of sports events.

Section 97 of the Broadcasting Act gives the Secretary of State for Culture, Media and Sport the power to draw up a list of sporting or other events of national interest.[18] This identification of sports with national

tax under section 501 (c) (6) of the Internal Revenue Code of 1986 {26 USC 501 (c) (6)}, combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto."

[15] See, *National Collegiate Athletic Association (NCAA)* v. *Board of Regents of the University of Oklahoma and University of Georgia Athletic Association*, 468 US 85: 82 L Ed 2d 70.

[16] Critics argue that this new 'commercial' face damages the national game making the governing body susceptible to outside commercial interests; while there is also support for the commercialization of the game. Both the sides nonetheless agree on the point that audiovisual media and football partnership is responsible for the high volumes of revenue generated in the game. For discussion on the point, see, Sophie Howard & Rhiannon Sayce, *Branding, Sponsorship and Commerce in Football*, available at http://www.le.ac.uk/so/css/resources/factsheets/fs11.html. Accessed on December 4, 2005.

[17] See, Simon Gardiner & Alexandra Felix, *Juridification of the Football Field: Strategies for Giving Law the Elbow*, 5 MARQ SPORTS LJ 189 (1995).

[18] See, *Codes & Guidance Notes - Code on Sports and Other Listed Events*, available at http://www.ofcom.org.uk/static/archive/itc/itc_publications/codes_guidance/sports_code/index.asp.html. Accessed on April 4, 2006. In *Regina* v. *Independent Television Commission, Ex Parte TV Danmark 1 Ltd*, [2001] UKHL 42, the House of Lords upheld the protection granted to the aforementioned selected events. Lord Hoffmann, giving the leading judgment concluded that "the balance between the interests of sports organizers and pay-TV broadcasters in maintaining a free market and the perceived interest of the citizen in being able to watch important sporting events has

interest is the characteristic feature of the UK sports, differentiating it from the US approach, which is essentially commercial.

Amongst the EU member states, sports represent the culture of promoting goodwill and friendship amidst the citizens of the EU. The European Commission (EC) has a Sport Unit within the DG Education and Culture (DG X). In addition the other institutions of the EU *viz.*, the EU Council[19] and the EU Parliament[20] have several committees dealing with the specific issues of sports in accordance with their nature, as and when they arise.[21]

The social function of sports has, however, been diluted with the increasing pressure of the commercial world. Importantly, the single major institution responsible for inducing this commercialization of EU sports has been the audio-visual media. As happened in the US and the UK, within the EU also the television and sports became natural partners in their endeavor to achieve maximum commercial success. Commercial success, however, has been accompanied by the issue of public accessibility to the sports broadcasts.

Primarily the EU competition law has been the most common mode for resolving the sports broadcasting disputes. In addition, the EC has issued directives with the hope of decelerating the broadcast induced commercialization of sports. Thus, Article 3a of Television Without Frontiers Directive of the EC allows each member state to take measures in accordance with community law to ensure that broadcasters under its jurisdiction do not broadcast, on an exclusive basis, events which are regarded by that member state as being of major importance for society in such a way as to deprive a substantial proportion of the public in that member state of the possibility of following such events via live coverage or deferred coverage on free television.[22]

already been struck in the terms in which Article 3a has been framed." , available at http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd010725/dan-1.htm. Accessed on April 4, 2006.

[19] The Council of the European Union forms along with the European Parliament the legislative arm of the European Union (EU). The Council of the European Union contains ministers of the governments of each of the European Union member states. It is sometimes referred to in official European Union documents simply as the Council or the Council of Ministers, available at http://www.consilium.europa.eu/showPage.ASP?lang=en . Access on July 30, 2006).

[20] The European Parliament (formerly European Parliamentary Assembly) is the parliamentary body of the European Union (EU), directly elected by EU citizens once every five years, available at http://www.europarl.europa.eu/. Accessed on July 30, 20006.

[21] See, *Sports Policy in the EU- Introduction*, available at http://www.euractiv.com/en/sports/sports-policy-eu-introduction/article-117541?_print. Accessed on May 15, 2006.

[22] (89/552/EEC) Further Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amended the Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ No L202/60 of 30.7.1997). As a result of this directive the member states

Further, provision is made for notification of these designated events to the EC. A duty is imposed upon every member state to ensure 'by appropriate means' that its own broadcasters do not exercise an exclusive right to televise an event designated by another Member state in such a way that a substantial proportion of its public is deprived of the possibility of watching.[23] In conclusion, therefore, the important legal instruments that inform the response of the EC to the disputes relating to sports broadcasting are: the EU competition law and the EC directives.

III. MEDIA, SPORTS, AND LAW WITHIN THE INDIAN CONTEXT - A CONFLICT ZONE

Within the Indian context, cricket drives the media sports growth. The game of cricket became a lucrative programming content for the broadcasters after 1983 when India won the cricket world cup.[24] With Doordarshan broadcasting the images of the world cup win live into the Indian homes, cricket was firmly put on the road of commercialization. The process of commercialization was further enhanced with the mushrooming of private broadcasters during the 1990s.[25] The commercialization of the game of cricket inevitably led to the disputes over broadcasting rights and the consequent legal intervention.

The *Hero Cup Case*[26] is the first case wherein the Supreme Court of India had the occasion to decide a sports broadcasting dispute. The case emerged out of a dispute between the Board of Control for Cricket of India (BCCI) and the Ministry of Information and Broadcasting (MIB). In India, the game of cricket is organized under the aegis of BCCI by the respective state's cricket governing bodies. These bodies in turn have affiliates at the club level. Thus it is a pyramid with BCCI at the top and the local clubs at the base. The Cricket Association of Bengal (CAB)[27] is one such state body and important *dramatis personae* of the *Hero Cup Case*.

In the year 1993 the CAB organized a six-nation international cricket

have amended their broadcasting laws. See generally the notifications published by Member countries in the official Journal of European Communities.

[23] See, Torben Toft, *TV Rights of Sports Events*, available at http://www/sitesources/comm/competition/speeches/text/sp2003_002_en. Accessed on March 13, 2006.

[24] Though India has been world champions in Hockey for a long time but post independence its success rate in that field was dwindling. Indian and Pakistani national teams have traditionally dominated men's hockey, but have become less prominent with the Netherlands, Germany and Australia gaining importance in the late 1980s. See, Field Hockey, available at http://www.fieldhockey.com/. Accessed on April 15, 2006.

[25] On the effect of trade liberalization on Television industry, See, Arpita Mukherjee, *Audio-visual Policies and International Trade: The Case of India*, available at http://www.hwwa.de/Forschung/Publikationen/Report/2003/Report227.pdf. Accessed on April 15, 2006.

[26] *Secretary, Ministry of I & B* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161.

[27] CAB is the member association of BCCI and is situated in the Indian state of West Bengal.

tournament to mark its Diamond Jubilee celebrations and named it the Hero Cup.[28] As part of its effort to ensure the broadcast of the said tournament, the CAB put forth two alternatives before the MIB for consideration, *viz.*, 1) that Doordarshan would create the host broadcaster signal and also undertake live telecast of all the matches in the tournament; or 2) any other party may create the host broadcaster signal and Doordarshan would only purchase the rights to telecast in India. Furthermore, the CAB emphasized that it will retain the foreign television rights.[29]

Doordarshan in response made an offer of Rs. 1 crore as a host broadcaster. This belied the expectation of CAB, which subsequently sold the broadcasting rights of the said tournament to Transworld International (TWI) on an exclusive basis. This was an all-inclusive agreement comprising of rights both for the Indian market as well as for foreign television broadcasting. Under this agreement the CAB was to receive a guaranteed sum of US$ 5,50,000. Furthermore, additional revenue was to be split between CAB and TWI in the ratio of 70:30. Doordarshan reacted to these developments by refusing to negotiate with TWI for the purpose of broadcasting the matches. The implication of this decision of Doordarshan was grave.

Doordarshan is the sole free service broadcaster in India having a terrestrial network throughout the country. Hence, if Doordarshan does not broadcast the matches, it will be inaccessible to a majority of the public who lack the means to subscribe to pay channels.[30] Faced with this reality, the CAB urged Doordarshan to enter into a co-production agreement with TWI for the purpose of broadcasting the matches. This arrangement would have denied Doordarshan the exclusive rights to the broadcasts of the matches. Doordarshan rejected this proposal. Consequently, the impasse continued with Doordarshan adamant at not buying the signals from TWI and, therefore, not broadcasting the matches on its national network.

The CAB made a fresh offer to Doordarshan of the right to generate live feed on its own. This was also rejected by Doordarshan, which claimed the broadcasting rights to the Hero Cup matches on an exclusive basis as per its own terms.[31] Thereafter the dispute spiraled into a tussle between the state institutions *versus* the sports organisations.[32] The contentions of the parties centered on the issue of the rights of the sports organizer and sports broadcaster vis-à-vis the right of the public to freely access the sports broadcasts.

The contention of the MIB was that airwaves being a scarce resource

[28] The case is referred to as *Hero Cup Case* as the six-nation tournament was to be sponsored by the Hero company.

[29] *Supra* n. 26 at 231.

[30] Hypothetically therefore if another free service broadcaster with countrywide network were available the question of restricted public accessibility would have failed to withstand the scrutiny.

[31] *Supra* n. 26 at 231.

[32] *Id.* at 240.

need regulation. Hence, there can exist no general right to a licensee to use the airwaves for the purpose of broadcasting.[33] The import of this line of argument is that the utilization of airwaves should cater to the interests of larger number of the people. However, the problem with this argument was that CAB or TWI never sought license to own or permanently use the spectrum.[34] The CAB and TWI were seeking permission to import the equipment, making the necessary logistical arrangement and generate signals by recording the event. For ensuring accessibility to the Indian viewers they wanted Doordarshan to purchase the signals and broadcast it or alternatively grant permission to Doordarshan to access the event and broadcast it. The question of allotting frequencies or putting pressure on a limited resource like airwaves was never an issue.

Furthermore though the problem raised in this case was about public accessibility, it was also an excuse used by both the CAB as well as the MIB to get the best commercial deal from the commodification of the game of cricket.[35] Thus, for example, the CAB contended that the profit earned from cricket is essential for the development of the game. Accordingly, it is important for the organisers to sell the broadcasting rights of the game to the highest bidder. This revenue generation would in turn help in the dissemination of information about the game and thus, educate the viewers and persons interested in the game. The logic of this argument is that the commodification of the game of cricket is inevitable for its well being which in turn serves the interest of the viewing public.

The CAB resorted to Article 19 (1) (a) of the Constitution of India to strengthen its argument.[36] It claimed that the right to broadcast sports event forms part of the fundamental right to freedom of speech and expression. Reason being that sports-broadcast is a mode of education, information as well as entertainment. Correspondingly the viewers also have the right under Article 19 (1) (a) to be educated, informed and entertained. Therefore, freedom under Article 19 (1) (a) can be abridged only in compliance with the requirements of Article 19 (2).[37]

The Supreme Court accepted these contentions of the CAB and overlooked the vested interests of both the parties, i.e., protecting their commercial gains. The judgment concentrated on the moot point of freedom of speech and

[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.* Ministry of Information and Broadcasting (MIB) argued that the primary object of telecasting cricket matches by CAB was to conduct trade as covered under Art. 19 (1) (g). MIB was dismissive of the need to determine the issue of freedom of speech and expression qua Art. 19 (1) (a).
[36] See, Art. 19 (1)- All citizens have the right- a) to freedom of speech and expressions ...
[37] As per Art. 19 (2) "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".

expression under Article 19 (1) (a) as available to the sports organizers and viewers of sports event. To quote Sawant, J.:

> We are not concerned in the present case with the right of the private broadcasters, but only with the limited right for telecasting particular cricket matches for particular hours of the day and for a particular period.... The only objection taken against the refusal to grant the said right is that of the limited resources. That objective is completely misplaced in the present since the claim is not made on any of the frequencies owned, controlled, and utilised by Doordarshan. The right claimed is for uplinking the signal generated by the BCCI/CAB to a satellite owned by another agency.[38]

The *Hero Cup Case* is thus a case on Article 19 (1) (a) and the permissible restrictions as enumerated under Article 19 (2). The judgment also entailed the discussion on the difference in the effect of 19 (1) (a) and 19 (1) (g)[39] as well as 19 (2) and 19 (6).[40] Nevertheless one can draw certain conclusion that will help us in furthering the present discussion. To begin with, in this case the court conceded the argument that "airwaves/frequencies are a public property" and have to be used in the best interest of the public. But the court emphasized that monopoly over information produced and disseminated either by the government or "private affluent broadcasters" is dangerous. The solution, therefore, lies in establishing an autonomous agency, representative of all sectional interests and free from dominance of either the state or the private broadcasters.

Furthermore, the court observed that Doordarshan has the monopoly of the national telecasting network. Hence not showing the tournament will harm the interest of majority of people who cannot afford to subscribe to pay channel. The court declared the negative approach of Doordarshan as detrimental to public interest.[41] Thus the need for a free service broadcaster other than Doordarshan is implied in this observation of the court. This need is felt to ensure public accessibility to sports broadcasts.

Another point that emerges from this decision is the novelty of the dispute. This was the first time that the apex court was dealing with a dispute relating to sports broadcasting. Thus commerce, as per the judges, was incidental to the

[38] *Supra* n. 26.
[39] As per Art. 19 (1) (g) "every citizen has a right to practice any profession, or to carry on any occupation, trade or business."
[40] As per Art. 19 (6) "Nothing in sub-clause (g) ... shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to-the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise]."
[41] *Supra* n. 26.

main objective of the game of cricket, which is organised to educate and entertain the masses. This explains the reliance on Articles 19 (1) (a) and 19 (2) in order to resolve the dispute, both by the judges as well as the parties. The court also referred to the Indian Telegraph Act, 1885, in particular section 4 (1). Throughout the judgment the focus is on the ambit and interpretation of Articles 19 (1) (a) and 19 (2) as well as section 4 (1) of the Indian Telegraph Act, 1885. To quote Jeevan Reddy, J.:

> There may be no difficulty in agreeing that a game of cricket like any other sports event provides entertainment and entertainment is a facet, a part, of free speech, subject to the caveat that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing social interests.[42]

With the absence of alternatives to Doordarshan the court ended up directing the state broadcaster to telecast the matches. The court also devised a temporary arrangement for sharing of revenues generated from the matches. The *Hero Cup Case* for the first time emphasized the need to have an independent public authority for regulating the broad gamut of issues relating to broadcasting. In addition, it was also clarified that 19 (1) (a) does not encompass within its ambit "the right to establish, maintain or run broadcasting stations or broadcasting facilities." This is significant in the sense that a dispute relating to sports broadcasting is not a problem to be resolved by resorting solely to constitutional provisions. It also necessitates an in-depth understanding of the peculiarities of sports and media relationship leading to a well thought out legislative response.

The court stressed upon the need for an adequate legislative framework for broadcasting. Here one may quote Jeevan Reddy, J. who observed that:

> coming to the Indian Telegraph Act, 1885, a look at its scheme and provisions would disclose that it was meant for a different purpose altogether.... Except section 4 and the definition of the expression 'telegraph', no other provision of the Act appears to be relevant to broadcasting media.... The situation is undoubtedly unsatisfactory. This is the result of the legislation in this country not keeping pace with the technological developments.[43]

Post *Hero Cup Case*, the sports broadcasting scenario witnessed more competition and consequently more uncertainty. Accordingly the need to regulate the private broadcasters has also gained urgency.[44] The Apex Court ruling insisted that the government should establish an autonomous body for

[42] *Ibid.*
[43] *Ibid.*
[44] See, Scott Bouvier, THE BILL AND COMPARATIVE MEDIA LAW, Chapter 9; J. CARDOZO, *The Broadcasting of Sport and Major Events Under the Broadcasing Bill*, 5 INT'L & COMP L 507 (1997).

regulating the broadcasting media.[45] Both Sawant and B.P. Jeevan Reddy, JJ. underscored the need for an autonomous "public authority representative of all sections and interests in the society to control and regulate the use of the airwaves." Jeevan Reddy, J. thus elaborated upon the requirement of autonomy by pointing out that "While all the leading democratic countries have enacted laws specifically governing the broadcasting media, the law in this country had stood still, rooted in the Telegraph Act of 1885."[46] Therefore "it is ... imperative that Parliament makes a law placing the broadcasting media in the hands of a public/statutory corporate or the corporations, as the case may be. This is necessary to safeguard the interests of public and the interests of law as to avoid uncertainty, confusion and consequent litigation."[47] In short, as per the judges, India needs a legal framework to regulate broadcasting.

Unfortunately, the government failed to pay heed to the guiding principle of *Hero Cup* judgment. As a token of compliance the government notified on 15th September 1997 the Prasar Bharati (Broadcasting Corporation of India) Act, 1990. The ostensible objective of the Act is to provide autonomy to Doordarshan and All India Radio. The structural parameters have, however, not been altered enough to be free from the state control. The corporation continues to be under the deep and pervasive control of the state, financially as well as administratively.[48]

Since it would have been politically suicidal for any government to grant autonomy to the most widely accessible channel of communication, hence, a compromise was sought that would keep away the angst of judiciary as well as secure the political interests of the democratic representatives. Thus section 12 of the Act emphasizes that the provisions are in addition to the requirement of Indian Telegraph Act, 1885.[49] Further the Union government controls the constitution of the Prasar Bharati Board.[50] The mandate of the Corporation has been laid as that of a public service broadcaster with the primary objective of education, information, and entertainment for the masses.

However, the implementation of this mandate has witnessed political interference right from the inception.[51] Moreover commercialization of Doordarshan has become an acknowledged reality. Pursuing the public-spirited mandate and ensuring autonomy will, thus, require efficient management of resources and a strong political will. In contrast, the Corporation is largely funded by the state[52] and the central government has power to determine the

[45] See, S. Krishnaswamy, *Governing the Airwaves* 17 FRONTLINE 03, available at http://www.hinduonnet.com/fline/fl1703/index.htm. Accessed on September 1, 2005.
[46] *Supra* n. 33.
[47] *Ibid.*
[48] See, PRASAR BHARATI (BROADCASTING CORPORATION OF INDIA) ACT, 1990.
[49] *Id.* S. 12.
[50] *Id.* S. 4.
[51] See, Praveen Swami, *A Short Lived Experiment*, available at http://www.hinduonnet.com/fline/fl1509/fl150900.htm. Accessed on January 1, 2006.
[52] *Id.* S. 17.

content of the programmes in the interest of "the sovereignty, unity and integrity of India or the security of the State or preservation of public order."[53]

This means a careful perusal of the Act shows that the autonomy of the Corporation has to be sacrificed at the altar of executive interest, which need not necessarily be the interest of the public. It also means that excessive commercialization will not be hampered so long as there is no visible threat to the interest of the state.[54] Finally it implies that the state can act to secure the commercial interest of the Corporation by any executive or legislative mechanism. It has preserved the state control, retained the basic character of Doordarshan and has left open the scope for commercialization.

The government thus continues to search for an effective legislative response to the broadcasting problems. Doordarshan functions and competes with the private broadcasters, as per the mandate conferred by the Prasar Bharati Act. Till date there have been two abortive attempts to bring in reforms in the field of Indian broadcasting, viz., the Broadcasting Bill of 1997 and the Communication Convergence Bill, 2000. While these bills have generated debate both within and outside Parliament, no action has been taken to implement either of them. Both the documents refer to the live broadcasting of sports events. While the Broadcasting Bill envisages a regime that protects the monopoly of Doordarshan over sports broadcasts, the Convergence Bill is concerned with ensuring public accessibility to the live broadcasts of sports events, irrespective of the fact whether the broadcaster is Doordarshan or any other free service broadcaster.[55]

IV. CONCLUSION

The government continues to grope for an adequate response to the concerns of regulating broadcasting in general and sports broadcasting in particular.

[53] S. 23 of the Act provides that "(1) The Central Government may, from time to time as and when occasion arises, issue to the Corporation such directions as it may think necessary in the interest of the sovereignty, unity and integrity of India or the security of the State or preservation of public order requiring it not to make a broadcast on a matter specified in the direction or to make a broadcast on any matter of public importance specified in the direction."

[54] As per S. 12 (5), 12 (6) and 12 (7) of the Act.

[55] As per S. 23 of the Broadcasting Bill: "1) No licensee shall carry a live broadcast of any sporting event of national or international interest, held in India, as may be specified by the regulations, without the consent of the [Broadcasting Authority of India] unless the public service broadcasters [presently, AIR and Doordarshan] have also been given the broadcasting right for carrying the same. 2) Any contract of exclusive broadcasting right of any event referred to in sub-section (1) above without the consent of the Authority, shall be void and inoperative. As per Section 31 of the Convergence Bill, (1) For the purpose of ensuring the widest availability of viewing in India of a national or international event of general public interest to be held in India, the Central Government shall notify the same well in advance.

(2) The National or International event of general public interest notified under sub-section (1) shall have to be carried on the network of a public service broadcaster as well (3) In order to strive towards providing a level playing field for bidders for broadcasting rights, or persons interested in receiving broadcasting right for events, notified under sub-section (1), the Commission shall determine, well in advance of such event, the principles and terms for the access to the network of the public service broadcaster."

Ensuring public accessibility within the commercial framework of current sports structures is the problem. Only a public service broadcaster can ensure such accessibility. However, it is not every sport that can ensure revenue as well as serve the purpose of a public service broadcaster. It has to be a sport, which is popular amongst the masses, has a glamour appeal and marketable quality. Considering the state of affairs amongst the Indian sporting fraternity, cricket is the only sport that meets all the requirement of ideal television content for a broadcaster in India. Thus it is understandable that notwithstanding the *Hero Cup Case*, litigation continues to afflict the cricket broadcasting.

The issues raised are same in all the disputes that have come before the courts post-1995.[56] To begin with, the main argument hinges on the prerogative of the governing body to sell the broadcasting rights exclusively vis-à-vis the accessibility of general public to the broadcast of cricket matches. The next issue involves the right of the broadcaster who has entered into a contract for procuring exclusive rights to telecast the matches. Finally the concerns of public policy intervening in a commercial transaction are also debated. In all the cases reprieve has been granted in the form of interim measures, *viz.*, sharing of the feed with Doordarshan on the payment of a specified sum to compensate the broadcaster owning the exclusive rights.

The predicament for the policy framers thus continues to be the same– eleven years after the *Hero Cup Case*. An example of the official indecisiveness is the policy guideline issued by the central government on 11th November 2005 for downlinking of television channels. With regard to sports broadcasting the guideline imposes obligations on all broadcasting organizations, having sports broadcasting rights, to share their feed with Prasar Bharati. This is mandatory only in the case of the events of national importance, to be decided by the Ministry of Information and Broadcasting in consultation with Ministry of Sports and Youth Affairs, Prasar Bharati and the concerned broadcaster. In the case of cricket, however, this obligation is mandatory for all the matches involving India and the finals of all the international competition. This policy thus continues to promote and strengthen the monopoly of the state, a position contrary to the message of the *Hero Cup Case*.

Recent developments indicate the continuation of the abovementioned policy. First, the central government cleared the draft Broadcasting Services Regulation Bill, 2006. The secrecy with which the bill was drafted created uproar amongst the broadcasters as well as the press. The provision of the bill severely curtailed the freedom of speech and expression of the media persons. There was scope of excessive government interference in the way the programmes would be produced and broadcast.[57] The broadcasting companies were also worried about the cap imposed by the proposed bill on cross-media

[56] See, e.g., *TEN Sports* v. *Citizen Consumer and Civic Action Group and Others*, (2004) 5 SCC 351; *M/s ZEE Telefilms Ltd. & Anr* v. *Union of India & Ors*, (2005) 4 SCC 649.

[57] See, Ammu Joseph, *The Broadcast Bill and the Public Interest*, THE HINDU, July 31(2006).

ownership, which is fixed at 20 per cent. Thus a broadcaster could not have more than 20 per cent stake in another broadcasting network, a cable network or DTH or a radio network.[58]

Concerning sports broadcasting the Bill adopted the approach of the 11th November guidelines. Thus the Bill made it mandatory that the rights for all the national and international sporting events, to be notified by the government had to be shared with Doordarshan.[59] In essence Doordarshan would be the beneficiary of all the broadcasting rights sold to the private broadcasters. With regard to the broadcasting rights of one day cricket matches, the Bill provided that the private broadcaster had to share the broadcasting rights with Doordarshan for all the matches in which India played irrespective of whether the match is at home or abroad. Further, the Bill provided that the rights for the semi-finals and finals of all the international cricket tournaments had to be shared, irrespective of whether or not India plays in those matches.[60] In the case of test matches, the Bill stated that for the matches to be played within India the rights had to be shared, while for the matches to be played abroad, highlights of the same had to be provided. The 2006 bill was, however, nullified by the adverse publicity.

The second step that the central government has taken has been a reaction to the failure to implement the abovementioned Broadcasting Services Regulation Bill, 2006. On 10th March 2007, the Parliament approved the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Bill, 2007 (hereafter referred to as Sports Broadcasting Bill, 2007). As the name itself suggests this latest legislative attempt is a reiteration of the previous policy. Hence, the Sports Broadcasting Bill, 2007 once again codifies the old approach, i.e., signals to all the sporting events of national importance have to be mandatorily shared with Doordarshan and AIR.[61] The Sports Broadcasting Bill, 2007 is to have a retrospective effect, i.e., from 11th November 2005. This is understandable, as already mentioned, 11th November guidelines continue to define the sports broadcasting legislations, e.g., the 2006 Broadcasting Bill.

Thus the Indian sports broadcasting scenario is a complex picture of disputes and indecisions. There is a tendency of the government to maintain status quo. No attempt has been made to incorporate innovative idea so as to provide alternatives to Doordarshan. This is in stark contrast with the scenario in U.S., U.K., and E.U. where there exists more than one public service broadcaster. A common factor that one finds amongst the situation in India vis-à-vis the other three jurisdictions is the fact of commercialization and

[58] See, *India to go Ahead with Draconian Broadcast Bill*, NEWSWATCH, available at http://www.newswatch.in/?cat=72. Accessed on August 2, 2006.
[59] See, Ambarish Mukherjee, *Draft Bill: Share Rights for Sports Broadcast*, THE HINDU BUSINESS LINE June 23, 2006.
[60] *Ibid.*
[61] See, *Parliament Approves Sports Telecast Bill*, available at www.indiantelevision.com. Accessed on March 28, 2007.

commodification of sports. The difference, however, is that in India the entire debate on sports broadcasting is driven by the commercial interest in cricket, whereas in the other three jurisdictions there are substitutable choices amongst different variety of spectator sports.

One positive observation that can be made at the end of this paper is that while commercialization and commodification of sports is undeniably an existing reality, the state is trying to find acceptable formulae for ensuring public accessibility. One may criticize the Indian government to strengthen the monopoly of Doordarshan over sports broadcasting. Nonetheless, this mechanism would ensure public accessibility. The downside is being a monopoly it will have the tendency to take its viewers for a ride and provide poor quality picture and commentary. However, notwithstanding the Doordarshan centric approach of the government, as of now the Sports Broadcasting Bill, 2007 appears to be the best bet. The legislation is governed by the apparent norm of public interest, ensuring public accessibility: Though the real reason is to ensure that Prasar Bharati gets the broadcasting rights without competitive bidding. This criticism can be dismissed when one understands the fact that Doordarshan is the only existing public service broadcaster. Hence, while watching your favorite cricket match say three cheers for Doordarshan.

EQUITY v. SOCIAL JUSTICE: A COMMENT ON *M. NAGARAJ* V. *UNION OF INDIA*

*Jitendra Mishra**

I

The decision of the Supreme Court in *M. Nagraj* v. *Union of India*[1] is a landmark in the development of constitutional law. The Court in this decision delineated the scope of the amending power of Parliament by restating the doctrine of basic structure with precision and lucidity. While pronouncing upon the constitutional validity of the amendments made in Article 16 and Article 335, the Court provided a viable framework for reconciling the competing demands of justice to the backward classes, equity for the forward classes and efficiency of the entire system. The decision highlights the role of judiciary in the integration of competing values in a society, which aims at bringing about social transformation within constitutional framework.

With the advent of independence, it was felt in every quarter that only equality provisions would not overcome the cumulative disadvantages of the people who are at the bottom of the social hierarchy. Keeping it in view, the framers of our Constitution adopted the policy of reservation, which was an effort at redistributing the national cake. It was a radical and calculated shift from the concept of formal equality in order to achieve substantial equality and to offset the historical inequalities of these groups. As intended, the reservation is a reliable mechanism to help the 'hitherto deprived' sections of the society namely, the SCs, STs and OBCs. However, the problem often arises whenever it is implemented afresh either by way of political action or judicial interpretation and direction.

The policy of affirmative action has been seen as a part of nation's commitment to uplift the SCs and STs. When the Supreme Court in *Indra Sawhney* v. *Union of India*[2] (hereinafter referred to as the *Mandal Case*) directed the Government to exclude the 'creamy layer' of OBCs from the purview of reservation, corresponding demand to exclude creamy layer from the SCs and STs did not arise. But after one and half decade of the *Mandal* judgement, it is being increasingly felt that most of those (particularly from amongst SCs & STs) who really deserve protective discrimination are rarely benefitted by the reservation policy.

* Reader, Department of Law, Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur, (UP). email: jmishra_gkp@yahoo.com; jmishra_gkp@rediffmail.com.

[1] AIR 2007 SC 71.

[2] 1993 Supp (3) SCC 217.

II

In the instant case the validity of several constitutional amendments[3] introducing Articles 16 (4A), 16 (4B) and a proviso to Article 335 in the Constitution was challenged in various writ petitions. Amalgamating all the petitions, the Supreme Court referred the matter to the Constitution Bench comprising of the then Chief Justice Y.K. Sabharwal, K.G. Bala Krishnan; S.H. Kapadia, C.K. Thakker, and P.K. Balasubramanyan, JJ. for their consideration and decision. The Bench while upholding the validity of all the constitutional amendments in question made certain observations regarding "creamy layer" which have given rise to some controversy.

Clause (1) of Article 16 guarantees equality of opportunity to all citizens in public employments or services under the State. Clause (4) of the same Article empowers the State to reserve the appointments or posts in favour of any backward class of citizen which, in its opinion, is not adequately represented in those services. By virtue of this provision, the Government had been extending the benefit of reservations in promotions as well until it was struck down by the Apex Court in the *Mandal Case*. This ruling, it was argued, adversely affected the interests of the SCs and STs.

In view of the commitment to protect the interests of the SCs and STs, the Government decided to continue the existing policy of providing reservation in promotions but confined it to SCs and STs alone. Consequently, the 77th Amendment introducing a new clause (4A) in Article 16, was enacted in 1995. In order to neutralise the adverse effect of *Union of India* v. *Virpal Singh Chauhan*[4] and *Ajit Singh Januja* v. *State of Punjab*[5] the said clause (4A) was once again amended in 2001 by the 85th Constitution Amendment Act. In an attempt to strike a balance between the interests of reserved and non-reserved categories of

[3] Art. 16 (4A), introduced by 77th CONSTITUTION AMENDMENT ACT, 1995 and further amended by 85th AMENDMENT ACT, 2001 runs as follows :
Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, *with consequential seniority*, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
Art. 16 (4B), introduced by 81st CONSTITUTION AMENDMENT ACT, 2000 is as follows :
Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or Clause (4-B) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on the total number of vacancies of that year.
82nd CONSTITUTION AMENDMENT ACT, 2000 added a proviso to Art. 335 which runs as follows :
Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

[4] AIR 1996 SC 448.

[5] AIR 1996 SC 1189.

people, the Supreme Court in these two cases[6] held that even if reservation is allowed in promotions, seniority could not be granted to a person thus promoted. A person from the general category who is promoted later in time would "catch up" his seniority against a reserved category candidate who was promoted earlier in time on the basis of reservation in promotion. The Court held that the seniority between reserved category candidates and general candidates shall be governed by their original panel position. The 77th and 85th Amendments enable the State to make provision for reservation in promotions with consequential seniority to any class or classes of posts in the state services in favour of SCs and STs which in its opinion are not adequately represented in such services.

The Supreme Court in the *Mandal Case* emphatically stated that the number of vacancies to be filled up on the basis of reservation in a year including carried forward (backlog unfilled reserved vacancies) reservation should in no case exceed 50 percent of total vacancies. Thus, the Supreme Court made it clear that carry forward rule cannot be allowed to violate the 50 per cent ceiling limit.[7] Due to this ruling it became difficult to fill the backlog-reserved vacancies as in many cases the total of current and backlog vacancies taken together exceeded the ceiling limit of 50 per cent. The Government, therefore, decided to amend the Constitution once again so that backlog vacancies of a year could be considered as a separate class to be filled up in any succeeding year/years, and these vacancies could not be considered together with the current vacancies for determining the ceiling limit of 50 per cent. Keeping this in view, the 81st Constitution (Amendment) Act, 2000, introducing a new clause (4B) in Article 16 was passed. This clause enables the State to keep out the "carry forward/unfilled vacancies" of a year and to exclude them from ceiling limit of 50 per cent reservation. The State can, therefore, fill backlog-reserved vacancies in any succeeding year/years without considering them together with current vacancies for determining the 50 per cent ceiling limit. It may be relevant here to note that clause (4B) of Article 16 is not confined only to SCs and STs but covers OBCs also.

Along with these amendments the validity of one more amendment, inserting a proviso to Article 335[8] made in 2000 was challenged before the Supreme Court. This amendment enables the State to relax the qualifying marks or lowering the standards of evaluation in any examination in order to give the benefit to SCs and STs in promotion. This amendment was made after the judgement of the Apex Court in *S. Vinod Kumar* v. *Union of India*[9] in which the Supreme Court following the *Mandal Case*[10] held that it was no longer permissible to lay down lower qualifications, lesser marks or lower standards of evaluation for promotion while all this was permissible at the stage of initial appointment. This amendment, confined only to the SCs and STs, has been

[6] *Supra* ns. 4 and 5.
[7] *Supra* n. 2 at 735 and 740.
[8] THE CONSTITUTION (82ND AMENDMENT) ACT, 2000.
[9] (1995) 6 SCC 580.
[10] *Supra* n. 2.

enacted with a view that if once a separate category is carved out of clause (4) of Article 16, that category may be given relaxation in promotion as well.

III

The Supreme Court had to consider a crucial issue that whether by virtue of impugned constitutional amendments, the power of Parliament was so enlarged as to obliterate any or all of the constitutional limitations and requirements. In brief, the question that arose for determination was whether the impugned amendments obliterated the basic structure of the Constitution.

Introducing twin tests of the 'width of power' and 'identity' for determining the violation of basic structure, the Supreme Court held that neither of the two tests was transgressed by the impugned amendments. Neither the boundaries of the width of power were violated nor the identity of the Constitution, i.e, structure of the equality as embodied in Articles 14, 15 and 16 was altered. Similarly, neither equity, justice and efficiency and the limitations on the mode of exercise of powers by the state were removed nor any of the overarching axioms like secularism, federalism, etc., were violated by those amendments. Thus, the Court concluded that the impugned amendments could not be faulted because they did not violate the basic structure of the Constitution.[11]

As regards the 77th and 85th constitutional amendments introducing and amending Article 16 (4A), the Supreme Court said that this Article is an enabling provision and follows the line suggested by it in the *Mandal Case* and thereby retains equality as a concept which is carved out of Article 16 (4).[12] The *M. Nagraj Case*,[13] thus, clarifies that the concept of "catch-up" rule and "consequential seniority" are neither overarching axioms of the Constitution, like secularism, federalisms, etc., nor they are constitutional principles which involve constitutional requirements and limitations as implicit in clauses (1) and (4) of Article 16. They are judicially evolved concepts to control the extent of reservation. The judiciary derived them from service jurisprudence and, therefore, they are not beyond the amending powers of the Constitution. The obliteration of these concepts, according to the Supreme Court, did not alter the structure of equality code enshrined in Articles 14, 15 and 16 so long the parameters mentioned in Article 16 (4) are retained. Articles 16 (1) and 16 (4) are an emphatic way of stating the principle of equality implicit in Article 14. Equality under Article 16 (4) is enabling in nature and refers to affirmative action by way of reservation. It creates a field, which enables the State, if it wishes to do so, to provide for reservation in cases where it is satisfied on the basis of quantifiable data regarding backwardness of a class of citizens and the inadequacy of representation of such a class in public employment. Thus, the 'backwardness' and 'inadequacy of representation' has been held to be compelling reasons to be always kept in mind in providing for reservation to a class.[14] Of

course, the scope of judicial review will be open in case of non-compliance of these parameters along with the overall administrative efficiency, another parameter implicit in Article 335 of the Constitution. The Court made it clear that Clause (4A) of Article 16, confined only to SCs and STs, is also enabling in nature. This article does not violate any of the parameters of constitutional requirements and limitations.[15]

Referring to 81st constitutional amendment introducing a new clause (4B) in Article 16, the Supreme Court observed that this newly introduced clause was a direct consequence of the *R.K. Sabharwal Case*[16] in which the concept of post based roster was introduced. This article is also an enabling provision, which seeks to make classification on the basis of differential between current and carry forward vacancies in order to fill up the backlog (unfilled reserved) vacancies by the intended beneficiaries only. The overall approach of the Supreme Court is to give a genuine social justice orientation to the reservation scheme envisaged in clauses (4), (4A) and (4B) of Article 16. This can best be seen in the instant decision[17] wherein the Court opined that the impugned amendments by which Articles 16 (4A) and 16 (4B) were inserted, flow from Article 16 (4). Article 16 (4) was enacted as a remedy for past historical discriminations against a social class. Likewise, clauses 4A and 4B are curative in nature and also have nexus with Articles 17 and 46. Articles 16 (4A) and 16 (4B), therefore, form a composite part of the scheme envisaged and fall in the pattern of Article 16 (4). They do not alter or obliterate the structure of equality embodied in Article 16 (4). Thus, as long as the parameters mentioned in those Articles are complied with by the state, the provision of reservation could not be faulted.[18] The Supreme Court, therefore, upheld the classification envisaged by Articles 16 (4A) and 16 (4B).

The basic problem as formulated by the Supreme Court is that the 'General Class' seeks equity in public employment and admission to educational institutions while the 'Backward Classes' demand justice to them. Therefore, the Court has to strike a balance between constitutional framework of equality and justice. Further, the principle of social justice on which reservation policy rests often comes into conflict with the principle of merit/administrative efficiency. The Supreme Court in the *Mandal Case* while dealing with the question of reservation in promotions attached higher value to administrative efficiency. Though, the Court did not impose an absolute ban on reservation in promotions but wanted it to be done without compromising efficiency of administration.[19] However, merit is neither a fixed ideal nor an absolute concept in itself but depends on the fact situation, i.e., circumstances of a given case. It depends on how society defines a desirable act. The impact of reservation on merit, therefore, depends on how that policy is designed. Obviously, it is the State who

[15] *Id.* at 106.
[16] *R. K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745.
[17] *M. Nagaraj* v. *Union of India*, AIR 2007 SC 71.
[18] *Id.* at 100.
[19] *Supra* n. 2.

can better define and measure the merit/efficiency, as ultimately it has to bear the costs of error of defining and measuring merit. Thus, it is amply clear that 'equity', 'justice' and 'efficiency/merit' (under Article 335) are three variable components of reservation policy. In the instant case of *Nagraj*, the Supreme Court had to arrive at an equilibrium among justice to the backwards, equity for the forwards and efficiency for the entire system. The Supreme Court, while dealing with the present question made it clear that the inadequacy of representation and backwardness of SCs and STs are the circumstances which enable (provides discretion) the state to act under Article 16 (4) of the Constitution. Whereas Article 335 of the Constitution imposes limitations on the discretion of the Government acting under Article 16 (4) and 16 (4A).[20]

Upholding the validity of 82nd constitutional amendment that introduced a proviso to Article 335, the Supreme Court said that this proviso has nexus with Article 16 (4A) and 16 (4B) and is compatible with the scheme thereof.[21] Efficiency in administration under Article 335 is related to SCs and STs and has been held to be a constitutional limitation on the discretion vested in the State to provide for reservation in employment. Likewise, the said proviso is also related to SCs and STs alone and confers discretionary power on the state to relax the qualifying marks and/or standard of evaluation. In view of this the Apex Court opined that even after insertion of said proviso the limitation of overall efficiency under Article 335 is not obliterated but only relaxed to some extent.[22] 'Efficiency/merit' is a variable factor to be decided by the state on the basis of fact situation of the given case. Because the state, who has to bear ultimately the cost arising out of errors in defining and measuring merit / efficiency, has to decide whether the overall efficiency of the system is affected by such relaxation. In case of affirmative answer, the State is free not to relax such standards. Otherwise, the state may evolve a mechanism under which efficiency, equity and justice, all three variables could be accommodated. Moreover, State can do all that to protect the interest of SCs and STs with special care and caution. If the State, on the basis of quantifiable data has reached a conclusion that there exists compelling reasons of backwardness and inadequacy of representation, it may relax the qualifying marks for SCs and STs.[23] However, excessiveness in either reservation or evaluation would be against the constitutional mandate.

IV

After an elaborate discussion, the Supreme Court concluded that the impugned amendments had merely introduced enabling provisions, which confer discretion on the State to make provision for reservation in favour of SCs and STs.[24] There is a vast gap between equality in law and equality in fact. No doubt this anomaly can be minimized and theory can be translated into reality by the

[20] *Supra* n. 1 at 101.
[21] *Id.* at 99.
[22] *Id.* at 100.
[23] *Id.* at 102.
[24] *Ibid.*

administration in the context of prevailing local conditions in public employment. The enabling provisions are permissive in nature and enacted to balance equality with positive discrimination. They deal with the concept, which have to be identified and valued as in the case of access vis-à-vis efficiency which depend on the fact situation only and not on the abstract principles of equality clause. Merit, efficiency, backwardness and inadequacy of representation cannot be identified and measured in vacuum but on the basis of fact-situation of a given case which necessarily involves discretion to some extent yet within the reasonable limit of constitutional parameters. The Supreme Court, therefore, categorically stated:

> Every discretionary power is not necessarily discriminatory ... equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of 'guided power'. This theory is based on the assumption that in the event of arbitrary exercise by those in whom the power is conferred would be corrected by the Courts. This is the basic principle behind the enabling provisions, which are incorporated in Articles 16 (4A) and 16 (4B).[25]

This observation makes it clear that vesting of power by an enabling provision is constitutionally permitted. However, exercise of those powers by the State can be arbitrary. In such circumstances the role of judiciary comes in to correct the arbitrary action of the state.

The Supreme Court tried to reconcile the conflicting interests of various classes in the society. Applying the width test it reiterated that the concept of reservation under Article 16 (4) is hedged by three constitutional requirements, namely, backwardness, inadequacy of representation, and overall administrative efficiency.[26] The Court opined that backwardness and inadequacy of representation are the compelling reasons to make reservation in the services under the State. However, excessive reservation, according to the Court, would amount to the derogation of the aforementioned requirements. The Court, therefore, added a quantitative limitation in terms of 50% ceiling limit as fixed in the *Mandal Case* as an additional requirement.[27]

Dealing with the question of identity, the Supreme Court observed that the impugned amendments do not alter the structure of equality. For, they retain the controlling factors, i.e., 50% ceiling limit and concept of creamy layer as well as compelling reasons of backwardness and inadequacy of representation which enable the State to make reservation keeping overall efficiency of administration under Article 335 of the Constitution.[28] Simultaneously, they do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-

[25] *Id.* at 101.
[26] *Id.* at 105.
[27] *Id.* at 106.
[28] *Ibid.*

classification between OBC on the one hand and SCs and STs on the other as held in the *Mandal Case* and the concept of post-based Roster with in-built concept of replacement as held in the *R.K. Sabharwal Case*.[29]

Another area that the Supreme Court touched, was the distribution of benefits and burdens, which are deeply concerned with social justice. Distribution of benefits can be made on the basis of three conflicting criteria, namely, rights, needs; and means. These conflicting criteria can be reconciled and distribution can properly be made within framework of two concepts of equality, i.e., formal and egalitarian, or proportional equality. Emphasizing on the concept of proportional equality, the Court held that this concept expects the state to take affirmative action in favour of disadvantaged sections of the society within the framework of democratic polity.[30] After all, the state has to ensure that "no class prospers on the cost of other class and no person suffers because of drawback which is not his but social."[31] The Court has, therefore, been in full agreement with the majority decision of the *Mandal Case* to adopt the means test for excluding creamy layers from the protected group of beneficiaries.

The Supreme Court repeatedly cautioned that the ceiling limit of 50%, the *concept of creamy layer (Controlling factors) and compelling reasons, namely,* backwardness and inadequacy of representation and the overall administrative efficiency are all constitutional requirements without which the structure of equality would collapse.[32] The Court has also made it clear that even if the State has compelling reasons, its reservation policy cannot violate the ceiling limit of 50% or obliterate the rule of creamy layer or extend the reservation indefinitely.[33]

The manner in which the Supreme Court formulated its views regarding the doctrine of creamy layer has led to varying interpretations and also to bitter controversy. According to one interpretation, the observations of the Court regarding exclusion of creamy layer from the purview of reservation are confined only to the 'Other Backward Classes' and do not apply to the SCs and STs. The other interpretation of the judgment would extend the rule regarding exclusion of creamy layer to the SCs and STs as well. In the debate that has ensued there has been some mixing up between 'what policy is desirable' and 'what has actually been laid down by the Court'.

V

Sukhadeo Thorat has expressed the view that the exclusion of creamy layer is theoretically and empirically flawed. The idea of excluding well-off members of Dalits from reservation is not supported by the theory or experience because

[29] *Ibid.*
[30] *Id.* at 88.
[31] *Ibid.*
[32] *Id.* at 106.
[33] *Ibid.*

discrimination is a fact of life for both economically well off and worse-off members of Dalit community. Emphasizing on community based equal opportunity policy through reservation he makes it clear that exclusion of creamy layer of Dalits from reservation will lead to their under representation and thereby it may halt the ongoing progress of Dalit community.[34]

Kalpana Kannabiran criticizes the decision saying that:

> The crux of affirmative action rests on the fact of caste-based discrimination - that is, on grave social disabilities arising from caste status. The very formulation of the concept of creamy layer, an exercise in dominance, disaggregates discrimination and narrows its articulation down to economic status alone, thus distorting the realities of disadvantaged castes, Dalit and Adivasi realities. ... The systematic denial of justice with respect to atrocities is inextricably linked to the whittling down of entitlements through the arbitrary action of undefined concepts.[35]

It is submitted that within the constitutional framework of democratic polity in India, the Government is committed to carry out the pious obligation endowed by the framers of the Constitution for the welfare of its people in general and deprived ones in particular. A number of social justice oriented policies and programmes of affirmative action including reservation have been formulated and implemented by the Government to empower the deprived and marginalized sections of the society, viz., SCs and STs. Though the policy of preferential treatment favouring the SCs and STs has long been in existence, it is yet to be realized in full. Even today the weakest among the weak remain deprived and marginalized and they are still out of reach of the policies and programmes meant for them.[36] The reason is that a lion's share of benefits is grabbed by a handful affluent of SCs and STs.[37] Consequently, weak and marginalized candidates are continuously lagging behind as they are not in a position to reap the support offered to them.[38] Therefore, an initiative is needed to ensure the benefit to the more deserving and neglected people on the one hand, and the existing system of reservation should be reviewed at regular intervals on the other, so that the most deprived sections of SCs and STs could logically be identified and put on priority of policies and programmes made for them. Thus, the exit system in reservation policy should be evolved for exclusion of better off in order to include still marginalized people of that community.[39] Unfortunately,

[34] Sukhadeo Thorat, *Understanding Caste*, THE TIMES OF INDIA, Lucknow, November 14, 2006.
[35] *Reservation and the Creamy Layer*, THE HINDU, October 24, 2006.
[36] A..K. Lal, *Protective Discrimination: Social Necessity or Political Compulsion* in A..K. Lal (*ed*). PROTECTIVE DISCRIMINATION: IDEOLOGY AND PRAXIS 49-58 (2002).
[37] Department of Social Security, LOKUR COMMITTEE REPORT, 8 (1965); See also, C. Parvathamma, THE CLAMOUR FOR RESERVATION (1990).
[38] Sachchidananda, *Rethinking Scheduled Caste Reservation* in A..K. Lal (*ed*), *supra* n. 36 at 36.
[39] *Supra* n. 36 at 56; *ibid.*

the system of protective discrimination has become the system of entry without an exit.[40]

In a welfare state, people seek political action for reparation of social injustice done to them. Political action in this particular area has reflected itself in the form of reservation, which is considered to be re-distribution of benefits. But society witnesses that such re-distribution is not spread evenly amongst the beneficiaries as the "better suited among them enjoy a disproportionate share of those benefits."[41] This inconsistency can only be removed by the parliamentary action of de-scheduling advanced castes or individuals from the Presidential List of SCs and STs.

The criterion for selecting SCs/STs was primarily based on their low social and ritual standing in the traditional social hierarchy along with their lowest position in income, education, etc. But the democracy coupled with planned economy and social reconstruction programmes have resulted into the change of traditional social structure of India. The criteria of status determination, the hierarchy of status in the society and the role attached with status have all been affected by the changes of our time, which have not left the SCs/STs untouched. Present situation shows a significant change in their socio-economic status. The dividing line between Scheduled and non-Scheduled Castes has started disappearing. Besides, the state's initiative of affirmative action and preferential treatment has exalted their conditions. Industrialization and urbanization have acted as a major catalyst for their socio-economic improvement. Thus, now the time has come to exclude the creamy layer of SCs and STs, who have acquired the status comparable to forward classes of people in the society and they need no more reservation in the present scenario.

The Government of India appointed a committee under the Chairmanship of B. N. Lokur in 1965 to go into the problem and advise on revision of the existing list of SCs and STs. The Committee was of the view that untouchability was 'fast disappearing' and the demarcating line between high castes and low castes had 'tended to become blurred'.[42] Thus, the Committee concluded:

> The time has come when the question of de-scheduling of relatively advanced communities should receive serious and urgent consideration.[43]

The Committee, therefore, recommended rescheduling the SC/ST list by de-scheduling some castes from the Presidential list.[44] Unfortunately, the recommendation of the Committee never found support of the Government and political leadership of SCs and STs. This trend of disapproval and resentment of political parties on the issue yet has not been given up due to electoral considerations. Consequently, the problem is existing and anomaly is increasing.

[40] *Supra* n. 38.
[41] *Id.* at 33. See also, LOKUR COMMITTEE REPORT, *supra* n. 37.
[42] *Supra* n. 37 at 6.
[43] *Id.* at 10.
[44] *Id.* at 11.

It may well be hypothesized that the politicians have not proved themselves equal to the task and as a result judiciary is called upon to resolve the problem. And, no doubt, adopting a social justice oriented balancing approach the Supreme Court advanced the remedy by suppressing the mischief. The attempt of the Apex Court is that the benefit of reservation should go to the real needy only.

VI

K. Sukumaran, a former Judge of the Kerala High Court, asserting that policy formation is out of bound to the judiciary, termed the *M. Nagraj* verdict as an encroachment on parliamentary functions.[45] Another retired Judge of A. P. High Court B. S. A. Swamy commented on said verdict saying that the Court's job was only to see if the law was being properly applied and, that the policy decision of the Government cannot be 'dictated' by the judges.[46] While, Ravi Kumar, former Chairman of the Karnataka Backward Classes Commission and A. Subbarao, a senior Supreme Court Advocate, referring to the *Chinnaiah Case* opined that as per the Constitution, the Scheduled Castes, as identified and categorized by Parliament could not be further classified.[47] Echoing the same view, K.V. Vishwanathan, an advocate, has emphatically stated that the Supreme Court has not mandated and recognized the concept of any creamy layer among SCs and STs.[48]

V. Venkateshan has pointed out that the impugned amendments are silent on the issue of creamy layer and thereby they only suggest that creamy layer candidates are also included in the list of intended beneficiaries. The verdict of *M. Nagraj* is ambiguous and factually wrong as the larger Bench of the Supreme Court has already ruled out the applicability of creamy layer concept to the SCs and STs. Therefore, the Government is under no obligation to exclude the creamy layer of SCs and STs from the list of beneficiaries. It is only Parliament who can modify the list of SCs and STs and the *M. Nagraj* verdict can never be construed as a direction to Parliament to do so.[49]

The Government of India is also not willing to implement the said verdict rather it is interested to extend the benefit of existing policy of reservation to all beneficiaries of SCs and STs irrespective of their economic status due to political reasons of battle for ballots. Besides, all major political parties also reacted strongly on this verdict.[50] Consequently, in order to tone down the move of political parties and other groups, the Government sought the opinion of Attorney General of India. The Attorney General, Millon K. Banerji submitted that the decision of the *M. Nagraj Case* does not relate to creamy layer among SCs and STs as this issue was not before the Court in the instant case. According

[45] THE HINDU, 14, October 21, 2006.
[46] *Ibid.*
[47] *Ibid.*
[48] K.V. Vishwanathan, *Creamy Layer Rule Does not Apply to SCs and STs*, THE HINDU, 8, October 28, 2006.
[49] V.Venkateshan, *Ambiguous Verdict*, FRONTLINE, 33-34, Novermber 17, 2004.
[50] THE HINDU, 1, October 21, 2006.

to him, the observation of the Court on creamy layer is not the '*ratio*' of the judgement and hence, is not binding. Mr. Banerji is also of the view that the Bench in the *Nagraj Case* does not seem to have taken note of observation of the Full Bench in the *Mandal* Case. The reference to the creamy layer in the *M. Nagraj Case* is, therefore, *per incurium* (*obiter dicta*). Even assuming that the observation of the Supreme Court on creamy layer in the *Nagraj Case* are *ratio decidendi*, such decision runs contrary to the *ratio* of larger Bench in the *Mandal Case* and hence, it is not a binding law under Article 141 of the Constitution.[51]

It need hardly be reiterated that providing for reservation in a given case is a policy matter to be decided by the State and the judiciary should not interfere in it provided the State has followed the constitutional norms prescribed therein or evolved by the judiciary. But the extent of reservation is always subject to judicial review. The State has to ensure that, "no class prospers at the cost of other class and no person suffers because of drawbacks which is not of his but social."[52] If the state fails to do so, the role of judiciary comes in. After all, Constitution is not only what is written in the Constitution but also what the judges say.

The opinion of the Attorney General of India and other legal experts in respect of *M. Nagraj* decision shows that the root cause of legal controversy on the issue of creamy layer lies in the *Mandal*[53] and the *Chinnaiah*[54] *Cases*. A reference to the two decisions becomes necessary to clarify the position.

The Full Bench of the Supreme Court in the *Mandal Case*, in its majority view while justifying the concept of creamy layer for OBCs opined, though by *obiter dicta*, that the same would not apply to SCs and STs. However, the Court believed that the creamy layer doctrine would be helpful in proper and more appropriate identification of backward classes. The Court, therefore, observed:

> The very concept of a class denotes a number of persons having certain common traits, which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the contexts necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward.[55]

The Court, however, felt it difficult to divide OBCs in backwards and more backwards and said that while drawing the line it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of

[51] THE HINDU, 14, November 24, 2006.
[52] *Supra* n. 1 at 88.
[53] 1993 Supp (3) SCC 217.
[54] *Infra* n. 58.
[55] *Supra* n. 53 at 724.

exclusion should not merely be economic unless the economic advancement is so high that it necessarily means social advancement. The dividing line, therefore, must be a realistic one. The Court further opined that it must be recognized that there are certain positions, the occupants of which can be treated socially advanced without any further inquiry.[56]

Respondents, in the *Mandal Case*, while contending that 'one swallow does not make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward, pointed out that clause (4) of Article 16 aimed at group backwardness and not individual backwardness. Agreeing that the said clause aims at group backwardness, the Court felt that exclusion of such socially advanced members would make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4) of Article 16. The Supreme Court, therefore, toned down the rigours of Mandal Scheme by laying down the doctrine of creamy layer. It is the most valuable contribution of the judiciary in respect of reservation policy in India. It is noteworthy here that the Court did not rule out the applicability of the concept of creamy layer in the matter of reservation to SCs and STs. It simply confined it to OBCs. This is the parenthesized observation of the Supreme Court in the *Mandal Case* at the end of para 792:

> This discussion is confined to Other Backward Classes and has no relevance in the case of Scheduled Tribes and Scheduled Castes.[57]

This observation of the Supreme Court makes it clear that majority of the judges in the *Mandal Case* did not intend to extend the concept of creamy layer to SCs and STs . The reason was not far off to seek, i.e., the matter relating to the SCs and STs was not in question before the Court. Extending the creamy layer concept to the reservations for SCs and STs in the *M. Nagraj Case* is a welcome step of the judiciary. Now, one can hope that the real benefit of reservation policy would percolate to the really deserving sections of SCs and STs. It would be against the common sense and social justice to give the benefit of reservation to advanced members of the Scheduled Castes and the Scheduled Tribes under the colour of castes (Presidential list of the SCs & the STs) to which they belong.

However, prior to *M. Nagraj*, a Constitution Bench of the Supreme Court in *E. V. Chinnaiah* v. *State of Andhra Pradesh*[58] held that any executive action or legislative enactment which interferes, disturbs, re-arranges, re-groups, or re-classifies the various castes found in the Presidential List would be violative of the scheme of the Constitution and would also be violative of Article 341 of the Constitution. In this case the constitutionality of the respondent's (Government of Andhra Pradesh) action of sub-dividing or sub-grouping the castes enumerated in the Presidential List was challenged. Government action of sub-dividing and sub-grouping the Scheduled Castes was solely based on caste line as in view of the Government of Andhra Pradesh some castes enumerated in the Presidential List

[56] *Ibid.*
[57] *Id.* at 725.
[58] AIR 2005 SC 162.

had have better representation in the government services whereas some had failed to secure the benefit of reservation. Thus, in order to identify the castes which failed to secure the benefit of reservation, the Government prepared group-cum-caste wise list of Scheduled Castes, which was challenged in the instant case.[59] Referring to the Constituent Assembly Debates, the Court said:

> It is clear that the Constitution intended all the castes including the sub-castes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group could not be divided for any purpose.[60]

The Court was, therefore, of the firm view that the members of the Scheduled Castes form a class by themselves and any further sub-classification would be impermissible while applying the principle of reservation. Once they are included in the Presidential List, any division of these classes of persons on any consideration would amount to tinkering with the List.[61]

A close analysis of the *Chinnaiah Case* makes it clear that the Court ruled out the caste-wise classification of the Scheduled Castes for any purpose. During the course of judgement, the Supreme Court nowhere used the concept of creamy layer as used in the *Mandal Case* with regard to OBCs. However, it prohibits sub-classification of Scheduled Castes on any ground. But, in order to interpret any sentence, i.e., *ratio* of a case, we cannot go far away from the context. The observation of the Court for the purpose of the precedent should, therefore, be construed in the context of facts and contents raised therein. It should not be interpreted like a statute. And, of course, prohibition imposed by the Apex Court in the *Chinnaiah Case* is only with regard to caste-wise sub-classification of Scheduled Castes. On the other hand, the *M. Nagraj Case* speaks status-wise sub-classification of SCs and STs. It is not a direction to tinker with the list of SCs and STs. It directs only to exclude economically well off among the SCs and the STs from the purview of reservation. The decision of the *Chinnaiah Case*[62] has, therefore, no binding effect on *M. Nagraj* v. *Union of India*[63] as the context of both the cases is quite different.

Now turning to the observation of the Full Bench of the Supreme Court in the *Mandal Case*, it is noteworthy that the observation of the Bench, that "this discussion is confined to Other Backward Classes and has no relevance in the case of Scheduled Tribes and Scheduled Castes", is not the *ratio* of the *Mandal Case* as the matter of reservation relating to the Scheduled Castes and Scheduled Tribes was not in question at all before the Apex Court. In such a position the observation of the Court in relation to the applicability or otherwise of the creamy layer doctrine to the reservation for SCs and STs is merely an *'obiter dicta'* and has, therefore, no binding effect on subsequent cases relating to SCs

[59] *Ibid.*
[60] *Id.* at 168.
[61] *Id.* at 170.
[62] AIR 2005 SC 162.
[63] AIR 2007 SC 71.

and STs.[64] As a precedent, it has no force because it is merely an observation on the matter, which was not in question at all before the Court. In the *Nagraj Case*, the question of exclusion of creamy layer from amongst the SCs and STs was open and had to be decided by the Court on merits without being controlled by precedent.

It is axiomatic regarding equality that those who are similarly circumstanced are entitled to similar treatment. Amalgamation of two classes of people - economically well-off and economically worse-off people of SCs and STs – for the purpose of reservation would be unreasonable. For, treating two different classes similarly would be clearly against the mandate of Articles 14 and 16 of the Constitution. It is well-settled rule that treat similar similarly and different differently. To treat unequal as equals also violates Article 14, 15 and 16 of the Constitution.

The decision in the *M. Nagraj Case* fully reflects the above constitutional philosophy. A uniform yardstick of 'creamy layer' has been adopted by the Court in this decision to give the benefit of reservation to the really deserving members of SCs and STs. Truly speaking, this decision shows the real judicial concern with the helpless, poor, hapless, and hitherto deprived group of Backward Class including Scheduled Castes and Scheduled Tribes. Enforcement of this decision will also silence the criticism that the benefit of reservation hardly reaches the most backward and deprived group of Backward Classes.

In view of highly sensitive nature of social and political issues underlying the *Nagraj Case*, it would be surprising if the decision did not give rise to controversy. Vital issues, which sharply divide the society, cannot be resolved just by one judicial decision. A significant contribution of the *Nagraj* decision has been that the scheme of reservations as envisaged by the four constitutional amendments seems to have been accepted by the country. There has been no serious challenge to it from any quarter. To that extent the Supreme Court has been successful in securing a national consensus. However, from the political and social point of view, no significant progress has been made towards the attainment of consensus on the exclusion of creamy layer from amongst the SCs and STs. It is a major shift from the policy hitherto followed and both judicial process and political processes have to work further in order to arrive at a national consensus on this highly sensitive issue.

[64] See also, C.K.Allen, LAW IN THE MAKING 261 (1997). "Dictum may be of different kind, sometimes they may be called almost casual expression of opinion upon a point, which has not been raised in the case, and is not present to the judge's mind".

ACCESS TO JUSTICE: SOME REFLECTIONS ON THE ROLE OF LEGAL EDUCATION

Kamala Sankaran[*]

The lack of justice within our legal system is often attributed to the lack of legal literacy among the population. Legal aid and legal literacy are often seen as critical inputs necessary for empowering persons who lack the information, knowledge, resources and skills necessary to access and navigate the legal system at large. This is no doubt true. As a result, a lot of emphasis has been placed on developing suitable legal aid schemes and launching legal literacy programmes that will 'solve' the problem of the lack of access.

Amongst the solutions mooted, importance has also been given to restructuring legal education in India because it is seen as an important vehicle for making legal aid and the courts accessible to the socially excluded and deprived. Developing the socially-sensitive lawyer or judge and therefore, focussing on creating a justice-oriented law student has been seen as an inherent component of the legal aid mission of legal education. As a result, the law schools and legal education generally have been identified as being helpful to the consumer in obtaining justice, generating legal awareness, simplifying access to legal relief by creating avenues for these, and contributing in developing suitable lawyers for this purpose. It is often a demand-side solution targeting the consumers of justice. However, legal education has not been identified as a suitable site for studying the problems of justice delivery. The supply-side of justice - the flip side of access, is seen to be entirely a matter for the judges and the judicial academies to ponder over. Courses on judicial administration, court management matters are usually not offered as useful courses in the law schools and are not very important areas of research in the law schools and law universities.[1]

I. LEGAL EDUCATION AND ACCESS TO JUSTICE

Beginning with the Report of the Expert Committee on Legal Aid, 1973 on Processual Justice, the emphasis had been on locating the law school as a site for disseminating legal aid in a clinical setting. It is also appropriate for identifying and developing the roles that teachers and students could play in increasing legal awareness and bridging the gap between the courts and those in need of justice. Reading the Report in 2006, I was struck by how prescient the report was in some ways and also by the manner in which the discussion on legal education and access to justice has changed in India. The legal aid clinic run by the law

[*] Research Professor, Indian Law Institute, New Delhi. Email: kamala_sankaran@hotmail.com. This is a modified version of a presentation made at LEARS/UNDP/Yale Law School organised International Conference on Access to Justice: Law, Policy and Institutions, August 11-13, 2006.

[1] Commentators have often written on the paucity of data to study the judicial process and access issues in the past. See, Upendra Baxi, SOCIO-LEGAL RESEARCH IN INDIA: A PROGRAMSCHRIFT (1975); S. Murlidhar, LAW POVERTY AND LEGAL AID (2004).

schools was seen as a place where the student would be exposed to the real world of litigants and courts, and where the teacher would impart training to the student in how to go about this task. It was also seen as a setting for the students' experiential learning to happen. Depending on how well the legal aid programme is structured - the quality of the orientation, the guidance in the field, the de-briefing sessions, the ethical aspects of conducting legal aid work - contribute to the actual learning for the student. The learning is also dependent on the sensitivity with which the task assigned is carried out. The legal aid clinic is now described as a place where the social justice role of the educated elite studying in law schools would find an outlet.[2]

In 1990 the Curriculum Development Centre in Law set up by the University Grants Commission sought, amongst several other things, to make legal education more relevant by introducing pedagogic changes in *all* existing courses taught at law schools. In its report it critiqued the manner in which "legal reality is presented by and large, 'as if it was motionless, static, compartmentalised and predictable,' thus robbing processes of learning of all adventure and excitement; rendering it barren of creativity and critical reflection.... Law teaching is usually alienating in a double way; first, the existential needs, interests and experience of the taught are usually ignored and second, lack of careful contextualisation of national level and overseas materials makes legal information both sociologically and historically alien".[3] The route of using the legal aid clinics as the window to legal reality was broadened to include far reaching changes in the overall curriculum, to place the study of law in its social setting. This was expected to contribute to a shift from the traditional teaching of positive law and uncritical reading of case law to a more critical understanding of how law was embedded in social reality and how the role played by law could vary depending upon the position and status of different persons/communities in the society. It would follow that the legal aid component would be part of the revised formal pedagogic content of the overall law curriculum. The critical reading of law and the legal process in the classroom would then help provide theoretical and jurisprudential answers to what the student experienced in the clinical setting, and the legal aid clinic would not be some stand-alone, 'do-good' activity of the law school, separate and unlinked from the teaching-learning process.

II. Towards Mandatory Legal Aid Activities

The legal aid clinic in a law school has continued to occupy a significant place in legal education generally and often serves as a badge for indicating the social responsibility of a law school and the social relevance of its legal education across the country.[4] Largely many of the better-known law schools and

[2] Report of the Expert Committee on Legal Aid 155 – 164 (1973).

[3] Report of the Curriculum Development Centre in Law, Vol I 45 (1990), citing Prof. Upendra Baxi's working paper on socially relevant legal education prepared for the UGC in 1975-76.

[4] This paper does not examine how the introduction of clinical methods of teaching, particularly in the national law schools, has interfaced with the pre-existing legal aid clinics.

colleges had set up such clinics or legal aid outreach programmes in the past few decades. Initially these clinics or programmes were often voluntary on the part of students and teachers with some financial commitment from the university or legal aid committees.

The shift in the manner in which such activities were carried out, began with the instruction of the Bar Council of India in 1996 to all universities engaged in imparting legal education making adoption of the prescribed Practical Training Scheme compulsory. Of interest is Paper IV tilted *Public Interest Lawyering, Legal Aid and Para-Legal Services* (applicable to both 5-year and 3-year LL.B. courses).

The brief description of the course outline states:

> This course carrying 100 marks will have to be designed and evaluated according to local conditions by the College in consultation with the Universities and State Bar Councils. It can be taught partly through classroom instructions including simulation exercises and partly through extension programmes like Lok Adalat, Legal Aid Camp, Legal Literacy and Para Legal Training. The course should also contain lessons on negotiations and counselling, use of computer in legal work, legal research in support of Public Interest Litigation, writing of case comments, editing of Law Journals and Law Office Management. The marks may be appropriately divided to the different programmes that each University might evolve for introduction in the Colleges under its control.[5]

Operationalising this instruction has resulted in a great deal of heated discussions across law schools in India. Transforming voluntary legal aid clinics into a mandatory, taught course has several implications for the teachers and administrators of law schools. There is need to develop standards and practices on many aspects of its implementation, e.g., methods for monitoring and evaluating the students' participation in such activities; how to allot marks/credits; the question of the workload of teachers; resources needed by the law school; ethical considerations of the quality of the engagement of students with clients; etc. There are many other unresolved questions. For example, which section of population should be the focus of the outreach programme – juveniles, undertrials, women, victims of caste violence, workers denied minimum wage, is a subject of debate within faculties. Many law schools/colleges, particularly the 3-year law schools with enrolment of students running into thousands find involving all its students in legal aid clinic to be an impossible task.

The quality of the legal aid intervention has also been an important issue. My personal experience as a teacher of the Practical Training course in the Faculty of Law, Jamia Millia Islamia during 1999-2000 and involvement with legal aid and Lok Adalat activities with students have raised many uncomfortable

questions. The students helped the Legal Services Authority in the organising of Motor and Accident Claims Lok Adalats, and some permanent Lok Adalats by visiting homes of litigants, persuading them to come before the Lok Adalat, appearing for some parties, assisting the presiding judge, and otherwise observing the proceedings. The students were enthusiastic about helping in the quick resolution of disputes. However, many students are dismayed by the rough and ready justice meted out and the complete lack of 'voice' of the litigants, particularly where they were women.[6] The experience in helping organise Lok Adalats and legal awareness programmes in the past couple of years when I was teaching at the Faculty of Law, University of Delhi underscores the need to have constant monitoring of such programmes and for the faculty to structure carefully such programmes with the authorities concerned. It also highlights the need for feedback sessions with participating students so that the entire experience can be summed up and made sense of.[7]

The fierce debate over the implementation of the Bar Council of India's instructions and the participation of the faculty in determining matters relating to the revised course content and design, find reflection in the 184th Report of the Law Commission of India on Legal Education and Profession Training submitted in 2002 (hereinafter referred to as the Law Commission Report).[8] The Law Commission is primarily concerned with the *manner* of decision-making in the determination of standards of legal education rather than with its *outcomes*. It emphasises on the need for the Bar Council of India and the University Grants Commission (the two commanding bodies of legal education in India) to talk to each other while ensuring participation of the faculty in such determination. Not surprisingly, therefore, the questions of the content of legal education or how it can be made socially relevant do not find place in the Report.

The Law Commission Report instead goes on to comment at length on the MacCrate Report (1992) prepared by the American Bar Association. The Law Commission Report highlights the need for skills to be taught to the law students and the need to include adjunct faculty in the form of lawyers and retired judges in the teaching of skills and litigation-related courses. This is also because

[6] Marc Galantar and Jayanth K Krishnan, *"Bread for Poor": Access to Justice and the Rights of the Needy in India* 55 HASTINGS LJ 788 (2004) raise important questions of the functioning of the Lok Adalats.

[7] The Campus Law Centre and USEFI had organised a Workshop (of which I was the Workshop Director) on Legal Education and Access to Justice in 2002, where teachers, students, and NGOs from various law schools and social work departments in north India, had addressed questions such as the preparation needed to conduct and evaluate students engaged in collaborative outreach programmes with other institutions, the guiding, evaluating and monitoring of students in outreach programmes and other related areas. For details, see, Campus Law Centre, PROCEEDINGS OF CLC-USEFI WORKSHOP ON LEGAL EDUCATION AND ACCESS TO JUSTICE (2002).

[8] Law Commission of India, 184TH REPORT ON THE LEGAL EDUCATION AND PROFESSIONAL TRAINING AND PROPOSALS FOR AMENDMENT TO THE ADVOCATES ACT, 1961 and the UNIVERSITY GRANTS COMMISSION ACT, 1956 (2002) available at http://lawcommissionofindia.nic.in/reports/184threport-PartI.pdf. The Report has references to the various committees and reports dealing with legal education prepared in recent years by several agencies in India.

academic law teachers are seen as not having the requisite experience and skills needed to handle litigation-related courses. It should be borne in mind that the present stand of the Universities in India is not to permit full time law teachers to practise regularly in a court of law, for fear that it may jeopardise his/her commitment to legal education. This has been challenged in the courts and the courts too have upheld the validity of such a rule in the universities. In *Anees Ahmad's Case*, [9] the question of allowing full-time teachers of University of Delhi to practice came to be decided. In deciding the matter the court did not seek to examine if it is possible for law teachers to have finite and regulated time devoted to law practise, or whether this would be in keeping with the terms of other professional courses such as medicine or architecture where teachers have greater flexibility with regard to their professional work. It must be pointed out that the argument whether the legal profession requires full-time attention was not explicitly examined in this case. For instance, the validity of Rule 3 of Advocates (Right to Take up Law Teaching) Rules, 1979 under which the advocates enrolled with a Bar Council are allowed to teach for a limited number of hours a day was not examined by the court in this case.

The need for skills and the need to get a better 'fit' between legal education and the profession are the themes running through some of the recommendations made in the Law Commission Report. Apart from identifying adjunct faculty to teach such skills to the law students, law schools are also urged to identity and include skills-teaching in the law curriculum. To me, this approach seems quite removed from the Report of 1973, which located in legal aid the social justice agenda of legal education, the need to address the social justice *deficit* in legal education and the legal system itself. Presumably, legal aid and legal literacy can be activities where such skills can be imparted and learnt by the law students. Participating in legal aid programmes was then conceived as a worthy end in itself and not as a means to an end. The implications of this shift have many consequences. From this perspective, the law school is perceived merely as one among several delivery agents, such as NGOs and para-legal groups, of the outreach programme of the now institutionalised legal services. The 'programmatic' aspects of the legal aid programme then have to be tailored to 'fit' into the schemes and funding of the legal services authorities. Planners of legal education necessarily have to keep all these aspects in mind when they determine the role of the law schools in initiatives such as the National Legal Literacy Programme and the schemes under the Legal Services Authority Act, 1987.

III. ACCESS TO JUSTICE VERSUS DELIVERY OF JUSTICE

The focus on legal aid and legal literacy as the prime means of improving access to justice require involvement of agencies such as the law schools in this process. It has meant that much of the attention of the law schools needs to be directed towards developing out-reach programmes, running an in-house

[9] See, *Anees Ahmed* v *University of Delhi*, AIR 2002 Del 440.

clinic/cell with the help of lawyers, developing legal awareness materials, etc. On the other hand, there are no analyses of the structural defects and lacunae in the justice delivery system that made for tardy dispensation of justice. The reasons for delay and costs in the judicial system, the structural reforms that could be brought about, in short, the critique of the judicial administration system are not highlighted to the same degree as aspects that could *also* fall within the domain of the legal education system in India today. Instead, legal aid measures have been seen as a necessary concomitant of the poor system of justice delivery in India emphasising the role of the law schools in bringing about some relief to the consumers in such a system. However, there are limited returns of legal aid activities when the legal systems and procedures are tilted against access to the poor and marginalised. This is compounded when PILs and court judgements are seen to be inimical to the livelihood of the poor and homeless.

In recent years, the judges, judicial academies, the Law Commission, and the executive have been concerned with the matters of case management, fast track courts and other measures to increase the efficiency of the justice delivery system. Not much attention or place has been given to legal education or academia in addressing the supply-driven problems of justice delivery. This is also because such questions have not been high on the research agenda of universities.[10] Judicial administration is only now becoming a part of the LL.M. curriculum.[11] In these market-driven times, legal education may need to address both the demand and the supply side of justice-dispensation.

[10] E.g., see, Upendra Baxi, *supra* n. 2.

[11] For instance, Judicial Administration is a specialisation being offered by the Indian Law Institute in its newly launched LL.M. course since it became a deemed university in 2004.

THE ROLE OF CLINICAL LEGAL EDUCATION IN INCREASING ACCESS TO JUSTICE: THE CONTEXT OF BANGLADESH

Mostafa Mahmud Naser[*]

It is no longer sufficient for the law to provide a framework of freedom in which men, women and children may work out their own destinies; Social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and exposed, to provide them with financial and other support, and with access to courts, tribunals and other administrative agencies where their rights can be enforced.

[Sir Leslie Scarman, in the 1974 Hamlyn Lectures]

I. INTRODUCTION

Law being the embodiment of social values and at the same time the means of attaining them[1] is considered as one of the most effective vehicles of development. The credo is that for any problem that arises in a society there must be a solution; and the law is the principal source of remedy.[2] Legal education plays an important role in socializing the next generation of lawyers, judges, and public policy makers. As gatekeepers to the profession, law schools have a unique opportunity and obligation to make access to justice a more central social priority.[3] That is why, if there is any area demanding reforms, if there is any subject which has a strategic role to play in the development of the country, if there is any discipline which needs urgent radicalization, it is law and legal education.[4]

But the traditional education as imparted in the law schools of Bangladesh has converted the study of law into a mere totality of norms applicable to certain defined facts and situations. It has little relevance towards the needs and aspirations of the grassroots and community, society and humanity at large. This approach has overlooked the societal responsibility of law graduates and law schools. It is imperative that law as a subject should not be isolated from the issues of social justice, development, democratic values and human rights. Law indeed can act to accelerate the socio-economic and democratic progress.

[*] Assistant Professor, Department of Law, University of Chittagong, Bangladesh.

[1] M. Amir-ul-Islam, *In the Quest For A Modern Education in Law*, paper presented in BLTA Symposium on Legal Education in Bangladesh: Problems and Prospects 1 (20-21 Nov. 1992).

[2] William M. Evan, SOCIAL STRUCTURE OF LAW: THEORETICAL AND EMPIRICAL PERSPECTIVES 109 (1990).

[3] Deborah L. Rhode, ACCESS TO JUSTICE 193 (2004) cited in Stephen Wizner and Jane Aiken, Teaching And Doing: The Role of Law School Clinics in Enhancing Access to Justice 1, available at http://www.courts.state.ny.us/ip/partnersinjustice/teaching-and-doing.pdf. Accessed on July 8, 2006.

[4] *Supra* n. 1 at 19-21.

Therefore, it is an urgent necessity that law schools and law graduates in Bangladesh should play the role of 'social engineers' for the transformation of the society in order that justice and equity for all can be ensured and law should be reached at the door steps of the marginalized section of the society. Law schools, therefore, must be called upon to play its important role for socio-economic and democratic promotion and for the transformation of the society in order to ensure justice and equity for all.

This article examines a number of key objectives and functions of clinical legal education which have the potential to increase access to justice in the light of prevailing political and socio economic conditions in Bangladesh. It also briefly highlights the development of clinical legal education programmes in Bangladesh. Finally, this article endeavours to search for a better approach to clinical legal education aimed at enhancing access to justice.

II. CLINICAL LEGAL EDUCATION *VIS-À-VIS* ACCESS TO JUSTICE: CO-RELATION IN THE CONTEXT OF BANGLADESH

Bangladesh is a poor country and a developing democracy. Its socio-economic problems are acute and multifarious. The problems of social justice prevailing in Bangladesh society are grossly manifest in wide variance in the standard of living of different classes of people, in the exploitation of the disadvantaged and poor section of the society and in the practical inability of the poor to have access to law. The Constitution of Bangladesh contains high ideals and provisions of fundamental human rights and freedoms that, if implemented and enforced in their true senses, can help to ensure access to justice.

Legal system in Bangladesh theoretically ensures access to justice for each and every citizen of the country[5] but in practice the doors of justice is not open for disadvantaged segment of the society. National and international law impose obligation upon the state to establish a legal system accessible to each and every member of the society. Nevertheless, the discharge of this obligation is yet a far away goal. The most accepted democratic concepts of equality before law and right of every citizen to access justice is meaningless if for reasons of poverty or lack of financial resources an individual cannot take recourse to law for vindicating his lawful and reasonable rights.[6] In our adversarial legal system, poverty, inordinate delay, high cost of litigation, lack of legal aid mechanism and unavailability of alternative informal justice delivery system are considered the road blocks in the way of access to justice.[7] In most of the cases, access to justice is only available to the resourceful person and powerful elite since in order to have access to justice one must have the means which includes money. The poverty-ridden people in our country are, normally, not aware of the rights and

[5] Constitutional provision of equality before law and equal protection of law is the gateway of equal access to justice.

[6] K.A.A. Qamruddin, *Legal Aid : Its Importance in Bangladesh*, 8 (2) LAW AND INTERNATIONAL AFFAIRS: JOURNAL OF INSTITUTE OF LAW AND INTERNATIONAL AFFAIRS 22 (1985).

[7] Md. Saiful Karim, COURT SPONSORED ADR IN PRACTICE IN BANGLADESH: PROBLEMS AND PROSPECTS, unpublished LL.M. dissertation, University of Chittagong, 25-31 (2003).

the relief(s) they are entitled to. This is primarily due to lack of education. Even if they are made aware of their rights and the relief(s), because of financial constraints they cannot enter even the gate of justice.[8] Even if they somehow reach the courts, their misfortune continues. Courts are supposed to offer a forum where the poor and powerless can stand with all others as equals before the law. But, in reality, the justice delivery system of Bangladesh is overtly or subtly biased against the poor and powerless, shamelessly 'bound' to power, wealth, and social status. Many of the Bangladeshi poor, therefore, choose to avoid the legal systems altogether rather than face intimidation, bear cost, and loose time in proceedings they cannot hope to win. The institutions of legal education, i.e., law faculties and law departments in the universities, both public and private, and the law colleges of Bangladesh can play a vital role in this regard by concentrating their resources and efforts in encouraging and enhancing access to justice.[9] Therefore, the questions of who teach in these institutions, how do they teach and what is taught as well as who are taught are very pertinent for dealing with the problem of access to justice.

Legal education in Bangladesh is still imparted predominantly in traditional method, i.e., class room lectures, tutorials, seminars, discussions and bits of moot-court and court attendance. While this method has its own merits, it needs to be supplemented by more practical and professional approach to legal education. Traditional legal education in combination with clinical legal education will be able to produce lawyers and legal scientists with high professional skills who will also be able to do social engineering.

The North American concept of clinical legal education[10] which is fast gaining ground in the law schools of the developing countries can prove to be a powerful vehicle of promotion and protection of human rights combining legal education with legal service for the poor. Clinical legal education is basically practical legal training through moot-court, mock-trial, participation of the students in ADR and in public legal education, i.e., mass legal awareness programmes, chamber practice with the lawyers, counselling, participating in the conduct of live cases, short of appearing in the courts. Clinical legal education is experiential learning through doing, or by the experience of acting like a lawyer. Clinical legal education merits separate treatment, for it is not merely a

[8] Justice Shah Abu Nayeem Mominur Rahman, *Poverty and Access to Justice and the Role of the Higher Judiciary in Bangladesh*, paper presented in First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, (3 November, 2002), available at http://www.humanrightsinitiative.org/jc/papers/jc-2002/judges-papers/rahman.pdf. Accessed on July 10, 2006.

[9] REPORT PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES, Association of American Law Schools Equal Justice Project supported by the Programme on Law & Society of the Open Society Institute 32 (March2002), available at http://www.aals.org/equaljustice/final_report.pdf. Accessed on July 10, 2006.

[10] See generally, H Brayne. *et al*, CLINICAL LEGAL EDUCATION: ACTIVE LEARNING IN YOUR LAW SCHOOL 278 (2003); N.R. Madhava Menon, *Clinical Legal Education: Concept, Concerns* in N.R Madhava Menon (*ed*), A HANDBOOK ON CLINICAL LEGAL EDUCATION 1-24 (1998); M. Shal Alam (*ed*), MANUAL FOR CLINICAL LEGAL EDUCATION 1-12 (2001).

methodology of teaching or learning, it is also providing service to the people and, hence, more practical and noble. When young students at the formative stage of their career are exposed to community legal services, they get sensitized to the problems and needs of the marginalised sections of the society, and feel motivated to continue to work for them when they enter professional life. To state in the words of Dr. Mizanur Rahman, broad objectives of clinical legal education are:[11]

> (i) to acquaint the students with the lawyering process and to develop skills of advocacy;
>
> (ii) to expose students to the social reality and instil in them a sense of societal responsibility in professional work;
>
> (iii) to make one aware of the limits of legal system and appreciate alternative lawyering skills including exposition to alternative dispute resolution; and
>
> (iv) to develop a sense of professional ethics.

One of the fundamental aims of clinical legal education, therefore, is to expose the students to society at large. Clinical legal education is not merely a method of practice oriented legal education with a view to eradicating the loopholes of the traditional method of legal education but it is a novel system of legal education which (a) combines theory with practice, (b) combines education with service to the people, (c) builds bridges between the law schools and bar associations, (d) brings the students closer to the people in need of law, (e) awakens in the students social concern and motivates them to 'serve humanity', and (f) instils in the students a sense of responsibility to play the role of social engineers as professionals in future.

It is to be noted that clinical legal education does not aim at replacing traditional method of legal education. On the contrary, clinical method has come to supplement and complement the traditional method. Involving students in the provision of legal services enables them to discern the social importance of law and the needs of marginal and oppressed communities, rendering them conscious of the role of the legal profession in respect of those demands. In emerging democracies such as Bangladesh, still facing enormous constitutional and legal changes, clinics have a responsibility to instil lawyers with a strong sense of responsibility and professional ethics. Clinical programmes naturally function as a forum in which professional ethical dilemmas are explored and resolved and more fundamentally political questions, such as the role of lawyers, students and professors in the construction and consolidation of a legal system may also be considered.

On the relevance of the programme, the Chief Justice of Nigeria said:

[11] Mizanur Rahman, *Clinical Legal Education in Bangladesh: Establishing a New Philosophy*, 1 CHITTAGONG UNIVERSITY STUDIES – LAW 8 (1996).

> One of the benefits derivable from clinical legal education is that it helps to bring to the legal profession a sense of social consciousness. It makes lawyers to be socially responsible and more committed to the pursuit of wider social goals. In other words, university legal aid clinics introduce students to the possibilities of using law for social justice with a view to inspiring them to think creatively about how to use their skills to meet the legal needs of their communities. Upon graduation, many of such students take up advocacy in public interest law as a career.[12]

He concluded by noting that it has become necessary to involve other stake holders in the legal profession.

Successful implementation of clinical legal education programmes in the law faculties and law schools in a country like Bangladesh will not only improve the quality of its legal education, but it can go a long way in meeting the demands of social justice, legal needs of the poor and improving human rights conditions. Historically students in Bangladesh have always played a very dynamic and progressive role in various socio-political movements of the country. In fact, students in Bangladesh come forward as a very vocal force on all major national issues. Some of these students' force can be successfully used for dealing with the problems of social justice and practical access to law through clinical legal education.

III. DEVELOPMENT OF CLINICAL LEGAL EDUCATION IN BANGLADESH

Traditionally, law schools in Bangladesh have concentrated on teaching law and legal education in isolation from legal practice, ignoring almost completely the potential of practice as a source of education for the law student. The way a lawyer learns on the job is not generally discussed systematically, nor is it used in the law faculty. The practical skills and ethical dimensions of legal practice are largely ignored in scholarly works and widely absent in the legal curriculum.

Introduction of the Clinical Education Programmes in the law faculties at Dhaka, Rajshahi and Chittagong and a Pilot Clinical Programme at the City Law College in Dhaka may be considered as thoughtful and careful efforts and responses to the needs of legal education. It should, however, be mentioned that the first ever response came from the Legal Education Committee of the Bangladesh Bar Council with the launching of its Clinical Legal Education Courses on December 18, 1993.[13] Sponsored by Ford Foundation, Dhaka and Chittagong University law faculties introduced clinical legal education in mid-nineties with encouraging success to teach clinical skills to law students and provide legal services for the disadvantaged populations. It sought to broaden the community of activists providing such services by constructing a pipeline of

[12] Innocent Anaba, *Using Clinical Legal Education to Serve Society: A Challenge to African States*, available at http://www.vanguardngr.com/articles/2002/features/law/law625022005.html. Accessed on July 6, 2006.

[13] *Supra* n. 11 at 3-4.

programmes that would channel motivated individuals into that community on a full-time, part-time or *pro bono* basis. These legal activists would in turn form a constituency for long-term systemic reform geared toward increasing access to justice.[14]

In the Chittagong University Faculty of Law, along with clinical teachers of the Faculty, practicing lawyers are invited to take part in the clinical process of teaching law. Students are given lessons on skills and techniques of lawyering, i.e., interviewing and counselling of clients, marshalling of facts, art of advocacy and drafting of documents. This is done by briefing the students on these skills of lawyering and also by giving oral and written demonstrations. Simulation exercises on an imaginary case by assigning the roles of clients, witnesses, advocates and judges to individual students are widely practised. The Faculty has adopted moot court model as the principal vehicle for running its clinical legal education programmes. Describing university law clinics in Bangladesh, Stephen Golub observed:[15]

> The clinics aimed to upgrade Bangladeshi student skills while exposing them to legal aid and NGO work. This experience takes place at a crucially formative stage in the students' careers, when many mix idealism with surprising cynicism about their profession's ethics and orientation. As one observer put it, 'NGO exposure can help put these students in touch with their country's problems, because many of them [coming from relatively privileged backgrounds] are removed from that reality.' NGO links also can create a 'pipeline effect,' helping to convert student dedication into concrete knowledge and actions that broaden the community of legal activists. Some may commit to NGO or pro bono work after graduation; others might develop new perspectives on social justice. And as their role in the legal profession grows over the years, they could become powerful voices for reform.

It is heartening to note that clinical legal education programmes in Chittagong and Dhaka university law faculties successfully mobilised students to take active part in various human rights awareness activities not only in their vicinities, but also in distant parts throughout the country. The Chittagong University Faculty of Law under its clinical legal education system has undertaken massive programmes of public legal education and is pursuing them for the benefit of both students and various target groups of people. Students' spontaneous participation in them is very encouraging. Under these programmes, lectures and seminars in secondary schools, colleges and in the communities of disadvantaged and poor people are organised. The goal is to acquaint them with the basic laws of the land, human rights norms and any particular branch of law, which might be interesting to any particular group or community, or any new

[14] Stephen Golub, *From Village to the University: Legal Activism in Bangladesh* in Mary McClymont and Stephen Golub (*ed*), MANY ROADS TO JUSTICE 128 (2000).
[15] *Id.* at 145.

legislation, which has been enacted for any disadvantaged group. Lectures are conducted both by students and teachers. This is a process of educating and being educated. The Faculty also prepares, publishes and distributes amongst the people simplified versions of the Constitution of the country, social welfare legislation and international human rights instruments. General goals are to increase the legal awareness of the people so that their rights can be better defended.

The Chittagong University Faculty of Law has also undertaken to identify the legal needs of the poor and disadvantaged groups adjoining the University areas and extend the legal service in the form of providing legal consultancy, engaging lawyers for representing their cases in the courts, motivating them to resort to legal means when their rights and interests are violated. This programme provides legal service to individual clients who do not have sufficient means to pursue their cases on any specific dispute.

Apart from providing legal services, the Faculty also seeks to identify public interest issues like environmental hazards, municipal services, working conditions of the labourers, sanitation, violation of any fundamental right by executive action or non-action, etc. and motivate the affected people to seek redress in the court and provide necessary assistance. The Faculty has plans to initiate such public interest litigations on behalf of any affected group, if such need arises. This is one area where there is opportunity to effect law reforms through progressive judicial decisions.

Pursuing their commitment towards society, some teachers of the law faculty of Chittagong University, Bangladesh had actively involved themselves and their final year LL.B. students in conciliation work as part of legal aid. Their concern and commitment for a social cause must be appreciated and applauded. Later in recognition of their sincere efforts, BLAST (Bangladesh Legal Aid and Services Trust) a national NGO, joined hands to give it a shape. A Legal Aid Clinic was established in Madanhat, Hathazari (adjacent to Law Faculty) in 1997. A teacher of Law Faculty acts as an advisor and the students work there as student trainees.[16]

Similarly, the University of Dhaka, Faculty of Law is now running a similar programme for leading law students from across Bangladesh, immersing them in field research that exposes them to the lives and legal needs of disadvantaged populations. A number of alumni of this effort, and of a clinical legal education programme that provides brief placements with NGOs, have gone on to staff legal services groups after graduation.[17]

[16] The author of this article had opportunity to work in that legal aid clinic as a student trainee.
[17] Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* in WORKING PAPERS, RULE OF LAW SERIES, DEMOCRACY AND RULE OF LAW PROJECT (Number 41, October 2003) Carnegie Endowment for International Peace, available at http://www.ceip.org/files/publications/HTMLBriefs-WP/WP_Number_41_October_2003/2000a40bv01.html. Accessed on July 6, 2006.

IV. Need to Expand Goals: Journey from Traditional Legal Education to Justice Education

Any legal education/law school curriculum supposedly pursues the objective of producing skilled lawyers by educating students so that they can easily and confidently handle the numerous laws and enactments existing in the country for the resolution of specific disputes of the clients in question.[18] There is general agreement today that one of the basic obligations of a law school is not only to prepare its students for the practice of law but also to empower them with the means and tools to challenge injustice and discrimination in the society and to understand the pulse of the community. Unfortunately, the community and societal implications of this mandate are not fully developed and law schools in Bangladesh have neglected the charge to prepare students for effective and responsible participation for community interaction. They continue to focus, instead, on their responsibility to prepare students to pass examinations that facilitate getting law degrees. But a mere certificate of a law degree is not a valid indicator of a new lawyer's ability to practice law effectively and responsibly.

Law graduates having traditional legal education through lecture method of teaching in big class rooms feel unprepared to interview and counsel clients, draft and file papers, prepare a case, conduct trials, examine witness or argue a case before the judge. They in fact do not acquire the skill of applying their knowledge of substantive laws learned in classes to the actual situations of clients. They also feel that they have not gained the experience to understand the role of a lawyer in the society.[19] The education of the future lawyers who see their task to work for social change has met historically with formidable indifference. We just do not seem to care much and do almost nothing about preparing those whose vocation is to work with the subordinate: the poor, the women, the minorities, etc.[20]

Legal education in Bangladesh regularly resists change of any sort.[21] If the rule of law has to be part of the democratic culture and if human rights and social justice as envisioned in our Constitution are to be respected, there is no alternative except to inform and illuminate legal education with values drawn from the society abandoning the methods which are inappropriate to the teaching of law and review the whole process in the context of social needs and problems. It is in the classrooms of the law faculties and law colleges that the future lawyers, judges and the substantial numbers of legislators, human rights activists and social reformers are nurtured and groomed.[22]

[18] *Supra* n. 11 at 1.
[19] Shafique Ahmed, *Post Final Practical & Creative Skills Training Course*, 1 (2) CLEP BULLETIN 8 (July 1994).
[20] *Supra* n. 11 at 139.
[21] Mizanur Rahman, *Anti-Generic Learning and Rebellious Lawyering*, 2ND HUMAN RIGHTS SUMMER SCHOOL MANUAL 156 (2001).
[22] M. Shah Alam, *Legal Education in Bangladesh: Search for Reforms*, A REPORT TO THE WORLD BANK RESIDENT MISSION IN BANGLADESH 156 (1997).

The legal education of Bangladesh has been criticized since its inception as serving only some of the educational needs of new lawyers. Since 1993 numerous groups of leaders of the legal profession and groups of distinguished lawyers, judges, and academics have studied legal education and universally concluded that most graduates of law schools lack the minimum competencies to provide effective and responsible legal services to the poor. Our common apathy towards legal education is strikingly reflected in a recent article by a former chief justice of Bangladesh where he, writing on the importance of judiciary has enumerated and analysed all possible institutions and issues relating to justice, law and judiciary. At the conclusion of the article he has rightly written, "we need honest and dedicated people to reform and to man the judiciary of Bangladesh. Ultimately, the man behind any system is of great importance".[23] Hence, a change in the quality, content and complexions of legal education is to be viewed as an urgent social necessity.[24]

V. The Quest for a Better Serving Clinical Legal Education Programme Enhancing Access to Justice

The challenge for law schools is to do better in socializing law students and to make 'access to justice a more central social priority.' If you ask any law student in Bangladesh about the objective of legal education, simply s/he will answer that the objectives of legal education is to make the students conversant with the substantive and procedural laws. Now the question is should we be confined to so narrow a space or should we look at the issue from a broader point of view.[25] Until recently, legal education in Bangladesh was not perceived as an educational and intellectual pursuit but only as a means of imparting certain principles and provisions of laws to enable students on graduations, to become juniors to 'senior lawyers'.[26] As mentioned earlier, law, however, is much more than principles and provisions – it is about justice, equity and fairness as well as the values about which societies organize themselves through orderly institutions. Law is also intertwined with economy, development, business and the emerging globalized order.[27] Therefore, we have to set objectives of legal education from a broader perspective.[28] In 1992, Barrister M. Amirul Islam, the then Vice-Chairman of the Bangladesh Bar Council outlined the broad objectives of legal education in Bangladesh as follows :

> Besides helping the students to master the lawyering skills, legal education must be able to help develop inter-disciplinary approach for

[23] Justice Latifur Rahman, *The Judiciary and its Importance*, THE DAILY STAR 18 (July 16, 2005).
[24] *Supra* n. 1 at 16-18.
[25] Sheikh Hafizur Rahman Karzon, *A Brief Appraisal of the Legal education in Bangladesh*, THE DAILY STAR, available at www.thedailystarnews.net/law.htm. Accessed on May 6, 2006.
[26] www.brac.edu/law. Accessed on June 5, 2006.
[27] *Ibid.*
[28] Mohammad Monirul Azam, *Legal Education in Bangladesh*, paper presented in the Seminar on the Occasion of First Anniversary of Law Department of The Premier University 4 (2004).

building the personality and the intellectual ability to understand the society and the human situation in a changing social order.[29]

Professor Jay Erstling from the University of St. Thomas, Minnesota, USA while acting as a consultant to the Bangladesh Bar Council, expressed his view on the objectives of legal education as follows:

> Legal Education must inform students about crucial societal issues, including poverty alleviation, the role of women, the environment and human rights and must focus on ways in which the legal system can help to solve the problems plaguing society. In other words, legal education must not teach students simply what the current law says, but rather it must provide students with the vision and skill to make the law more responsive to the development needs of this country. Put simply, it must train students to be social engineers.
>
> Legal education must not only teach students about legal theory, but must prepare students to engage in the practice of law or law related professions. Students, therefore, must learn not only how to be outstanding lawyers but also outstanding members of the judiciary, government service, NGO or industry. To accomplish that goal, legal education must impart skills in research, drafting, oral communication, interviewing, interpreting and advocacy...[30]

It is not an easy task to consider how to improve legal education, even if all concerned agree there is a need for improvement. Generations of debate have not resolved the relative merits of a liberal, general education versus a technical, professional orientation for the practice of law. Nor will we ever be able to reach universal agreement about the specific knowledge, skills, and values that law schools should teach if for no other reason than the vastly diverse practice settings in which our graduates work. There are some fundamental things about which we should be able to agree, however, and we should not refrain from trying to improve legal education simply because the task is difficult. Other countries are reforming their systems of legal education, and our attention to improving the preparation of lawyers for practice in Bangladesh is long overdue.

Objectives of clinical legal education can be achieved under the supervision of law faculties or law schools by undertaking massive works in the following areas:

A. Integration of Social Values through Curriculum

Lack of social relevance and humanistic approach in the curriculum alienates and suppress various values, ethics, gender perspectives and views of minority etc. Therefore, by way of adding courses to the curriculum that address

[29] *Supra* n. 1 at 16-17.

[30] Jay Erstling, *Reform of Legal Education in Bangladesh*, REPORT SUBMITTED TO THE BANGLADESH BAR COUNCIL 3 (1993).

the issues of gender, cultural migration, minority and indigenous peoples or allowing students to work with people of other cultures, we can equip law students to revisit their responsibilities to the marginalized sections of the society. The law curriculum should be introduced in integration with other disciplines. It is time to appreciate that the subject matter of economics, sociology, anthropology, philosophy, literature and psychology are essential to the education of the future law graduates. As the minimum, the budding lawyers must be taught in the economics of law, lawsuits and lawyering.[31]

B. Professional Practice and Skills Development

Members of the legal profession need to play the role of educator, planner, and counsellor. Therefore, lawyers must be trained in skills that provide for a broader understanding of various facets of legal problems. Fundamental lawyering skills are important to provide social justice; however, any set of skills confined only to traditional methods of problem solving would be manifestly insufficient.

Students would be required to undergo the entire process of lawyering either by exposure to actual cases or in dramatic simulations. In both instances, they are to act as lawyers and learn the details of lawyering from the experience of being a lawyer, real or simulating. While the students work under the supervision of a practicing lawyer or a clinical teacher, they are expected to face situations, analyse facts and take decisions independently. In interacting with the clients and confronting facts of diverse nature and presenting them in the court, the student lawyers get the real touch of the picture of the society. They understand law in the context of the problems of the society and can form opinion about the quality of a particular law. This awakens the students to the issues of social justice and instils in them a sense of professional responsibility. But how successfully they will master the skills of lawyering and how much they will be sensitised to social problems will depend much on the quality of supervision by the clinical teacher.

C. Externship

In externships, students either participate as lawyers in the representation of real clients under the supervision of practicing lawyers or they observe or assist practicing lawyers or judges at work.

These forms of experiential learning aim:

- To broaden, extend, and deepen students' understanding of concepts and principles.
- To help students integrate theory and practice.
- To increase students' motivation.

[31] *Supra* n. 21 at 158-160.

• To help students develop the knowledge, skills, and values they need as professionals.

Under this programme, post-graduate students are required to work with leading NGOs, engage in para-legal activities in different parts of Bangladesh. This programme proved extremely useful for the students as it provided necessary motivation and sensitized and exposed them to the society and masses at large. Placement with legal services groups will offer Bangladeshi law students valuable opportunities to broaden their perspectives, integrate such services into their careers, and join the community of legal activists.

D. Law Clinic

Clinics remained focused on poverty law issues and formulated increasingly sophisticated educational regimes to accompany live client representation. Balancing the twin missions of service and education, the clinical movement became an institutionalized component of legal education.[32] Today, there is little dispute about the merits of clinical legal education. By addressing human rights and social justice concerns, law clinics and NGOs may help upgrade the quality of the legal profession in general. Dismay at the profession's low ethical and professional standards drove many top law graduates into teaching or business in the past. The clinics and expanding NGO opportunities can improve legal training and encourage high-calibre graduates to practice law.[33]

E. Legal Service

The primary obligation to provide legal services to the poor resides with the government, and to a lesser extent, with the legal profession and not with law schools. Nevertheless, law schools do have some obligation to contribute in solving the crisis of access to justice, and it seems obvious that the obligation is best accomplished by law school clinics assisting low-income individuals and communities that are underserved or have particular difficulty obtaining lawyers because of the nature of their legal problems.[34] Unless we design our clinics to involve students in the delivery of legal services to clients, we teach them too little about legal services work, underexpose them to the real world of low-income clients, miss opportunities to engage students in seeking fundamental change through class actions, and thus fail to meet the law school's obligation to make a meaningful contribution to addressing the access to justice problem.

F. The Legal Advice

Legal advice is a corollary of legal education and is an essential concomitant of legal aid.[35] At the pre-litigation stage when the legal problem has already arisen, a legally informed person listens to the problem and gives advice as to how should the problem be dealt with. The advice may be to avoid litigation, or

[32] *Supra* n. 9 at 4.
[33] *Supra* n. 14 at 150.
[34] Stephen Wizner and Jane Aiken, *supra* n. 3
[35] Sujan Singh, LEGAL AID: HUMAN RIGHT TO EQUALITY 262 (1996).

it may take the shape of drafting an application or a legal document. A competent legal advice saves uncalled for litigation; it may assist in rightly tackling the situation having legal consequences; or it may be an education on a law point.

G. Legal Aid

The legal aid in the popular sense, understood by the present or potential beneficiaries, means only the representation in the court of law.[36] Traditionally legal aid meant providing assistance to poor litigants who did not have sufficient financial means to run their cases in the court. Legal aid now has set broader goals to provide legal assistance to various communities especially disadvantaged ones to defend their rights in general, to make them aware of their specific rights and human rights in general, to motivate and help them to seek alternative dispute resolution in order that cumbersome, hazardous and costly process of litigation can be avoided and with that end in view to organize negotiation, mediation, conciliation and arbitration amongst the disputants. Therefore, the system that is to be adopted in Bangladesh has to be devised in such a manner that justice may be available easily, speedily and at less cost.

Law schools can establish legal aid cells where students and teachers can guide people in identifying their problems and make them aware of the remedies available to them.[37] Students in these cells can provide paralegal services such as drafting affidavits, assisting in registration of marriages, births and deaths, electoral rolls, and filling out various forms. This type of work gives students ample opportunity to learn client interviewing, counselling, and drafting skills. Another approach is for law schools to adopt a village and encourage students to conduct a survey to identify the problems that the people in that particular village face. After identifying the problems, students can approach the concerned authorities and arrange a public forum. Often, local authorities are not responsive to local citizens' concerns, especially those from disadvantaged communities. The idea here is to inform villagers about the programme and to encourage them to participate in the forum so that they can meet the concerned officers on that particular day and can settle their grievances in public. Students can be instrumental in the smooth functioning of the entire programme, and they can follow up on particular matters with the concerned officers. These kinds of programmes are very effective, as the officers after giving an assurance publicly are not fulfilling their promises.

H. Public Interest Litigation

Student involvement in public interest litigation starts when they become sensitized to social justice issues in the course of regular lectures and at Legal Aid Society meetings. By this process of sensitization to the general social

[36] *Id.* at 266.
[37] Frank S. Bloch and M. R. K. Prasad, *Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-national Currents from India and the United States*, available at http://www.law.ucla.edu/docs/blochprasad_institutionalizing_social_justice_mission.pdf. Accessed on July 10, 2006.

situation and the persistence of injustice in their own immediate society, students are able to identify various areas where they feel that the intervention of the judiciary might be required. The faculty should guide them as to how they should further investigate or research the issue to ensure that there is a real situation of injustice in which members of public could genuinely be interested. Thereafter, the students need to be advised to write to competent authorities who are obliged under law to remedy the injustice. If such authorities do not provide relief, the students with guidance from members of the profession may file a petition before the High Court Division together with all of the information that they have gathered concerning the problem. Public Interest Litigation operates in Bangladesh under special rules that allow any member of the public to present the case. Therefore, if the litigation proceeds the students themselves argue the case before the court.

I. Greater Emphasis on Alternative Dispute Resolution (ADR)

Justice education requires us to place an even greater emphasis on negotiation, dispute resolution and collaborative working relationships. Our students must be taught how to resolve problems before they deteriorate into potential lawsuits. Our young lawyers need to be educated to recognize that even if the outcome of litigation is relatively certain, there is not always just one right answer to a problem. A money judgment may not be an effective solution for all parties, and so lawyers should work to provide for a lasting solution, one that is worked out through negotiation or appropriate dispute resolution technique. They need to learn that it is not enough to dig out the facts of the problem: they must understand the context in which the problem arose. A good lawyer can assist clients in articulating their problems, finding their interests, ordering their objectives, and generating, assuring, and implementing alternative solutions.[38]

J. Public Legal Education / Street Law Programme

In order to have access to justice, a person must know about his rights and the remedies for the wrong done to him as well as the forum for obtaining that remedy. The creation of good laws and their proper applications do not depend solely on the legislators and law enforcing agencies, but in a large measure depend on the consciousness of the people about their rights and duties in the society and on the knowledge of the law of the land which must protect their rights.[39] Therefore, public legal education might be a powerful tool to educate the people about their rights and provide them with information about the laws of the country.

Public legal education can be effected through lectures, discussions, publications and distributions of the simplified and adapted versions of

[38] Reno, Janet, *Lawyers as Problem-Solvers*, Keynote Address to the AALS, 49 JOURNAL OF LEGAL EDUCATION 5-39 (1999) cited in *supra* n. 22 at 158-160.

[39] Dr. M. Shah Alam, *Clinical Legal Education as Perceived by Chittagong University Law Faculty*, paper presented at the NATIONAL SEMINAR ON CLINICAL LEGAL EDUCATION IN BANGLADESH: PROBLEMS AND PROSPECTS organized by Chittagong University Law Faculty 4 (31st May 1995).

Constitution, and international human rights instruments, etc. or adopting any other informal methods like production of street plays that focus on legal issues. As a part of the public legal education programmes lectures, seminars and discussions can be organized in villages, factories, professional unions, educational institutions and amongst particular disadvantaged groups like slum dwellers, garment workers, or aborigines. Public legal education should also motivate the people to participate constructively in the creation of law, which has a pervasive influence on our society. People's participation in making laws and public policies will not only lessen the traditional use of 'conventional wisdom, and 'intuition' of the legislators and policy makers but it will also lessen their unresponsiveness to society's urgent problems.

K. Professional Ethics: Making Lawyers Work for the People

The whole idea of clinical legal education can go in vain if ethical side of legal profession is overlooked. The objective of clinical legal education is not merely to help students master the skills of lawyering and make them technically sound. In representing a client's case in the court, student lawyer must not resort to any means, which is morally condemnable and must avoid resorting to false witnesses and distortion of facts. While client's interest must guide his actions and efforts, ethical and moral values must also be upheld, for in that lies greater good of the society. In fact, in all the programmes that are linked with clinical legal education emphasis is always on the aspects of justice, protection of rights and progressive development of the society. While execution of these programmes requires moral and ethical motivation, successful implementation of the programmes will instil further ethical and moral values in the students.

Ethical aspects of legal profession must be included in the law faculty curriculum. Interdisciplinary approach to curriculum development is necessary to make the students more concerned about society, to make them understand the requirements of its progressive and humanistic development. For the legal education to have any practical meaning it is important to guide the students learn the lessons of ethics, morals, law, justice, human rights and society in their interrelationship, so that they can better identify their tasks in the service of the people and in progressive development of the society.

L. Community Involvement, Diversity and Pro-people Practice

Our legal education has so far been concentrating on the lawyering process and skills learning. To make legal education truly meaningful in the context of our social realities, effort must be made without further delay to accommodate the remaining objectives in the clinical curriculum. This, very likely, will necessitate establishment of *'out-reach programmes'* where students will have the opportunity to face the 'real problems', and work on their resolutions. This will allow the students to reflect on whether justice can always be done by

litigation.[40] This will enable the law schools to produce graduates who are better equipped for practice and to promote a fuller appreciation of the lawyer's functions in the society, giving a human perspective of law, and a deeper understanding of law as a social phenomenon and an intellectual discipline.[41]

VI. CONCLUDING REMARKS

The Constitution of Bangladesh in its Preamble and the Fundamental Principles of State Policy[42] speaks about social justice[43] as its key pillar. According to Article 15 of the Constitution[44] it shall be a fundamental responsibility of the state to attain, through economic growth, a constant increase of productive forces of the people, with a view to securing to its citizens, the provision of the basic necessities of life, including food, clothing, shelter, education, and medical care. But due to vicious circle of poverty, even after thirty five years of independence these goals are yet to be achieved. High ideals of our liberation struggle as reflected in the Constitution will continue to remain mere promises if we fail to ensure that every individual citizen has access to justice and access to the law - just law, justly and equitably administered.

In the background of constitutional commitment and the societal needs, legal education must embrace a broad and comprehensive concept. Legal education, therefore, should be rendered with a view to create an environment and ability for reshaping the structure of the society for the purpose of achieving national goals.

The law and legal system are being called upon to advance arguments and develop tools to compel the state to abide by the social justice mandate of the Constitution and to promote the human rights of the under-privileged section of society. The responsibilities of legal education in a globalizing world make it necessary periodically to revisit law school programmes, to allow for necessary reforms and improvements. Law schools must prepare them to meet these challenges by providing not only a sound substantive education, but also the necessary skills and experience. By adapting curriculum to alert students to the international contexts, offering clinics and externships, promoting student and faculty exchanges, and emphasizing ethical foundations, today's legal education will fulfil its obligation to train lawyers to serve their clients and society.

[40] *Supra* n. 11 at 9.

[41] Mizanur Rahman, *Teaching Lawyering: The Clinical Method*, 1 (2) CLEP BULLETIN 6 (2 July1994).

[42] The main objective behind the Fundamental Principles of State Policy in Part II of the CONSTITUTION OF BANGLADESH is to establish a welfare state and to provide socio-economic justice.

[43] This social justice concept is a natural progression from the theories of laissez-faire to Marxism and Humanism. The concept of social justice thus takes in its sweep the objective of removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities.

[44] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, 1972 (as modified up to 31st December, 1998), Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh.

The Commonwealth countries, among them developing commonwealth countries, have inherited rich legal tradition. This has produced in these countries not only many brilliant law teachers, scholars, judges and lawyers, but also has established a wide and strong network of legal institutions – law faculties, law colleges, law schools, legal research institutes, besides various associations of law practitioners, where innumerable number of legal minds are at work. They will make a great force if they do undertake various human rights implementation programmes in their respective countries. International links with existing clinical programmes present an important opportunity to enhance the legitimacy of clinical education. Regional cooperation between clinical programmes in Bangladesh and India may help to generate positive results, illustrating the potential benefits of broader engagement with the international clinical legal education movement.

Legal educational in Bangladesh should be changed to make it cope up with the modern challenges and to prepare law graduates to be able to fulfil the dreams, demands and aspirations of our people and society aspiring to march forward as a modern nation through democracy, development and good governance.[45]

The present system of legal education in Bangladesh is not able to meet the needs of present time and national goals. Change of legal education in content, quality and objectives in line with modern challenges, national goals and global order would be able to produce law graduates having vision to establish a just and equitable society through a democratic polity, where rule of law and human rights are maintained as cardinal principles in all walks of life.

As law teachers, judges and lawyers, we have the responsibility to contribute in this process. We cannot predict right now the end result of our efforts but we do know that participating in this process from our own respective position is vital to contribute towards establishing a true *Sonar Bangla* (Golden Bengal)[46] as envisioned in our Constitution, where it shall be a fundamental aim of the state to realize through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.[47]

[45] *Supra* n. 28 at 17.

[46] *Sonar Bangla* or Golden Bengal in popular notion refers to a pre-colonial 'Golden Age' of prosperity, plenty and abundance of material wealth in the territory of the present Bangladesh and the adjacent areas populated by the Bengali-speaking people. The dream of *Sonar Bangla* has been repeatedly mentioned by the political leaders, cultural activists, students, workers, peasants during our liberation struggle.

[47] Preamble to the CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, adopted on November 4, 1972 and given effect from December 16, 1972.

JUDICIAL ACTIVISM IN INDIA: AN OVERVIEW

Harmeet Singh Sandhu[*]

Judicial activism is perhaps the most used and the least understood term in judicial parlance as of today. Confusion prevails as regards its process, the agents responsible for it, the circumstances which led to its rise, whether it is provided for in the Constitution or not and also whether it is a worldwide phenomenon or restricted to India alone. An endeavour has been made to seek answers to all these questions in the following paragraphs.

With the passage of time, the judiciary in India has become increasingly active. Whereas it was content with interpreting the Constitution in the most conservative or even reactionary manner till the early 1970s without trying to read in between the lines of the Constitution; during the last two decades or so, it has become more and more active, responsive, dynamic and vibrant. Apart from being the guardian of the Constitution, the Indian judiciary is also acting as an agent of social change, a crusader for social justice, a creator of new rules and procedures, and in the eyes of critics a "third chamber" and a super executive.[1]

This activism on the part of the Indian judiciary appears to have been the result of existence of a state of affairs wherein the legislature nearly failed to perform its duties properly and has accordingly expressed its inability and helplessness to tackle the issues thrust upon it. At times, it is the reckless and irresponsible attitude on the part of the legislature and the executive that forces the judiciary to exercise reasonable checks on them so as to bring about a proper balance in the exercise of constitutional authority.

As a result of this incompetence and negligence on the part of the legislature and the executive, people are made to face a lot of hardships. They are deprived of their constitutional and legal rights. It is because of the violations of the people's rights that judiciary has come to play a vital role. On the one hand, it has to ensure that any law passed by the legislature is in conformity with the provisions of the Constitution and on the other hand it has to ensure that the executive is enforcing these laws efficiently and not in any way acting beyond its powers.

In this connection, Ashok Kumar Johri writes that judicial activism is similar to the usual legal activities. Looking at different aspects of judicial activism, we find that it implies active involvement of the judges in dealing with various issues. It is in this context that Justice Krishna Iyer observes that every judge is an activist either on the forward gear or the reverse.[2]

[*] Lecturer, School of Legal Studies, G.N.D.U. Regional Campus, Jalandhar.

[1] Harshvardhan, *Judicial Activism in India*, 26 INDIAN JOURNAL OF POLITICS 134 (1992).

[2] Ashok Kumar Johri, *Judicial Activism and Social Transformation*, 11 UP JOURNAL OF POLITICAL SCIENCE, 26-37 (January-June,1989).

From the above observation, we can say that activism or otherwise depends on the judge's personal subjectivity.

I. HISTORICAL BACKGROUND

Judicial activism is said to have first originated in the English courts in the form of concepts like 'equity' and 'natural justice' as there were no sufficient safeguards for people in statutory laws at the time. In the UK the governing rule for the nature of the judicial process was expressed by Sir Francis Bacon in the early seventeenth century when he said that the judges must remember that their job is to interpret law and not to make law.[3]

Inclined towards this tradition, English judges developed a great deal of liking for their constitutionally imposed chains in their eagerness to avoid blasphemy of judicial legislation. They thereby bound themselves in heavier chains of their own making and resulted in their adopting the rule of literal interpretation of the plain and unambiguous language of statutes, disregarding the fact that in real life words are rarely plain and unambiguous. This led to a number of absurd and inevitable results. The early sixties, however, witnessed the emergence of a new generation of English judges, spearheaded by the likes of Lord Reid, Lord Denning and Lord Wilberforce. With their doctrine of 'purposive interpretation' they breathed new life into the English administrative law, reviving and extending ancient principles of private bodies that exercise public power, and rejecting claims of unfettered administrative discretion.[4] However, this concept later developed on the American soil.[5]

The evolution of judicial activism can be traced back to 1803 when Chief Justice Marshall, while delivering the judgment in the case of *Marbury* v. *Maddison*[6] observed that the Constitution was the fundamental and paramount law of the nation and "it is for the court to decide what the law is." He thus held that this particular phrase in the Constitution of the United States confirmed and strengthened the principle supposed to be essential to all the written constitutions. Accordingly, a law repugnant to the Constitution is void and that the courts as well as other departments are bound by that instrument and whenever there is a conflict between a law made by the Congress and the provisions of the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. This led to the birth of the twin concepts of judicial review and judicial activism.[7]

[3] R. P. Kataria, *et al.* S.K. SARKAR PUBLIC INTEREST LITIGATIONS AND PUBLIC NUISANCES 21 (2nd ed 2006).

[4] *Ibid.*

[5] Bachan Lal Kalgotra, *Evolution and Jurisprudential Dimensions of Judicial Activism* in K.L. Bhatia (*ed*) JUDICIAL ACTIVISM AND SOCIAL CHANGE 242 (1990).

[6] 2 L Ed 60 (1803).

[7] R. C. Lahoti, JUDICIAL ACTIVISM, Souvenir, All India Seminar on Judicial Reforms with Special Reference to Arrears of Court Cases (2005).

Many trace its beginnings to the landmark judgments delivered by the US Supreme Court in the 1950s. In *Brown* v. *Board of Education (Brown II)*[8] the US Supreme Court required the schools in southern American states to end racial segregation. During 1960s the issues pertaining to civil rights and the problems of the poor were handled by major PIL (Public Interest Litigation) centres. By the mid-1970s, PIL embraced such diverse issues like consumer protection, environmental protection, land use, occupational health and safety, health care, media access and employment benefits. However, there has been a decline of PIL in the United States since 1980s.[9]

Judicial activism, which has been a uniquely American development, has been defined in many ways.[10] This vague American concept with complex variables has meant different things to different people. Judicial activism may be described as employment of judicial legislation to expand the jurisdiction of the court so as to serve the interests of its constituency in pursuance of its ideology, theory and conception of judicial function. The court performs these political and economic functions in a simple manner. It enlarges the rights of its constituency so as to accommodate its ideology. We could, thus state that judicial activism swirls around the rights of the court's constituency. All this presupposes that judicial decision-making is not only a logical process of deductive reasoning derived from legal norms, but also a culturally determined process guided by the judges' own social, economic or moral convictions, inclinations and preferences.[11]

While speaking in favour of judicial activism, Justice Ahmadi explaining the basis of legitimacy of this new activism on part of the Supreme Court says that it is wrong to say that one democratic institution is trying to encroach upon the domain of the other. In fact, it is a new method evolved by the citizens of the country to highlight their concerns, which their representatives in Parliament have ignored. When there was a growing sense of frustration among the people with the democratic process, the new executive accountability litigation was a necessary corrective measure.[12]

Justice Kuldeep Singh, however, feels that the term "judicial activism was a misnomer." This was used both for praising and condemning the judiciary. According to him, it would be wrong to believe that the judiciary stepped in because other organs like the executive or the legislature failed to act. The

[8] 349 US 294.
[9] Shyam Divan and Armin Rosencranz, ENVIRONMENTAL LAW AND POLICY IN INDIA: CASES MATERIALS AND STATUTES 134 (2001).
[10] Jeffrey M. Berry, LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOUR OF PUBLIC INTEREST GROUPS 6 (1977).
[11] Mohammad Ghouse, *The Two Faces of Judicial Activism*, *supra* n. 5 at 106.
[12] Praveen Swami, *The Judicary - Supreme Concerns- Judicial Activism in Action*, FRONTLINE 98 (May 3, 1996).

judiciary was doing what the Constitution had enjoined upon it to do. He said that they had devised new tools to carry out this constitutional obligation.[13]

Moreover, these days legal system is viewed upon as a dynamic and self evolving enterprise which is to realize societal goals and aspirations. The ushering in of the new social order is not just restricted to legislators alone. The judges and administrators are expected to be "progressive", "activist", and "forward looking" rather than worshippers of the traditional blind-folded balance wielding goddess of justice. The dynamic legal system of today has manifested itself forcefully and aggressively, thereby posing new challenges to all those who are concerned with law making and execution of the laws.[14]

D.N. Saraf has referred to an eminent American authority, which while explaining this phenomenon, has contended that judicial activism acknowledged the fact that the decision maker should give preference to the social philosophy of the time and place while applying the law.[15]

Greatness of the bench lies in creativity. Thus, in the never ending process of judging, something more is expected of a judge than a mere initiative and lifeless reproduction of a mechanical routine. So whenever law comes before a judge, he is to invest it with a meaning and content and in this activism, he makes the law serve the society in the best possible manner, not only in its present needs but also lead it forward for its structural and qualitative improvement.[16]

In this regard, Justice Krishna Iyer has said that in an inevitable chemistry of social change, judges are certainly not anti-catalysts. He asks that how could judges ignore directive principles and not devise a system, which responds to the requirements of a nation with such a large population and millions living below absolute levels of the poverty line? [17]

It is known that the judiciary is neither a knight tilting at windmills nor can it afford to be a sleepy watchman or an absent minded umpire. However, the question to be answered is, will the judges of the highest court of the land sitting in an ivory tower be justified in ignoring the stress and strain to which the society is subjected to? Can they sit silently without giving appropriate mandate protecting the fundamental rights and liberties of citizens of the country? They should not do so because the judiciary is supposed to exercise and evolve its jurisdiction with courage, creativity, vigilance and practical wisdom. Judicial activism and self restraint are facts of that courageous creativity and pragmatic wisdom.[18]

[13] *Judicial Activism is Not About Euphoria, But Justice*, THE TIMES OF INDIA 11 (July 30, 1996)
[14] D.N. Saraf, *The Limits of Judges' Domain - Some Policy Considerations*, *supra* n. 5 at 79.
[15] *Id.* at 84.
[16] Kirpal Singh Chabra, JUDICIAL ACTIVISM AND SOCIAL CHANGE, *supra* n. 5 at 130.
[17] Rajeev Dhawan, *The Judiciary Cannot Stand Idly By*, THE TIMES OF INDIA 2 (October 27, 1996).
[18] Bal Krishna, *Limits of Judicial Activism*, HINDUSTAN TIMES 9 (July 8, 1996).

Ram Jethmalani while speaking on the new role of the Supreme Court feels that in a country like India, the courts have to play an activist role if the law is to keep pace with social needs. In a country where 80 percent of the people are socially suppressed, economically depressed, and educationally backward, the executive and legislature are apathetic and fail to discharge their constitutional duties, the Supreme Court is left with no other option but to step in and direct these functionaries to discharge their obligations.[19]

II. PRINCIPLE OF PUBLIC INTEREST LITIGATION

Public interest litigation is one of the most popular forms of judicial activism.[20] New change is taking place in the judicial process as a result of PIL.[21] Defining the term 'public interest' is difficult. Oxford English Dictionary[22] defines it as "the common well being,... also public welfare". Black's Law Dictionary on the other hand defines the term 'public interest' as:

> Public Interest- Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government.

The council for Public Interest Law set up by the Ford Foundation in the USA, in its report[23] has opted for a broad definition:

> Public interest law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that ordinary market place for legal services fail to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities and others.

It is further mentioned in this report that in the USA, PIL has basically revolved around ensuring that citizens whose lives may be affected by government policies get adequate opportunities of highlighting their concerns.[24]

In contrast to the American reports, the judicial activism in India has been initiated by some judges of the Supreme Court themselves and they are trying to develop its ideology and content. The Supreme Court of India has defined

[19] *Ibid.*
[20] Bachan Lal Kalgotra, *supra* n. 5 at 246.
[21] K.L. Bhatia, *Kaleidoscopic View of Jurisprudential Dimensions of Judicial Activism with Reference to Swadeshi Jurisprudence: Saint or Sinner*, *supra* n. 5 at 158.
[22] Vol. XII, 2nd Edition.
[23] BALANCING THE SCALES OF JUSTICE - FINANCING PUBLIC INTEREST LAW IN AMERICA, A report by the Council for Public Interest Law 6-7 (1976).
[24] *Id.* at 7-8.

'Public Interest Litigation' (PIL) in *Janta Dal* v. *H. S. Chaudhary*[25] as a legal action in the court of law for safeguarding the interests of the people whereby their legal rights or liabilities get affected.

In India, this doctrine seems to have been introduced by Justice Krihna Iyer. A.K. Tiwari[26] submits that Justice Krishna Iyer introduced the concept of PIL in *Mumbai Kamgar Sabja* v. *Abdul Bhai*[27] without using the word PIL when he pointed out that as our law deals with rural poor, urban lay and the weaker sections, test litigations, representative actions and flexibility will promote access to justice of the common man. The genesis of the change in the *locus standi* principle in PIL cases may be traced to his statement that "public interest is promoted by the spacious construction of *locus standi* in our socio-economic circumstances and representative actions, *pro bono publico* and like broadened forms of legal proceedings are in keeping with current assent on justice to the common man."

However, all the judges of the Supreme Court do not seem to be in agreement. Justice P.N. Bhagwati prefers to call PIL as social action litigation (SAL). Justice Bhagwati does not explain as to why he prefers to call it SAL rather than PIL except saying that the development of social action litigation recognizes that many of the fundamental problems of poor people are in fact group problems rather than individual problems.[28]

Professor Upendra Baxi,[29] on the other, hand feels that SAL has inaugurated the era of epistolary jurisdiction where citizens are enabled to bring violation of the people's rights before the Apex Court indicating how the state has effectively denied citizenship to Indian people. He further emphasizes that the SAL has furthermore demonstrated the structural lawlessness of the state. He opines that proving cases of state repression is an onerous task with state counsel trying every trick in the book to subvert the ends of justice.

III. LIBERALIZATION OF THE RULE OF LOCUS STANDI

Traditionally only the aggrieved person could approach the court for judicial redress and no other person had any standing to bring an action in that respect. This rule was utterly incongruous with the social justice promise of our republic to the disabled and deprived humans who sought the right to life and its poignant implications. Therefore, the public spirited individuals or groups were allowed to move the court on behalf of the poor and disadvantaged sections of people for the enforcement of their rights and entitlement.[30] The rule of *locus standi* has

[25] AIR 1993 SC 892 at 906-907.
[26] A.K.Tiwari, ENVIRONMENTAL LAWS IN INDIA 183 (2006).
[27] AIR 1976 SC 1455.
[28] *Supra* n. 21.
[29] See, Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 8 & 9 DELHI LAW REVIEW 104 at 106 (1979 & 1980).
[30] D.K. Bhatia, *Judicial Activism through Public Interest Litigation: Trends and Prospects*, XXV (I) INDIAN BAR REVIEW 39 (1998).

been liberalized so as to have the grievance placed before the court and then depend upon the court to provide appropriate relief.

The landmark judgment by Justice Bhagwati in *Judges' Transfer Case* of 1982 heralded the new era of public interest litigation movement by holding that any member of the public or social action group can maintain an application in the High Court or the Supreme Court on behalf of the people who because of poverty or any other disability are unable to safeguard their constitutional or legal rights.[31] The need for relaxing the *locus standi* was once again reiterated in the case of *Sheela Barse* v. *Union of India.*[32]

Though a departure from the strict rule of *locus standi* in case of public interest litigations has been accepted in our country, yet no precise and inflexible working definition has been evolved in respect of *locus standi* of an individual seeking judicial remedy and various activities in the field of PIL. One of the reasons for not being in a position to evolve a consistent jurisprudence in the field of PIL and apply a rigid litmus test can be attributed to reservation and diversity of approach to the philosophy among some judges of the Supreme Court as has been reflected in various decisions of the Supreme Court. Another reason for this is the fact that the broad contours of PIL are still developing with diverse views on several aspects of the concept of the newly developed law and jurisdiction leading to a rapid transformation of judicial activism with a far reaching change both in the nature and form of judicial process.[33]

However, a word of caution has also been written on the application of this phenomenon. In *S.P. Gupta* v. *Union of India,*[34] it has been specifically pointed out that relaxation of the rule of *locus standi* in the field of PIL does not give everybody the right to approach the court under the guise of a public interest litigant. It was held in this case that due caution should be observed by courts while entertaining PILs and its process should not be allowed to be abused.[35]

While delivering the judgment in *Dattaraj Nathuji Thaware* v. *State of Maharashtra and Others,*[36] Justice Arijit Pasayat said that public interest litigation has now come to occupy an important field in the administration of law and it should not become "publicity interest litigation", or "private interest litigation", or "politics interest litigation", or the latest trend "paise income litigation".[37] It was further held that it was depressing to note that as a result of such proceedings initiated before the courts lot of time was wasted, which otherwise would have been used in disposing cases of genuine litigants. Justice Pasayat reasoned that though no effort was spared in fostering and developing

[31] *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149 at 188-89.
[32] AIR 1988 SC 2211.
[33] Jill Cotrell, *Third Generation Rights and Social Action Litigation* in Sammy Adelman and Abdul Paliwala (*eds*), LAW AND CRISIS IN THE THIRD WORLD 109 (1993).
[34] 1981 Supp SCC 87.
[35] *Id.* at 219.
[36] (2005) 1 SCC 590.
[37] *Id.* at 592- 593.

the laudable concept of PIL and extending their long arm of sympathy to the poor, the ignorant, the oppressed, and the needy whose fundamental rights were infringed and violated and whose grievances went unnoticed, unrepresented and unheard, they were not in a position to ignore the fact that there were certain types of people who without any public interest and in order to gain publicity have been breaking the queue muffling their faces by wearing the mask of public interest litigation and getting into the courts, thus leading to delay in the hearing of numerous types of genuine litigations. This creates frustration amongst the genuine litigants and they tend to loose faith in the administration of justice in our country.[38] It has further been held in this case that PIL is a weapon which has to be very carefully used and has to be always used for delivering social justice to citizens. Its aim should always be redressal of genuine public wrong or public injury and should not be used for publicity or personal vendetta. There is no emphasis that policy oriented cases only be brought before courts. There is also no avowed thrust that citizens whose lives may be affected have a right to participate in the formulation of those policies.

In its quest for achieving the constitutional goal of social justice the Apex Court has expanded the ingenious concept of PIL to multifarious areas. Its development can be summarized as follows:-

- Evolving epistolary jurisprudence,
- Enforcing public duties,
- Appointing socio-legal commissions of inquiry,
- Monitoring execution of judicial orders.

A. Epistolary Jurisprudence or Treating Mere Letters as Writ Petitions

It has been held by the Supreme Court in *Judges Transfer Case-I*,[39] *Asiad Case*[40] and *Bandhua Mukti Morcha Case*[41] that procedure should not stand in the way of access to justice by the weaker section of Indian humanity. The court would not insist on a regular writ petition where the poor and disadvantaged are concerned and even a letter addressed by a public spirited individual or social action group acting in public interest would be enough to ignite the jurisdiction of the court.[42] As a result, the court has consistently treated letters addressed to it as writ petition and granted relief in appropriate cases such as to emancipate bonded labourers[43] and illegal detenues;[44] to improve the condition of under trial prisoners,[45] female[46] and juvenile prisoners,[47] inmates of mental asylums[48] and

[38] *Id.* at 595.
[39] *Id.* at 149.
[40] *Peoples Union For Democratic Rights* v. *Union of India*, AIR 1982 SC 1473.
[41] *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802.
[42] *M.C. Mehta* v. *Union of India*, (1987) 1 SCC 395 at 406.
[43] See, *Supra* ns. 36 and 40.
[44] *Veena Sethi* v. *State of Bihar*, AIR 1983 SC 339.
[45] *Adra Khadia* v. *State of Bihar*, AIR 1981 SC 934.

protective homes;[49] to prevent custodial torture and deaths;[50] and to ensure protection of environment.[51]

B. Enforcing Public Duties

Over a period of time, it has been observed that it is not only the poor and the disadvantaged who lack access to justice under the conventional form of procedure. Millions of common people feel frustrated when they realize that various governmental decisions and their execution fall short of constitutional requirements and ideals. Moreover their basic human rights are being violated because of the administrative inaction. In such circumstances the court is left with no other option but to step in and fill the vacuum so as to vindicate public interest by making the executive authorities do their mandatory duties in a rightful manner.

Accordingly, the Supreme Court while dealing with environment related issue in *Indian Council for Enviro-Legal Action* v. *Union of India,*[52] observed that though enforcement of law was within the jurisdiction of the Executive, their non-performance of mandatory obligations left the court with no other option, but to pass directions to enforcement agencies to implement the law.[53]

The courts have repeatedly issued directions and orders to the executive authorities especially in cases concerning environmental pollution, violation of labour laws, inhuman treatment of prison inmates, denial of basic human rights, etc. Recently the Government of Arunachal Pradesh was directed to ensure protection and rehabilitation of Chakma refugees.[54] Similarly, the Reserve Bank was directed to take suitable steps to protect interests of small depositors in residuary non banking companies.[55]

C. Appointing Socio-legal Commissions of Inquiry

In most of the cases, the petitioners under PIL have approached the courts with lots of evidence and valuable data to substantiate their averments. However, there are times when the PIL requires further investigation and inquiry. The Supreme Court has, as and when the need arose, departed from the adversarial system of pronouncing judgments on the given set of facts and evolved a strategy of appointing commissions to collect facts and data whenever a complaint of breach of fundamental rights of the under privileged has been made. A responsible person like a magistrate, advocate, professor or journalist is

[46] *Sheela Barse* v. *State of Maharashtra,* AIR 1983 SC 378.
[47] *Sheela Barse* v. *Union of India,* AIR 1986 SC 1773.
[48] *Supreme Court Legal Aid Committee* v. *State of Madhya Pradesh.* (1994) 5 SCC 27.
[49] *Upendra Baxi* v. *State of Uttar Pradesh,* (1981) 3 SCALE 133.
[50] *D.K. Basu* v. *State of West Bengal,* AIR 1997 SC 610.
[51] *Rural Litigation and Entitlement Kendra* v. *State of Uttar Pradesh,* AIR 1988 SC 2187.
[52] (1996) 3 SCC 212.
[53] *Id.* at 301.
[54] *National Human Rights Commission* v. *State of Arunachal Pradesh,* (1996) 1 SCC 742.
[55] *M/s. Overland Investment Limited* v. *State of West Bengal,* AIR 1997 Cal 18.

appointed as a commissioner and this method has proved very beneficial in providing justice to the poor people.

In *Khatri* v. *State of Bihar,*[56] which is popularly known as the *Bhagalpur Blinding Case,* eye specialists were ordered to investigate the precise nature and causes of blinding. In *Sheela Barse* v. *State of Maharashtra,*[57] a noted social scientist was directed to visit the jail to ascertain the complaints of ill treatment of women prisoners and submit a report to the court.

This change in the attitude of the court finds authority in the power of the courts under Articles 32 and 226 for enforcement of fundamental rights and other rights. The power to appoint a commission or an investigating body for conducting enquiries is incidental or ancillary to the power, which the court is called upon to exercise in proceedings under Article 32. This is equally applicable to exercise of jurisdiction by high courts under Article 226.

D. Monitoring Execution of Judicial Orders

As a result of indifferent attitude of the bureaucracy in executing the directions and orders of even the higher courts, especially in matters indicting influential and resourceful politicians, industrialist, etc., the courts have started monitoring the execution of court orders and directions issued to the executive authorities. The Supreme Court and the high courts have been conscious of their obligation to protect the fundamental rights of the people and taken on themselves the task of effective control and monitoring of laws in selected areas where the enforcement agencies have been non-functional.

Recently, in a number of cases involving charges of corruption against political leaders, the court monitored investigation by the CBI so that there was no partiality and bureaucratic proclivity for delay.[58] Similarly in cases involving "environmental protection" the courts have effectively monitored the anti-pollution laws through PIL cases.[59] Since then the range of PIL has spread from release of bonded labourers to child labourers, to Nari Niketan, to street hawkers, and to environmental issues.

IV. THE CONSTITUTIONAL BASIS OF PUBLIC INTEREST LITIGATION

Virtually the entire development of PIL has occurred within the context of Article 32 (in the Supreme Court) and Article 226 (in the High Courts) of the Indian Constitution.

Article 32 of the Constitution included in Chapter III dealing with fundamental rights, provides:

[56] AIR 1981 SC 928.
[57] AIR 1983 SC 378.
[58] *State of Bihar* v. *Ranchi Zila Samta Party,* (1996) 3 SCC 682 (popularly known as the *Fodder Scam Case*).
[59] *Indian Council for Enviro-Legal Action* v. *Union of India,* (1996) 3 SCC 212.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions, or orders, or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by this part.

Article 226 provides that:

Every High Court shall have power... to issue to any person or authority, including in appropriate cases any government directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition quo warranto, and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

These provisions in the Constitution of India have been very helpful in safeguarding the interests of the people and ensuring that peoples' rights are not violated.

It is an open secret that legislature and executive in India are not fulfilling their constitutional obligations. There are numerous occasions where these two organs of the Constitution have, in fact, caused undue hardships to the masses. Had it not been for the activist judiciary, the sufferings of these people would have been manifold. Every day television channels are highlighting the apathy of the Executive in taking appropriate action against the wrongdoers in the country. Unfortunately, undue political interference ensures that the concerned government officers are sitting like mute spectators, adding to the woes of the sufferers.

In these circumstances, the only recourse a public spirited person is left with is to approach the court and file a PIL. Had this alternative not been available to the people, India would have become a totally unfit country to live in. All the same, there is a lot of scope for improvement in the application of the concept of PIL. We need to evolve some kind of standards and bench-marks for screening PILs and ensuring that only genuine PILs are filed. Moreover, stringent penalty should be imposed on anybody who tries to misuse this novel concept. This would ensure that only genuine PILs are filed and regular work of the courts is not hampered.

Over the years, judiciary in India has come to the rescue of common man by interpreting the Constitution of India in its right perspective. By becoming more responsive to its duties, it has ensured that the legislature and executive also perform their duties properly. It has further ensured that the legislature as well as the executive does not violate people's constitutional rights. New interpretations have been given to various provisions of the constitution so as to serve the

society in the best possible manner. Radical changes have been brought about to make the judicial process simple and more accessible. Innovative methods like the public interest litigation have been introduced. The rule of *locus standi* has been liberalized whereby even third party intervention has been permitted. However, all the judges do not think alike. All the same, the judiciary in India has gone a long way in realizing the wishes of the framers of the Constitution.

WORSE OFF IN MOTHER'S WOMB!

Sunanda Bharti[*]

I. INTRODUCTION

The legal understanding of the concept of 'person' or 'personality' revolves around possession of rights and capacity to discharge legal duties. Hence, natural persons, that is, human beings are the prime claimants of legal personality.

Legal personality of natural persons begins at birth and extinguishes with death with the result that pre-birth, post death stages are devoid of any legal persona. In the case of a human corpse, absence or extinguishment of personality is understood almost immediately for it requires no genius to grasp the simple fact that a dead body is incapable of exercising any legal rights and not duty bound towards anybody.[1] Understanding absence of personality in the pre-birth stage, however, poses problems. The problem is: Whether an unborn foetus or a child in the mother's womb is a legal person or not? If personality begins only post birth, would it be an exaggeration to say that an unborn is worse off in his/her mother's womb—susceptible and doomed to suffer all assaults without respite, till of course, it takes its place amongst the living! It is the submission in this paper that the answer is yes. As a general rule of law they are not legal persons though there are exceptions, where the unborn is indeed treated as a legal person. Some such examples have also been put forth in this paper. This position was expressed by Stephenson, L.J. - 'A doctor can lawfully, by statute do to a foetus what he cannot lawfully do to a person who has been born.'[2]

II. EXAMINING THE LEGAL STATUS OF AN UNBORN CHILD IN VARIOUS LAWS

In the following discussion, we would examine the true legal persona of an unborn child, that is a foetus, basing our analysis primarily on the Hohfeldian thesis of jural relations. A strict analysis forces us to conclude that the whole idea of foetal rights, whatever be the branch of law, is nothing more than a chimera, as really speaking, a foetus is not regarded in law, as an entity capable of possessing legal rights and discharging legal obligations.

[*] Lecturer, Law Centre-I, Faculty of Law, University of Delhi.

[1] It is incorrect to believe that in some instances such as ensuring a decent burial for the dead or protecting the reputation of the deceased, etc., dead have 'rights' in the legal sense of the term. In all such cases there is no right/claim in the dead body as such, as per strict Hohfeldian thesis. The primary reason why these provisions are there in law is holistic—the considerations are humane, grounded in equity and not because a dead has rights or can 'claim' to be buried decently, etc. Instances such as a deceased retaining copyright in any literary work published during his lifetime for 60 years post death or the wishes of a testator being given due effect by the executor as per law are exceptions to the general rule and the deceased is allowed to preserve his legal personality and exercise his legal rights through a living human agent. All rights of the deceased become vested in and are exercised by the survivors/legal representatives and not by the dead. This is an arrangement made by law to tackle or rather avoid certain difficult situations.

[2] *McKay* v. *Essex AHA*, (1982) 2 ALL ER 771 at 781. In India foetal death is legally permissible under the circumstance prescribed in the Medical Termination of Pregnancy Act, 1971.

A. Property Law[3]

One popular exception is found in the property laws of many countries, including India, wherein property can be transferred by way of a trust to the child who is still in the mother's womb[4].

In the UK[5] also the maxim *nasciturus pro iam nato habetur*[6] is applied in certain cases where the unborn child stands to gain. 'In the Civil Law a fiction was invented that in all matters affecting its interests the unborn child *in utero* should be regarded as already born, but English law applies this fiction only for the purpose of enabling the child if it is born to take a benefit. For instance, it is thought reasonable that a child who has lost his father should not be further penalized by losing any interest, which he would have secured had he been alive at his father's death.'[7]

So, in order to protect the interests of the child, law has created a fiction and accepted personality in favour of the unborn.[8] This personality, however, activates only when the child is born *alive* and thus ownership of that property is contingent—a point that can be used to argue that only *some measure* of and not *full* personality has been granted by law to the foetus here.[9] Unfortunately, however, this meagre accommodation of the foetus as a 'person' by law, although for limited purposes, is so hyped and over-rated that most of us live under the comfortably assumed notion that foetus has legal personality. The law of torts and the criminal law has something else in store for the unborn which would be examined in the succeeding parts.

[3] Although property law is a part of the civil law only, it has been dealt with separately here, for it specifically speaks of foetus and its rights in a few places.

[4] Although Blackstone was able to assert confidently that in criminal laws, 'life is the immediate gift of God, a right inherent by nature in every individual, and it begins in contemplation of the law as soon as an infant is able to stir in the mother's womb', subsequent legal development in relation to the unborn child in a civil context does not wholly endorse this view. The rights of the unborn child are recognized at law for limited purpose only, e.g., in connection with succession to property.

[5] Incorrect as it may sound, the expression UK has been used in this paper to represent just England and Wales.

[6] This Latin maxim in full is *'Nasciturus pro iam nato habetur,quotiens de commodis eius aggitur'* meaning *'the unborn is deemed to have been born to the extent that its own benefits are concerned.'* This is a common rule in Roman law used in most European countries. In normal circumstances a foetus may not inherit because it has not been born yet, but due to this rule the foetus is legally presumed to be born in order to inherit.

[7] David P. Derham *(ed)*, A TEXT-BOOK OF JURISPRUDENCE BY G. W. PATON 349-356 (3rd ed 1964).

[8] See, S.13, TRANSFER OF PROPERTY ACT. 1882 (India).

[9] For instance, in the UK, a child who is in the womb at the time of creation of an estate or interest and is afterwards born alive is deemed to be a 'person in being' for the purposes both of the vesting of the estate or interest in him. See, *Thellusson* v. *Woodford*, (1805) 11 Ves 112 at 142, 143, HL; *Blackburn* v. *Stables*, (1814) 2 Ves & B 367; *Knapping* v. *Tomlinson* (1864) 34 LJ Ch 3; *Villar* v. *Gilbey*, (1907) AC 139 at 149, HL, explained in *Elliot* v. *Lord Joicey*, (1935) AC 209 at 225, HL.

B. Law of Torts

If there is any branch of law that presents the most intricate problems in relation to rights of an unborn, it is the law of torts. In the law of torts, as a general rule, only the party who has suffered injuries at the hands of the tortfeasor can sue. So, if a pregnant mother is a victim of negligence on the part of a certain tramways as a result of which the child is born with several deformities, the mother can clearly sue for damages. *Can the child sue for pre-natal injuries*? Some scholars opine that such an allowance be made in favour of the child[10] (and some legal systems, like Canada, UK and Africa do have such laws), provided the child is born *alive* (with or without deformities is pointless).[11] There are important points to be noted here. One, that the scholarly opinion is hinging on the factum of live birth as if to reinforce the general rule that legal personality of human beings begins at birth. However, if the child is allowed to sue for injuries suffered by it prior to birth, does it not automatically mean that legal personality precedes birth? Or does it amount to taking the law of torts to an absurd limit? A rather moderate but scientific view says that since in the modern world of developed medical science and related techniques, it is possible to determine precisely as to when the deformity set in, the child, if born alive should be allowed to sue the perpetrators in torts for pre-natal injuries. Again, the requirement of 'born alive' has been emphasized.

The argument of this paper is if the unborn child has a legal personality, it should be able to sue (independently of the mother's right to sue)[12] immediately when it is injured. Why does s/he have to wait till birth? If fiction can be introduced to understand personality in case of vesting of property (and other cases where the unborn stands to benefit), what indeed prevents law from using that very instrument of fiction to treat foetus as 'person' prior to birth?

On the question whether the child born with deformities on account of a pre-natal injury should be allowed to sue the party that was primarily responsible for inflicting that injury, the law has developed through following stages:

- Stage-I, where no tortious liability was recognized for injuries to the foetus *in utero* (whether the child was born alive or not was immaterial);
- Stage II, where tortious liability for pre-natal harm was recognized and recovery for pre-natal injuries was allowed, if the foetus was *viable* at the moment of injury and born alive, case being filed in the representative capacity.[13]
- Stage-III, where complete legal rights were *almost* given to the foetus by conceding personality in its favour through 'wrongful death' cases'—cases where the foetus died *in utero* because of third party negligence.[14]

In fact, the current legal jurisprudence is developing a step ahead wherein the scholars are asserting that the accrual of foetal legal rights should not necessarily be consequent upon knowledge of *life* in the womb. They are challenging the 'born alive' rule. They argue that the 'born alive' rule stemmed from a very primitive rudimentary medical knowledge, a difficulty that has long since been eradicated by developments in medical technology. Hence, if it is determined that the child was 'alive' in the sense of being viable,[15] at the time of injury, it should be allowed to sue through an appropriate representative, for the pre-natal injuries—a stand that the present paper takes.[16] While the legal development in US is at Stage-III and in UK it is at Stage-II, it is difficult to ascertain where India stands presently, as lack of case law and legislation on the aspect makes it difficult to narrate the legal stand.[17]

The UK position may be analyzed in two broad parts:

[10] In English Law, it is still doubtful whether an infant born alive can recover for injuries inflicted before birth. To prove in fact a causal link between the negligence and the particular injury is difficult, but if this hurdle can be surmounted, there seems to be no conclusive reason why recovery should be denied: *Supra* n.7 at 349-56.

[11] *Woods* v. *Lancet*, 303 NY 349 at 352-356; *Kelly* v. *Gregory*, 282 App Div 542 at 543.

[12] The case of maternal liability is on a different footing. The issue of abortion, which is not a subject matter of this paper, has been briefly mentioned elsewhere.

[13] Perhaps the food for such school of thought was provided as early as 1933, through the famous Canadian case of *Montreal Tramways* v. *Leville*, (1933) 4 DLR 337, wherein the judge stated: 'to my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.' Sixty years later, the same ethos resounded in *De Martell* v. *Merton and Sutton Health Authority*, (1993) QB 204: 'if a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had, save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor.'

[14] See, (1973) 35 L Ed 2d 147. This signifies a stage where India, perhaps would take long to reach and the UK yet to recognize. See, *Bagley* v. *North Herts Health Authority*, (1986) NLJ Rep 1014. In the UK, damages under the Fatal Accidents Act, 1976 were not permitted on the basis that the child had died *in utero* as a result of the negligence. The USA however *does* recognize wrongful death cases: see, *Smith* v. *Brennan*, (1960) 157 A 2d 497.

[15] Though here also when a foetus may be taken as viable requires determination. Those challenging the 'born alive' rule chant the mantra that 'a foetus is not a potential person but 'a person with much potential.'

[16] Though, here the problem is not less complicated. Cases such as whether a child not breathing through his own lungs or the one on life support should be taken as 'alive' (*R* v. *Handley*, (1875) 13 Cox's CC 79 at 81) or whether child born without brain but with some brain stem related activity is a person-in-being (*Rance* v. *Mid Downs*, HA (1990) NLJR 325) have boggled legal jurisprudence since ages. In the latter case, the court refused to treat the child as alive, unless it breathed on his own lungs *alone*.

[17] Please refer to the post-script of this article, as a radical development has taken place in India that places the country at par with the USA in matters of foetal rights and personhood.

1. The common law that applied to children born *before* the Congenital Disabilities (Civil Liability) Act, 1976 came into force, i.e., 22 July 1976;[18] and

2. the statutory law as contained in the above mentioned Act applicable to children born *since* its enforcement.[19]

As per the common law in the UK, a foetus has no legal personality. This has been established in a series of Stage-I landmark cases, *Paton* v. *B.P.A.S.*[20] and *Re F (in utero)*.[21] However, in *Burton* v. *Islington Health Authority*[22] and *De Martell* v. *Merton and Sutton Health Authority*[23] representing Stage II cases, the court applied the maxim that 'that an unborn child shall be deemed to be born if it was beneficial to the unborn.'[24]

[18] As established by *Burton* v. *Islington Health Authority*, (1991) 1 All ER 825 and *De Martell, supra* n. 13, both of which addressed the question whether a child who is born alive but suffers from disabilities caused by the defendant's negligence while it was in the mothers womb, has a cause of action in negligence against the defendant or not. The answer came in the affirmative.

[19] In respect of children born since 1976 the position is governed by statute. The CONGENITAL DISABILITIES (CIVIL LIABILITY) ACT, 1976 provides:

'Civil liability to child born disabled.

S. 1(1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

(2) An occurrence to which this section applies is one which –

(*a*) affected either parent of the child in his or her ability to have a normal, healthy child; or

(*b*) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.

(3) Subject to the following subsections, a person (here referred to as 'the defendant') is answerable to the child if he was liable in tort to the parent or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

S. 4 (5) further states that 'This Act applies in respect of births after (but not before) its passing, and in respect of any such birth it replaces any law in force before its passing, whereby a person could be liable to a child in respect of disabilities with which it might be born; but in s. 1 (3) of this Act the expression 'liable in tort' does not include any reference to liability by virtue of this Act, or to liability by virtue of any such law.'

So the statutory law basically absorbs the common law.

[20] (1979) QB 276. Here, it was held that 'the foetus has no right of action, no right at all until birth'.

[21] (1988) 2 ALL ER 193. The decision in Paton's case above was concurred with.

[22] *Supra* n. 18, *Burton*.

[23] *Supra* n. 13, *De Martell*.

[24] The famous Canadian case of *Montreal Tramways* v. *Leville*, (1933) 4 DLR 337 was also relied upon in which Lamont J. stated—'to my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.'

Though *Burton's* case was decided on common law grounds, the same result would have followed even under the CONGENITAL DISABILITIES (CIVIL LIABILITY) ACT, 1976, which gives the child a civil cause of action for pre-birth injuries (including against the mother when driving – an aspect that have been dealt with later in the paper).

Thus, in the UK, pre-natal injuries suffered by the child *in utero* are deemed to have been sustained by him/her at the time of his/her birth/post birth. This is a fiction introduced by law as prior to birth he has no legal personality and, hence, cannot suffer damages before existing. It is because of this fiction that a tortfeasor cannot escape liability by arguing that the organism they injured was not in law the plaintiff and also cannot deny liability for the defects with which the plaintiff was born, on the basis that these were inflicted before birth.[25]

This is a welcome development as it indirectly supports the pro-lifers, as at least some respite is available to the foetus. While Stage-II relates to cases where the child is born alive, Stage-III deals with cases wherein pre-natal injury results in the death of the foetus and the foetus is allowed to sue through a legal representative and it is a stage that is yet to be achieved by most of the countries, barring the USA.[26]

If one really goes deeper into the controversy pertaining to the legal status of foetus in the law of torts, one would be introduced to the multitudinous dimensions of the whole problem. There are issues such as:

> If the child upon being born alive is allowed to sue the tortfeasor, then should he also be allowed to sue the *mother* say, in case the mother was aware of the condition of the child and still, driven by compassion, etc., decided against abortion?

Such a question of maternal liability is a bit different, and it would be irrational to grant the foetus same rights against the mother, as it can possibly claim against a third party. Let us analyze how.

It seems logical to argue that the foetus has neither a *claim* to abortion, nor does it have the *right* to life *vis-à-vis* the mother. Her status is unique and may merit, depending upon the facts of each case, statutory immunity. The mother is, after all, the sole person entitled to take this decision. If the mother knowingly refuses to be treated for a particular gynaecological condition fatal to the foetus, whether she should be taken as violating the 'right to life' of the unborn requires further academic investigation and research. If she refuses treatment for reasons personal to her, and the unborn dies, is stillborn, or is born deformed; or knowing the deformed status of the unborn she nonetheless decides to keep the child, it is not to be held against her. To loan the apt expression from the German Supreme Court, 'she must not reproach herself for having failed, by a decision placed in her hands, to have killed her child or to have brought into the world a cripple'.[27]

In the UK, a competent pregnant woman has the right to refuse any medical treatment needed by the foetus for whatever reason or none at all, regardless of

[25] *Supra* n. 18, *Burton*.

[26] *See, infra* Post-Script for recent development.

[27] The views expressed by the court in Bundesgerichtsh of (Sixth Civil Senate), BGHZ 86, 240, JZ 1983, 447 may be taken to reflect the general opinion on the issue.

the consequences for herself or her unborn child.[28] Since this is almost an absolute right placed in the mother, it does not find favour with the pro-lifers and some countries like the USA have assuaged these people through radical judgements.[29]

Whether the mother owes a duty to take care towards the child in her womb and the extent of that duty, if it does exist, is a separate area of enquiry and research and is being touched upon very briefly in this paper. The question has received different answers in different jurisdictions.[30] A simple/logical solution is that such cases of maternal liability treating the foetus as a legal person should be taken as an exception to the general rule, even though all mother-foetus problems do not merit inclusion in such exceptions, as explained later. Problems tend to arise when the mother's duty to take care is compared with the duty of care resting with the third parties towards the unborn child. In cases of 'third party-foetus' disputes, the former should and has been held liable in torts, in most of the jurisdictions sometimes even when negligence results in foetal death.[31]

[28] *Re M.B.*, (1997) 8 Med LR 217.

[29] *Roe* v. *Wade*, 35 L Ed 2d 147 (1972).

[30] If the pregnant woman is negligent, the following two results may logically be used to argue and fix culpability on the mother—when the child dies as a result of the negligent act or when it is born alive with deformities (if the child dies, there is no one who would sue). In Canada, the Supreme Court was unequivocal in denying the possibility of imposing a judicial duty of care on pregnant women towards their born-alive children. See, *Dobson* v. *Dobson*, (1999) 2 SCR 753 wherein the defendant had been involved in a car accident, caused by her own negligent driving, while she was 27-weeks pregnant. As she was insured, she wanted to be found liable in the suit, brought in the name of her plaintiff-son by his grandfather. Focusing mainly on autonomy concerns (pp. 768–90), the Court held that a duty in tort should be categorically denied. The Court refused to distinguish between 'lifestyle choices' and the breach of a general duty of care. Lifestyle choices are discretionary decisions by the pregnant woman on how to lead her life. See also, *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.*, (1997) 4 Med. L. Rev. 125. In New South Wales, the court imposed a duty of care when the pregnant woman was involved in a car accident which injured the child subsequently born: *Lynch* v. *Lynch*, (1991): 415. In England, there is clear statutory immunity in tort for pregnant women in relation to pre-natal negligence, with an exception for negligent driving: CONGENITAL DISABILITIES (CIVIL LIABILITY) ACT, 1976 (UK), s. 1 (1). In *Bonte* v. *Bonte*, (1992) 16 A 2d 464 (NH) the Supreme Court of New Hampshire held that a child could sue its mother for failure to use reasonable care in crossing a street: she was hit by a car, with the result that her seven-month-old foetus was born with brain damage.

[31] However, in most of foetal death cases, third party liability hinges on whether the foetus was viable or not. If yes, then its death is, and rightly so, seen as an end to 'potential life', as the foetus, but for the injury, would have been born alive. In such cases of wrongful death, the scholars argue that the foetus has been given 'rights' in the legal sense though controversies and debates have arisen here as well. See, *Smith* v. *Brennan*, (1960) 157 A.2d 497. in which the Supreme Court of New Jersey held that a 'child has the legal right to begin life with a sound mind and body'. Thus, a child cannot only recover damages for pre-natal harm if born alive; there is a possibility of recovery (on behalf of relatives) for a stillborn child to whom the pre-natal injuries have resulted in death rather than injury. *Verkennes* v. *Cornieai*, (1949) 38 NW 2d 838 was the first to permit recovery for the death of the foetus *in utero* under a wrongful death statute.

However, cases of mother's liability to the foetus complicate the issue as the rights of the mother of self determination and bodily integrity[32] get involved or rather are in direct conflict with the foetal rights.[33] In maternal liability, there is a jugglery of rights where we are to weigh the recognized values of 'self-determination' and 'bodily integrity' of a competent mother on the one hand with the interests of the foetus on the other. Accordingly, accepting the pro-life (or anti-abortionist) scholars' argument here that mother should bear the same liability for injurious, negligent conduct as would a third party, would be grossly unjust for the mother.[34] It would be unjust, unfair and illogical to adopt 'a conventional tort analysis' with regard to maternal duties toward the foetus simply because the rights of the competent mother ought to be respected as well. Under the ostensible garb of protecting the 'rights' of the foetus, neither can the well-established rights of the mother be ignored, nor can the state be allowed to intervene in the very private affairs of the mother. It is accepted that law is allowed to restrict autonomy if it is a nuisance to others interferes with the legitimate interests of other persons, but every jurisdiction is free to decide if it is justified to restrict the rights of the mother. The UK has considered the question quite ingeniously—by carving out an exception where the mother can be held liable for inflicting pre-birth injuries on her child, if she was negligent while driving.[35] So rights of the mother have been curtailed short of being absolute through a mechanism.

Insofar as state intervention in maternal affairs is concerned, abortion should be given some consideration, (though abortion laws appropriately fall under the domain of criminal law) as pro-lifers (or anti abortionists) argue that recognition of abortion as illegal *per-se* implies acceptance of personhood in favour of the unborn for it indicates that the foetus' 'right to life' is being protected by law. It is difficult to accept this view in totality as it appears quite irrational in the light

[32] It is well recognized in law that like any competent human being, a competent pregnant mother also has the right to lead a lifestyle of her choice. She is the sole person to determine what is good or bad for her. This view has had many voices of dissent across countries. For instance, in the Canadian case of *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.*, (1996) 10 WWR 111; (1997) 4 Med L Rev 125 the dissenting judge stated that '(i)t is a fundamental precept of our society and justice system that society can restrict an individual's right to autonomy where the exercise of that right causes harm to others', meaning thereby that the State is justified in restricting the choices of pregnant women in the interests of foetuses. Yet medical law clearly recognizes the value we give to the individual's bodily integrity, by allowing him or her to resist unwanted bodily intrusions. For instance, a surgeon cannot perform a cesarean on a pregnant woman if she refuses it.

[33] Emboldened by the wrongful death statutes, it is argued by many scholars that a foetus has the *right* to life and preservation which it can exercise against the mother. However, this logic works only in third party liability, wherein as opposed to maternal liability cases, there is no conflict of rights. The opposite faction opines that although wrongful death statutes may define the foetus as a *person*, this is strictly so as to enable recovery on the part of the parents and should not be taken to mean that the foetus is a person for other purposes within the law: *Bonbrest* v. *Kotz*, 573 A 2d at 1255. The argument of the present paper is that a foetus should be taken as a person for all cases, except the instances of maternal liability.

[34] 301 NW 2d 869 at 870.

[35] See, S.1 (1), CONGENITAL DISABILITIES (CIVIL LIABILITY) ACT, 1976 (UK).

of the fact that the same foetus cannot, in most legal systems, *demand* such rights against third parties for injury or wrongful death.

Referring to countries where induced abortion is punishable the pro-lifers argue that it is punishable because induced abortion is a breach of maternal duty towards the foetus. In India, the Medical Termination of Pregnancy Act, 1971 (hereinafter MTPA), however, permits termination of pregnancy overriding the provisions of the Indian Penal Code,1860 (hereinafter IPC) in certain cases, for example, the health or life of the mother is at stake; or the pregnancy is a result of rape; etc.[36] For cases covered by the MTPA the legal fraternity believes, and rightly so, that killing the foetus is justified as it is either for self-preservation (from the mothers' point of view) or to discard the result of a forced pregnancy, as in rape. It is necessary to be asserted here that these exceptional situations, in the light of the unique relationship of mother-foetus should be the only one where foetal rights may be disregarded in some superior interest. In all other cases of third party liability the foetus should be considered as a legal person and not an entity whose rights and interests may be overridden by those conventionally regarded as 'persons' in law.

Terminating the pregnancy is illegal in India if the case falls outside the above-mentioned exceptions of the MTPA, 1971. An absolute application of this rule is objectionable as it clearly goes against the rights of self-determination of the woman.[37] Refusal to allow the right to abortion to the pregnant woman has grave consequences for the mother who would be besotted with compulsory

[36] S. 3 of the MTPA states :

(1) Notwithstanding anything contained in the Indian Penal Code, (45 of 1860) a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) A pregnancy may be terminated by a registered medical practitioner:

(a) Where the length of the pregnancy does not exceed 12 weeks, if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds 12 weeks but does not exceed 20 weeks, if not less than 2 registered medical practitioners are of opinion, formed in good faith that:

i. The continuance of the pregnancy would involve a risk to the life of the pregnant women ;or

ii. A risk of grave injury to her physical or mental health ;or

iii. If the pregnancy is caused by rape; or

iv. There exist a substantial risk that, if the child were born it would suffer from some physical or mental abnormalities so as to be seriously handicapped; or

v. Failure of any device or method used by the married couple for the purpose of limiting the number of children; or

vi. Risk to the health of the pregnant woman by the reason of her actual or reasonably foreseeable environment.

S. 3 (2) Explanation 1: Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

[37] The right to self-determination of a pregnant woman is recognized in most jurisdictions. For instance, in India, the MTPA, 1971 requires the mother's consent (and of nobody else) for abortion. S. 3 (4) of MTPA, 1971 clarifies that:

(a) No pregnancy of a woman, who has not attained the age of 18 years, or who having attained the age of 18 years, is a lunatic, shall be terminated, except with the consent in writing of her guardian.

(b) Save as otherwise provided in cl. (a), no pregnancy shall be terminated, except with the consent of the pregnant woman.

parenthood with primary responsibility of caring for the child. The unwanted child may also grow up mentally impaired and insecure if left uncared for. However, the right is not absolute and most jurisdictions that legally allow abortions have placed reasonable limits on this right to restrict recklessly whimsical exercise of the right. The very private affair of the woman becomes a state issue and the statutory limits become operative once she crosses the first trimester. In the very famous American case of *Roe* v. *Wade*,[38] the court ruled that while a woman's right to an abortion during the first trimester cannot be curtailed at all by the state, the latter can regulate the abortion procedure during the second trimester 'in ways that are reasonably related to maternal health', and in the third trimester, demarcating the viability of the foetus, the State can choose to restrict or even to proscribe abortion as it sees fit.

This was a pro-life decision in the sense that it upheld the rights of the unborn against giving absolute right of abortion to the mother. A woman's claim to superior rights was not accepted once she was past that first trimester stage. In such a case, the inherent powers and responsibility of the State in protecting maternal health (second trimester onwards) and protecting the rights of now viable unborn (during the third trimester) would come into play.[39]

These restrictions on the expecting mother, whether read as maternal duties or foetal rights or inherent right of the state in the well-being of its subjects, has a favourable consequence of a foetus being recognized as a protectable entity, after a certain stage of development, so much so that it can in appropriate cases, supersede the rights of even the mother.

However, whether lifestyle restrictions should be imposed on the mother once she decides to keep the child in the interests of the latter is a question that may be considered by the legislature. Presently, various countries hold different views ranging from the extreme of giving absolute liberty to the pregnant woman to imposing legal embargos on her.

One view says that lifestyle choices of a pregnant woman - whether to smoke, drink alcohol, eat certain types of food or bungee-jump, etc., may be seen as reckless, but legally imposing a particular pattern of conduct upon the pregnant woman is inconsistent with her human rights. A pregnant woman should not be held to have or expected to have a legal duty to accept a particular lifestyle, or accept medical treatment for the foetus or future child if it blatantly overrides her rights to self-determination and bodily integrity.[40] Another view, while remaining mum about the imposition of legal embargoes, asserts that the mother's right to free determination of lifestyle has to be subservient to the rights

[38] 35 L Ed 2d 147 (1972).

[39] In response to *Roe* v. *Wade*, several countries enacted laws limiting abortion.

[40] It must be re-emphasized here that as against mother-foetus issues, in cases of third party-foetus, no such conflict of rights arise—that is a third party's bodily integrity, etc., is never in issue so far as injury to the foetus is concerned. So, there is nothing in law that stops it from recognizing a viable foetus as a legal person (without the requirement of being born alive), except of course in cases of maternal liability.

of the foetus, once she voluntarily exercises her right to retain the foetus.[41] Many more issues revolving around abortion emerge but, since, the paper seeks to establish the foetus and not the mother as the locus of rights, it is required to conclude the above discussion.

Coming back to the issue of foetal personality, the most important reason against mandating a legal duty to impose medical treatment and lifestyle patterns on the pregnant woman is the issue of conflict of rights, discussed below. It is these myriad and complicated difficulties that pose problems in deciding maternal liability.[42]

Moving out of maternal liability but continuing with the problems that arise in analyzing the legal status of an unborn, another question is whether the child, born with deformities, on account of a pre-natal injury, be allowed to sue the doctor (presumed to know of the foetal condition) as well, for bringing him into the world to suffer.

In *Vo* v. *France*,[43] a case before the European Commission of Human Rights, the doctor concerned was charged with unintentionally causing the child's death. Not only did the court refuse to concede personality in favour of the foetus, it declined altogether to consider whether Article 2 of the European Convention of Human Rights dealing with 'everyone's rights to life',[44] be applied to a foetus. Hence, all the hopes of *Vo* v. *France* creating a landmark deciding the issue of the legal status of a foetus were belied and the decision turned out to be a damp squib with all fluff and no stuff.[45] A being with a

[41] "No woman can call herself free, until she can choose consciously whether she will or will not be a mother": Margaret Sanger. However, her culpability, if any can/may be fixed, once she makes a choice of continuing with the pregnancy and then follows a reckless lifestyle is a case to be considered by the legislatures of individual countries.

[42] D. Johnsen, an American legal scholar had the foresight to caution the legal jurisprudence 'that the idea of foetal rights could expand in ways which would conflict with women's interests and rights.' See, D. Johnsen, *The Creation of Foetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection* 95 Yale LJ 599 (1986).

[43] (Application No 53924/00) (2004) 2 FCR 577 (European Court of Human Rights (Grand Chamber) stationed at Strasbourg).

[44] Any person who feels their rights have been violated under the convention by a state party can take a case to the court; the decisions of the court are legally binding, and the Court has the power to award damages. Art. 2 states that:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defense of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[45] However, the case did manage to generate immense literature on when life should be considered to begin. Those who seek to challenge the common law doctrine opine that life begins at conception itself. Hence, a foetus, since it has life, should be considered not only a natural person but also a legal one for to conclude otherwise would be to glorify genocide. In short, if a foetus merits individual medical treatment, it also merits legal recognition.

potential life was destroyed by the action of another, and yet no liability could be attached to the perpetrator. The case should compel us to take a relook at foetal rights or rather the lack of them. It would not be an exaggeration to say that the court in *Vo* v. *France* was clever in circumventing the main issue of foetal rights and hence foetal personality. *Attorney-General's Reference*[46] is the closet UK parallel to *Vo* v. France.

The legal position on whether the foetus should be allowed to sue the doctor has been explained in the German case.[47] The court stating that "even if an error had occurred in the treatment of the patient (mother), the defendant (doctor) had not injured a protected interest or a right of the deformed child; instead he was responsible for the fact that the child was alive and enjoyed legal capacity. The foetus had no right to its abortion -- the decision was that of the mother alone. Furthermore, the alternative between existence and no existence could not be expressed in legal terms of damage."[48] In rejecting the claim it was guided by the following considerations:

1. A direct duty, enforceable by an action in tort, to prevent the birth of a child on the ground that in all probability it will be affected by an infirmity which makes its life appear 'valueless' in the eyes of society or in its own presumed opinion would be alien to the duties sanctioned by the law of tort. No such duty exists. This principle holds good, although according to what is probably the dominant opinion as well as the actual legal practice the birth of such children should be prevented.

2. The denial of claims by the child itself is imperative in such cases. Such claims are only admissible if the child's interest in personal integrity has been violated culpably by human activity which, as stated before, may have occurred even before the child was conceived. Those having legal personality cannot conceivably derive claims from acts which gave rise to the claimant's existence and legal personality.

Though there are not many cases on the issue across the world, one does find stray references in England and the USA.[49]

[46] Reference (No 3 of 1994) (1998) AC 245. Briefly put, the defendant had stabbed a young whom he knew to be pregnant with his child. The attack took place at about 24 weeks gestation. Although the mother was discharged from hospital after treatment for her injuries, she went into premature labor as a result of the attack at only 26 weeks gestation. The trial judge directed that no conviction for either the murder or the manslaughter of the baby was possible in law, as it was only a foetus and hence, incapable of being murdered. The matter ultimately went to the House of Lords which held that the trial court as correct. This case has been further discussed under the sub-heading 'Criminal Laws' *infra*.

[47] Bundesgerichtsh of (Sixth Civil Senate), BGHZ 86, 240, JZ 1983, 447.

[48] *Ibid.*

[49] In England a claim by the child was rejected in *McKay* v. *Essex Health Authority and Another*, (1982) 2 WLR 890. Similarly in the United States, too, this opinion has been generally accepted for some time. See, *Curlender* v. *Bio-Science*, (1980) 165 Cal 477.

C. Criminal Law

When it is said that legal personality begins at birth, it means a 'live birth' wherein the body of the child is completely extruded from the mothers. Unless this happens, the child has no legal personality and it cannot be 'murdered'. The law of murder would apply to the child only if he is killed after taking his place amongst the living.[50] In India, if a child who is capable of being born alive is prevented from doing so by inflicting a pre-natal injury upon the expectant mother, the offender would be guilty not of murder, but of 'causing miscarriage', which is an offence of lesser gravity than culpable homicide amounting to murder.

Section 312 defines the offence of 'causing miscarriage', which may be taken as synonymous with abortion.[51] It is evident from a plain reading of the section that if the foetus dies under conditions prescribed by the provision, the offence is of '*causing miscarriage*'. It is not murder because the foetus has been, due to conventional convenience, kept removed from the league of legal persons. A strange anomaly of understanding created by this convention is that for every other thing a foetus is treated as a *life form*, yet legally it cannot 'die' because it is yet to be born!

While causing miscarriage with the consent of the woman is punishable with 7 years of imprisonment under Section 312, Section 313[52] provides for life imprisonment or imprisonment up to ten years for abortion 'without woman's consent'. Again, it is notable that the offence of causing miscarriage is of lesser gravity than murder. Had the foetus in these cases grown up to its full stage and taken birth, even for a second, and then died, the accused *may* have been branded a murderer and punished accordingly. The IPC, under Section 299, Explanation 3 says that causing death of a child in the mothers womb is not homicide. However, it would be homicide (whether murder or otherwise, depends upon facts), if any part of the child has been brought forth, though the child may not have breathed or been completely born.[53] It may thus be concluded that rules of murder would not protect the foetus, till the time the unborn is fully in the mother's womb. The situation changes quite dramatically by the simple fact of 'part of the child coming forth', an expression that covers those situations

[50] 'In the case of birth, most systems require complete extrusion from the mother's body--the child in the womb is not a legal personality and can have no rights.' *Supra* n. 7.

[51] S. 312, IPC reads: Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to 3 years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine.
Explanation: A woman, who causes herself to miscarry, is within the meaning of this section.
See also, *supra* n. 37.

[52] *Id.* S. 313 states: 'Whoever commits the offence defined in the last preceding Section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'.

[53] See, *id.* S. 299, Explanation 3.

wherein the child dies during the process of birth. It plainly means that so long as the unborn is a 'foetus simpliciter' (completely inside the mothers womb), its killing would not qualify even as homicide.

The same sentiment is unequivocally expressed by Section 315 of the IPC that makes an act done with the intention of preventing the child from being born alive or causing it to die after birth an offence, but of lesser degree than murder, despite the distinct intention to kill the foetus.[54] Similar intention to kill the foetus is evident in the wordings of Section 314 and yet it is a lesser offence than murder, simply because one is not killing a child-in-being even when in addition to the foetus, the mother also dies.[55]

It is important to mention that the remaining relevant Section 316, not only uses the expression 'death' for an unborn child (when the unborn is in its advanced stage of development), but also prescribes a comparatively equitable punishment for the 'death' of that unborn. The punishment here in appropriate cases may even be life imprisonment.[56]

If extinguishment of foetal life can be treated as 'death' under one provision, and the same punishment of culpable homicide not amounting to murder (that would have been given, had the taken life been that of a non-foetal entity), be prescribed for the culprit, then there is no reason why intentionally cutting short of the foetal life cannot be equated on the same footing as murder of a *person*. This highlights the stubbornness or perhaps indifference with which the legislature has been treating foetal rights.

While the fact that the state *does* take cognisance of foetal deaths and prescribes at least some punishment for the guilty might be an indication of the foetal right to life, it requires much more to upgrade the legal status of foetus to a

[54] *Id.* S. 315 states, 'Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.'

[55] *Id.* S. 314 provides: 'Whoever, with intent to cause the miscarriage of woman with child, does any act which causes the death of such *woman*, shall be punished with imprisonment of either description for a term may extend to ten years, and shall also be liable to fine; and if the act is done without the consent of the woman, shall be punished either with imprisonment for life or with the punishment above mentioned.
Explanation: It is not essential to this offence that the offender should know that the act is likely to cause death.'

[56] *Id.* S. 316 states, 'Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Illustration:
'A', knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.'

'person'. On the other hand, these provisions create a false sense of equity and a false understanding that since foetal death is taken cognisance of by the state, foetus is a 'person'. By prescribing punishment for foetal death, the state does indirectly recognize the former's 'right to life', but such accommodation appears totally incomplete and hollow for the purpose of granting personhood to foetus in the absence of equitable punishment[57] or any explicit state acquiescence or assertion that foetus is 'person'.

The fundamental rule of criminal law in the UK is that a foetus *in utero* cannot be 'murdered' (or 'manslaughtered' or subject to infanticide for that matter) and this has existed since the seventeenth century as a part of the common law.[58] It might not, therefore, be possible to convict a person for murder, just because the foetus was viable at the time of the act. Foetal killing, however, may take place through abortion and the unborn foetus in such case *is* shielded to some extent by the Offences Against the Person Act, 1861 and the Infant Life (Preservation) Act, 1929 making it an offence to destroy with intent, the life of a child capable of being born alive before it has an existence independent of its mother.[59] These Acts are applicable only where there is intent to kill the foetus capable of being born alive; cases of negligent death of the foetus are still not covered. In short, there is no remedy available to the foetus in the criminal laws of the UK for its negligent death,[60] though in the USA such a provision is contained in the Wrongful Death Statutes.[61]

In *Attorney-General's Reference*[62] the UK court held that "it is established beyond doubt for the criminal law as for the civil law that the child *en ventre sa mère* does not have a distinct human personality, whose extinguishment give rise to any penalties or liabilities at common law."

Scholars opine that a very important reason why *Attorney-General's Reference* should be considered as landmark is the unique way in which the House of Lords described the foetus. While conceding, rather re-emphasizing the age-old rule that a foetus is not a legal person, it declared that it is not an adjunct of its mother either. It was, in the words of Lord Mustill: 'An organism *sui generis* lacking at this stage the entire range of characteristics both of the mother

[57] Punishment for intentionally killing a foetus is not that for murder, which clearly implies that no personhood (or at least, no full personhood) has been recognized in favour of the unborn. Applicability of law relating to murder still hinges on whether the foetus has taken live birth.

[58] It may be important here to note the distinction between 'murder' and 'abortion'. For the former, one must be a 'person-in-being' whereas the latter is applicable only to embryo, foetus and child in the womb. In the UK, abortion has been a statutory crime since 1803, and at common law, prior to 1803.

[59] As these legislations are on a different footing altogether, only a brief reference is being made here.

[60] See, A. Whitfield, *Common Law Duties to Unborn Children* 1 MED L REV 28 (1993).

[61] *Supra* n. 14.

[62] *Supra* n. 46.

to which it is physically linked and of the complete human being which it will later become.'[63]

It is submitted that the court either seems confused on what exactly is the status of a foetus or has circumvented the main issue of expressly stating the legal position/status of a foetus in terms of legal personality, just as it was omitted in *Vo* v. *France*.

In relation to when legal personality begins under criminal laws, Paton notes,[64] "A child must be completely born alive before the rules of murder will protect it, for murder is the killing of a reasonable person in being. If, however, the prisoner intentionally inflicts serious injury on a child in the womb, and the child is born alive and then dies from the injuries, this is murder. If a child was killed during the process of birth it was not murder at common law, since the whole body of the child must be extruded before it becomes a person."[65]

It should be noted that though a foetus does not have personality under the criminal law,[66] it is clear that violence towards a foetus that results in harm suffered *after* the baby has been born alive can give rise to criminal responsibility but not so if the harm was suffered *in utero*[67] – and the same applies to damage sustained under the civil law in most of the jurisdictions.[68]

III. CONCLUSION

After having considered the position in both civil and criminal laws in detail, it is important to draw attention to the absurdity of the whole position. The law as it stands seems to imply that it is advisable to injure the foetus *fatally* than merely to injure it for minimal liability. In case of former,

- if the case is brought under the criminal law, one would not be guilty of the same degree of offence in terms of gravity and punishment as the 'killing of a person', and

[63] *Id.* at 256 as per Lord Mustill. Lord Hope expressed a similar view: 'an embryo is in reality a separate organism from the mother from the moment of conception. The foetus cannot be regarded as an integral part of the mother, notwithstanding its dependence upon the mother for its survival until birth'.

[64] *Supra* n. 7 on natural persons and unborn children.

[65] However, in the UK, the unborn is often referred to as 'child in being' in the legal literature. A child remains 'in being' so long as it does not gain an existence independent of the mother, that is, when its entire body is separated from that of the host. see, *R* v. *Poulton*, (1832) 5 C & P 329.

[66] Though sometimes because of ordinary usage of language, we do feel as if even they are 'persons'. In *Hamilton* v. *East Fife Health Board*, 1993 SC 369, at p 383, for instance, we have Lord McCluskey holding: 'it is perfectly common in ordinary speech to refer to a child in the womb as 'he', 'she', 'him' or 'her'; it was this child who sustained injuries to his person (while in the womb) and who died in consequence of personal injuries sustained by him.'

[67] Per Lord Mustill in *Attorney-General's Reference*, *supra* n. 63 at 254.

[68] See, CONGENITAL DISABILITIES (CIVIL LIABILITY) ACT, 1976 (UK); *supra* n. 18, *Burton*; *supra* n. 13, *De Martell*.

- if the case is brought under the law of torts, there would be no one to sue the tortfeasor, as most countries are still in stage I[69] or by far stage II[70] of legal development in this regard.[71]

But if the foetus survives that injury and is born alive (with or without deformities), one would be in for a lot more trouble, at least if the case is argued under the civil law.[72] Under the law of torts, a hefty compensation may be successfully demanded by the foetus at least in some countries.[73]

It may be of relevance to point out that under the criminal law, the offence would not be that of an 'attempt to murder' (as foetus is not a person-in-being). However, in the Indian context, it may be covered under Section 511 of IPC as an attempt to cause miscarriage.[74] This offence may, however, be converted into *murder*, provided the foetus survives the assault but dies shortly after! The situation clearly cries of only one grief —that the unborn is worse off in mothers' womb!

IV. POST SCRIPT

While this paper was in the penultimate stage of completion, an important development took place in the sphere of foetus rights law in India. In early March 2007, an Indian State Consumer Forum[75] delivered an unprecedented ruling in favour of a woman seeking an insurance claim on the death of an unborn child. The Forum determined that the unborn baby was a living human

[69] Countries in which no tortious liability is recognized for injuries to the foetus, whether the child is born alive or not, is immaterial.

[70] Countries in which tortious liability for pre-natal harm is recognized but hinges on its live birth. The case is filed in representative capacity, by someone on behalf of the foetus.

[71] The last stage that is, Stage III relates to countries in which wrongful death of a foetus is also actionable in torts in representative capacity. The dead foetus can claim for its own death, the benefit accruing to the survivors. Only a handful of countries like the USA fall in this category.

[72] P. J. Pace, *Civil Liability for Pre-Natal Injuries* 40 MLR 141 (1977).

[73] It must be emphasized that in such cases the mother can of course (in all legal systems) ask for compensation for injuries/mental trauma etc suffered by her, but we are here dealing with foetal rights, that is cases where the injured foetus is allowed to sue in his/her own name and claim compensation for it is treated as a legal person in his/her own capacity.

[74] It seems that the status of a foetus under the law of torts is a bit better than criminal law.

[75] Today India is one of the few countries in the world, which has exclusive courts for consumer redressal. A major breakthrough came during 1986 when Parliament passed a law for protection of consumers (of goods and services alike) - the CONSUMER PROTECTION ACT, 1986. The Act set up a three-tier quasi-judicial machinery at the district, state and national levels with the sole view of providing speedy and simple redressal to consumer disputes. The District Forum deals with the cases involving claims up to Rs. 20 lakhs, the State Commission between Rs.20 lakhs to one crore and the National Commission deals with the cases involving claims exceeding Rs. one crore. The objective of the consumer courts is to ensure speedy justice to the consumers against various malpractices and negligence without involving any cost, as no court fees is charged. Consumer courts have been set up as special courts, as it was expensive and time consuming to get justice through civil courts. Since 1986, the importance of these quasi judicial bodies and their rulings has only increased.

being entitled to personhood and required the insurance company to pay the claim.[76]

Facts of the case in brief: One Kanta Kotecha filed the claim on the deaths of her husband, her son and daughter-in-law, and her unborn grandchild of seven months gestation who all were killed in a tragic automobile accident. The claim for her son was rejected by the United India Insurance Company, saying that since he was not a paid driver the policy did not cover him. The Insurance Company also rejected the claim for the unborn child as the latter "could not be considered a passenger in the vehicle since it was not yet born."

Kotecha complained before the Yavatmal District Forum, Maharashtra which said that the insurance company must pay the claim for the son but not the unborn child. Kotecha then appealed to the Maharashtra State Commission. The Commission, taking a cue from the United States law under the Unborn Victims of Violence Act, 2004 that made it a crime to injure or cause the death of an unborn child against the will of the mother, issued a ruling stating that "the term 'human foetus' implies a living, growing organism." The commission reasoned that since the unborn baby was 'living', it was entitled to personhood.

This radical decision has placed India in Stage III of legal development, at par with the USA, as full legal personality has been recognized in favour of the unborn even when third party intervention/negligence results in foetal death.[77] The extinct foetus is allowed to sue for wrongful death and claim compensation through a representative.

[76] THE TIMES OF INDIA 1 (Mumbai 6 March, 2007).

[77] Such cases are called as 'wrongful death' cases in the USA.

THE LEGAL NATURE OF THE OSCE AS AN INTERNATIONAL ORGANIZATION

Ruslan Garipov[*]

Mankind has dreamed of peace and stability all throughout history, but only in our era the means of preserving universal peace have appeared. In the past, the state sought to provide for its security on its own or through alliances with other states. Today, peace and security are conceived in universal terms. The last few decades have shown that it is impossible for states not only to win a nuclear war, but also stop arms races, the latter being one of the reasons for undermining economies of some countries.

The great political changes which have occurred on the international scene have brought questions of security to the foreground. The problem is both about re-evaluating concepts of international security, as well as determining the role of those institutions whose main task is to strengthen such security.[1]

The formation of the Organization for Security and Cooperation in Europe (OSCE) has been a major contribution in the pursuit of international security. Chapter VIII of the Charter of the United Nations permits the existence of "regional bodies", in practice, regional organizations, which are allocated powers to pursue the peaceful resolution of "local disputes", i.e., disputes between the state participants of such organizations.[2] Read in this context, Chapter VIII of the Charter of the United Nations makes it clear that regional agreements and organizations may significantly contribute to the efforts of the Security Council of the United Nations to maintain peace and international security. The OSCE, as regional agreement in the sense of chapter VIII of the Charter of the United Nations, has declared itself to be the main tool in its region for preventing conflicts, regulating crises and for post-conflict reconstruction.

The OSCE is the only organization including all European nations, the United States and Canada, which bears joint-responsibility for the security of Europe. Due to its unique status, the organization is irreplaceable. It is impossible to ensure the security of the New Europe without the OSCE.

Today the OSCE has a unique place among European institutions of international security. It is defined by the length and breadth of its members; its universal approach to security, conflict resolution and commitment to open dialogue and consensus formation; and the presence of mechanisms for cooperating with other international organizations.

But in the work of the OSCE there is one legally important question. Some experts believe that the OSCE is not an international intergovernmental organization in the sense in which rules of international law prescribe. Some specialists think that the OSCE has no international legal status and it is not a

[*] Head of the Department of State and Law Disciplines of the Tatar State Humanitarian and Pedagogical University (Kazan, Russian Federation). Member of the Russian Association of the International Law (Moscow, Russian Federation). Fulbright Scholar, 2007.

[1] Nevertheless the dangers of a large-scale confrontation, as well as cold war, are considered by property of the past, distinction of interests and contradictions between separate (first of all formed again) countries cannot be completely overcome. It also represents a potential source of occurrence of conflicts, first of all national - ethnic.

[2] See, CHARTER OF THE UNITED NATIONS.

subject of international law. For example, Professor Gerhard Hafner from Vienna University (Austria) wrote about the prevailing view that the OSCE is neither an international organization nor a subject of international law.[3] The OSCE owns all features of international intergovernmental organization, except one, the very important feature - the constitutive document in the form of a legally registered Act. The OSCE was established not by any international law regulation, but by political agreement. So there is a problem in the definition of the OSCE.

There is an opinion that the OSCE is not an intergovernmental organization with certain rights and duties which international law requires. On the other hand, the OSCE has already been suggested to be an international organization, irrespective of its soft law basis.[4] This conclusion was derived from the obvious will of the participating states to endow the OSCE with such legal nature since otherwise it could not fulfil the functions conferred upon it.[5] It has, however, been also submitted that the OSCE, albeit lacking international personality, constituted an international organization.[6]

So the question whether the OSCE is an international intergovernmental organization or not, is still open. Opinions vary greatly upon this problem and in order to throw light upon the given question it is necessary, first of all, to take into consideration the law of international organizations.

There is hardly any normative definition of the international organization in international law and that causes all possible disagreements upon an organisation being the subject of international law. International conventions mentioning the international organization as a rule simply indicate that international organizations are the international intergovernmental organizations.[7]

The necessity for the international organization to be defined by the international – legal science was predetermined. There are a lot of different definitions of international intergovernmental organizations in the scientific literature. It is necessary to come to the general conclusion to determine what the international organization is and what features it must have.

For example, the international intergovernmental organization is characterized with the following features by Russian Professors Ignatenco and Tiunov: "It is issued by state fixing its intention in the constituent act – special international contract (Statute, Convention); it exists and acts in the frame of constitutive act, which defines its status and power; it is a permanently working

[3] See, Gerhard Hafner, *Did the FR Yugoslavia Make the OSCE an International Organization?* in Wolfgang Benedek, *et al* (*ed*)., DEVELOPMENT AND DEVELOPING INTERNATIONAL AND EUROPEAN LAW 35(1999).

[4] The possibility of the existence of international organizations based on international decisions in the form of resolutions is acknowledged by Brownlie. See, I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 683 (1999). See also, K. Zemanek, *The Legal Foundations of the International System (General Course on Public International Law)*, 266 RECUEIL DES COURS 116 (1997).

[5] See, I. Seidl-Hohenveldern, *Internationale Organisationen Aufgrund von Söft Law* in U. Beyerlin (*ed*), RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG, FESTSCHRIFT FUR RUDOLF BERNHARDT 233 (1995).

[6] See, M. Wenig, *Der Volkerrechtliche Status der OSZE: Gegenwartiger Stand Und Perspektiven*, 3 OSZE JAHRBUCH 401 (1997). See also, E. Klein, *Die Internationalen und Supranationalen Organisationen als Volkerrechtssubjekte* in W. Graf Vitzthum (*ed*). VÖLKERRECHT 279 (1997).

[7] See, e.g., CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (1986).

unit; it can be seen from its stable structure, from the system of its permanent organs; it is based on the principle of sovereign equality of states-participants; the states are bound up with resolutions of the organs of organization in the boundaries of their competencies and in compliance with established juridical power of these resolutions; every international organization has all the rights, which are peculiar to a juridical person; the international organization has privileges and immunity, which provide its normal activities and are admitted at the location of its headquarters and in any state at the time of realization of its functions."[8]

According to Russian Professor Bekyashev an international organization is a union of states conforming to international law created on the basis of an international treaty for carrying out cooperation in political, economical, cultural, scientific-technical, juridical and other spheres, having a necessary system of governance, rights and duties derived from law and a self government, whose structure is determined by the will of states-parties.[9]

It is important to point out, that all these authors mention the OSCE in their works as an international intergovernmental organization, based on a committee for security and cooperation in Europe.

Well known Russian Professor Kapustin allots the following essential attributes to an international intergovernmental organization: "Extremely interstate character of the union; a legal basis of the given union in the international agreement, as a rule, in the form of an international treaty;[10] constant and independent organizational structure; legal independence."[11] Additional attributes like the purposes and principles of interstate union; own budget; headquarters where the sessions of its organs are held and the diplomatic representatives of the states-participants are symbolic of the international organization. All these attributes from the author's point of view are classical, because they are most frequently repeated in the scientific and educational literature.

However, as far as the OSCE is concerned, this organization takes a unique place. On the one hand it does not have a formal international legal status and most of its decisions are politically binding and have no compulsory juridical force. With all this, it has all the necessary attributes and characteristics of international organizations: constantly working with leading organs; the permanent headquarters and institutes; permanent staff; regular financing; and local departments. Most of the documents, decisions and obligations which are accepted there are admitted in juridical form and their interpretation requires the knowledge of the international legal principles and the normative methodology of laws of international agreement.

[8] G.W. Ignatenco and O.I. Tiunov, INTERNATIONAL LAW 316 (2002).
[9] K.A. Bekyashev, INTERNATIONAL PUBLIC LAW 250 (2003).
[10] Here, in our opinion the author was correct. He did not exclude the possibility of other forms of constitutive documents existing besides the international treaties.
[11] A.J. Kapustin, *The Concept, Object, Sources and Subjects of International Organization's Law* in L.N. Galenskaya and M.L. Entin (*eds*), LECTURES ON ACTUAL PROBLEMS OF INTERNATIONAL AND EUROPEAN LAW 133-4 (2004).

Even though the statements being taken by the OSCE do not have a compulsory validity, it does not lower the effect. Being signed at a high political level they are as important as statements of all international-law regulations.

So, the OSCE has all the enumerated features of international intergovernmental organization, except the very important constitutive document in the form of legally registered act. Hence, it does not normatively fulfil the legally compulsory requirement of constitutive document for being an international organization.

The OSCE was established not by international law regulation, but by political agreement. Its constitutive documents are the Final Act, passed in Helsinki in 1975; Charter for the New Europe and an Additional document to it passed in Paris in 1990; the Declaration "Challenge of the time of change" and a set of decisions about structure and basic directions of the actions of the OSCE passed in Helsinki in 1992; and also the decisions of Budapest conference of the leaders in 1994. According to some authors the OSCE is the organization in the process of development. It doesn't have an integral constitutive act yet. On the other hand, it has been said that the role of constitutive document is carried out by the documents of Paris, Helsinki and Budapest's meetings temporarily.[12]

Here the opinion of the Dutch scientist must be mentioned who considers that an agreement ratified by all state-participants is not necessary for the formation of international intergovernmental organization. There could be another form of agreement of participants which plays the important role of constitutive document, for example the Academic Council of UK, International Bureau of Hydrography, and so on.[13]

There is also the international practice of the international organization being created not on the basis of international agreement but on the resolution of an organ of the international organization, for example, the specialized organs of the UN.[14]

Therefore, we can speak about different kinds of constitutive documents of the international intergovernmental organizations. Possibly, the OSCE is the third form of the formation of the international intergovernmental organizations different from previous ones. It is created on the base of the common norm of the international law - Helsinki Final Act. So for those who believe the supporters in the necessity of legally obligatory form of the constitutive documents there is a valid agreement in accordance with the international law as the basis of the OSCE.

As for the organs and institutes being one of the most important signs of the international organization, it is necessary to mark especially the presence of the Secretariat of OSCE, which was created for administrative service of the permanent organs and the consultations of all levels.[15] According to the dictionary in international law, the Secretariat is one of the most important signs

[12] See, *supra* n. 8 at 339.
[13] See, H.G. Schermers, Vol. I INTERNATIONAL INSTITUTIONAL LAW: STRUCTURE 6-7 (1977).
[14] See, E.A. Shibaeva, and M. Potochniy, THE LEGAL QUESTIONS OF INTERNATIONAL ORGANIZATION'S STRUCTURE AND ACTIVITY 18(1988).
[15] See, PRAGUE DOCUMENT ON FURTHER DEVELOPMENT OF CSCE INSTITUTIONS AND STRUCTURES (1992).

of the international intergovernmental organization.[16] In 1977 some authors stated that the creating of the Secretariat would initiate the transformation of the CSCE into international organization.[17] A year earlier the famous Soviet (and later Russian) lawyer-internationalist Professor Malinin marked the tendency of shaping Helsinki process into more organized forms and predicted the possibility in future of "establishing of the constant consultative organ and other sections of the international European mechanism."[18]

In the whole, we can state in relation to the system of organs of the OSCE and their functioning, the OSCE is a valuable international organization without any deficiencies in the system of its organs and institutions in comparison to other international organizations.

Since 1991, the OSCE uses actively the institute of Missions. The purposes of the Missions are prevention of conflicts, assistance in regulating the crises, and gathering of necessary information. The mandates of every mission, including the duration, purposes and methods of the activity, are worked out in accordance with the definite situation in the region of their location.[19] A number of states-participants of the OSCE, referring to the fact that the OSCE has no juridical obligatory constitutive document, doubt the legal-subjectiveness of the OSCE as an international organization.

Practically we see that the staffs of mission do not enjoy all privileges and immunities in some states which accept field missions.[20] The actual carrying out of their practical work is affected when they are denied equal status and legal basis for actions of the missions. That is why it is especially important to give to the OSCE a new status and significance as a stable foundation for its further work.

After the establishment of the first long-term missions of the OSCE in the Balkans and in the countries of CIS, they took a decision about the legal capacity of institutions of the OSCE and their privileges and immunities in the conference in Rome in 1993. The absence of international-legal character of decisions of the OSCE was an obstacle in allowing a considerable number of states-participants with notification of the incorporation of statements concerning the legal-capacity of institutions of the OSCE and their privileges and immunities in the national legislation. However, in Austria on May 15, 1993, by the Federal law of legal status of institutions, the volume of privileges and immunities of the OSCE establishments and their staff was equalled to the privileges and immunities of the departments of the UN located in Vienna.[21]

[16] C. Parry *et al*, PARRY AND GRANT ENCYCLOPEDIC DICTIONARY OF INTERNATIONAL LAW 278 (1986).

[17] See, e.g., S. Bastid, *The Special Significance of the Helsinki Final Act* in T. Buergenthal (*ed*), HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 17 (1977).

[18] S.A. Malinin, *The Conference in Helsinki (1975) and International Law*, 2 MAGAZINE OF JURISPRUDENCE 27 (1976).

[19] See, V. Dronov, FROM CSCE TO OSCE: HISTORICAL RETROSPECTIVE : ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE 111 (1997).

[20] See, J.A. Yasnosokirskiy, *The OSCE: Privileges and Immunities*, 2 MOSCOW JOURNAL OF INTERNATIONAL LAW 250 (1999).

[21] *Id.* at 249.

We should pay attention to the fact that only the OSCE is considered as regional agreement in the sense of the Chapter VIII of the UN Charter among all European institutions and organizations in the sphere of safety.

The Chapter VIII of the UN Charter foresees possibility of existence of the regional organs, practically regional organizations which have authority to solve peacefully the "local arguments" or arguments between states-participants of such organizations.

In this context in Chapter VIII of the UN Charter it is said that regional agreements and organizations can make an important contribution in intensification of efforts of the UN by guaranteeing peace and safety.[22]

But in the 90s a question was raised constantly about the necessity of transformation of the OSCE into valuable international organization. So, for example, in the meeting of the OSCE in Prague in January 1992 the President of Czechoslovakia Vaclav Gavel offered to develop and accept the regulation of the safety and collaboration in Europe. Similar suggestion was given by the President of France.[23]

With the transformation of the OSCE into the classical international organization a lot of questions will possibly come up. For example, what will be the difference between the OSCE and European Council in the framework of human dimension? Will the OSCE lose its main difference from other international organizations – its dynamism and flexibility, the advantages that it has thanks to its unique status? Accordingly, the changes happening in the OSCE must have a profoundly thought out character and not damage its activity.

The transformation of the Conference into the organization in 1995 did not bring any differentiation into its international and legal status. The Budapest agreement underlines: the fact that the changing of the name from the CSCE to the OSCE changed nothing either in the nature of the obligations of the CSCE or in the status of the CSCE and its institutions.[24] In the basing of such a decision the participants referred to the necessity to save the flexibility of the organization. But the main difficulty was the ratification of the agreement with such content in the Parliaments of some participating states.

Besides, concerning the history of the OSCE, it is necessary to note that the status of the CSCE gained the character of the international organization in 1990 with the signing of the Paris Charter for New Europe.[25] With the acceptance of the CSCE Helsinki document in 1992, the process of the institutionalisation of the CSCE was begun by the summit in Paris.[26]

Apart from institutionalization, the process of reformation was also characterized by other features, namely, by change of authorities and of procedure of the OSCE. Some serious changes took place with the transition

[22] See, *supra* n. 2.

[23] See, Aric Bloed, INSTITUTIONAL ASPECTS OF THE NEW CSCE: LEGAL ASPECTS OF A NEW EUROPEAN INFRASTRUCTURE 13 (1992).

[24] CSCE Budapest Document, TOWARDS A GENUINE PARTNERSHIP IN A NEW ERA (1994).

[25] Several organs and institutes were created. Meetings were held on more regular basis. Permanent bodies were formed. Thus, at the given stage of the CSCE's development, there was a certain evolution of the Conference's legal status. Hence, it is not simply a sum of the states already, but a high-grade subject of international law.

[26] See, CSCE Helsinki Document, THE CHALLENGES OF CHANGE (1992).

from clean consultations to harder regulations of correlation of the states-participants concerning international control, chance to undertake actions protecting human rights without the consent of the state-transgressor, directive application, etc.[27]

It is possible to find in the literature different points of view about the international-legal status of the OSCE. At the same time the OSCE is called in all sources (educational and scientific) as an international organization, thereby in fact recognizing its international status.

It is well known that international intergovernmental organizations as well as states are recognized as subjects of the international public law.[28] Any international intergovernmental organization is a subject of international law and the OSCE is not an exception.

International intergovernmental organization is a subject because states agreed to give it suitable rights and responsibilities that are precisely determined in constituent acts (rules, status, contracts, conventions, and so on) and completely correspond to the main principles of international law.[29] Constituent acts of many intergovernmental organizations have precise clauses about law-subjectiveness of such organizations, but the absence of clauses about its law-subjectiveness in constitutive documents of international organizations does not mean that the organization is not a subject of international law.

In this case it is necessary to mention the opinion of the Norwigian lawyer, F. Seyersted, who worked out the conception of objective law-subjectiveness of the international organization. He considered that as any organization had at least one organ and in this way was differing from state-participants, it "*ipso facto*" became an international person. From the point of view of the theory of "objectiveness" law-subjectiveness is independent of the will of state-participants.[30]

It is also necessary to point out that the OSCE possesses legal personality by the internal right of participants when in 1993 the decision about legal capacity, privileges, and immunities was accepted. The participants have undertaken to take action on legislative bodies to give legal capacity and immunities to the OSCE establishments.[31]

Thus, in summing up it may be stated that in view of various facts analysed above, it is possible to establish the fact, that the OSCE is the subject of international law. In other words, it possesses legal personality like any other international intergovernmental organization. It should be also noted, that in formulating the concept of the international intergovernmental organization in international law, it is necessary to take into consideration all existing forms and kinds of such associations.

[27] See, A.B. Makarenko. *Institutionalization of European Process within the OSCE (CSCE) Limits*. No. 6 ST PETERSBURG'S UNIVERSITY BULLETIN 118 (1997).
[28] See, T.N. Neshataeva, INTERNATIONAL ORGANIZATIONS AND LAW: THE NEW TENDENCIES 74 (1999).
[29] See, K.A. Bekyashev, INTERNATIONAL PUBLIC LAW 110 (2003).
[30] See, F. Seyersted, *The Legal Nature of International Organizations*. 51 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 203-5 (1982).
[31] See, I.I. Lukashuk, INTERNATIONAL LAW: SPECIAL PART 118 (1997).

IRAQI SPECIAL TRIBUNAL: A CRITICAL LEGAL ANALYSIS

Anupam Jha[*]

The establishment of Iraqi Special Tribunal and its working has aroused considerable attention in the international community. This attention has been caused due to many factors including the choice about the nature and nomenclature of the Tribunal, flaws in the making of the Statute of the Tribunal and its Rules of Procedure and Evidence, biased chamber judges and investigative judges, provision for foreign judicial experts and observers, proper opportunities for the preparation and conduct of defense proceedings, rules on evidence and finally, the question of penalty. The objective of the trial was to combat impunity to the persons who went on to commit crimes threatening the whole humanity. No doubt such crimes were committed in Iraq, but the manner in which attempts were made to hold them responsible has not been acceptable to the international community. The mechanisms created, the procedures established, rules of evidence laid down and penalties fixed were not in accordance with the international standards. The standards should not be decided either by the victors or by victims. Rather, it should be set on the basis of commonly agreed international principles on combating impunity. All these have started a debate on the question whether post conflict justice in Iraq is tending towards the notion of victor's justice or victim's justice.

The above-mentioned issues require an in-depth research. An attempt has been made in this article to unfold, analyze and discuss these issues keeping in mind the objective of the trial. This article discusses various issues concerning the Iraqi Special Tribunal and exhorts the international community to draw lessons from the working of this Tribunal for the future.

I. BACKGROUND TO THE FORMATION OF IRAQI SPECIAL TRIBUNAL

The present day Iraq has a very old history. Its history dates back five millennia. It has given birth to several civilizations. Its legal tradition goes back to one of the world's oldest codifications, the Code of Hammurabi, promulgated some 3750 years ago.[1] In the modern period, Iraq was administered by Britain from 1922 to 1932 as League of Nations mandate after the First World War. The Hashemite monarchy, established by the British government in 1922 was toppled by bloody military coup in 1958.[2] Thereafter, a spate of coups occurred in 1963 and in 1968.[3] During the latter coup, Saddam Hussain was head of the security forces, and he was later elevated to become the Vice President.[4] In 1979, he took over the presidency after Ahmed Hassan Al-Bakr resigned.[5] Saddam's Ba'athist regime was marked by war of aggression against Iran in 1980, which lasted until

[*] Lecturer, Law Center – II, Faculty of Law, University of Delhi.
[1] John Henry Wigmore, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 66-84 (1936).
[2] Michael Eppel, IRAQ FROM MONARCHY TO TYRANNY: FROM THE HASHEMITES TO THE RISE OF SADDAM 147-52 (2004).
[3] *Id.* at 204-08, 241.
[4] *Id.* at 242, 244.
[5] Al-Bakr later died under mysterious circumstances. See, Charles Tripp, A HISTORY OF IRAQ 254 (2000).

1988, and by occupation of Kuwait from August 1990 until February 1991. Saddam's regime was involved in the killing of 148 Shia men and teenage boys in the northern town of Dujail pursuant to a failed assassination attempt against Saddam in 1982.[6] A ruthless suppression of Shia rebellion[7] was carried out in 1992. The Kurds[8] were also repressed during 1988-1991. The Ba'ath regime is established to have killed more than 5 lakh Iraqi citizens from 1968 to 2003. The Anfal Campaign against Kurds resulted in 182,000 deaths in 1987-88.[9]

Notwithstanding the dreadful catalogue of crimes committed by this repressive regime, the international community tolerated the situation, and major powers maintained economic and financial ties with the regime.[10] However, the Bush Administration was not in a mood to tolerate those ties any longer. Shortly after 2001, the idea of a Security Council commission to investigate violations of international humanitarian law and human rights law by the Saddam's regime was floated within George Bush Administration but was soon discarded.[11] This may have been due to ideologically based opposition to a UN-led effort, as well as the fact that it originally was a Clinton Administration idea. In 2002, the Department of State (hereinafter called DOS) started a grand project known as "Future of Iraq" which included over 100 Iraqi expatriates from different parts of the world.[12] In March 2003, before the US-led coalition forces attacked Baghdad, the idea of establishing an ad hoc international criminal tribunal by the Security Council was again briefly considered.[13] This idea was abandoned when concerns relating to use of Weapons of Mass Destruction by Iraqi Forces did not materialize and Baghdad fell down very easily. Up to September 2003, there was no consensus on the form of tribunal.

Since September 2003, the Department of Defense, DOS and Department of Justice actively pursued the idea of an Iraqi national tribunal having international support. The statute of such a tribunal was drafted in December 2003 and was approved by the Governing Council and the Coalition Provisional Authority (hereinafter called CPA).[14] In accordance with the established process, the Governing Council approved a decree on 9 December 2003, establishing the

[6] *Al-Dujail Lawsuit Case*, Case No. 1/9First/2005, the original Arabic version translated in English by Mizna Management LLC.

[7] The Shia Arabs constitute 60% of the total ethno-religious groups in Iraq. See, Michael J. Kelly, *The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal*, 38 CORNELL INT'L LJ 987 (2005).

[8] *Id.* The Kurds constitute 17% of the total ethno-religious groups in Iraq.

[9] See, http://www.stategov/s/wci/fs/19352.htm. Accessed on February 21, 2007 for compilation of statistics regarding human rights violation of the former Ba'ath regime.

[10] M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L J 331 (2005).

[11] *Id.* at 340.

[12] David Rieff, *Blueprint for a Mess*, NEW YORK TIMES, November 2, 2003 at 28.

[13] *Supra* n.10 at 344.

[14] The CPA was created by the US government on 16th June 2003 as an organization under the control of the Department of Defense to administer Iraq, in keeping with UN Security Council Resolution 1483 (2003). In July 2003, the CPA appointed the Governing Council to serve as a transitional Iraqi governmental body subject to CPA's approval of its orders, directives, and personnel appointments.

Iraqi Special Tribunal (IST), and on the same day, the CPA issued Order 48 containing the Statute. On 10th December, after CPA Administrator Paul Bremer signed the order, it was published in the CPA's Official Gazette.[15] Thus, it became an official institution of the occupying power.

II. FORM OF TRIBUNAL

There were three alternatives for the Bush administration for the formation of an effective tribunal. One was an ad hoc international tribunal to be established by Security Council on the pattern of International Criminal Tribunal for the former Yugoslavia (herein after called ICTY) and International Criminal Tribunal for Rwanda (hereinafter called ICTR).[16] Second was to establish a mixed international and national tribunal similar to one established in Sierra Leone.[17] The last alternative was to constitute a national Iraqi tribunal with international support. Though it was apparent that an international tribunal would enjoy the greatest amount of international support and legitimacy, the ability to establish such a tribunal through Security Council was doubtful, given the limited role the United Nations was afforded by the United States in Iraq.[18] Additionally, even if it were possible for the Security Council to establish a tribunal, the experiences of ICTY and ICTR suggested that it would be costly and time consuming.[19] The combined budget for ICTY and ICTR in one year had been generally an average of US $100 million.[20] Cumulatively, the ICTY and ICTR had cost around US $1.5 billion till date. Apart from the heavy cost of such tribunals, it was also a matter of concern that a tribunal under UN auspices would not impose the death penalty for any convicted perpetrator.[21]

The necessity, therefore, was to have a different type of tribunal, which could be characterized as an "internationalized domestic tribunal".[22] The Iraqi Special Tribunal was established with this nature of tribunal in mind. This tribunal is internationalized because it has jurisdiction over international offences[23] and its Statute provides that the Iraqi Special Tribunal should resort to the relevant decisions of international courts or tribunals as persuasive authority in interpreting those crimes.[24] Its Statute also provides that the President of the Tribunal can draft rules of procedure and evidence, which will be adopted by a majority of the permanent judges of the Tribunal.[25] The Rules of Procedure and Evidence have been promulgated and those rules supplement the existing Iraqi

[15] See, http://www.iraqcoalition.org/tmscripts/20040423pageturn.html. Accessed on December 20, 2005.

[16] Security Council Res. (hereinafter SC Res.) 827, UNSCOR, 48th Session, 3217th mtg, UN Doc S/RES/827 (1993); SC Res 955, UN SCOR, 49th Session, 3453d mtg, UN Doc S/RES/955 (1994).

[17] SC Res 1315, UN SCOR, 55th Session, 4186th mtg, UN Doc S/RES/1315 (2000).

[18] *Supra* n. 10 at 342.

[19] *Ibid.*

[20] See, http://www.un.org/icty and http://www.un.org/ictr. Accessed on June 23, 2007.

[21] *Supra* n. 10 at 344.

[22] Michael Scharf and Arhan King, *Errors and Missteps*, 38 CORNELL INT'L L J 915 (2005).

[23] *Ibid.*

[24] Art. 17 (b), STATUTE of the IRAQI SPECIAL TRIBUNAL.

[25] *Id.* Art. 16.

Code of Criminal Procedure.[26] The Rules are modeled on rules and procedures used by the modern international tribunals.[27] In addition, while no international judges have been appointed to its bench, its Statute and Rules require that international experts be assigned to advise and to assist investigative judges, trial judges, appeals chamber judges, the Prosecutions Department, and the Defense Office.[28]

No norm or precedent exists in international law for an occupying power, the legitimacy of which is in doubt, to establish an exceptional national criminal tribunal.[29] Yet, there was no doubt of the need for a special tribunal to prosecute Saddam and the regime's major offenders.[30] The Iraqi Special Tribunal was created with the express goal of bringing personal accountability to those Ba'athists that were responsible for depriving Iraqis of their human rights and of virtually extinguishing the real rule of law for over two decades.[31] If the creation of the Iraqi Tribunal is set in the wider context of the predominant American occupation of Iraq, the above goal of bringing personal accountability to the Ba'athists become politically motivated. Such motive can be appreciated when many limitations, which are imposed on the administration of justice by the Statute itself, are examined.

III. LAW ADMINISTERED

The Statute of the Iraqi Special Tribunal provides that the Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11-14,[32] committed since 17 July, 1968 and up and until 1 May 2003, in the territory of Iraq or elsewhere.[33] Thus, two important limitations on the jurisdiction of the Tribunal are mentioned in the opening line of the above article.

The pertinent question that arises in this context is as to why only Iraqi nationals or residents of Iraq are covered under the *ratione persona* jurisdiction and not all? Given the general principle recognized under all national criminal legal systems relating to personal jurisdiction that a national criminal court has personal jurisdiction over all individuals committing a crime within the territory of their nationality or residence status, it is not clear why the IST's jurisdiction does not extend to all individuals who may be accused of the crimes set out in Articles 11 to 14 of the Statute who are not Iraqi nationals or residents of Iraq as referred to in Article 10.[34] In any state, the population can be divided into different categories. Some are called nationals, some others are called residents,

[26] Revised version of Iraqi Special Tribunal Rules of Procedure and Evidence, available at http://www.iraqispecialtribunal.org/en/laws/rules.htm. Accessed on March 15, 2007.
[27] *Supra* n. 10 at 344.
[28] IST Rule 39, *Supra* n. 26.
[29] *Supra* n. 10 at 359.
[30] *Ibid.*
[31] Michael A. Newton, *The Iraqi Special Tribunal: A Human Rights Perspective*, 38 CORNELL INT'L L J 866 (2005).
[32] Arts. 11-14 deal with subject matter jurisdiction of the Tribunal.
[33] Arts. 1(b) and 10, *supra* n. 24.
[34] *Supra* n. 10 at 372.

and some are non-residents. In the Iraqi context, the non-residents can be the coalition forces present there since the year of 2003. However, the Statute of the Iraqi Special Tribunal does not apply to those non-residents even if they have committed the crimes under the Statute. This jurisdictional restriction on the applicability of Statute dilutes the effectiveness of the Tribunal to actually combat all those crimes for which it was created.

Another limitation on the jurisdiction is temporal jurisdiction. The Statute also limits the temporal jurisdiction of the IST to crimes committed between 17 July 1968 to 1 May 2003. Does this mean that there was no commission of war crime, genocide and crimes against humanity before 17 July 1968 and there shall be no similar recognition after 1 May 2003? It is probable, therefore, that the IST's jurisdictional exclusion of coalition forces during the same range of the IST's temporal jurisdiction without a concomitant obligation for the coalition forces to prosecute, adds to the perception of politicized justice.[35] Interestingly, however, there is no limitation as to places where the crimes were committed.

Further, the maxims "*nulla poena sine lege*"(no punishment without law) and "*nullum crimen sine lege*" (no crime without law), which are cornerstone principles of criminal law, are violated in the Statute of Iraqi Special Tribunal. These principles are not merely principles of justice.[36] These principles have become known in almost all the legal systems of the World. They are also embodied in the International Covenant on Civil and Political Rights,[37] the European Convention on Human Rights,[38] and the American Convention on Human Rights.[39] The IST Statute violates these principles by borrowing the definition of the crimes of genocide, crimes against humanity, and war crimes from the Rome Statute of International Criminal Court (ICC),[40] which are not contained in the 1969 Iraqi Criminal Code.[41] The Rome Statute does not violate the principles either of "*nulla poena sine lege*" or "*nullum crimen sine lege*". Rather it elaborates upon these principles and incorporates them within its fold in Articles 22 and 23. The Statute lays down that a person shall not be criminally responsible unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the ICC. It also provides that a person convicted by the Court may be punished only in accordance with this Statute. However, the Iraqi legal system did not criminalize genocide, war crimes and crimes against humanity upto the formation of the Tribunal. How could the people of Iraq have known, at the time of commission of those acts that they were committing a

[35] *Id.* at 359.
[36] As per the majority judgement in the *Nuremberg* judgement, IMT Judgement reprinted in 41 AMERICAN JOURNAL OF INT'L LAW 216 (1947).
[37] Art. 15, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 19 December 1966, 6 INT'L LEGAL MATERIALS 368 (1967) (entered into force on 23 March 1976).
[38] Art. 7, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 4 November 1950, 312 *UNTS* 221.
[39] Art. 9, AMERICAN CONVENTION ON HUMAN RIGHTS, 22 November 1969, 1144 UNTS 123 (entered into force on 18 July 1978).
[40] Arts. 6-8, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, available at http://www.cpi.int. Accessed on March 31, 2007.
[41] Art. 7, Law No. 111 of 1969.

crime for which they could be punished severely after 25 long years when their country would be occupied by foreign countries and they would be prosecuted under the laws made primarily by the occupation forces?

Furthermore, the issue of legality of the Statute of the IST needs to be discussed. Legality has two aspects, formal and substantive. Formal legality means that a law must be promulgated or enacted appropriately and published in the Official Gazette. Substantive legality means international instruments can be applicable in the domestic state only when it is implemented according to international law. The Statute defines the three core crimes identical to those contained in the Rome Statute of International Criminal Court.[42] How can these crimes be prosecuted without establishing a foundation of their application under Iraqi law? This approach violates the principle of formal legality, since these crimes are not covered in the 1969 Criminal Code, nor were they separately promulgated in another national legislation published in the Official Gazette of Iraq.[43]

Apart from formal aspects of principles of legality,[44] substantive aspects of legality are also violated. Substantive aspects of legality are dealt with in two parts (a) crimes of genocide and war crimes and (b) crimes against humanity. As far as crime of genocide and war crimes are concerned, Iraq did not enact any law criminalizing these acts. However, it is a fact that Iraq ratified all the four Geneva Conventions on February 14, 1956 and Genocide Convention on January 20, 1959.[45] The Iraqi people publicly knew these crimes also. Furthermore, the prohibition of genocide and war crimes is considered as a 'jus cogens' norm, which enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules. Although the scope of definition of war crime can be debatable, there is no confusion that war crimes can be prosecuted.

Remedying the violation of the principles of legality with respect to crimes against humanity is more problematic than with respect to genocide and war crimes.[46] Unlike war crimes and genocide, this category of international crimes has not been included in a specialized international convention. Thus, unlike genocide and war crimes, any treaty on crimes against humanity does not bind Iraq.[47] However, prohibiting crimes against humanity is regarded as 'jus cogens' norm and so this norm permeates Iraqi domestic law also. This approach has not been argued ever before in any Arab Court. Despite that, the defense counsel in the *Al Dujail Case* at Iraqi Tribunal raised this contention. The Tribunal again

[42] Arts. 6-8, *supra* n. 40.
[43] *Supra* n. 10 at 374.
[44] Formal aspects of legality are promulgation in national Iraqi legislation and publication in the Official Gazette
[45] For details of state parties to the Convention, see, Ratifications and Reservations, CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, 9 December 1948, available at http://www.ohchr.org/english/countries/ratification/1.htm. Accessed on March 14, 2007.
[46] *Supra* n. 10 at 376.
[47] The legal doctrine and practice in Iraq deems that a treaty, even if ratified, must be subject to the adoption of national implementing legislation before it can be considered applicable domestically. Additionally, under Iraqi law, all laws must be published in the Official Gazette.

took resort to international customary law and 'jus cogens' and held that crime against humanity was applicable in Iraq also.[48]

Another issue of legality is removal of immunity by the Statute of IST. The Iraqi Provisional Constitution[49] affords immunity to the Head of State and the members of the Revolutionary Command Council.[50] The Revolutionary Command Council is the supreme institution of Iraq, which on 17th July 1968, assumed the responsibility to realize the public will of the people, by removing the authority from the reactionary, individual, and corruptive regime, and returning it to the people.[51] On the other hand, the Statute of the IST expressly denies immunity with respect to any of the crimes stipulated in Articles 11-14.[52] The question, which arose in this context, was whether international law could be imposed on Iraq when its own Constitution did not allow it. On this question, the Tribunal has held that the Statute of IST is clear and conforms to the international customary rule, which disclaim that the accused may keep in any way the immunity when he had committed crimes against humanity.[53] Although this ruling is in conformity with international law on the point, yet it is flawed in the sense that a country regards its Constitution as the highest law of the land. There cannot be any law in a country over and above the Constitution.

IV. JUDGES JUDGED

The judges of the IST are of three categories: (a) investigative judges, (b) trial chamber judges, and (c) appeal chamber judges.[54] The presence of investigative judges is due to the nature of Iraqi legal system. As Iraqi legal system is not an adversarial or accusatorial system, its tradition allows for investigative judges to gather evidence and prepare the case for submission to trial. As the drafters of IST were confused regarding the role of investigative judges and of prosecutors, the result is not better than confusion. Thus the chief investigative judge is given a similar position as the prosecutor general of a country in which accusatorial or adversarial legal system is practiced.[55]

The Chief Investigative Judge is given the powers to supervise investigators, integrate their outcomes, set up policies for the office, select appropriate personnel in advisory capacity and also as observers, establish priorities and so on.[56] The Governing Council of Iraq appointed all the twenty

[48] *Al-Dujail Lawsuit Case*, Case No. 1/9 First/2005, available at http:// 877.320.9128. Accessed on April 22, 2007.
[49] PROVISIONAL CONSTITUTION OF IRAQ, 1970, available at www.mallat.com. Accessed on January 22, 2007.
[50] *Id.* Art. 240.
[51] Art. 37, DRAFT IRAQI CONSTITUTION of 15 October 2005, available at http://www.nytimes.com/2005/08/28/international/iraqtext_new.html?_r=1&pagewanted=all&oref=slogin. Accessed on July 03, 2006.
[52] Art. 15, *supra* n. 24.
[53] *Supra* n. 48.
[54] Arts. 3-5 and 7, *supra* n. 24.
[55] *Supra* n. 10 at 382.
[56] Arts. 7 (f) and (n), *supra n.* 24.

permanent investigative Judges according to the provisions of the Statute.[57] The Chief Investigative Judge Raid Juhi was chosen by the investigative judges themselves according to the provisions of the Statute.[58] He finished his inquiry into the *Al Dujail Case* in June 2005 and thereafter referred the case to the Trial Chamber.[59] Addressing a press conference, Judge Juhi set the starting tone of Iraqi Tribunal music system with a high pitch.[60] The multinational forces started dancing to the music and the Iraqis indulged in violence.

Out of the five judges in each Trial Chamber,[61] Chief Judge Rizgar Mohammed Amin gave a mature look to the Tribunal when he started hearing the defense plea. However, judges were replaced mid-trial, including the original Chief Judge who was pushed out by political pressure from the new Iraqi government formed in January 2006.[62] Thereafter, a Kurdish Judge Rauf Rahman was appointed as new Chief Judge.[63] It can be anybody's expectation that impartiality and continuity were broken when it happened.

Out of nine Appeal Chamber Judges,[64] President Aref Shahen was so quick in delivering the judgement that it again appeared that the higher tribunal was not prepared to hear the other side of the story. When Saddam Hussein's lawyers filed the appeal, Judge Aref confirmed the death sentence within three days.[65] Such haste in conducting judicial proceedings shows prejudice in the Tribunal's working. Furthermore, it was tragedy for the Tribunal that any judge, who showed the slightest respect for the legal procedure or which favored the defendant, was removed from his post.[66] This caused the court to be adjourned time and again and the show trial just dragged on.[67] The show trial and fair trial are quite different. Show trials hardly convinces anyone except the forces behind them. Fair trials may not convince the forces behind them but it convinces the right thinking people of the international community. A judicial tribunal has a duty to ensure that justice takes its course, even if there is political or media pressure.

V. TRIAL

A. *The Prosecution*

The role of prosecutors in Iraqi criminal procedure is different from that of the investigative judge.[68] The prosecutors in Iraq do not only gather evidence, but

[57] *Id.* Art. 7 (b).
[58] *Id.* Art. 7 (c).
[59] John F. Burns, *Saddam Trial Set, but Critics Fault Tribunal*, THE TIMES OF INDIA, Delhi July 19, 2005.
[60] *Ibid.*
[61] Art. 4 (b), *supra* n. 24.
[62] *Kurdish Judge Appointed New Chief Judge of Iraqi Special Tribunal*, available at http://lawofnations.blogspot.com/2006/01. Accessed on March 16, 2007.
[63] *Ibid.*
[64] Art. 4 (c), *supra* n. 24.
[65] Aijaz Ahmad, *Empire Marches On*, 24 (1) FRONTLINE, Chennai, 6 (January 13-26, 2007).
[66] *Ibid.*
[67] *Ibid.*
[68] *Supra* n. 10 at 382.

they have to investigate and gather evidence before the case is referred to Investigative Judge. It is the latter who constitutes the dossier of evidence to be presented at the trial by a prosecutor.[69] The prosecutor presents evidence at trial and calls the witnesses to confirm this testimony. There is no right of cross-examination at the trial.[70] The expenditure incurred by the prosecution in the *Al Dujail* trial was around US $ 400 million. Apart from it, hundreds of thousands of US troops and dozens of American lawyers assisted the prosecution.[71] All these resources were deployed to collect evidence for more than two years to build a case against Saddam.[72]

The maximum number of appointment of prosecutors can be twenty.[73] A Chief Prosecutor heads the Prosecution Department.[74] All the twenty prosecutors have to be Iraqi nationals.[75] However, it is submitted that even if the prosecutor and the accused are of the same nationality, that does not guarantee that the investigation and other proceedings conducted by him can be impartial. Neither the Statute nor the Rules of Procedure have any provision mandating the prosecutors to be impartial.[76] There is also no provision expressly prohibiting prosecutors from taking part in a case, in which their impartiality is or could be seen in doubt, including cases in which they were previously involved or similar other matters.[77] The manner in which the Chief Prosecutor Jaafar-al-Moussawi conducted the proceedings cannot be termed as impartial. The reason being that in the course of the trial proceedings, the defence alleged that the Chief Prosecutor Jaafar-al-Moussawi had met the prosecution witnesses in a funeral in Al Dujail during July 2004.[78] The public prosecutor was seen in the CD of the mentioned funeral.[79] The defence also alleged that the public prosecutor had offered them amounts of money to testify against Saddam Hussein.[80] Thus, the impartial nature of the office of chief public prosecutor was not apparent in the trial.

B. *Foreign Judicial Advisors and Observers*

Pursuant to the provisions of the Statute of the IST,[81] the President of the Tribunal can appoint non-Iraqi nationals 'to act in advisory capacities or as observers' to the Trial Chambers and to the Appeal Chamber. Similar provisions

[69] *Ibid.*
[70] *Ibid.*
[71] *Saddam's Legal Team Denied Rights*, THE TIMES OF INDIA, New Delhi, April 11, 2006.
[72] *Ibid.*
[73] Art. 8 (c), *supra* n. 24.
[74] *Id.* Art. 8 (e).
[75] Art. 28, *supra* n. 24
[76] *Iraqi Special Tribunal -- Fair Trials Not Guaranteed*, AMNESTY INTERNATIONAL DOCUMENT posted on 13th May 2005, available at http://web.amnesty.org/library/Index/ENGMDE140072005. Accessed on March 7, 2007.
[77] *Ibid.*
[78] *Al-Dujail Lawsuit Case*, Case no. 1/9 First/2005, *supra* n. 48.
[79] *Ibid.*
[80] *Ibid.*
[81] Arts. 6 (b), *supra* n. 24.

are also found for the investigative judges and the prosecutors.[82] Such an observance or monitoring by foreign observers and advisors of the judges, investigative judges and the prosecutors of the Special Tribunal is unprecedented except in prior colonial regimes.[83] This provision was criticized by the members of Iraqi legal profession and is still probably the most offensive provision in the Statute.[84] Moreover, the presence of foreign observers cast doubts on the independence of the sitting Iraqi judges, investigative judges, and the prosecutor.[85]

Neither the Statute nor the Rules of Procedure of the Tribunal give precise details of the exact functions of the observers and advisors.[86] The Statute of IST provides that the role of the non-Iraqi nationals and observers shall be to provide assistance to the prosecutors of the Tribunal, and to monitor the performance of the Prosecutor.[87] Similarly, it lays down that those observers and advisors can assist the Tribunal Trial Chamber Judges, Appeal Chamber Judges, Investigative Judges, and monitor the protection by the Tribunal of general due process of law standards.[88] There is no clarity in the Statute or the Rules of Procedure about the effect of any advice or observation tendered by those advisors or observers to the Tribunal. The scope of the word 'monitoring' in the Statute is not defined. The United States provided millions of dollars to support a team of about fifty American and British lawyers, investigators, and forensic experts.[89] They work in an agency known as the Regime Crimes Liaison Office, which is financed by Department of Justice of US and is housed within the American embassy. Such a huge expenditure by the United States is not purposeless. The view that the Iraqi Special Tribunal is guided ultimately by the US and the UK is reinforced by the above facts.

C. *Defence*

The Statute of the IST lays down a number of rights for the accused.[90] Those rights are derived from international human rights law standards and which in turn are derived from adversarial system.[91] But the Iraqi legal system is following inquisitorial system. In the inquisitorial system, if the defence counsel wishes to direct any questions to a witness, it can be done only through investigative judge.[92] The investigative judge has the discretion to pose the questions in any form to the witness. The defence team, therefore, does not possess the right to confront and cross-examine the prosecution.

[82] *Id.* Arts. 7 (n) and 8 (j)
[83] *Supra* n. 10 at 368.
[84] *Ibid.*
[85] *Ibid.*
[86] *Supra* n. 76.
[87] Art. 8 (j).
[88] *Id.* Arts. 6 (b), 7 (n).
[89] *Trying Saddam*, CBC News in Depth: Iraq, available at http://www.cbc.ca/news/background/iraq/trying_saddam.html. Accessed on March 16, 2007.
[90] Art. 20, *supra* n. 24.
[91] E.g., Arts. 9-15, ICCPR, *supra* n. 37.
[92] *Supra* n. 10 at 384.

Even then, in the *Al-Dujail Case*,[93] the eight accused dared to defend themselves through a team of lawyers. The lawyers who dared to defend Saddam Hussein in the Court were defamed, intimidated and, at times, simply murdered.[94] Among the lawyers who sought to defend Saddam Hussein even then was also the former Attorney General of the United States, Ramsey Clarke. Clarke had formerly worked valiantly in documenting hundreds of thousands of Iraqi dead during the period of the United Nations condoned Anglo-US sanctions prior to the full-scale invasion. Saddam's defense team consisted of volunteer lawyers without adequate resources or the ability to find experts or adequate witnesses.[95] The defence team could not visit the sites of the alleged crimes "because of the state of insecurity in Iraq".[96] Non-Iraqi lawyers for the defense could not even enter Iraq to visit their clients regularly. Saddam's attorneys were held under virtual house arrest without access to telephones, faxes, computers or books. Even the legal notes prepared by Saddam's attorneys were read by American officials and only thereafter those notes were approved or rejected.[97] In these conditions, the right of the accused to a fair trial is not fulfilled and the impression of politicized justice is created.

Such an impression is further enhanced when no requirement of proof beyond reasonable doubt is found in the Statute, which is very strange.[98] This is particularly troubling given that many of those appearing before the Tribunal were to be awarded death penalty if convicted. The Rome Statute of the International Criminal Court expressly requires proof beyond reasonable doubt in order to secure a conviction.[99]

Then the defence has the right to appeal if there is conviction at the trial stage.[100] The Statute of the IST provides for only three grounds for an appeal by defence or prosecution. These are (a) procedural error, (b) error of fact, and (c) error of law. In contrast, the Rome Statute of the International Criminal Court allows a convicted person to appeal against conviction or sentence on four grounds: (a) procedural error, (b) error of fact or law, and (c) any ground that affects the fairness or reliability of the proceedings or decision.[101] The last ground is available to the convicted person as well as the prosecution. This is a very important right of each party to the trial and if this right is not granted, then it can again create an impression of politicized justice.

Even though the third ground is not found in the Statute of the IST, yet the defence team of Saddam Hussein filed an appeal raising expectation of fair hearing. However, that expectation was belied when the Appeal Court confirmed

[93] *Al-Dujail Lawsuit Case*, Case No. 1/9 First/2005, *supra* n.48.
[94] *Supra* n. 65.
[95] *Supra* n. 71.
[96] *Ibid.*
[97] *Ibid.*
[98] Art. 20 (b), *supra* n. 24.
[99] Art. 6, ROME STATUTE OF INTERNATIONAL CRIMINAL COURT, *supra* n. 40.
[100] Art. 25, *supra* n. 24.
[101] Art. 81, *supra* n. 40.

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)og, THE TIMES OF INDIA, Delhi.

III. DEATH PENALTY

As regards death penalty, the United States did not insist, as a matter of fact, on this form of punishment.[112] Thus, the Statute lays down that the penalties imposed by the Tribunal shall be those prescribed by Iraqi law, especially Law No. 111 of 1969.[113] But the Interim Government of Iraq itself gave seal of approval to death penalty. However, Jalal Talabani, the President of Iraq, conveyed a ray of hope when he said that he had to sign Saddam's death warrant if the Tribunal convinced the latter.[114] Talabani personally opposed the death penalty but he allowed it because of enormous pressure from Shia and the Kurds, as well as from the President of the United States, George Bush who, as the Governor of Texas had signed more death sentences than any Governor of a US State in recent memory.[115]

Death penalty is a degrading punishment and most of the countries of the world dislike it. The most recent statistics indicate that eighty-four countries of the world have abolished the death penalty for all crimes.[116] The International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and East Timor do not permit death penalty.[117] The two international organizations, namely, United Nations and European Union disapprove this practice of death penalty.[118] However, it was remarkable that when Saddam was given death penalty, not a squeak of protest came out of any of the members of the European Union, which signed Rome Statute and purportedly having far greater esteem for human rights, international law and judicial processes.[119] It is even more suprising that the President of the European Union Parliament Hans-Gert Poettering had protested over *Md. Afzal Case* in India when Indian President Kalam visited London in April 2007.[120] The Arab States were also conspicuous by their silence. The Heads of Arab States piously deplored the timing of execution of Saddam because he was hanged on the first day of Eid-al-Azha – the great feast of the sacrifice which symbolically reenacts the myth of Abraham and Ishmael, and when the grand Muslim ritual of the 'Hajj' in Mecca is concluded – but not much else about this victor's justice.[121] The absence of a united stance on death penalty portends a bleak future for those who champion the cause of prohibition of this penalty.

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[112] Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL* 38 CORNELL INT'L J 915 (2005).
[113] Art. 24 (a), *supra* n. 24.
[114] *Supra* n. 89.
[115] *Supra* n. 65.
[116] *Supra* n. 76 at 18.
[117] *Ibid.*
[118] *Supra* n. 65 at 8.
[119] *Ibid.*
[120] Rashmee Roshan Lall, *EU Mounts Pressure for Afzal Pardon*, THE TIMES OF INDIA, Delhi, April 26, 2007.
[121] *Ibid.*

VII. CONCLUSION

The quest of the multinational forces to prosecute individuals alleged to have committed serious crimes against humanity led to the creation of the Iraqi Special Tribunal, which was endorsed by Iraqi government also in 2006. The structure of the Tribunal is built on the basis of the Statute of the IST, again originally made by the multinational forces and subsequently approved by the Iraqi government. The Rules of Procedure and Evidence are also made by those forces and endorsed by the Iraqi government. The first case was referred to the Tribunal was *Al-Dujail's*. The Tribunal has also rendered the decision and two of the accused has been awarded death penalty.

However, the Tribunal has met with criticisms since the time of its creation upto the judgement in *Al Dujail Case*. Some of those criticisms are not just criticisms but those have contextual merit. The creation of the Tribunal by the multinational forces for *ad hoc* purposes has not been successful till now. If any of the international crime is committed, then that situation should be referred to the International Criminal Court if the legal system of that country in which the international crime was committed is not able to prosecute.

Furthermore, if a trial is conducted then it must follow due procedure according to the international standards. The trial should not be a sham one. The trial should also not be a shadow trial. The rights of the accused should not be compromised. The principle of equality of arms should also be practiced. The security of the counsels of both parties must be provided. The judges must be impartial and not one who carry their preconceived notions with them while rendering judgement. The penalty should not be the ultimate penalty. All these fundamental principles of the trial were violated in the *Al-Dujail Case*. The international community is not fully convinced with the logic, manner and the result of the trial.

The above fundamental principles of a trial can be followed if the investigation, prosecution and subsequent judicial proceedings take place in an objective manner. Such objectivity can be ensured when the investigators and prosecutors are chosen not on the basis of their ethnicity and political alignments, but on the basis of their experience and expertise in conducting investigation and prosecution. A person's impeccable record in neutrality, integrity and impartiality must be given respectable consideration. Furthermore, the procedural rules of a tribunal must ensure that the investigators, prosecutors and the judges enjoy their tenure without any fear or pressure. The defence side must be provided security of life and given access to all relevant information to defend themselves efficiently. In order to secure a conviction, proof beyond reasonable doubt should be required. The convicted person must be allowed to appeal on the ground of unfair and arbitrary trial proceedings or decision. The appeal must be heard patiently and not in haste. The death penalty should not be inflicted.

SPACE TECHNOLOGY AND LAW: SOME UNRESOLVED QUESTIONS

*Sandeepa Bhat B.**

I. INTRODUCTION

The pleasant event of space exploration is undoubtedly one of the greatest achievements of the twentieth century. The whole world was astonished on 4 October 1957, when the former Soviet Union showed the possibility of putting an object beyond the earth's gravitational force by launching Sputnik-I into outer space. The United States responded immediately by launching Explorer-I in the very next year. This signaled the beginning of space race between two super powers. The venture into the outer space has resulted in great scientific development, but at the same time it has also created problems. Though the space technology is useful in many ways, its use is not confined to beneficial purposes. The present day world is witnessing the harmful consequences of the space technology, especially in the form of its military uses.

The outer space consists of huge quantum of resources which can support the living of several generations of human beings on earth. The best utilisation of these resources can be possible only if the exploration and exploitation of outer space is carried on within a well-structured legal framework. Unfortunately, the outer space law has not fully developed till today. It has failed to develop at the same pace at which the technology is developing. The outer space activities are regulated not only by public international law, but also by domestic laws of the states. It is apparent that the space law, as a result of various commercial activities, is moving into the areas of law which were previously remote, including private international law, insurance law, contract law, intellectual property law, international trade law, criminal law and also European Community law. Consequently, the need for a comprehensive space law has gained much more significance in the recent period of time.[1]

II. USES OF SPACE TECHNOLOGY

A. Communication

Telecommunication is one of the first applications of the space technology. Due to the rapid development in the space communication technology, man's ability to transmit large quantum of information over great distances has developed by many folds. The space technology is used in the television, telephone and also in the modern communication tool-internet. Without the space technology, the direct television broadcasting (such as the relay of cricket tournaments and other sports events), modern mobile communications and e-

* Researcher, ISRO Project on Space Law & Ph.D. Scholar, Department of Studies in Law, University of Mysore, Mysore – 570006. I would like to thank Prof. (Dr.) H.K. Nagaraja, Research Guide, Visiting Professor of Law, National Law School of India University, Bangalore and Prof. (Dr.) P. Ishwara Bhat, Chairman and Dean, DOS in Law, University of Mysore for their valuable guidance in writing this article.

[1] Sandeepa Bhat B., *Contribution of UN General Assembly Resolutions and Treaties in the Development of Space Law*, 1 KARNT LAW JOURNAL 230 (2005).

transactions (such as e-mails, e-commerce, e-banking, e-money, etc.) would have remained as uncherished dreams. The space technology as a major means of communication is very important especially in connecting people in remote areas, such as ships or aircrafts, where the wire-line cannot be used as a means of communication.[2]

B. Remote Sensing

Since its advent, the satellite technology is used for remote sensing of the earth, which includes the study of earth and its resources.[3] It helps in the easy finding of the valuable resources such as metals, fuels, minerals, water bodies, etc., which are hidden in the womb of mother earth.[4] The ability to track the movements of large groups of refugees and displaced persons has improved with the development of remote sensing technology. The remote sensing satellites also help in the search and rescue operations in the remote areas like dense forests.

C. Meteorology

The field of meteorology is another area in which the space technology is playing a pivotal role. Though meteorology is part of remote sensing, the meteorological satellites are distinguished from other remote sensing satellites due to their uniqueness.[5] The space technology has revolutionised the climatic forecasting techniques.[6] The meteorological satellites, however, see more than clouds and cloud systems. The information as to fires, effects of pollution, sand and dust storms, snow cover, ice mapping, boundaries of ocean currents, energy flows, hurricanes, tsunamis, typhoons, detection of changes in the earth's vegetation, sea state and ocean color, etc., are other types of environmental information collected using weather satellites.[7] This technology has helped in the detection of the ozone depletion[8] and the deforestation of the Amazon rainforest.

D. Navigation

Very early in the Space Age, researchers realized that constellations of satellites could be put in orbit to permit ships, aircraft, or other vehicles to precisely determine their locations. A number of navigation satellite constellations have been put into orbit, with the most prominent being the US "Global Positioning System (GPS)". The GPS constellation was established by the US military for support of American forces in the field, but its use is

[2] Available at http://www.unescap.org/ICSTD/SPACE/documents/MinisterialConferenceReport/MCREPORT.asp#growth. Accessed on September 24, 2007.
[3] Available at http://www.gisdevelopment.net/tutorials/tuman008.htm. Accessed on April 30, 2007.
[4] Available at http://www.asdi.com/applications-remote-sensing.asp?gclid=CJCm7KiV6osCFQyIPgodVG IITQ. Accessed on April 30, 2007.
[5] Available at http://www.profc.udec.cl/~gabriel/tutoriales/rsnote/cp5/cp5-8.htm. Accessed on April 30, 2007.
[6] T. Vijaya Chandra, *Uses of Outer Space* in V.S. Mani *et al (ed)*, RECENT TRENDS IN INTERNATIONAL SPACE LAW AND POLICY 57 (1997).
[7] Available at http://www.imd.ernet.in/doc/learn-meteorology.htm. Accessed on September 24, 2007.
[8] The Antarctic Ozone hole is mapped from weather satellite data.

widespread for public and commercial applications as well.[9] Differential GPS is currently being used to obtain unbelievable accuracies for everything from precision landing systems for aircraft to measuring the movement of the Earth's crust.[10] These satellites have proved to be very useful in the transportation, traffic control, as well as search and rescue missions.

E. Collection of Solar Power

With the knowledge of the fact that the solar power is a major energy source, which can be used for performing several activities, attempts are also made for the collection of it. This resulted in the development of solar power satellites to collect solar energy in outer space and transmit it to the earth. The advantage of solar energy over other sources is that it is a renewable energy source with zero emission and no waste. The solar power satellite concept arose because space has several major advantages over earth for the collection of solar power. There is no air in space, so the satellites would receive somewhat more intense sunlight throughout the year, unaffected by weather. This allows the collection systems to avoid the expensive storage facilities necessary in many earth-based power collection/generation systems.[11] This has become viable alternative energy source in areas where no conventional power source exists.[12]

F. Telemedicine

Telemedicine is the art of delivery of the medicine at a distance. It involves the use of communications and information technologies for the delivery of clinical care. With the development in the satellite technology, it has become possible that the medical specialists in different countries can have a real time consultation through video conferencing.[13] This has helped in providing the best available treatment to the people suffering from various kinds of illness in both the developed and developing countries. In this way telemedicine is most beneficial for populations living in isolated communities and remote regions, as it gives them an opportunity to have access to the best available treatment in their own country. In addition, the monitoring of the patients at home using known devices like blood pressure monitor and transferring the information to a caregiver is a fast growing emerging service in the developed countries.

G. Teleeducation

The space technology is also playing a major role in imparting mass education. The lecture delivered in one corner of the world may be made accessible throughout the world with the help of modern webcams. This helps in providing best education to the children in their own country.

[9] Available at http://www.vectorsite.net/ttgps.html. Accessed on April 30, 2007.
[10] Available at http://www.space.edu/projects/book/chapter26.html. Accessed on April 30, 2007.
[11] Available at http://encarta.msn.com/encyclopedia_761554832/Solar_Energy.html. Accessed on September 24, 2007.
[12] Available at http://www.thespaceplace.com/nasa/spinoffs.html. Accessed on May 02, 2007.
[13] Available at http://www.telemedtoday.com/. Accessed on September 24, 2007.

H. Space Research

With the establishment of the International Space Station,[14] the research activities in outer space have started. The vacuum of the space is specifically helpful for conducting some kind of researches, especially in the field of medicine. For example, protein crystal studies show that more pure protein crystals may be grown in space than on earth. Analysis of these crystals helps scientists better understand the nature of proteins, enzymes and viruses, perhaps leading to the development of new drugs and a better understanding of the fundamental building blocks of life. This type of research could lead to the study of possible treatments for cancer, diabetes, emphysema and immune system disorders, among other research.[15] In addition research in tissue culture, living cells can be grown in a laboratory environment in space where they are not distorted by gravity. Such cultures can be used to test new treatments for cancer without risking harm to patients, among other uses.[16]

I. Resource Exploitation

The celestial bodies in the outer space consist of large quantum of resources, which are of high economic value.[17] The development of the space technology has made the scientists to think in terms of the extraction of these resources. NASA is making efforts in the direction of mining the moon and other celestial bodies. But till date, though the samples are brought from outer space and celestial bodies, the large-scale exploitation of the resources has not become feasible.

J. Military Uses

The space technology is also useful in the military field. Apart from the space-based weapons, the technology is also used for conducting ground-based military operations. The space technology is used for command and control of the troops, communication between the mobile military forces, forecasting the weather to select the weapon system and launch times, missile attack on the targeted areas with pinpoint accuracy, detection of the movement of enemies and missile launches,[18] and so on. However, the development in the space technology relating to military field has made the modern wars more devastating than ever before.[19]

[14] It is a research facility working in the outer space. Agreement on International Space Station was signed on 29 September 1988, by United States, Japan, Canada and members of European Space Agency. The construction work started soon after and it is being upgraded according to the schedule with new components.

[15] Available at http://www.shuttlepresskit.com/ISS_OVR/. Accessed on May 02, 2007.

[16] *Ibid.*

[17] For example, helium-3, which is abundant on the moon, is the costliest thing on the earth. It is costlier than gold, diamond or enriched Uranium.

[18] The US has the facility to detect and verify the Russian missile launch within 180 seconds and also to detect the nature of the launch (test/attack) within 300 seconds. *Supra* n. 6 at 67- 68.

[19] See generally, Luther M. Rangreji, *Demilitarisation of Outer Space: A Vanishing Point of Jurisprudence?* in V.S. Mani, S. Bhatt & V. Balakista Reddy (ed), RECENT TRENDS IN INTERNATIONAL SPACE LAW AND POLICY 517 - 534 (1997).

III. LAW GOVERNING THE OUTER SPACE

Until Sputnik soared into the sky, the legal aspects relating to outer space were considered as unnecessary matters to be discussed at length. Once the Sputnik entered the outer space, the need for legal regime to regulate outer space activities was felt for the first time. For sometime a great deal of controversy arose as to the nature and scope of the law applicable to outer space activities. Some jurists thought that there was complete legal vacuum in outer space and some others opined that traditional international law applied to outer space.[20] The UN General Assembly responded quickly to this controversy by passing series of Resolutions on different aspects of outer space activities.

A. UN General Assembly Resolutions on Outer Space

The UN General Assembly recognised the need for the legal regime to regulate the space activities in 1958 itself. The General Assembly Resolution 1348 of 1958 recognised the common interest of the mankind in outer space and urged for the peaceful use of outer space. The Resolution also established an ad-hoc Committee on Peaceful Uses of the Outer Space with an objective of promoting the outer cpace research, organising the mutual exchange and dissemination of information on outer space research and coordinating the national research programs for the study of outer space. But the ad-hoc Committee failed to function effectively because of the differences between the member states. This has resulted in the General Assembly Resolution 1472,[21] which replaced the ad-hoc Committee with permanent "Committee on Peaceful Uses of Outer Space" (COPUOS).

Upon the initiative of COPUOS, the General Assembly adopted the 1961 Resolution.[22] The Resolution declared that the exploration and use of outer space should be only for the betterment of mankind and to the benefit of states irrespective of the stage of their economic or scientific development. It also declared that the international law, including the Charter of the United Nations applies to outer space and celestial bodies. Moreover, for the first time, it recognised the principle of individual non-appropriation of outer space and celestial bodies.

The above mentioned Resolutions of 1958 and 1961 formed the basis for the development of outer space law. The General Assembly Resolution 1962,[23] which was adopted unanimously, constituted a major step in the progressive development of the space law. It combined certain fundamental principles of space law in one document for the guidance of states in the exploration and use of outer space. The basic principles such as benefit and interests of mankind, non-appropriation, free exploration and use, application of international law and United Nations Charter to space activities, state responsibility for national activities in outer space, principle of cooperation and mutual assistance,

[20] S. Bhatt, STUDIES IN AEROSPACE LAW: FROM COMPETITION TO CO-OPERATION 57 (1974).

[21] UN General Assembly Resolution 1472 (XIV) of 12 Dec. 1959.

[22] UN General Assembly Resolution 1721 (XVI) of 20 Dec. 1961.

[23] UN General Assembly Resolution 1962 (XVIII) of 13 Dec. 1963.

jurisdiction and control over space objects and persons thereon, international liability for damage to a foreign state and the principle "astronauts are envoys of mankind in outer space" are considered as fundamental norms to be observed in the exploration and use of outer space. Subsequently the General Assembly passed series of resolutions especially relating to the peaceful uses of outer space[24] and for the promotion of international cooperation.[25] In addition, the General Assembly has formulated regulations in the field of direct television broadcasting,[26] remote sensing of earth,[27] and use of nuclear power sources in outer space.[28]

However, the resolutions adopted by the General Assembly are not binding on the states except in the cases specifically provided by the UN Charter. They are merely recommendatory in nature.[29] But there exists some difference of opinions regarding the status of the General Assembly resolutions adopted unanimously. The Soviet Union gave much weight to the resolutions adopted unanimously. When the draft Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space was presented to the Committee, the Soviet Union undertook to respect the principles enunciated in the draft declaration if it were unanimously adopted.[30] The UK delegate also stated that although the General Assembly resolutions were not, save in the exceptional cases provided for in the UN Charter, binding upon the member states, a resolution, if adopted unanimously, would be most authoritative.[31] Indian delegate was of the view that a declaration has moral force and, when adopted unanimously, is generally accepted as part of international law.[32] But, if we look at the UN Charter, Article 18 does not make any distinction between two-third majority and unanimity. Resolutions of General Assembly, even on important matters, require only two-third majority. So no special significance is attached to the unanimously adopted resolutions under the UN Charter.[33] Therefore, General Assembly resolutions, whether adopted unanimously or not, are merely recommendatory in nature.

[24] The list includes, UN General Assembly Resolutions 1721, 1802, 1962, 1963, 2130, 2221, 2222, 2223, 2260, 2261, 2600, 2601, 2733, 2776, 2915, 3182, 3234, 3388, 31/8, 32/196, 33/16, 34/66, 34/67, 35/14, 35/15, 36/35, 36/36, 36/97, 37/89, 37/90, 38/70, 38/80, 39/59, 39/96, 40/87, 40/162, 41/53, 42/33, 42/68, 43/56, 43/70, 44/46, 44/112, 45/55, 45/72, 46/33, 46/45, 47/51, 47/67, 47/68, 48/39, 48/74, 49/74, 50/27, 50/69, 51/44, 51/122, 51/123, 52/37, 52/56, 53/45, 53/76, 54/53, 54/67, 54/68, 55/32, 55/122, 56/23, 56/51, 57/57, 57/116, 58/36, 58/51, 58/89, 58/90, 59/2, 59/65 and 59/116.

[25] For example, UN General Assembly Resolutions 1963 and 2130.

[26] UN General Assembly Resolution 37/92 of 10 Dec. 1982.

[27] UN General Assembly Resolution 41/65 of 3 Dec. 1986.

[28] UN General Assembly Resolution 47/ 68 of 14 Dec. 1992.

[29] See generally, Bin Cheng, STUDIES IN INTERNATIONAL SPACE LAW 125-149 (1997).

[30] A/C.1/SR 1342 (2 December 1963) p. 161.

[31] A/AC.105/C.2/SR.17 (17 April 1963) p. 9.

[32] A/AC.105/C.2/SR.22 (24 June 1963) p. 10.

[33] *Supra* n. 28.

B. UN Treaties on Outer Space

Before 1963, there was a strong disagreement between US and USSR regarding the form in which the principles governing the activities in outer space were to be set out. The Soviet bloc wanted a binding treaty. On the other hand, US wanted a General Assembly resolution and not a treaty. One of the principal arguments advanced in favour of General Assembly resolutions was its simplicity. The preparation of a treaty and obtaining required number of ratification was a time consuming process. But, as the General Assembly resolutions lacked binding force, the need for entering binding treaties in the field of outer space was recognised by the states after 1963. It has resulted in the conclusion of five important treaties in the field of outer space under the auspices of UN.

The first among them is the Outer Space Treaty (OST),[34] which is undoubtedly the Magna Carta of international space law. It heavily derives several principles from the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.[35] The Outer Space Treaty provides a legal framework for man's exploration and use of outer space.[36] The Treaty transforms the principles enunciated in resolution 1962 (XVIII) into binding legal obligations. It enumerates the legal status of moon and other celestial bodies in loose terms.[37] The Outer Space Treaty also speaks about the partial demilitarization of outer space, use of moon and other celestial bodies for peaceful purposes,[38] international responsibility for national activities in outer space,[39] launching state party's liability for damage caused by space objects to another state party or to its nationals[40] and state of registry's jurisdiction and control over the objects launched into outer space.[41] The state parties to the treaty are also required to regard astronauts as envoys of mankind in outer space and must render to them all possible assistance in the event of accident, distress or emergency landing on the territory of another state party or on the high seas.[42]

The death of three United States astronauts on board Apollo-I and one Soviet Union astronaut on board Soyuz-I in 1967, resulted in the request from General Assembly to COPUOS for urgently drafting the text of an agreement on assistance to and return of astronauts and space vehicles. Consequently Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return

[34] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. It was adopted by General Assembly on 19 December 1966, opened for signature on 27 January 1967 and entered into force on 10 October 1967.

[35] Stephen Gorove, *Sources and Principles of Space Law* in Nandasiri Jesentuliyana (*ed*), SPACE LAW: DEVELOPMENT AND SCOPE 46 (1992).

[36] Arts. I, III, IX, X and XI of OST.

[37] *Id.* Art. II.

[38] *Id.* Art. IV.

[39] *Id.* Art. VI.

[40] *Id.* Art. VII.

[41] *Id.* Art. VIII.

[42] *Id.* Art. V.

of Objects Launched into Outer Space[43] was entered, which elaborates the basic principle set forth in Article V of Outer Space Treaty. Under the Agreement, the contracting states are duty bound to notify both the launching authority and the Secretary General of United Nations on receipt of information or discovery of emergency or unintended landing of astronauts or space objects in the territory under their jurisdiction, on the high seas or in any other place not under the jurisdiction of any state.[44] If owing to accident, distress or unintended landing, the astronauts land in the territory under the jurisdiction of a contracting party, it must immediately take all steps to search and rescue them.[45] If the landing is outside the territory under the jurisdiction, the contracting parties, which are in position to do so, must extend assistance in search and rescue operations.[46] The astronauts so found must be safely and promptly returned to the representatives of the launching authority.[47] However, the search and return of space objects are only upon request of launching authority. The expenses incurred in such search and return must be borne by the launching authority. The launching authority must take effective steps to eliminate possible danger of harm from hazardous or deleterious space object or its component parts discovered in the territory of a contracting party.[48]

The likelihood of accidents, misfires, mishaps, danger to aircrafts, environmental damage and damage to person and property of other states, which is associated with the space activities, has resulted in the signing of the Liability Convention.[49] It necessitated the drafting of new Convention for imposing the liability on states for damage caused by their space objects. The Liability Convention elaborates Article VII of OST. The Convention provides for rules governing international liability for damage caused by space objects and procedure for the presentation and settlement of claims. The Convention distinguishes absolute liability for damage caused on the surface of the earth or to an aircraft in flight[50] from liability based upon fault when the damage occurs in outer space.[51] The Convention provides for joint and several liability in case of a joint launching.[52] The amount of compensation must be determined in accordance with the international law and the principle of justice and equity so as to restore the aggrieved party to the condition, which would have existed if the damage had not occurred.[53] The settlement of claim for compensation has to be

[43] The Agreement was adopted on 19 December 1967, opened for signature on 22 April 1968 and entered into force on 3 December 1968.
[44] Art. I of Rescue Agreement.
[45] *Id.* Art. 2.
[46] *Id.* Art. 3.
[47] Art. 4.
[48] *Id.* Art. 5.
[49] CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS. The Convention was adopted on 29 November 1971, opened for signature on 29 March 1972 and entered into force on 1 September 1972.
[50] Art. II of LIABILITY CONVENTION.
[51] *Id.* Art. III.
[52] *Id.* Art. V.
[53] *Id.* Art. XII.

made through diplomatic negotiations.[54] If the states fail to settle the claim through diplomatic channels, a Claims Commission may be established for the settlement. The decision of the Claims Commission is recommendatory, unless the parties agree it to be final and binding.[55]

Another major problem in the field of outer space is the problem of identification of the space objects and the entities that launch them. The necessity of identification and registration of space object was recognised by the Ad-hoc Committee on the Peaceful Uses of Outer Space in 1959. This resulted in the adoption of the Registration Convention. [56] It provides for two forms of registration of every space object launched into earth orbit or beyond. Firstly, each object must be registered in a national registry, which has to be maintained by the launching state.[57] Even in case of joint launching of any space object, the object has to be registered in the national registry of one of the states.[58] Since the contents of national registry are left to each states concerned, they may or may not be useful for identifying the objects recorded in the registry. But it shows the existence of juridical link between the launching state and the objects launched. Secondly, each state of registry must furnish to the Secretary General of UN, specific items of information concerning each object carried on its registry.[59] The Secretary General of UN must maintain a register to record these information.[60] It is this information that will, in most cases, help to identify objects in the outer space. If a state party fails to identify a space object, which has caused damage or which may be of hazardous or deleterious nature, it may seek the assistance of other state parties in identifying the object. The other state parties, especially the states possessing space monitoring and tracking facilities, should respond to the greatest extent feasible to such request.[61]

The conquest of moon on 21 July 1969 has made everyone to think about the new norms and legal principles for the regulation of human activities relating to moon and other celestial bodies. This resulted in the formulation and adoption of the Moon Agreement. [62] The UN COPUOS took almost 10 years to draft the provisions of the Moon Agreement, which in addition to restating some of the provisions of Outer Space Treaty, has several novel stipulations. The Agreement stipulates application of international law,[63] peaceful uses,[64] environmental

[54] *Id.* Art. IX.
[55] *Id.* Art. XIX.
[56] CONVENTION ON REGISTRATION OF OBJECTS LAUNCHED INTO OUTER SPACE. The Convention was adopted by the General Assembly on 12 November 1974, opened for signature on 14 January 1975 and entered into force on 15 September 1976.
[57] Art. II (1) of REGISTRATION CONVENTION.
[58] *Id.* Art. II (2).
[59] *Id.* Art. IV.
[60] *Id.* Art. III.
[61] *Id.* Art. VI.
[62] AGREEMENT GOVERNING THE ACTIVITIES OF STATES ON THE MOON AND OTHER CELESTIAL BODIES. The Agreement was adopted on 5 December 1979, opened for signature on 18 December 1979 and entered into force on 11 July 1984.
[63] Art. 2 of the MOON AGREEMENT.
[64] *Id.* Art. 3.

protection,[65] notion of province of mankind,[66] freedom of scientific investigation,[67] protection of life and health of persons on moon and other celestial bodies,[68] etc. Article 11, the crux of the Moon Agreement, declares the moon and its natural resources to be the common heritage of mankind and requires states to establish an international regime to govern the exploration of natural resources of moon and other celestial bodies. The states are conferred with the jurisdiction and control over their personnel, vehicles, equipment, facilities, stations, and installations on the moon.

IV. SOME UNRESOLVED QUESTIONS

A. Definition of Outer Space

The development of the space technology has resulted in the evolution of several legal problems. The first among them relates to the definition, delimitation and demarcation of outer space. In simple terms, air space means the region where air is found and outer space is the zone adjacent to it. An important question to be answered here is how to determine the upper limit of air space? This question is of great significance because the upper limit of air space is the lower limit of outer space and two different systems of law apply to these two zones.[69] There are different theories on the delimitation of outer space evolved by different writers of different countries.[70] Unfortunately, none of the theories is perfect and indisputable. There is a great deal of uncertainty regarding this question because of the fact that there is no precise line, which can mark the boundary between these two areas.[71] The General Assembly of UN, the COPUOS and its legal Sub-Committee, the COSPAR, and the Secretariat of UN have attempted to finalise a viable definition of the outer space. But none of them have succeeded in providing a definition acceptable to all the countries due to the divergence of opinion between different countries.

B. Responsibility/Liability for Private Space Activities

The existing international treaties on outer space state that the responsibility or liability for damage caused in space activity must be shouldered by the states concerned.[72] They also make it clear that the state responsibility and liability also extend to damage caused by private space activities. This means that the benefits of space activities are reaped by the private investors and the burden has to be incurred by the states. This kind of strict responsibility/liability regime discards one of the basic elements of state responsibility that being the notion of

[65] *Id.* Art. 7.
[66] *Id.* Art. 4.
[67] *Id.* Art. 6.
[68] *Id.* Art. 10.
[69] Airspace is subject to the sovereignty of the state beneath it. But the outer space is not subject to the sovereignty of any state.
[70] Some of the important theories are *usque ad coelum*, gravitational theory, theory of satellite orbit, theory of Karman line, theories based on effective control, interest and on security, intermediate theory, etc.
[71] See, E.R.C. Van Bogaert, ASPECTS OF SPACE LAW 11 (1986).
[72] Arts. VI and VII of the OUTER SPACE TREATY, Arts. II, III, IV and V of the LIABILITY CONVENTION, and Art. 14 of the MOON AGREEMENT.

imputability. So the preliminary question for consideration is, whether making the states responsible or liable for the outer space activities conducted by the private investors is in conformity with the principles of justice, equity and fairness?

C. Pollution of Space Environment

The increased space activities have resulted in the large-scale pollution of the space environment in the form of space debris, rocket fuels and nuclear and radioactive substances used for launch. The existing provisions of the space treaties relating to the prevention of pollution are grossly inadequate. Article IX of the Outer Space Treaty prohibits only harmful contamination of outer space without even defining the term. Though more stringent prohibition on the pollution is enshrined under the Moon Agreement,[73] it applies only to the environment of the moon and other celestial bodies and not to the outer space as a whole. More importantly the Liability Convention, which fixes the liability of the states for damage caused by the space activities, concentrates only on damage caused to the person or property of another state. But it is silent about any damage caused to the space environment.

D. Military Uses of Space Technology

Most dangerous effect of space technology is experienced in the form of increased military uses. Though the treaties and UN General Assembly resolutions on outer space clearly state that the outer space should not be subjected to military uses and should only be used for peaceful purposes, they fail to define the terms 'military uses' and 'peaceful uses'. Initially all states including the United States of America had the view that 'peaceful uses' means non-military uses.[74] But when the military reconnaissance satellites had become technically feasible there was a total shift in the US theory. It advocated that the military satellites not involved in aggressive operations could and should be considered peaceful since they would be harmless. According to the US, military use is inevitable as it is also an instrument of maintaining peace and the prohibition of military application would be contrary to the right of self-defence guaranteed by the United Nations Charter.[75] Thus, this misinterpretation has made the outer space subject of several military activities.[76]

[73] Arts. 7 and 11 of the MOON AGREEMENT.
[74] This view is reflected in the proposal made by the US President Dwight D. Eisenhower to the USSR in January 1958. The proposal states that the two countries should agree to use outer space "only for peaceful purposes" and not for "testing missiles designed for military purposes".
[75] *Supra* n. 6 at 63 and 64.
[76] United States, the chief proponent of this view, has successfully used the space observation Jstars system to capture the movement of each vehicle in an area of 200 sq. km on a simple computer screen during the Bosnian war. It also maintains several geostationary communications satellite networks, which are used to support its military operations in various parts of the world. Recently, China demonstrated its space military technology by destroying an old weather satellite by using anti-ballistic missile.

E. Question of Sovereignty over the Celestial Bodies and Mining of their Resources

The concept of common heritage of the mankind (CHM) enshrined under the Moon Agreement[77] prohibits the claim of sovereignty over the moon and other celestial bodies as well as individual exploitation of their resources. It also advocates for the equitable sharing of the benefits derived from the use of the moon and other celestial bodies.[78] Unfortunately, as the Moon Agreement is accepted by only a handful of countries, there exists dilemma as to the binding nature of the concept of CHM. This has left open the possibility of the developed countries utilising the outer space resources at the expense of the rights and interests of the developing countries.

F. Inventions in Outer Space

With the establishment of the International Space Station, the states have shown their willingness to conduct inventions in outer space. The conducting of the inventions in outer space has brought forward two important questions, which remain unaddressed. Firstly, whether the patent, which is a monopoly right, can be granted to an invention conducted in outer space, which is governed by the principle of benefit an interest of all countries?[79] Secondly, how to determine the jurisdiction and law applicable in case of violation of any earthly invention in the outer space?

G. Financing of Space Activities

The space activities in the developmental stage were largely sponsored by the governments as the private sector was not much interested. But once it was evident that the space activities can result in huge profits, the private sector started investing in the space ventures. This has resulted in the emergence of many questions surrounding the rights and duties of the creditors and the debtors involved in the space activities. The non-uniformity in the laws governing investments and securities in different countries has made the enforcement of the rights of the creditors uncertain. There is much confusion as to the jurisdiction in case of dispute, applicable law and remedies available to the creditors in case of default by the debtor, question of insolvency and priority of the competing creditors over the security. Though UNIDROIT is making an effort in this direction, it is yet to achieve success as the regime proposed by it has not yet come into force.[80]

[77] Art. 11 of the MOON AGREEMENT.

[78] Sandeepa Bhat B., *Move Towards a Guiding Principle in Exploring the Outer Space Resources*, I (3) KARNT LAW JOURNAL 19 (2007).

[79] Art. I of the OUTER SPACE TREATY states that exploration and use of the outer space and celestial bodies must be carried out for the benefit and interest of all countries.

[80] UNIDROIT has adopted CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT in 2004, but it has not come into force in the field of outer space as the necessary PROTOCOL ON THE MATTERS SPECIFIC TO SPACE ASSETS is still in the draft stage.

V. CONCLUSION

The space exploration is undoubtedly a boon for technological advancement. All great breakthroughs in the technology depend on the satellite systems in one way or the other. But the path of development of the space law, which is necessary for the best utilisation of the outer space, is not so smooth. The differing interests of the developed and the developing countries remained as an obstacle in the progressive development of the space law. This is evident from the fact that no major space treaty has been entered after 1979. Moreover the above discussed five major treaties fail to provide a well-structured legal framework either due to low level of ratification[81] or due to the loose wordings of the provisions.[82] The rapid technological development has shown that the space law, which is almost four decades old, is no match to the existing technology. Therefore, a serious thinking is necessary in the direction of reformulation of space law to cope with the challenges posed by the space technology.

[81] The Moon Agreement has been signed and ratified only by 11 states.

[82] The provisions of the Outer Space Treaty are misinterpreted to defeat the very purpose of the Treaty.

POSSESSION OFFENCE: A PARADIGM SHIFT IN ONLINE OBSCENITY LAWS—A PROBE

*Talat Fatima**

I. INTRODUCTION

"What is illegal offline is illegal online,"[1] commented the *Home Office* on the present state of obscenity and pornography in the backdrop of the Internet. Aberrant activities on the Internet have given opportunities to the Internet gurus to make lucrative clientele online in total disregard of its baneful effect on the social and moral ethos of human society. Even countries like the United States of America who are the flag holders of freedom of thought and expression abhor it vehemently. As the fleeting images and the nature of the Internet is such that it is becoming difficult to put a halt to the nudity race which is going online, the United Kingdom is rallying forth to control the menace by proposing a new *possession offence* which holds the possessor of obscene material (as per the specific definition of 'obscene material' in the proposed law) liable. This paper analyses the concept of online obscenity comparing it with the traditional concept and examining at the same time the proposal of *possession offence*.

Of all the crimes being committed on the Internet, obscenity appears to be the one which has serious moral implications and it is the form of information that has increased in economic value in our networked environment. It is said that the pornography industry has been estimated to contribute some $20 billion annually to the global economy.[2] While the other cyber crimes threaten the very credibility of the Internet, cyber pornography promotes the use of Internet.[3] Apart from general obscenity or pornographic material there is also specified pornography such as child pornography which has increased multifold with the advent of information technology. Diversity exists among nations regarding illegality of pornography while majority of countries regard child pornography as illegal. Moreover, cultural, moral and legal variations make it difficult to define *"pornographic content"* in a global society.[4] Perhaps all the crimes bearing a moral turpitude face the same difficulties when they are judged at the international level, for example prostitution is regarded in some countries as a source of earning foreign exchange and thus attracting foreign tourists and selling one's body for sexual use by others for monetary gains is promoted as an industry while in countries like India it is an offence.[5] Similarly the debate over obscene material on the Internet is contentious because the governing laws differ drastically.

For example, in Britain, individuals regularly consume images that might be classed as obscene in many Middle Eastern countries. In seeking to clarify this issue the European Commission's Green Paper on the Protection of Minors and Human Dignity in Audio-Visual and Information Services (1998) highlighted the

* Lecturer in Law, Government Law College, Dholpur, Rajasthan (on leave). Presently, Research Scholar, Faculty of Law, University of Delhi, Delhi. E-mail: talatdefence@yahoo.co.in.

[1] A. Travis, BOUND AND GAGGED: A SECRET HISTORY OF OBSCENITY IN BRITAIN 293 (2000).

[2] *Cashing on Porn Boom*, BBC News, July 5, 2001.

[3] Vivek Sood, CYBER LAW SIMPLIFIED 70 (2001).

[4] Y. Akdeniz, *Governance of Pornography and Child Pornography on the Global Internet: A Multilayered Approach* in L. Edwards and C. Walde, (*ed*), LAW AND THE INTERNET: REGARDING CYBERSPACE (1997).

[5] *Supra* n. 3 at 72.

need to distinguish between illegal acts, such as child pornography, which are subject to penal sanctions and children gaining access to sites with pornographic content, which is not illegal but may be deemed as harmful for children's development. Nonetheless, differences in classification between countries create problems when information of a seemingly pornographic content is internationally transmitted via the Internet.[6]

II. THE LIABILITY TRIO

The originator, the carrier and the consumer of the pornographic material form the chain of infringers who can be booked for answerability in law courts. Though the same trio existed in the traditional obscenity crime, in the Internet ambience, due to technological reasons[7] it becomes difficult to differentiate between the originator and the carrier and to nab the ultimate user. The suggested *possession offence* shifts the legal attention from the originator/carrier to the ultimate user or holder of obscene material, thus signalling a sea change in the law concerned. Possession of obscene material with the intent to publish is an offence in the UK (discussed *infra*) though possession for private use is not an offence. Thus, pornography or obscenity though existing as an offence even before the birth of the Internet has now received a boost and due to its economic dimension is emerging more as a life style than as a crime. The cheap and easy accessibility of the Net has expanded the diameters of this crime and its impact on the society especially in the developing nations is devastating giving a bad name to the Internet as well. Before examining the legal response to it by the major countries it is essential to see how the Internet has changed the traditional concept of obscenity.

III. TRADITIONAL OBSCENITY

A thin line demarcates between something which is obscene and something which is a piece of art or creativity. Obscenity is regarded as an offence as it drives a human to commit a crime which he would not have committed had he not countered the disputed obscene material. The lecherous material arouses the baser instincts in a human being and corrupts his judgment so much so that he forgets the standards of decency and morality which are the gifts of civilization. Thus as per Chief Justice Cockburn in *Hicklin* the test of obscenity is this: "...whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[8]

The Supreme Court has observed that the test of obscenity laid down by Cockburn, CJ. should not be discarded. It has held that obscenity without prepondering social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating sex in a manner appealing to

[6] Richard A. Wright and J. Mitchell Miller, Vol. I, ENCYCLOPAEDIA OF CRIMINOLOGY 215 (2005).

[7] "...the convergence of broadcasting, telecommunications and IT industries has allowed text, data, video, audio and images to be reduced to a binary code before transmission to the end-user often rendering it impossible to know what type of content is being transmitted. This is the case with the Internet where data is reduced to small packets transmitted using the TCP/IP." Graham JH Smith *et al*, INTERNET LAW AND REGULATION 402 (3rd ed 2002).

[8] *Hicklin*, (1868) LR 3 QB 360 at 371. It is also confirmed by the Supreme Court of India and various high courts in a number of cases - *Thakur Dutt & Devi Chand*, (1917) PR No. 25 of 1917; *Ghulam Husain*, (1916) PR No. 5 of 1917; *Sree Ram Saksena*, (1940) 1 Cal 581; *Ranjit Udeshi*, (1962) 64 Bom LR 356.

the carnal side of human nature or having that tendency. The obscene matter in a book must be considered by itself and separately to find out whether it is so gross that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall.[9]

Section 292 of the Indian Penal Code, 1860 (IPC) regards the sale, etc., of obscene material as an offence and for such purposes regards certain books, pamphlets and other mediums as obscene if these contain the kind of matter as described in Section 292 (1) in the following words:

> 292 (1)- For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear the matter contained or embodied in it.[10]

The wording of the section does not contain definition of the term obscene and thus it is totally left to the courts to explain the connotation of the term. In *Chandrakant Kalyandas Kakodkar* v. *State of Maharashtra & Others,*[11] the Supreme Court ruled that the concept of obscenity would differ from country to country on the standard of morals of contemporary society and recognized that in India the standards of contemporary society are fast changing. The court said that it is the class and not an isolated case into whose hands the book, article or story falls, suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The Apex Court later held in *Samaresh Bose* v. *Amal Mitra*[12] that in order to constitute an offence under Section 292 of the IPC the obscene matter must be so gross and obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. More importantly the court also held that obscenity is an extremely subjective concept and may differ not only from society to society but also from judge to judge and though the judge may apply his wisdom dispassionately his mind may affect the verdict unconsciously.[13] In the UK, the *Hicklin* test dominated the legal circles until 1954 and slowly and gradually public opinion towards sex became liberal and its horizons broadened so much so that Stable, J. observed in the *Martin Secker Case*[14] that the *Hicklin* test should be applied keeping in mind

[9] Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *Chapter XIV-Offences Affecting Public Health* in THE INDIAN PENAL CODE 259 (26th ed. 1987).

[10] Clause (2) of S. 292 from sub-clause (a) to (e) enumerate the various activities which will come within the mischief of the section and are thus punishable accordingly.

[11] (1969) 2 SCC 687.

[12] (1985) 4 SCC 289.

[13] In yet another case, *Bobby Art International and Others* v. *Om Pal Singh Hoon and Others.* (1996) 4 SCC 1 the Apex Court has justified even the nude scenes in the movie as it was necessary to show the atrocities committed on the young village girl which shattered her psyche and which ultimately led her to take the course of revenge. Thus though nudity in movies in normal circumstances may be regarded as *obscene,* in the given surroundings as in the case of *Bandit Queen,* it is justified.

[14] *Regina* v. *Martin Secker and Warburg Ltd.* (1954) as quoted in Dev Saif Gangjee, *Pondering Cyberporn in the Indian Context* in Nandan Kamath (*ed*), LAW RELATING TO COMPUTERS, INTERNET & E-COMMERCE 309 (2004).

present day standards taking into account the prevailing attitude towards sex. The change in attitude led to the passing of the Obscene Publications Act, 1959 in which under Section 2 obscenity is described in following words:

> For the purpose of this Act, an article shall be deemed to be obscene if its effect is, *taken as a whole,* such as to tend to deprave and corrupt persons, who are likely, *having regard to all relevant circumstances,* to read, see or hear the matter contained in it.

In the United States the *Hicklin* test was abandoned in 1933 in James Joyce's the *Ulysses Case.*[15] Moreover in the US obscenity is not an area of constitutionally protected speech or press.[16] In 1973 the United States Supreme Court formulated the following test:

> (a) whether the "average person, applying contemporary community[17] standards" would find that the work, taken as a whole, appeals to the *prurient interest*...
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[18]

Stevens, J. (dissenting) pointed out in *Smith* v. *United States,*[19] "In my judgment, the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." The concept of obscenity is an extremely relevant one. The community as such does not always correspond to a geographic area. A non geographic standard may, for example, be applied to radio and television broadcasts.[20] However, in the US an individual has the right to possess obscene materials in the privacy of his or her own home.[21] Thus what the state restricts is the dissemination or publication of an offending material and not more than that. The law prescribes imprisonment up to five years for knowingly interstate or foreign transport of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonographic recording, electrical transcription, or other article capable of producing sound or any other matter of indecent or immoral character.[22]

IV. TRADITIONAL ENGLISH LAW AND INDIAN LAW ON OBSCENITY COMPARED

[15] *United States* v. *One book entitled Ulysses*, 72 F 2d 705 (2d Cir 1934).

[16] *Roth* v. *United States,* 354 US 476, 484, "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

[17] Defining the relevant 'community' to determine patent offensiveness and appeal to *prurient interest* is that which appeals to shameful or morbid interest in sex. See, *Brockett* v. *Spokane Arcades, Inc.*, 472 US 491 at 504 (1985).

[18] *Miller* v. *California,* 413 US 15 (1973).

[19] 431 US 291 at 313-16 (1977).

[20] See, *In re Liability of Sagirrarius Broadcast Corp.*, 7 FCC Rcd 6873 (1922) (non geographical standard applied for measuring whether Howard Stern broadcast was patently offensive). As mentioned in Jonathan Roosenoer, CYBER LAW: CRIMINAL LIABILITY 181 (1997).

[21] "If the First Amendment means anything it means that a State has no business telling a man, sitting alone in his own house, what book he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley* v. *Georgia,* 394, US 557 at 565 (1969).

[22] S. 1465.

The traditional English law for long regarded obscenity as a mere libel but the Obscene Publications Act, 1959 (later supplemented and amended respectively by the Obscene Publications Act, 1964 and the Criminal Law Act, 1977) now govern obscenity. Under Section 2 (5) of the said Act defence of ignorance is available to the accused and he can show that he had not examined the objectionable article. The Indian law, however, divides the liability regarding the offence of obscenity. Under Section 292 as regarding the offence of obscenity *knowledge* of the objectionable matter is not regarded as an ingredient of crime but in case of selling or keeping the objectionable matter *mens rea* is required to be proved. The Supreme Court of India in *Ranjit D. Udeshi*[23] stated that to escape liability the accused will have to prove his lack of knowledge. Here the English law and Indian law are the same. Moreover under both the laws as under Section 4 (1) of the Obscene Publications Act, 1959 and under Exception clause of Section 292 of the Indian Penal Code, 1860 publications for public good are exempted from the mischief of the respective sections. The US Supreme Court in the *Splawn's* Case has taken the same view.[24] Moreover in India as regarding exhibition of films a certificate granted by the Censor Board is a good defence by virtue of Section 79 of the Indian Penal Code, 1860. Thus traditional obscenity laws whether in India, the UK or the USA circumscribe the guilt to an area where the objectionable matter is not aimed at achieving public good or where it is not a piece of art, etc. None of the laws come up with a definite definition of the term *obscenity*.

V. CYBER OBSCENITY

Technology and its proliferation expanded the ambit of the crime of obscenity as well. Today pornographic material is freely and readily available on the Internet thus bringing such material to the vision of millions at the click of a button. Ramifications of such a crime are equally great. The *Carnegie Mellon Study*, though methodologically flawed showed that at least half of Internet content was related to pornography. It attracted and became the genesis of the first Internet moral panic.[25] Another project by Mehta and Plaza[26] in 1994 analyzed the content of pornography on the Internet and another study on the newsgroups by Harmon and Boeringer[27] in 1997 showed the ease with which the pornographic material on the Internet was accessed and viewed. Pornography is available on the Internet in different formats, that is, short animated movies, sound files or textual stories.[28] Thus cyber pornography refers to stimulating sexual or other erotic activity over the Internet.[29] This includes pornographic

[23] 1965 (2) Cr LJ 8 (SC).

[24] *Splawn* v. *California*, 1978 Cr LJ 1385: (1977) 52 L Ed 2d 606.

[25] M. Rimm, *Marketing Pornography on the Information Superhighway*, 83 THE GEORGETOWN LJ 1849 (1995) containing a survey of 9,17,410 images, descriptions, short stories, and animations downloaded 8.5 million times by consumers in over 2000 cities in forty countries, provinces and territories.

[26] M.D. Mehta and E.P. Dwaine, CONTENT ANALYSIS OF PORNOGRAPHIC IMAGES AVAILABLE ON THE INTERNET (The Information Society 1997).

[27] D. Harmon and S. Boeringer, *A Content Analysis of the Internet-Accessible Written Pornographic Depictions* ELECTRONIC JOURNAL OF SOCIOLOGY 3 (1997), available at http://www.sociology.org/content/vol003.001/boeringer,html. Accessed on July 30, 2007.

[28] Y. Akdeniz, GOVERNANCE OF PORNOGRAPHY AND CHILD PORNOGRAPHY (1997).

[29] E-bhasin Internet Service, available at http://www.ebhasin.com/bonline/pro_faqs.htm. Accessed on July 27, 2007.

websites, pornographic magazines produced using computers to publish and print the material and the Internet to download and transmit pornographic pictures, photos, writings, etc. Recent reports show that online pornography industry is growing at an alarming rate.[30] Hard-core pornography including material aimed at pedophiles has earned a bad reputation for the Internet. On the Internet there is general pornography or other sexual material which is not illegal for adults to access but there is specific category of pornography called *child pornography* which is legally forbidden by almost all the legal systems including the US, the UK and India. It is illegal for adults to read or view *child pornography*.[31] It is this area of pornography which is stringently treated by legislation almost universally.

VI. CYBER PORNOGRAPHY: THE LEGAL BATTLE

In the traditional UK legislation it is not an offence to possess obscene material in private as long as there is no attempt to publish, distribute or show it to others. But as regards *child pornography* possession as well as circulation is criminalised. Section 160 of the Criminal Justice Act, 1988 makes it an offence for a person to have any indecent photograph of a child in his possession. English obscenity laws amended in 1994 address computer-related activities in this area. Thus in 1994 the Criminal Justice and Public Order Act amended the Protection of Children Act, 1978 and the Criminal Justice Act, 1988 to extend offences in relation to the distribution and possession of indecent photographs of children to the concept of *pseudo-photographs* created through the use of digital images.[32] It also widened the definition of a publication to include a computer transmission which led to the prosecution of Fellows and Arnold in *R* v. *Fellow* and *R* v. *Arnold* in 1996.[33] While countries may differ in their definition of the term *obscenity or pornography* depending on the standard of morals existing in a particular community, almost all the legal systems do have a common conviction in drawing a distinction between *mainstream pornography* which is lawful and *child pornography* which is considered illegal. Courts in UK have also applied the existing legal provisions to the latest activities on the Internet in this field. In *R* v. *Bowden* a court held that downloading and printing images from the Internet fell within the concept of *making* as the term 'applies not only to original photographs but....also to negatives, copies of photographs and data stored on computer disc.'[34] Again the term "publication" has been given a wide interpretation when the Obscene Publications Act, 1959 is applied to the Internet

[30] In a 2002 report, online pornography industry generated approximately $ 1 billion annually with growth projections to $ 5-7 billion over the next 5 years. 74% of adult commercial sites display free teaser porn images on homepage. Child viewing online pornography is all the more shocking. Nine in ten kids who are 8-16 years old have viewed porn online, mostly accidentally while doing homework. As much as twenty six popular children's characters, such as *Pokemon, My Little Pony* and *Action Man,* revealed thousands of links to porn sites out of which 30% were hard-core. As quoted in, Devashish Bharuka and Ajit Joy, *Computer Crimes* in S. K. Verma & Raman Mittal (*eds*), LEGAL DIMENSIONS OF CYBERSPACE 237 (2004).

[31] 5.1 *Pornography*, CYBER CRIME: HIGH TECH CRIME, Overview by the JISC Legal Information Service.

[32] Ian Walden, *Computer Crime* in Chris Reed & John Angel (*eds*), COMPUTER LAW 300 (5th ed 2003). See also, recommendations made by the Home Affairs Committee of the House of Commons in COMPUTER PORNOGRAPHY (1st Report, Session 1993-94 HC No. 126).

[33] *Supra* n. 6 at 216.

[34] (2000) 1 Cr App R 438, 444, per Otton L.J.

activities related with downloading and uploading obscene material. In doing so where images are stored outside the jurisdiction of the United Kingdom, 'publication' is said to take place when the same is transmitted into the United Kingdom. As Rose, L.J. stated in *R* v. *Waddon*:[35]

> As it seems to us, there can be publication on a website abroad, when images are there uploaded; and there can be further publication when those images are downloaded elsewhere. That approach is, as it seems to us, underlined by the provisions of S. 1 (3) (b) as to what is capable of giving rise to publication where matter has been electronically transmitted.

This approach of the court was further confirmed in *R* v. *Perrin*[36] where the Court of Appeal held that 'publication' takes place when images are accessed in the United Kingdom and on this basis the accused was convicted. The verdict was, however, criticized on the ground that the approach subjects foreign publication to UK law and it was suggested that international cooperation would be a more appropriate strategy.[37]

Again while applying the Protection of Children Act, 1978 and Criminal Justice Act, 1988 issue regarding cache copies came up before the court. In *Atkins and Goodland* v. *Director of Public Prosecutions*[38] the pornographic material was contained in the cache memory of the defendant's machine which are generally created and stored automatically by the browser software and the user is *unaware* of the activity. As the prosecution failed to prove that the defendant was *aware* of the cache copies the conviction could not be upheld in appeal as the court ruled that *knowledge* of the offending material on the part of the defendant was necessary to make him liable under Section 1 (1) of the Protection of Children Act, 1978 or under Section 160 of the Criminal Justice Act, 1988. Similar issue came up before the court in *R* v. *Westgarth Smith and Jayson*[39] and the prosecution was able to prove that the defendant was aware of the *caching* function within his browser software and the court held that the mere 'act of voluntarily downloading an indecent image from a web page on to computer screen is an act of 'making'. Section 7 (4) (b) of the Protection of Children Act, 1978 recognises as *publications*, photographs stored on computers and even *pseudo-photographs* - digitally altered images especially used by pedophiles to merge the bodies of adults with the faces of children. Federal Law prohibits transport of the offending material. In a landmark prosecution *United States* v. *Thomas*[40] a couple living in Milpitas, California, were convicted by a Memphis, Tennessee jury for transmitting obscene computer-generated images (GIF files) in interstate commerce. The case centred on the 'Amateur Action Bulletin Board System', a BBS operated from the Thomases' home since 1991. It featured a collection of adult computer files. Robert Thomas scanned pictures from sexually explicit magazines purchased in California public bookstores, creating GIF files organized in binary format on the BBS (which has to be

[35] Unreported, April 6, 2000. C A (Crim Div).
[36] (2002) EWCA Crim 747.
[37] M. Hart, COMPUTERS AND LAW 25 [2002].
[38] (2000) 2 All ER 425.
[39] (2002) EWCA Crim 683.
[40] Nos. 94-6648, 94-6649, 1996 US App Lexis 1069 (6th Cir 1996).

downloaded and then decoded to become viewable images). Access to the GIF file was limited to BBS members. Robert Thomas also purchased videotapes in adult bookstores, which he sold to BBS members.[41] Thomas could escape conviction at the jury stage as there was no evidence that the BBS had any members in Tennessee other than Dirmeyer or that Thomas ever solicited subscribers from Tennessee, he also denied requesting the magazines,[42] and the jury acquitted him on the child pornography charges. However, on appeal it was argued that the operative statute does not cover computer transmissions at all and it is concerned only with *tangible objects*, not *intangible computer impulses*.[43] The US Court of Appeals for the Sixth Circuit rejected these claims and ruled that the defendants "erroneously concluded that the GIF files are intangible" and sentenced Thomas to thirty-seven months of imprisonment and his wife, Carleen, was sent to prison for thirty months.

In US a pornography specific legislation, the Communications Decency Act, 1996, couched in broad terms aims at protecting children from exposure to indecent material and is the most successful and controversial effort so far.[44] The Communications Decency Act, 1996 prohibits a person in interstate or foreign communications who uses a "telecommunication device"[45] for knowingly making, creating, or soliciting any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication."[46]

Regarding "interactive computer services" in particular, the Act prohibits their use to send or "display in a manner available to" a person under eighteen any comment, request, proposal, suggestion, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs,

[41] *Supra* n. 20 at 182.
[42] In 1994, Dirmeyer sent Robert Thomas an envelope containing three child pornography magazines. Dirmeyer claims that he sent Thomas an e-mail message stating that he had "hardcore sex magazines featuring young girls having sex with adults and other children," proposing to let Thomas scan the magazines and create GIF files. The government claims that Thomas was "interested," and Dirmeyer then sent the child pornography magazines – which formed the basis for a federal search warrant. According to the Society for Electronic Access, local law enforcement authorities did not bring any charges against Thomas and returned the computer equipment. In its *amicus curiae* brief, the Society notes, "Mr. Thomas and Mrs. Thomas have sworn under oath and without contradiction that the San Jose Police Department provided them with a written release affirming that the materials stored on the [Amateur action BBS] were legal and not obscene." *United States* v. *Thomas, Nos.* 94-6648, 94-6649, Brief of Amicus Curiae The Society for Electronic Access, 7 n. 2 (6th Cir Dated Apr. 1995).
[43] The claim was relied on the decision of the Tenth Circuit in *United States* v. *Carlin Communications Inc.*, 815 F 2d 1367 (10th Cir 1987).
[44] *Supra* n. 20 at 185.
[45] According to the government, "[w]hatever meaning is encompassed by th[e] term ["telecommunication device"], it specifically 'does not include an interactive computer device'." *A.U.C.L.* v. *Reno*, Civ No 96-963, Defendant's Opposition to Plaintiff's Motion for a Temporary Restraining Order (ED Penn Feb 14, 1996); 47 USC. S. 223 (a) (1) (B).
[46] *A.U.C.L.* v. *Reno*, Civ No 96-963, Defendant's Opposition to Plaintiff's Motion for a Temporary Restraining Order (ED Penn Feb 14, 1996); 47 USC S. 223 (a) (1) (B).

regardless of whether the user of such service placed the call or initiated the communication.[47]

Penalties under the Communications Decency Act included fines up to $ 100,000 and 2 years' imprisonment.[48] The said Act being rated as broad enough to stifle the liberty of speech and expression guaranteed under the First Amendment was struck down in July 1997.[49] Under the Act interest of minors was jealously guarded.

Traditional Indian law of obscenity is contained in Sections 292-294 of the IPC as mentioned above. Apart from some other popular forms of cyber crimes the Information Technology Act, 2000 (IT Act) included pornography in the category of IT Offences in Chapter XI. Section 67 of the IT Act says:

> 67-*Publishing of information which is obscene in electronic form*- Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodies in it, shall be punished on *first* conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a *second* or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

The wording of the section does away with any distinction between child pornography or mainstream pornography which only aims at the fact that obscenity in any form on the Net is illegal. However, the main stress is on *publishing or transmitting in electronic form* the offending material and hence mere possession of such an offending material is not an offence under the section. The punishment given is not only two-fold, that is, not only that imprisonment and fine are to be read conjointly, but that the punishment is two-tier. In the case of a subsequent conviction the punishment is doubled which is stringent according to Indian standards.

Section 67 is, however, conspicuously silent on certain important points. *Firstly,* it says nothing about the *knowledge* of the offender, i.e., it says nothing whether in cases where such an offending material is hidden in the *cache* memory of a system of which the offender is unaware, what will be his liability in such a case?

Secondly, the section uses the word *persons* and omits to mention the age of such a person. It only means that if the material published, *depraves and corrupts* the mind of a mature person of 50 years the offence is committed but if a child of 8 years is not depraved or corrupted by seeing, hearing or reading such an offending material the offence is not committed. Does the Section then aims at particular application? Like fraud and other crimes in the matter of Internet obscenity too the provisions of traditional obscenity law as contained in Section 293 of the IPC will be helpful as to when it comes to prosecute persons dealing

[47] 47 USC S. 223 (d).
[48] *Ibid.*
[49] Dev Saif Gangjee, *Pondering Cyberporn in the Indian Context* in Nandan Kamath (*ed*), LAW RELATING TO COMPUTERS, INTERNET & E-COMMERCE 305 (2004).

in cyber pornography that is accessible to persons under the age of twenty years.[50] Other Acts like the Indecent Representation of Women's Act, 1986 and Young Persons (Harmful Publication) Act, 1950 may also have a bearing in the matter of Internet obscenity.

Thirdly, a comparison of Section 292 of the Indian Penal Code, 1860 and Section 67 of the IT Act discloses the similarity in omitting to clarify as to what is the true content of the term *obscenity;* vagueness regarding the term is the common lacuna of both the sections. The phrase "deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear the matter contained or embodied in it" is a verbatim replica of the phrase contained in Section 2 of the Obscene Publications Act, 1959 of the UK which reads:

> For the purpose of this Act, an article shall be deemed to be obscene if its effect is, *taken as a whole,* such as to tend to deprave and corrupt persons, who are likely, *having regard to all relevant circumstances,* to read, see or hear the matter contained in it.

However, as the Obscene Publications Act, 1959 is an Act containing the detailed obscenity law of the UK, the vagueness of the phrase is clarified in other parts of the Act but as Section 67 of the IT Act is a sole provision on the Internet obscenity, the wordings need to be more comprehensive. An altogether exhaustive law of internet obscenity is strongly recommended.

VII. POSSESSION OFFENCE: A PARADIGM SHIFT

In UK the *Home Office* recommends a distinct offence of possessing explicit pornography containing actual scenes or realistic depictions of

- intercourse or oral sex with an animal;
- sexual interference with a human corpse;
- serious violence in a sexual context; and
- serious sexual violence.[51]

The suggested law, however, brings a change in the definition of the term 'obscene material' which lays more stress on the *content of* the pornographic material rather than on the *effect* of it on the mind of the user.[52] It was also thought that some kind of serious sexual violence may not be covered by the current obscenity laws as they do not "deprave and corrupt" but are more likely

[50] Devashish Bharuka and Ajit Joy, *Computer Crimes* in S.K.Verma & Raman Mittal (*eds*), LEGAL DIMENSIONS OF CYBERSPACE 240 (2004). S. 293, IPC reads: Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees.
[51] CONSULTATION: ON THE POSSESSION OF EXTREME PORNOGRAPHIC MATERIAL, Scottish Executive and Home Office (2005). The CONSULTATION also specifies that "serious violence" will mean serious bodily harm in a setting that is sexual. The CONSULTATION defines "serious bodily harm" as where a prosecution for grievous bodily harm could be brought in England and Wales, and assault to severe injury in Scotland [40-42].
[52] Jacob Rowbottom, *Obscenity Laws and the Internet: Targeting the Supply and Demand*, CRIMINAL LAW REVIEW 100 (February 2006).

to repulse the reader.[53] The *Home Office Consultation* justifies the *possession offence* in the following words:

> a desire to protect society, particularly children from exposure to such material, to which access can no longer be controlled through legislation dealing with publication and distribution and which may encourage interest in violent or aberrant sexual activity.[54]

This proposal has triggered a host of controversies and legal discourses as many believe that the proposal goes a bit too far in criminalizing the mere possession of porn images/material. The proposal, however, depicts the helplessness of law-makers as they are not left with any other option because the demand for such objectionable material is on the rise and suppliers also escape the legal noose due to inadequacy of law on the subject.

VIII. Online Intermediaries

In UK during the debate on the inclusion of *possession offence* in obscenity laws in 2004 there was also discussion regarding liability of the ISPs (Internet Service Providers) and other online intermediaries regarding distribution or transmission of obscene or defamatory material. Stress was laid on imposing greater responsibility on the ISPs in preventing access to obscene material. However, this suffered a set back where the e-commerce regulations gave more immunities to the online intermediaries who act as *'conduits'*, *'cache'* or *'host'* and provided immunity to them on the basis of absence of 'knowledge' of the illegal content.[55]

Despite the incrimination of the online intermediaries based on 'knowledge' factor the trend in UK has been more towards looking for the self-regulation model. For example, "the Internet Watch Foundation (IWF) which operates a hotline to which individual users can report sites containing illegal content."[56] There are also other ways which intermediaries can adopt to stop the dissemination of illegal content like the BT or British Telecom Internet services can block access to the site listed as illegal by the IWF.[57]

India being an upcoming information superpower with increasing connectivity the liability of ISPs is also raising its head as a crucial issue. All the sections relating to IT offences are to be read with Section 79[58] of the IT Act as it contains the exemption of Internet Service Providers (ISPs) from being liable for

[53] *Calder and Bayers* [1969] 1 QB 151.

[54] *Supra* n. 52 at 101.

[55] The E-Commerce Directive divides the ISPs acting as an intermediary into three categories; where they are passive and act as mere *conduits*; where the intermediary is concerned with *caching*; and lastly, where the role is limited to mere *hosting*. In all these cases awareness of illegal content on the part of the intermediary negates immunity. *Supra* n. 7 at 402.

[56] *Supra* n. 52 at 105.

[57] *Ibid.*

[58] S. 79 says, "Network Service Providers not to be liable in certain cases- For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention."
Explanation – For the purposes of this Section -
(a) "network service provider" means an intermediary,
(b) "third party information" means any information dealt with by a network service provider in his capacity as an intermediary.

information or data regarding which they had no knowledge and exercised due diligence to prevent the offence. By virtue of Section 79 the ISPs are granted immunity regarding publication of any information or data which is obscene in electronic form as declared under Section 67 of the IT Act.

In 2004[59] the arrest of the CEO of bazee.com in connection with the sale of an obscene CD triggered the debate regarding the distinction between the 'service provider' and 'content provider'. The case is also significant for deciding the future course of investigation pattern regarding cyber crimes in India where service providers are involved. It was argued in legal circles that arrest of Avinash Bajaj, the CEO of bazee.com was not justified as he was only the 'service provider'. However, heading of Section 79 declares; 'Network service providers not to be liable in certain cases'. The section is peculiar in the sense that much against the established criminal law pattern which puts the burden of proving the offence on the investigation, here the burden is on the ISPs which only explains that the law makers were perhaps apprehensive and aware of the difficulties which would come in the way of an investigator of crimes committed through electronic means. Admittedly, this marks a lacuna in Section 79 of the IT Act which does away with the distinction between the various roles played by the ISPs like the mere *access provider, content provider, hosts, caches,* etc., while in sub-section (a) it only uses the term 'intermediary' to explain the meaning of the term 'network service provider'. This lacuna places greater liability on the intermediaries as often they may be required to be answerable in law courts for defaults, which were not committed by them. For instance, where the ISP is in the role of a *conduit,* holding him liable under Section 79 would be unfair. Again an online intermediary may also be in the role of a *host* where it stores the information of the recipient of the service and in such a case he is not to be held liable if it is stored at the request of the recipient provided the *host* is unaware of the illegality and if aware he acted expeditiously to remove it.[60] Though under the IT Act the ISPs are saved from unnecessary and unreasonable harassment as tons of data passed through their medium of which they are not aware and, hence, not made responsible; the section is backward in its content as distinction between the different roles played by the ISPs would avoid the crucial issues revolving around cases like bazee.com in future.

IX. Global Extra-Legal Efforts

Child pornography as different from mainstream pornography is somehow connected with social issues and hence it receives stringent legal treatment[61] even in most advanced societies like the USA and the UK and the growth of the Internet has provided child pornographers with a distribution vehicle which is

[59] The entire matter revolved around three persons; firstly a 17 year old Delhi school boy who captured porn images of his female class fellow and later circulated it through his mobile phone to about 50 other students; the second person was Ravi Raj of IIT Kharagpur who picked up the video clip and posted it on bazee.com which is said to be India's largest Internet auction site. An e-firm in Kharagpur helped him in the deal and more than half a dozen persons purchased it; the third was Avinash Bajaj, the CEO of bazee.com who was arrested by the Delhi police on December 17, 2004.

[60] This is the pattern followed in the E.U. Commerce Directive which distinguished well between the different roles played by the online intermediaries and fixed the liability accordingly. *Supra* n. 7 at 2.

[61] *Supra* n. 50 at 238.

perceived to be relatively anonymous.[62] Thus not only legal reforms in this area but even other steps are taken to tackle it. In July 1995 the British police were involved in *Operation Starburst*, an international investigation of a paedophile ring who used the Internet to distribute pictures of child pornography. Some 37 men were identified worldwide and arrests were made in England, Europe, America, South Africa and the Far East.[63] In India some positive steps have been taken in this direction. The Bombay High Court Committee gave its recommendations in its report on 30.01.2002 which was pursuant to a letter sent to the Chief Justice of the Bombay High Court.[64] The issues before the Committee resolved themselves into two broad categories: *Regulatory* and *Educational*.[65] In the *Educational* category the Committee dealt with awareness among Internet users through e-mail newsletters, online content, hotlines and help desks. In the *Regulatory* category the ISPs, cyber cafes, and online portals, which provided communication services were taken care of.[66] The committee made the following recommendations to protect children from pornographic sites on the Internet:

a) Blocking of sites;

b) Preventing minors from accessing unsuitable material from cyber cafés;

c) Preventing the publication or propagation of pornography from cafés.

X. CONCLUSION

The Internet praxis is diagonally opposed to regulation. But the effects of the online world are felt in the offline world where we live. Regulation must be given a chance and legal acumen must come forth to extend the arms of law to the jungle of lawless abode called cyberspace. The proposed *possession offence* will not be a real success unless the technological hardships are also given due consideration.[67] In a squeamish society like India, obscenity is the most intolerable offence as it erodes the highly sensitive moral ethos of traditional culture. Keeping a watch on the technological fallouts which are being faced by countries with high connectivity and convergence and at the same time reporting and prosecuting the infringers in this area would fetch positive results. Where humans survive, law must reign supreme else we all perish.

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[62] *Ibid.*

[63] Yaman Akdeniz, *The Regulation of Pornography and Child Pornography on the Internet*, 1 THE JOURNAL OF INFORMATION LAW AND TECHNOLOGY (1997).

[64] The letter was treated as *suo moto* writ petition. The Internet Users Association of India (IUAI) was permitted to intervene in the matter. On September 28, 2001, a division bench of the High Court passed an order appointing a committee to suggest and recommend ways, measures and means to protect/shield minors from access to pornographic and obscene material on the Internet. (13.02.2002 passed in WP no. 1611 of 2001), available at http://www.cyquator.com/highcourt/2.htm. Accessed on July 30, 2007. *Supra* n. 50 at 239.

[65] *Ibid.*

[66] The Committee was of the view that it was inherently impossible, or at the very least, impractical to evolve a common set of regulations governing all classes of service providers. Each type of service provider has its unique combination of techno-economic capabilities and limitations. E.g., online portals that provide communication platforms and solutions (e-mail, messaging, and chat) cannot assume the same responsibilities as an Internet Service Provider, which provides access to the Internet and thereby to all of its protocols, including those provided by online portals. *Supra* n. 53 at 109.

PROCEDURAL JUSTICE FOR PARTIES TO ARBITRATION: REFLECTIONS AND PERSPECTIVES ON INDIAN ARBITRATION LAW

V. S. Jaya * & *Vishnu Konoorayar* *

I. INTRODUCTION

With the increase in trade and commerce arbitration has become a sophisticated alternative dispute settlement mechanism for deciding disputes of national as well as international character. One of the objectives of the arbitration law is to provide for an arbitral procedure, which is fair, efficient, and capable of meeting the needs of specific arbitration. In India, the law governing arbitration is contained in the Arbitration and Conciliation Act, 1996.

As is the case of any modern statute, this Act while recognising the concept of 'party autonomy, in some form or the other, prescribes the procedure for conduct of arbitral proceedings.[1] The parties are given the freedom to agree on the procedure to be followed by the arbitral tribunal, on the language to be used and about the time of filing the statement of claims and defence. The principles of natural justice have been made equally applicable to proceedings before the arbitral tribunal. These include the right to hearing, written proceedings before the arbitral tribunal and seeking assistance of courts in taking evidence. The earlier Arbitration Act of 1940 did not contain any specific provision relating to the applicability of the provisions of the Code of Civil Procedure, 1908, or of the Indian Evidence Act, 1872 but the Arbitration and Conciliation Act, 1996 specifically excludes their applicability but expressly includes the basic principles that govern the arbitral procedure.[2] The arbitrators, as impartial judges, have to follow the equality rule in every phase of the arbitral proceedings.

This article analyses the issues and trends relating to the procedural rights of the parties under the Arbitration and Conciliation Act, 1996. Any irregularity would often help the parties to challenge the award. At the same time minor irregularities in the procedure may not affect the validity of the award at all. The act of non-compliance with the procedure and its effect on the arbitral award needs careful analysis. In this context the scope and extent of discretion being exercised by the tribunal in matters of procedure is also examined.

II. PROCEDURAL RIGHTS OF A PARTY: NATURAL JUSTICE, LEGITIMATE EXPECTATION AND FAIRNESS

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* Assistant Research Professors. The Indian Law Institute, New Delhi.

[1] S. 18. Arbitration and Conciliation Act, 1996 provides, "Equal treatment of parties. The parties shall be, treated with equality and each party shall be given a full opportunity to present his case."

[2] S. 19 reads, "Determination of rules of procedure (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).
(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.
(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

The Arbitration and Conciliation Act, 1996 embodies the basic principle that the parties shall be treated with equality and each party shall be given full opportunity of presenting his case.[3] This basic rule requires that arbitral tribunal shall act impartially and with fairness. The doctrine of natural justice pervades the procedural law of arbitration. It is not so much to act judicially but to act fairly. The procedure adopted must be fair, just and reasonable in the particular circumstances of the case. The requirement of reasonable or legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in fair decision-making process.[4]

In *Food Corporation of India* v. *Indian Council of Arbitration,*[5] the court held that legislative intent underlying the Act is to minimize the supervisory role of the courts in the arbitral process and quick nomination or appointment of arbitrator, leaving all contentious issues to be decided by him. The institution opted by the parties shall nominate the arbitrator as sought for by them giving due importance to the procedural rights of the parties.

In *Maula Bux* v. *State of West Bengal,*[6] the Court explained the important rules of natural justice. They include the following duties

1. To act fairly, in good faith, without bias, and in a judicial manner.
2. To give each party the opportunity of adequately stating his case and correcting or contradicting any relevant statement to his case and not to hear one side behind the back of the other.
3. A man must not be a judge in his own case, so that a judge must declare any interest he has in the subject matter of the dispute before him.
4. A man must have a notice of what he is accused.
5. Relevant documents, which are looked at by the tribunal should be disclosed to the parties interested.

Later these elements were incorporated in the Arbitration and Conciliation Act, 1996[7] and have been in issue in many cases before courts under this Act.

A. Fair Hearing

Fair hearing is a postulate of decision-making. The procedure for affording an opportunity of hearing is as important as a decision on merits. The question is, whether the authority had been fair in dealing with the party? If it has been arbitrary, absent-minded, unreasonable, or unspeaking, it cannot be denied that there has been no administration of fair hearing.[8]

[3] *Supra* n. 1.
[4] *Food Corporation of India* v. *Kamadhenu Cattle Feed Industries,* AIR 1993 SC 1601.
[5] (2003) 6 SCC 564.
[6] AIR 1990 Cal 318.
[7] Ss.18, 12 and 24, ARBITRATION AND CONCILIATION ACT, 1996.
[8] *Ibrahim Kunju* v. *State of Kerala,* AIR 1970 Ker 65.

This implies that the affected party should not only know the case, which is made against him, but he must also know what evidence has been considered for drawing a presumption affecting him. He should be given a fair and real opportunity to rebut that presumption. The authority should apply its mind to relevant facts and decide rationally without reliance on facts not furnished to the other party.[9]

B. Requirement of Notice

The arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received, unless otherwise agreed by the parties.[10] Hence, receipt of a notice from a party to the agreement for reference of the dispute to arbitration by the other party is a pre-requisite for commencement of the arbitral proceedings. Appointment of an arbitrator at the behest of appellant without sending notice to the respondent and afterwards an *ex parte* award given by the arbitrator is illegal.[11] Similarly, there is an obligation on the Chief Justice to issue notice to the opposite party when he is moved under section 11 of the Act,[12] for giving an opportunity of being heard.[13] Likewise, if the party fails to comply with demand of other party to appoint an arbitrator within 30 days of receipt of notice to do the same, his nomination at a later stage shall be accepted only on the proof of bonafides of the party.[14] The Arbitration and Conciliation Act, 1996 gives ample opportunity to the parties to present their case[15]and the requirement of notice for providing the parties with an opportunity to present their case fairly is an inevitable procedure.[16] The notice required under the Act means either written notice or an oral notice. Even if the notice given is an oral notice, it will not amount to violation of the principles of natural justice. Though the arbitral tribunal may not be strictly bound by the rules and procedures observed in the court, its procedure should not be opposed to natural justice. In *Nagender Singh* v. *Commander,*[17] the Guahati High Court observed as follows:

> There shall not be any opportunity offered to one side to get an advantage with the arbitrator over the other by lack of notice. If there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the arbitrator, the

[9] D.P. Mittal, TAXMAN'S LAW OF ARBITRATION, ADR AND CONTRACT, 121 (2nd ed 2001).
[10] S. 21, ARBITRATION AND CONCILIATION ACT, 1996.
[11] *Dular Poddar* v. *Executive Engineer,* (2004) 1 SCC 73.
[12] S. 11, ARBITRATION AND CONCILIATION ACT, 1996 deals with procedure for appointment of arbitrators.
[13] *S B P & Co* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618.
[14] *Groupe Chimique Tunisien S. A.* v. *Southern Petrochemicals Industries Corporation Ltd.*, (2006) 5 SCC 275.
[15] S. 18.
[16] S. 24 (2). It reads, "The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property."
[17] AIR 1989 Gau 553.

proceedings will be vitiated by the breach of the principles of natural justice.

In case an arbitrator did not allow adjournment even for one day when counsel of the party was busy in another arbitration proceedings and proceeded to pass an award *ex parte*, without giving notice of his intention to do so, it is a violation of the principles of natural justice.[18] Natural justice generally requires that the persons liable to be directly affected by the proposed acts, decision or proceedings be given adequate notice of what is proposed, so that they may be in a position to make representations on their own behalf and to appear at a hearing or an enquiry. They must get an opportunity for effectively preparing and answering the case they have to meet.

It is mandatory that the opportunity should be effective and not illusory. The notice should be of sufficient length to enable the party to prepare his case. The purposes and the requirement of the show-cause notice are two fold. Firstly, the person must get an opportunity to meet the case against him. Secondly, he must also get an opportunity to set forth his own case to show why an order adverse to him should not be made.

The judiciary has laid down the following requirements of a valid notice:

1. Specific and intelligible reasons for the proposed action should be furnished. Basic reasons for the proposed action should be spelled out briefly and broadly.[19]
2. The reasons cannot be vague and too general in nature but must be specific and based on material facts.[20]
3. The objections to the proposed action should be considered and reason shall be given as to why action is taken despite the objections.[21]
4. If an order does not deal with any of the reasons stated in the explanation, such an order is liable to be quashed.[22]
5. Where the opportunity of being heard is required to be reasonable, the matter will be justifiable and it will not depend on the sweet will of the authority concerned.[23]
6. The question whether the opportunity is reasonable or not will be a matter for the interpretation by the court and not by the authority itself.[24]

[18] *Rusthanjee Deensha* v. *Manual Probhudayal*, AIR 1964 MP 15.
[19] *Saptagiri Enterprises* v. *C.I.T.*, (1991) 189 ITR 705 (AP).
[20] *Vijayasanthi Investments (P.) Ltd.* v. *Chief C.I.T.*, (1991) 187 ITR 405 (AP).
[21] *Kashiram Aggarwla* v. *Union of India*, (1965) 56 ITR 14 (SC).
[22] *Shyam and Co.* v. *C.I.T.*, (1991) 192 ITR 387 (All).
[23] *Sagarmal Spinning And Weaving Mills Ltd.*, v. *C.B.D.T.*, (1972) 83 ITR 130 (MP).
[24] *Smt. Jeevan Kumar* v. *Union of India*, (1979) 118 ITR (Raj).

7. Where an arbitrator is appointed without the intervention of the court, proceeding commences from the date of service of notice by one party on another requiring appointment of an arbitrator.[25]
8. In a case where the date of sending the notice is prior to coming into force of the 1996 Act, the earlier Act of 1940[26] will be applicable.[27]
9. For filing an application under Section 8 of the Act and to refer the matter for arbitration, service of notice on the other party under arbitration agreement is not mandatory. What is necessary at this stage is existence of an arbitration agreement.[28]
10. Non-consideration of the very material and relevant documents throwing light on the controversy to have a just and fair decision amounts to misconduct on the part of the arbitrator and would vitiate the award.[29]

C. Fair Consideration of the Available Materials

An effective opportunity would be fair if it is followed by a fair consideration of the explanation offered and the materials available. The final order should be one that discloses reasons for the decision sufficient to show that the mind of the authority has been applied to relevant facts and the decision has been reached rationally without reliance on facts not furnished to the affected party.

In *Mandu Distilleries (P) Ltd.* v. M.P. *Pradushan Nirwaran Mandal*,[30] the court held that, an order is liable to be quashed if the grounds stated in the show-cause notice and the basis of the order are not the same and are distant neighbours.

Another Issue is whether an oral hearing is a part of the reasonable opportunity of being heard. Some times such an oral hearing is necessary on the grounds of public policy and public interest. In such situations the authority that hears must decide. Usually courts take the view that, when a right to representation is given and a decision is taken on consideration thereof, there is compliance with the requirements of natural justice. It is the duty of the arbitral tribunal to act fairly to both the parties, and as such the arbitral tribunal must not hear one party in the absence of the other.

Russel has summarized this obligation on the part of the arbitral tribunal in the following words: "The tribunal does, however, have the power to proceed in the absence of a party. For a hearing to take place even if one of the parties is not

[25] *Milkfood Ltd.* v. *Ice Cream (P) Ltd.*, (2004) 7 SCC 288.
[26] THE ARBITRATION ACT, 1940.
[27] *Supra* n. 25.
[28] *Rashtriya Ispat Nigam Ltd.* v. *Verma Transport Co.*, (2006) 7 SCC 275.
[29] *Sathyanarayana Bros. (P) Ltd.* v. *T.N. Water Supply and Drainage Board*, (2004) 5 SCC 314.
[30] AIR 1995 MP 57. See also, *Shyam and Co.* v. *C.I.T.*, (1991) 192 ITR 387 (All).

present, the tribunal should ensure that the non-attending party has been given due notice of the hearing."[31]

Not every meeting between the arbitrator and one party alone amounts to arbitrator acting in contravention of the principles of natural justice. A meeting can take place in which one of the parties had no notice. If nothing is, however, done in that meeting except to discuss a question of adjournment and the meeting is in fact adjourned without the subject or reference being entered upon, the court usually refuses to set aside the award on the ground of lack of notice. The arbitral tribunal cannot decide a dispute, being the subject matter of the arbitral reference, on the basis of its personal knowledge or private inquiries. The parties under such circumstances can take recourse to protection under the Act.[32]

As far as possible, the arbitral tribunal should not deny the opportunity to either party to the reference to be represented through a lawyer. Where statutory rules or bye-laws of a trade association specifically provide that no party shall be entitled to appear before the arbitrators through a lawyer without their permission, it would be within the discretion of the arbitrators to permit a party to be so represented. But the discretion by the arbitrators is to be exercised judicially.[33]

The arbitral tribunal should give sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property.[34] It is the duty of the arbitral tribunal to inform the parties that it intends to proceed with reference to a specified time and place, whether the parties attend or not.

In *Lovely Benefit Chit Funds & Finance Pvt. Ltd.* v. *Puran Dutt Sood,*[35] the Delhi High Court observed,

> An arbitrator ought not to proceed *ex parte* against a party if he has not appeared at one of the sittings. The arbitrator should give another notice intimating that he would proceed with the matter *ex parte* if either party fails to attend. Even after notice, if the defaulting party does not attend, the arbitrator may proceed in his absence.

The main objective behind the enactment of the Arbitration and Conciliation Act, 1996 is to obtain the benefit of minimal judicial intervention. That is the reason why the arbitrators are vested with the power to decide even challenges against their own mandate. For the smooth and efficient functioning of the arbitral tribunal, it is necessary that the arbitrators shall be insulated against the clutches of judiciary. Keeping in view this fact, courts now a days interfere with

[31] Anthony Walton and Mary Victoria, RUSSEL ON ARBITRATION 263 (20th ed 1982).

[32] S. 34 (2) (iii) ARBITRATION AND CONCILIATION ACT, 1996 reads, "An arbitral award may be set aside by the court if, the party making the application was not given proper notice of the appointment of an arbitrator, or the arbitral proceedings or was otherwise unable to present his case."

[33] *Nanalal M. Varma and Co.* v. *G. Ambalal,* AIR 1956 Cal 476.

[34] S. 24 (2).

[35] AIR 1983 Del 413. See also, *supra* n. 11.

the arbitral awards only when there is a substantial irregularity in the arbitral proceedings. A minor deviance from the procedure without affecting the outcome of the proceedings or the award may not vitiate the award. This view is emphasized in the following statement of Fali Nariman, the distinguished senior lawyer and former President of the International Council on Commercial Arbitration (ICCA), "The general feeing is that, in arbitration devotion to law is less admired by the public than a willingness to strain it." That must be right and although it applies to the arbitrator's substantiated decision; it also applies with particular force to decisions about how to proceed.[36] Here what is to be examined is whether the arbitrators are at their freedom to determine the degree of compliance with the procedure accepted by the parties.

D. Rules of Major Arbitral Institutions Regarding the Requirement of Notice

Rules of arbitration of the International Chamber of Commerce (ICC),[37] contains the requirement of notice[38] and require that a reasonable opportunity to present the case should be given to each party.[39] Similarly, the international arbitration rules of the American Arbitration Association (AAA)[40] mandates giving of notice.[41] It contains provisions that enable the parties to have a reasonable opportunity to present their case.[42]

Rules of the London Court of International Arbitration (LCIA)[43] deal with the procedure before the arbitral tribunal. It also contains provision regarding notice to parties, similar to the rules of other international arbitral institutions.[44]

[36] Geoffrey M. Beresferd Hartwell, *Arbitration – A Commercial Man's Way to Justice*, 32 CHARTERED SECRETARY 984 (2002).

[37] The International Chamber of Commerce is an international organization that works to promote and support global trade and globalisation. The arbitration rules of ICC came in to force on Jan. 1, 1998.

[38] Art. 21 (1), Rules of the Arbitration of the International Chamber of Commence reads, "When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it."

[39] Art. 15 (2) reads, "In all cases the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

[40] American Arbitration Association is a very popular international organization that administers arbitration proceedings and other forms of alternate dispute resolution mechanisms. The International Centre for Dispute Resolution (ICADR) is widely acknowledged as the international branch of AAA. It introduced its first set of international arbitration rules in the year 1991.

[41] Art. 13 (2), International Arbitration Rules of the American Arbitration Association reads, "The tribunal may hold conferences or hear witnesses or inspect property or documents at any place it seems appropriate. The parties shall be given sufficient written notice to enable them to present at any such proceedings."

[42] Art. 16 (1) reads, "The arbitral tribunal shall fix the date, time and physical place of any meetings and hearings in the arbitration, and shall give the parties reasonable notice thereof."

[43] LCIA is a London based international institution and provides a forum for dispute resolution proceedings for all parties irrespective of their location or system of law. LCIA adopted its international arbitration rules on January 1, 1998.

[44] Art. 19.2, The London Court of International Arbitration Rules reads, "The arbitral tribunal shall fix the date, time and physical place of any meetings and hearings in the arbitration, and shall give the parties reasonable notice thereof."

The parties should have a reasonable opportunity of presenting their case.[45] The Arbitration and Conciliation Act, 1996 of India, has adopted the relevant provisions of the UNCITRAL Model Law[46] dealing with requirement of notice.[47] The provisions enable the parties to have reasonable opportunity to be heard.[48]

An analysis of the Arbitration and Conciliation Act, 1996 and the rules of arbitration of international arbitral institutions make it clear that Indian law is compatible with the Arbitration rules of those institutions. The arbitral awards made by impartial and expert arbitrators have sanctity. As experts are available in India at lesser cost, it is likely to become a popular centre for alternative dispute resolution in the world over and particularly in the Asian region.[49]

III. DETERMINATION OF THE RULE OF PROCEDURE

The Arbitration and Conciliation Act, 1996 provides for the determination of rules of procedure for conduct of arbitral proceedings. The Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, does not bind the arbitral tribunal.[50] The parties are given the freedom to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.[51] Failing agreement by the parties, the arbitral tribunal may conduct the arbitration in such a manner, as it considers appropriate.[52] The power thus conferred on the tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[53]

The same approach is followed in the matter of granting freedom about the place of arbitration and the language to be used.[54] Failing agreement, the arbitral tribunal is empowered to decide the matter. In determining the place, the tribunal should take into consideration the circumstances of the case including the convenience of the parties.[55] For consultation amongst its members, for hearing

[45] *Id.* Art. 14.1 (i) reads, "The arbitral tribunal has the general duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent."

[46] The growth in international commercial arbitration has provoked rapid development towards the harmonization of the law and particularly the practice of international arbitration. As part of this endeavour, the United Nations Commissions on International Trade Law adopted UNCITRAL Model Law on international commercial arbitration on June 21, 1985. Most of the countries who are signatories across the globe has adopted this convention and amended their respective national laws accordingly. India amended its earlier ARBITRATION ACT of 1940 in tune with the UNCITRAL Model law to facilitate the global business and trade.

[47] Art. 24 (2), UNCITRAL Model Law on International Arbitration reads, "The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of goods, other property or documents."

[48] Art. 18 reads, "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[49] Ashwani Kumar Bansal, *India as a Centre of International Arbitration*, 32 CHARTERED SECRETARY 1414 (2002).

[50] S. 19 (1), ARBITRATION AND CONCILIATION ACT, 1996.

[51] *Id.* S. 19 (2).

[52] *Id.* S. 19 (3).

[53] *Id.* S. 19 (4).

[54] *Id.* Ss. 20 (1) and 22 (1).

[55] *Id.* S. 20 (2).

witnesses, experts or parties, or for inspection of documents, goods or other property, the arbitral tribunal may meet at any place it considers appropriate, unless otherwise agreed by the parties.[56] About the period of time within which the claims and defences to be filed by the parties, the parties may agree or the arbitral tribunal will determine.[57]

A. Autonomy of Parties in Determining Rules of Procedure

The autonomy of parties to determine the rule of procedure is of special importance. It allows the parties to select the rules, according to their specific wishes and needs. It provides flexibility for solving any procedural question, not regulated by the agreement or the Act. It enables resolution of any procedural difficulty experienced during the course of the proceedings. In *National Thermal Power Corpn.* v. *Singer Co.*,[58] the court upheld the principle of party autonomy in international business as the guiding principle of the self regulating mechanism envisaged by arbitration rules of major institutions like ICC.

The arbitral tribunal is bound to follow the rules of procedure laid down by the parties through an agreement or determined by the arbitral tribunal with reference to specific features of the dispute unimpaired by the traditional concepts and uninfluenced by the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872. This is because of the fact that technicalities or rigidities of procedural laws can no longer affect the promptness and effectiveness of the decision making process of the arbitral tribunal.[59] Too much insistence on the procedural requirements is not desirable.[60] Parties are therefore, empowered to determine the rules of procedure to enable the arbitral tribunal to decide the dispute in a just, fair and reasonable manner.

In some cases the parties may expressly refer the matter to arbitration rules of an international arbitral institution. Under such a situation, the arbitrators have to follow procedural rules of that particular arbitral institution. The arbitral proceedings, which are regulated by arbitration rules of arbitral institutions and ad hoc arbitration rules of international arbitration, are to a great extent harmonized.[61]

If there is no express stipulation as to the procedures to be followed by the arbitral tribunal, it should determine the procedure. There are many occasions where parties impliedly mention the rules of some arbitral institution. The question is whether the arbitrators are bound by such procedures in the absence of an express reference. One of the basic premise on which the arbitration proceedings are carried out is the intention of the parties to arbitration that is

[56] *Id.* S. 20 (3).

[57] *Id.* S. 23 (1).

[58] (1992) 3 SCC 551.

[59] *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425; See also, *Raipur Development Authority* v. *Chokhamal Contractors*, (1989) 2 SCC 721.

[60] *Jawarmal Ram Karan* v. *Jaumadas*, AIR 1990 Guj 42.

[61] L.M. Sharma, *International Commercial Arbitration*, (1994) 3 COMP LJ 57 (Jour).

reflected through their consent. What is of significance is that the arbitration agreement must be bilateral.[62]

In *P.C. Agarwal* v. *K.N. Khosla,*[63] the Delhi High Court has taken the view that when an arbitration agreement includes a reference to arbitration, both present and future disputes shall be referred to arbitration. The procedure adopted by the parties determines the rules of the arbitral proceedings. Hence, it follows that the arbitrators are duty bound to follow the procedure envisaged by the parties. Suppose, the main contract is in some way related to UNCITRAL Model Law, then the reference to arbitration by the parties of a dispute connected with the contract will also be governed by the UNCITRAL Model Law.[64]

Under such situations, the courts are reluctant to validate an award if it is against the procedure intended by the parties. Taking into consideration, the cost of the proceedings and importance of international trade, the courts have started showing leniency in validating such arbitral awards when the procedural infirmity is a minor one. An arbitrator is a substitute for a civil judge to determine civil disputes between the parties. The arbitrator is required to act as an impartial judge. He must decide disputes according to the procedure agreed by the parties unless otherwise provided.[65] The procedure agreed by the parties can be subjected to minor changes, if there is no objection from the parties, provided it should not affect the end result in an adverse manner otherwise the court can set aside such an award.

B. Discretion of the Arbitral Tribunal in Procedural Matters

It is an accepted principle that when parties have agreed upon a procedure, the arbitral tribunal is bound to follow it. However, it is possible for the arbitral tribunal to exercise its discretion also. Substantial irregularities in the procedure will definitely vitiate the award. Hence, by keeping the objective of the arbitration process in mind, the arbitrators have the freedom to exercise their discretion, provided that it is not affecting the outcome of the proceedings. It is said that, "Within the frame work of new law, the parties, arbitral tribunal and designated institutions could frame procedures for still quicker resolution of commercial disputes."[66]

Hence the arbitral tribunal may conduct its proceedings in the manner it considers appropriate, if the parties fail to agree on the procedure to be followed by it. It is subject to the requirement of equal treatment of parties,[67] giving sufficient advance notice of hearing,[68] communication of statement, information and other documents by one party to another,[69] participation of the expert in an

[62] L.M. Sharma, *Arbitration Agreement Must be Bilateral*, (1994) 2 COMP LJ 19 (Jour).
[63] AIR 1975 Del 54.
[64] *Dharma Prathisthanam* v. *Madhok Construction (P) Ltd.*, (2005) 9 SCC 686.
[65] M.A. Sujan, *Accountability of an Arbitrator*, AIR 2002 Journal 66.
[66] G. Raghuraman, *Salient Features of the New Law of Arbitration*, (1996) 2 COMP LJ 84 (Jour).
[67] S. 18, ARBITRATION AND CONCILIATION ACT, 1996.
[68] *Id.* S. 24 (2).
[69] *Id.* S. 24 (3).

oral hearing,[70] and making documents available to the other party for examination.[71]

In *Sudarshan Trading Co.* v. *State of Kerala,*[72] the Supreme Court has opined that arbitral tribunal will have the power to adopt its own rules for evaluating evidence. It is the sole judge of quality and quantity of evidence. The court has no jurisdiction to substitute its own evaluation of the conclusion of law or fact. Courts in other countries have taken another view in this regard.[73] To give reasons that are inadequate, to act on no evidence or on evidence that ought to have been rejected, and not taking into consideration evidence which ought to have been considered, are viewed as an error of law.

C. Relevance of Place and Language of Arbitration

The arbitral proceedings including hearing and meetings are expected to be held at the place determined by the parties. However, the arbitral tribunal has the discretion to meet at any place it considers appropriate to enable arbitral proceedings being carried out in a manner most efficient and economical. The legal relevance of the place of arbitration is that it determines the international character of arbitration.[74] It is also a connecting factor for the 'territorial' applicability of the law and becomes the place of origin of the award. Apart from this, the place of arbitration has got some factual relevance too. The place should be convenient for the parties and the arbitrators. It should be selected taking into account the availability and the cost of support services needed and the location of the subject matter in dispute. If the arbitrator decides the place of arbitration without looking into the relevant factors, the parties can approach the court for setting aside the award on the ground of substantial procedural irregularity. As against the usual court procedure, the arbitration does not contain the limitation as to selection of forum.[75]

With regard to the language of the arbitral proceedings also the Act gives freedom to the parties to agree upon the language to be used.[76] If they fail, the arbitral tribunal determines the language. Translation of documentary evidence in that language may be ordered to accompany the evidence. Bearing in mind the needs of the proceedings and economy, the arbitral tribunal may consider which of them should be accompanied by a translation into the language of the proceedings and may order accordingly. The arbitral tribunal can also determine the possible need for the interpretation of the oral presentations. The arbitral tribunal must allow the parties to submit their claim and counter claim at the earliest opportunity.[77] If there exists circumstances, which requires the parties to

[70] *Id.* S. 26 (2).
[71] *Id.* S. 26 (3).
[72] AIR 1989 SC 890.
[73] *R* v. *Agricultural Land Tribunal Ex. P. Bracy*, (1960) 1 All ER 518.
[74] *Bhatia International* v. *Bulk Trading S. A.*, (2002) 4 SCC 105; See also, *Shreejee Traco (I) (P) Ltd.* v. *Paperline Internatioanl Inc.*, (2003) 9 SCC 79.
[75] Krishna Sarma, *Trans-national Commercial Arbitration in India*, (2000) 4 COMP LJ 11 (Jour.).
[76] S. 22, ARBITRATION AND CONCILIATION ACT, 1996.
[77] Per Cotton L.J. in *Philipps* v. *Philipps*, (1978) 4 QB 127.

give an oral hearing, then the arbitral tribunal must provide it. Non-compliance with such procedures will vitiate the award.

D. Determination of Rules of Procedure under Rules of Major Arbitral Institutions

Rules of major international arbitral institutions are somewhat similar in various aspects including the rules of arbitral proceedings. The rules of ICC[78] contain provisions as to place of arbitration,[79] language of arbitration,[80] and choice of law.[81] If the parties fail to reach an agreement on the place of arbitration, language of arbitration or choice of law, the arbitrators themselves can decide that matter.[82] The ICC rules also deal with the mode of establishing the facts of the case and hearings.[83]

The AAA[84] rules require that once the tribunal has been constituted, the parties or their representatives may communicate in writing directly with the tribunal.[85] The rules also contain provisions as to place of arbitration,[86] language[87] and mode of conduct of arbitration,[88] provisions as to written statements,[89] evidences,[90] and hearings.[91]

The Rules of LCIA[92] deal with the mode of conduct of arbitral proceedings.[93] It also speaks elaborately about the procedures to be followed in filing written statements and documents.[94] Under the LCIA rules, the parties may agree in writing on the seat of their arbitration. Failing such a choice the place of arbitration shall be London, unless and until LCIA court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.[95] There are rules regarding the language of arbitration,[96] hearings procedures and procedure for admission of the witnesses. Article 22 of LCIA rules deal with certain additional powers conferred on the arbitrators to conduct the proceedings.

[78] *Supra* n. 37.
[79] Arts. 13 and 14, RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE.
[80] *Id.* Art. 16.
[81] *Id.* Art. 17.
[82] *Id.* Arts. 14 (3), 17 (2).
[83] *Id.* Arts. 20 and 21.
[84] *Supra* n. 40.
[85] Art. 12, INTERNATIONAL ARBITRATION RULES OF THE AMERICAN ARBITRATION.
[86] *Id.* Arts. 13 (1), 13 (2).
[87] *Id.* Art 14.
[88] *Id.* Arts. 16 (1) – 16 (4).
[89] *Id.* Arts. 17.
[90] *Id* Arts. 19.
[91] *Id.* Art. 20.
[92] *Supra* n. 43.
[93] *Id.* Art. 14, London COURT OF INTERNATIONAL ARBITRATION RULES.
[94] *Id.* Art. 15.
[95] *Id.* Art. 16.1.
[96] *Id.* Art. 17.

IV. CONCLUSION

The Arbitration and Conciliation Act, 1996, as it is modelled on the UNCITRAL Model Law has become a statute of international business standards in dealing with arbitration cases. In the era of fast growing industrialization and international commercial trade, there is an imminent need for settlement of disputes at an early date. Over judicialisation of such disputes in traditional court divides the parties into two enemy camps. Redressal of disputes does not require confrontation, but it requires collaboration, co-operation and mutual trust that are available in arbitration proceeding than in the ordinary courts. The arbitrator, while acting as an impartial judge, has to adhere to certain basic principles such as *audi alterm partem* and independence and impartiality. Any deviance from the normally expected standards may vitiate the entire arbitration process. So the law envisages accountability of the arbitrators. The setting aside of an arbitral award on the ground of minor procedural irregularities will destroy the objective behind out of court settlements.

Though the Act seems to be a perfect legislation with its objective of speedy and quick disposal of disputes, there are flaws in it as has been proved by actual practice. Now that more than ten years have elapsed after it came in to force, the need for a change in the law is more urgently felt by the stakeholders. Seven years ago the law commission had suggested some changes to the Arbitration and Conciliation Act, 1996, but they have not yet been implemented on the ground that said recommendations if implemented would invite more judicial intervention in the arbitral proceedings.[97] There is also a counter argument that under the law commission's recommendations there would be changes in the law to reduce delays caused by application to the court in both domestic and international arbitrations.[98]

Amendments to the Arbitration and Conciliation Act, 1996 were proposed in 2003 by the Arbitration and Conciliation (Amendment) Bill, 2003. Keeping in view its importance, the Committee on Personnel, Public grievances, Law and Justice took the view that the Bill as pending before Parliament was not sufficient and comprehensive enough to achieve the desired objectives of the new statute and recommended that the Government may consider bringing in a fresh comprehensive legislation on the subject before Parliament, as expeditiously as possible. However, nothing more has happened since then and the present Act continues to be in force without any changes to its provisions.

The present move to incorporate more provisions relating to procedural rights of parties as part of Arbitration and Conciliation Act, 1996 requires a re-look in this context. What the arbitrators are supposed to do is to adhere to the principles of natural justice in deciding the disputes and resolve the dispute for the parties. Overemphasis on their rights may destroy the very purpose of arbitration itself.

[97] 176th Report of the Law Commission of India (2000).
[98] O.P. Malhotra, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION (2006).

DISHONOUR OF CHEQUES IN INDIA

Lalitha Sreenath[*] *& M.R. Sreenath*[*]

I. INTRODUCTION

An efficient banking system determines the buoyancy of the nation's economy in terms of growth and development. India is among the countries that show a continual growth in the usage of cheques. The volume of cheques cleared is on an average Rs. 200 crores per year.[1] Cheques contribute to 80% of the banking transactions.[2]

II. HAZARDS CHEQUES AND BUSINESS

Though the cheques have been in use in Great Britain for nearly 250 years and until the end of the nineteenth century, the use of cheques as a means of payment was a privilege confined to rich and wealthy businessmen. With economic growth, commercial expediency made use of cheques popular among business organizations and then it spread to private individuals. As late as in 1960s and 1970s, the businessmen were reluctant to take on these conditional payments as avoidable risks and whenever business compelled them, it became a common practice for most stores in London to actually photograph the customers holding the cheques for easy identification and proof in case the customers turned fraudsters. However, to counter this reluctance of the risk-averse businessmen, the banks invented the cheque guarantee card and assumed responsibility for the cheques. The cheque guarantee card provided a guarantee to the retailer that the cheque he had accepted in payment for goods will not be dishonoured due to lack of funds provided he (the retailer) had fulfilled his responsibilities laid down in the guarantee scheme. Thus, in 1975 around 2,000 million cheques were used and the number kept steadily soaring until 1990 when it touched four billion. Cheque usage has fallen since then primarily due to the increased use of plastic cards and direct debits by personal customers. However, cheques remain popular in the business sector for paying suppliers. Overall cheque volumes are expected to continue to fall from a level of 2.8 billion in 1999 to about 1.7 billion by 2009.

Cheques, despite their convenience are but conditional payments, the condition being that the cheque will be paid on presentation. Payment by cheques definitely has advantages for the drawer of the cheques. For instance, if the goods are found to be defective, it may be of considerable negotiating advantage for a person to be able to stop the payment on the cheque and to return the goods, rather than trying to rescind the sale and demand refund. This has some important practical consequences. Suppose, that A buys goods from B and pays

[*] Professors, IIMI, Indore, Madhya Pradesh, India.

[1] See, *NCR to Run Cheque Truncation Project*, 26 June , 2005, available at http://www.thehindubusinessline.com/2005/06/27/stories/2005062701881200.htm. Accessed on March 30, 2007.

[2] It is similar to countries like England, the US and France where cheque has always dominated non-cash payments. See, RBI REPORT OF THE WORKING GROUP ON CHEQUE TRUNCATION AND E-CHEQUES, July 30, 2003.

by cheque. The cheque is stolen from B by C who forges B's endorsement and cashes it through the banking system in circumstances where the bank is protected and A's account is debited. B cannot demand further payment from A, as the condition for payment was not breached since the cheque was, in fact, paid upon presentation.

However, there are other serious consequences of accepting payment by cheque, particularly in sales of movable goods, when the rights of innocent third parties intervene. For example, when A enters into a contract with B for the purchase of a car and pays B by cheque for the car, the general rule would be that ownership of the car would pass to A when the cheque is handed over. If A acts fraudulently and the cheque is not paid, B may be unable to recover the motorcar if A has sold it to someone else in the meantime.

III. LEGAL POSITION IN INDIA

In India, the Negotiable Instruments Act, 1881 was framed as an attempt to consolidate the law relating to the bills of exchange, cheques and promissory notes. Though the legal provisions contained in the Act reflect the status of the law prevailing in 1881 in England, the need for effecting amendments was felt only after withstanding the tests of time and judicial scrutiny for more than a century. It was prompted by the incidence and volume of misuse of the cheque facility. Ideally, a cheque or a negotiable instrument should be as infallible as genuine currency of the country. Once a person starts a current account or a savings account with prescribed minimum balance, the cheque facility would be available to the customer. However, it became commonplace for unscrupulous persons to issue cheques to traders for goods or services with full knowledge of the insufficiency of funds in the bank account to meet the cheques when presented.

IV. LEGAL REMEDIES

Since cheque is negotiable instrument of great commercial convenience and currency, the dishonour of cheque "comes as a shocking betrayal for the holder and may have a deleterious and cascading effect on the lives and financial health of many others." In Indian law, the legal remedies available were under the Indian Penal Code, 1860 (IPC) for fraud or for recovery of the money under civil law.

The criminal remedy was available under Section 420 read with Section 415 of the IPC, if the accused induced the victim to part with any property to do any of the things mentioned in the section. Thus, a person could be convicted of the offence of cheating if he took delivery of goods against the cheque and had positive intention of deceiving the party at the time of issuing the cheque. Otherwise it would amount to only a civil liability requiring the filing of a civil suit for the recovery of the amount These remedies were found inadequate to address the incidence of cheque deception or the genuine concerns of the trading community.

Accordingly, the Banking Laws Committee was set up in 1972 by the Government of India which submitted its report in 1975. The recommendation of

the said committee was to bring in an amendment to the IPC to effectively deal with the evil of cheque bouncing by way of sanctioning imprisonment up to five years.

To address the legitimate concerns of honest businessmen, the Negotiable Instruments Act, 1881 (N.I. Act) was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, w.e.f. 1.4.1989. The Statement of Objects & Reasons mentions that this has been done to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.[3]

Accordingly, the Act introduced a new chapter, namely, Chapter XVII (Sections 138-142), to the N.I. Act 1881. To borrow the words of D. H. Waghela, J., "Section 138 of the Act makes a civil transaction an offence by fiction of law."[4] As elaborated by M.B. Shah, J., "... section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained."[5]

The Chapter is purported to be a complete code in itself with respect to the dishonour of cheques and deals with various aspects of dishonour of cheques:

(i) The ingredients of the offence of dishonour of cheques;
(ii) Quantum of punishment for committing such an offence;
(iii) Determination of liability for offences committed by companies; and
(iv) Procedure for filing complaint before the court.

Notwithstanding the fact that transaction of supply of goods or service on payment by cheque apparently looks like commercial transaction, dishonour of cheque per se has been made an offence subject to fulfilment of the prescribed conditions precedent and subsequent. The important feature of the new amendment is the doing away with the proof of *mens rea* - the dishonest intention of the drawer when the cheque bounces has been dispensed with.

Further addition has been made by the Negotiable Instruments (Amendment & Miscellaneous Provisions) Act, 2002 prescribing imprisonment upto 2 years or

[3] See, Dr. P.W. Rege's commentary quoted in *Goa Plast Private Limited* v. *Souza*, (2004) 2 SCC 235: "It is true that Negotiable Instruments Act has not failed to provide a remedy for the aggrieved party; but the foregoing provisions of the Act lay down a procedure which is in the first place very elaborate and since the remedy would be merely of a civil nature, the process to seek civil justice, in the second place becomes notoriously dilatory. To ensure promptitude in remedy against defaulters, therefore, was the only way in which the element of credibility and dependability could be re-introduced in the practice of issuing negotiable instruments in the form of cheques. The best way to do this was to provide a criminal remedy or penalty, which is just the thing that is sought to be done by the Amending Act."

[4] *Rohit Chunubhai Mehta* v. *Gujarat State Fertilizer Company Limited and Another*, (2004) 110 CrLJ 2298.

[5] *Nepc Micon Limited and Others* v. *Magma Leasing Limited*, (1999) 4 SCC 253.

payment of a fine, which may extend to twice the amount of the cheque or both for an offence under Section 138.

A. Pre-conditions for filing complaint under Section 138

The pre-conditions for filing complaints under Section 138 are:

1. Payee / holder in due course of such cheque should have made a demand for the payment of the money by giving a notice in writing[6] to the drawer of the cheque within 30 days of the receipt of information from the bank regarding the return of the cheque unpaid.
2. Drawer of such a cheque should have failed to make payment of the said amount of money to the payee or holder in due course of the cheque within 30 days[7] of the receipt of the notice.[8]
3. The complaint should have been filed within the time limit. The payee or holder in due course has to file the complaint within 30 days of the drawer failing to make payment after 30 days of receiving notice (after 30 days but within 60 days of issuing the notice to the drawer).
4. The complainant should issue due notice. The requirement of giving notice is mandatory.[9] If no notice demanding payment is served upon the drawer within 30 days from the date of dishonour of cheque, complaint is not maintainable. Notice means a notice in writing. Postal acknowledgement duly containing the signature of the drawer is proper proof of service of notice on the addressee shown in the postal acknowledgement. The commencing date in reckoning the period of 30 days is the date on which the notice is returned to the sender. The drawer of the cheque has the right to show that he had no knowledge that the notice was brought to his address. The notice need not necessarily be by registered post only.[10] It can be sent by a telegram, fax

[6] *K. Bhaskaran* v. *Sankaran Vaidhyan Balan*, (1999) 7 SCC 510: "Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address".

[7] Substituted for "within fifteen days" by THE NEGOTIABLE INSTRUMENTS (AMENDMENT AND MISCELLANEOUS PROVISIONS) ACT, 2002 (55 of 2002) w.e.f. 06.02.2003.

[8] It is based on the rule of purposive construction or mischief rule laid down in *Heydon's Case* (76 ER 637), which states that in the interpretation of a statute the court must adopt that construction which suppresses the mischief and advances the remedy. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the proviso to Section 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. The drawer is given 30 days time from date of receipt of notice to make the payment, and only if he fails to make the payment he may be prosecuted.

[9] In many cases it has been emphasized that it is not the "giving" of the notice but it is the failure to pay after "receipt" of the notice by the drawer, which gives the cause of action to the complainant to file the complaint within the statutory period.

[10] In this connection a reference to S. 27, GENERAL CLAUSES ACT becomes relevant in those cases where the notice has indeed been sent by registered post. S. 27 reads: "Meaning of service by post- Where any Central Act or Regulation made after the commencement of this Act authorizes or

5. or by a letter as well. Registered post is preferable as there would be clear evidence of the service.

It is pertinent to note that "provisions relating to giving of notice often receive liberal interpretation"[11] as the context envisaged in Section 138 of the Act invites such a liberal interpretation for the person who has the statutory obligation to give notice "because he is presumed to be the loser in the transaction and it is for his interest that the very provision is made by the legislature."[12] A person "receives" a notice when it is duly delivered to him in person, or at the place of his business.[13]

The payee has the statutory obligation to "make a demand" by giving notice.[14] The thrust in the clause is on the need to "make a demand". Legislature has prescribed notice as the only mode for making such demand. Once the notice is dispatched, payee's part is over and the next depends on what the receiver does. However, the courts have also opined "... no rule of universal application can be laid down that in all cases where notice is not served on account of non-availability of the addressee, the court must presume service of notice.[15]

Interestingly in some cases doubts have been raised about the possibility for fraudulent complaints being filed by some unscrupulous complainants, who may manage to get a false postal endorsement of "refusal" or "unclaimed" or "party not available" and then prosecute an innocent or bona fide drawer, in vain.[16] And the courts have rebutted such assertions with witty repartee. The drawer can also establish by evidence that said endorsement of "refusal" or "unclaimed" or "not found" during delivery time to be false. Alternatively, he may pay the amount due and compound the matter.

B. Requirements of a valid complaint

The requirements are:

a. There should be a complaint in writing by the payee or holder in due course of the cheque.

requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, preparing and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post." However, the Supreme Court has consistently held that refusal of notice would amount to service of notice.

[11] P.St.J. Langan (*ed*), MAXWELL'S INTERPRETATION OF STATUTES 99 (12th ed 1969) Cf. BLACK'S LAW DICTIONARY at 621: "A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it."

[12] K.T. Thomas, J. in *K. Bhaskaran* v. *Sankaran Vaidhyan Balan and Another*, (1999) 7 SCC 510.

[13] *Kunjan Panicker* v. *Christudas*, (1997) 2 Ker LT 539 (DB) wherein it was held that 11 refusal and even failure to claim in, will be tantamount to service of notice. See also, *Harcharan Singh* v. *Shivrani*, (1981) 2 SCC 535 and *Jagdish Singh* v. *Nathu Singh*, (1992) 1 SCC 647.

[14] Clause (b) of the proviso to S. 138, NEGOTIABLE INSTRUMENTS ACT, 1881.

[15] *D. Vinod Shivappa* v. *Nanda Belliappa*, 2006 Indlaw SC 256.

[16] *Id.* para 24.

b. within the completion of one month from the date on which the cause of action arose
c. filed through the Power of Attorney,[17] agents of the payee, or the holder in due course;
d. containing the list of witnesses and the list of documents.

C. Checklist for filing complaint under Section 138

a. The cheque should have been issued in discharge of whole / part of the debt / liability.
b. It should have been presented to the bank within a period of 6 months of the date on which it is drawn or within the period of its validity, whichever is earlier.
c. There should be dishonour of the cheque.
d. Such dishonour should be due to insufficiency of funds.[18]

The payee may successively re-present a dishonoured cheque any number of times within the period of its validity but when a notice under Section 138 of the Act is received by the drawer of the cheque, the payee or the holder of the cheque forfeits his right to again present the cheque, since the cause of action had accrued when there was failure to pay the amount within the prescribed period.

D. Place of filing

The complainant can choose any of the courts within whose jurisdiction any one of the five acts constituting the offence had taken place; "(1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice."[19] The court not inferior than that of a Metropolitan Magistrate or a Judicial Magistrate of the

[17] *Bharatbhai K. Patel* v. *C. L. Verma (Since Deceased) Thro' Poa-Surjit Singh Macker and Another*, 2002 (108) CrLJ 3469, wherein the complaint was disallowed as the complainant was neither payee nor the holder in due course stating that absence of specific power of attorney was very relevant in the case.

[18] *Dalmia Cement (Bharat) Ltd.* v. *Galaxy Traders & Agencies Ltd.*, (2001) 6 SCC 463. *Contra*, *Sadanandan Bhadran* v. *Madhavan Sunil Kumar*, (1998) 6 SCC 514. In *Kumaresan (N.C.)* v. *Ameerappa*, 1991 (10) KLT 893. The Court held that there could not be more than one cause of action in respect of a single cheque. Where on dishonour of the cheque, a notice was issued which was received by the drawer and on his request for time for payment the complaint was not filed and on his subsequent failure to pay the cheque amount as agreed, the sender re-presented the cheque for clearance and on dishonour, for want of sufficient funds, he filed complaint, the complaint was held not maintainable. Reconciling and harmonizing the position of law, the Apex Court further held that the payee may, without taking premptory action, in exercise of his right under clause (b) of the proviso to s. 138 of the Act, go on presenting the cheque, at any point of time during the validity of the cheque. But, once the payee gives a notice under the above clause (b) of the proviso, he forfeits his right, to present the cheque again, for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for the offence and the cause of action for filing the complaint will arise.

[19] *K. Bhaskaran* v. *Sankaran Vaidhyan Balan*, (1999) 7 SCC 510.

First Class only can try an offence under Section 138. All the following courts have jurisdiction:

(i) the court situated at the place where the drawer of the cheque fails to make the payment of money;[20]

(ii) the court situated at the place where the bank through whom the cheque was issued, is located;

(iii) the court situated at the place where the cheque was issued or delivered.

If the magistrate is of the opinion that there are sufficient grounds for proceeding, he shall call the complainant for pre-summoning evidence and presentation of the necessary documents. Summons is issued for the attendance of the accused and the witnesses.

E. Offences by companies

In cases of dishonour of cheques issued by companies, the Supreme Court in *Anil Hada* v. *Indian Acrylic Ltd.*,[21] neatly explained the rationale for fixing liability on the natural persons, who might have directly or indirectly contributed to the commission of the offence or who could have prevented it in the following words:

> The offence of dishonour of cheque comes into being by a deeming clause in Section 138 of the N.I. Act and, in case of offence by companies, the natural persons are again held guilty by a deeming fiction as provided in the provisions of Section 141 of the N.I. Act.

Where the person committing the offence is a company, every *person in charge* of or responsible to the company for the conduct of the business of the company at the time the offence was committed shall be *deemed* to be *guilty* of the offence and shall be liable to be proceeded against and punished. It further held that simply because the company is not prosecuted as a result of some legal impediment, the accused persons cannot escape penal liability.[22]

In *Rohit Chunubhai Mehta* v. *Gujarat State Fertilizer Company Limited and Another*,[23] it was argued that the "directors were in the position of trustees and their liability to account for the company did not depend upon proof of malafides. In addition to their fiduciary duties, the directors also owe a duty of care to the company not to act negligently in the management of its affairs--- the standard being that of a reasonable man in looking after his own affairs." The court held:

> A director may be shown to be so placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of the company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the company.

Accordingly the court opined that it was not open for the directors to contend that the cheques to the tune of Rs. 5 crores could have been issued against supply of raw materials without the knowledge, consent and connivance of the board of directors, in view of the admitted well-known sickness of the accused-company to such an extent that its entire net-worth was wiped out and it was declared sick by the B.I.F.R. in 1993.

Company official shall not be punishable, if he proves that the offence was committed without his knowledge; or that he had exercised due diligence to prevent the commission of such offence; or where the person is nominated as director of the company by virtue of his holding any office or employment in the Central or State Government, or financial corporation owned or partly controlled by the Central or State Government.

F. Liability of other company officials[24]

The liability of Company officials acquires significance in the context of ascertaining the position of several persons who may not be directly concerned with the day-to-day functioning of the organization. Where offence is committed by a company, and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of any director, manager, secretary, or other officer of the company, such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

In *State of Karnataka* v. *Pratap Chand*,[25] the Supreme Court has taken the opportunity to explain the meaning of the term "person in charge" as denoting a "person who should be in overall control of the day-to-day business of the company or firm. The person should (*sic* may) be a party to the policy being followed by a company and yet not be in charge of the business of the company or may be in charge of but not in overall charge or may be in charge of only some part of the business."[26] The Supreme Court in *K. P. G. Nair* v. *Jindal Menthol India Ltd.*[27] has observed:

[20] See also, *Vuppala Venkata Nageshwara Rao* v. *Tulluri Chit Funds Private Limited and Another*, 2005 (111) CrLJ 575, which held that it is clear that the court at the place where the cheque is presented for payment also has jurisdiction to entertain the application.

[21] 2001 SCC (Cri) 174.

[22] *Ibid.*

[23] 2004 (110) CrLJ 2298.

[24] *Jagmohan and Etc.* v. *State of Uttar Pradesh and Another*, 2005 (111) CrLJ 1361where the court upheld the complaint filed despite the fact that the company was not been impleaded as an accused and the complaint was against only the Directors of the registered company.

[25] (1981) 2 SCC 355.

[26] See also, *Katta Sujath* v. *Fertilizers and Chemicals Travancore Ltd.*, (2002) 7 SCC 655; *Girdhari Lal Gupta* v. *D. N. Mehta*, 1971 (77) CrLJ 1; *State of Haryana* v. *Brij Lal Mittal*, (1998) 5 SCC 343; *Municipal Corporation of Delhi* v. *Ram Krishan Rohtagi*, 1983 (89) CrLJ 159.

[27] (2001) 10 SCC 218 (para 8).

> From a perusal of Section 141, it is evident that in a case where a company committed offence under Section 138 then not only the company but also every person who at the time when the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. It follows that a person other than the company can be proceeded against under those provisions only if that person was in charge of and was responsible to the company for the conduct of its business."

Again in *Rohit Chunubhai Mehta* v. *Gujarat State Fertilizer Company Limited and Another,*[28] it has identified the "Crux of the postulate" as "the intention of the person who induces the victim by his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence."[29]

G. *Miscellaneous Aspects*

Once a cheque is issued there is a presumption that the holder received the cheque for the discharge of any debt or liability.[30] It has been held that where "the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the court to presume that the holder of the cheque received it for the discharge of any debt or liability."[31] The burden is on the accused to rebut such a presumption.

Mere issuance of a notice by the drawer to the drawee or to the bank for stoppage of payment[32] or closure of the account will not preclude an action under the Act.[33] In numerous judicial decisions[34] a contrary argument was accepted

[28] 2004 (110) CrLJ 2298.
[29] *Ibid.*
[30] In *M.M.T.C. Ltd.* v. *Medical Chemicals and Pharma (P) Ltd.*, (2002) SCC (Cri) 121, it was clearly stated that even when the complainant did not allege existence of subsisting debt or liability against which the cheque was issued, the burden of proving the non-existence of any debt or liability was on the accused, which could only be discharged at the trial.
[31] Cri. A. No. 234 of 1995 cited in (1999) 7 SCC 510.
[32] The SC has correctly overruled its earlier erroneous decision in *Electronic Trade & Technology Development Corpn. Ltd.* v. *Indian Technologists & Engineers (Electronics) (P) Ltd.*, (1996) 2 SCC 739, in the case of *Modi Cements Ltd.* v. *Kuchil Kumar Nandi*, (1998) 3 SCC 249 and *A.Yeshwant Badave* v. *Surendra Madhavrao Nighojakhar*, (2001) 3 SCC 726. The SC opined that merely because the drawer issued a notice to the drawee or to the bank for stoppage of the payment it would not preclude an action under s. 138 of the Act by the drawee or the holder of a cheque in due course.
[33] It has been consistently held that dishonouring the cheque on the ground that the account is closed as a consequence of the act of the drawer rendering his account to a cipher would be covered by the phrase "*the amount of money standing to the credit of that account is insufficient to honour the cheque.*"
[34] *G. F. Hunasikattimath* v. *State of Karnataka*, 1993 (76) CC 278; *S. Prasanna* v. *R. Vijayalakshmi*, 1992 CrLJ 1233; *Omprakash Bhojraj Maniyar* v. *Swati Girish Bhide*, 1993 (78) CC 797. *Contra*, *Shivendra Samsguiri* v. *Adrnio*, 1996 CrLJ 1816; *J. Veeraraghavan* v. *Lalith Kumar*, 1995 CrLJ 1882 (Mad); *Dada Silk Mills* v. *Indian Overseas Bank*, 2994 CrLJ 2874; *G. M. Mittal Stainless*

holding that there were more than 40 kinds of eventualities where the bank might return the cheque but as the legislature in its wisdom had specified only two situations, the return of the cheque on the ground of the account being closed would not fall within Section 138. However, these conflicting interpretations have been resolved by the Supreme Court in *NEPC Micon Limited and Others* v. *Magma Leasing Limited.*[35]

The Indian judiciary has heavily relied upon Maxwell[36] while interpreting the relevant sections relating to cheque bouncing:

> There is no doubt that the office of the judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief, to carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoyed : *quando aliquid prohibetur, prohibetur et omse per quod devenitur ad illud.*

Thus, varied manipulations, "shifts and contrivances which parties may have devised in the hope of thereby falling outside the Act" have been recognized and the judiciary had to, using the oft-quoted words of Wilmot C.J., "brush away the cobweb varnish, and shew the transactions in their true light."

H. *Punishment*

The Supreme Court in *Suganthi Suresh Kumar* v. *Jagdeeshan,*[37] emphasized that "... No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light heartedly. The very object of enactment of provisions like Section 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate."[38] The Bench pointed out that if the amount is paid to the complainant then there might be justification "for imposing a flee-bite sentence". It further laid down the guideline to be followed by the trial court:

> But in cases where the amount covered by the cheque remained unpaid it should be the look out of the trial magistrate that the sentence for the offence under Section 138 should be of such nature as to give proper effect to the objective of the legislation.[39]

However, as per Section 29 (2) of the Code of Criminal Procedure "the court of a Magistrate of the First Class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both."

Provisions have been made by the latest amendment for compounding of offences by the parties and also for a summary trial of the cases.

Steels Ltd. v. *Nagarjuna Investment Trust Ltd.*, 1997 (90) CC 106; *Japahari* v. *Priya*, 1999 (96) CC 818; *Rakesh Nemkumar Porwal* v. *Narayan Dhondu Joglekar*, 1993 CrLJ 688 (Bom).
[35] (1999) 4 SCC 253.
[36] Quoted in *Swantraj* v. *State of Maharashtra*, AIR 1974 SC 517 at 520.
[37] 2002 (2) SCC 420.
[38] *Id.* Para 111.
[39] *Ibid.*

I. *Payment of Compensation*

The author's suggestions[40] for incorporating compensation provision from the Code of Criminal Procedure has received judicial recognition in *K. Bhaskaran* v. *S. Vaidhyan Balan and Another*.[41] The learned Judge has pointed out that the trial in these cases is held by the Judicial Magistrate of the First Class who cannot impose a fine exceeding Rs. 5,000 besides imprisonment. He opines:

> It is true, if a Judicial Magistrate of the First Class were to order compensation to be paid to the complainant from out of the fine realised the complainant will be the loser when the cheque amount exceeded the said limit. In such a case a complainant would get only the maximum amount of rupees five thousand.

To overcome this statutory hurdle, he has further suggested an alternative route propounded by the author:[42]

> However, the Magistrate in such cases can alleviate the grievance of the complainant by making resort to Section 357 (3) of the Code. It is well to remember that this Court has emphasized the need for making liberal use of that provision. No limit is mentioned in the sub-section and, therefore, a Magistrate can award any sum as compensation. Of course while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a Court of a Magistrate of the First Class in respect of a cheque which covers an amount exceeding Rs. 5000 the Court has power to award compensation to be paid to the complainant.

In *Hari Kishan* v. *Sukhbir Singh*[43], Shetty, J. speaking for the Division Bench stated,

> the power of imposing fine is intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is to some extent a constructive approach to crimes and a step forward in a criminal justice system. It is because of this that it was recommended that all Criminal Courts should exercise this power liberally so as to meet the ends of justice, by cautioning that the amount of compensation to be awarded must be reasonable.

The same has been affirmed in yet another judgment delivered by the learned Judge,[44]

> Whenever a Magistrate of the First Class feels that the complainant should be compensated he can, after imposing a term of imprisonment,

[40] Lalitha Sreenath, *Cheque Bouncing*, AIR 1996 Journal 7 – 11.
[41] (1999) 7 SCC 510.
[42] *Supra* n. 40.
[43] AIR 1988 SC 2127.

[44] *Pankajbhai Nagjibhai* v. *State of Gujarat and Another*, (2001) 2 SCC 595.

> award compensation to the complainant for which no limit is prescribed in Section 357 of the Code.

However, the authors still submit that incorporation of a specific legislative provision in the N.I. Act, rather than the judicial commendation for award of compensation in cases of dishonour of cheques would help all the complainants throughout the country, regardless of the awareness (about this aspect) of the advocates espousing their cause or on the discretion of the presiding judiciary.

V. CONCLUSION

Proper and smooth functioning of all business transactions particularly of cheques as instruments primarily depends upon the integrity and honesty of the parties.[45] In our country it was noted that the cheques were issued as a device not only to stall but also even to defraud the creditors in a large number of commercial transactions. The sanctity and credibility of issuance of cheques in commercial transactions has been eroded to a large extent. Undoubtedly, dishonour of a cheque by the Bank causes incalculable loss, injury and inconvenience to the payee, and the entire credibility of the business transactions within and outside the country suffers a serious set back.

As has been often commented, "the future of money is plastic", with the development of e-commerce, tools such as the smart card may well become the medium of the future.[46] Small value purchase payments could spur the use of the smart card[47]. However, the majority of the commercial transactions is still settled either by cash payments or by issue of cheques and is not affected by the possession of platinum cards as status symbols in elite commercial circles. And, it is for the protection of such persons from dishonest and unscrupulous persons parading the markets and business places brandishing chequebooks that these measures may be of primary concern.

[45] Bhanoji Rao, *Pay by Cash, Please!*, BUSINESS LINE, (Nov 14, 2006), available at http://www.blonnet.com/2006/11/14/stories/2006111400530800.htm. Accessed on April 20, 2007. "If India wants to march ahead towards becoming a developed nation, it will have to get out of the 'cash please' mentality sooner than later.

[46] See, for a detailed study of the impact of IT on financial innovations, James A. Dorn *(ed)*, THE FUTURE OF MONEY IN THE INFORMATION AGE (1997). Interestingly Australia has converted all its currency notes into plastic. Canadian Producer Domtar Inc. holds the patent for a revolutionary new product that could replace paper currency trademarked as Luminus.

[47] A study conducted by Frost and Sullivan, management consultants, reveals that the Indian smart card market could swell to 3 million by 2005. In contrast, even 12 years after they made their appearance into the country, credit cards total a mere 3.5 million.

BOOK REVIEWS

JUSTICE IN ROBES by Ronald Dworkin. Universal Law Publishing Co., New Delhi. (Reprint) 2007. Pp. 308, Rs. 325/-

The book JUSTICE IN ROBES is a compilation of essays written by the Ronald Dworkin in various books and journals during the period 1991 – 2004. In the essays, the author has commented and critically analysed the views of scholars who, according to him, have either disagreed with him or with each other in different ways at different levels. All the readings focus on the question: 'How should a judge's moral convictions bear on his judgments about what the law is?' The question is not so simple as it appears to be because there are various perspectives, approaches and schools of thought for defining the terms, 'law' and 'legal system'. Similar is the situation with regard to the place of morals, customs, conventions, and social and cultural values in various legal systems. The courts are referred to as 'courts of law' by some nations and 'courts of justice' by others. The very nomenclature provides the basis for distinction between the attitudes of judges of the two sets of courts. Moreover, the morals and customs are not only culture and socio-specific but are even temporal-specific. This makes the study very complex as the legal, moral and social values are not only discipline-intertwined but refer even to inter-period relationships within the same discipline. To cite very simple examples, the maturity level of a person to exercise the political right to vote in India was previously considered by law to be twenty-one years but now it has been reduced to eighteen years; the concept of 'cruelty' under family law has undergone a paradigm shift because of the judge's interpretation of the written law. The shift is not only from 'physical' to 'mental cruelty' but is also from 'spousal' to 'family cruelty'. The book also tries to bring forth the significance of myths, beliefs, assumptions and presumptions underlying the written law and interpretational techniques evolved by 'men in robes' while writing 'judgments' and giving 'justice'.

JUSTICE IN ROBES is divided into nine chapters with a very elaborate "Introduction" running into thirty-five pages. Dworkin, in his analytical style, has first tried to find out whether there can be a precise understanding in the 'doctrinal sense' of 'what kind of a social structure counts as a legal system?' He then moves onto the 'aspirational concept of law', which exposes the idea that there is more or less a universal agreement that rule of law is desirable but there is disagreement on the best statement of that ideal.

Chapter One refers mainly to the works of Professor Rorty, William James, Sanders, Dewey, Ludwig, etc. Dworkin then makes an appraisal of Professor Fish's writings who has written a number of articles criticizing Dworkin's works.

Chapter Two moves from pragmatism to theory and is, therefore, titled 'In Praise of Theory'. In this chapter, Dworkin addresses the role of theory in legal reasoning and legal practice by way of examples.

Darwin's New Bull Dog, the third chapter is a critical essay on Richard Posner's works. The two theses given by Posner are: The 'Strong Thesis' holding that no moral theory can provide a 'solid base' for a moral judgment and the 'Weak Thesis' which holds that whatever force moral theory might have in ordinary life or politics, judges should ignore it because they have better devices available for their special purpose.

Moral Pluralism is the title chosen for Chapter Four to depict and analyse the 'value pluralism' ideology of Isaiah Berlin. The author appreciates Berlin's exposition of conflicting values of 'liberty' and 'equality' but he concludes that it would be difficult to sustain the ambitious thesis of Berlin.

Chapter Five, *Originalism and Fidelity*, begins by drawing a distinction between fidelity to the Constitution's text and to past constitutional practice including the past judicial decisions interpreting and applying the constitutional principles and values.

Chapter Six is a debate between H.L.A. Hart and Ronald Dworkin on how far and in what ways lawyers and judges must make their own 'value judgments' in order to identify the law in particular cases. The author has taken a few examples like *Sorenson's case* to substantiate his viewpoint and make the chapter more reader friendly. Another lively controversy taken up by Dworkin is whether 'judicial review' is inconsistent with 'democracy' as the majority rule. This argument becomes very significant in the contemporary Indian legal system in the light of *Keshavananda Bharati* , *Minerva Mills* and the more recent *Coelho's case*.

Thirty Years On, Chapter Seven makes a very interesting reading on the development and evaluation of legal positivism. Ronald Dworkin has picked up the works of Professor Jules Coleman, Raz, and Jeremy Bentham, etc., for analyzing positivism.

Chapter Eight, *The Concepts of Law* is newly written for this book. It explores in great detail certain philosophical issues that had been raised in the previous chapters.

Chapter Nine is devoted completely to Professor John Rawls, whom Ronald Dworkin considers to be a great political philosopher. In the end of the book the author shows his admiration and respect for Rawls by commenting that "we are only beginning to grasp how much we have to learn from that man" (Rawls).

The book on the whole is a mix of arduous, intricate, ticklish, yet very intriguing and stimulating philosophies. It will be understood and enjoyed better by those who have read or have some flavour of the works of the philosophers discussed by the author. JUSTICE IN ROBES should become a part of the library of all those who are interested in law and justice.

*Alka Chawla**

* Reader, Campus Law Centre, Faculty of Law, University of Delhi.

KAUTILIYA ARTHASASTRA A LEGAL, CRITICAL AND ANALYTICAL STUDY by V. K. Gupta. Bhartiya Kala Prakashan, Delhi. 2004. Pp. xxvi+432. Price Rs.1250/-

The name Arthasastra suggests it to be a book on economics, which is far from reality. It gives a full code of law and is an important classic source for the study of Indian legal philosophy. It is a discourse on law and statecraft.

Kautiliyan work is significant not only for modern India but also for the whole world. Upendra Baxi in the *Foreword* to the earlier abridged edition said, "A close study of the Kautiliyian discourse on law, power, and justice with an eye to the continuities in statecraft in Indian history till present time, will undoubtedly be richly rewarding. We must resist the tendency of dismissing this discourse as antiquarian and antiquated."[1] This still holds good for the current edition which is a revised and enlarged edition of the earlier abridged version printed in 1986.

This book is a legal, critical and analytical study of KAUTILIYAN ARTHASASTRA written between 321-300 BC. It has been divided into five parts and forty-five chapters. The entire original text from KAUTILIYA ARTHASASTRA except non-legal materials consisting of 2600 sections (sutras) out of the total of 5391 sections have been reproduced, regrouped and analyzed subject-wise from the legal perspective.

The value of the work has been considerably enhanced by the author's own commentaries at the end of each chapter and, more importantly, by an appendix providing the relevant text in Sanskrit, giving autonomy to the reader to analyse and give her own interpretation.

Part I devoted to *Legal Theories* includes two chapters dealing with the basic concepts of law and punishment. The basis of law is justice. State is to engage itself into various welfare activities. One interesting aspect is the paternalistic notion of state power wherein the ruler discharges his duties under *rajdharma*[2] as a benign and conscientious parent. By the same token, the subjects are also obliged to perform their duties. One may notice the non-enforceable duties[3] in the Indian Constitution, unlike KAUTILIYAN ARTHASASTRA wherein non-performance of respective duties is considered as a crime, punished by state, which is governed by rule of law. Kautiliya attaches significant importance to *Dandaniti*[4] on which depends the well-being and progress of the state. To me *Dandaniti* is the forerunner of deterrent theory of punishment, which has utilitarian[5] notion underlying it. The two most interesting aspects of the Kautiliyan theory are, first, that corporal punishments, except the capital punishment, can be avoided by paying a redemption amount. This can be equated

[1] Prof. U. Baxi, *Foreword* in V.K. Gupta, KAUTILIYAN ARTHASASTRA, (abridged ed 1986).
[2] Duty of a ruler
[3] Chapter IV A, CONSTITUTION OF INDIA.
[4] Concept of punishment.
[5] Jeremy Bentham gave the pleasure v. pain theory in the late 18th century.

with a victim oriented criminal justice dispensation perceptible in contemporary scenario. Gradation of punishment proportionate to severity of crime, group liability, speedy trial are basic features of Arthasastra and secondly the provision for punishment for judges for unjust decisions that resemble modern day philosophy for impeachment of judges.

Part II dealing with *Criminal Law* has fourteen chapters in it. The most prominent inclusion in the field of criminal law by the author is Consumer Protection Act. Prof. Gupta says, "Kautiliya stands for strict control of economy...welfare of subjects and advancement of state go together. Stern action against profiteering and food adulteration is recommended by Chanakya. Modern theory for price fixation of covering marginal expenditure and revenue is akin to Kautiliyan principle."[6]

Part III is devoted to *Civil Law* and has sixteen chapters including, amongst others, the law of contract, marriage, divorce, property, agriculture, industry taxation, town planning, labour law and welfare activities, etc. The author highlights that polygamy was permitted only in exceptional circumstances. The concept for divorce on ground of mutual dislike coupled with subsistence/maintenance in cases of separation is also noticeable. Kautiliya's approach towards the status of women in society is remarkably emancipated. The woman is recognized first as a person and then her other rights and status in society are to be protected. Widow re-marriage is allowed in some cases. However, at another place,[7] the author says that when a child is begotten on a female slave by her master, both the child and the mother shall at once be recognized as free. The reader gets confused about how to reconcile the contradictory claims about women's status.

Kautiliya understood the importance of free international trade and was in favour of protecting trademarks and brands and also recommended remission of taxes on agriculture for a limited period for various reasons. According to the author, India joining the World Trade Organization in 1994 was a glowing tribute to the genius of Kautiliya.[8]

Part IV is devoted to constitutional and administrative laws having seven chapters. The most intriguing inclusion is the law of writs in this part. Prof. Gupta suggests that there were 13 major purposes and 8 other subsidiary purposes for which writs could be issued. The author's claim that Kautiliya was the originator of the concept of writs demands further probe.

Part V having 6 chapters exclusively deals with various aspects of international law, i.e., law of peace, treaties, ambassadors, and wars including specific recognition of the human rights of prisoners of wars. Prof. Gupta deserves to be complimented for his eximious effort in schematically bringing

[6] KAUTILIYA ARTHASASTRA 107 (2004).
[7] *Id.* at 240.
[8] *Id.* at 270.

the corpus of KAUTILIYAN ARTHASASTRA to the knowledge of legal community and establishing Kautiliya as an Indian jurist of contemporary relevance. Structured in a clear and lucid manner the book is a reservoir of knowledge on the subject of law and statecraft. On the whole, the book is truly a work of encyclopaedic range notwithstanding the printing errors. KAUTILIYAN ARTHASASTRA A LEGAL, CRITICAL AND ANALYTICAL STUDY is an invaluable source of reference not only for legal fraternity but also for professionals belonging to the field of history, politics, management and sociology. The scholarly compilation is a must for libraries of these disciplines.

Anju Vali Tikoo[*]

LAW IS NOT AN ASS AND OTHER ESSAYS by Bimal Kumar Chatterjee. Eastern Law House, Kolkata. 2006. Pp. 231, Rs.150/-

Over the years, legal writings have occurred either in the form of commentaries on different statutes/constitutions, critical appraisals of the Court decisions or essay based description of legal subjects, the author's book falls into the latter category. Even though the title, LAW IS NOT AN ASS is a little bit misleading, but definitely it is not demeaning. This reflects upon the working of various subjects of our legal system. It also suggests the ways in which these subjects could have given a better performance. These reflections have come through lectures and presentations by the author at various places of legal learning. The author follows a story teller approach in analyzing various subjects of legal discipline, at times rhetorically and at times sentimentally, yet carrying a message of their relevance and need for reform in some subjects.

The starting point of the book is the author's reflection on the attitude of society towards lawyers. It is true that historically and even in the present context the feelings of the population towards lawyers is rather unkind. History is replete with instances where lawyers are ridiculed and visited with mistrust, yet they continue to be part and parcel of every legal system. Each of these legal systems has institutionalised the profession of lawyering. In the first chapter the author has re-visited the profession of lawyering and has highlighted the duties of lawyers, not only towards his clients but also to the general public at large. But surprisingly he does so by quoting Lord Denning, instead of relying on Indian Advocates Act, which is the written code of conduct for lawyers in India. He addresses the challenges of the legal profession in the present scenario. He argues, and I agree, that a good legal education model is necessary for an effective and well delivering justice system. The Indian universities imparting legal education have tried to stand unto the new challenges of the legal education despite the uncharitable attitude of the Bar Council of India. The Bar Council is far removed from the genuine requirements/concerns of these educational institutions, and is taking decisions without the involvement of these institutions.

[*] Lecturer, Law Centre-I, Faculty of Law, University of Delhi, Delhi.

The author also laments at the growing numbers of touts/brokers in the legal profession. Probably there is no running away from this reality and this scenario will continue, given the disproportionate division of work between lawyers. Even the busiest lawyer hardly refuses any work as he has many juniors at his beck and call even if they are not as competent and diligent as the senior. There are other inherent contradictions in the legal professions that have been analysed by the author.

The cries for judicial reforms in India are often heard and yet there is no systematic and methodological approach to make the judicial system in India meaningfully efficient and less time consuming. We are all alive to the fact of huge arrears of cases and many Chief Justices of India have lamented about this sad fact of the Indian judicial system. The discussion about judicial reforms in the background of such malfunctioning judicial system gets murkier particularly when there is no consensus between the judiciary and the executive about any prospective reform. The judiciary relies on the independence of judiciary for thwarting any attempt on judicial reforms. The author being a lawyer himself had every reason to visit the subject of judicial reforms in India. He does so by doing a macro level analysis of functioning of legal system in India. He argues and I agree, that badly drafted legislations, incompetent judges and harried executive orders without any legitimacy have contributed to the Mount Everest of judicial arrears. He advocates amending laws, at least at procedural levels, and even repealing some outdated laws for the purpose of reducing delays in courts. I doubt whether that by itself will be of some help in the pending litigations though it may be so for future. He advocates preventive and deterrent measures to avoid unmeritorious and vexatious litigation. I don't know what those measures include, nor has the author clarified it. The author seems to justify the establishment of a National Judicial Commission.

The question of interpretation of statutes and constitution has always baffled lawyers. Not because we have no settled legal trends of such interpretations but because sometimes the judicial interpretations have gone against what was in the minds of drafters of the statute, yet the judicial mind gives either contextual justification or circumstantial justification of such interpretation. Such a wilder or bolder interpretation can sometimes lead to bizarre conclusions and impose many unforeseen obligations on the subjects of law. And if it is the area of constitutional interpretations it can lead to even constitutional crisis. Who is at fault in this scenario has been examined by the author in Chapter 5. He argues that the draftsman (or parliamentary counsel) of statutes has the onerous responsibility of using a simple, plain and unambiguous language in statutes, if that was so, lesser could be the scope of litigation. In the same breadth he warns against the tendency of lawyers to resort to needless verbosity while interpreting the statutes. Instead he favours a purposive interpretation despite the use of words being immensely important in the interpretation of statutes.

'Wither Supreme Court', I thought is an interesting and important chapter written by the author. It is interesting because the recent judicial activism or

over-activism on the part of the Indian superior judiciary has been heavily commented upon. Even though justifications abound in favour of judicial activism and public interest litigation, yet it has given rise to some constitutional questions. These questions if not answered, will lead one to believe that some sort of constitutional crisis has overtaken Indian legal system. The author counsels for self-restraint on the part of superior judiciary so that the positive aspects of the judicial activism do not go wayward. He also argues, perhaps rightly, that Articles 141 and 142 of the Constitution are the facilitators of an effective dispensation of justice rather than empowering the judges with absolute powers with all its pitfalls. He also favours appointment of quality judges in the High Courts as eventually they would don the highest seats of justices of the Supreme Court and their quality and prudence would sharpen the shape of justice in India.

Secularism and freedom of religion have been important constructs of a multicultural, multilingual and multireligious Indian social order. That is precisely the reason that the Supreme Court has held secularism as the basic feature of our Constitution and thereby secularism and freedom of religion are constitutionally guaranteed. However, neither religion nor secularism has been defined constitutionally; therefore, it has been an onerous task for the Supreme Court to analyze the fine constructs of secularism and religion. This definition was necessary, as over the years deeper polarization of Indian society on religious and caste lines has shaken the fibre of Indian social order and many a time courts are hard pressed to take a balanced approach. Given the diverse approaches to secularism and the way it operates in India, it was but natural for the author to analyse the Supreme Court's opinion on secularism. Chapters 9 and 10 contain a detailed account of the Supreme Court analysis of secularism in Indian scenario. The author while analysing *Keshavananda* to *Ismail Faruqui* has highlighted the freedom of religion as being the core construct of secularism. Yet this freedom cannot be licensed as it is subject to freedoms of others and requirements of public order and health. It is high time that our governing elites take a balanced approach in matters of state and its relationship with religion and religious freedoms.

Chapter 11 is an overview of the recent controversy surrounding the office of profit and the way in which our Parliament through an ordinance (which later on was passed as law) protected some parliamentarians from losing their membership of Parliament. The Act is under challenge before the Supreme Court. The author has rightly pointed out certain grey areas in the wake of an Act of Parliament on office of profit. The author has also highlighted the ensuing tension between Parliament and the judiciary as to who will decide the question of disqualification of the members of Parliament. The author in chapter 12 describes the functioning of legal aid in our legal system in general terms. It would have been better if the author had talked about its functioning in a critical way from a lawyer's perspective. One sympathises with the author's assertion that the cause of denial of procedural equality is because of lack of resources by the poor and disadvantaged groups of Indian society and that the working of free

legal aid is far from satisfactory despite the Legal Services Authorities Act, 1987.

The author has discussed in detail the issues arising out of *T.M.A. Pai* decision of the Supreme Court dealing with the right of establishing educational institutions. It also discusses the scope and extent of Government intervention in establishing and administering educational institutions either by individuals or by minorities (religious or linguistic). The author is right when he argues that even in a liberal educational establishment the law of the land including the Constitution is applicable making governmental intervention imminent. However, in the case of minority established and administered institutions the intervention cannot go to the extent of taking away their constitutionally protected rights of administering the institution and there can be no reservations in minority educational institutions. However, it is rather surprising that the author has not referred to the later decisions of the Supreme Court including *Islamic Academy* and *P. Inamdar* that have clarified some of the issues raised by *T.M.A. Pai.*

Chapter 15 is a broad overview of the disinvestment policy of the Government. It also describes the way in which the Central Government has been implementing it. The author probably rightly argues that if disinvestments can be made in profit making public sector undertakings, there is no point in not doing so in loss making units. If we do not do so the vulnerable will continue to suffer. Chapter 16 is a review of the bankruptcy laws in India and how they are functioning in our legal system. There are other chapters included in the book that I think are either descriptive of some laws or some activities and do not need any kind of comment in this review.

Overall the book is nicely written though not as critical as expected from a senior lawyer like the author. The book makes a compulsive reading in the hands of readers. I am sure the easy and simple way of explaining various legal subjects dealt by the author would benefit the readers. For those who read at leisure, this is a welcome addition.

Jawahar Lal Kaul[*]

HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA edited by V.S. Mani. Oxford University Press, New Delhi, 2007. Pp. xiii + 262, Rs. 650/-

War or armed conflict, whether international or non-international, brings with it untold suffering and indelible scars. Therefore, efforts have been made since time immemorial to balance the need to go to war and to mitigate the effects of war requiring that humanitarian rules be followed during the hostilities irrespective of the reasons or justifications of the war or who started the war.

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[*] Professor, Campus Law Centre, University of Delhi, Delhi-110007.

In spite of the general prohibition of use of force by the United Nations Charter, war or armed conflict still continue to plague the world. The South Asian region too experiences many conflict situations, such as the "Shi'a-Sunni Conflict in Pakistan", the Maoist Insurgency in Nepal, Sri Lanka and LTTE, inter-state conflict between India and Pakistan and proxy-war fought in the Jammu and Kashmir.

The book under review is edited by V.S. Mani, a legal luminary in the field of international law, and contains contributions from various writers from South Asia. It consists of twenty-two articles grouped under six parts and an appendix section providing fact sheet on the status of international humanitarian law in South Asia and other international treaties in general. It is indeed the first book of the kind to delve specifically upon international humanitarian law in relation to this region and fills the academic vacuum in this field.

It is well known that roots of humanitarian rules relating to conduct of warfare are as old as the war / confrontations. More often than not these rules are embodied in the major literary works of the culture. Recognizing the significance of religion as the embodiment of humanitarian rules in the earlier era, Part I of this book beautifully draws the humanitarian rules from Buddhism, Christianity, Hinduism and Islam. The ingenuity, with which C.G. Weeramantry has culled out the rules from Buddhist text such as the *Sutras, Jataka*, etc., is commendable. V.S. Mani has elaborately discussed the phases traversed by Christianity and evolution of the just war concept in this religion. B.C. Nirmal and Aftab Alam too have given quite an engaging article on the issue. The writers have been successful in giving the reader a pleasure trip to history on the humanitarian precepts prevailing at that time.

Part II of the book has been systematically put forth in such a way that a reader who may want an overview of the humanitarian law in South Asia will be able to accomplish it by reading the first article by S.K. Verma. The rest of the articles will satisfy the reader who may want to go into the details of a country specific position.

Borhan Uddin Khan has presented the position of Bangladesh covering all possible aspects ranging from the conventions to which it is a party to the national measures taken up to implement the humanitarian principles and steps which are needed to be taken up to further strengthen them and make them more effective. Khan has rightly emphasized the need to integrate the provisions of the treaties to its municipal law (as dualism is practiced), constitute a national committee to oversee the implementation of IHL and to make people aware of these rules. One thing that I would like to add here is that since it is the military forces who are engaged in war or hostilities the necessity to make them aware of these rules on a priority basis should have been emphasized in the essay given the limitation of time and resources.

The article on Bhutan's response to IHL written by V.S. Mani can be well explained as "short and crisp". Even though Bhutan follows Buddhism and has

incorporated its principles in the limited civil and criminal law of the country, Mani, by pointing out the violations of rights, brought home the necessity to codify its laws incorporating the IHL treaties.

India's attitude on IHL has been covered by the essay of Ravindra Pratap pointing out the reasons for not signing or signing or putting some reservation while signing of the conventions. However, various legal provisions available in the national laws upholding or promoting the principles of IHL have not been included. S.K. Verma has specifically picked up India's position by stating the mandate of the Constitution as well as the role, which the NHRC can play in the matter of implementation of IHL.

Part III of the book is quite engaging telling the story of the various hostilities that have occurred in the past in the region. Rupa C. Hingorani has narrated well the hostilities that India experienced till 1961 and also touched upon the legal issues surrounding them. She has discussed in details the arguments and counter arguments put forth in the *Rev. Mons. Sebastiao Monteiro Case*, grounds on which the Juridical Commission of the ICRC advocated the treatment of Razakars as POWs, etc., when the situation demanded. Mani's essay is captive and engaging to such an extent that when the essay ended it gave the feeling that there is more to come.

What I found good in T.R. Onta's essay, *IHL and Internal Armed Conflict in Nepal* is that at the outset the writer has given in points the IHL treaties signed by Nepal. Later he goes on to discuss in detail the *Maoist* actions and the applicability of IHL in this situation. After examining current scenario and the role played by the ICRC and the NRCS the writer has come up with certain recommendations in the conclusion so as to better ameliorate the sufferings caused by the conflict between the government forces and the *Maoist* rebels.

Thushara Rajasinghe succinctly traces the root cause of the birth and rise of Tamil militancy in Sri Lanka covering the means of warfare adopted by the government as well as the Tamil militants and highlighted the acts, which violate the humanitarian rules.

The essay by B. S. Chimni is focused on refugee issues but makes no concrete link with IHL. As under the 1951 Refugee Convention, a person may become refugee due to various reasons including civil war or internal conflict, it would have been appropriate if Chimni had focused on refugees of the hostilities within the countries of South Asia and how South Asia is coping with it and then discussed the ways to improve the human condition of those refugees. Nirmala Chandrahasan's essay discusses the direct outcome of the hostilities between the Sri Lankan government and the LTTE. Though her essay ends on a positive note that ceasefire has taken place and peace talks are underway, the air strike conducted for the first time by the LTTE recently has shocked and raised many eyebrows.

Part IV, *States of Emergency, Human Rights and IHL* consists of a single essay by Venkat Iyer. He has presented various problems in the field from

defining the term 'state of emergency' to the structural and institutional problems. This essay is a must read with regard to the interface of IHL and human rights.

Part V of the book deals with the humanitarian organizations, which deal with the protection of IHL in South Asia with reference to the ICRC. The writer, Umesh Kadam has provided in his essay an exhaustive and beautiful overview of the various activities and initiatives taken by ICRC for the promotion of humanitarian law reflecting his long association with the ICRC.

Lastly, Part VI of the book deals with the implementation of IHL in military organizations. Nambiar in his essay, *Applicability of IHL to United Nations Peace Organizations* presents the UN peacekeeping as an invention of the UN Secretariat and analyzes the applicability of IHL in the peace operations.

The essay, *Military Law Mechanism for IHL Implementation* by Nilendra Kumar focuses on the advantages of military law over normal criminal justice delivery system and projects it as an effective means of penalizing the grave breaches of law of armed conflict.

We hear from many quarters that most of the international conventions and treaties are products of western countries and are formulated from their perspective taking into account their experiences in the past. This book will help in giving an insight to the rich humanitarian precepts which developed in South Asia for incorporating them in the current humanitarian rules at the international level to make people of this region feel related to these rules.

The book, being the first of its kind, will be useful for any person dealing with IHL in whatever capacity. It will also help in the implementation programmes of IHL if the essence of this region regarding this law is taken into account. This book may also ignite the idea of developing a South Asian code on humanitarian law specific to this region given the commonality of culture, history and traditions enjoyed by it.

K. Ratnabali[*]

OUTLINES OF INDIAN LEGAL & CONSTITUTIONAL HISTORY by M.P. Singh. Universal Law Publishing Co., New Delhi. Eighth Edition 2006. Pp. xx+220, Rs. 125/-

Administration of justice, according to modern notions, is one of the most vital functions of the state. It is indeed the most important part of the public administration. It is the calibre of the judiciary that adds to the excellence of a government. It is well said that the average citizen becomes conscious of the existence of the state and of its coercive power when he sees the courts functioning and their decisions enforced both in civil and criminal cases. This

[*] Lecturer, Law Centre-I, Faculty of Law, University of Delhi.

explains why the court is regarded as the most majestic symbol of the power of the state. The court is the custodian of all civil life. There is an additional reason why the study of the history of modern judicial system of India is of much importance to the students of law. The study reveals how the Indian state of the time surrendered its right to the English trading company by permitting it to settle disputes among themselves in their settlements according to their own laws, which in course of time came to include local population as well. The English traders, who were no legal specialists or legal professionals, by their familiarity with their legal system attempted to formulate a process of law and order oriented and directed by their system. This resulted in a break with the Hindu *Sastric* and Muslim *Quranic* laws and jurisprudence which, even today, has a faint echo in the family law. With the gradual acquisition of political power a well-organised modern system of law and administration of justice, which is more British than Indian came to be established.

The book under review is a revised edition after a gap of over twenty years. In the present edition the author has added sub-chapters in the contents for easy reference besides correcting the obvious errors and elaborating the topics more sequentially. Moreover the author has also added a table of cases making the book more user friendly. The physical size of the book has been enlarged. However, some aspects of the previous edition have not been thoroughly revised. Improved get-up, quality paper, sequential chapterisation and better presentation are the highlights of the present edition.

The book has been divided into three parts. Part I deals with establishment of the East India Company and its early settlements in India, *viz.*, Surat, Madras, Bombay and Calcutta. The author has dealt with the justice administration system separately at these settlements as it was obtaining till the year 1726 when the crown's courts were set up in India under the Charter of 1726. This charter brought uniformity in the different justice administration systems obtaining in the settlements. The author has thereafter dealt with the shortcomings of the Charter of 1726 and mentioned the Charter of 1753 whereby a few changes were effected in the working of the then system. The author in this part has extensively dealt with the beginning and evolution of Adalat System in India. He has critically analysed the three judicial plans of Warren Hastings in the light of their working. Further improvements made upon the Adalat System by Lord Cornwallis, Sri John Shore, Lord Wellesley, Lord Minto, Lord Hastings, Lord Amherst and Lord William Bentinck have been separately discussed and analysed. This part also focuses on the establishment of Supreme Courts at Calcutta, Madras and Bombay under the Regulating Act, 1773. The difficulties in the working of the Regulating Act, 1773 have been highlighted and the changes introduced by the Settlement Act, 1781 to cure the same have been detailed. After the abortive attempt of the people of India in the year 1857 to regain independence, the Company's government in British India was replaced by the direct rule of the Crown in the year 1858. The Indian High Courts Act, 1861 was enacted to establish High Court of Judicature in India to replace and unify the then existing system which was defective in many aspects. The author

has exhaustively dealt with the same along with the appellate jurisdiction of the Privy Council. The codification of the law and development of personal laws during British period have also been given a separate, though brief, treatment. A small chapter on modern judiciary gives a fair idea about our present judicial hierarchy to the beginners. This part also deals with the early development of legal profession in India leading to the enactment of the Advocates Act, 1961.

Part II deals with the constitutional history of India beginning with the Indian Councils Act, 1861 through the Indian Independence Act, 1947. The events of 1857 brought the Company's government to an end and the administration of the country was placed in the hands of the crown through the Secretary of State for India. No internal constitutional change, however, took place till the passing of the Indian Councils Act, 1861. Thereafter, the author has detailed the provisions of the Indian Council Act, 1892, the Minto-Morley Reforms of 1909, the Government of India Act, 1919, the Government of India Act, 1935 and the Indian Independence Act, 1947. With the coming into force of the Act of 1947 on August 15, 1947 the British rule in this country came to an end with a colourful ceremony in which Lord Mountbatten was sworn in as the First Governor-General of free India. The Act of 1947 made the Constituent Assembly, already elected in 1946, a sovereign body free from all limitations. After giving full opportunity to the members of the Assembly to express their views, the present Constitution of India was adopted and enacted on November 26, 1949. It, however, came into force on January 26, 1950. The author has chronologically and analytically mentioned and discussed the provisions of various Constitutional Acts and their working culminating into the enactment of our Constitution.

Part III of the book contains two chapters: one deals with the concept and sources of laws and other deals with the Rule of Law in India. The author has described law as a complex phenomenon defying all efforts towards a commonly agreeable definition or even explanation. Having thus conceptualized law, the author has dealt with the relationship of law with morality. Under the sources of law, the author has discussed the general legal sources of law, viz., the Constitution, legislation, precedent and custom. The reviewer, however, feels that in the present day system of judicial activism a lot of law is enacted through the dubious form of judicial legislation which strikes at the basic feature of our Constitution, viz., separation of powers among different organs of the State. Further, the effect of international law on municipal law as a source of law could have been discussed in the setting of this chapter.

The book is lucid in presentation and deals with a vast area in a very effective manner in a short volume. The book would be a useful reference for the students of Indian legal and constitutional history and for others who are interested in the history and evolution of our legal system.

*K.D. Singh**

* Lecturer, Law Centre-II, Faculty of Law, University of Delhi.

CASES AND MATERIALS ON FAMILY LAW by Kusum. Universal Law Publishing Co., New Delhi. 2007. pp. XXXIX+306, RS. 195/-

Since independence, the marriage and family relations are in a state of flux. The ties which kept the family cohesively together have attenuated and are at the verge of collapse. One of the baneful effects of occidental ways of life is that the time honored institution of marriage is undermined. Family laws in India vary with religion, community, sect, domicile and even the form of marriage a person may have undergone.

Family laws cover an enormous area of domestic relations such as marriage, matrimonial remedies of divorce, judicial separation, nullity, maintenance, legitimacy of children, custody, guardianship, adoption, joint family, intestate and testamentary succession. The long list of topics and multiplicity of diverse family laws some of which are codified while others are uncodified, make it not only a very vast area of study but also one that governs an integral part of life of an individual. New laws and judicial pronouncements from time to time defining family relations require an in-depth study of the law in the present scenario. The study of this branch of law, therefore, becomes very important and a case book on the same would undoubtedly be very helpful for those wanting to familiarise themselves with the development and interpretation of law by the judiciary.

The book under review is a compilation and analysis of the judicial pronouncements on the subject. The book as such is not divided into parts or chapters. However, cases on various aspects of family relations have been grouped to place it before the readers in a comprehensive manner. The casebook highlights recent cases pertaining to various aspects of family law, like Hindu law of marriage; conjugal rights and obligations; restitution of conjugal rights; dissolution of marriage – due to fault, by mutual consent, due to non-cohabitation after the decree of restitution of conjugal rights or judicial separation and also as per the customary law; irretrievable breakdown of marriage; matrimonial home; disposal of matrimonial assets; re-marriage after dissolution; recognition of foreign divorce decree by Indian courts; grant of damages to divorced wife; maintenance of members of the family under Hindu marriage act, 1955, Hindu Adoption and Maintenance Act, 1956 and Code of Criminal Procedure, 1973; adoption; succession; guardianship; and custody of children. Besides, the book also contains cases on Christian marriage law; Muslim law of marriage, divorce and maintenance; Special Marriage Act, 1954; Parsi law of marriage; Indian Succession Act, 1925; Family Courts Act, 1984; conflict of law and some other miscellaneous matters. However, the cases dealing with uncodified law of joint Hindu family and coparcenary are missing from the book.

Discussion of each case is divided into four parts. The first part highlights the issue/s involved in the case. In the second part, the author presents the relevant facts and contentions of the parties in brief. The third part contains the order/decision of the court. In the fourth part, the author delves deep into the

order and gives her own scholarly comments on the decision of the court in the case.

The author overall has worked hard in compilation of this book and has poured in her immense knowledge and experience. The book with a qualitative analysis of the recent case law is an asset for not only the students of law, but also for lawyers, judges, academicians and even social activists. The book shall find place in the legal arena for its plain and simple language, accuracy and brevity.

Kiran Gupta[*]

COPYRIGHT AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PERSPECTIVES by Alka Chawla. Macmillan India Ltd., New Delhi. 2007. Pp. xxx+255, Rs. 265/-

The whole scenario of growth of national economies and their international equations changed with the advent of globalisation and its corollary developments. Knowledge economies destined to emerge as major global players in the new world order. Today, the success of an economy is determined by the successful intellectual property right (IPR) regime established in that particular State. The protection of IPRs in its varied forms is a prerequisite and even takes central state in this changed situation, especially, with the emergence of the WTO-TRIPS agreement.

Copyright is a very important type of intellectual property right that provides economic benefits to the authors or creators. The copyright law serves twin purposes of protecting the economic interests of creators and at the same time enabling the society to utilise the fruits of those creative minds. Rewarding the creative efforts of authors and performers through effective IPR legal system encourages them to produce more and contribute to the economic development of the country. The internet age offers more opportunities to innovators and creators but at the same time it poses many challenges in terms of unauthorised usage of materials put on the internet. More specifically, protection of copyrights becomes crucial in this ultra-technological era, as unbridled downloading, copying and infringement are rampant via internet. Fine-tuning of legal frameworks and implementation mechanisms becomes a necessary consequence for every country. This is more so for a country like India when it is poised to become a super economy in a short span of time. Efforts are being taken to revamp the copyright protection system in many countries including India.[1]

In order to ensure better intellectual property protection and enforcement regime, effective understanding of copyright law by all concerned is indispensable. There is a long felt need for a good textbook on copyright law.

[*] Reader, Law Centre-II, Faculty of Law, University of Delhi.

[1] For the efforts taken in the UK, see, GOVER'S REVIEW OF INTELLECTUAL PROPERTY (2006), available at http://hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm. Accessed on April 25, 2007. For reform process in Canada, see, http://strategis.ic.gc.ca/epic/site/crp-prda.nsf/en/rp01142e.html. Accessed on April 25, 2007.

The book under review fulfils this need. The book is comprehensive in its coverage and written in a very lucid language. Classified into ten chapters, the book gives an exhaustive account of copyright law in India incorporating international conventions and case laws. Chapter 1 is a primer about the concept of intellectual property and the general principles of copyright law covering the functions of copyright system, subject matter of copyright, the bundle of rights protected under copyright law, etc. The history and evolution of copyright law is traced in the Chapter 2. The author accounts for the global harmonisation efforts of copyright law since the adoption of the Berne Convention for the Protection of Literary and Artistic Works, 1886 (as modified by the Paris Act of 1971) till date. The second part of the same chapter deals with the regime of copyright law in India under the Copyright Act, 1957 (the Act). It also mentions briefly the various amendments to the Act.[1] However, the government is considering comprehensive amendments to the Indian Copyright Act and has asked for responses to various radical changes suggested in the Act.[2] New definitions of the terms 'communication to the public', 'cinematograph film', and 'performer' are suggested. The proposal includes modification of sections, insertion of new sections on tariff schemes for copyright societies and penalties for circumventing technological measures applied for the purpose of protecting copyrights. The author could have critically analysed the relevance and feasibility of the proposed amendments and contributed to an informed discussion among the students and intelligentsia.

Chapter 3 deals with the works in which the copyright subsists. The 'idea-expression dichotomy' has been very well explained with the help of the latest case laws.[3] Chapter 4 is devoted to authorship and the first owner of copyright. Practical illustrations and cases discussed in this topic make every point crystal clear. The rights of copyright owner and infringement are discussed in Chapter 5. This chapter starts with the dictum that the 'interests of the authors' are the foundation of their rights. The author establishes it with relevant provisions of the Copyright Act. The exclusive economic rights of the copyright holders as provided under Section 14 of the Act, such as the right to reproduce the work in any material form; right of issuing copies to the public; right to perform the work in public or communication to the public; right to make cinematographic film or sound recording in respect of the work; right to make translation of the work; right to make adaptation of the work; right of distribution of the work by way of sale, lease, rental and lending or transfer of ownership or possession of copies of the work are discussed. The right to resale share in original copies as introduced by the Copyright (Amendment) Act, 1994 under Section 53A is explained with

[1] Amendments in 1983, 1984, 1994 and 1994.

[2] See, the notification by the Registrar of Copyrights, Department of Secondary and Higher Education, Ministry of Human Resources Development inviting suggestions for amending the Copyright Act, 1957, available with the list of proposed amendments at http://copyright.gov.in/Logon.aspx. Accessed on April 25, 2007.

[3] Alka Chawla, COPYRIGHT AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PERSPECTIVES 38-46 (2007).

the help of illustrations.[1] The section on moral rights of authors against any distortion or mutilation of their work covers the international and national perspectives on this aspect.

Copyright is not an absolute right.[2] It comes with three kinds of statutory limitations, namely, the limited term of copyright protection, licences (statutory and compulsory licence), and exceptions as to the permitted acts enumerated under Section 52 of the Act. All these limitations are discussed in detail in Chapter 6 titled *Limitations to the Copyright*. Chapter 7 is devoted to the rights of broadcasting organisations. While discussing regulation of broadcasting in India, the author has highlighted the circumstances that led to the enactments of the Cable Television Network (Regulation) Act, 1995 to regulate cable network, the Prasar Bharti Act, 1997 to regulate public service broadcasters and the Telecom Regulatory Authority of India Act 1997 for regulating broadcasting and cable services in the wake of the Supreme Court judgment in *Union of India* v. *Cricket Association of Bengal*.[3] The author explains that though there are legal frameworks to deal with broadcasting, the issues pertaining to violation of IPRs have not been covered in these regulatory laws and therefore one has to resort to the Copyright Act and international conventions for this matter.[4] The rights of the performers are also discussed in this chapter. Chapter 8 moves on to focus on the collective administration of rights through copyright societies.

According to William Cornish, "The great issue of the present is, first and foremost, whether copyright can survive the Internet..."[5] The film and music industries throughout the world have already tasted the bite of Internet because of unregulated and unauthorised downloading and sharing of copyrighted materials. According to a study made by WIPO, "Internet downloading, through speedy compress of MP3 or for burning into CD is predicted to rise steeply alongside trade in pirate CDs, which may have involved as many as 950 million disks in 2001 (valued at US $4.3 billion)."[6] Another study reveals that "Already some 500,000 films are said to be downloaded in breach of copyright each day.... in all it is claimed that 40 per cent of programs are copied without consent."[7] This important issue is discussed in Chapter 9 of the book with succinct details. The book rightly points out that though India has a very progressive Copyright Act, it is still in some ways behind the jurisdiction in comparison with the West in regulating Internet transactions as Internet 'browsing' is not explicitly dealt within the Act, either as a form of

[1] *Id.* at 92-114.
[2] *Id.* at 121.
[3] (1995) 2 SCC 161.
[4] Chawla, *supra* n. 3 at 154.
[5] William Cornish, INTELLECTUAL PROPERTY: OMNIPRESENT, DISTRACTING, IRRELEVANT? (2005).
[6] WIPO, *Intellectual Property on the Internet: A Survey of Issues* (2002), §§ 31-39. Quoted in *Id.* at 51. These statistics are based on 2002 estimates. In 2007, the copyright violations may be several times more and horrifying.
[7] Business Software Alliance, 7TH ANNUAL PIRACY STUDY (2002), quoted in Cornish, *supra* n. 9 at 51.

'infringement' or as a type of 'fair dealing'.[1] According to the author, there are no decided cases in India on the issues relating to the Internet.[2] Chapter 10 of the book deals elaborately with the remedies against infringement of copyright.

Though the copyright law has existed for several decades, there have been large scale violations because of defective implementation and enforcement of the law. In this knowledge era concrete steps have to be taken to accord importance to intellectual property protection in true sense. The reviewer hopes that the book under review which is very well written will certainly go a long way in fulfilling the needs of those who want to understand copyright law in its right perspective. The strength of the author lies in her clarity in explaining the intricacies of copyright law with simple words and illustrations. This book will be of immense help to the students as well as the practitioners of intellectual property law.

*L. Pushpa Kumar**

HUMAN RIGHTS, JUSTICE, & CONSTITUTIONAL EMPOWERMENT edited by C. Raj Kumar and K. Chockalingam. Oxford University Press, Delhi. 2007. Pp. liv+520, Rs. 695/-

The Indian state is pictured as a fast growing economy raising an array of questions, e.g., will the process of globalisation and economic liberalization mitigate the inequalities in terms of caste, religion and wealth? Which entity will guarantee protection of human rights of people, more particularly that of the vulnerable sections of society when the role of state is shifted from service provider to that of facilitator for the functioning of private actors? Do we expect market forces to regulate our rights or care for our needs? The social and legal dimensions of these issues are examined and subjected to an in depth study in this edited version. The book is divided into three parts: Constitutionalism, Human Rights and Social Empowerment; Governance, Development and Human Rights; and Criminal Justice, Victim Justice and Women Empowerment. A platform for the discourse is provided in the beginning of the book by Granville Austin, featuring the characteristics of the Indian Constitution and *A Man for All Seasons* note on Justice Krishna Iyer[3] by Soli Sorabjee.

In Part I, Upendra Baxi brings out tips of caution evolved by Justice Krishna Iyer, which may be useful for the contemporary Indian judges who are inclined towards *structural adjustment* of judicial activism. Krishna Iyer insists that no post colonial constitution or jurisprudence can take human rights seriously when it fails to take human / social sufferings seriously. M.P. Singh discusses the

[1] Chawla, *supra* n. 3 at 183.
[2] *Id.* at 178.
* Lecturer, Law Centre–1, Faculty of Law, University of Delhi.
[3] The book is dedicated to Justice Iyer "for his tireless efforts and contribution as a judge and jurist to numerous struggles upholding human rights..."

evolution of human rights in India *via* the constitutionalization of rights. Indian Constitution, in his view, gave equal emphasis to civil and political rights and socio-economic rights in consonance with the societal values. He shows how the Indian judiciary developed the interrelationship between these two categories by balancing fundamental rights with Directive Principles of State Policy (DPSP). It is argued that justice is best served by achieving social and economic democracy. Equality and compensatory discrimination are analyzed by P.N. Singh wherein he substantiates how effective social justice and equality could be promoted by vesting resources in empowering the competitiveness of the backward sections of the population rather than through hyped political mileage programmes. Sudhir Krishnaswamy discusses the horizontal application of fundamental rights and state action in India. Horizontal rights focus on whether the rights apply to relations between private individuals. He examines a number of Supreme Court decisions to show the application of horizontal rights directly or indirectly. The value of press freedom for ensuring human rights is highlighted by N. Ravi. He narrates the instances wherein press was used as a medium of establishing peace in the conflict zones of Balkans or leading to PIL in *Bhagalpur Blinding Case.*[1] He also highlights the negative side of the press wherein they engage in hate speech targeting religious and caste groups as happened in Gujarat. It is undisputed that free press is essential for retaining democratic values.

In Part II, Arjun Sengupta emphasizes upon the composite nature of right to development. According to him, the classification of rights into first, second and third generation is against the principles of interdependence and integrity of human rights as a whole. Economic growth based on equity and social justice is essential for realizing right to development. The trans-judicial influence between the Indian and South African courts on social rights jurisprudence form the theme of the paper of Arun Thiruvengadam. He discusses the status of socio-economic rights in the Indian and South African Constitutions. The South African Constitution uses a restrictive clause, namely, the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right, on the lines of International Covenant on Economic, Social and Cultural Rights. After an analysis of the South African Constitutional Court cases,[3] he shows that the Constitutional Court has gradually developed an attitude of recognizing and giving effect to the socio-economic rights. Corruption creates a vicious atmosphere of lack of respect for rule of law and democratic institutions violating human rights. Corruption is institutionalized in India, for instance, corruption operating among the police forces. He emphasizes upon the relevance of a corruption free society to promote the value of rule of law. He suggests that corruption should be addressed not only

[1] *Anil Yadav* v. *State of Bihar*, (1981) 1 SCC 622.

[3] *Soobramoney* v. *Minister of Health, KwaZulu-Natal*, 1998(1) SA 765 (CC), available at http://www.concourt.gov.za/files/soobram/soobram.pdf; *Government of the Republic of South Africa* v. *Grootboom*, 2000(1) SA 46 (CC), available at : http://www.concourt.gov.za/files/grootboom1/grootboom1.pdf; *Minister of Health* v. *Treatment Action Campaign*, 2002(5) SA 721 (CC), available at http://www.concourt.gov.za/files/tac/tac.pdf.

through criminal law enforcement but also should be viewed as a human right violator, affecting all branches of governance.

Globalization as a concept is not inherently anti or pro human rights, points out Surya Deva. Globalization as a process is more viewed as anti human rights due to the nature and motive of the actors involved. A portion of his paper is devoted to discussing how has the Indian state responded to the process of globalization till now. His analysis shows that many economic reform measures did not adequately take into account the human rights implications inspite of the positive role played by the judiciary in many cases. The critics argue that even the judiciary was influenced by the liberalization process at the cost of human rights. In the period where the state is increasingly withdrawing from key sectors, he brings in a highly relevant item for discussion in the context of fundamental human rights – *against whom*? There are decisions, which have held private actors accountable even though they were not 'state' for the purpose of Article 12. However, DPSP relating to education, health, drinking water and tribals are violated on a continuous basis. Though the court has upheld the right to education up to 14 years, there is not enough spending on primary education by the government. Higher education through professional establishments facilitates the entry of only the affluent groups.

Venkat Iyer emphasizes upon the need for searching inwards with respect to the functioning of human rights groups. In his words, in the 50s, 60s, and 70s human rights campaigners focused on gradual incorporation of human rights in the legal systems across the world since they realized that such an approach is necessary to take the public into confidence. He contrasts this approach with the present advocates of human rights who are over ambitious, exaggerating facts, far away from showing commitment to the cause of protection of human rights. The social auditing by the CAG[4] often reports about the failure of the state machinery, which coincides with what, many human rights groups agitate about. May be that isolated instances give voice to his findings, but not all.

Balakrishnan Rajagopal through his excellent analysis shows that activism centered judicial decisions were not translated into reality in the area of human rights. According to him, court's activism has many biases - in favour of state and development, the rich against workers, the urban middle class and against rural farmers, in favour of globalitarian class and against the distributive ethos of Indian constitution. He argues that despite the procedural innovation through democratization of standing, substantive *ad hocism* acts as an obstacle in the way. With some notable exceptions (right to education), the record of the Indian Supreme Court in recognizing economic, social and cultural rights is not an

[4] See, Chapter 3. REPORT OF THE CAG ON THE UNION GOVERNMENT (CIVIL): PERFORMANCE APPRAISALS (2002), available at http://cag.nic.in/html/reports/civil/2002_book3/cahpter3.pdf wherein the Report stated that the water supply in terms of providing potable drinking water to all villages by 2004 is known for misplanning and negligence.

encouraging one, for example, cases like *T.K. Rangarajan*[5] (banning strike); and *Olga Tellis*[6] and *Narmada Bachao Andolan.*[7]

The articles in Part III, discuss the rights of the victim and lacunae in the legal system be it victims of communal violence or of sexual harassment. Smita Narula highlights the grave situation prevailing in India in terms of impunity for communal violence. She discusses the issue in the context of the anti-Sikh riots occurred in Delhi in 1984; communal riots of Mumbai in 1993; and the communal violence following the Godhra incident in Gujarat in 2002 by analyzing the action/inaction by the police forces, prosecution and judiciary, which ultimately point to the need for reform in criminal justice system of India. She reiterates that communal violence is neither inevitable nor spontaneous. Chockalingam points out the need for serious discussion on victim justice. Lutz Oette discusses how far the Indian legal system supports the protection of human rights of the victims. While proposing criminal justice reforms, N.R.M. Menon suggests division of offences into three categories, namely: warrant trial for hard crimes; summons trial for correctional offences; and summary trail for welfare offences. He proposes procedural and substantive reforms for each category. Approach to sexual harassment in India and the statutory responses is discussed by Srivastava pointing out the inadequacies in the system. According to B.B. Pande it is necessary to deconstruct the image of the poor and marginalized to see it in more humane and scientific lines. It is argued that criminality is imposed on this community from historic times (breach of contract of service during colonial period), perpetuating poverty among the groups. His live description shows how every bit of the criminal justice machinery colludes with each other to produce a unanimous conclusion. He suggests *de facto* and *de jure* decriminalization to overcome the deficiency in the system.

The fundamental tenet of the book is about realization of socio-economic rights in the era of economic reforms and the means by which the Indian state and the judiciary in particular can play a role in giving effect to the constitutional goals incorporating internationally developed legal norms as part of the domestic law and learning from the judicial decisions of other developing countries. The book is a valuable asset for people from all walks of life to understand the ramifications of on-going developmental programmes. It conveys the message that socio-economic and cultural rights are to be at par with civil and political rights to achieve justice in the society. Hence, it is vital for the governance machinery to safeguard the constitutional goals and wherever lapses occur, constitutionally empowered movements shall make them conscious about it through legitimate means.

*Meena S. Panickar**

[5] *T K Rangarajan* v. *Government of Tamil Nadu and Others*, 2003 SOL Case No.429.
[6] In *Olga Tellis* what the court upheld was not the right to housing but the eviction without notice and hearing defeated Art. 21.
[7] *Narmada Bachao Andolan* v. *Union of India and Others*, (2000) 10 SCC 664.

GOYLE'S THE LAW OF PARTNERSHIP by M. R. Mallick. Eastern Law House, Kolkata. Second Edition 2006. Pp. 67+748.

The Indian Partnership Act was enacted in 1932. Prior to this, the law of partnership formed part of Chapter-XI of the Indian Contract Act, 1872. However, with the expansion of trade and commerce the need for a separate and independent statute was felt. Hence, the present Partnership Act was passed. Since then there has been continuous development of the subject through amendments, expert committee reports and judicial decisions. The proposed Limited Liability Partnership (LLP) Bill, 2006 has further added importance to the subject. It is in this context that the present work acquires importance.

The volume under review is a revision of Goyle's THE LAW OF PARTNERSHIP, which was first published in 1989 and presented a comprehensive and integrated view of the law of partnership in a narrative form. The new edition tends to make it more lucid and claims that it would attract the bench, bar and the litigant public. Another salient feature of the new edition is that it lays down the provision of Income Tax Act, 1961 as amended by the Finance Act, 1992 which made the procedure of assessment of partnership firm and its tax liabilities quite simple and easier. The author has also explained the provisions of Section 69 in a detailed manner.

The book is divided into eight chapters. The first chapter begins with a brief historical background and attempts to define various terms like act of a firm, business, third party, etc. It also explains that the provisions of the Partnership Act shall not be held to be retrospective in operation. In addition, the chapter specifies that the Act is not exhaustive as the unrepealed provisions of the Indian Contract Act shall continue to apply to partnership firms save in so far as they are not inconsistent with the express provisions of the Indian Partnership Act. Likewise, chapter second emphasizes on the creation of partnership and its various facets. With a view to tracing the nature and meaning of partnership, the author goes into its historical background and also refers to Lindley's nineteen definitions of partnership. In addition, the definitions offered by Kent and Pollock have also been taken into consideration in this regard. Pollock's definition of partnership in his DIGEST and the definition of partnership given in section 4 of the Indian Partnership Act, 1932 correspond to each other with slight modifications.[1] The other aspects highlighted in this chapter include partnership at will and particular partnership. The author has discussed the nature and scope of various forms of partnership in a precise manner.

The third chapter while focusing on relations of partners to one another has highlighted the aspects like duties of partners, conduct of business, mutual rights and liabilities, property of the firm and its applications. With regard to the

* Lecturer, Law Centre-I, Faculty of Law, University of Delhi.
1. M.R. Mallick, GOYLE'S THE LAW OF PARTNERSHIP 14 (2006).

partnership property the author has quoted the decision of Supreme Court in *Arm Group Enterprises Limited* v. *Waldorf Restaurant*[2]. The Supreme Court in this case decided that it would depend upon the terms of partnership deed to decide when the property belonging to a person would become the partnership property[3]. Since the goodwill of the business forms a component of the property of the firm the author has tried to explain and clarify it with the help of judicial decisions and observations made by eminent authorities like Lindley and Bank.

Chapter four elucidates that the relations between the partners are governed by the fundamental norm of good faith, yet their relationship with the outside world are governed by the rules of agency. The law of partnership has often been described as nothing but the extension of the law of agency. This concept of agency is enunciated in regulating the relations of the partners vis-à-vis third party[4]. With regard to matters like mutual agency, authority of partner to enter into a subsidiary partnership with a third party, reference to arbitration, doctrine of holding out, position of minor into a partnership, the author has given a detailed account relying on eminent personalities, Acts and the decisions of courts. The fifth chapter deals mainly with the matters relating to the incoming and outgoing partners in a similar manner.

Chapter six provides a descriptive account of various modes of dissolution of firm and the liabilities, rights, authority, etc., of partners after dissolution of the firm. The main thrust of chapter seven is on registration and effects of non-registration of a firm. The major part of this chapter is devoted to Section 69 which deals with the effects of non-registration of a firm. The registration of a firm is not mandatory but suits or proceedings by a firm or partners cannot be filed without the proper registration of the firm and in that view Section 69 is mandatory in character. In *U.P. State Sugar Corporation Ltd.* v. *Jain Construction Company*[5], the Supreme Court has expressed the view that registration of the firm during the pendency of the suit would not cure the defect arising out of the non-compliance with Section 69 of the Partnership Act[6].

The eighth chapter of the volume is supplemental which deals with measurers like the mode of giving public notice, repeals and savings. Besides, it includes Schedule I dealing with documents and acts in respect of which the fee is payable and schedule II relating to the Acts repealed.

Apart from the eight chapters, the volume contains a table of cases running into 55 pages, 22 appendices covering copies of the Partnership Rules (Andhra Pradesh, Assam, Bengal, Bombay, Delhi, Haryana, Jammu and Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Punjab, Rajasthan, Tamil Nadu and Uttar Pradesh), liability of partnership firm and partners under

2. AIR 2003 SC 4106.
3. *Supra* n.1 at 158.
4. *Id.* at 192.
5. AIR 2004 SC 4335.
6. *Supra* n.1 at 534.

the Income Tax Act, 1961 and the Code of Civil Procedure, 1908. These appendices run into 157 pages. In addition, the author has given a detailed index running into as many as twelve pages.

The author deserves praise for the volume which has emerged as a valuable addition to the literature on the subject. It would prove useful to the legal professionals, teachers, students, and scholars. In fact, the book contains the Acts, relevant sections, rules, court decisions and valuable references from the works of perceptive writers on the law of partnership. However, more insightful comments and meticulousness in copy editing would have further added to the quality of the volume.

Suman[*]

MEDIEVAL HINDU LAW by Ashutosh Dayal Mathur. Oxford University Press, Delhi. 2007. Pp. xxxii+251, Rs. 595/-

In ancient period the punishing of the wicked and protecting the righteous was considered as the supreme duty of the King. The justification of kingship depended on the performance of this duty. According to ancient injunction one-sixth of the sins of the people accrued to the ruler if he failed to discharge this function to the satisfaction of all. The law-givers took keen interest to formulate laws easily applicable to the changing needs of the society. The law codes of that period do suggest the development of customary law and the consideration of circumstantial evidence in administration of justice. There was a gradation of courts and the King being the fountain-head of justice was the highest court of appeal. Appeals lay from the lower courts to the higher courts. The village courts of *panchayats* played a significant role in settling local disputes, both in the ancient and medieval times. There were detailed rules regarding judicial procedure, conduct of judges and witnesses. Pleaders also figured in the ancient Indian judicial system.

The rulers in ancient India who administered justice were subject to certain traditional obligations and customary limitations. For example, the rulers had to take into consideration the laws of the guilds in administering justice. All were not equal in the eyes of law. A *brahmana* and a *sudra* were not treated alike. The punishment for offences depended on the social status of the offender. The caste of the offended also influenced the judgement; the punishment being severe if the person offended belonged to a higher caste. The penalty was mild in case the offended occupied an inferior status in the society. Apart from these, the ancient India was conversant with many of the features of modern judicial system. The success of a judicial system is said to depend upon two basic elements: a well-regulated system of courts following a simple and orderly procedure, and a

* Lecturer, Law Center I, Faculty of Law, University of Delhi, Delhi - 110007.

definite, easily ascertainable, and uniform body of law. These two basic elements certainly formed the basis of ancient Indian judicial system.

In the medieval period, Indian society came to be divided into two parts: Hindus and Muslims. Like the Hindus, the Muslims in social relations and political organization were governed by their holy book, certain rules, practices and traditions. There was a gradation of courts from the lowest to the highest and the emperor was the final court of appeal. Whenever they were in the capital, they held the court once or twice a week, heard the complaints and dispensed justice. Civil and Canon law cases pertaining to the Hindus were heard by learned *brahmans* appointed for the purpose, while the criminal cases were tried according to Islamic law. The revenue cases were tried according to local traditions. The change in the ruling community did not affect the functions of the *panchayats* of the village and during this period they exercised criminal jurisdiction in petty cases. In criminal cases, *panchayats* were the lowest trial courts and their findings were final. As in ancient period, all were not equal in the eyes of law and the Hindus as well as the poor were discriminated against the Muslims and the rich respectively.

Hindu law, as it is now generally agreed, has the most ancient pedigree of any known system of jurisprudence. Hindu law as is commonly understood is a set of rules contained in several Sanskrit books which the Sanskritists consider as books of authority on the law governing the Hindus. Hindu law, though believed to be of divine origin, is based essentially on immemorial customs and is admixture of religion, morality and law. The concept of Hindu law is deeply rooted in Hindu philosophy and Hindu religion. The book under review is a great work about some important issues concerning Hindu law and Muslim law.

The book has been divided into seven chapters. The work under review seeks to study the changes which took place in the field of Hindu law as it evolved between the eighth and the fourteenth centuries and as reflected in the selected Sanskrit texts written during this period. It also tries to explore the reasons which brought about those changes.

The first chapter deals with the evolution of Hindu law from divine justice to worldly law. Hinduism has never, except in small sects, had any organized church or papacy to act as the final arbiter of righteous conduct. In spite of the tall claims that *shruti* or the *smriti* is the fundamental norm of dharma or that all people on the earth must learn rightful conduct from the *brahmanas* of *Brahmarsi desa*, Hindu law has allowed different groups and regions to develop their own dharmas.

In the second chapter, the author has dealt with the concept of marriage and family. Family law covers areas like marriage, obligations of spouses, dissolution of marriage and maintenance, adoption and most importantly the law of partition and inheritance. The principal concern of this chapter is with the title of dispute traditionally called *stri-pum-dharma* which seeks to regulate the mutual conduct of men and women both within and outside marriage. In chapter three the author

has discussed the law on inheritance and partition of property. The rise of two rival schools of the law of inheritance, *viz.*, the *Mitaksara* school and *Dayabhaga* school during the medieval period has also been noticed by the author in this chapter. The law of inheritance and partition of property throws up interesting questions about the structure of the family, relative status of members, and the concept of ownership in property itself. Medieval texts show that these concepts underwent dramatic changes which get reflected in the changing law on partition and inheritance.

Chapter four deals with the regulation of economic transactions and relationships. Right from the period of the early *smritis, dharma sastra* has sought to regulate economic transactions and relationships. Traditional *vyavahara padas* covering this area include banking laws, i.e., debts and deposits, gifts, sale and purchase, relations between employers and employees, and joint commercial undertakings.

Chapter five entitled as "Law & Community" deals with relationships of human beings which give rise to many forms of social organizations. Chapter six deals with criminal law. The *dharmasastras* do not classify disputes as civil and criminal. This distinction made now is based on the procedure laid down for the two. All civil matters are disputes between competing parties who have to contest each other's claims in the court themselves. Criminal matters on the other hand are ones where the state takes up cudgels on behalf of the aggrieved party, collects and produces evidence, and conducts the trial. Chapter seven deals with law of evidence and procedure.

The book is a scholarly presentation of specific issues relating to evolution of Hindu law in the Medieval period. It has been written with a great amount of research and hard work. The reviewer has no doubt that the book will be eminently useful for the academic scholars of Hindu law. The book is recommended for all law libraries being a good reference work with extensive research contents from the various sources in the field of Medieval Hindu Law.

Sushila[*]

MITRA'S LEGAL AND COMMERCIAL DICTIONARY revised by Tapesh Gan Choudhary. Eastern Law House, New Delhi. Sixth Edition 2006. Pp. 928, Rs. 675/-

It is difficult to review a dictionary. "I am quite aware," said Lord Coleridge, "that dictionaries are not to be taken as authoritative exponents of the meaning of words used in the Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are, therefore, sent for instruction to these Books."[1] Further the utility of dictionary definition is obviously limited where judge and counsel use different works.[2]

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[*] Lecturer, Law Centre-I, Faculty of Law, University of Delhi, Delhi-110007.
[1] *R.* v. *Peters* (1886) 16 Q.B.D. 636, 641.
[2] *Nairne v. Stephen Smith & Co. Ltd.*, [1943] 1 K.B. 17.

Judicial observations can never be regarded as complete definitions; they must be read in the light of the facts and issues raised in that particular case.[1]

A word is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used. This is expressed by the Latin maxim *Noscitur a sociis*. A special meaning may be given to a word because of the context in which it figures, is a well-recognized canon of construction.[2] Yet the dictionaries are for consultation "in the absence of any judicial guidance or authority.[3]

An attempt has been made in the lexicon under review to cite as many references as are to be found in the dictionaries of this size. The meanings of legal and commercial terms are drawn from interpretation clauses in different statutes, judicial pronouncements in various contexts and descriptions in standard treatise of authority. Black's Law Dictionary, Jowitt's Dictionary of English Law, Concise Oxford Dictionary, Webster's Comprehensive Dictionary amongst others is frequently cited. Definitions are at places taken from statutes for easy reference quoting relevant sections. The word "consent", for example, in its various forms is defined by quoting from Sections 14, 19, 19a and 20 from the Indian Contract Act, 1872.

This standard work of reference has made a few variations in the compilation. A "Note" in dark shade draws attention of the reader to commentaries on critical terms and expressions. Another conspicuous feature is the index, in which words are grouped under vital words, for ready reference. For example, under the word "Agent" collateral expressions qualifying or centering on it are listed as commission agent, *del credere agent*, duly authorized agent, forwarding agent, general agent, insurance agent, mercantile agent, recognized agent and special agent. The work features Latin terms and maxims as are currently in use. Quotations from scholarly publications decorate the treatment of words and forensic philosophy is spelt out in this updated work.

The publication is a handy and useful book of reference for those connected with legal, commercial and mercantile world, and a useful edition for the law library.

V. K. Gupta[*]

FRONTIERS OF LEGAL THEORY by Richard A. Posner. Universal Law Publishing Co., New Delhi. (Reprint) 2006. Pp. ii+453, Rs.450/-

Five years law courses in India have included in their curriculum study of history, political science, economics, sociology and even psychology. Scanning of the course contents and books prescribed on these subjects leaves one bewildered. Most of them deal with the study of pure social science. Indian

[1] (1970) 1 WLR 752, 754.
[2] *State of Assam* v. *Ranga Mahammad*, (1967) 1 SCR 454; AIR 1967 SC 903.
[3] *Kerr* v. *Kennedy*, (1942) 1 K.B. 409 at 413 per Asquith J.
[*] Professor, Law Centre-II, Faculty of Law, University of Delhi.

LL.B. students gain sketchy knowledge of these subjects in a half-hearted manner. Prescribed syllabi are too long and the law schools have taken upon themselves to teach in a semester or two all that there is in a subject and what is taught in 3 years to an undergraduate social science student. Yet, students hardly discover any relationship between law and social sciences. No one other than law teachers and jurists better understands the importance of the basic precepts and philosophies of great social thinkers which give an insight into the dynamics and the spirit of law for evolving new theories within the existing framework of law to meet the ends of justice and fulfilling the aspirations of the ever changing society.

Judge Posner steps into this field. He advocates the study of law and pragmatism in relation to representative democracy wherein he discusses rise of philosophical and legal pragmatism, as propounded by John Marshall. He evaluates Dewey's theory of law and the concept of political democracy. Legitimacy of the economic interpretation of elite and pragmatic democracy is questioned and the concept is applied to the impeachment of President Clinton. Kelsen's positivism and economics is contrasted with Hyke's theory of adjudication. He compares purpose versus consequences in terms of free speech.

Richard A. Posner in his book FRONTIERS OF LEGAL THEORY explores the most exciting development in legal thinking since the World War-II. It charters the growth of interdisciplinary legal studies, the application of social sciences and the humanities to law in the hope of making law less formalistic, more practical, better grounded empirically and better tailored to social goals. Promoting the concept of legal theory as a unified field of social science, the author delineates five areas of particular scrutiny: economics, history, psychology, epistemology, and empiricism.

Economics should not be taught as it is done in arts or commerce schools. Instead focus should be on law and economic movements, relationship between normative law and economics, transition from utilitarianism to pragmatism. Similarly history should be taught in relation to legal aspects of history. How past events have shaped the present laws? The code of conduct of past rulers that have percolated down to present generation policy laws. For example, the study of history should give us an insight into how the law of possession was developed or what is the impact of history on contemporary laws and law making. Psychology should stress upon behavioural law, place and need for emotions in law specially in criminal law, social norms and even impact of religion, e.g., moral laws and legal rules. Under epistemology the author has discussed testimony, adversarial procedure and its criticism, and also rules of evidence.

Posner tells us that much of the study of legal rules is empirical in spirit yet non-quantitative. The author has done a statistical study of the judgment reversed by the US Supreme Court and incorporation of citations in research-works drawing attention towards the weaknesses of judicial citations. He advocates that

scholars should be encouraged to research more in the fields having commercial application.

The book is highly recommended for law teachers of five year courses to improve upon and update syllabi of history, economics, psychology and philosophy. The book opens up new vistas and stresses upon in right earnest the need for empirical research at higher levels to make it relevant to the new eco-socio environment of liberalization, privatization and globalization.

V.K. Gupta[*]

[*] Professor, Law Centre-II, Faculty of Law, University of Delhi, Delhi.