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PROFESSOR INCHARGE'S PAGE

I feel great pleasure in presenting the first volume of the *National Capital Law Journal* to law teachers, advocates, Judges, law students and others who are called upon to grapple with nitty-gritty of law. At the outset, I take this opportunity to thank and congratulate my learned colleague, Professor Balbir Singh who concieved the idea to publish a Journal of Law Centre-II. It was only on account of change of events with the passage of time that I took over as Incharge of Law Centre-II and got an opportunity to write this page.

It hardly needs to be emphasised that a Law Journal is a vehicle to carry to the readers, the new ideas, techniques, pursuits, innovations and research undertaken by law scholars in law schools and other spheres of law. Legal research is necessary concomitant of law teaching and as such it is necessary duty of law teachers to undertake serious and meaningful research. Legislature makes the law, executive implements the law and judiciary interprets the law and thus the Court has the last word to say on any point of law. Ours is a Constitution of checks and balances. If the legislature or the executive makes a mistake, the judiciary sets them right through the interpretation of law. So the law is not exactly that what we find in the statute book. Law is the last word of the last judge. Meaning thereby, the final position about any law emerges on account of interpretation given to it by the Supreme Court in India. An example in sight is Article 14 of the Constitution of India which appears to have guaranted absolute equality to all. Our Supreme Court as a result of true interpretation of Article 14 read within the doctrine of reasonable classification on the ground that the equality can be only among equals. In a country like India which is socially and economically imbalanced society, absolute equality is neither possible nor desirable. Article 14 does not specifically provide for reasonable classification which however has become a part of Article 14 as a result of its interpretation by the Indian Supreme Court.

To err is humane, so goes the saying. What if the Court, especially the Supreme Court makes a mistake in interpreting the law. For other Courts, the remedy is an appeal to the higher Court. It is one situation, among others, where law professors should conduct sincere and serious research to highlight the errors committed by the Supreme Court in interpretation

of law. There are several instances available to show the mistakes committed by the Supreme Court. In case titled *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643, the Supreme Court held that there is no difference between a law and an amendment of the Constitution and because of the statutory injunction contained in Article 13 of the Constitution to the effect that the state shall not make a law to take away or abridge the fundamental rights guaranted by part III of the Constitution, the Parliament cannot change the fundamental rights even by an amendment of the Constitution. Professor P.K. Tripathi, a professor of law of Delhi University immediately rose to occasion and produced an article criticising the judgement of the Supreme Court in *Golak Nath* case, clearly bringing out a difference between an ordinary law made by the legislature in exercise of legislative power and amendment of the Constitution on the ground of 'Criterion for Validity'.

It is heartening to note that the Supreme Court in its judgement in *Keshva Nanda Bharti* v. *State of Kerala*, AIR 1973 SC 1461, while overruling its judgement in *Golak Nath* adopted the same principle of 'Criterion for Validity' as propounded by Prof. P.K. Tripathi, even though without referring to the research work done by Prof. P.K. Tripathi. I am writing all this with a view to stress the paramount need for law professors to produce research work which may operate as guide for the judiciary and give the judges an opportunity to correct their own mistakes, if any, in future judgements.

One formidable difficulty in the way of law teachers undertaking worthwhile research, had been that they remained divorced from law in action as they were not allowed to practice law in Courts. Justice V.R. Krishna Iyer, former judge of Indian Supreme Court in his foreword to a report prepared by Prof. Upendra Baxi, former Vice-Chancellor of Delhi University on Social-Legal Research in India, in 1975, quoting from the situation as obtaining in United States advocated the need for permission to law teachers to appear in Courts. According to Justice Krishna Iyer, the practising teachers can champion various legal causes and produce meaningful sociol-legal research. The legal academicians must get a practical exposure in Courts, through legal aid cases and social action cases in order to equip themselves better to produce legal research. Justice P.N. Bhagwati, former Chief Justice of Indian Supreme Court realising the potentials of law teachers recommended to the Government of India to take steps for enrolment of law teachers as advocates on my request. Accordingly, the Central Government made a rule in 1979 enabling law teachers to get themselves enrolled as advocates. University Grants Commission which controls the Indian Universities, passed a resolution to the effect that law teachers can be allowed to appear in Courts in Legal aid cases and social

action cases. The Delhi University in the meeting of its executive council also resolved to allow law teachers to appear in Courts in legal aid cases and social action cases. Since this development, the quality of teaching and research in Law Faculty of Delhi University got a new filip. It is common knowledge that Prof. Upendra Baxi achieved academic excellence because he used to appear in Supreme Court like Agra Home case.

This is the maiden attempt of Law Centre-II to publish the journal. I am pretty sure that the journal shall meet the aspiration of its readers. It will, certainly illumine the intuition and inspire the intellect of the members of the legal fraternity. The editorial committee of the journal and especially Prof. A.K. Koul, Prof. Balbir Singh and Mr. V.K. Ahuja have done commendable work in producing the *Journal*. In the fond hope that this *Journal* will not compare ill with any of the best Journals in the World, I thank all the members of the editorial committee and wish the *Journal* a grand success. I thank the printer M/s Shivam Offest Press, New Delhi for doing good job of producing this volume with quality print on good paper and presentable cover and design.

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MAJORITIES' RIGHTS TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS

*Justice K. N. Goyal**

I. The Spectacle of Hindus Claiming to be Non-Hindus

The claim of the Ram Krishna Mission that it was a minority institution in as much as the religion followed by the Mission was different from Hinduism was rightly rejected by Supreme Court bench consisting of Justices Kuldip Singh, Venkatachala and Sahir Ahmad in *Bramchari Sideshwar Shai* v. *State of West Bengal.*[1] The learned Judges, however, allowed the Mission to administer the college through its own governing body. They did not consider it to be in the interest of justice to accede to the prayer of the teachers' union who had moved the High Court for a writ of mandamus to compel the State Government to constitute a governing body for the college on the standard pattern prescribed for other colleges. The question whether a religious denomination has the right under Article 26(a) of the Constitution to establish and maintain institutions for general education also as distinguished from religious education was left open to be decided in a proper case where all the parties who might be concerned with it are afforded adequate opportunity to have their say in the matter.

Similar attempts have earlier been made by the Arya Samaj to seek protection of Article 30 as a minority by claiming that theirs was 'Vedic religion' which was distinct from Hinduism. Their contention was also rightly rejected by a Division Bench of the Delhi High Court consisting of Justices Deshpande and Pritam Singh Safeer.[2] The claims of Jains and Sikhs whose religions were held to be separate, even though they were governed by a common Hindu law, were however, upheld.

A similar claim by the Brahmo Samaj did succeed before a full Bench of the Patna High Court in *Dipendra Nath Sarkar* v. *State of Bihar.*[3] But Deshpande J (as he then was) of the Delhi High Court in the above noted case[4] has rightly drawn attention to the definition of "Hindu" in the Hindu Marriage Act and other like Acts under which Virashaiyas, Lingayats and followers of the Brahmo Samaj, Prathana Samaj or Arya Samaj have been described as Hindus by religion. It is a different matter that though Budhists, Sikhs and Jains follow different religions, as recognised in the Constitution as well as in the Hindu Code, they too follow the Hindu way of life, as pointed out in *Ganpat* v. *Returning Officer*[5] and *Pannalal* v. *Sitabai,*[6] and are governed by the same

personal law as Hindus. The Delhi decision, dissenting from the Patna decision on the Brahmo Samaj, and distinguishing the other decision on Arya Samaj, namely, *Arya Pratinidhi Sabha* v. *Bihar*,[7] is clearly right, as also in accord with the view expressed in *Sastri Yagnapurushadji* v. *Muldas Bhudardas*.[8] The Calcutta High Court has also upheld the claim of Jains as a minority religious community in *Sree Jain Shewtambara Terapanthi Vidyalaya* v. *State of West Bengal*.[9]

The fact that sections of the Hindu community like the Arya Samaj, the Brahmo Samaj and Shri Ramkrishna Mission should have been driven to make such untenable claims is indeed disquieting and has led people to talk of the divisive impact of Article 30. Even some Judges have given expression to such feelings. Justice Safeer for instance spoke in the above mentioned Delhi judgement of the need to guard against all kinds of disruption, and observed that :

> The Constitution in origin is a secular constitution meant for all. Its directive principles indicate that the growth of a united nation in which all people may be living with satisfaction was the aim. It was not the aim to encourage fissiparous, dissipating anti-national tendencies. No nation can afford to submit itself to a process of disintegration.

II. Muslims and Christians as Majority Communities and Hindus as Minority

Let us therefore consider whether institutions run by majority communities are entitled to the same right that Article 30 confers on the minorities, or is it a mere privilege conferred on the latter which is not available to the "majorities". The plural number is advisedly used here. Taking the religious basis first, the Sikhs are the majority community in the State of Punjab. So are Muslims in the State of Jammu and Kashmir. Prior to division of Punjab, Sikhs were a minority throughout the State. If tomorrow Jammu is carved out as a separate State, Muslims will become a minority in Jammu, though today they are the majority community throughout Jammu and Kashmir. Let us now take the linguistic basis. Gujaratis are a minority in the city of Mumbai, and Maharashtrians are a minority in Ahmadabad. Prior to reorganisation of the Bombay State, Ahmedabad was part of it and Gujaratis were a minority there. Hindi-speaking sections of people called *"bhayias"* are a minority in Maharashtra. Marawaris and "Hindustanis", are a linguistic minority in Calcutta. But as soon as a *"bhaiya"* goes back from Mumbai to his home State of U.P. or Bihar, or a Marwari or "Hindustani" goes back from Calcutta to Rajasthan or U.P. he reverts to his status as a member of a majority community. A Tamilian or a Bengali while living in New Delhi is a member of a linguistic minority but as soon as he goes back to live in Tamil Nadu or West Bengal he

becomes a member of the majority community. All this follows from the Supreme Court decision in the two cases, *D.A.V. College, Bhatinda* v. *State of Punjab,*[10] and *D.A.V. College, Jullunder* v. *State of Punjab,*[11] decided the same day by the same Constitution Bench, holding that Arya Samajist Hindus (claiming Hindi in Devanagri as their language) were a religious as well as linguistic minority in the Sikh-majority State (having Punjabi in Gurmukhi as the State language).

Under Article 14 of the Constitution, the State is prohibited from denying to any person equality before the law or the equal protection of the laws. There is no doubt that some provisions such as in clauses (3) and (4) of Article 15 and clause (4) of Article 16 which permit discrimination in favour of women and socially and educationally backward classes of citizens, including members of Scheduled Castes and Scheduled Tribes, in regard to recruitment to public services or admission to educational institutions. This is permitted because of the need to make unequals equal and to bring about equality between different classes of citizens in the real sense. If there is a socially and educationally backward or otherwise deprived class of citizens its members may not be able to compete on equal terms with members of the relatively forward classes. Hence reservation was considered necessary in order to allow them proper representation in the public services and in the field of education.[12] Special representation has also been allowed in Legislatures for the members of Scheduled Castes and Scheduled Tribes. All this is by way of "affirmative action". Does the protection given to the minorities by Article 30 fall in the same class?

The question could not possibly be answered in the affirmative, for, as seen above, the same person who while living in one city is a member of a linguistic minority becomes a member of the linguistic majority on coming back to his fore fathers' land. Thus the label of "minority" and "majority" is not permanently affixed to a person who depends on his current abode and on the latest political boundaries pertaining to that abode. Surely a Tamilian or a Bengali while living in New Delhi does not become relatively backward compared to his kith and kin in his home State. It cannot therefore be contended with any justification that the minorities were favoured by way of affirmative action in order to make them equal to others who were better placed educationally. Indeed it is well known that the standard of Christian missionary educational institutions was by and large higher than the level of other institutions. Thanks to the dedication of Christian missionaries, aided generously by the British rulers, the educational as well as literacy average of Christians is also higher than that of Hindus.[13] Another religious minority, namely Parsis, are by all accounts far more advanced socially, educationally and economically than any other religious community in India. The religious

minorities of Sikhs and Jains are certainly not any more backward or forward as compared to Hindus generally. The facle assumption in *St. Stephens College* v. *University of Delhi,*[14] made in the context of preference to Christians in the matter of admissions to a Christian institution that minorities are "underprivileged" communities and that the principle underlying Article 16(4) is attracted in the matter is, with due respect, not based on any factual survey. The only circumstance cited in support of this conclusion was that if admissions were to be strictly on merit, not even ten percent seats could be secured by Christian candidates. Considering that the percentage of Christians in the total population of the country is much less, this can hardly be a matter of alarm. In any case, nobody pointed out to the Bench that the label of 'minority' applies not merely to the Muslims, Christians and Buddhists who are religious minorities in the country as a whole but also to Hindus as a religious minority in Jammu and Kashmir, Meghalaya and Punjab and migrant Hindus as linguistic minorities all over the country and to the advanced religious communities of Parsis, Jains and Sikhs. Besides, as will be presently seen, the protected minorities are not required to confine the admissions to their institutions to members of the minority community in order to earn the constitutional protection. Often, in minority institutions, the students belonging to the majority for outnumber those belonging to the minority concerned. It cannot therefore be said that it was proposed through Articled 30 to raise the educational standard of the minorities in order to make them equal to others.

III. The Kerala Education Bill Case

Article 30 first came up for interpretation before a seven judge Constitution Bench constituted to consider the reference made by the President under Article 143 in *re Kerala Education Bill* sponsored by the Communist Government of the State which was stoutly opposed by the Christians and Muslims.[15] Chief Justice S.R. Das delivered the majority opinion. He spoke for six judges, the sole dissent by Justice Venkatarama Aiyar being confined to the question whether minority institutions were entitled also to recognition and State aid as part of the right guaranteed by Article 30(1). Chief Justice Das hold, *inter alia* :

(*a*) An institution, in order to be entitled to the protection, need not deny admission to members of other communities.

(*b*) It is not necessary that an institution run by a religious minority should impart only religious education or that one run by a linguistic minority should teach language only. Institutions imparting general secular education are equally protected. The minority has a right to give a thorough, good general education.

(*c*) Grant of aid or recognition to such institutions cannot be made dependent on their submitting to such stringent conditions as amount to

surrendering their right to administer them. However the right to administer does not include the right to maladminister, and to ensure that there is no maladministration reasonable regulations can be made.

(*d*) Regulations prescribing the qualifications for teachers were held reasonable. Those relating to protection and security of teachers and to reservations in favour of backward classes which covered Government Schools and aided schools alike, were "perilously near violating that right", but "at present advised" were held to be permissible regulations.[16] However, provisions centralising recruitment of teachers through the State Public Service Commission and taking over the collection of fees *etc.* were held to be destructive of the rights of minorities to manage the institutions. So far as institutions which sought only recognition and not aid, even the provisions abolishing fees for primary schools were held impermissible. If fees are to be abolished in pursuance of the directive principle in Article 45, the State should compensate the institution for the loss of fees.[17]

(e) Clauses of the Bill which authorised the taking over of management in the event of specified failings, in effect, annihilated the minorities' right to administer educational institutions of their choice.[18]

IV. Educational Institutions as Charitable Institutions

Sidhajbhai v. *State of Gujarat,*[19] was a unanimous decision of a six-judge Constitution Bench. The petitioners again were Christian missionaries who were running numerous primary schools and also a training college for teachers which fed those schools. The State Government ordered that 80% of the seats in that training college should be reserved for teachers deputed by the Government. The managements were also directed to provide hostel accommodation for them. Directions regarding observance of holidays were also issued. On the refusal of the management it's grant was stopped. This was challenged by the management. Shah J. (as he then was), speaking for the Court, expressed the tentative view that under Article 26(a) every religious denomination had a right to establish and maintain institutions for religious and charitable purposes, "and in a larger sense an educational institution may be regarded as charitable". The learned Judge added that it was not necessary to decide this question as Article 30(1) itself was squarely attracted. There was hardly any need for hesitation in expressing this view and in basing this decisions or *Bramchari supra,* on Article 26(a) as well. As pointed out by Seervai,[20] "In India as in England the advancement of education is also a recognised head of charity; therefore, educational institutions would be covered by the words 'charitable institutions' in Article 26(a)". In *Unnikrishnan* v. *State of A.P.*,[21] the Court held that the right under Article 30(1) and (2) was infringed by the severe restriction on the right of the private training colleges

to admit students of their choice and by holding out a threat to withdraw recognition and to refuse to pay grant in the event of non-compliance. Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the right which is guaranteed : they secure the proper functioning of the institution in matters educational. Though the objective of training of teachers of schools of local bodies may be in the public interest, the same could not be permitted to be achieved at the cost of the institutions. The regulations which may lawfully be imposed as a condition of receiving grant or recognition, it was held, "must satisfy a dual test, the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it".[22]

A. Appointments and Disciplinary Powers

In *Rev. Father W. Proost* v. *State of Bihar,*[23] the petitioners were a Christian mission who were running St. Xavier's College, Ranchi. Two parents of students of that college also joined as petitioners. They complained against a new Act under which a University Service Commission was established. Every appointment, dismissal, removal, termination of service or reduction in rank of a teacher of an affiliated college was required to be made by the governing body of the college on the recommendations of this Commission and subject to the approval of the University. The Constitution Bench, speaking through Hidayatullah C.J., held, following the earlier decisions noticed above, that this provision was destructive of the right of management. The institution was held entitled to the protection of an exemption clause under which, in case of a minority institution only 'approval' of the Commission and the University was required and not 'recommendation' of the Commission. In other words, recruitment was to be made by the institution itself and not by the Commission for it. The provision requiring 'approval' was apparently not challenged.

B. Constitution of Governing Body

In *Rt. Rev. Bishop S.K. Patro* v. *Bihar,*[24] it was held by another Constitution Bench that the State authorities could not direct a Christian mission to constitute its governing body in a specified manner. The earlier decisions were followed, and it was added : "The fact that funds were obtained from the U.K. for assisting in setting up and developing the school or that the management of the institution was carried on by some persons who may not have been born in India is not a ground for denying the protection of article."

C. A Gratuitous Obiter Dictum

In *State of Kerala* v. *Very Rev. Mother Provincial*,[25] also called *the second Kerala case*, a six-judge bench again spoke through Hidayatullah C.J. In this case a large number of writ petitions were filed by Christian missions, but two were filed by the majority community also against certain provisions of the University Act. The Act provided for constitution of statutory governing bodies according to a standard pattern in supersession of the existing private bodies (Sections 48 and 49). The proposed statutory bodies were not answerable to the founders in the matter of administration of the institution. Even the community was to have no hand in the administration. Teachers were not to be dismissed, removed or reduced or suspended for a period exceeding 15 days without the previous sanction of the Vice-Chancellor. The order was to be further appealable to the Syndicate (Section 56). A teacher was not to be disqualified for continuing as such merely on the ground that he has been elected a member of the Assembly or of Parliament or of a local authority, and such member of the Assembly or of Parliament shall be on leave during the period in which the House concerned was in session. This enables political parties, observed the Court, "to come into the picture of the administration of minority institution which may not like this interference. When this is complied with the choice of nominated members left to Government and the University, it is clear that there is much room for interference by persons other than those in whom the founding community would have confidence". Section 63, "to crown all these", even enabled Government to supersede the management and entrust it to the University for a period not exceeding two years.

Mr. Mohan Kumarmangalam, appearing for the Kerala Government, tried to defend the provisions by referring to the Education Commission[26] which had made certain suggestions regarding the conditions of service of the teachers of colleges. The Court agreed that the provisions may have been made *bona fide*, but held that "even if salutary, cannot stand" as they "affect the administration of these institutions and rob the founders of that right which the Constitution desires to be theirs".[27]

The Kerala High Court had held that the provisions were also offensive to Article 19(1)(f) both in respect of majority as well as minority institutions. The High Court did strike down the provisions in Section 63 (which, as seen above, related to temporary supersession of the management) in relation to the majority community too as ultra vires of Article 31(2). The Hindu institutions also took the plea of discrimination, invoking Article 14. The learned Chief Justice at first expressed a tentative inclination to reject the plea based on Article 14 by observing that the claim of the majority community institutions to equality with minority communities in the matter of the establishment and administration of their institutions leads to the consideration whether the

equality clause can at all give protection, when the Constitution itself classifies the minority communities into a separate entity for special protection which is denied to the majority community. This is not a case of giving some benefits to minority communities which in reason must also got to the majority community institutions but a special kind of protection for which the Constitution singles out the minority communities. It may be respectfully submitted here that there is in fact nothing in the Constitution to support the words which is *denied* to the majority community. The mere fact there is special mention of the minorities, and there is silence about the rights of the majority communities should not necessarily, without more, lead to the conclusion that the intention was to deny the right to the majority communities. It is unfortunate that such a summarily dismissive view should have been expressed as a casual obiter dictum on a sensitive and important issue which, though expressly raised, was not even allowed to be fully argued because of the concession made by the State. We may let it rest at that, for the learned Chief Justice was quick to clarify: "The question, however, does not fall within our purview as the State, at the hearing announced that it was not intended to enforce the provisions of the law relating to administration against the majority institutions only, if they could not be enforced against the minority institutions". Again, however, at later stage of proceedings Mr. Mohan Kumarmangalam stated that he had instructions to say that any provision held inapplicable to minority institutions would not be enforced against the majority institutions also. Hence it relieves us of the task of considering the matter under Article 19(1)(f) not only in respect of minority institutions but in respect of majority institutions also. The provisions of Section 63 *affect both kinds of institutions alike and must be declared ultra vires in respect of both.*[28]

Then the two cases, one of *D.A.V. College Bhatinda,*[29] and the other of *D.A.V. College Jullunder*[30] were decided on the same day by the same Constitution Bench. Apart from the finding (already noted) that Hindus were a minority in Punjab within the meaning of Article 30(1), it was held that a minority institution could not be compelled to adopt the language of the majority as the sole medium of instruction or to seek affiliation from another University which carried on its instruction and examinations only in majority language, nor could it be obliged to have a governing body according to a pattern imposed by the statute, including representatives of the University and the Principal[31] or to comply with requirements relating to service and conduct of teachers as laid down by the University.

V. Theoretical Basis of the Protection

A nine Judge Bench, the largest so far on the subject was constituted in *Ahmadabad St. Xaviers Society* v. *State of Gujarat.*[32] It seems to have been constituted, as stated by Seervai, because of the criticism of decisions on

Article 30(1) voiced by ex-Chief Justice Dr. P.B. Gajendragadkar in his *Tagore Law Lecture* on "Indian Parliament and Fundamental Rights" and *Jawaharlal Nehru Memorial Lecture* on "Philosophy of National Integration". The Gujarat Act in question had sought to convert all affiliated colleges into constituent colleges of the University, with the result that teaching would be taken over by the University and the institutions would lose their individual character. Several judgments were delivered in the case, and they need to be analysed. In the leading judgment, Ray C.J. (for self and Palekar J.) observed that permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of management of the educational institution and *without displacing the management.* The choice in the personnel of management is a part of the administration. As a result of new elements in the shape of representatives of different types, namely, a nominee of the Vice-Chancellor and representatives of teachers, non-teaching staff and students of the college, it was said, "the calm waters of an institution will not only be disturbed but also mixed". The provision conferring power on the Vice-Chancellor or an officer authorised by him to approve or disapprove any penal action proposed by the management against a teacher or non-teaching employee, was held to be impermissible in as much as it confers arbitrary power on the Vice-Chancellor to take away the right of administration. Another provision under which any dispute between the management and a teacher or other employee of an affiliated college was to be referred to a tribunal of arbitration, comprising a representative each of the two parties and an umpire nominated by the Vice-Chancellor was also disapproved. These references to arbitration will introduce an area of litigous controversy inside the educational institution. The atmosphere of the institution will be vitiated by such proceedings.

A. Genuine Equality, But No Pampering

Jaganmohan Reddy J (for self and Alagiriswami J.), in a concurring judgment, observed that *equality of treatment of minority and majority or equality before law precluded discrimination.* According to the *Advisory Opinion of the Permanent Court of International Justice on Minority Schools in Albania* (April 6, 1935) :

> 'Whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations.... It is easy to imagine cases in which equality of treatment of the majority and of the minority whose situation and requirements are different, would result in inequality. The equality between the members of the majority and of the minority must be effective, genuine equality'.

Khanna J. and Mathew J. in their concurring opinions also referred the report of the Albanian case cited above. In fact the measure challenge in that case was abolition of all private schools. The Government had tried to justify it on the ground that the measure applied to the majority as well as the minority. It was the minority alone which had challenged the measure, and it was in that context that the Court had further observed, as quoted by Khanna J. that the object of the protection was to enable the minorities to preserve the characteristics which distinguish them from the majority, and satisfying their special needs. In order to attain that object, two things were regarded as particularly necessary. The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

The observations of the International Court in Albanian case regarding the need for differential treatment in favour of the minorities to enable them to preserve their basic distinguishing characteristics and racial peculiarities and traditions are, as rightly pointed out by Dwivedi J. in para 284 of the report, really irrelevant in the context of the Indian Constitution which by Article 29(1) separately guarantees to all sections of citizens the right to conserve their "distinct language, script or culture", apart from the rights to freedom of religion guaranteed by Articles 25, 26, 27 and 28 and the basic right to equality guaranteed by Article 14. The Supreme Court has also consistently taken the view, right from the *Kerala Education Bill (supra)* onwards, that while Article 29(1) is, in the words of Hidayatullah C.J., in *Rev. Father Proost (supra)*, "a general protection which is given to minorities to conserve their language, script or culture", Article 30(1) is "a special right to establish educational institutions of their choice. This choice is not limited to institutions seeking to conserve language, script or culture and the choice is not taken away if the minority community having established the educational institution of its choice also admits members of other communities. This is a circumstance irrelevant for the application of Article 30 (1) since no such limitation is expressed and none can be implied. The two articles create two separate rights, although it is possible that they may meet in a given case". The learned Chief Justice has referred to "minorities" only while dealing with Article 29(1) also, but that is merely because the passage was discussing only minority rights.

Khanna J. further observed, with reference to Article 30(1), that the management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. These provisions were made so that *none might have the feeling*

that any section of the population consisted of first-class citizens and the other of second-class citizens. Sardar Patel's declaration in the Constituent Assembly on February 27, 1947, that it was to show the falsity and hollowness of the claim of the British Government that they alone could protect the minorities and to prove "that nobody can be more interested than us in India in the protection of our minorities that we had made such provisions" was also quoted. The rights, in the word of Khanna J., were made a part of the fundamental rights and thus placed on a secure pedestal and withdrawn from the vicissitudes of political controversy. They flowed from the secular character of the Constitution to *ensure that no one shall be discriminated against on the ground of religion.*[33] The same principle was extended to language as it "has a close relationship with culture. The idea of giving some special rights to minorities is *not to have a kind of privileged or pampered section of the population* but to give to minorities a sense of security and a feeling of confidence.[34] The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the idea of equality may not be reduced to a more abstract idea but should become a living reality. The *majority in a system of adult franchise hardly needs any protection. It can look after itself and protect its interests.* Any measure wanted by the majority can without much difficulty be brought on the statute book because the majority can get that done by giving such a mandate to the elected representatives.[35] It may be submitted that the theory that the majority's rights do not need any protection is no longer accepted after what the Nazis were able to do to the people as a whole, not merely to the Jewish minority, because the Weimar Constitution did not provide for judicial review. It was in recognition of this hard reality in regard to the disastrous effects of the positivist doctrines that the U.N. Declaration of Human Rights was adopted and our Constitution makers also enacted Part III of the Constitution.[36] Virtually the entire part (Fundamental Rights) protects members of the main religious majority community to the same extent as it protects members of various minority communities. It is only the marginal note of Article 29 that incorrectly refers to minorities, as the article actually refers to all sections of citizens alike, and Article 30 that makes special provision for minorities. So the observation that the majority community does not need any protection is too sweeping to commend acceptance. But more of it later. First let us complete the survey.

Reliance was also placed by Khanna J. on an observation of Chief Justice Latham in a 1943 decision relating to *Jehova's Witnesses* that the provision in the Australian Constitution guaranteeing free exercise of any religion was really a provision required for the protection of minorities, and in particular, of "unpopular minorities" as "the religion of the majority of the people can look after itself." This reliance on Latham C.J.'s was, with respect, again meaningless in the Indian context where the Constitution expressly confers

freedom of religion on the majority community as well, vide Article 25(1).

Khanna, J. also spoke of the need of the Courts to adopt the same catholic, generous, liberal, sympathic approach which "marked the deliberations of the Constitution makers in drafting those articles" (Articles 29 and 30), so that "the minorities feel secure and *are not subject to any discrimination* or suppresion".[37]

While endorsing the views expressed in earlier rulings on what regulations would be permissible or not, Khanna J. added that it would also be permissible to make regulations (*a*) for ensuring regular payment of salaries before a particular date of the month, (*b*) for preventing diversion of funds of the institution and audit of accounts, (*c*) for prohibiting anti-national activities and providing that its employees should not have been guilty of such activities.[38]

Mathew J. (for self and Chandrachud J. as he then was) also gave a concurring judgment. He made it clear that they were not concerned in the case with the question whether the guarantee extended to establishing and maintaining a military academy or a police training school.[39] He also quoted the following passage from the recommendation by the Sub-Commission in its report to the Commission on Human Rights :

> "Protection of minorities is the protection of non-dominant groups, which while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population".[40]

It has already been pointed out earlier while discussing the references to the Albanian case in the judgments that our Constitution, by Article 29(1), has given a separate guarantee regarding language, script and culture and as held by the Court, that is an irrelevant consideration so far as the interpretation of Article 30(1) is concerned. But our judges, howsoever distinguished, usually find it difficult to resist the temptation to quote from foreign sources to fortify their reasoning even where our own Constitution and the ruling of our apex Court are crystal clear. Such references often have the effect of confounding the issue rather than adding any clarity to it. The learned judge had prefaced the quotation with the remark that it was "necessary in the interest of clarity of thought" the sub-Commission's recommendation and the Albanian opinion led him to jump, without further ado, to the conclusion that "minorities can be protected not only if they have equality but also, in certain circumstances, differential treatment". With the utmost respect, the passages cited being not attracted to the Indian context, the conclusion so drawn from them can only be said to be *non-sequitur*. In any case the rights of the majority communities were not under consideration in the case, and the observation cannot be construed

to have any adverse impact on those rights.[41]

Mathew J. went on to add that the Constitution makers granted this right in order "to give the parents in those communities an opportunity to educate their children in institutions having an atmosphere which is congenial to their religion". "The sheer omission of religion from curriculum" (of State schools) "is itself a pressure against religion".[42] It is perhaps possible to secularise subjects such as mathematics, physics or chemistry, but as Justice Jackson said in *McCollum* v. *Board of Education,*[43] 'music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.... Even such a science as biology raises the issue between evolution and creation as an explanation of our presence on this planet, the State cannot insist that the children belonging to the religious minority community should be educated in State-maintained educational institutions or in educational institutions conducted by the majority.... The parents have the right to determine to which school or college their children should be sent for education. The parental right in education is the very pivotal point of a democratic system. If aid from the State could be made conditional on surrender of constitutional rights, then, the learned Judge pointed out, the State could curb all fundamental rights through the power of purse.[44]

It is hardly surprising that with such extreme views of Mathew J. was reduced to being the sole dissenter in *Gandhi Faiz-e-Am* v. *Agra University,*[45] decided less than a year later.

Beg J. (as he then was), expressed strong reservations on several aspects. He was willing to support the State's power to regulate such institutions in a greater measure than was accepted in *Sidhajbhai,* or in *Very Rev. Mother Provincial.*

Dwivedi J. partly disented only on the question of affiliation. He demonstrated the illusoriness of the absoluteness claimed for the right under Article 30(1) by pointing out that it was in any case qualified by Articles 15(4), 29(2) and 28(3). He expressed the view that the right could not "be so exercised as to violate a citizen's legal or constitutional rights. Thus the management cannot punish a member of the teaching or non-teaching staff or a student for legitimate exercise of his freedom of speech and expression or of forming associations or unions".[46] He described the argument of imparting secular general education in a religious atmosphere as "over-accentuated" which overlooked the aspect that the students do not belong only to the minorities. They belong also to the notion whose "first concern" should be secular general education.[47] The extent of regulatory power may vary according to the class of institutions as well as within a class. A classification suggested was (1)

according to whether the education imparted is religious, cultural or linguistic instruction or secular general education or mixed, (2) according to grant of aid and recognition, (3) according to whether primary, sencondary or higher education is imparted, (4) whether it is a military academy or marine engineering in which the State is vitally interested.[48] Again the teaching staff and property may be subject to greater regulation than the composition of the managing body. *"Plainly, no minority educational institution can be singled out for treatment different from one meted out to the majority educational institution. A regulation meting out such a discriminatory treatment will be obnoxious to Article 39(1)".*[49] He did not agree with the majority view in this case and also the view expressed in earlier cases that the regulations can only be conceived in the interest of the institution.[50] He was not prepared to go to the extent Hidayatullah C.J. went in *Very Rev Mother Provincial,* in treating the ideas of the founders or their nominees "of how the interests of the community in general and the institution in particular will be best served" as sacrosanct.[51]

Dwivedi J. was also prepared to hold as valid, the restriction placed on the management's right to punish a teacher without the approval of the Vice-Chancellor.[52] And also the provision relating to reference of disputes with employees to a tribunal of arbitration as it was intended to check the abuse of power of administration by the managing body.

B. The Uncared For and Apathetic Majority

It is noteworthy before parting with this case that this nine-judge large bench was constituted to review all previous decisions on Article 30(1), and therefore notices were sent to the Attorney General, the Union of India and to the Advocate General of every State. Public notice was also issued to the minority institutions to enter appearance, if so advised. The All India University Teachers Association was also permitted to intervene. The entire controversy was thus between minority institution on the one hand and the Central and State governments (who wanted power of regulation in greater measure than allowed in earlier decisions) and the teachers (who too supported the Governments as the regulations which placed curbs on powers of managements in service matters suited them) on the other. No public notice was considered necessary for majority institutions, nor did any such institution came forward on its own as an intervener.

It is indeed sad to find that except in the *second Kerala case,* in which because of the undertaking of the State Government not to enforce against the majority institutions any provision which could not be applied to minority institutions also, the point remained unargued, the majority institutions have instead of boldly and squarely raising the plea of discrimination thought it

expedient to resort to the demeaning subterfuge of claiming that they were not Hindus either and therefore should be allowed the same privilege as accorded to the minorities. Were they deterred by the off-the-cuff loud thinking of Hidayatullah C.J. in the said case? Or is it also a case of minorities (including even jurists like Seervai) being always very vigilant about protection of their rights in contrast to the supine complacency of the majority? One cannot help recalling in this context a historical parallel. Dr. R.C. Srivastava's thesis on the Development of Judicial System in India from 1833 to 1858 (which carries a highly laudatory foreword from Mr. M.C. Setalvad) thus mentions that when it was proposed by the East India Company to replace Persian, a legacy of the Moghul rule, by local vernaculars, some English civilians such as Shore (Commissioner of Sagar and Narbada division), W.F. Dick (Judge of the Sadar Court of N.W.P.) and A. Ross (President of the Legislative Council) were in favour of Hindi in Devanagari script. Act No. 29 of 1837 was then passed authorising the Governor-General to dispense with any Regulation that enjoined the use of the Persian language in judicial or revenue proceedings and to prescribe the use of such other language and characters as he deemed fit. On July 5, 1839, the Bengal Government adopted a Resolution which enjoined upon all judicial authorities the use of Nagari characters in districts where Urdu was the dialect. There upon 150 Muslims of Bihar and 106 Muslims of Tirhut submitted separate petitions saying that introduction of Hindi was a threat to their religion. The petitioners reminded the Government of their role as protectors of the Muslims faith. The Government of India succumbed to this pressure and on 13th January, 1840 forbade the use of Nagari characters by any judicial officer before obtaining the special sanction of the Government. This made Nagari disappear from the scene in the Hindustani speaking provinces. Significantly none from the majority community raised a little finger against the withdrawal of Nagari within six months of its introduction and it abjectly acquiesced in the continued imposition of the Persian script on them even long after the replacement of Moghul rule by British rule, indeed right up to 15th August, 1947. Similar indolence has been exhibited by the majority during the last forty years about the right of equality in regard to establishment and administration of educational institutions with the minorities.

C. Teachers More Vigilant

While the majority managements have helplessly submitted to the discrimination, the teachers and their organisations have always fought for their rights, often successfully.

The view expressed in *St. Xaviers College,* that it is not permissible to provide that any penal order against an employee will be subject to the previous approval of the Vice-Chancellor was followed in *Lily Kurian* v. *Lewina,*[53] by a Constitution Bench headed by Chandrachud C.J. which held that such an

appellate power vested in an outside authority like the vice-Chancellor to directly to interfere with the disciplinary control exercisable by the managing body. The statute had since constituted an Appellate Tribunal instead of the Vice-Chancellor. The question of its validity was however not considered. Again, in *All Saints High School* v. *Government of A.P.*,[54] the provisions of Section 3(1) and (2) which laid down that no major penalty or termination shall be effective without prior approval of the competent authority was held invalid even though it was subject to the rider that approval shall be granted if the authority is satisfied that there are adequate and reasonable grounds for it. In the same case, another provision which placed a time limit of two months (extendable by another two months) for completion of the inquiry against a teacher beyond which an order of suspension will not be effective was however held to be valid. Chandrachud C.J. was not prepared to concede even to minority managements the absolute right to hire and fire its teachers. Provisions of Sections 4 and 5 providing for appeal against an order of punishment passed by the management were also struck down. The requirement in Section 6 of prior approval for any retrenchment of a teacher was upheld. So also the requirement that the salary of a teacher shall be paid by a certain day of a month. The Chief Justice took the middle course, Fazal Ali J. was for maximum rights for the management, while Kailasam J. was for maximum powers for the regulating authority. It was thus a majority judgment. In *Frank Anthony Public School Employees' Association* v. *Union of India,*[55] it was similarly held that reasonable provisions for security of tenure to teachers and also for laying down their pay scales, allowances, *etc.* were not only permissible under Article 30(1), but exemption of even unaided minority schools from general provisions in that behalf was discriminatory and hit by Article 14. It was further held that if appeal against penalty imposed on a teacher was provided to a district judge, as distinguished from the University or other regulatory authority, the same would also be valid, and its denial to teachers of such institutions discriminatory. A provision under which the management's order of suspension of teacher could not continue beyond a period of fifteen days without the approval of the Director was also held to be salutary, hence applicable to minority institutions as well. It was however, emphasised that approval to such suspension should not be withheld except on good and adequate grounds. In *Bihar State Madarsa Education Board* v. *Anjuman Ahle-Hadees,*[56] two provisions were struck down. One required the managing committee to include not only teachers but also representatives of the Board and of guardians besides co-opted members; the other vested in the Board "control" over the services of teachers and also required the management to seek the Board's prior approval before a penal order was passed. The Bench declined to "read down" the provisions. Similarly in *Bihar State Madarsa Education Board* v. *Madarass Hanfia,*[57] the power conferred on the Board to dissolve the managing commit-

tee of an aided and recognised institution was held violative of Article 30(1). However the Court disapproved of the view expressed by the High Court that the Chairman or majority of the members of the statutory board should necessarily belong to the minority community.

VI. Stephen's Case : A Wrong Assumption of Backwardness

The minority institutions have, however lost several battles against their teachers. The *Frank Anthony* ruling in regard to the Director's approval for an order of suspension was unsuccessfully assailed as contrary to *Y. Theclamma* v. *Union of India,*[58] *All Bihar Christian Schools Association* v. *State of Bihar,*[59] *Manohar Harries Walters* v. *Basel Mission Higher Education Centre.*[60] K.N. Singh J. in the *All Bihar Christian Schools* case has indeed been at pains to stretch the regulatory powers of the State to their maximum, in the process, "distinguishing" all previous decisions seemingly to decide the contrary. On the other hand, the Constitution Bench (headed by Kania J. as he then was and speaking through Shetty J. with Kasliwal J. dissenting) has, in *St. Stephen's College* v. *University of Delhi,*[61] bent over backwards in conceding the claim of the two government aided Christian institutions to make admissions according to their sweet will, (specifically, on the basis of 100 percent interview marks from out of candidates selected preliminarily on the basis of their secondary school marks, the number of candidates interviewed being about five times the number of seats) in total disregard of the norms fixed by the University and giving preference to students of their own community. The Court placed a limit of fifty percent on reservation of seats for them, applying in the process decisions under Article 16(4). By a process of reasoning which, with the utmost respect, is rather confusing, mixing up unrelated concepts, they side tracked Article 29(2) and 'distinguished' earlier decisions on the subject such as *D.A.V. College*[62] and *Kerala Bill.*[63] Cases relating to reservation in favour of backward classes of citizens were relied on and the minorities were assumed to be "the underprivileged". Emphasis was placed on the minorities right in their own educational institution and following Mathew J. in *St. Xavier's,* the parents' right to have their children educated in institutions having an atmosphere congenial to their own religion. Preference to Christians in admissions was defended as being not solely on the basis of religion but to prefer their community candidates in their educational institutions a rather baffling distinction which could be made only by a court which must be right because it is final.

The Supreme Court has further conceded to the minority managements the power to give indirect preference to candidates of their community in appointments to the posts of Principal and Vice-Principal by requiring that the candidates should fulfil over and above the qualifications laid down by the University or a Board, some additional lingual qualification and thereby

excluding other candidates from the field of choice. In *Virendra Nath Gupta* v. *Delhi Administration,*[64] it was so decided in favour of a linguistic (Malayalam) minority institution, and in the *Karamat Girls College of Lucknow* case the same principle was applied even in the case of a secular education institution run by a religious minority (Muslim) which prescribed Urdu as an additional qualification for the post of Principal. The latter case assumes without any discussion that minority institutions do have such a right.[65]

VIII. State Control on Minorities Technical Institutions

The right of Government or a University to prescribe suitable conditions relating to facilities for students and staff, excellence of standards and even limits on capitation fee to be fulfilled before even a minority could claim recognition for an institution, in particular one conducting professional courses, such as a teachers' training college,[66] or a medical, engineering, pharmacy, nursing, etc.,[67] has been consistently upheld by the Court. In *Milli Talimi Mission* v. *State of Bihar,*[68] there was a blanket ban on private colleges for teachers' training except for minorities, and the appellant's application was rejected on the ground of inadequacy of facilities. The Court (per Fazal Ali J.) held *on facts* that the decision of the authorities was unreasonable, but Mukharji J. as he then was, did not agree that it was coloured by any anti-minority bias.

Likewise the Court has religiously upheld the right of parents to get their children educated in the medium of their choice, vide *State of Bombay* v. *Bombay Education Society,*[69] (per Constitution Bench, headed by Mahajan C.J.), and the two *D.A.V. College cases,* though the Courts have conceded to the State the power to implement the three-language policy so that over and above the language of the puplis' choice of the regional and national languages could also be taught.[70]

VIII. One Minority Opposing Another's School

In *Mark Netto* v. *State of Kerala,*[71] the Christian community was running a boys school. It was denied permission to admit girls to the school on the ground that there was already a girls school run by the Muslim community in the neighbourhood. The Muslims also objected to a co-educational institution. The grounds for refusal of permission were held unsound and the refusal of permission was held violative of the Christians' right under Article 30(1). The Christian community had a right to have schools of their choice for teaching their girls if they did not think it in their interest to send them to the Muslim girls school. The rule under which the permission had been denied was held inapplicable to minority schools. It was not considered necessary to strike down the rule in its application to all.

IX Double Standards in Judicial Review

Let us contrast the various strongly expressed views in the above cases about rights of minority communities, rights of students of such communities and of their parents and of the managing bodies of their institutions with the approach in *Katra Education Society* v. *State of U.P.*[72] In U.P. the Intermediate Education Act was amended in 1958 with a view to conferring very wide powers on authorities *vis-a-vis* the managements. A statutory scheme of Administration provided for a uniform pattern of governing bodies. The Principal and two teachers selected by rotation according to seniority are ex-officio members. The Scheme has to be approved by the Director. On the Director's adverse report Government may appoint an Authorised Controller for the institution. If the management defaults in complying with any direction of the Controller then even the property and assets of the institution can be taken over by Government. For appointment of teachers a selection committee is provided for. It was also provided that the selection committee shall send its recommendations to the Deputy Director who may reject the same. Then another selection may be made by the Committee. If it is again rejected then the Director (in the case of Principal) or Deputy Director (in the case of any other teacher) may himself make the final selection and appointment. Conditions of probation, confirmation, punishment of teachers and their transfer from one institution to another are all prescribed by regulations. Prior approval of the inspector is required for any order of punishment. These provisions were challenged by a society running a girls school.

The power of the authorities in regard to appointment of teachers was upheld in a couple of reference (in para 9 of the report) as it was held to be implicit that it would be exercised in the interests of the students and of the institution and for serving the cause of education and could not be said to be uncontrolled, hence it was not hit by Article 14. Similar powers have since been held in the *Proost* v. *State of Bihar,*[73] to be destructive of the right of management, hence not permissible as a regulatory power.

The power to appoint an Authorised Controller was likewise upheld as "disciplinary and enacted for securing the best interests of the students", as "the State in a democratic set up is vitally interested in securing a healthy system of imparting education for its coming generation of citizens." Such a power, it has since been held in the *first Kerala case*[74] annihilated the concerned community's right to administer an educational institution of its choice. In *St. Xaviers,*[75] Ray C.J. emphasised that the regulatory power should be so exercised as not to displace the management. In majority of cases emphasis has been laid on the need to free the management from such control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the community in

general and the institution in particular will be best served. Since the termination of the Second World War there was a marked increase in the number of private schools and there were many complaints against the management of those schools, and discontentment among the teachers was rife. Hence these salutory provisions had been made on the recommendations of a Committee appointed by the State Government.

The exemption in favour of Anglo-Indian schools was assailed as discriminatory but the contention was rejected on the ground that the writ petition did not lay any factual basis for the plea. It was pointed out that the number of students appearing from the Anglo-Indian schools is very small, that no adverse reports were received against the management of such institutions. For want of a full averment to assail the classification their lordships did not propose to deal with the question in this appeal.

Emboldened by this crucial endorsement of their action in State Government has since made further amendments from time to time and also enacted the U.P. High School and Intermediate Colleges Teachers and Employees Payment of Salaries Act, 1971. The effect of all these measures is further to extend the control of the authorities as against the managements. While originally only a few Anglo-Indian institutions were exempted, now in view of various pronouncements of the Supreme Court all minority institutions covered by Article 30(1) stand exempted. Similar is the position with regard to degree colleges. Now all selections of teachers have been centralised and the managements are required to make appointments according to the decisions of a statutory Commission. Provisions regarding appointment of Authorised Controllers have been enacted in relation to colleges affiliated to every University.

Now one need not controvert the factual data adduced by Government, namely, that "many" private institutions were not well managed, and the 'very small number' of Anglo-Indian institutions were relatively better managed. There was no doubt that some very good Christian mission schools are continuing since British times. But can we generalise on that basis that every "minority" institution in U.P., whether old or newly established, which means every institution run by Muslims, Jains, Buddhists, Sikhs and by such Hindus as have immigrated from non-Hindi States like West Bengal, Punjab, Maharashtra, Gujarat, Tamil Nadu, etc. or displaced from Pakistan, should all be presumed to be well managed. Again, the mere fact that "many" institutions run by the Hindi-speaking Hindus were badly managed cannot lead to the general presumption that an institution will require greater control merely because it is established by the majority community. To make any such generalisation will amount to the worst possible, communal and linguistic

discrimination. Indeed, the basis of discrimination which was canvassed in *Katra Education Society* is no longer relevant to the issue now under consideration, for how well or badly an institution is managed cannot possibly be presumed to depend on the community (in terms of religion or language) of the owners or managers. It may even be pointed out that as exemption in favour of Anglo Indian schools had not been sought to be justified by the Government on the ground of Article 30(1) but solely on the ground of absence of complaints about management, the classification should have been struck down as it was ex-facie communal : one cannot generalise about quality of management on the ground of "Anglo-Indian" and the rest. The very fact that complaints were only against "many" did not "all" non-Anglo-Indian schools should be enough to show that the classification was communal and not on the merits of the institutions, and no other factual averments need have been considered necessary for the plea of discrimination.

X. Classification Should be Rational, Not Communal

The State or the Courts have no right to presume that every institution of a majority community is run by crooks or imbeciles and that all such institutions can be properly administered only through State authorities. It is true that many managements are corrupt, and effective measures must be taken to ensure that they are not allowed to misappropriate or dissipate the assets of the institutions or to indulge in nepotism or discrimination in the matter of appointment of teachers, admission of students, etc. But complaints are not confined to managements of majority institutions only. Excepting very few select old Christian missionary institutions like St. Stephens, Loreto, etc., most minority institutions also (including even Christian institutions) are not immune from similar complaints including very often complaints from teachers, parents and other members of their own community. Conversely, there may be excellently managed institution established by members of majority community also, say those by the Ramkrishna Mission, Bharatiya Vidya Bhawan, Birla Educational Trust, etc. So whatever regulation and control be needed it should be objectively decided in relation to each individual case, and not on covertly communal (whether based on religion or language) grounds. Any classification should thus be primarily on the bases as rationally suggested by Dwivedi J. in St. Xaviers, and secondly on the basis of ratings (as in the case of, say, debentures, or hotels etc.) with reference to availability of facilities, past performance, reputation, credibility, standard of teachers, infrastructure, etc., judged by a high powered autonomous body, not on the grounds of its being established by minority or the majority.

XI. Excessive Controls Prove Counterproductive

In the *Katra* case, the extensive controls and displacement of manage-

ments were justified as needed for "securing a healthy system of imparting education for its coming generation of citizens" in which "the State in a democratic set up is vitally interested". Is the State not equally interested in a healthy system for the coming generation of citizens from the minority community? When we come to minorities, we talk, instead, of the sanctity of the wishes of the founder or his nominees (the *Second Kerala case*), the right of parents to determine to which school or college their children should be sent for education, this right being "the very pivotal point of a democratic system," the inequity of the State insisting that the children should be educated in a State controlled institution. Parents of the majority community seeking to assert this right are driven to claim their right to get their children educated in Christian mission schools in preference to State controlled ones, on the assumption that English is the choice of medium of instruction in these schools.[76]

In U.P., statutory approval of authorities was required before any teacher was punished or suspended, and it was not even provided that such approval would not be withheld except for adequate and reasonable grounds, while in *All Saints High School,*[77] such a power even when so conditioned was struck down. In *St. Xaviers* such a power was held to be arbitrary. In *Katra,* much was made of the report of a committee set up by the State Government for justifying the controls, while in the *Second Kerala case* even reliance on the Radhakrishnan Commission report was held to be irrelevant.

In *St. Xaviers,* it was considered undesirable that educational institutions should be exposed to "litigous controversy" as the same will vitiate the atmosphere of the institution. The U.P. statute has brought about a virtual litigation explosion and we find even lawyers and law reports specialising in education cases. In the *second Kerala case* the Court disapproved the provision for legislators or corporators continuing as teachers as this could lead to political interference. In U.P. and other States having a bicamaral legislature, teachers got elected to the Legislative Council not only from the teachers' constituency but also, being the only organised, and numerous group of graduates, from the graduates' constituency. Since the fourth general elections (1967), many States have had unstable Governments and the party in power is often in a minority in the Upper House. A ministry with a precarious majority in the Lower House cannot afford to lose every day in the Upper House. Apart from legislative powers, every House of Legislature has so many other powers. Members can make things hot for the Government and its officials through points of order, questions, motions, notices, committees and assertion of "privileges". So the ministry has to keep the solid block of teacher M.L.C.'s happy, and thus the latter enjoy a lot of clout with ministers as well as officials of the Education Department. The constitution of the Board also includes elected representatives of teachers. The result is that the apprehensions

expressed in the *second Kerala case* about political interference and in *St. Xaviers* about litigation vitiating the atmosphere in minority institutions have come very much true in regard to majority institutions. Powers vested in the officers of the Education Department for regulating the schools and colleges are in practice exercised at the dictation of leaders of teachers associations. The remedy (of excessive State control) has thus proved worse than the disease (of mismanagement). The only redeeming feature of these laws so far is that some of the regulations do not yet apply to unaided recognised institutions or to institutions affiliated to the Anglo-Indian body namely Indian Council of School Education, even though the institution is run by members of the majority community. In consequence many educationists belonging to the majority community choose to forgo Government aid altogether and seek affiliation to I.C.S.E. and make up for aid by charging heavy fee from students. Most of the merit positions in the Board examinations go to these private unaided schools. Even the poor people choose to pay fee in hundreds of rupees per month for getting their children educated in these schools rather than sending them to Government-aided and controlled schools where the fees are abysmally low. Could such a result be viewed with equanimity by the courts or by educationists? K. Ramaswamy J. in *Maharashtra Board of Education* v. *K.S. Gandhi,*[78] in this context quoted with approval a passage from a judgment of P.A. Choudhary J. (of Andhra Pradesh High Court) in which falling standards of discipline and education have been commented on.

Now right to education has been accepted as a fundamental right,[79] per Constitution Bench headed by Sharma C.J. as it flows directly from the right to life (Article 21). It has further been held in the same case that education is a charitable activity. In *Bharat Sevachran Sangh* v. *State of Gujarat,*[80] a Bench consisting of E.S. Venkataramiah and Rangnath Mishra JJ. (as they then were) had held that a Gujarat statute empowering the Government to take over an educational institution for a period not exceeding five years had been "introduced in the interest of the general public and did not in any way affect prejudicially the fundamental rights of the management guaranteed under Article 19(1)(g) of the Constitution. The decision was distinguished in Unnikrishnan on the ground that it was not specified whether the "right" of the management was a profession, occupation, trade or business. The Court was not in favour of commercialisation of education and hence not prepared to accept it as a right to carry on trade or business. Teaching was a 'profession' but running a school was not practising a profession. As their lordship could not find a reason for not holding it to be an 'occupation' either, perhaps it is, they decided the case on the assumption that a person or body of persons did have a right to establish an educational institution. On the right to seek aid,

recognition or affiliation, the following passage from *St. Stephen's College*, was quoted with approval :

> "The educational institutions are not business houses. They do not generate wealth. They cannot survive without public funds or private aid. It is not possible to have educational institutions without State aid. This was also the view expressed by Das C.J. in *Kerala Education Bill 1957* case".

Jeevan Reddy J. recognised :

> ..."the hard reality" that "private educational institutions are a necessity in the present context. It is not possible to do without them because the Governments are in no position to meet the demand.... Private educational institutions - including minority educational institutions - too have a role to play". Further, "no private educational institution can survive or subsist without recognition and/or affiliation.... Since the recognising/ affiliating authority is the State, it is under an obligation to impose such conditions as part of its duty enjoined upon it by Article 14 of the Constitution".

XII. Majority Rights Flow From Article 14, 15, 19(1)(2), 21 and 26(a)

Thus while it is true that it is only the minorities whose right to establish and administer educational institutions is mentioned in Article 30(1), it does not follow that the same is *denied* to the majority communities. It was considered necessary to make a special mention of the right of minorities by way of extra assurance to them. It is not correct to say that minorities were considered backward and needed special concessions through Article 30(1) to bring them up. The object was to make it clear that they will not be discriminated against. It was not intended to pamper them as favoured communities. It should follow therefore from Article 14 and 15 that the majority communities have a right to similar treatment at the hands of the State in the matter of recognition, affiliation, government-aid or non-displacement of management in respect of educational institutions established by majority communities as accorded to minority institutions. Of course, conditions can and ought to be imposed in regard to aid, affiliation and recognition in order to ensure proper standards of teaching, but the same have to be uniformly onerous and cannot be so drastic as to involve surrender by the community or the founders or the management of its right to establish and administer the institution.

The thesis that "the majority in a system of adult franchise hardly needs any protection; it can look after itself and protect its interests; any measure wanted by the majority can without much difficulty be brought on the statute

book because the majority can get that done by giving a mandate to the elected representatives; it is only the minorities who need protection" is with the utmost respect to the distinguished Justice Khanna in *St.Xaviers,* too naive to commend acceptance. It is coloured by a romantic view, of democracy as a government of the people, by the people, for the people - a view which he must have given up while later delivering his famous dissent in *A.D.M. Jabalpur* v. *Shiv Kant Shukla.*[81] Modern parliamentary democracies are run on a party system which in India in the post Mandal era is built largely on the basis of caste and communal combinations. Governments are returned to power not on the basis of issues or mandates. Managements of educational institution do not form a vote bank while their teachers do. The main religious majority, namely Hindus, are not a homogeneous monolith. It is a very much divided society. There are caste and sub-caste divisions, and the Supreme Court's deference to the legislative and executive wisdom on Articles 16(4) and 15(4) has not made things easier. Electoral arithmetic has led to all sorts of permutations and combinations. In some States, it is Muslim O.B.C. and S.C. combinations which are in power and the so-called forward sections of the majority community are at the receiving end. In another State the Dravidians (who traditionally disowned Hindu gods and goddesses) are dominant. In a couple of States the professedly atheistic Marxists are in power with the support of the minorities. In J & K likewise, the majority of Muslims are Sunnis, and there are sometimes clashes with Shias, as is the case in Pakistan too. In that Islamic country, the Government has even asserted the right to declare Ahmedias as non-Muslims. In Punjab too, fundamentalist Sikhs have already declared Nirankaris to be non-Sikhs, and one hears from time to time of moves to deprive non-Keshadhari Sikhs of the right to vote at elections to the statutory Shiromani Gurudwara Prabandhak Committee. Thus one group of Sikhs in power may discriminate against educational institutions run by another group. Sometimes the Hindu-dominated parties enter into an alliance with the ruling Sikh group. Apart from these democratic realities, if the proposition of Khanna J. be taken to its logical conclusion, then there should be no need for any justifiable fundamental rights at all so far as citizens belonging to the majority community are concerned in today's set up the minorities' interests are well looked after by the legislatures and the executive and do not stand much in need of judicial protection. Hence it is expected of courts to say boldly that what is conceded for the minorities is also the due of the majority by virtue of Articles 14 and 15(1).

One may add that this is not a case of personal law reform which has been carried out in relation to communities (Hindus, Sikhs, Jains and Buddhists) which were ready to accept it and not in relation to Muslims who were opposed to it. The problem here has no religious or emotional overtones, but is simply one of restoring judicial consistency to interpretation of the regulatory powers

of the State.

Apart from Articles 14 and 15(1), this right to establish and administer educational institutions also flows, as seen above, from Article 19(1)(g) and 26(a), which make no distinction between majority and minority communities. The right of students to education, as a fundamental right under Article 21, also implies that they as well as their parents have right to choice of institution in which they would like the former to be educated. Every community has a right to found and administer educational and other charitable institutions and to run them according to its perceptions of what is best for the community and for the institution, subject of course to uniformly applicable State regulations without distinction of religion or language, minority or majority.

The only consequence of this will be that provisions relating to displacing of managements through statutory Schemes of Administration or through take-over of institutions and appointment of authorised controllers and also those divesting the managements of the powers of appointment and discipline pertaining to teachers will have to be treated as unconstitutional in so far as they relate to majority institutions too, to the same extent as they have been treated *vis-a-vis* minority institutions. And it will not be such a bad thing from the educational angle either. The ground reality is that just as nationalisation of many private industries on ground of mismanagement by industrialists has proved counter-productive, so also has the taking over of the management of educational institutions. The cause for interference in each case was the acts of mismanagement and dissipation on the part of private mill-owners or school/college managers. But the bureaucrats displacing them have, by and large, not felt any commitment to the industry/institution at all and have succumbed to political pressures, with the result that things have only worsened instead of improving. That is why they are now being re-privatised. It is only through de-politicisation of control over the institutions that the managements can be better and more evenly disciplined. Deprivation of management of their powers in regard to appointment and discipline of teachers has likewise led to a steep fall in discipline and standards. Many teachers do not care to listen even to their Principal or Head of Department, what to say of the management. Absenteeism, indulgence in private tuitions and running of coaching schools are the order of the day. So withdrawal of such strangulatory provisions can only lead to improving things rather than the contrary. Of course regulatory provisions to the same extent - no more, no less, as have been accepted to be necessary for the protection of teachers of minority institutions would in any case continue in relation to teachers of majority institutions also. The trend the world over is now for less and less of Government. If maladministration can be prevented in the case of minority institutions without emasculating the management, the same should be possible for majority institutions too. All

institutions irrespective of any discrimination or distinction should be places of worship of learning for students.

Last, but not the least, the Supreme Court has itself made it clear that it cannot, countenance, in the words of Khanna J., endorsed by Krishna Iyer J., any privileged or pampered section of the population. It only wants to ensure that the minorities are not discriminated against. But in effect the judicial application of double standards in dealing with majority and minority institutions has brought about the very situation which the learned judges have decried and disclaimed. This can only lead to heart-burning between majorities and minorities giving rise to the "feeling that a section of population consisted of first-class citizens and the other of second class citizens" (again in the words of Khanna J.). As observed by Pandian J, in *Raghunathrao* v. *Union of India,*[82] "fraternity", in the preamble to the Constitution, means a common brotherhood of all Indians. For bringing this about, quoting Dr. Ambedkar, the learned Judge added that "disruptive forces of regionalism, communalism and linguism have to be discouraged; for preservation of the unity and integrity of India every citizen should be made to feel that he is Indian first irrespective of other basis. In this view any measure at bringing about equality should be welcome".

Notes and References

* Retired Judge, Allahabad High Court, ex-Lokayukta U.P., former Member, Law Commission of India.

1. (1995) 4 SCC 646.
2. *Arya Samaj Education Trust* v. *Director of Education,* AIR 1976 Del 207.
3. AIR 1962 Pat 101.
4. *Id.,* paras 19, 21 and 29.
5. (1975) 1 SCC 589, para 11.
6. AIR 1953 Nag 70.
7. AIR 1958 Pat 359.
8. AIR 1966 SC 1119.
9. AIR 1982 Cal 101.
10. (1971) 2 SCC 261.
11. (1971) 2 SCC 269.
12. It is a different matter that this salutary principle is now being abused by politicians who, with the meek acquiescence of the Supreme Court (severely criticised by noted jurists like Palkhivala and Seervai; also see the dissenting judgments of Thommen, Kuldip Singh and R.M. Sahai JJ. in the *Indra Sawhney* case, 1992 Supp-3 SCC 217), have already succeeded in equating castes and sub-castes with "classess" within the meaning of Articles 15 and 16, thus perpetuating and strengthening the pernicious caste system, and are now merrily going about promising to annoint as "backward" every other group whether based on caste or religion that becomes politically important enough as a vote-bank to wrest the nomenclature and even clamouring for the removal of the judicially

imposed ceiling of fifty percent and for extension of reservation to the private sector and to the higher judiciary and the armed forces.

13. National Sample Survey, 43rd Round, 1987-88 (for both males and females).
14. (1992) 1 SCC 558.
15. AIR 1958 SC 956.
16. *Id.*, para 31. In subsequent decisions, similar provisions were held to be violative of Article 30(1), vide Khanna J. in *Ahmadabad St. Xaviers College* v. *Gujarat* (1974) 1 SCC 717 (para 109). But still later decisions, at the instance of teachers of minority institutions, have, even while paying lip service to the binding ruling in *St. Xaviers*, considerably watered down its impact, as will be discussed later.
17. *Id.*, para 33.
18. *Id.*, para 44.
19. AIR 1963 SC 540.
20. H.M. Seervai, Constitutional Law of India, Vol. 2, Ed. IV, 1993 at 1302.
21. (1993) 1 SCC 645 at para 10.
22. *Id.*, para 15.
23. AIR 1969 SC 465.
24. AIR 1970 SC 259.
25. AIR 1970 SC 2079; (1970) 2 SCC 417.
26. According to Khanna J. in *Ahmadabad St. Xavier's College, infra* n. 32 at para 110 of SCC, this was a reference to the Radhakrishnan Commission which had in 1948-49 recommended, *inter alia*, that constituent colleges should be preferred to affiliated colleges. Khanna J. pointed out that the subsequent reports of the Kothari Commission (1965-66) and the Dongerkery Commission (1972) had not made any such observation, and that in any case if a provision is violative of Article 30(1), the fact that it has been enacted in pursuance of the recommendations of an expert body would not prevent the Court from striking it down.
27. *Supra* n. 25, para 18 of SCC.
28. *Id.*, para 19.
29. (1971) 2 SCC 261.
30. (1971) 2 SCC 269.
31. The requirement to induct the Principal and one Head of Department (by rotation every year, in order of seniority) in the managing committee was, however, upheld by the majority (Krishna Iyer and A.C. Gupta JJ.) in *Gandhi Faiz-e-Am College* v. *Agra University,* (1975) 2 SCC 283, distinguishing *D.A.V. College* on the ground that in the latter case the requirements were much more onerous, namely, (a) a limit to the strength of the governing body; (b) the approval of the Senate to its constitution, and (c) the inclusion of two representatives of the University, besides the Principal. Krishna Iyer J. pointed out in *Gandhi Faiz* that *Very Rev. Mother Provincial, supra* and *Ahmadabad St. Xaviers College, infra* n. 32, were similarly distinguishable. Mathew J. however dissented.
32. AIR 1974 SC 1389; (1974) 1SCC 717.
33. *Ibid.*

34. Krishna Iyer J. in *Gandhi Faiz-e-Am College* v. *University of Agra*, (1975) 2 SCC 283 (para 12) laid special stress on this "sometimes ill-remembered" passage and also on Khanna J's several other observations to be noticed hereinafter. Chinnappa Reddy J, delivering judgment for a division bench consisting of himself and G.L. Oza J. in *Frank Anthony Public Schools Employees Assocation* v. *Union of India*, (1986) 4 SCC 707 (para 11) also drew attention to this passage from Khanna J.
35. *Supra* n. 32.
36. *Keshavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225.
37. *Id.*, para 89.
38. *Id.*, para 91.
39. *Id.*, para 128.
40. *Id.*, para 131.
41. *Id.*, paras 131 and 133.
42. *Id.*, paras 135 and 136.
43. 333 US 203.
44. *Supra* n. 36 paras 138, 142 and 150 to 171.
45. (1975) 2 SCC 283.
46. *Id.*, para 259.
47. *Id.*, para 263.
48. *Id.*, paras 266 and 267.
49. *Id.*, para 268.
50. *Id.*, para 271.
51. *Id.*, para 280.
52. *Id.*, paras 294 to 301.
53. AIR 1979 SC 52.
54. AIR 1980 SC 1042.
55. AIR 1987 SC 311.
56. 1994 Supp 2 SCC 509.
57. (1990) 1 SCC 428.
58. (1987) SCC 516.
59. (1988) SCC 206.
60. (1992) Supp 2 SCC 301.
61. (1992) 1 SCC 558.
62. *Supra* n. 30.
63. *Supra* n. 15.
64. AIR 1990 SC 1148.
65. AIR 1990 SC 1381.
66. (1993) 3 SCC 895.
67. (1993) 1 SCC 645; (1994) 2 SCC 734; AIR 1986 SC 1490; (1991) 3 SCC 87.

68. (1984) 4 SCC 500.
69. AIR 1954 SC 561.
70. (1994) 1 SCC 550; (1990) 2 SCC 352.
71. AIR 1979 SC 83.
72. AIR 1954 SC 1307.
73. *Supra* n. 23.
74. AIR 1958 SC 956.
75. *Supra* n. 32. See also, (1990) 1 SCC 128; AIR 1970 SC 2079; AIR 1987 Cal 232 wher similar observations were made by the Courts.
76. AIR 1954 SC 561.
77. AIR 1980 SC 1042.
78. (1991) 2 SCC 916.
79. *Supra* n. 21.
80. (1986) 4 SCC 51.
81. AIR 1976 SC 1207.
82. (1994) Supp. SCC 191, para 109.

PROTECTION OF THE UNITED NATIONS PEACEKEEPERS

*S.K. Verma**

I. Introduction

The post-cold war era, has seen the increasing involvement of the United Nations in the peace-keeping, peace-making and peace-enforcement activities. It has, at the same time witnessed an unprecedented surge in violence and attacks committed against peacekeepers. The parties in conflict often resort to detaining peacekeepers, including holding them hostages for political purposes. In May 1995, the Bosnian Serbs detained and prevented the movement of almost 400 United Nations peacekeepers and used them as human shields at probable targets of NATO bombing on 25-26 May. The UN officials described Serb operations as possessing a "terrorist" character.[1] There were also several attacks on French peacekeepers in Sarajevo, for which, on the demand of France, the Security Council adopted a resolution, condemning the attacks and inviting the UN Secretary-General to submit proposals to it on measures to prevent attacks against UN Protection Force (UNPROFOR).[2] In Somalia, the United States Chief Warrant Officer attached to the UN Unified Task Force (UNITAF) was held against his will following a mission in which a number of members of the force were killed.

It is reported that between 1948 to 1994, in the thirty-five peace-keeping operations undertaken by the UN nearly 720,000 peacekeepers have served, a total of 1194 have died in these operations, including 85 from India.[3] In 1993 alone, 202 personnel were killed.[4] In response to this ever-increasing incidence of violence against the peacekeeping forces, in 1993 the United Nations General Assembly established an Ad-hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel.[5] The Committee met in two sessions after which the Sixth Committee (Legal Committee of the General Assembly) worked on it and prepared the Draft Convention[6] which was adopted by the General Assembly by consensus on 9 December 1994 as a new multilateral Convention on the Safety of United Nations and Associated Personnel (hereinafter referred as Convention).[7] The Convention will come into force thirty days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the UN Secretary-General (Art. 27).[8]

While adopting the Convention, the General Assembly urged States to ensure the safety and security of the United Nations and associated personnel and those responsible for attacks against them should be brought to justice. It obliges States-parties to establish jurisdiction over crimes against the United Nations personnel including murder, kidnapping or threat of attack. It calls on host States and the UN to quickly conclude agreements on the status-of-forces.

This study will examine the scope of the Convention - the types of operations and personnel that are covered under the Convention. It will analyse its main features, including the key provisions concerning jurisdiction and status-of-forces. But at the outset, a brief survey of the UN peacekeeping operations will be undertaken.

II. United Nations Peacekeeping

The UN Secretary-General in his Agenda for Peace has very correctly remarked that "Peacekeeping can rightly be called the *invention* of the United Nations".[9] In fact, the UN Charter is not explicit about its peacekeeping function, which contains two distinctive chapters - Chapter VI (Pacific Settlement of Disputes - Arts. 33-38) and Chapter VII (Enforcement Action - Arts. 39-51). While the former is dedicated to working out a solution between the parties through peaceful means, the latter relies on the decision of the Security Council, imposing a solution through forcible measures. But the recourse to dispute settlement under Chapter VI has not been very encouraging in the history of the UN due to the absence or lack of political will of States. Similarly, recourse to Chapter VII and decisions for enforcement action are not always easy to come by because of the inherent flaws in the decision-making by the Security Council. Hence, in order to avoid war and political turbulence, the UN has innovated the method of peacekeeping, which is mid-way between dispute settlement and enforcement action, and has come to be called as Chapter VI and a half.

The essence of peacekeeping is the consent of the parties to the conflict to the deployment of UN forces as a buffer in conflict circumstances. However, the Security Council may station such forces compulsorily in the territory of a State under the enforcement action as was done with UNIKOM to monitor the line of Kuwait-Iraq border by replacing coalition forces, under the Security Council Resolution 689 of April 9, 1991. The peacekeeping forces are composed of military contingents of armed troops voluntarily made available by member-States to the UN. These forces are required to maintain the posture of impartiality with respect to the respective merits of the adversary positions and a commitment to use force only in self-defence strictly construed.[10] Consent and cooperation are basic pre-requisites for successful peacekeeping operations. However, the UN peacekeeping has now far transcended from this

original position. The demand for operations, the number of personnel, the budget involved are of greater magnitude now than before. Today's peacekeeping involves new situations and new tasks. Peacekeepers have been sent to areas where there are no agreements, where consent to UN presence is sporadic and where governments are non-existent (due to collapse of machinery) or have limited effectiveness. Presently, there are seventeen UN peacekeeping operations in existence, with all but one in former Yugoslavia (where Multinational Forces (IFOR) under the command of NATO have replaced UNPROFOR) are located in the developing world.

The UN peacekeeping operations may broadly be classified under three categories. First is the traditional one under which the UN force acts as a buffer between antagonistic forces in circumstances of unresolved disputes of States, and essentially to monitor truce and ceasefire agreements. They are aimed at keeping the parties separated to discourage the resumption of hostilities. They are, in essence, confined to inter-State disputes. Out of the seventeen peacekeeping operations presently in existence, nine fall within this category. Such operations tended to be of comparatively long duration. Consent of the States is a pre-requisite for stationing such forces in a State territory.

The second category of peacekeeping operations essentially deal with the circumstances arising out of a partially or fully "imploded State" where the normal institutions of a State are near collapse, or have collapsed, and a state of anarchy exists. Consent of the imploded State by definition, would not be available in such cases. Somalia and Rwanda are the typical examples where the local authority had substantially disappeared. These are the cases of failed State which is a threat to international peace and security.

The third category consists of those operations that concern with *intra-State conflicts* and *civil wars* in order to restore peace and security. This type of operations have blurred the dividing line between peacekeeping and peace enforcement, both in mandate and enforcement. In principle, the UN cannot intervene in the domestic affairs of a State as mandated under Article 2(7) of the Charter. Hence, UN intervention in civil wars is in contravention of its own Charter. But in certain circumstances, the Security Council can authorise action to address a local conflict, when a State requests it, as in Cambodia, when all semblance of State authority vanishes, as in Somalia, and when whole population is singled out for genocide, as Tutzi tribe in Rwanda. In such circumstances, it may be argued that the Security Council is not intervening in internal affairs, rather it is acting in accordance with the Charter to maintain international peace and security. On the other hand, more often than not, such operations, linked to humanitarian assistance or independent of them, are required to demilitarise the existing armed conflicts within States. Cambodia and Somalia are typical examples. It is also noteworthy that it was typical of

cold-war era that the two Super-Powers intervened in many civil wars where they tried to enforce their own forms of "peace-keeping". Over 75% of the wars during this era were intra-State, and external intervention was a significant factor in over two-thirds of these. However, with the end of cold-war era, the frequency of UN interventions in civil wars, in the name of "peace-keeping" has increased markedly instead. But in these assignments, the basis of *consent* for sending and stationing the peacekeeping forces, and impartiality of these forces has been often undermined. This is partly because of the UN mandate - as in Somalia, Bosnia, Cambodia, Rwanda, Haiti, in which peacekeeping proceeded either without the genuine consent of the parties to the conflict or perceived as taking sides in the course of trying to restore government, protect vulnerable elements in the population, and promote a transition to democracy and constitutionality sliding into the mould of Chapter VII enforcement measure.

Peacekeeping today has become far more complicated because conflicts and confrontations inside State borders are now more prevalent than inter-State wars. Today's peacekeeping involves new situation and new challenges. Peacekeeping is more than just keeping apart the warring parties. It may be aimed at protecting vulnerable populations, delivering humanitarian relief or responding to the collapse of a State. It may entail restoring democracy or building a foundation for national recovery. In such types of peacekeeping, there are no easy solutions. Each operation is different. Each requires new variables, in different combinations, often undertaken by multiple actors. It is in these types of operations where the peacekeepers are more vulnerable to attacks and killing from local groups.

The 1994 Convention on the Safety of UN and Associated Personnel addresses the problem of such attacks against peacekeepers. It also fills up the gap in international law because the four Geneva Conventions of 1949 and their two additional Protocols of 1977 lay down the norms and principles to regulate the armed conflicts, and their violations are attendant with certain legal consequences, but there existed no instrument to prohibit or provide legal remedies for attacks against peacekeepers who normally perform non-combatants peacekeeping functions and not as combatants in a war. Certain Security Council resolutions, existed, requiring parties to conflicts to ensure the safety of UN forces and humanitarian personnel but they had little impact. Furthermore, the resolutions were related to particular cases and did not have universal application.[11] The 1994 Convention is general in nature and it creates a regime for prosecution or extradition of persons accused of attacking peacekeepers and other persons associated with operation under UN mandate. For this purpose, it contains provisions concerning the relationship of peacekeepers and other personnels with host and transit States.

III. Scope of the Convention

A. Coverage of Operations

Articles 1 and 2 together expound the coverage of the Convention. Article 2(1) provides that the Convention applies to UN and associated personnel, as defined in Article 1. According to Article 1, United Nations operation covers an operation established by the competent organ of the UN in accordance with the Charter of the UN and conducted under the UN authority and control. The first category is where the operation is for the purpose of maintaining or restoring international peace and security. Thus, all operations authorised by the Security Council are automatically covered, including peacekeeping and peace-enforcement operations, because under the Charter, the Security Council is primarily entrusted with the task of maintenance of international peace and security (Art. 24 of the Charter). An operation properly authorised by the General Assembly for this purpose would also be covered.[12] The second category pertains to operations where the Security Council or the General Assembly *declares,* for the purpose of the Convention, that "there exists an exceptional risk to the safety of the personnel participating in the operation." It is so because sometimes operations may not be strictly related to peacekeeping, such as humanitarian and election-monitoring missions, which may expose the personnel involved to severe risks. However, no list has been drawn for this type of operations under the Convention. But in the final analysis of this provision, all UN operations can be covered under the Convention so long there is a *declaration* of the Security Council or the General Assembly about the *risk.*[13]

B. Coverage of Personnel

The very title of the Convention covers two types of personnel to carry out activities in support of the mandate of United Nations Operations (Preamble). The first is the "United Nations personnel", which is the core group of peacekeepers and comprises of the "military, police or civilian components of a United Nations Operation", engaged or deployed by the Secretary-General of the United Nations. For example, UN Observer Mission in El Salvador (ONUSAL); UN Operation in Mozambique (ONUMOZ); UN Assistance Mission for Rwanda (UNAMIR) and the UN Mission in Haiti (UNMIH) fall within this category. It also includes officials and experts on mission of the UN or its specialized agencies or the International Atomic Energy Agency (IAEA), who are present in the zone of risk in their official capacity and thus can be the natural targets of attacks.

The second group of "associated personnel" comprises of persons assigned by a government or an intergovernmental organization under an agreement with competent organ of the UN, or engaged by the UN Secretary-

General, a specialised agency or the IAEA. For example, NATO forces were asked to assist the UNPROFOR (now IFOR) in Bosnia-Herzegovina; Multinational Force Assisting UNMIH or US-led Multinational Force (MNF) in Haiti;[14] and US Assistance to UNITAF in Somalia fall within this category. These forces are normally not under the UN command and control. 'Associated personnel' also include persons deployed by a humanitarian non-governmental organization (NGO) or agency (*viz.* ICRC) under an agreement with the UN Secretary-General, a specialized agency or the IAEA. Through this clause, many NGOs and other groups connected with a UN operation can be covered. However, for this purpose, they should have a contractual link with the UN, which implies a measure of control by the UN over their activities in relation to the operation.

At the deliberations of the Ad-hoc Committee on the Elaboration of an International Convention dealing with the Safety and Security of UN and Associated Personnel, many Governments, NGOs and UN wanted to extend the coverage of personnel and viewed that all their employees in the field should be included, and not merely be restricted to personnel participating in the actual operations and argued that attacks on them are no less than attacks on armed peacekeepers. Nevertheless, strong views of certain powerful States prevailed that this exercise is primarily concerned with peacekeeping and not for the protection of all UN personnel. Moreover, to the extent the provision of universal criminal jurisdiction under the Convention intrudes on the sovereignty of States, such an intrusion would not be tolerated in relation to all UN activities by States, except in the matter of peacekeeping.[15]

C. Convention and the UN Enforcement Action

Article 2(2) of the Convention states :

> "This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

Thus, where the peacekeeping forces are acting as combatants in an armed conflict, they are outside the purview of the Convention. However, for the application of this provision, pertinent question to be determined is whether any of the personnel are engaged as combatants and whether the operation is one to which the law of international armed conflict applies.

The reason for the exclusion of the combatant UN forces is that such an action will be governed by the four Geneva Conventions of August 12, 1949 and their two additional Protocols of 1977. Attacks in contravention of these

humanitarian instruments or other mistreatment of persons constitute grave breaches, for which the offender would be liable under those Conventions. But they do not cover attacks on forces performing the traditional peacekeeping functions of monitoring and policing as such. However, when the UN deploys these forces as combatants, as in the Gulf-war (after Iraq invaded Kuwait), in furtherance of enforcement action under Chapter VII, they are covered by the Geneva Conventions for being international armed conflicts as defined in Article 2, common to all those Conventions.[16]

Where the Security Council resolution authorises an enforcement action specifically referring to Chapter VII, the position about the applicability of the Convention is clear, but where it is not explicit about Chapter VII action, to identify whether an action involves "enforcement" is a complicated inquiry in the absence of any definition under the Charter. Nevertheless, the object and purpose of the resolution, the particular action to be taken by the parties to a conflict despite their consent should be sufficient to decide whether the action was in the nature of enforcement measure, and hence would be covered under Article 2(2) of the Convention.

On the other hand, not all the Chapter VII actions would be covered under Article 2(2) of the Convention, but only when the UN forces, under the Security Council resolution, are engaged as combatants that it will have the application. When the force is engaged in humanitarian activities and/or to enforce peace, such as the UNPROFOR in former Yugoslavia, or UNOSOM's activities in Somalia, in each of these cases, attacks against covered personnel would fall within the scope of the Convention because the UN forces in such cases are not engaged as combatants. Similarly, use of force in self-defence by UN and associated personnel without sustained fighting would not take the operation out of the purview of the Convention because the UN forces, in such a case, are not necessarily engaged as combatants when they act in self-defence.[17] However, if *any* personnel are engaged as combatants, that will have the effect of applying Article 2(2) (*i.e.* the law of international armed conflict) rather than the Convention.

IV. Jurisdiction Under the Convention

In the matter of jurisdiction, the Convention closely follows the other UN conventions on terrorism, *viz.*, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973 (Protection of Diplomats Convention),[18] the International Convention Against the Taking of Hostages, 17 December 1979 (Hostages Convention),[19] as well as the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970,[20] and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil

Aviation, 23 September 1971.[21] The Convention on the protection of peace-keepers has created a regime of universal jurisdiction for attacks against UN and associated personnel.

Article 9 sets forth the crimes over which States will exercise jurisdiction, which are the intentional commission[22] of murder, kidnapping or other attack upon the person or liberty of any UN or associated personnel, *viz.*, keeping them as hostages as in the case of Bosnia-Herzegovina, a violent attack upon the official premises, the private accommodation or the means of transportation of any UN or associated personnel likely to endanger his or her person or liberty. Even a threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act; an attempt to commit any such attack; and an act constituting participation as an accomplice in such attack, or in organizing or ordering others to commit such attack. The words "organizing or ordering others" obviously refer to the orders of the superior military and political authorities.

In order to exercise its jurisdiction, a State-party should take measures to establish its jurisdiction when any of the crimes set out in Article 9 has been committed in its territory, or on board the ship or aircraft registered there, and when the alleged offender is its national (Article 10, para. 1). A State can also establish its jurisdiction over such crimes if the alleged offender is present in its territory and it does not extradite the offender to any of the States which can establish their jurisdiction as provided in other provisions of Article 10, para 4. It can also exercise its jurisdiction over any crime committed by a Stateless person, habitually resident in its territory, or with respect to its national, or in an attempt to compel that State to do or abstain from doing any act.

The Convention emphasises on the mutual cooperation amongst States in the prevention of the crimes enlisted in Article 9. In this direction, States are required to take all practicable measures to prevent preparations for the commission of these crimes in their territories through exchange of information (Art. 11). If a State where the crime is being committed, has reasons to believe that the alleged offender has fled from its territory, it shall provide information, in accordance with its national law, to the UN Secretary-General and other States concerned. If any other State possesses any relevant information about the victim, it must transmit that information to the UN Secretary-General and the States concerned (Art. 12). Mutual assistance among States-parties has also been emphasised in criminal proceedings. They must provide full assistance to each-other in connection with criminal proceedings, including assistance in obtaining evidence at their disposal necessary for the proceedings. The law of the requested State shall apply in all cases (Art. 16).

It is the responsibility of the State-party in whose territory the alleged offender is present to take appropriate measures under its national law to ensure

that person's presence for prosecution or extradition. These measures must be notified to the UN Secretary-General and to (*a*) State where the crime was committed; (*b*) State of nationality of the offender, and if the offender is a Stateless person, the State in whose territory he/she habitually resides; (*c*) State of nationality of the victim; and (*d*) other interested States. The most important obligation of the State-party in whose territory the alleged offender is present, is either to prosecute or extradite the offender. In this respect, Article 14 provides :

> "The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State."

This provision of the Convention gives effect to the principle of *aut dedre aut punire* of international law. The obligation to submit a case to competent authorities is not meant to prosecute the offender, but merely confined to submit the case before prosecutorial authorities who will act in good faith in prosecution proceedings. A State may not be able to proceed with the case in the absence of sufficient evidence in support of prosecution. Thus, this obligation of the State, in fact, is discharged when it has submitted the case to its competent authorities, who will decide, after taking into account all the circumstances involved, whether to prosecute the offender or not.

For the purposes of extradition, like all other treaties on terrorism, the Convention also provides that if the crimes under the Convention are not enlisted as extraditable offences in an extradition treaty between States-parties, they will be deemed to be included therein, and the Convention may form the basis for extradition. States-parties also undertake to include these offences in their future extradition treaties (Art. 15).

The offenders, and those targets of investigations are guaranteed fair treatment, a fair trial and full protection of their rights. The alleged offender shall be entitled (*a*) to communicate without delay with the nearest appropriate representative of the State of his/her nationality, or otherwise that State is entitled to protect the offender, or in case of a Stateless person, is willing to protect him, and (*b*) to be visited by a representative of that State (Art. 17). The outcome of any prosecution must be communicated to the UN Secretary-General, who, in turn would transmit the information to other States-parties (Art. 18).

V Status-of-Forces Under UN Operation

The status of forces are normally regulated through agreements between the UN and the host States. These agreements are concluded prior to the deployment of forces or soon thereafter.[23] The agreement governs all aspects of the operation, the stay of the forces, protection, privileges and immunities of the peacekeepers. The Convention takes note of the existing practice, and Article 4 provides that :

> "The host State and the United Nations shall conclude as soon as possible an agreement on the status of the United Nations operation and all personnel engaged in the operation including, *inter alia,* provisions on privileges and immunities for military and police components of the operation."

However, as each case of deployment has its special demands, such relationships can be better regulated through a bilateral agreement than through a multilateral treaty. The Convention, by taking into account this aspect, does allow some measure of flexibility under the status-of-forces agreement in the implementation of these provisions.

The Convention contains detailed provisions on the relationship between the UN and associated personnel on the one hand, and host and transit States on the other. The policy to conclude status-of-forces agreement with a host State has not always been successful, particularly when the internal law and order of the State is completely broken or other institutions are dismantled in a civil war, like in Somalia, and the forces are sent under Chapter VII to restore peace and order and provide humanitarian assistance. Nevertheless, Article 4 of the Convention reflects the concern of the troops contributing States and reinforce the desirability of the conclusion of such agreements at the earliest.[24]

A transit State is required to facilitate the unimpeded transit of UN and associated personnel and their equipment to and from the host State (Art. 5). This obligation also exists under Article 2 para 5 of the Charter of the UN. Under the humanitarian conventions (four Geneva Conventions, 1949 and their two additional Protocols, 1977) this obligation exists towards the relief agencies.

On the other hand, the UN and associated personnel, without prejudice to such privileges and immunities as outlined in the agreement, are required to respect the laws and regulations of the host State and the transit State, and refrain from any action or activity incompatible with the impartial and international nature of their duties. The UN Secretary-General should take all appropriate measures to ensure the observance of these obligations by the peacekeepers (Art. 6).

For the purposes of the Convention, the men and their equipment, involved in the UN operation must be properly identifiable. Article 3 provides that military and police components of a UN operation and their vehicles, vessels and aircrafts should bear distinctive identification.[25] Other personnel and vehicles involved in the UN operation are also to bear appropriate identification unless decided otherwise by the UN Secretary-General.[26] All UN and associated personnel are required to carry appropriate identification documents, which need not be only UN issued documents.

Article 7 of the Convention sets out the obligations of the host State and others towards peacekeepers. Accordingly, the UN and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate. This is in line with the general international responsibility which is also recognized in the Preamble of the Convention that "attacks against, or other mistreatment of, personnel who act on behalf of the UN are unjustifiable and unacceptable, by whomsoever committed," because they make important contribution in respect of UN efforts in the fields of preventive diplomacy, peacemaking, peace-keeping, peace-building and humanitarian and other operations. State-parties are required to take all appropriate measures to ensure the safety and security of the UN and associated personnel from the crimes set out in Article 9. But where the host State is unable to take the required steps, other State-parties will cooperate with the UN in the implementation of the Convention.

In order to tackle with situations that arose in Bosnia-Herzegovina and Somalia, when the UN peacekeepers were taken hostages for political purposes, Article 8 of the Convention provides :

> "Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949."

Accordingly, peacekeepers cannot be taken as prisoners-of-war, and if captured and detained during the course of performance of their duties, as soon as their identification is established, they should be released immediately, and should not be detained till the end of the operation.[27]

Among the other provisions of the Convention, Article 20(d) keeps intact the right of States contributing personnel to a UN operation to withdraw their personnel from participation in such an operation. However, the withdrawal

has to be in close coordination with the UN Secretary-General and keeping in mind the interests of the operation, the host State and other contributed forces. In the event of death, disability, injury or illness of peacekeepers while rendering peacekeeping service, appropriate compensation shall be paid (Art. 20(e)). However, it is not clear how this compensation be adjusted, *i.e.*, should it be in accordance with the present UN practice of providing compensation based on the amount paid by the contributing State? The matter of compensation is before the Fifth Committee (relating to Administrative and Budgetary Questions) of the General Assembly.[28]

The Convention also protects the right of self-defence of peacekeepers. But Article 21 on self-defence generated a lot of controversy at the stage of negotiation, which provides that nothing in the Convention shall be construed so as to derogate from the right to act in self-defence. It was argued that this provision logically allows parties to a conflict a general right of self-defence (and conversely a right to attack) against UN and associated personnel, and thereby legalise an illegal act and jeopardise the safety of peacekeepers. However, many delegates, including the United States, at the deliberations of the Ad-hoc Committee were not willing to take it that far by accepting this implication, even though the right of self-defence is an inherent right and is part and parcel of the customary international law and part of the UN law (Art. 51 of the Charter).

Disputes under the Convention shall be settled through arbitration and, if the parties fail to agree on the organization of the arbitration, the dispute may by referred to the International Court of Justice (Art. 22). This provision on dispute settlement, however, is optional and parties may opt out of it by making a declaration to this effect.

VI. Conclusion

Since the end of cold-war, the UN has undertaken peace-keeping functions in a big way in many troubled parts of the world. For its peace-keeping missions, UN depends entirely on the voluntary contribution of forces by States. Peacekeepers quite often are killed, wounded, detained or captured while discharging their functions. Doubtlessly, they are manning the dangerous terrains. They are prone to these unlawful acts, committed against them contrary to their position as representatives of international community, more in the territories where they are sent without the consent of the host State, particularly on the humanitarian missions or to restore peace and order in imploded States. The 1994 Convention on the protection of peacekeepers provides measures to cope up with unlawful acts committed against peacekeepers. The effectiveness of the Convention in the elimination of such unlawful acts will be known only after the Convention comes into force.

However, there are certain inherent drawbacks in the Convention, which may come in the way of its effectiveness :

(*i*) The operation of the Convention is restricted entirely to the parties to the Convention. Hence, the crimes set out in Article 9, if committed in the territory of a State which is not a party, the Convention will not be applicable. This will leave many operations outside the purview of the Convention.

(*ii*) Unless there is a status-of-forces agreement, the operation of the Convention will remain blurred and such agreement is difficult to come-by in the case of an imploded State.

(*iii*) The Convention does not make it clear as to what will be the extent of liability of an offender if he/she commits the crime under the orders or supervision of a superior.

(*iv*) The Convention also does not recommend for the minimum punishment to be meted out by States-parties to the persons convicted of the Convention crimes.

(*v*) The Convention suffers from all the flaws which have plagued the effectiveness of other UN Conventions on terrorism. Extradition of an offender cannot be demanded as a right if the State where the offender is present, promises to prosecute, even if the prosecution proceedings would have been a farce. There is no accountability of a State-party to discharge its Conventional obligation.

In spite of these drawbacks, the conclusion of the Convention is an encouraging and desired step to protect peacekeepers against the illegal attacks on them. It will make States aware about their duty towards peacekeepers.

Notes And References

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1. See New York Times, May 29, 1995 at 1; see also The Times Of India, June 6, 1995 at 15.
2. Security Council Resolution 987, April 19, 1995.
3. As of December 1994, there were 5209 Indian men and women serving with six UN peace-keeping missions. On 22 August 1994, seven Indian peacekeepers were killed in Somalia when they were escorting a convey from Baledogle to Baidoa, see UN Newsletter, 3 September 1994 at 3; See also *id.*, Vol. 50, No. 15, 15 April 1995 at 3.
4. See note by the UN Secretary-General, UN Doc. A/AC. 242/1 (1994). Between March 1993 to April 1995, there were 131 fatalities in Bosnia-Herzegovina, 134 in Somalia and 16 in Rwanda.
5. General Assembly Resolution 48/37 of 9 December 1993, UNGAOR, 48th Sess. Supp. No. 49, Vol. 1, at 333, UN Doc. A/48/49 (1993). The Ad-hoc Committee met in New York in two sessions from 28 March to 8 April and August 1 to 8, 1994.

6. For Sixth Committee Report, see UN Doc. A/49/742 (1994); see also UN Doc. A/C.6/49/L.4, Annex (1994) on the draft Convention.
7. The General Assembly adopted the Convention by consensus. See General Assembly Resolution 45/59, December 9, 1994. The Convention was opened for signature at UN Headquarter in New York on December 15, 1994. For the text of the Convention, see 34 International Legal Materials (1995) at 482.
8. See Article 24 of the Convention. Till May 1995, twenty-six States had signed the Convention and only one (Denmark) had ratified it.
9. Boutros Boutros-Ghali, Agenda For Peace 1995 (2nd ed.) (New York; United Nations, 1995) at 57.
10. The involvement of the peacekeeping forces in Congo (ONUC's) in clearing the road blocks was criticised as amounting to military enforcement measure, which was beyond the scope of 'peace keeping' and 'policing' measures for which the forces were sent under the Security Council resolutions.
11. See Security Council Resolution 859 of 24 August 1993 relating to the protection of UNPROFOR and office of the UNHCR personnel in Yugoslavia and Bosnia; Security Council Resolution 865, September 22, 1993 relating to UNOSOM II in Somalia wherein individual responsibility for criminal acts was reaffirmed; Security Council Resolution 925, June 8, 1994 on the safety of personnel in Rwanda.
12. See Uniting for Peace Resolution of 3 November 1950, General Assembly Resolution 377 (V) and Article 14 of the UN Charter.
13. *Declaration-trigger* mechanism was objected by a number of delegations, arguing that the Security Council or the General Assembly might not act promptly, which may create a gap in protection, and public statements might create political problems for nations contributing personnel. However, US did not see any problem in this mechanism, see UN Doc. A/49/PV. 84 (1994) at 15 for US statement.
14. Security Council Resolution 940, 31 July 1994.
15. See *Supra* n. 6.
16. It is, however, noteworthy that Article 2 talks in terms of "High Contracting Parties" which raises a doubt about their applicability to the UN. Nevertheless, these Conventions have now got the force of customary international law and thus apply to all forces engaged in international armed conflict. On the other hand, Article 2(2) refers to "the law of international armed conflict" rather than the Geneva Conventions which are certainly the part of the former.
17. However, such cases may overlap under the Convention and the Geneva Conventions. An important reason for permitting this overlap is to ensure that peacekeepers do not lose the benefits of the Convention simply because they respond in self-defence and fighting ensues.
18. 1035 UNTS 167.
19. 18 International Legal Materials (1979) 1456.
20. 10 International Legal Materials (1971) 133.
21. *Id.*, at 1151.
22. The same terminology has been used in the Diplomats Convention, 1973 and the Montreal Convention on the Safety of Civil Aviation, 1971, which means the perpetrator of the act is aware of the status of his victim, *i.e.*, in the case of the Convention

on Peacekeepers, his association with the UN, see the INTERNATIONAL LAW COMMISSION REPORT of its 24th Sess., UNGAOR, Sess., Supp. No. 10, at 95, UN Doc. A/8710/Rev.1 (1972).

23. See the Report of the UN Secretary-General on *Comprehensive Review of the Whole Question of Peace-keeping Operations in all their Aspects*, MODEL STATUS OF FORCES AGREEMENT FOR PEACE-KEEPING OPERATIONS, UN Doc. A/45/594 (1990).

24. On December 20, 1995, the Security Council examined the issue of consultation between it and the troop-contributing States in response to a letter written by 34 nations, see UN NEWSLETTER, 30 December 1995 at 3.

25. This provision is similar to the humanitarian Conventions under which the relief agency, like ICRC, its personnel and vehicles should bear distintive mark or emblem.

26. This provision is clearly aimed to dispel the concern expressed by the UN Secretariat that in some situations wearing the UN symbol might subject them to an increased risk of attack. Thus, it was the clear intention of the negotiators of the Convention that wearing an identification by the victim is not a *sine quo non* for establishing the criminal liability of the defendant.

27. It is contrary to Article 118 of the III GENEVA CONVENTION (on prisoners of war) wherein POWs shall be released and repatriated without delay after the cessation of active hostilities.

28. Cf. Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW (1995) 621 at 630.

SETTLEMENT OF DISPUTES IN INTERNATIONAL TRADE

*A.K. Koul**

I. INTRODUCTION

The creation of the World Trade Organisation (WTO) completes the Bretton-Woods system conceived after the World War II comprising of International Bank for Reconstruction and Development (IBRD), International Monetary Fund (IMF) and International Trade Organisation (ITO). The ITO could not materialise and was substituted by General Agreement on Tariffs and Trade (GATT) 1947, the creation and establishment of the WTO may in future years to come substitute ITO.[1] The WTO is an international economic and legal organisation created and established as a result of Uruguay Round of Multilateral Trade Negotiations (URMTNs)[2] held under the auspices of GATT. The URMTNs objectives were to develope an integrated, more viable and durable multilateral trading system encompassing the GATT and its past trade liberalisation efforts as well as the results of URMTNs. Accordingly, the purpose of the WTO is to provide institutional framework for implementation, administration and operation of the Multilateral and Plurilateral Trade Agreements, and serves as a forum for international trade negotiations and settlement of disputes.[3] More than hundred countries have approved and ratified the WTO and the signatory member countries have subjected themselves to the sovereignty of the WTO,[4] as well it is in the interest of the member states to comply with the decisions of the WTO especially for the sake of increasing the wealth and economic stability of all the trading partners of the world.[5]

The organisational structure of the WTO comprises of the Ministerial Conference, General Council and Councils for Trade in Services, Goods and Trade Related Aspects of Intellectual Property (TRIPs). The Ministerial Conference which is composed of representatives of all member states is vested with decision making powers and meets every two years.[6] The decision making powers of the Ministerial Conference are: (*a*) the right to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements;[7] (*b*) the power to waive obligations under the WTO Agreements and the Multilateral Trade Agreements[8] and (*c*) the amendments of the Multilateral Trade Agreements under certain circumstances. The decision making process

is by consensus and if the consensus cannot be reached, the Agreements provide for majority voting, unless otherwise specified.

The General Council is composed of representatives of all member states which meets in the intervals between meetings of the Ministerial Conference.[10] The General Council is also empowered to carry out the functions assigned to it by the WTO Agreement and the General Council has the power to establish its own rules of procedure. The Councils for Trade in Services, TRIPs and Trade in Goods monitor the functioning of the various Multilateral Trade Agreements. These Councils are also authorised to carry out the functions assigned to them by their respective Agreements as well as by the General Council,[11] and these councils have been empowered to establish subsidiary bodies to carry out the functions of these Agreements.[12]

In addition, General Council serves as the Dispute Settlement Body (DSB)[13] and also as Trade Policy Review Body (TPRB).[14]

II. Dispute Settlement in GATT, 1947

A. Scheme of the GATT, 1947

The GATT, 1947 in the legal technical sense did not conceive of a specific procedure or provision for the settlement of disputes nor did it provide legal norms as to when a breach or breaches would amount to violations of a rule to give rise to a dispute. Nor is there any provision in the GATT for the establishment of an internal tribunal to resolve actual disputes or to promulgate authoritative interpretations on questions of interpretations, yet over the years the disputes with regard to breaches of substantive norms of GATT and its articles as well as the questions of interpretations have been a recurring phenomena and surprisingly enough GATT, 1947 has resolved many more disputes and evolved umpteem interpretations and interpretative techniques to make run the international trade smoothly. To some extent, the Contracting Parties, acting jointly under Article XXV. 1 or under more specific provisions of GATT, 1947 exercised the functions of a Tribunal. As the GATT, 1947 is drafted in conventional terms, including a rather liberal use of prohibitory language, the remedy provisions are not drawn in terms of sanctions. The organising principle permeating the GATT, 1947 as a whole is a system of reciprocal rights and obligations to be maintained in balance.[16] Professor Jackson, however, notes that there are nineteen clauses in the GATT which obligates GATT contracting parties to consult in specific instances including the instances of customs valuation, and invocation of escape clause.[17] Also, there are seven different provisions for compensatory withdrawal or suspension of concessions.[18]

The main task of the GATT, 1947 settlement of disputes being that the

reductions of tariffs in the various rounds of tariff negotiations should not be diluted by the actions of other contracting parties and the contracting parties must observe whatever commitments they have made under the GATT counter as well as the contracting parties must observe the substantive norms of international trade. The GATT, 1947 conceived in Article X an important obligation towards achieving the above said objectives. Article X entitled publication and administration of trade regulations, which required the publication of laws, regulations, periodical decisions and administrative rulings of general application pertaining to the treatment of products for customs duties. Such instruments are to be published promptly in such a manner as to enable governments and traders to become acquainted with them. Similarly, agreements 'affecting international trade policy' in force in between the government or a governmental agency of one contracting party and another contracting party, were also to be published. Certain types of measures of general application, such as changes in a rate of duty or the imposition of a restriction on imports were not to be enforced before such measures had been officially published.[19] By 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance further set out the commitment of contracting parties to notify such measures to the maximum extent possible notwithstanding whether those measures are consistent with the rights and obligations of the contracting parties under the GATT.[20]

B. Article XXIII and the Role of Panels

Despite the many aspects of the GATT that are relevant to a balanced view of the GATT dispute settlement mechanism, Article XXIII in addition conceives of a formal system of settlement of disputes. Article XXII concerns with the consultation and ordains that every contracting party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation regarding such representation as may be made by another contracting party with respect to any matter affecting the operation of GATT. Also, the contracting parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation.

Article XXIII not only provides last resort in any dispute but its gamut delimits and defines the true scope of all of the substantive provisions of the GATT. As Article XXIII has been expressly incorporated in various WTO agreements, as the standard for dispute settlement or a very similar provision is contained in other agreements as well as Dispute Settlement Understanding (DSU) of the URMTNs also incorporates Articles XXII and XXIII as basic priciples for the management of disputes, hence a critical analysis of Article XXIII is called for.

C. Critical Analysis of Article XXIII

To begin with, Article XXIII gives the affected party a sole remedy the withdrawal of such concessions or other obligations as the contracting parties may determine to be appropriate in the circumstances. A complainant under this Article must show that either (*i*) benefits accruing to him under the GATT are being nullified or impaired; or (*ii*) the attainment of an objective of the GATT is being impeded. In addition, the complainant must further show that such nullification or impairment is a result of (*a*) a breach of obligation by the respondent contracting party; (*b*) the application of any measure by the respondent contracting party, whether it conflicts with the GATT or not; or (*c*) the existence of any other situation.

Over the years the contracting parties were at pains to implement the provisions of Article XXIII with all its attendant limitations either by way of resolutions, rulings by Chairman and other working parties, however, by 1962, the first panel on complaints was constituted.[21] And by 1979, as a result of Tokyo Round of Tariff Negotiations the system of panels was codified and more than forty cases were resolved by way of panels. By 1990, 140 cases[22] were resolved under Article XXIII by the use of the panels and the panels have played a dominant role in the overall settlement of disputes brought before the contracting parties. The panel is an independent body of experts with three main tasks *viz* (*a*) to inquire into the facts of the case; (*b*) to assess all the relevant elements for a decision on the measures; and (*c*) to submit a proposal for such a decision. The reports of the panels do not have a legal force. Finally the panel reports go to GATT contracting parties where the mediating and political aspects are reconsidered and the panel report if gets adopted, achieves legal force. Although Article XXV : 4 provides for majority voting, this provision has been modified to require consensus.

The complaints under Article XXIII 1(b) termed as 'non-violation complaints' have raised questions of interpretation (nine complaints have been filed under this part of the Article) and non-violation complaints have been successful only if the infringement of tariff benefit could be proved.[23]

(i) Nullification and Impairment of Benefits

A survey of the cases of violation of Article XVIII reveals that the panels adopted different and varying interpretations to the phrase nullification and impairment of benefits. In early violation cases[24] some sort of injury to the contracting party was considered necessary before invoking Article XVIII, however, in subsequent cases, the concept of *prima facie* or nullification and impairment was introduced.[25] Nullification and impairment concepts have further been concretised in the form of 'adverse effect' and 'frustration of

reasonable' expectation and these two concepts are not necessarily applied in a cumulative way but are applied separately.[26]

However, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance provided :

> "16. The functions of panels is to assist the contracting parties in discharging their responsibilities under Article XXIII. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the GATT and if so requested by the contracting parties, make such other findings as will assist the contracting parties in making the recommendation or in giving the rulings provided for in Article XXII : 2. In this connection, panels should consult regularly with the parties to the dispute and give them adequate opportunity to develope a mutually satisfactory solution."[27]

(ii) Burden of Proof

The burden of proof lies on the party complaining the GATT violation,[28] but in cases where the respondent member state would raise exception clauses as exceptions to the violations, the burden of proof, would shift to the respondent.[29] However, the GATT process did not contemplate oral testimony and any evidence documentary, oral or otherwise is not subjected to any tests of relevance, admissibility or probative value.

(iii) Remedies and Sanctions

The practice of panels normally is to propose that the contracting parties recommend that the violation of the Agreement by the party should be terminated. And finally, in case the contracting party does not stop violation of GATT, the contracting parties may sanction suspension of concessions.

III. WTO, GATT 1994 AND THE Settlement of Disputes

A. DSU and Its Applicability

The central provision pervading the settlement of disputes under the WTO is GATT Article XX and XXIII, though as shown already, Article XXIII does not provide specific procedures for settling disputes concerning matters arising out of GATT. Therefore, the Understanding on Rules and Procedures Governing the Settlement of Disputes 1994 (DSU)[30] came into being only after the WTO agreement came into force.[31] The rules and procedures of the DSU are applicable to the Agreements establishing the WTO; Agreement on trade in goods; GATS; TRIPs and DSU.[32] DSU shall also apply to Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement and Arrangement Regarding Bovine Meat provided the signatories

to each Agreement decide for accepting the terms of the DSU application.

The rules of DSU with special modification have been applicable to other Agreements as listed in Appendix 2 to DSU such as[33]:

Agreement	Rules and Procedures
Anti-Dumping	17.4 to 17.7
Technical Barriers to Trade	14.2 to 14.4, Annex. 2
Subsidies and Countervailing Measures	4.2 to 4.12, 6.6, 7.2 to 7.10, 8.5, Foot note 33, 25.3 to 25.4, 28.6, Annex. V.
Customs Valuation	19.3 to 19.5, Annex. II.2(f), 3, 9, 21.
Sanitary and Phytosanitary Regulations.	36
Textiles	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 to 8.12.
GATS (General Agreement on Trade in Services)	XXII : 3, XXIII : 3
Financial services	4.1
Air Transport Services	4
Ministerial Decisions on Services Disputes	1 to 5.

(The above list of rules and procedures includes provisions where only a part of the provision may be relevant in the context).

B. The Objectives of the DSU

As already explained, the main objectives of GATT disputes settlement were : that the tariff and other concessions negotiated in various rounds should not be whittled down by the contracting parties; contracting parties should ensure observance of the obligation entered upon by them for carrying on the international trade smoothly; and accordingly the member states were obligated to publish, preserve and impose restrictions in their municipal setting to give full effect to the obligations entered upon in pursuance of being the members of GATT.[34] In short the central core of dispute settlement in GATT was the balancing of concessions of contracting parties as well as[35] adherence to the GATT's obligations.

The working of the GATT, 1947 till the establishing of DSU and WTO, establishes beyond doubt that the primary function or objective of the GATT settlement of disputes was to arrive at a mutually acceptable solution to the disputes arising out of GATTs obligations but it was not always in keeping with the core provisions of the GATT and the interests of other parties[36] always seemed secondary. However, Article 3 of the DSU takes a holistic approach not only by affirming in the principles of management of disputes under Articles XXII and XXIII of GATT, 1947 but also by safeguarding that the settlement of disputes should be GATT consistent also. The DSU although prefers a mutually acceptable solution but the settlement should also be consistent with the covered agreement as provided by the URMTNs in the Marrakesh Treaty. DSU is central element of the WTO and should serve to preserve the rights and obligations of the members of the WTO under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Further it is essential for the effectiveness of the WTO to settle disputes promptly and maintain proper balance between the rights and obligations of the members, as it is the aim of the dispute settlement mechanism to secure a positive solution to a dispute.

C. Dispute Settlement Mechanism

(i) Dispute Settlement Body (DSB)

The settlement of disputes mechanism in the WTO is administered by the Dispute Settlement Body (DSB) which will effectively be the WTO General Council acting in a specialised role. As already mentioned the General Council is composed of representatives of all member states which meets in the intervals between meetings of the Ministerial Conference, the General Council working as DSB can establish its own rules of business.[37] The DSU will also regulate the dispute settlements under all covered Mulitateral Agreements, although under some agreements special rules and procedures will be applicable.[38] The DSB is empowered to establish panels, adopt panels and appellate body reports, maintain surveillance of the implementation of rulings and recommendations and authorise suspension of concessions and other obligations under the covered Agreements. While the DSB administers the dispute settlement provisions of a covered Multilateral Trade Agreement in Annex 4 only those members who are parties to that covered Agreement can participate in decisions or actions taken by the DSB with respect to that dispute.[39]

(ii) Consultation

Normally, an international trade dispute settlement commences with consultation between the sovereign countries under Article XX of the GATT,

1947 and as already noted the consultation mechanism was further strengthened and reaffirmed in the Tokyo Round,[40] the DSU affirms in the effectiveness of the consultation and provides that each member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representation made by another member concerning measures affecting the operation of the covered Multilateral Trade Agreements taken within the territory of the former.[41] Such consultations occur regularly at the official level and can be raised to ministerial level as appropriate.

The request for consultations are to be notified to the DSB and relevant council and committees by the requesting party and the DSU requires that there should also be an identification of the measures at issue and an indication of the legal basis for the complaint.[42] This provision in the DSU reinforces the belief that international trade disputes have international law dimensions and as such the WTO members should delineate the character of dispute before it is submitted for consultation to DSB.

If the consultations fail to settle the dispute within sixty days after the request for consultation, the complaining party may request the establishment of a panel. The complaining party may also request a panel during the sixty day period provided both the parties jointly consider that consultation has failed.[43]

It is pertinent to mention that the request for consultation and its field of reference that may be referred to panel is crucial as any failure to raise an issue or to advance a particular objection to the impugned measure has resulted in the respondents successful objection to its consideration by the panel. Reference may be made of the cases decided by the GATT panel in EEC-Quantitative Restrictions Against Imports of Certain Products from Hong Kong,[44] Canada-Administration of the Foreign Investment Review Act,[45] as well as United States-Denial of Most Favoured Nations Treatment as to Non-Rubber Footwear from Brazil.[46] In all these cases the ill conceived reference proved fatal for defining the real issue by the panel. In the Brazilian case referred above the panel has specifically ruled that having heard and considered the arguments of Brazil and the United States as to whether or not the panel should consider presentations on Article X and XVIII : 1 (b) and (c), the panel rules as follows:

Article X : The panel notes that its terms of reference are limited to the matters raised by Brazil in its request for the establishment of this panel.... In its request, Brazil referred to the discrimination in the United States countervailing duty laws as applied to Brazil, not however, to any discrimination resulting from the administration of the United States courtervailing duty laws. The panel therefore considers that the matter raised by Brazil in its submissions relating to Article X : 3 (a) is not part of its terms of reference. The

panel would like to emphasise however, that it is ready to consider any arguments on the issue of discrimination, taking into account its terms of reference. In regard to Article XXIII : 1 (b) and (c), the Panel further notes that in its request for a panel, Brazil claimed that United States had acted inconsistantly with the GATT. Brazil did not claim that the benefits accruing to it under the GATT were nullified or impaired as a result of measure or situation of the type referred to in Article XXIII : 1 (b) and (c). The panel therefore considers that the matters raised by Brazil relating to these provisions were not covered by its terms of reference.[47]

Whenever, a member of WTO other than the consulting member thinks that the member has substantial trade interest in consultations being held pursuant to Article XXII : 1 of the GATT, Article XXII : 1 of the GATS Agreement or the corresponding provisions in other covered Multilateral Trade Agreements, such interested member may notify the consulting member and the DSB within ten days of the circulation of the request for consultation of its desire to join the consultations. It is obligatory on the part of other consulting members to join the interested member provided the concept of substantial interest is well founded and accordingly the consulting member/ members shall so inform the DSB. If the request to be joined is denied, the applicant member is free to request for consultations under Article XXII : 1 or XXIII : 1 of the GATT, Article XXII : 1 or XXIII : 1 of the GATS Agreement or the corresponding provisions in other covered Multilateral Trade Agreements.[48]

(iii) Good Offices, Conciliation and Mediation

If the consultation fails, the member of WTO may avail themselves DSU's conciliation or mediation services. Article 4 of DSU provides for good offices, conciliation and mediation which are taken voluntarily if the parties to the dispute so agree and requested at any time of the dispute and can be terminated at any time. Whenever good offices, conciliation or mediation are entered into within sixty days of a request, the complaining party must allow a period of sixty days from the date of the request for consultation before requesting for the establishment of a panel. Also, the complaining party may request a panel during the sixty days if the parties to the dispute jointly consider that the good offices, conciliation and mediation has failed to settle the dispute. Further the Director General of GATT may offer to provide such services in an effort to assist members to resolve a dispute.[49]

(iv) The Establishment of Panels

To resolve the dispute within sixty days if the consultation fails, or the complaining party so requests, a panel may be established by the DSB to hear

the dispute. The DSB may by consensus also decide not to establish a panel. The request for the establishment of panel has to be made in writing and such request shall indicate whether consultations preceded the request for panel; identify the specific measures at issue; and also provide a brief summary of the legal nature of the complaint and the problem clearly. Special terms of reference as alternative to the above method of reference is also possible provided the written request includes the special terms of reference.[50] The establishment of panel appears to be a matter of right with the complaining party.

1. Terms of Reference of Panels

In order to avoid delays and also to clear the functioning of panels, the standard terms of reference are to be furnished within thirty days from its establishment and are "to examine, in the light of the relevant provisions in (name of the covered Agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of the party) in document DS ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those Agreement(s)". The DSB may authorise its Chairman in establishing a panel to draw up the terms of reference of the panel in consultation with the parties to the dispute and such terms shall be circulated to all members.[51]

2. Composition of Panels

The panels shall be composed of three panelists or five provided the parties to the dispute agree for the same within ten days after the establishment of the panel. It is the secretariate which propose nominations for the panel to the parties to dispute and the parties to dispute are not expected to oppose nominations except for compelling reasons. If the parties do not agree within twenty days from the establishment of a panel, at the request of either party, the Director General of WTO in consultation with the Chairman of DSB, and the Chairman of the relevant council or committee may form the panel by appointing the panelists whom he or she considers most appropriate in accordance with any relevant special or additional procedcure of the covered Multilateral Agreement, after consulting with the parties to the dispute. Accordingly, the Chairman of the DSB may inform the members of the composition of the panel thus formed not later than ten days from the date he or she receives such a request.[52]

The Secretariate has to maintain a roster of panelists both governmental and non-governmental individuals possessing the qualifications of either having served on or presented a case to a panel, served as a representative of a WTO member, or of a contracting party to the GATT, 1947 or as represen-

tative to a council or committee of any covered Multilateral Agreements or its predecessor Agreement, or in the Secretariate, taught or published on international trade law or policy, or served as a senior trade policy official of a member. These panel members are to be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.[53]

In order to keep the panels neutral, it is provided that citizens of members whose governments are parties to the dispute or a member of a covered Multilateral Agreement at issue in a dispute, having a substantial interest in a matter before a panel shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.[54] If a dispute is between a developing country member and a developed country member, the panel shall include at least one panelist from a developing country.[55]

3. Panel Procedures

Once appointed, the panel hears oral arguments by the parties and reviews their written submission on the issues. Other WTO members may also intervene and present arguments to the panel, although the panel considers only issues raised by the principal disputing parties. Formal rebuttals are made in the subsequent meetings of the panels. The party complained against has a priority to take the floor first followed by the complaining party. Panelists have a right to put questions and ask explanations in course of meetings from the parties orally or in writing. The oral arguments presented by the party to the panel shall also be made available to the panel in writing. The DSU rules provide time limits for implementation of various stages in the panel process such as (a) receipt of first written submission of the parties :

1. complaining party (plaintiff), 3-6 weeks; 2. party complained (defendant), 2-3 weeks; (*b*) date, time and place of first substantive meetings with the parties; third party session, 1-2 weeks; (*c*) receipt of written rebuttals of the parties, 2-3 weeks; (*d*) date, time and place of the second substantive meeting with the parties, 1-2 weeks; (*e*) submission of descriptive part of the report of the parties, 2-4 weeks; (*f*) receipt of comments by the parties on the descriptive part of the report, 2 weeks; submission of the interim report, including the findings and conclusions to the parties, 2-4 weeks; (*h*) details for party to request review of parts of report, 1 week; (*i*) period of review by panel including possible additional meeting with parties, 2 weeks; (*j*) submission of final report of parties to the dispute, 2 weeks; (*k*) circulation of the final report to the members, 3 weeks.[57] These time limits suggest that a panel report should be arrived at within a period of eight to nine months. The other provisions of panel procedures stress transparency and a legalistic approach for concluding the

panel deliberations as well as expeditious disposal of the disputes brought before the panel. Specific provision has been made to extend the more favourable and differential treatment to the developing countries which has been accorded to them by the covered Multilateral Agreements in course of settling the disputes.[58]

The panel have a right to seek information and technical advice from any individual or body which it deems appropriate and for eliciting such information and advice, the panel should inform the member. It is obligatory on the member to respond promptly to any such request by the panel. The panel may also seek information from any relevant source and may also consult experts, to obtain their expert opinion on the matters at issue.[59]

4. Adoption of Panel Reports

GATT, 1947 practice of adoption of panel reports was somehow faulty as the GATT Council had to adopt the panel reports by consensus and as such the panel reports were never accepted in their spirit and character and also were blocked by the losing country. If the panel report was not adopted, the panel exercise was a futility. Thus procedure of adoption of GATT panel reports was considered the greatest lacuna in the GATT, 1947 settlement of disputes and this provision would make the settlement of disputes non-starter.

However, DSU has organically and fundamentally changed the procedure of settlement of disputes of GATT, 1947. The DSU goes somewhat further than the GATT, 1947 by providing for interim review of the pros and cons of the dispute after the parties have submitted their submissions to the panel and parties to the dispute may request review of the interim report or its parts.[60] This is a further check against erroneous findings of fact and law as well as opportunity for the losing party to have last opportunity of rectifying the mistake before the panel arrives at its final decision.

Once the report has been finalised by the panel, it is submitted to DSB, the members are given twenty days before DSB adopts the report. The members within ten days can raise objections to panel report and the party to a dispute shall have full right to participate in the consideration and deliberation of the report by DSB. The DSB after the issuance of the panel report and within sixty days shall adopt the panel report at a meeting (if a meeting is not scheduled, a meeting of the DSB should be held) unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB by consensus decides not to adopt the report. If a party has notified its intentions to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.[61]

5. Appellate Review

The DSB has been empowered to establish standing Appellate Body with seven members, three of whom shall serve on any one case and shall hear appeals from panel cases. The standing Appellate Body is composed of persons of recognized authority, who have demonstrated expertise in law, international trade and the subject matter of the covered Multilateral Agreements. These members are not to be affiliated with any governments. The tenure of the person appointed to serve on the standing Appellate Body is four years with the possibility of re-appointment.[62]

The standing Appellate Body is limited to considering issues of law covered in the panel report and legal interpretations developed by the panel. The appellate proceedings are normally to be concluded within sixty days and in any event not to exceed ninety days and the appeallate body has to inform the DSB in writing of the reasons for extension of time. The report of the standing Appellate Body is subject to the same automatic adoption rule as regular panel reports by the DSB unless the DSB decides otherwise by consensus within thirty days of its circulation to the DSB.

The DSB provides a strict rule of confidentiality and there is a prohibition of *ex-parte* communications with the panel or Appellate Body with regard to the matters for their consideration. Also any writen submission to the panel or Appellate authority is treated most confidential, however, the members to the dispute have a right of access to the same.[63]

The decision of the panel and the Appellate Body that a measure is inconsistant with a covered multilateral Trade Agreement, shall obligate the member to bring the measure into conformity with that Multilateral Agreement. The Appellate Body or panel can also recommend measures for bringing the measure in conformity with the rule or the Multilateral Trade Agreement.[64]

6. Surveillance of Implementation of Recommendations & Rulings

Article 21 provides elaborate mechanism of surveillance of implementation of recommendations and rulings of panels and Appellate Body reports. If a panel finds a complaint is justified, its report categorically recommends that the offending member should cease and desist from the violations of GATT rules by either withdrawing the offending measures or suitably amending the measures to bring it in conformity to the GATT rules or covered Multilateral Agreements.

Accordingly once the report is accepted, the DSB is empowered to monitor whether or not its recommendations have been implemented. The DSB is further empowered to keep vigil in respect of the measures which a losing party

has to take to remedy a violation of GATT or the covered Multilateral Agreement in pursuance of the recommendations of the panel within thirty days of the adoption of the panel or Appellate Body report. If the member is not in a position to comply with the panel's recommendations immediately, a reasonable time may be granted to such member by the DSB or a mutually agreed time frame within forty five days of adoption of the recommendations and rulings may also be worked out, or further arbitration may be proceeded to following adoption by the rulings and reports by the DSB between the disputants. In such arbitration, arbitrators are supposed to implement the panel recommendations and rulings within a period of fifteen months.

In case of disagreement between the disputants of the existence or consistency with a covered Multilateral Agreement, of the measures taken to comply with the recommendations and rulings such disputes are to be resolved by referring them to the settlement dispute mechanism of the covered Agreements.

The DSB is further empowered to keep under surveillance the implementation of the adopted recommendations or rulings. Any member has a right to raise the issue of implementation of the panel recommendation at the DSB. DSB shall keep on its agenda the implementation of the panel recommendations and rulings for a period of six months.[65]

7. Compensation and the Suspension of Concessions

If the recommendations are not implemented, the winning party may be entitled to seek compensation or the authority to seek to suspend concessions previously made to that member. However, neither compensation nor the suspension of compensation or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered Multilateral Agreements.[66] Article 21.1 of the DSU provides that prompt compliance with recommendations or rulings of the DSB is essential in order to assure the effective resolution of disputes to the benefit of all members.

It is noteworthy that Article 22.3 of the DSU, catalogues the principles for suspending concessions and obligations after invoking the dispute settlement procedures as conceived in the DSU and briefly are as under :

(*a*) suspension with respect to same sector in which the nullification or impairment or violation has occured;

(*b*) suspension with same sector is neither practicable nor effective, suspension in other sectors under the same agreement;

(*c*) suspension with other sectors is not effective or practicable and the circumstances are serious enough, suspend concession or other obligations

under another covered Multilateral Agreement;

(*d*) for applying the above principles, sectoral trade and how far it can compensate, as well as broader economic elements related to the nullification or impairement and broader economic consequences of the suspension or other obligations. If the party request authorisation to suspend concessions or other obligations pursuant to (*a*) and (*b*) set above, it shall state the reasons for the request which is sent to DSB. Such a request shall also be forwarded to the relevant council of the covered Multilateral Agreements. The level of suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment.[67]

It is important to note that the DSB shall not authorise suspension of concession or obligations if a covered Agreement prohibits such suspension.[68]

Although as noted earlier, the level of the suspension of concessions or other obligations authorised by DSB has to be equivalent to the level of nullification or impairment, yet the DSB can under certain circumstances and by way of a protest by a complaining party, refer the matter to arbitration. Such arbitration has to be carried out by the original panel, if members are available or by an arbitrator appointed by the Director General of WTO. Such arbitration has to be completed within sixty days and concessions or other obligations negotiated earlier cannot be suspended during the course of the above said arbitration.[69] The role of the arbitrator is limited as he cannot examine the nature of the concessions or other obligations to be suspended but is concerned only to examine whether the level of nullification and impairement is equivalent to the level of injury incurred by the member. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered Multilateral Agreement. The arbitrator may further examine whether the principles required to suspend concession or other obligations (Article 22.3) have not been complied with and the decision of the arbitrator in this connection is final. All these decisions by the arbitrator shall be communicated to the DSB promptly and the DSB upon request by a party may grant authorisation to suspend concession or other obligations.[70] Finally DSU provides that the suspension of concessions or other obligations are by way of a temporary relief and are applicable till such time as the measure has been found to be inconsistent with a covered Multilateral Agreement has been removed, or the member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits or a mutually satisfactory solution is reached. It is incumbent on the DSB to continuously monitor the compliance of implementation of the adopted recommendations or rulings, including cases where compensation has beed provided or concessions or other obligations have been suspended but the recommendations to

bring the measure into conformity with the covered Agreements have not been implemented.[71]

Further, the dispute settlement provisions of the covered Multilateral Agreements can be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a member. Whenever, the DSB rules that a member does not observe the provisions of a covered Multilateral Agreement, it is incumbent on the member to observe the provisions by taking reasonable measures necessary for such observance.[72]

8. Non-Violation

As already explained in the beginning of this Article, complaints under Article XXIII : 1(b) termed as non-violation complaints have raised questions of interpretation (nine complaints have been filed under this part of the Article) and non-violation complaints have been successful only if the infringement of tariffs were proved. The DSU have incorporated the above said non-violation principles and have provided that whenever the provisions of Article XXIII : 1(b) of GATT, 1947 are applicable to a covered Multilateral Agreement, a panel or appellate body may only make rulings and recommendations where a party to the dispute considers that any benefit accuring to it directly or indirectly under the covered Multilateral Agreement is being nullified or impaired or any objective of that Multilateral Agreement is impeded as a result of the application by a member of any measure, whether or not it conflicts with the provisions of that Agreement.[73] DSU rules further provide for a panel or Appellate Body to arrive at a decision whether a case concern a measure that does not conflict with the provision of a covered Multilateral Agreement to which the provisions of Article XXIII : 1(b) of GATT 1994 are applicable, the DS procedures of 1994 are applicable provided :

(*a*) the complaining party presents a detailed justification in support of her complaint relating to measures which does not conflict with the covered Multilateral Agreement;

(*b*) where the measure has been found to nullify or impair benefits under or impede the attainment of objectives of the relevant covered Multilateral Agreement without its violation thereof, there is no obligation to withdraw the measure. However, in such cases the panel or the Appellate Body shall recommend that the member concerned make a mutually satisfactory adjustment;

(*c*) the arbitration provided in the rules and as discussed above, may upon request of either party determine the level of benefits which have been nullified or impaired and the arbitration may also suggest ways and means of reaching a mutually satisfactory adjustment; and

(*d*) compensation may be part of a mutually satisfactory adjustment as final settlement of dispute.[74]

Where the provisions of Article XXIII : 1(c) of the GATT 1994 are applicable to a covered Multilateral Agreement, a panel may not only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered Multilateral Agreement has been nullified or impaired or the attainment of any objective of that Multilateral Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of Article XXIII : 1 (a) and (b) of GATT, 1994 are applicable where and to what extent such party considers and a panel determines that the matter is covered by the above paragraph, the procedure of DSU applies only upto and including the point in the proceedings where the panel report has been issued to the members. For the consideration of adoption, and surveillance and implementation of recommendations and rulings the procedure and rules contained in the decision of the GATT Council of Representatives of 12 April 1989 (BISD 365/61) applies. For such an application the following principles may be kept in mind i.e. the complaining party should present a detailed justification in support of any argument made with respect to issues covered; and in cases involving above said matters, if a panel finds that cases also involve dispute settlement matters other than those covered under Artcle XVIII : 1(c) the panel should issue a separate report detailing with such matters.[75]

IV. Jurisprudence of Litigating Process in WTO

A. General

An overview of the whole gamut of the DSU and the attendant rules in covered Multilateral Agreements to a fairly large extent have treated to overcome the principal complaints of the GATT dispute settlement system such as delays in the establishment of panel, panel members, and completion of panel reports; and competence, quality and neutrality of panel reports; blocking of panel reports, and their non-implementation.[76] However, there is/ was a lurking doubt that major economic powers can refuse to comply with adverse panel report or Appellate Body decision and the WTO dispute settlement will collapse? But the recent WTO decision in the case of United States Bar on Indian Woolen Garments, which was the first case which a developing country, India took to WTO against the temporary safeguards (qouta) imposed by the United States since April 1995 on imports of woolen garments such as woolen coats and blouses on the plea that these imports from India has damaged the United States garment industry disapproved the restrictions/quotas imposed by the United States[77] and blissfully, the United States immediately and unconditionally removed the restriction on the Indian

Woolen imports. The withdrawal of restriction by the United States, therefore, underscores the importance of WTO/DSU as effective and the decisions are abiding on all the countries, rich or poor, small or big. Secondly, WTO/DSU settlements are effective, foolproof and efficacious. WTO panel in this case gave verdict in less than one year which is quite reasonable from all accounts of how long the settlement of international trade dispute takes.

There are some ancillary questions, such as would not the Appellate Body undermine the panel process and prestige? Who will serve the seven person Appellate Body? Would the Appellate Body function as appellate judges/ Court? Would the right of appeal delay the settlement of disputes? And would the settlement process/system become too much legalistic and run the risk of formal due process and its attendant risks etc? These question would be answered after the WTO/DSU have been given a fair trial.[78] As the WTO/DSU is in existence only for a year, the above questions cannot be answered at the present moment.

B. Latches

As already discussed, that international trade dispute normally would be initiated by way of complaints and followed by consultations as and when any member of WTO believes that the legal system (statutes, rules, regulations, custom duties, executive actions, decision of Courts/administrative tribunals or the implementation of treaties) of the member has resulted in some or the other violations of the other member of WTO. If consultations fail, the aggrieved state could set the settlement of disputes procedure under DSU in motion. But the procedure prescribed in the DSU do not provide a time limit after a member becomes aware of the supposed violation. Therefore, there appears to be a lacuna that even though a violation has continued for years together, the member did not think it expedient to bring the complaint before the GATT/WTO.[79] Thus the WTO/DSU should have provided something like doctrine of latches or stale claims as provided in some municipal legal systems.

C. Applicable Law

Once the settlement of dispute process started, what sources or legal authority are relevant to WTO/DSU, panels and Appellate Body. The general principles of international law codified in the Vienna Convention on the law of Treaties especially Article 31 prescribes that for the interpretation of treaty, a panel should examine the ordinary meaning of the terms of the treaty in the context and in the light of its objectives and purposes but for the purposes of WTO/DSU all the earlier GATT Agreements since 1947 are to be taken into account as they have very vital bearing not only on the WTO/DSU but also on the covered Multilateral Agreements as well as GATT, 1994. For the purposes of applicable law, the GATT Article XXIII and the Tokyo Round of codes such

as Anti-dumping, Customs Valuation are of great importance as these codes have developed a well defined jurisprudence of rights and duties of the parties to these codes. It may also be mentioned here that the legal rights and obligations of the parties have been spread throughout the length and breadth of the Articles of GATT 1947 as amended and incorporated in 1994 and the interpretation of these Articles are *quid-pro-quo* for the WTO/DSU. It is a fact that the jurisprudence of GATT, 1947 did not develope the science of *stare-decisis*, or the doctrine of precedent for the settlement of disputes, yet in the great majority of important cases, GATT settlement mechanism did take help of the earlier GATT decisions and without framing the earlier decisions as precedents, the GATT panels adopted the reasoning of the earlier decisions and frequently also referred to negotiating history, various committees established in course of the working of GATT, 1947 as well as the Havana Conference and ITO Charter.[80]

There is a doubt that although WTO/DSU have provided a comprehensive mechanism of settlement of disputes in international trade, yet the disputes may defy solutions as the themes/objectives of the URMTN are being further diffused and extended as well as the role of the WTO is extended over the areas either newly discovered or carved out of the existing ones. Specifically attention is drawn to the most recent Singapore Ministerial Conference of the WTO members wherein the bargaining and settlement of trade issues between the member states, developed and developing appeared to be tortious and contentious as many developed countries were not only interested to bring in social, labour and other issues in the fold of WTO but were equally emphatic in resorting to actions which would adversely effect the multilateral trading system established by the URMTN. Non-trade issues are also being brought in the WTO which in due course of time may whittled down the importance of WTO.

So far as the covered Multilateral Agreements such as GATT, 1994 including the DSU, GATS and TRIPS and the interpretation of the provisions of the settlement of disputes are concerned, the WTO may find it difficult to develope a uniform and quick jurisprudence as the implementation of these Covered Agreements have been fraught with great opposition from the developing member states. Finally, the WTO/DSU would assume the role of fact finding mediators/judges/arbitrators/dispute settlement procedures may become more legalistic and less pragmatic, as a consequence of which the role of international trade lawyer may be increased. So far the dispute settlement procedures have been essentially handled by the bureaucracy of the members of WTO and with the increased role of panels to collect, sift and apply the law, the role of international lawyers will be profound. The disputing members in the WTO/DSU have to use all legal craftesmanship and technical backup in

case the disputing member is interested to win her case.

In the ultimate analysis, as India is sucked in the system and the legal system of India is already pregnant with instruction to deal with the new challenges posed by the WTO/DSU India should gear itself to face the new and complex disputes likely to arise as a member of international trade regime and globalisation and thoroughly prepare her briefs both in terms of legal reasoning, jurisprudence and technical expertise.

Notes and References

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1. The Bretton-Woods system as conceived after the second world war comprised of IBRD, IMF and ITO. As the ITO could not materialise and a stop-gape arrangement GATT was created, the creation of WTO completes the Bretton-Woods system and may in future years to come substitute ITO. See J.S. Schott, *The Uruguay Round : An Assessment*, Institute for International Economics (Washington D.C., 1994) at 16.
2. *Uruguay Round of Multilateral Trade Negotiations* is the eighth round of tariff negotiations held under the auspices of GATT and the Agreement Establishing the World Trade Organisation done at Marrakesh, 15 April 1994. For the text of the results of the *Uruguay Round of Multilateral Trade Negotiations*, See GATT Agreements (Bombay : World Trade Centre, 1994).
3. WTO Agreement, Article III. The Multilateral Trade Agreement on Trade in Goods are found in Annex 1A to the WTO Agreement and consist of the GATT 1994, the Agreement on Agriculture, the Agreement on Trade Related Investment Measures (TRIMS) and various other Agreements. The General Agreement on Trade in Services (GATS) is appended as Annex 1B and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) is Annex 1C to the WTO Agreement. The plurilateral Trade Agreements consist of Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement, International Bovine Meat Agreement are embodied in Annex 4 of the WTO Agreement.
4. Article XVI (4), WTO Agreement.
5. Preamble to the WTO Agreement. See also, Kenneth W. Abbot, *GATT as a Public Institution : The Uruguay Round and Beyond*, 18 Brook Journal of International Law (1992) at 31.
6. Article IV, WTO Agreement.
7. *Id.*, Article IX (2).
8. *Id.*, Article IX (3).
9. *Id.*, Article IX (1).
10. *Id.*, Article IV (2).
11. *Id.*, Article IV (5).
12. *Id.*, Article IV (6).
13. *Id.*, Article IV (3).
14. *Id.*, Article IV (4).

15. Article XXV : 1 reads :

'Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Whenever reference is made in this Agreement to the contracting parties acting jointly, they are designated as contracting parties'.

16. For this view, see Kenneth W. Dam, THE GATT AND INTERNATIONAL ECONOMIC ORGANISATION (University of Chicago Press, 1977) at 352.

17. See John H. Jackson, WORLD TRADE AND THE LAW OF GATT (Virginia : The Michie Company, 1969) at 164. GATT Articles and paragraphs are as follows :

II: 5; VI ; 7; VII : 1; VIII : 2; IX : 6; XII : 4; XIII : 4; XVIII : 12; XVIII : 16; XVIII : 21; XVIII : 22; XIX : 2; XXII; XXIII; XXV : 1; XXVII; XXVIII : 1; XXVIII : 4; XXXVII : 2.

18. GATT Articles and paragraphs are as follows : II : 5; XII : 4; XVIII : 7; XVIII : 21; XIX : 3; XXIII; XXVII; XXVIII : 3; XXVIII : 4.

19. The balance of the Article X contained obligations with respect to the uniform, impartial and reasonable administration of laws, regulations etc. and the maintenance of tribunals and review procedures for review and correction of administrative action relating to customs matters. See generally, John H Jackson, *Supra* n. 17 at 461-464.

20. GATT BISD 26S/210 at para 3. Various WTO AGREEMENTS for example, the TRIMS and subsidies agreements have also imposed extensive notification requirements upon Members.

21. For an overview on the development of the dispute settlement in the GATT, See John H. Jackson, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS : CASES, MATERIALS AND TEXT, 3rd ed. (West Publishing House, 1995) at 327-371; Robert Hudee, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY, 2nd ed. (New Hampshire : Butterworth, Salem, 1990); Robert Hudee, ENFORCING INTERNATIONAL TRADE LAW : THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (New Hampshire : Butterworth, Salem,1993). See also Pierre Pescartore, *The Gatt Dispute Settlement Mechanism*, 27 JOURNAL OF WORLD TRADE (1993) at 6-20.

22. See GATT, *Analytical Index* prepared by E-U Petersmann (1989) of Article XXIII. Also see, Armin Von Bogdamdy, *The Non-Violation Procedure of Article XXIII : 2, GATT : Its operation and Rationale,* 29 JOURNAL OF WORLD TRADE (1995) at 95-111.

23. See Amin Von Bogdandy, *Supra* n. 22 at 98.

24. See cases referred in John H Jackson, WORLD TRADE AND THE LAW OF GATT (Virgina : The Michie Co., 1969) at 181-187. Of importance is the case of *Italian Discrimination Against Imported Agricultural Machinary*, GATT Panel Report adopted on October 23, 1958, BISD, 7TH SUPPL. 60 (1959). Panel noted that it considered whether the violation had caused injury to the UK's commercial interests and whether such injury represented an impairement of benefits.

25. c.f. see the case of *U.S. Taxes on Petroleum and Certain Imported Substances.* 34TH SUPPL. BISD 136 (1988). Panel Report adopted on June 17, 1987.

26. See Arim Von Bogdandy, *supra* n. 22 at 101.

27. The WTO UNDERSTANDING follows a similar approach.

28. In *Canada-Import, Distribution of sale of certain Alcoholic Drinks by Provincial Marketing Agencies,* GATT BISD 39 S/27 at 74-75, the Panel examined a complex set

of practices which the United States alleged were GATT-inconsistent.

29. *Japan-Restrictions on Imports of Certain Agricultural Products*, 35TH SUPPLL. BISD 163 (1989). Panel Report adopted on March 22, 1988.
30. For the text of the UNDERSTANDING, see *supra* n. 2 at 197.
31. See the *WTO Dispute Settlement Mechanism*, GATT FOCUS No. 107, May 1994 at 12.
32. *Supra* n. 22 at 207-208.
33. *Ibid.*
34. One of the main objective of the GATT was to provide a legal framework for enabling the contracting parties to enter into 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.' See Article XVII : 3 of GATT. See also discussion in *United States Restrictions on Imports of Sugar*, GATT BISD, 365/331 at 342.
35. cf Article I of the GATT ensures that the products of all contracting parties would be treated in a non-discriminatory fashion. Article II of the GATT further ensures that tariff concessions would not be negatived by the use of taxes or other charges (except in certain circumstances). Article III of the GATT ensures that a product once having entered into the commerce of contracting party, would be accorded the treatment no less favourable than the like domestic product etc.
36. For the text of Articles 3 see *supra* n. 22 at 197.
37. Article IV (3), WTO AGREEMENT.
38. See Appendix 2 to the DSU which lists, the special or additional dispute settlement rules and procedures. There are special rules, in particular, under the Anti-dumping and Subsidies Code. The DSU explicitly provides that DSB Chair may decide what rules and procedures to follow when there is a dispute. Article 12 of the DSU.
39. Article 2, DSU.
40. See *supra* n. 20.
41. Article 4, DSU.
42. *Id.*, Article 4.4. The corresponding consultation provisions in the covered Multilateral Agreements are listed as under :

    Article 7, AGREEMENT ON RULES OF ORIGIN; Article 7, AGREEMENT ON PRESHIPMENT INSPECTION; Article 18.6, AGREEMENT ON THE IMPLEMENTATION OF ARTICLE VI OF THE GATT; Article 14.1, AGREEMENT ON TECHNICAL BARRIERS TO TRADE; Article 6, AGREEMENT ON IMPORT LICENCING PROCEDURES; Article 13 and 30, AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES; Article 18.1 and Part C, AGREEMENT ON AGRICULTURE; Paragraph 35, AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES; Article 8, TRADE RELATED INVESTMENT MEASURES; Article 8.4, AGREEMENT ON TEXTILES AND CLOTHING; Article 64, TRADE RELATED INVESTMENT MEASURES; Article 8.8, AGREEMENT ON TRADE IN CIVIL AIRCRAFT; Article VIII : 3, AGREEMENT ON GOVERNMENT PROCUREMENT; Article VII : 7, INTERNATIONAL DAIRY ARRANGEMENT; Article VI : 6, ARRANGEMENT REGARDING BOVINE MEAT.
43. *Id.*, Article 4.7.
44. GATT BISD, 305/129 (1983).
45. GATT BISD 305/140 (1983).
46. GATT BISD 395/128 (1991).
47. *Ibid.*

48. Article 4.11, DSU.
49. *Id.*, Article 5.
50. *Id.*, Article 6.
51. *Id.*, Article 7.
52. *Id.*, Article 8.
53. *Ibid.*
54. *Ibid.*
55. *Id.*, 8 : 10.
56. *Id.*, Article 12 read with Appendix 3 of DSU.
57. *Ibid.*
58. *Id.*, Article 12 : 11.
59. *Id.*, Article 13.
60. *Id.*, Article 15.
61. *Ibid.*
62. *Id.*, Article 17.
63. *Id.*, Article 18.
64. *Id.*, Article 19.
65. *Id.*, Article 21.
66. *Id.*, Article 22.1.
67. *Id.*, Article 22.
68. *Id.*, Article 22.4.
69. *Id.*, Article 22.5.
70. *Id.*, Article 22 : 6 and 22 : 7.
71. *Id.*, Article 22 : 8.
72. *Id.*, Article 22 : 9.
73. *Id.*, Article 26.1.
74. *Ibid.*
75. *Id.*, Article 26.2.
76. William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INTERNATIONAL LAW JOURNAL (1987) 51-109.
77. Reported in THE HINDUSTAN TIMES, January 8 (1997) at 1.
78. See William J. Davey, *The GATT Dispute Settlement System : Proposals for Reform in the Uruguay Round*, Paper presented in Workshop on the MTNS OF GATT (1992).
79. The case of *Japan Restrictions on Imports of Certain Agriculture Products*, GATT, BISD, 35 S/163, where the import restrictions remained hidden for decades.
80. See generally, Christopher Thomas. *Litigation Process Under the GATT Dispute Settlement System*, 30 JOURNAL OF WORLD TRADE LAW (1996) 53-81.

LEGAL AND INSTITUTIONAL PROVISIONS FOR PROTECTION OF ENVIRONMENT IN INDIA

R.C. Trivedi and G.K. Ahuja***

I. Environmental Policies - An Overview

A. Policies during Pre-Independence Period

Environmental concern in India is as old as Indian civilization. The earlier environmental concerns were mostly focused on conservation of forest, wildlife and natural resources. The policies were mostly linked with culture and religions. In the early days of British rule the prime concern was for exploitation of natural resources available in the forests. The decimation of forests was primarily for military purposes and for teak export trade. In 1806 when reservation of Malabar teak was declared, the Europe had been completely deforested and demand for wood especially for ship building, iron smelting and tanning was to be met with Indian teak. The most critical period in the history of Indian forestry was the building of the railway network. This was created to meet the need for rapid troop communication and for enabling the characteristic pattern of colonial trade. The early years of railway expansion saw an unprecedented assault on the more accessible forests. Monopoly right to the states to demarcate valuable tract of forest, was given through the Indian Forests Act 1865, which was replaced by a much more comprehensive legislation in 1978. Monopoly right was established by a legal provision, which sought to establish that the customary use of forest by villagers was not as a right but on a privilege basis. During Second World War also Indian forests were extensively used.[1]

The protection of wild life during British period was primarily to protect specific area and particular species. In 1873, Madras enacted the first wildlife statute for the protection of wild elephants. After six years, Central Government passed the Elephants Preservation Act of 1879. In 1912, the Central Government enacted a broader Wild Birds and Animals Protection Act, specifying closed hunting seasons and regulating hunting of designated species through licences. These regulations related primarily to hunting and did not regulate trade in wildlife and wildlife products, which are major factors in the decline of wildlife. As a consequence, wildlife continued to decline and many species became extinct. The first comprehensive law for protection of wildlife and its habitat was perhaps the Hailay National Park Act of 1936 which

established the Hailey (now Corbett) National Park in Uttar Pradesh.[2]

B. Post Independence Period

(i) Prior to Human Environment Conference, 1972

The period after independence up to 1972 is the period of continuous deterioration of the environment due to fast industrialization, urbanization, population growth and increasing poverty. While during British period expansion of agriculture, railways, timber trade and World Wars were the guiding factors. During post independence period it is the expansion of industries which is the major guiding factor for formulation of forest policy. In the wake of national development through fast industrialization, to be self sufficient in food and other basic needs of the growing population, environment continue to degrade due to deforestation, loss of wild life, increasing air, water and soil pollution, development of slums and occurrence of droughts and floods all leading to degradation of environment and quality of life.[3] Although the water supply and sanitation were attended to in the Government's plans but control of pollution and environment as such was not emphasised much. The Government of India had appointed an Environmental Hygiene Committee in 1948-49 which had recommended a comprehensive plan to provide water supply and sanitation facilities for ninety percent of the population within a period of 40 years,[4] however, no concerted efforts have been made to fulfil this target. In 1954 the Union Health Ministry announced the National Water Supply and Sanitation Programme under health schemes and made specific provision to assist the states to implement the programme. The budget provisions for water supply and sanitation has been continuously increased in the Five Year Plans since 1956.[5] Thus all the efforts during this period were mainly focused towards the public health and sanitation, and not to control pollution. As a result, the pollution level in the environment has increased to an alarming level especially in the large urban areas in the country. The concern for preserving the quality of life and promoting environment while undertaking the industrialization and other developmental activities was stressed for the first time in the Fourth Plan (1969-74),[6] and it was felt necessary to regulate the pollution in a stricter manner.

(ii) Policy Percepts After 1972 Conference

The year 1972 marks a watershed in the history of environmental managements in India. Prior to 1972, environmental programmes were dealt by different ministries of the Government of India, and each persuaded these objectives without any proper coordination system. When the 24th UN General Assembly decided to convene a conference on Human Environment in 1972, a National Committee on Environmental Planning and Co-ordination

(NCEPC) was established in the Department of Science and Technology. The NCEPC was an apex advisory body in all matters relating to environmental protection and improvement. The promotion of environmental quality was emphasised for the first time in the Fourth Plan (1969-74). During the Fifth, Sixth and Seventh Plans such a concern was turned into concrete actions by launching several programs for enhancing the quality of life and incorporating environmental concerns while assessing economic and technical feasibility of a project.

The forests of India are devastated to an alarming extent. As per the satellite pictures only ten percent of the land has adequate forest cover, against 33 percent required to ensure ecological stability. India continues to lose over 1 million hectares of forest annually. Over 60% of India's land, some 175 million hectares is already degraded.[7] The debate over how to balance the various demands of the nation on the forests has intensified in the last decade. The Forty Second Amendment Act of 1976 transferred forests and wildlife from the state list to the concurrent list of the Constitution. This transfer empowered the Central Government to act directly in managing India's forests and wildlife. Since then the Central Government has enacted several legislations for the protection of forests and wildlife.

The Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred to as Water Act) was passed for restoration and maintenance of wholesomeness and cleanliness in our national aquatic resources. To implement the provisions of the Act at central level, Central Pollution Control Board and at state level, State Pollution Control Boards were formed.

The major environmental concerns of India were focused on water pollution, air pollution, soil erosion, deforestation, desertification and loss of wildlife.[8] The most challenging problem in protection of environment is the nation's desire to industrialise faster. This challenge is manifested in policy pronouncements of the Government of India. Hence, the major policies are focused on integrating the environment with developmental activities. These concerns are reflected in the national planning process, constitutional provisions, and the administrative machinery set up to accommodate developmental policies that focus on environmental conservation.

The environmental issues gained political attention only after Silent Valley controversy where a major hydroelectric cum irrigation project was to be constructed causing damage to the world's richest biological and genetic heritages[9] and Mathura Refinery which might cause acid rain on Taj Mahal.[10] In 1980 General Election, when Congress-I came to power, it immediately set-up a committee chaired by N.D. Tiwari to recommend legislative measures and administrative machinery to ensure environmental protection. It was on the

recommendation of this committee that the Department of Environment at the Centre was created to recognise the important role of environmental conservation in sustainable national development.[11]

The Air (Prevention and Control of Pollution) Act (hereinafter referred to as Air Act) was passed in 1981 for the control of air pollution in the country conferring on Water Pollution Control Boards such powers and functions related to air pollution prevention and control. The continuing decline in the quality of the environment together with the tragedy at Bhopal in which a leak of Methyl-iso-cyanate from a pesticide factory killed more than 2500 people and injured several thousands has spurred the Central Government and a few State Governments to adopt stronger environmental policies, to enact fresh legislation and to create, re-organise and expand administrative agencies.

The most significant central legislation in recent times is the broad Environment (Protection) Act, 1986 (hereinafter referred to as EPA) which empowered the Central Government to take all necessary measures to protect and improve the environment. In 1987, a new chapter regulating hazardous industrial processes was introduced into the Factories Act, 1948. The amendments to the Air Act in 1987 and Water Act in 1988 empowered the enforcing agencies to close polluting industries and to stop their electricity or water supply. The penal provisions in both these laws were also strengthened.

Supported by recent legislative, administrative and judicial initiatives, environmental regulation in India has become very powerful. The new regulations cover noise, vehicular emissions, hazardous wastes and chemicals, hazardous micro-organisms and transportation of toxic chemicals. Stringent penalties were introduced in the older pollution control laws. The licensing regime is supplemented by 'citizen suits' provision together with a statutory 'right to information', now enable an aggrieved citizen to directly prosecute a polluter after examining the government records and data. The technology-forcing deadlines issued under the Central Motor Vehicle Rules, 1989 compel the manufacturer of vehicles to upgrade the technology to the standards. Under the EPA, rules have been notified for mass based standards for the manufacturer of vehicles for the then and for year 1995 and 2000. In March 1992, rules have been notified for environmental auditing of all the industries which may cause water or air pollution or generate solid or hazardous wastes. Mandatory worker's participation in plant safety and stringent penalties on high level management for the breach of factory safety regulation are expected to reduce industrial accidents. Vesting of enormous administrative powers in the enforcing agencies is also an encouraging step towards improvement of environment. Gigantic project like Ganga Action Plan is also a sign of high concern for environment. Recently, the Ministry of Environment and Forests has adopted

a 'Pollution Abatement Policy'[12] which includes adoption of clean technology, conservation of resources, change of concentration based standards to mass based standards, incentives for pollution control, public participation, environmental auditing and Eco-mark on environment friendly products.

II. Protection and Improvement of Environment and Prevention of Hazards

A. Laying down of Standards for Environmental Pollutants

The simplest administrative approach to regulate industrial pollution would be to promulgate permissible limits for various pollutional parameters on a general basis, make them binding on all discharges and prosecute and punish offenders. Control of pollution at sources is the immediate short-term objective adopted by all the State Pollution Control Boards. To control pollution at source, the industries must know the extent up to which their effluent or emission must be treated/controlled so that they can discharge the treated effluent to receiving environment without significant effect. The cost of treatment should be such that the industry is able to take the burden. The Central Pollution Control Board has initiated evolving industry specific Minimum National Standards (MINAS) as early as in 1977-78.[13] At present it has evolved effluent standards for 23 categories and emission standards for 21 categories of industries. The State Boards use these guidelines for necessary follow-up action. No State Board is permitted to relax the MINAS. On the contrary if situation so demands, the State Boards may make them more stringent. These standards have been notified under Environmental (Protection) Act, 1986 by the Government of India.[14]

B. Hazardous Substances Management

Hazardous substances are spreading througout the modern industrialised societies. These substances are generated, used and discarded by large number of industries in India. Use of pesticides is increasing day by day for the protection of crops and public health from different pests. The hazardous substances are extensively regulated by law in India.

C. Coastal Area and Tourism Management

For protecting the ecological, cultural and aesthetic values of coastal areas and to ensure that the use and activities in the coastal areas are consistent with the environmental conservation principles, the Ministry of Environment and Forests has issued a notification under Environment (Protection) Act, 1986 to ban certain activities and to categorises the coastal areas into certain regulation zones. The notification identifies prohibited activities within the 500 m of the high tide line and those that are to be permitted in accordance with the guidelines given in the notification.

D. Environmental Impact Assessment and Environmental Clearance for Projects

The Government's policy to promote the environment while undertaking any developmental activity has made it necessary to introduce the environmental aspects into planning and development. A new procedure to protect environmental concern was introduced which requires Ministry of Environment and Forest's appraisal before it is approved by the Planning Commission. Similarly any major industrial project requiring licence from the Ministry of Industry, the Licensing Committee will grant licence only after the Ministry of Environment and Forests has reviewed the project to ensure that suitable provisions for protecting environment have been made. The basic objective of Environmental Impact Assessment (EIA) is to identify, predict and evaluate the likely economic, environmental and social impact of any developmental activities and to prepare an action plan for remedy as a part of the overall Environmental Management Plan (EMP). At present there is no statutory/ mandatory requirement for conducting EIA, but any project costing Rs. five crore and above needs to get environmental clearance. The Ministry of Environment and Forests is contemplating for mandatory EIA.

III. Laws and Institutional Provisions

In the urban environmental protection, prevention and control of nuisance was the only regulation available during the nineteenth century. The Shore Nuisance (Bombay and Kolaba) Act, 1853 one of the earliest law concerning water pollution, authorised the collector of land revenue in Bombay to order the removal of any nuisance below the high water mark in Bombay harbour. Oriented Gas Company Act 1857 regulated the pollution produced by the Oriented Gas Company by imposing fine on it and giving a right of compensation to any one whose water was fouled by the company's discharges.[15]

Indian Penal Code enacted in 1860, imposed a fine on a person who voluntarily foul the water of any public spring or reservoir. In addition, the Code penalised negligent acts with poisonous substances that endangered life or caused injury and public nuisances. The Indian Easement Act, 1882 provides protection against pollution by upstream users to the riparian owners. The Indian Fisheries Act, 1897 penalise the killing of fish by poisoning water and by using explosives. Indian Port Act, 1908 prohibits discharge of oil into port waters. Indian Forest Act, 1927 prohibits poisoning of water in forests.[16]

There are two post independence laws touching on water pollution. Section 12 of the Factories Act, 1948 required all factories to make 'effective arrangements' for waste disposal and empowered State Governments to frame rules implementing this directives. Second, River Boards, established under the River Boards Act, 1956 for the regulation and development of interstate

rivers and river valleys were empowered to prevent water pollution. In both these law, prevention of water pollution was only incidental to principal objective of the enactment.

As early as 1962, the Ministry of Health has appointed an expert committee on water pollution problems in the country. The committee recommended to enact central and state laws. The central council has recommended to enact a single law by the Parliament. A bill was drafted and circulated to all the states in 1965, with a request to pass enabling resolutions to enable Parliament to enact the above law on their behalf as required in Article 252(1). The Prevention of Water Pollution Bill, 1969 was introduced in Rajya Sabha after six states had adopted enabling resolutions. In August 1970, the Rajya Sabha decided to refer the bill to a joint committee which modified it in many respects and then presented it to Parliament in 1972. Parliament passed the bill in 1974.[17]

A. Water (Prevention and Control of Pollution) Act, 1974

(i) Objectives and Legal Provisions

The basic objectives of the Act is to maintain and restore the wholesomeness of our national aquatic resources by prevention and control of pollution.

The Water Act, 1974 represented one of India's first attempt to deal comprehensively with environmental issue. Parliament adopted minor amendments to the Act in 1978 and revised the Act in 1988 to closely conform to the provisions of the Environment (Protection) Act, 1986.

Water is a state subject under the Constitution. Consequently, the Water Act, a central law, was enacted under Article 252 (1) of the Constitution which empowers the Union Government to legislate in a field reserved for the states. All the states have approved implementation of the Water Act.

The Water Act is comprehensive in its coverage, applying to streams, inland waters, subterranean waters, and sea or tidal waters. Standards for the discharge of effluents or the quality of the receiving waters are not specified in the Act, but it enables State Boards and Central Board to prescribe these standards.

The Act provide for a permit system or 'consent' procedure to prevent and control water pollution. The Act generally prohibits disposal of polluting matter in streams, wells and sewers or on land in excess of the standards established by the State Boards. A person must obtain consent from the State Board before establishing any industry operation or process, any treatment and disposal system or any extension or addition to such a system which might result in the discharge of sewage or trade effluent into a stream well or sewer

or onto land. The State Board may condition its consent by orders that specify the location, constructions and use of the outlet as well as the nature and composition of new discharges. The Act empowers a State Board, upon thirty days notice to a polluter, to execute any work required under consent order which has not been executed. The Board may recover the expenses for such work from the polluter. The Act gives the State Boards the power of entry and inspection to carry out their functions. Moreover, a State Board may take certain emergency measures if it determines that an accident or other unforeseen event has polluted a stream or well. These measures include removing the pollutants, mitigating the damage and assuming orders to the polluter prohibiting effluent discharges.

(ii) Pollution Control Boards

The Water Act establishes a Central and State Pollution Control Boards. The Central Board may advise the Central Government on water pollution issues, co-ordinate the activities of State Pollution Control Boards, sponsor research relating to water pollution, and develop a comprehensive plan for the prevention and control of water pollution. The Central Board was also performing functions of a State Board for the Union Territories till 1991. During 1991 these functions were transferred to the local administration of respective Union Territories. In a conflict between a State Board and the Central Board, the Central Board prevails. Since 1982 the Central Board has been attached to the Department of Environment, Government of India.

The State Boards were established by the State Governments under the provision of the Act to perform functions specified in the Act. The State Boards may plan comprehensive pollution abatement programme and advise the State Government on water pollution issues. They also collaborate with Central Board, inspect sewage or trade effluent, grant consent for the discharge of the effluent, lay down and modify the standards, evolve economic methods of treatment and disposal of sewage and trade effluent, advise the State Government on location of industries, collect and disseminate the data in relation to pollution status in the State and prosecute the offenders under the provisions of the Act.

(iii) Penal Provisions

The Act chiefly employ a system of criminal sanction to discourage the polluters from polluting the water courses. The penal provisions can be categorised in four classes :

1. Penal provision for not providing information as required under the provision of the Act, is punishable with imprisonment up to three months or a fine up to ten thousand rupees or both.

2. Penal provision for disposal of polluting matters in water bodies more than the prescribed limit in the consent order or providing new outlets without obtaining consent of the State Pollution Control Board is punishable with minimum imprisonment of one and a half years which may be extended up to six years. For repeating the above offence, the penalties are enhanced.

3. Penalty for continuing contravention of provisions of the Act is punishable with fine of rupees five thousand per day till the compliance with the provisions of the Act.

4. There is a provision of publishing name of the offender in the newspaper at the offenders cost.

The 1988 Amendment Act introduced a new Section 33A which empowers State Boards to issue directions to any person, officer or authority, including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service. The State Boards can also apply to courts for injunction to prevent water pollution under Section 33 of the Act. Under Section 41, the penalty for failure to comply with a court order under Section 33 or a direction from the Board under Section 33A is punishable by fines and imprisonment. The Amendment Act also increased the power of the Central Board relative to the State Boards. Under Section 18 of the Act, the Central Government may determine that a State Board has failed to comply with Central Board's directions and that because of this failure an emergency has risen. The Central Government may then direct the Central Board to perform the function of the State Board.

B. The Water Cess Act, 1977

Objectives and Legal Provisions

To strengthen the Pollution Control Boards by providing money for equipment and technical personnel and to promote water conservation by recycling, Parliament adopted the Water Cess (Prevention and Control of Pollution) Act, 1977. The Act empowers the Central Government to impose a cess on water consumed by industries listed in Schedule I of the Act. Specified industries and local authorities are subject to the cess if they use water for purposes listed in Schedule II of the Act.

The Act was amended and notified on 28th of February, 1992 to enhance the rate of cess charges.

C. Air (Prevention and Control of Pollution) Act, 1981

(i) Objectives and Legal Provisions

The basic objectives of the Air Act, 1981 is to prevent control and abate air pollution and preserve quality of air in the country. The Air (Prevention and Control of Pollution) Act, 1981 was enacted by invoking the Central Government's power under Article 253 to make laws implementing decisions taken at international conference.

Procedurally, the Air Act follows the basic structure of the Water Act with a Central Board and State Boards administering a system of consent orders, monitoring activities, and enforcement through fines and criminal prosecutions. The Act grants discretion to each State Government to designate particular areas as 'air pollution control areas'.[18] Polluters located outside such air pollution control areas cannot be prosecuted by the State Board, but every industrial operator within an air pollution control area must obtain a consent from the State Board.

(ii) Pollution Control Board

The Air Act specifies that Central and State air pollution control authority is to be exercised by the Central and State Water Boards. These Boards have dropped the terms 'Water' from their title and are usually known as "State or Central Pollution Control Board".

(iii) Penal Provisions

To discourage the polluters, the Act provides following penal provisions:

1. Failure to comply with the provisions of the Act or with the directives issued under the Act is punishable with imprisonment not less than one and a half years which may extend up to six years.
2. Failure to provide information or perform certain acts specified under Section 38 of the Air Act is punishable with imprisonment up to three months or a fine up to rupees ten thousand or both.
3. Whoever contravenes any of the provisions of this Act is punishable up to three months or fine up to rupees ten thousand or both. For continuing controversy additional fine is rupees five thousand per day during which such contravention continued.

The Air Act, 1981, is amended in 1987 on the similar lines as Water Act to make it more effective. Several sections have been modified to match with the Environment (Protection) Act, 1986.

D. Nodal Administrative Ministry for Environment and Forest

Tiwari Commission Report

As mentioned earlier, the environmental planning and co-ordination was done by the NCEPC during seventies. At its inception the Committee consisted of the members drawn from various disciplines concerned with environmental management. Most of the non-official members were specialists. The Committee was to plan and co-ordinate while the responsibility for execution remained with the various ministries and agencies of the Government. The Committee was assisted by Department of Science and Technology.

In the beginning of 1980, it was felt necessary to set up a committee chaired by N. D. Tiwari to recommend legislative measures and administrative machinery to ensure environmental protection. The Tiwari Committee report submitted on September 15, 1980 made far reaching recommendations on administrative and legislative measures for environmental protection. It has recommended the creation of a Department of the Environment at the Centre which could solely devote to the environmental conservation in sustainable national development. It further recommended the creation of environmental advisors in all ministries, a cabinet sub-committee on the environment under the chairmanship of the Prime Minister, and a comprehensive and systematic review of the relevant central and state legislation on environmental management.

On the basis of recommendations of the Tiwari Committee, a separate Department of Environment was established on November 1, 1980. The functions hitherto performed by the Department of Science and Technology were transferred to the newly created department. On the recommendations of the Tiwari Committee, the NCEPC has been replaced by a National Committee on Environmental Planning (NCEP). Its functions were mainly advisory. To improve the implementation of environmental law, policy and directives, the Department of Environment was replaced in 1985 by an integrated Department of Environment, Forests and Wildlife which later on became an independent Ministry.

At the instance of the NCEPC, almost all the States and the Union Territories have established environmental boards under terms similar to those of the national committee. To give stature and executive authority to the boards, they are chaired by the respective Chief Ministers. An official of the Department of Environment is invariably a member of the State Boards to provide good liaison between them and the national committee. Subsequently, these boards were replaced by the State Department of Environment. These departments also follow the functions similar to the Central Department of Environment. They co-ordinate the activities of the Central Department of

Environment in their states. They also co-ordinate the activities of respective State Pollution Control Boards.

E. Ministry of Environment and Forest, Government of India

The Ministry of Environment and Forests plans, promotes and co-ordinates environmental and forestry programmes in the country. The Ministry's main activities include conservation and survey of flora and fauna, forests and wildlife; prevention and control of pollution; afforestation and regeneration of degraded areas, protection of environment and research related to these topics. These functions are performed through environmental impact assessment; eco-regeneration; assistance to organizations implementing environmental and forestry programmes; promotion of environmental and forestry research; extension of education and training to augment manpower; collection, collation, storage and dissemination of environmental information and creation of environmental awareness at the national level.[20]

After the implementation of the Environment (Protection) Act, 1986, the Ministry of Environment and Forests has taken several steps to provide legal and institutional basis which include issue of several rules, notification of standards, action regarding environmental laboratories, strengthening of State Department of Environment and Pollution Control Boards, delegating of powers, carrying out various activities in the field, hazardous wastes/chemical management and setting up of the Environmental Protection Councils in the States. Additional responsibilities have been placed on Central and State Pollution Control Boards under the provisions of Water and Air Acts.

F. The Environment (Protection) Act, 1986

(i) Objectives and Provisions

In the wake of Bhopal gas tragedy, the Government of India enacted Environment (Protection) Act, 1986 under Article 253 of the Constitution. The purpose of the Act is to implement the decisions of the United Nations Conference on the Human Environment of 1972, in so far as they relate to the protection and improvement of the human environment and the prevention of hazards to human beings, other living creatures, plants and property. The Act is an 'Umbrella' legislation designed to provide a framework for Central Government to co-ordinate the activities of various central and state authorities established under previous laws such as Water Act and Air Act.

The potential scope of the Act is broad with 'environment' which include water, air and land and interrelationship which exist among water, air, land, human beings, other creatures, plants, micro organisms and property. Section 3(1) of the Act empowers the Centre to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality

of the environment and preventing, controlling and abating environmental pollution. Central Government is authorised to set new national standards for ambient quality of the environment and standards for controlling emissions and effluent discharges; to regulate industrial locations; to prescribe procedures for managing hazardous substances; to establish safeguard for preventing accidents; and to collect and disseminate information regarding environmental pollution.

The Environment (Protection) Act (EPA) was the first environmental statute to give the Central Government authority to issue direct written orders including orders to close, prohibit or regulate any industry operation or process or to stop or regulate the supply of electricity, water or any other services.[21] Other powers granted to the Central Government to ensure compliance with the Act include the power of entry for examination, testing of equipment and other purpose[22] and power to take samples of air, water, soil or any other substance from any place for analysis.[23] The Act explicitly prohibits discharge of pollutants in excess of prescribed standards.[24] There is also a specific prohibition against handling, hazardous substances except in compliance with regulatory procedures and discharges.[25] Persons responsible for discharges of pollutants in excess of prescribed standards must prevent or mitigate the pollution and must report the discharge to government authorities.[26]

The Act provides for severe penalties. Any person who fails to comply with or contravenes any of the provisions of the Act, or the rules or directions issued under the Act shall be punished for each failure or contravention, with a prison term of up to 5 years or a fine up to rupees 1 lakh or both. The Act imposes an additional fine up to rupees five thousand for every day of continuing violation.[27] If a failure or contravention occurs for more than one year after the date of conviction, an offender may be punished with a prison term which may extend to seven years.[28]

The Act empowers the Central Government to establish standards for the quality of the environment in its various aspects, including maximum allowable concentration of various environmental pollutants (including noise) for different areas. These standards could be based on ambient levels of pollutants sufficiently low to protect the public health and welfare. Emission or discharge standards for particular industries could be adjusted to ensure that such ambient levels are achieved. The Environment (Protection) Rules, 1986 allow the state or central authorities to establish more stringent standards based on recipient system.

The EPA includes a citizen's suit provision[29] and a provision authorising the Central Government to issue direct orders to protect the environment.[30] The Central Government may delegate specified duties and powers under the EPA

to any officer, State Government or other authority.[31]

(ii) Framework for Enforcement of Provisions

The Department of Environment, Forests and Wildlife of the Central Ministry of Environment and Forests is responsible for making rules to implement the EPA. The Department has also delegated the powers to carry out enforcement to the Central and State Pollution Control Boards in the country.

(iii) Rules and Regulations Enforced

The Ministry of Environment and Forests has so far enforced several rules and regulations. It has adopted industry specific standards for effluent discharge and emissions for 23 and 21 categories of industries respectively. The Department has also designated certain state and central officials to carry out specified duties under the Act and has designated specific laboratories for testing the samples of air, water and soil obtained under the Act.

(iv) Hazardous Wastes and Hazardous Substances Management

The Hazardous Waste (Management and Handling) Rules issued under the Act in July 1989 have introduced a permit system administered by the State Pollution Control Boards to regulate the handling and disposal of hazardous wastes. The regulatory quantity of hazardous wastes is also notified under the Rules. These Rules fix responsibility for the properly handling, storage and disposal of such wastes. No person without Board's authorization may collect, receive, treat, transport, store or dispose of hazardous wastes. Moreover, the Rules provide for the packaging, labelling and transport of hazardous wastes and require State Governments to compile and publish an inventory of hazardous waste disposal sites. Significantly, the import of hazardous wastes into India for dumping and disposal is prohibited under the Rules.

The Manufacture, Storage and Import of Hazardous Chemicals Rules of November 1989 gives responsibilities of those handling hazardous substances (other than hazardous wastes). Under these Rules, hazardous industry is required to identify major accident, hazards, take adequate preventive measures and submit a safety report to the designated authority. An importer of hazardous chemicals must furnish complete product safety information to the competent authority and must transport the imported chemicals in accordance with the Central Motor Vehicle Rules, 1989. A set of rules on the transportation of hazardous chemicals by road have also been notified under the Motor Vehicle Rules, 1989 by the Ministry of Surface Transport. A few amendments clearly indicating the responsibilities of the occupier, transporter, driver are being included in the Rules. The State Governments have identified hazardous installations and operations in their States and implemented the notified rules. Rule 3 prescribes the duties of various governmental authorities, for example,

the Central and State Pollution Control Boards are required to enforce governmental directives and procedures pertaining to the isolated storage of hazardous chemicals, and the district collectors or other designated authority is required to prepare off-site emergency plans to contain major chemical accidents. Under Rule 4, an occupier must identify the major hazards posed by his industry, take steps to prevent and limit the consequences of an accident and train workers in operational safety.

Under Rule 18, an importer of hazardous chemicals into India must disclose complete product safety information. Where the imported chemical is likely to cause a major accident, the designated governmental authorities are empowered to issue directions, including an order to stop the import. The importer must also ensure that the transport of the chemicals from the port of entry is in accordance with the Central Motor Vehicle Rules, 1989.

Rules to regulate the manufacture, use, import, export and storage of hazardous micro-organisms and genetically engineered cells were issued under the EPA in December 1989.[32] These Rules cover industries, hospitals, research institutions and other establishments that handle micro-organisms or are engaged in genetic engineering. Committees of experts established, under Rule 4 play a pivotal role in administering regulation.

Besides the rules issued under Environment (Protection) Act, 1986, provisions touching on certain other aspects of storage, transportation and regulation of hazardous substances are contained in the Central Motor Vehicle Rules, 1989; the Insecticides Act, 1968; the Explosive Substances Act, 1908; the Inflammable Substance Act, 1952 and the Atomic Energy Act, 1962. In addition, the 1987 amendment to the Factories Act, 1948 introduced a new chapter on hazardous industrial activities. This chapter aims at increasing plant safety by such measures as increased worker participation in the monitoring of safety measures and stiff penalties against employees for non-compliance with safety norms.

In December 1989, the Environment (Protection) Rules were amended to prescribe ambient air quality standards in respect of noise. These standards lay down the day time and night time limits of noise in industrial, commercial and residential areas as well as in "Silence Zones". A silence zone is an area up to 100 mt. around hospitals, educational institutions, courts *etc.* which is so declared by the competent authority. The use of vehicular horns, loudspeakers and bursting of crackers is banned in silence zones.

Under Rule 5, Central Government may prohibit or restrict the location of any industry and the conduct of certain activities in notified areas. Any aggrieved person, including an affected industry may file an objection against the prohibitions and restrictions.

G. Public Liability Insurance Act, 1991

Public Liability Insurance Act, 1991 makes it mandatory to cover insurance for public which may be affected by use, transport of all the hazardous chemical industries. It provides immediate relief to the victim of hazardous accidents. Every person who has control over handling of hazardous substance has to take insurance policies against liability to give relief to the affected persons. Whoever contravenes any of the provisions of the Act is punishable with imprisonment for a minimum period of one and a half years which may be extended up to 6 years.

H. Environmental Auditing

Recently, the Government of India has promulgated an amendment in the Environment (Protection) Rules called the Environment (Protection) Second Amendment Rules, 1992. According to these Rules every person carrying on an industry, operation or process requiring consent under Water Act, 1974 or Air Act, 1981 or Hazardous Waste (Management and Handling) Rules, 1989 issued under EPA, 1986, shall submit an environmental auditing report for the financial year ending the 31st March in the form prescribed under the Rules to the concerned State Pollution Control Boards. The main components of the form are information on quantity of raw material consumed including water, per unit of product/s, total production, quantity of pollutants generation in terms of air and water and quantity of hazardous and solid waste generation and their recycling and reuse.

I. Supportative and Allied Legislations

There are more than 200 central and state laws today which can be interpreted one way or another to protect the environment.

(i) The Factories Act, 1948

The Factories Act, 1948 was amended to introduce special provision on hazardous industrial activities. The 1987 amendment to the Factories Act empowers the states to appoint site appraisal committees to advise on initial location of factories using hazardous process. Factory Inspector and the local authority must provide all particulars regarding health hazards at the factory and preventive measures taken. These preventive measures must be publicised among the workers and nearby residents. Every occupier must also draw-up an emergency disaster control plan, which must be approved by the Chief Inspector. The occupier is required to maintain workers medical records and must employ operations and maintenance personnel who are experienced in handling hazardous substances. The permissible limits of exposure to toxic substances are prescribed in the Second Schedule to the Act. Safety Committees consisting of workers and managers are required to review the safety

measures.

The Factory Act after its 1987 amendment defines 'occupier' as a senior level manager. Such person is held responsible for non compliance with the Act. There is heavy penalty on non-compliance.

(ii) The Insecticide Act, 1968

The Act established a Central Insecticide Board to advise Centre and States on technical aspects of the Act. A committee of the Board registers insecticide after verifying their safety and efficacy. The manufacture and distribution of pesticides is regulated through licensing. The Central and State Government are vested with emergency powers to prohibit the sale, distribution and use of dangerous insecticides.

The Insecticide Rules, 1971 prescribe the procedure for licensing, packaging, labelling and transportation of insecticides. They also provide for workers safety during manufacture and handling of insecticides through protective clothing, respiratory devices and medical facilities.

(iii) The Atomic Energy Act, 1962

The regulation of nuclear energy and radioactive substance in India is governed by the Atomic Energy Act, 1962 and Radiation Protection Rules, 1971. Under the Act, the Central Government is required to prevent radiation hazards, guarantee public safety and safety of the workers handling radioactive substances and ensure the disposal of radioactive wastes.

(iv) Motor Vehicles Rules, 1989

In 1989, the Central Motor Vehicle Rules introduced nationwide emission levels for both petrol and diesel driven vehicles. Rules 115 (1) requires that every motor vehicle be manufactured and maintained so that smoke, visible vapours, grits spark ashes cinders are not emitted when the vehicle is driven. Rules 115 (2) prescribe carbon monoxide level for petrol driven and smoke level in diesel driven vehicles. Vehicles manufactured after 1st April 1992 must meet the addition emission standards prescribed for petrol and diesel vehicles under Rule 115 (3) and 115 (4) respectively. Rule 115 (6) requires every manufactures to certify that his new vehicle conform to the prescribed standards.

(v) Indian Easement Act, 1882

A riparian owner is one who has title to land adjacent to a natural stream. The Indian legal system has recognised the right of riparian owners to unpolluted waters since the adoption of the Indian Easement Act, 1882. Under Section 7 of that Act every riparian owner has the right to the continuous flow

of the waters of a natural stream in its natural condition without obstruction or unreasonable pollution.

J. Constitution of Special Purpose Authority

Apart from the government machinery described above, there are large number of different institutes and organizations including educational, research, training, mass awareness and special purpose authorities in the country which are directly or indirectly working for the environment. Some important ones are mentioned here.

(i) The Central Ganga Authority

The Government of India announced an ambitious new plan for cleaning up Ganga river in 1985. A newly created Ganga Authority headed by the Prime Minister, is ultimately responsible for the river's restoration. The eight member authority includes the Central Government's planning and environmental ministers and the chief ministers of the states through which the Ganga flows.

(ii) National Waste Land Development Board

National Wasteland Development Board (NWDB) was established in May 1985 with primary objectives of undertaking wasteland development in the country. NWDB seeks to achieve this through a massive programme of afforestation with people's participation. First four years of Seventh Plan saw coverage of 7.16 million hectares of land under it. Besides providing impetus to on-going programmes such as rural fuel wood plantation, operation soil watch, decentralized nurseries, etc., several new initiatives like seed development agencies, aerial seeding marginal financial assistance to autonomous bodies, minor fuel wood and fodder projects were taken up.

(iii) National Environmental Engineering Research Institute

The Institute was established in 1957 under Council of Scientific and Industrial Research, Government of India to carry out research in the field of water supply and waste water management, sanitation, industrial effluent treatment, solid waste management, microbiological pollution problems. It has done considerable work in the field of rural sanitation programmes apart from carrying out the above research. Recently, it has been involved in hazardous waste management and environmental impact assessment.

(iv) G.B. Pant Himalayan Paryavaran Evam Vikas Sansthan

This autonomous organization of the Ministry of Environment and Forests was established in 1988 to restore Himalyan ecology. The Institute comprises of a Central Unit at Almora, three regional units each at Srinagar (Garhwal),

Gangtok and Mokakchung. The major activities of the Institute includes restoration of degraded land and sustainable rural development, afforestation, integrated watershed management, maintenance of biological diversity, environmental impact, assessment of mining and other developmental activities.

(v) Industrial Toxicology Research Centre

The Institute was established in 1966 under Council of Scientific and Industrial Research, Government of India, mainly to evaluate toxicity of chemicals used in the industries. The Institute at present is mainly engaged in research to identify through systematic epidemiological surveys the health hazards to which industrial and agricultural workers are exposed; to undertake safety evaluation of the chemicals used in the industries and day to day life; to conduct studies on mode of action of chemical pollutants; to develop suitable diagnostic tests and remedial measures; to collect and disseminate information on hazardous waste.

K. Non-Government Agencies

The number of voluntary agencies, community groups, academic societies, corporate entities (non-governmental organizations) working for environment has increased significantly in the last few years. This is mainly due to growing awareness on environmental degradation and its importance for survival of mankind. At present there are about 900 NGO's working in different parts of our country for the welfare of the environment.[33] The National Environmental Awareness Campaigns, promoted by the Ministry of Environment and Forests have successfully encouraged many NGO's whose primary concern was rural development, civil right, women's development, tribal welfare, appropriate technology *etc.* as there is a direct link between environmental protection and human welfare.

The main objective and activities related to environment of all the NGO's are to promote the environmental education and awareness through organisation of film shows, workshops, seminars, training programmes especially for the students; to collect, compile and disseminate data related to environment and preparation of documentary films for public awareness to promote environmental friendly technology and sanitary practices in daily life through awareness programmes; to make aware the public and authorities about the problem areas and extent of environmental degradation including harm to the public health and other resources; afforestation; protection of wildlife; and conducting research related to protection of environment.

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NOTES & COMMENTS

A CRITIQUE OF THE MADISONIAN THEORY OF DEMOCRACY+

*Shailendra Vikram Singh**

Attributing all instability, injustice and confusion in democratic society to factionalism, Madison sets forth to offer cures for this malady. He gives his own definition of a faction : a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the Community. It is disputable if a faction can be in majority at any given time; for 'faction' is according to dictionary meaning, 'a group or clique within a larger group, party, government, organization or the like.' It conveys dissent and therefore, a faction has to be in a minority. So it seems redundant to talk of controlling a majority faction, if it cannot exist.

But even if we grant Madison, in keeping with his definition that a majority faction can exist, it seems so futile to control it even if it is capable of control, at all. If there is a majority faction, it denotes the will or the spirit of the people - the *VOLKSGEIST*, as Von Savigny would have called it—and it should be the criteria for social and legal conduct and as such should not be curbed. How can it be adverse to the rights of other citizens or to the permanent and aggregate interests of the community? How could that majority faction have come to power if their ways were detrimental to general interest? If most people want a thing how can it be tyrannical or oppressive or bad? What is the definition of good and bad? Is it not a relative principle? It cannot be absolute. If the majority want to pursue a particular line of action, they have every right to do so and the minority is under a duty to toe themselves or fall in line, with them. That is an essential principle of democracy or majority rule.

Madison believes that the principle of Republicanism takes care of the minority faction but to control the majority faction, he prefers a Republican Representation to a Pure Democracy. How will transforming a pure democracy into republican representation improve matters? If 90 people out of 100 (in a pure democracy) can be tyrannical, what is the guarantee that 9000 people out of 10,000 (in a republican representation) shall not be tyrannical? The ratio, percentage and probability remains the same. By increasing the number, it is not clear, how he fancies to control majority tyranny for the process of

representation *viz.* election remains the same in both the cases.

Reliance on numbers and more territory, is placed due to two reasons : firstly, there can be no concert and secondly, factionalism cannot spread from one area to others, so easily. Both these Madisonian reasons have become irrelevant now, in view of the great scientific and technological progress, for communication is no problem, now. So it will serve no purpose to increase numbers except as he himself admits, the electorate shall be too little acquainted with the representatives and this will cause confusion.

According to Madison, the most common and durable source of factions is the 'various and unequal distribution of property'. He surprisingly does not attempt to suggest any treatment for this disease. If this inequality and variance in relation to rights of property can be tackled, may be, we can get rid of the major source of factionalism. It is not to be suggested that a communistic pattern of society without any rights to acquire property, shall be advisable, to do away with the malady of factions. But it is certainly possible to regulate laws relating to property (without affecting any other liberties or freedoms) so as to bridge the gap between the variance and inequality in regard to property and thence curb factionalism. It is submitted that such a Republic can and does exist.

It is very ambiguous that Madison believes that frequent popular elections shall not check tyranny. Why not? The advocacy for separation of powers of the executive, legislative and judicial organs which he puts forth for avoiding tyranny is not being disputed. But time and again, history has shown that in a republican nation popular elections are the biggest external check on tyranny. The ouster of the Congress regime in India, through the medium of popular general election in 1977, when it was acting arbitrarily and despotically, more than proves the point. So in a democracy, the decisive significance and value of elections cannot be denied or underrated.

Then Madison did not take into account another way of curbing factionalism, that is through judicial review. Of course, there is a possibility that the tyrannical majority faction may take away the power of reviewing its legislative actions from the judiciary, but then, it is a factual question depending on the Constitution, its rigidness, its process of amendment and its basic structure. But if the majority faction is so corrupt and arbitrary, the people also would not mind their tyranny, for although it may sound a little cynical, but they are there through their approval and have no ground to complain.

Lastly, Madison has been rightly criticized by Diamond for ignoring the value of virtue, from his entire thesis. Why should he start on the premise that people will be self-servingly ambitions or shall have selfishly interfering interests? He has been even charged with magnifying and multiplying, 'the

selfish, the interested, the narrow, the vulgar and the crassly economic' interests in society. However, the concept of virtues or 'better motives' or 'finer values' and 'higher sentiments' is conspicuous by its absence, in his scheme of things. In older days, it was not too remote or unusual to find even Kings and Emperors who were very benevolent, sacrificing and did things for the betterment of their governed, unselfishly. This element of compassion, kindness and moral values should not be completely divorced from a democratic theory, for it is human to have these traits too, side by side, with the disease of factionalism.

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+ The author owes this paper to his stay at the Yale Law School as a Visiting Scholar where he audited Prof. Bruce A. Ackerman's Course on Constitutional Theory. The article revolves around the Central Theme of Madisonian Theory of Democracy with reference to the American State and the U.S. Constitution.

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LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT

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Sustainable development is a modern fashionable phrase that is freely and frequently used in academic, legal, social, political, scientific, and even business circles. The critics of the phrase aver that it does not offer any precise, succint and final meaning of universal acceptance. It seems to convey different meaning to different people. An environmentalist would interpret it as ample heritage for future generations. A legal scholar would describe it as balanced synthesis of environmental and developmental imperatives. An economist would view it as economic growth which can be sustained for generations. A social ecologist would look upon it as sustained use of forests. A businessman who harvests and sells timber may look upon it as sustained projects. In the West, somewhat jocularly, the multinational companies reckon sustainable development as sustained growth or sustained profits. Politicians find their vote bank in the phrase and adopt it in election campaign.

Sustainable development is a process in which development can be sustained for generations. It means improving the quality of human life while at the same time living in harmony with nature and maintaining the carrying capacity of life supporting ecosystem. Development means increasing the society's ability to meet human needs. Economic growth is an important component but cannot be a goal in itself. The real aim must be to improve the quality of human existence to ensure people to enjoy long, healthy and fulfiling lives.

Sustainable development focusses at integration of developmental and environmental imperatives. It modifies the previously unqualified development concept. To be sustainable, development must possess both economic and ecological sustainability. The concept of sustainable development indicates the way in which development planning should be approached.

I. Conceptualisation

The concept of sustainable use of the earth's resources is an ancient one. Without the principle of sustainability as a way of life, humans would not have survived into the twentieth century. The principle of sustainable development, however, received impetus with the adoption of Stockholm Declaration in 1972, World Conservation Strategy prepared in 1980 by the World Conservation Union (IUCN) with the advice and assistance from the United Nations

Environment Programme (UNEP) and the Worldwide Fund, the World Charter for Nature of 1982, Report of the World Commission on Environment and Development (Brundtland Report) and the document *Our Common Future of 1987*, the document *Caring for the Earth: A Strategy for Sustainable Living* developed by the second world conservation project comprised of the representatives of the IUCN, UNEP and the Worldwide Fund for Nature. The Concept of sustainable development is the foundation stone of the Montreal Protocol for the protection of ozone layer of 1987 and the instruments adopted at the Earth Summit held at Rio in 1992.

A. Definition

The Brundtland Report defines sustainable development as development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. The report emphasizes that sustainable development means an integration of economics and ecology in decision making at all levels.

The Caring for the Earth document defines sustainability as a characteristic or state that can be maintained indefinitely whereas development is defined as the increasing capacity to meet human needs and improve the quality of human life. This means that sustainable development would imply improving the quality of human life within the carrying capacity of supporting ecosystems.

The Brundtland report as well as *Caring for the Earth* have developed the World Ethic of Sustainability which may be summarised as follows:

a. Every human being is part of community of life, made up of all living creatures.

b. Every human being has fundamental and equal rights, including the right to access to the resources needed for a decent standard of living.

c. Each person and each society is entitled to respect of these rights and is responsible for the protection of these rights for all others.

d. Every life form warrants respect independently of its worth to people.

e. Everyone should take responsibility for his or her impacts on nature.

f. Everyone should aim to share fairly the benefits and costs of resource use.

g. The protection of human rights and the rights of nature is a worldwide responsibility that transcends all cultural, ideological and geographical boundaries.

B. Intragenerational Equity

The problem of intragenerational equity must be approached in the light of different economic, environmental, cultural and political circumstances prevailing within the countries and between the countries. The inequality between people as a result of greed and the maldistribution of power is major obstacle to achieving sustainability. Unsustainable behaviour by the poor people is almost always due to factors such as loss of land, growing indebtedness, or loss of access to markets, that leave them unable to support themselves properly. When wealthier people appropriate resources for themselves at costs far below their value for production, poor people who lose by such appropriations are powerless to hold the wealthy accountable. Having no resource, they place greater stress on their environments, by moving deeper into the forest, occupying marginal land unsuitable for agriculture or herding, or adopting some other way of staying alive.[1]

The Brundtland Report also recognizes the inequalities between countries and stresses that several problems arise from inequalities and access to resources. The report maintains that inequitable land ownership structures can lead to overexploitation of resources in the smallest holdings, with harmfull effects on both environment and development. Accordingly, Brundtland report asserts that the future cannot be common in the sense of being equal, fair and just when the economic and ecological situation of lower and higher income countries are compared. Undoubtedly, the inability of mankind to promote the common interest in sustainable development is often a product of the relative neglect of economic and social justice within and amongst nations. Thus, the Brundtland report emphasizes that the reduction of poverty is a precondition for environmentally sound development in lower income countries.[2] The two conventions, namely Climate Change Convention and the Biodiversity Convention adopted at Rio alongwith Agenda 21 which is an action plan for the future also give expression to this proposition.

C. Sustainability and Economic Growth

Economic growth is not an antithesis to sustainability but a condition underlying sustainability. The 1987 World Commission on Environment and Development (Brundtland Commission) asserts that only economic growth can eliminate poverty. Economic growth can create capacity to solve environmental problems. To achieve sustainability, economic growth cannot be based on overexploitation of the resources but must be managed to enhance the resource base. What the Mankind needs is global consensus on economic growth which is consistent with sustainable development.[3] Such global consensus must take into account the ecological constraints.

The threats to the global environment have the potential to open our eyes and make us accept that North and South will have to forge equal partnership. It is time to launch a new era of international co-operation. Issues like debt crisis, trade policies, resources for the international financial institutions, harnessing technology for the global benefit, strengthening the United Nations system, and specific major threats to the environment such as global warming and loss of biological diversity are interrelated. Is it not appropriate to consider our economic and environmental concerns together, given the critical links between the two?

II. International Law And Sustainability

International law is an increasingly important mechanism in the quest for sustainable development. *Trail Smelter Arbitration* holds States responsible for the damage resulting from the transboundary pollution to the other States or the property of persons therein.[4] In 1972, United Nations Conference on Human Environment was held at Stockholm where a wide range of resolutions were adopted which formed an action plan for international co-operation on environmental matters. It produced Stockholm Declaration containing 26 principles which opened the floodgates for subsequent developments for the protection and promotion of the environment. The United Nations Environment Programme was also established under the auspices of the Stockholm Conference.

The Declaration loudly proclaims that man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. It affirms international customary law which requires a State to pay compensation for injury to another State caused by activities originating in its own territory. Principle 21 of the Declaration confers responsibility on States to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond their national jurisdictions. Principle 21 is reinforced by principle 22 which requires the States to co-operate to develop international standards regarding liability and compensation for the victims of pollution and other ecological damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction. The Stockholm Declaration provided the basis for further developments in the field of environmental protection. In the process, the work of UNEP acted as a catalyst and geared the momentum for further developments.

To achieve sustainability, the Vienna Convention to prevent the depletion of ozone layer was concluded which served as a framework convention and laid

down broad guidelines. The Vienna Convention was followed by Montreal Protocol which came up in 1987. The Protocol aims at the protection of ozone layer which is vital for the survival of mankind as it protects mankind from the dangerous effects of ultraviolet radiations.

In 1992, United Nations Conference on Environment and Development (UNCED) was held wherein more than 170 governments participated. UNCED's mission was to put the world on a path of sustainable development which aims at meeting the needs of the present without compromising the ability of future generations to meet their own needs.[5] The Earth Summit was held with a view to provide principles of economic and environmental behaviour for individuals and nations. As a matter of fact, UNCED heralded a new global commitment to sustainable development, premised on the interconnectedness of human activity and the environment.[6]

The Earth Summit produced five documents which are as follows:

A. Rio Declaration on Environment and Development

The Rio Declaration sets out 27 principles to guide the behaviour of nations towards more environmentally sustainable patterns of development. The declaration, a delicate compromise between developing and industrialized nations which was torturously crafted at preparatory meetings, was adopted in Rio without negotiations due to the fears that further debates would jeopardize any agreement. UNCED Secretary General Maurice Strong and U.N. Secretary General Boutros Ghali called on States to negotiate a more inspirational and legally progressive " Earth Charter" for adoption in 1995 on the 50th anniversary of the United Nations.

B. Agenda 21

Agenda 21 was also adopted at UNCED which is a voluntary action plan. It is named as Agenda 21 because it is intended to provide an agenda for local, national, regional, and global action into the 21st century. Agenda 21 comprises hundreds of pages of recommendations to address environmental problems and promote sustainable development. Agenda 21 is primarily composed of four sections which are as follows:

(i) Social and Economic Dimensions

This section includes recommendations on : sustainable development co-operation, poverty, consumption, demographics, health, human settlements, and integration of environment and development in decision making.

(ii) Conservation and Management of Resources

This section includes chapters on atmospheric protection, land resources, deforestation, desertification and drought, mountains, agriculture, biological

diversity, biotechnology, oceans, freshwater resources, toxic chemicals, hazardous waste, and radioactive wastes.

(iii) Strengthening the Roles of Major Groups

It includes ways to increase the participation in sustainable development efforts of major social groups: women, youth, indigenous groups of people, non governmental organisations, local authorities, trade unions, business and industry, scientific and technological communities and farmers.

(iv) Means of Implementation

It includes chapters on financial resources, technology transfer, co-operation and capacity building, institutional arrangements, legal instruments and mechanisms, and information collection, analysis and dissemination.

C. Forest Principles

These are non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests. Many States and experts sought further negotiations on a framework convention on forests.

D. Framework Convention on Climate Change

The Convention requires signatories to take steps to reduce their emissions of greenhouse gases. The Convention, however, sets no mandatory targets and timetables for such actions.

E. Framework Convention on Biodiversity

It prescribes steps for the protection and sustainable use of the world's diverse plant and animal species. The benefit sharing and technology transfer provisions of the Convention give expression to the concept of intragenerational equity. Moreover, the Convention insists on the sustainability of biotechnological research and development.

III. U.N. Commission On Sustainable Development

The U.N. Commission on Sustainable Development (CSD) was established to serve as a permanent forum through which governments could review progress towards the goals of sustainable development and integrate economic and environmental decision making. The CSD will review reports from governments and international organisations of their efforts to implement Agenda 21, discuss financial and technical issues, and recommend further actions to promote sustainable development.

It is feared that CSD would act only as a watchdog body to monitor compliance of governments and international institutions with environmental

agreements inasmuch as Human Rights Commission does in its field. However, we cannot lose sight of the fact that CSD's mandate is sustainable development—integrating environmental and economic objectives rather than just environmental protection. In view of the fact that there are few widely accepted standards in this evolving area by which the body could evaluate behaviour, it falls to the CSD itself to build consensus on norms of behaviour which over time could provide a basis for more effective monitoring and compliance.

The CSD will rely on political rather than legal authority to integrate global environmental and economic policies. Its success will depend heavily on the participation from national governments, including the reports and information they provide, the technical expertise and political authority their delegates bring, and to the degree to which these governments reinforce CSD decisions through national representatives to other international fora. If the States use the Commission to build consensus on global sustainable development goals and thereafter the States reinforce that consensus through their national and international efforts, the Commission can in turn greatly strengthen their collective capacities to tackle environment and development problems.

IV. Conclusion

The challenges of environment and development are daunting. The real work of integration of environment and development lies ahead. The survival of mankind rests on the implementation of the concept of sustainable development. The agreements at UNCED mark the beginning of an international political will to take the necessary steps to protect the earth. What the mankind needs is to supplement the framework conventions adopted at Rio with the adoption of specialised protocols. At the first meeting of the Parties to the Convention on Biological Diversity held in December 1994 at Nassau, Bahamas, India demanded immediate and adequate safeguards against hasty experimentation and use of Genetically Modified Organisms (GMOs), since these could have unimaginable repercussions.[7] The indiscriminate and unregulated use of GMO's poses a threat to the mankind which can only be checked through a legally binding agreement. It is, therefore, necessary to adopt clear, comprehensive and legally binding international protocol on bio-safety under the convention on biodiversity.

The Convention on Climate Change does not contain specific targets and timetable for the reduction of greenhouse emissions. In view of the horrifying threat of the extinction of mankind as a result of global warming in 500 years, the Climate Change Convention needs to be supplemented by a protocol containing specific targets to be followed by the States. This would equip the Convention with the teeth necessary to implement the concept of sustainable

development.

India has been an active player in implementing the decisions arrived at the Stockholm Conference by enacting various environmental legislations and adopting forty second constitutional amendment. It would be in the fitness of things if India enacts legislations to implement the decisions arrived at Rio especially Biodiversity Convention which is based on the principle of intragenerational equity. There is a pressing need to work within the global community and build capacity for change in a world order based on sustainability, equity, prosperity and security for all.

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CIVIL REMEDIES FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS

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The human being is the only creature endowed with the ability to think and is always trying to find solutions to the multifaceted problems faced by him. As a result of his thinking process, new ideas and inventions keep on emerging in every conceivable field of science and technology. Similarly new creations are made in the field of arts and literature. All this is an outcome of the human brain. The resulting outcome is known as intellectual property. The law extends protection to intellectual property and in case of infringement certain remedies are available to the owner of intellectual property. These remedies may be classified into three heads: (1) Civil remedies (2) Administrative remedies and (3) Criminal remedies. This paper is confined only to civil remedies.

The civil remedies for infringement of intellectual property include interlocutory injunction, final injunction, damages, account of profits and delivery-up or destruction.

I. Interlocutory Injunction

Injunction is the most important remedy against the infringement of intellectual property because the defendant is stopped dead in his tracks.

The owner of intellectual property normally wants speedy and effective relief to prevent further infringements of his intellectual property and further damage to his business. He cannot afford simply to wait for some years until the full trial takes place. As a consequence, the law provides interim relief to the plaintiff by way of interlocutory injunction.

Injunction means a judicial process by which one who is threatening to invade or has invaded the legal or equitable rights of another is restrained from commencing or continuing such act or is commanded to restore matters to the position in which they stood previous to that action.[1]

The grant of this remedy is within the discretion of the trial Court which is not arbitrary, vague and fanciful but legal and regular.[2]

A. Copyright

In India, Copyright Act, 1957 provides the remedy of interlocutory

injunction against the infringement of copyright.[3] Interlocutory injunction is granted under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code, 1908. The principles laid down in English precedents are frequently relied upon and followed in courts in India.

It is settled law that in granting interlocutory injunction three factors would be taken into consideration. First, the establishment of a *prima facie* case, second, the balance of convenience in the favour of plaintiff and finally irreparable injury would be caused to the plaintiff if interlocutory injunction is not granted.[4]

Injury caused to the plaintiff by the acts of defendant must not be trifling. Acquiescence or delay on the plaintiff's part may disentitle him to an interlocutory injunction.

The proviso of Section 55(1) of the Copyright Act, 1957 provides that if the defendant proves that at the date of infringement, he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the Court may in the circumstances deem reasonable.

In case if the work is very large and the pirated portion can be separated from the unobjectionable portion, the pirated work will be stopped from publishing but where pirated work cannot be separated from lawful work the Court will not hesitate in granting injunction to restrain the publication of the whole work.[5]

B. Designs

The plaintiff may ask for an interlocutory injunction *pendente lite* against the infringement of the copyright in his registered design. The principles applicable to the grant of interlocutory injunction in the case of infringement of design can be summed up as under: (1) plaintiff should make out a *prima facie* case; (2) the balance of convenience is in the favour of plaintiff; (3) interlocutory injunction may not be granted when the plaintiff can be adequately compensated in the event of his success in the action; (4) interlocutory injunction will be denied to the plaintiff if there are substantial grounds for attacking the validity of the registration of plaintiff 's design; (5) interlocutory injunction will normally be denied if the defendant gives an undertaking to keep an account and such undertaking will give the relief which the plaintiff requires; (6) if interlocutory injunction is granted the plaintiff will have to give a cross undertaking in damages to recoup the defendant for any loss sustained if the plaintiff fails in the action.

In *Niki Tasha P. Ltd.* v. *Faridabad Gas Gadgets P. Ltd.*,[6] the Delhi High Court denied the interlocutory injunction to the plaintiff. Rohatgi J. on the basis of the principles laid down in a British case *American Cynamide* v. *Ethicon*[7] decided by the House of Lords concluded:

> "The balance of convenience lies in favour of refusing the interlocutory relief that is sought. The granting or withholding of interlocutory relief will depend upon the ability of either party adequately to be compensated in monetary terms and ultimately on the balance of convenience. The defendants' ability to pay damages is a factor which tilts the scales against the plaintiffs."

In case of *Bansal Plastic Industries* v. *Neeraj Toys Industries*[8] the Court held that it is in the discretion of the Court to grant a temporary injunction which would be exercised in accordance with reasons and sound principles. Interim injunction will be refused to plaintiff where the defendant is also holding registration of design.[9]

C. Trademark

In a trademark infringement action, the plaintiff wants to stop the defendant from using his mark before his market is destroyed. The plaintiff in order to get interlocutory injunction, has to show at the preliminary hearing that the mark used by defendant is likely to confuse customers.

Where the matter is extremely urgent, the plaintiff may move for an *ex-parte* interim injunction before the motion for interim injunction is fully heard. The Court may grant an *ex-parte* injunction for a limited period subject to certain conditions, where plaintiff make full disclosure to the Court of all facts which are material to the exercise of the Court's discretion and the Court is satisfied that it is in the interest of justice to issue an *ex-parte* injunction to the plaintiff.

Under Order XXXIX, Rule 3 of Civil Procedure Code, 1908 when an *ex-parte* injunction is issued to the applicant, it becomes his duty to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with other documents.

The Trade Mark Bill, 1993 which was introduced in the Parliament with the intention of repealing the existing Trade and Merchandise Marks Act, 1958 and re-enacting a new one with necessary changes provided for an *ex-parte* injunction or for an interlocutory order.

Clause 136 of the Bill was proposed to provide expressly that the Court might grant an *ex-parte* injunction and in particular, orders intended to

preserve evidence or documents relating to the subject matter of the suit so that the defendant was restrained from dealing with assets in a manner which would affect the plaintiff's ability to recover damages or other pecuniary remedies after final orders.

The factors for granting interim injunction against the infringement of trademarks are same as are available in the case of copyright infringement.[10]

In order to establish a *prima facie* case for grant of *ad interim* injunction against the infringement of trademark or passing-off, it is incumbent upon the plaintiff to show, *inter alia*, that plaintiff has been using its trading style and trademark for quite a long period and continuously; that the goods of the plaintiff have acquired a distinctiveness and are associated in the mind of the general public as goods of the plaintiff and that goods of defendant also carry the same or similar trademarks; that the trademark of the defendant is likely to deceive and cause confusion in the public mind and injury to the business reputation of the plaintiff; and that the market of consumption of goods of the parties are the same.[11]

In *Johnson and Johnson* v. *Christine Hoden India (Pvt.) Ltd,*[12] plaintiff failed to have made a *prima facie* case for the grant of interim injunction. In *National Carbon* v. *Raj Kumar,*[13] plaintiff were using trademark EVEREADY on their torches while the defendants who were newcomers and had manufactured only 2000 torches used LITEREADY trademark, interlocutory injunction was granted.[14]

Interim injunction may be granted even though the defendant has moved for rectification of the plaintiff's mark and the suit is stayed.[15] Colourable imitation of mark which may cause confusion in the mind of the purchaser is also a ground for granting the interlocutory injunction.[16]

Phonetic similarity is also a ground for granting interlocutory injunction.[17] But the rule of phonetic similarity should not be extended in such a way that words with same consonants of similar despatch should always be treated as phonetically similar.[18]

Generally unexplained delay in bringing the action may be a ground for refusal of interim injunction.[19] However, Court may condone the delay in some circumstances.[20]

D. Patent

The principles upon which interlocutory injunction may be granted in a patent action are the same as are applicable in the case of copyright infringement.

In *National Research and Development Corporation of India* v. *Delhi*

Cloth & General Mills Co. Ltd.,[21] the Delhi High Court observed that for grant of temporary injunction, principles applicable to the infringement of patent actions are that there is a *prima facie* case, that the patent is valid and infringed, that the balance of convenience is in favour of the injunction being granted and that the plaintiff will suffer an irreparable loss. It is also a rule of practice that if a patent is a new one, a mere challenge at the Bar would be quite sufficient for a refusal of a temporary injunction, but if the patent is sufficiently old and has been worked, the Court would for the purpose of temporary injunction, presume the patent to be valid one. If the patent is more than six years old and there has been actual user, it would be safe for the Court to proceed upon this presumption.[22] But if the patent has not been used in India, the plaintiff cannot in equity seek temporary injunction.[23]

Unlike other intellectual property, interim injunction restraining the defendant from infringing a patent does not come within the scope of Order XXXIX, Rule 1. However, Section 151 of the Civil Procedure Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. And it has been held that the Court has powers under Section 151 to grant injunction in cases not falling within Order XXXIX Rule 1 and 2.[24] Reliefs for the infringement of patents will be granted under Section 108 of Patents Act which are subject to certain other provisions.

II. Final Injunction

A. Copyright

If the plaintiff succeeds at the trial in establishing infringement of copyright, he will normally be entitled to a permanent injunction to restrain future infringements. This injunction will be operative only during the unexpired term of the copyright.

Injunction will be refused to the plaintiff if compensation will afford him adequate relief. But if the invasion of plaintiff's copyright is of a serious character which would not adequately be compensated by an award of damages, the injunction will be granted to the plaintiff.

In *K.P.M. Sundhram* v. *M/S Rattan Prakashan Mandir,*[25] it was held by the Court that withholding of injunction would be more injurious to plaintiff's right than the grant of injunction would impose burden on defendants. Therefore, the Court restrained defendants 1 to 3 from printing, publishing and selling the books of plaintiff.

Normally, the Court will refuse injunction in the circumstances where (1) there is no evidence that the defendant has done or threatens to do anything

which would interfere with the enjoyment of any right vested in the plaintiff, or (2) invasion of the right, if any, of the plaintiff, is of a theoretical nature, which would at the most give the plaintiff a right to claim nominal damages, or (3) the injunction would inflict far more injury on the defendant than the advantage which the plaintiff could derive from it.[26]

B. Designs

If the plaintiff succeeds at the trial in establishing infringement of his registered design, he will normally be entitled to a permanent injunction to restrain future infringement because there is always a possibility of recurrence of such infringement in future. The object of granting injunction is to prevent such recurrence and restore the *status quo*. In a few exceptional cases, however, if it can be definitely shown that there is no such likelihood of any recurrence, then an injunction may be refused.

On the other hand, even if there is no infringement the Court may grant an injunction if it is shown that the defendant had the intention of infringing or had threatened to infringe.

In *Calico Printers Association Ltd.* v. *Savani & Co.*,[27] the Bombay High Court granted the permanent injunction to plaintiff against the importation of infringed articles to India. The injunction was restricted to British India and only for the period of copyright in respect of future infringements of the plaintiff's copyright.

C. Trademark

The plaintiff is entitled to permanent injunction if he establishes the infringement of his trademark at the final hearing. Permanent injunction may be granted on the basis of threatened future injury. The Court need not wait for the appropriation of one's property by use of a similar trade name actually to take place, if it clearly appears that such wrongful appropriation is extremely probable and is likely to occur.[28]

In *Aravind Laboratories* v. *V.A.Samy Chemical Works*,[29] permanent injunction was granted where defendant's trademark 'RANI EYEVIX' was found deceptively similar to plaintiff's trademark 'EYETAX'. An injunction may be denied where the infringement or unfair competition was discontinued in good faith before commencement of the suit, and there is no reason to believe that it will be resumed.

If a defendant is guilty of deliberate and intentional fraud, he will be dealt with more strictly and permanent injunction will be granted but on the other hand if the plaintiff's trade is fraudulent, relief will be denied.

D. Patent

The factors for granting permanent injunction against the infringement of patent are same as are available for the infringement of any other intellectual property. Permanent injunction will be limited for the duration of the patent only. Permanent injunction will also be granted where a threat to infringe plaintiff's patent has been established. Actual infringement is merely evidence upon which the Court implies an intention to continue in the same course.[30]

Injunction will not be granted where defendant has stopped the use of infringing article. In such a case only damages would be awarded. Acquiescence of plaintiff is a ground for the refusal of injunction.

Injunction will also be denied where the infringement relates to a patent endorsed "Licences of right" and the defendant is willing to take a licence under Section 88 of the Patents Act 1970. This privilege is not available against the infringement by importation of the patented article from foreign Countries.[31] After coming into force of Trade Related Aspects of Intellectual Property Rights(TRIPs) Agreement in 1995, it became obligatory for India to do away with provisions of "licences of right".

In case of partially valid patent if the plaintiff proves that the invalid claim was framed in good faith and with reasonable skill and knowledge, the Court has discretion to grant injunction or other relief in respect of any valid claim which is infringed.[32]

III. Damages

The purpose of an award of damages is to restore the plaintiff to his position before the infringement. Such damages are therefore compensatory.

A. Copyright

Copyright infringement is a tort and the overriding principle in tort law is that damages should be compensatory.[33] Damages in tort aim to put the victim back to his position before the tort.[34] If infringement is established, damages are presumed.[35] Nominal damages are always awarded where a legal right has been infringed irrespective of the actual damage.[36] Generally, the damages would be equivalent to the fair fee or royalty which the defendant would have paid had he got the licence from the copyright owner. But it does not mean that defendant has got a licence from the copyright owner. Some more factors will also be taken into consideration to assess the damages *e.g.* diminution of the sales of copyright owner's work, or the loss of profit which he might otherwise have made, but this will exclude any benefit which may have accrued to the defendant by use of his work. Apart from this, the fact that the pirated work may have injured the reputation of copyright owner is also a fact that may be taken

into consideration in assessing the damages.[37]

Unlike United Kingdom, there is no provision in India in the Copyright Act, 1957 for the award of additional damages in special circumstances such as the flagrancy of the infringement or the fortune reaped by the defendant by his misdeed. However, court, in the absence of such a provision, may award exemplary or punitive damages in appropriate cases.

Damages for conversion as defined by Lord Atkin in *Lancashire and Yorkshire Railway* v. *Mac Nicoll*[38] are damages while dealing with goods in a manner inconsistent with the rights of the true owner, provided that it is also established that there is also an intention on the part of defendant, in so doing, to deny the owner's right, or to assert a right which is inconsistent with the owner's right.

The Copyright Act 1957 declares that all infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such copies shall be deemed to be the property of the owner of the copyright. It then entitles him to take proceedings for the recovery of possession of the infringing copies and plates or in respect of the conversion thereof.[39] But the owner of copyright will not be entitled to any remedy if the defendant proves that at the time of conversion of the infringing copies, he was not aware and had no reasonable grounds for believing that copyright subsisted in the work or that he had reasonable grounds for believing that such copies do not involve infringement of the copyright in the work.[40]

The remedies of damages for infringement of copyright and for conversion set out above, are not alternative but cumulative.

B. Designs

When a person commits an infringement of copyright in designs as detailed in Section 53(1) of the Designs Act 1911, he will be liable for every contravention of the section to pay to the registered proprietor of the design a sum not exceeding Rs. 500/- which is recoverable as a contract debt. The total sum recoverable in respect of any one design will not exceed Rs. 1000/-.[41]

If the proprietor elects to bring a suit for the recovery of damages for any such contravention and for an injunction against the repetition thereof, the infringer is liable to pay such damages as may be awarded and to be restrained accordingly.[42]

The remedies available under Section 53(2)(a) and 53(2)(b) are two distinct remedies and plaintiff cannot avail both the remedies simultaneously. He has to elect one out of two and that too on an earlier stage of the trial.[43]

The Rangoon High Court in *Calico Printers Association Ltd.* v. *Hajee*

Yusuf Fateh Mohamed[44] held that the actual damage suffered by the plaintiff must always be seriously considered in determining the amount recoverable. In this case while upholding the claim of plaintiff under Section 53(2)(a), Court awarded much reduced amount on the ground that the plaintiff had suffered very little actual damage.

C. Trademark

In trademark infringement cases, it is sufficient for the plaintiff to prove that his right has been invaded. He need not prove special damage in order to get damages. Normally, if a plaintiff succeeds in getting an injunction for the infringement of his trademark he is entitled to claim damages. But where the suit for infringement relates to a certification mark, the Court cannot grant relief by way of damages other than nominal damages.[45] The plaintiff is entitled only to nominal damages, where the infringement is innocent and the infringer discontinues the use of plaintiff's trademark the moment he becomes aware of the infringement.[46] In a passing-off action also, in similar circumstances only nominal damages will be granted to the plaintiff.[47]

In trademark infringement cases, the defendant is liable for all the loss actually sustained by the plaintiff which was the natural and direct consequence of the unlawful acts of the defendant. But if the plaintiff claims substantial damages, the onus is on him to prove that the action of the defendant has resulted in substantial damages to him.[48] In *Gujarat Ginning* v. *Swadeshi Mills,*[49] only nominal damages were ordered as there was no evidence of a fall in the sales of the plaintiff's goods.

Damages will also include injury to the plaintiff's reputation, business and goodwill.[50] While assessing damages, the cost of advertisements to counteract the effect of the defendant's conduct may also be taken into account. In *Manockju Petit Manufacturing Co.* v. *Mahalaxmi Spinning and Weaving Co.*[51] it was held by Farran J.:

> "In cases of unlawful use of a trademark, loss of profits forms the substantial ground of the claim for compensation. Loss of profits can be caused evidently in two ways: (1) by diminishing the amount of the goods sold by the plaintiff by taking his customers or ousting him from his usual market, or in some similar way; (2) by causing the goods actually sold by the plaintiff to be sold at a diminished price".[52]

D. Patent

A successful plaintiff is entitled to damages in respect of actual infringements of his patent, or at his option, an account of profits.[53] Damages should be equivalent to the injury which the plaintiff has suffered from wrongful acts of the defendant. Only those injury would be taken into account which have

been resulted to plaintiff from the natural consequence of the wrongful acts of the defendant.[54] If the patentee licences his patent, the easier way of assessing the damages is royalty payment which the defendant would have made, had he got the licence from the patentee.

But if the patentee seeks to recover damages on account of reduction of his prices, he must establish that the reduction was necessitated by the defendant's wrongful competition and was not the result of the ordinary exigencies of the trade.[55]

Damages may be refused by the court where the infringement is innocent,[56] or renewal fee has not been paid within the prescribed period[57] or where the amendment of a specification is allowed, the infringement caused by defendant before the date of the decision allowing the amendment.[58]

IV. Account of Profits

As a corollary of the injunction, equity might require a defendant to account to a plaintiff for profits made by infringement of his intellectual property. The remedy of account of profits is not in addition to the remedy of damages. It is an alternative remedy.

The distinction between an account of profits and damages is that by the former the infringer is required to give up his ill gotten gains to the party whose rights he has infringed whereas by the latter he is required to compensate the party wronged for the loss he has suffered.[59]

Therefore, a plaintiff is entitled to opt either damages or account of profits.

A. Copyright

The plaintiff is entitled to require the defendant to account for the profits made by him by the unauthorised use of former's copyright. The account is of net profits *i.e.* the sale price of the infringing copies minus manufacturing and delivery cost. In *Mohan Lal Gupta* v. *The Board of School Education, Haryana,*[60] the defendant was ordered to pay 20% of the profits to the plaintiff as the matter copied was less than one-tenth of the book.

The basis on which an account is ordered is that there should not be any unjust enrichment on the part of the defendant and that the defendant should be deprived of any profit which he earned by wrongful acts committed in breach of the plaintiff's rights.[61] The plaintiff would be refused an account of profits if there are no profits. In such a case the plaintiff may elect to claim damages and he would be bound by an election once made.[62]

B. Designs

In case of infringement of copyright in designs, it is not clear under Designs

Act, 1911 whether a defendant can be asked to keep an account. The judgements of the Courts on this issue are not very clear. However, in a case *Calico Printers Association, Ltd.* v. *Gosho Kabushiki Kaisa Ltd.*,[63] this remedy was refused to the plaintiff. The Court in this case, made it clear that the plaintiff could not have an account of profits made by the defendant as an alternative to a claim of damages or to a claim for the payment of Rs. 1000/. This is for the simple reason that it was not so provided by the statute.[64]

In *Calico Printers Association Ltd.* v. *Ahmed Abdul Karim Bros. Ltd.*,[65] the defendants admitted infringement of the design of plaintiff and gave an undertaking not to infringe plaintiff's rights in future and offered him to pay profits made by infringement. The Court granted the profits earned by the defendant as damages to the plaintiff.

However, Prof. Ponnuswami is of the view that instead of granting an interlocutory injunction against the defendant, the Court may order the defendant to keep an account. It is within the judicial discretion whether the injunction will be ordered or the defendant will be ordered to keep an account.[66]

To sum up, it can be said that despite the fact that Sections 53(2)(a) and 53(2)(b) do not provide a remedy by which a defendant may be ordered to keep an account, but the Courts are entitled under its general jurisdiction to grant equitable remedies which have not been excluded by the statute expressly or by necessary implication. The same attitude was taken by the Court in the case of remedy of delivery of goods under the Designs Act in *Calico Printers Association Ltd.* v. *Savani & Co.*[67]

C. Trademark

The principle upon which the Court grants an account of profits is that where one party owes a duty to another, the person to whom that duty is owed is entitled to recover from the other party every benefit which that other party has received by virtue of his fiduciary position as he has obtained it without the knowledge or consent of the party to whom he owed the duty.[68]

So far as apportionment of profits is concerned there are two ways of sharing the profits. Where the trade mark infringed has become well known as the product of a particular manufacturer and has acquired a reputation under that mark, all profits made by an infringer by selling goods of that kind under that name may in some cases be said to be attributable to his use of the mark.[69] But where a substantial part of the sale of the defendant's articles is a result of the merits of his articles and his established reputation, the plaintiff will not be awarded the full profits. The burden to prove this situation is on defendant. It lies on the plaintiff who seeks an account of profits to establish that profits were made by the defendant knowing that he was transgressing the plaintiff's rights.[70]

D. Patent

It has been held in *Saccharin Corporation Ltd.* v. *Chemicals and Drugs Co. Ltd.*[71] that the patentee who elects to take profits stands in the shoes of the infringer, and condones so to speak, his wrong, and is entitled only to those profits.

The Court will order an account of profits which is equitable. If the Court considers it necessary in the interests of justice, it will direct an apportionment and then ascertain the profits.

Account of profits will be refused to patentee where the defendant proves that at the time of infringement he was not aware and had no reasonable grounds to believe that the patent existed.[72] The Court may also refuse an account of profits in respect of any infringement committed after a failure to pay renewal fee within the prescribed period.[73] In case of amendment of specification, the Court will not grant account of profits in respect of the use of invention before the date of decision allowing the amendment unless it is shown that the specification was originally framed in good faith and with the reasonable skill and knowledge.[74]

V. Delivery Up Or Destruction

In order to ensure that injunctions are properly effective, Courts of equity and their successors maintain a discretion to order delivery up of infringing articles or documents for destruction, or else to require their destruction under oath by the defendant.[75]

A. Copyright

Where a person is found in possession of infringing copies of works or an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that it has been or is to be used to make infringing copies, the Court can order such person to deliver infringing copies or articles to the owner of copyright. The machinery[76] made or used for the purpose of making infringing copies would also be delivered up to plaintiff.

In *Muddock* v. *Blackwood*[77] the defendant had in his possession some of the infringing copies and sold others, but without making any profits on the sales. It was held by the Court that the plaintiff was entitled to the usual injunction, to delivery up of the copies in defendant's possession and to damages representing the actual amount of the proceeds of the copies sold.

Where only a part of the work complained of infringes the plaintiff's copyright, then, if it is physically possible to separate one from another, the defendant would be ordered to deliver up infringing material, but where the

parts cannot be separated, the order for delivery up may extend to the whole of the article.

The Copyright Act, 1957, though does not speak specifically of the remedy of delivery up but provides in addition to injunction, damages and accounts, any other remedy which may be conferred by law.[78] Therefore, Court can grant remedy of delivery up under Copyright Act 1957.

B. Designs

The Designs Act, 1911 makes no provision for delivery up or destruction of infringing articles. But in *Calico Printers Association Ltd.* v. *Savani & Co.*,[79] the Court made an order for delivery up of the infringing goods. It was held by the Court in that case that though Sections 53(2)(a) and 53(2)(b) of the Designs Act, 1911 did not specifically provide for delivery up of the goods to the plaintiff for destruction but it did not have the effect of excluding equitable remedies in respect of an infringement of copyright in design which the Court is entitled to grant under its general jurisdiction.

In another case *Calico Printers Association Ltd.* v. *Ahmed Abdul Karim Bros. Ltd.*,[80] it was held by the Court that the order for delivery up can be made by this Court as an equitable relief. But such an order for delivery up must be made in the spirit of the provisions of Section 53. Such a relief can be granted only in respect of goods for the purpose of sale but not in respect of any other purpose.[81] Thus it becomes clear that the Court while exercising its discretionary power can grant this equitable remedy to the plaintiff.

C. Trademark

Unlike copyright law, the Trade and Merchandise Marks Act refers only to "delivery up of infringing labels and marks for destruction or erasure" and not to delivery up of the goods bearing such labels or marks.[82] It is therefore clear from the above mentioned provision that goods bearing the deceptive mark in the possession of the defendant may not be ordered to be destroyed but only that the labels or marks may be ordered to be erased therefrom and after erasing labels or marks the goods will be hand over to the defendant. But where the mark is so stamped or imprinted on the goods that erasure is impossible without destruction of the goods, the Court may order for the destruction of the goods.

Though under the old Trade Marks Act, 1940, there was no specific provision for delivery up of infringing labels and marks but the Court had ordered delivery up of infringing marks for destruction or erasure.[83]

D. Patent

The Court can order for the destruction or delivery up of infringing goods

which are in possession of the defendant. It is entirely within the discretion of the Court. The purpose of making such order is to prevent the defendant from making use of the infringing articles which are in his possession. The Court will limit the order upto the extent which is necessary for the protection of the plaintiff. In *British United Shoe Machinery Co. Ltd.* v. *Grimson Shoe Machinery Co. Ltd.*[84] it was held that delivery up of a part of the offending combination was sufficient.[85]

The defendant is not entitled to any compensation for loss caused to him by such destruction or delivery up, and cannot set off the value of goods delivered up against a claim for damages.[86]

VI. Conclusion

Intellectual property law, a product of the industrial civilisation has assumed equal importance both at national and international levels. Today, when the demand for increased protection of intellectual property has arisen, the developing countries have shown reluctance to give full protection to intellectual property. For this reason the developed countries have negotiated trade related aspects of intellectual property (TRIPS) not under World Intellectual Property Organisation (WIPO) which is a body for intellectual property but under the auspices of General Agreement on Tariffs and Trade (GATT) which is a forum for international trade.

In India different type of civil remedies are available against the infringement of intellectual property. Though the remedy equivalent to the remedy of Anton Piller Orders in United Kingdom is not available in India but sometimes our Courts grant the same remedy.[87]

There is no provision under the Copyright Act, 1957 for the award of additional damages in special circumstances such as the flagrancy of the infringement or the fortune reaped by the defendant by his misdeed. Therefore, our Copyright Act should be modified in order to cover additional damages under its provisions.

Damages under the Designs Act, 1911 seems to be inadequate. Under the Act, the infringer is liable to pay the proprietor a sum, not exceeding Rs. 1000/- in the aggregate as a contract debt.[88] Though this limitation of Rs. 1000/- does not expressly cover the damages that may be awarded by a court in an infringement suit but the general feeling is that damages are limited to Rs. 1000/-. The provisions of the Designs Act have become outdated. This is one of the reasons why there is not much innovation in India.

The remedies of account of profits and delivery up or destruction are not available under Designs Act, 1911 against the infringement of copyright in registered design. However, the Courts are entitled under their general

jurisdiction to grant equitable remedies as has been held by Court in *Calico Printers Association Ltd.* v. *Savani & Co.*[89]

The Copyright Act 1957 has been amended by Copyright (Amendment) Act, 1994 to protect computer software in an effective manner.

The enforcement regime of designs protection is inadequate and requires a complete overhaul to provide strong penalties for design piracy.

The Trademark Bill, 1993 was proposed to update the trademark law and provided for strong penalties against the trademark infringements. But unfortunately that Bill has lapsed in the Parliament.

The Patent Act, 1970 was also proposed to be amended by the Parliament. A Bill in this concern was introduced in the Parliament but it has also lapsed.[90]

Notes and References

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2. *Harbuns* v. *Bhairo*, Indian Law Reports, 5 C-259(PC).
3. Section 55 of Copyright Act, 1957.
4. *Bharat Law House* v. *M/S Wadhwa & Co. Pvt. Ltd.*, AIR 1988 Del 68 at 70.
5. *Ghafoor Bux* v. *Jwala Prasad.* (1921) Indian Law Reports 43 All 412.
6. AIR 1985 Del 136.
7. (1975) A.C. 396.
8. 1989 Industrial Property Law Reporter 75.
9. *Indo Asahi Glass Co. Ltd.* v. *Jai Mata Rolled Glass Ltd. & Anr.*, 16 The Patent and Trade Mark Cases 1996 Del 220.
10. See also *Century* v *Roshanlal*, AIR 1978 Del 250 at 251.
11. *Hindustan Radiators Co.* v. *Hindustan Radiators Ltd.*, AIR 1987 Del 353 at 358-59. See also *M/s Bhatia Plastics* v. *M/s Peacock Industries Ltd. & Anr.*, 15 The Patent and Trademark Cases 1995 Del 150; *Ciba Geigy Ltd.* v. *Crosslands Research Laboratories Ltd.*, 16 The Patent and Trademark Cases 1996 Del 1; *Colgate - Palmolive Co. & Anr.* v. *Sundeep Enterprises*, 15 The Patent and Trade Mark Cases 1995 Del 389; *Metropol India (P) Ltd.* v. *Praveen Industries India*, 16 The Patent and Trade Mark Cases 1996 Del 77.
12. AIR 1988 Del 249.
13. AIR 1954 All 218.
14. See also *Roop Chand* v. *Kiran Soap*, 1980 Industrial Property Law Reporter 76 where wrappers of articles of plaintiff and defendant which carried trademarks Sinaula and Sindrela were found similar.
15. *Jagan Nath* v. *Bhartiya Dhoop*, AIR 1975 Del 149; see also *M/s Gold Star Co. Ltd.* v. *M/s Gold Star Industries & Ors.* 15 The Patent and Trade Mark Cases 1995 Del 18.

16. *Kedar Nath* v. *Monga Perfumery*, AIR 1974 Del 12; see also *Castrol Ltd. & Anr.* v. *Subash Kapoor & Ors*, 15 The Patent and Trade Mark Cases 1995 Del 31.
17. *M/s Vrajlal Manilal & Co.* v. *M/s Adarsh Bidi Co.*, 15 The Patent and Trade Mark Cases Del 88; *American Home Products Corpn.*, *Wyeth Lab. Ltd.* v. *Lupin Lab. Ltd.*, 16 The Patent and Trade Mark Cases 1996 Bom 44; *M/s Mitaso Appliances Ltd.* v. *Shri Joginder Singh*, 15 The Patent and Trade Mark Cases 1995 Del 105.
18. *M.A. Rahim* v. *M/s Aravind Laboratories*, 15 The Patent and Trade Mark Cases 1995 Mad 1.
19. Interim injunction was refused in *Paras Traders* v. *Rajasthan Copy Manufacturers Association (Regd)*, 16 The Patent and Trade Mark Cases 1996 Del 229 where the plaintiff filed a suit after a delay of five years.
20. In *Hindustan Pencils* v. *India Stationary*, AIR 1990 Del 19 at 25, interim injunction was granted despite a delay of six years.
21. AIR 1980 Del 132.
22. *Id.* at 135.
23. *Franz Xaver Huemer* v. *New Yash Engineers*, 16 The Patent and Trade Mark Cases 1996 Del 232.
24. *National Research and Development Corporation of India* v. *Delhi Cloth & General Mills Co. Ltd.*, AIR 1980 Del 132; *Manohar Lal* v. *Seth Hira Lal*, AIR 1962 SC 527; *Surendra Lal Mahendra* v. *Jain Glazers and Ors*, The Patent and Trade Mark Cases 1981 at 112; See also P. Narayanan, Patent Law (Calcutta: Eastern Law House, 1985) at 556.
25. AIR 1983 Del 461.
26. Satyawrat Ponkshe, The Management of Intellectual Property (Pune: Bhate & Ponkshe Publications, 1991) at 305.
27. AIR 1939 Bom 103.
28. Srinivasa Iyengar, The Trade and Merchandise Marks Act & Rules (Allahabad: Law Book Co. (P) Ltd., 1986) at 410-11.
29. 14 The Patent and Trade Mark Cases 1994 Mad 223.
30. *Rohtas Industries Ltd.* v. *Indian Hume Pipe Co. Ltd.*, AIR 1954 Pat 492 at 496.
31. Section 112 of Patents Act, 1970.
32. *Id*, Section 114.
33. Gerald Dworkin quoted in Stephen M. Stewart, International Copyright and Neighbouring Rights (London: Butterworth & Co. Ltd., 1989) at 517.
34. W.R.Cornish, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (London: Sweet & Maxwell, 1989) at 38-39.
35. *Moore* v. *Clarke* (1842) 11 LJ Ex 286.
36. *Constantine* v. *Imperial London Hotels Ltd.* 2 All E R (1944) 171.
37. E.P. Skone James *et. al.*, Copyright (London: Sweet & Maxwell, 1991) at 343.
38. (1919) 88 LJKB 601 at 605.
39. Section 58 of Copyright Act, 1957.
40. *Id*, proviso to Section 58.

41. Section 53(2)(a) of DESIGNS ACT, 1911.
42. *Id.* Section 53(2)(b).
43. *Calico Printers Association Ltd.* v. *Gosho Kabushiki Kaisa K. Ltd.*, AIR 1936 Bom 408.
44. AIR 1933 Rangoon 240.
45. Section 106(2)(a) of the TRADE AND MERCHANDISE MARKS ACT, 1958.
46. *Id.*, Section 106(2)(b).
47. *Id.*, Section 106(2)(c).
48. *Aravind Laboratories* v. *V.A. Samy Chemical Works*, 14 THE PATENT AND TRADE MARK CASES 1994 Mad 223.
49. AIR 1939 Bom 118.
50. *Swadeshi Mills Co.* v. *Juggilal Kamlapat Cotton Spinning and Weaving Mills Co.*, AIR 1927 All 81.
51. INDIAN LAW REPORTS 10 Bom 617.
52. *Id.* at 630.
53. Section 108 of PATENTS ACT, 1970.
54. *Meters Ltd.* v. *Metropolitan Gas Meters Ltd.*, 28 RPC 157 at 165 (C.A.).
55. *Alexander & Co.* v. *Henry & Co. and Ors*, 12 RPC 360 at 367.
56. Section 111(1) of PATENTS ACT, 1970.
57. *Id.*, Section 111(2).
58. *Id.*, Section 111(3).
59. *Supra* n. 48.
60. INDUSTRIAL PROPERTY LAW REPORTER, 1978 at 83.
61. *Supra* n. 37 at 353.
62. *Ibid.*
63. AIR 1936 Bom 408.
64. *Id.*, at 411.
65. AIR 1939 Bom 198.
66. Krishnaswami Ponnuswami, *Design Protection in India: The Designs Act 1911*, paper presented at WIPO NATIONAL WORKSHOP ON INTELLECTUAL PROPERTY TEACHING, UNIVERSITY OF DELHI, 1991 at 19.
67. *Supra* n. 27 at 112.
68. *Electrolux* v. *Electrix*, 70 RPC (1953) 158 at 159.
69. P. Narayanan, LAW OF TRADE MARKS AND PASSING-OFF (Calcutta: Eastern Law House, 1991) at 497-98.
70. *Supra* n. 48.
71. 17 RPC 612 at 615.
72. *Supra* n. 56.
73. *Supra* n. 57.
74. *Supra* n. 58.

75. *Supra* n. 34 at 41.
76. This includes plates, blocks, moulds, printing presses in cases of printed material, negatives in the case of photographs, matrices and all kinds of reproduction equipment in the case of phonograms or films.
77. 77 LAW TIMES REPORTS (1898) 493.
78. Section 55 of Copyright Act, 1957.
79. *Supra* n. 27.
80. *Supra* n. 65.
81. *Id.*, at 201.
82. Section 106(1) of the TRADE AND MERCHANDISE MARKS ACT, 1958.
83. *Bhagwan Das* v. *Watkins Mayor*, AIR 1956 Pun 17; SWADESHI MILLS v. JUGGILAL KAMLAPAT, AIR 1927 All 81.
84. 45 RPC 85.
85. See also *Mergenthaler Linotype Co.* v. *Intertype Ltd.*, 43 RPC 381 at 382.
86. *United Telephone Co.* v. *Walker*, 4 RPC 63 at 67.
87. See *Tata Oil Mills Co. Ltd.* v. *M/s Wipro Ltd.*, AIR 1986 Del 345; *K.P.M. Sundaram* v. *M/s Rattan Prakashan Mandir*, AIR 1983 Del 461.
88. Section 53 of the DESIGNS ACT, 1911.
89. *Supra* n. 27 at 112.
90. On 31 December 1994, the Patent (Amendment) Ordinance was passed. Thereafter the Patent Amendment Bill, 1995 was introduced in the Parliament to replace the Ordinance but the same has lapsed.

ARBITRATION AND CONCILIATION ACT, 1996: AN OVERVIEW

*Devraj Singh**

I. Introduction

It was recognised that with the globalisation of our economy, the economic reforms may not become fully effective if the law dealing with settlement of domestic as well as of international commercial disputes remains out of tune with such reforms. With a view to amend arbitration laws the Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration proposed amendments to the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recommendation and Enforcement) Act, 1961 to make them more responsive to contemporary requirements.

It was also recognised that in addition to arbitration, conciliation was also getting increasingly worldwide recognition as an instrument for settlement of commercial disputes. In India, conciliation was not recognised as an instrument for settlement of commercial disputes. In Industrial disputes a conciliation officer was required to enter into conciliation proceedings whenever any industrial dispute arose in compliance with the statutory requirements as contemplated in the Industrial Disputes Act, 1947.

The Arbitration and Conciliation Ordinance, 1996 was thus promulgated by the President to meet these acute needs of the business community for prompt settlement of disputes. The Ordinance had to be re-promulgated on two more occasions as the Parliament failed to pass the Bill within the stipulated period. Recently the Arbitration and Conciliation Act (hereinafter referred to as the 'Act') has been passed and received the assent of the President of India on 16th August, 1996. The Act has been brought into effect from 27th January, 1996 the day the Ordinance was first promulgated.

The Act has been divided into four parts. Part I relates to arbitration in India. Part II relates to enforcement of foreign awards under the New York and Geneva Conventions. Part III applies to conciliation and Part IV contains certain supplementary provisions empowering the High Court to make Rules regarding arbitration which are consistent with the Act. The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 are repealed.[1]

II. Aim and Objectives of the Act

The Act has the primary function of comprehensively catering to international and commercial arbitration and conciliation along with domestic arbitration and conciliation by an arbitral procedure, which is fair, efficient and capable of meeting the needs of specific arbitration by a reasoned arbitral award within the limits of the jurisdiction of the Arbitral Tribunal. It is also hoped that the supervisory role of the Courts would be minimised in the arbitral process. The Arbitral Tribunal being free to use meditation, conciliation, or other procedures during the arbitration proceedings to encourage settlement of disputes. The Act also aims at making the award capable of enforcement in the same manner as a decree of the Court.

Conciliation is now recognised as a means of settlement of disputes both domestic and international. The settlement agreement arrived at by the parties by conciliation is accorded the same status as the arbitral award and can be enforced as a decree of a Court under the Code of Civil Procedure, 1908.

As far as foreign awards are concerned, every arbitral award made by a country to which one of the two international conventions, *i.e.*, New York Convention or Geneva Convention, relating to foreign arbitral awards applies, will be treated as a foreign award.

The Act has also sought to make the arbitration law and conciliation law to be similar to the recommendations and model law as adopted by the United Nations Commission of International Trade Law (UNCITRAL).

III. Arbitration

A. Arbitration Agreement

An arbitration agreement is defined in Section 7 of the Act to mean "agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a definite legal relationship, whether contractual or not". Sub-section (2) of Section 7 further provides that the agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) prescribes that the said agreement is deemed to be in writing if it is contained in a document signed by the parties, an exchange of letters, telex, telegrams and other means of telecommunications which provide a record of the agreement or by an exchange of statement of claim and defence in which the existence of agreement is alleged by one party and not denied by the other.

The Arbitration Act, 1940 defined arbitration agreement to mean, "a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not".

No specific words are required to constitute an arbitration agreement. Courts have given decisions on the interpretation of the clauses contained in an agreement determining whether the clause amounted to an arbitration clause or not. In the case of *Peer Mohammed Safi* v. *Cantonment Board,*[2] the High Court has held that a settlement between workers and the management regarding revision of pay cannot be treated as an arbitration agreement merely because a clause in the memorandum of settlement provided that if any question arises about the interpretation or implementation of the terms of settlement or in cases of arrear or discrepancy, the matter is to be referred to specified person.

Where the provision contained in the agreement read, 'In the event of dispute the decision of Superintending Engineer of the circle shall be final,' the Calcutta High Court has held that though the express word or arbitration was not appearing in the aforesaid clause, even then the expression embodied in provision amounts to an arbitration clause which could be enforced.[3] The Superintending Engineer obviously could enter into the dispute only when it was referred to him and while deciding the dispute he had to act judicially and decide the dispute after hearing both the parties and by inducing material for support. The Supreme Court while interpreting clause in the contract which provided that except otherwise specified in the contract, the decision of the Superintending Engineer for the time being should be final, conclusive and binding on all the parties to the contract upon all questions relating to the specification *etc*. such clause does not constitute an arbitration agreement.[4]

Even where the clause has provided that the decision of a particular person will be final and binding upon the contractors, the Courts have held that the clause did not constitute an arbitration agreement.[5]

Where the arbitration agreement gives an option or liberty to only one of the parties to the agreement to refer present or future differences to arbitration, it is not an arbitration agreement for the party having the option may or may not take advantage of the arbitration clause because in order to constitute arbitration agreement there must be an unqualified or unconditional agreement to submit present or future differences to arbitration.[6]

The Arbitration Act, 1940 did not prescribe the form of wording or manner in which the arbitration agreement is to be made between parties. The Act has improved upon the situation to the extent that it has specified the possibility of a separate arbitration agreement or an arbitration agreement constituted by exchange of letters, telegrams, faxes or such other means but it has left open the entire question of the wordings to be used to constitute an arbitration agreement.

The wordings of the definition of arbitration agreement gave rise to considerable litigation regarding the interpretation of the term 'arbitration agreement,' its acceptance, construction, dispute, form of writing and signature. It was not required that an arbitration agreement be signed by the parties. However, it was essential that the arbitration agreement should be in writing and should convey the intention of the parties to refer disputes to any particular person. Where the dispute clause in the contract merely mentions the word 'contractor' and 'arbitration', the agreement has been held not to show intention of the parties to refer dispute to any particular person. It has been held by the Court that such an agreement cannot be said to confer power on a person for adjudication and hence, the clause cannot be held to contain an arbitration agreement.[7]

There was also considerable litigation regarding the fact whether a particular clause amounted to submission to arbitration or not. It is not envisaged at present whether such litigation would come to an end by adopting the present form of the definition of arbitration agreement.

B. International Commercial Arbitration

The Act defines 'international commercial arbitration' to mean an arbitration relating to disputes arising out of legal relationship whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties whether an individual, body corporate, or a company is having business or residing abroad and in case of Government, the Government is of a foreign country.[8]

C. Mode of Communication

The mode of all communication between parties has been changed. Order-5 of the Code of Civil Procedure prescribes the rules for issue and service of summons. Rule 10 of Order 5 provides that for service to be effective the summons must be delivered or a copy tendered to the recepient. The summons or copy thereof be signed by the judge or such officer as he appoints in this behalf and sealed with the seal of the Court. The service is to be effected by delivery of a copy of the summon to the defendant personally or to an agent or someone on his behalf and by obtaining signature of the person to whom the said copy is delivered to an acknowledgment of service endorsed on the original summon.[9]

Under Rule 12 of Order 5 of the Code of Civil Procedure, service shall be made on the defendant in person where practicable, unless he has an agent empowered to accept service, in which case, service on such agent shall be sufficient. Similarly, under the other Rules, *i.e.* 13, 14, 15 and 16, service is effective only when the person or the agent actually receives the summons and

the person affixes his signature on the copy of the summon acknowledging service of the summon.

Overriding all the provisions of the Code of Civil Procedure, a new section *viz.* Section 3 has been enacted in the Act where it would be sufficient to send to the addressee at his last known place of business, habitual business or mailing address, a registered letter effecting necessary communication. It is also possible to effect service of the written communication by any other means where a record of the attempt of delivery is possible. Thus, couriers, speed posts, a personal messengers who maintain records could also be used for the purpose of effecting service on the party. Such means are still not recognised by the Code of Civil Procedure. Whereas such means have been recognised for effecting communication between parties under the Act by virtue of Section 3. Section3(3) specifically provides that this section does not apply to written communication in respect of proceedings of any judicial authority.

D. Composition and Jurisdiction of Arbitral Tribunal

The number of arbitrators to determine the dispute has been left to the parties, the limitation being that an even number of arbitrators shall not be appointed. In case the number of arbitrators are not determined, the Arbitral Tribunal shall consist of a sole arbitrator. The arbitrator may be of any nationality and the parties are free to agree on the procedure for appointing the arbitrator or arbitrators.

Under the Arbitration Act, 1940, Section 3 provided that the provisions contained in the First Schedule of the Act shall be applicable to a reference for arbitration. Conditions regarding number of arbitrators, appointment of arbitrators, time for making award, the appointment of umpire and such other provisions were made in the said schedule.

A period of 30 days has been given to a party from the receipt of request to appoint an arbitrator and the arbitrators have been given a period of 30 days from the date of their appointment to appoint a third arbitrator named as Presiding Arbitrator (earlier referred to as Umpire) for completing arbitration. In case the parties fail to appoint the arbitrator, the Chief Justice of the High Court within whose territory the parties propose to settle their dispute shall have the power to appoint an arbitrator or Presiding Arbitrator as the case may be. Where the matter concerns international commercial arbitration, the words 'Chief Justice' shall mean the Chief Justice of India.

A positive feature of the Act is that the arbitrators have been given an opportunity to disclose in writing any circumstances likely to give rise to justifiable doubts to independence or inability of arbitrators.[10] The arbitrator has also been burdened with the duty of informing the parties in writing

of aforementioned circumstances unless they are already aware of the circumstances.

The additional important feature is with respect to the qualification of the arbitrator. Earlier no qualifications were prescribed for appointment as an arbitrator. Under Section 12 (3)(b), an arbitrator may be challenged if he does not possess the qualifications agreed to by the parties. An analogous provision does not exist in the Arbitration Act, 1940 and it may be considered to be a redeeming feature, as a number of disputes which arise between the parties are of a technical nature whether relating to science, technology or other similar special fields of knowledge and the rival contention can be appreciated and adjudicated upon only by the person who is well versed in such matters.

The parties have been prescribed the freedom of challenging the appointment of an arbitrator unless some new reason comes within their knowledge of which they were not aware of at the time of appointment of the arbitrator. The parties have been given freedom to agree to a procedure for challenging the arbitrator under Section 13 of the Act. A limitation of 15 days has been laid down since the parties become aware of the constitution of the Arbitral Tribunal for challenging the arbitrator. In case the parties fail to do so, no challenge can be made on a subsequent date.

In case the arbitrator fails to perform the function or becomes *de jure* or *de facto* unable to perform his function or for other reasons fails to act without undue delay and he withdraws from his office or the parties agree to the termination of his mandate, a new arbitrator may be appointed to arbitrate upon the matter.

The Arbitration Act, 1940 did not confer on the arbitrator any power to determine whether the arbitrator had the authority to arbitrate upon a dispute or not. In fact there is catena of decisions which lay down that once the jurisdiction of the arbitration is challenged an arbitrator has no authority to decide whether he has the jurisdiction or not.

In such an eventuality, the parties are left with no option other than to refer the matter to the Court for appropriate decision on the matter. Section 16 of the Act confers on the Arbitral Tribunal an authority to rule on its own jurisdiction with respect to the existence or validity of the Arbitration Agreement.

Under the Arbitration Act, 1940, in case the arbitration clause was contained in an agreement which was null and void, the arbitration agreement is also rendered null and void. Under Section 16 (1)(b) whether the contract is null and void and is so determined by the Arbitral Tribunal, such a decision shall not render *ipso facto* the arbitration clause invalid.

In case a party is desirous of challenging the jurisdiction of Arbitral Tribunal, the challenge shall be raised not later than the submission of the statement of defence. This provision has also set at rest partly the controversy regarding the agreement when stay may be obtained from Civil Courts to restrain the Court from proceeding with the civil dispute where a party is seeking resolution of the dispute through arbitration.

Where it appears that the Arbitral Tribunal is acting in excess of the scope of its authority, a plea to this effect shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings thereafter it shall be deemed to be a belated plea, deemed to have been waived, and shall not be entertained at any subsequent stage unless a justified plea is raised in this context.

It is only during the course of further litigation that the extent of the words of 'delay justified' and can be appreciated in their fullest ramification. The expression 'sufficient cause' contained in Section 5 of the Limitation Act may provide some guide lines in the matter. While construing the words 'sufficient cause' the courts have been rather liberal. If similar meaning is given to the words 'delay justified', it may open up a new area of litigation and become a cause for intervention of the Courts.

E. Conduct of Arbitral Proceedings

(i) Language of Arbitration

The parties have been given freedom to agree upon the language or languages to be used in arbitral proceedings. In case the parties fail to agree, the Arbitral Tribunal shall determine the language to be used in the arbitral proceedings and such language shall be used for any written statement by a party, in hearing, the arbitral award, decision or other communication by the Arbitral Tribunal. The Arbitral Tribunal has the discretion to order that documentary evidence shall be accompanied by a translation into the language agreed by the parties or determined by the Arbitral Tribunal.

(ii) Procedure

As a matter of course, the arbitrators had been following the Code of Civil Procedure in the matter of procedure regarding the disputes before them. Section 23 of the Act has clarified the procedure to be followed in respect of statement of claims and defence submitted by the parties.

Unlike the Arbitration Act, 1940, no time limit has been prescribed for completing the arbitral proceedings. Under the Arbitration Act, 1940, the arbitral proceedings were to be concluded within four months from the date of entering into the arbitration. No such limit has been prescribed under the

present Act. As a consequence, there is no need for seeking extension of time to conclude arbitration or consent of the parties for allowing the arbitrator time to conclude the arbitral proceedings.

The Arbitral Tribunal has been conferred with the authority to decide whether to hold oral hearings for the presentation of the evidence or oral arguments or whether the proceedings shall be conducted on the basis of documents and other materials.[11]

The Arbitral Tribunal shall hold oral hearings unless agreed to the contrary by the parties. Oral hearings shall be held only after an advance notice has been given and the parties have opportunity of inspection of documents, goods or other property. All statements, documents or other information or application made to the Arbitral Tribunal shall be communicated to the other party.

In case a party fails to communicate its statement of claim, the Arbitral Tribunal shall terminate the proceedings. In case the defending party fails to communicate its statement of defence, the Arbitral Tribunal has to continue with the proceedings without treating the failure as an admission of the allegation by the claimant. The position is similar where the parties fail to appear at an adjourned hearing or fails to produce documentary evidence.[12]

(iii) Assistance of Experts

The Arbitral Tribunal has also been conferred with the authority to appoint an expert on specific issues to be determined by it and may require a party to give an expert, appointed by it, any relevant information or to provide access to any relevant documents, goods or other property for his inspection. The expert may also be requested to participate in an oral hearing where such necessity is felt.[13]

(iv) Evidence

Regarding evidence, a totally new procedure has been provided. The Arbitral Tribunal or a party may seek the assistance of the Court in taking evidence. The Court may execute the request by ordering that the witness or expert provide evidence to the Arbitral Tribunal directly. No power has been conferred on the Arbitral Tribunal to summon witnesses or to issue process. For this purpose, for taking evidence the Arbitral Tribunal or a party with the approval of Arbitral Tribunal may apply to the Court for assistance in taking evidence.[14]

F. Making of Arbitral Award

(i) Substantive Law

The substantive law to be applied to the dispute under arbitration in the case of international commercial arbitration shall be in accordance with the law

designated by the parties and in other cases according to the substantive law for the time being in force in India. If the parties to international commercial arbitration fail to agree among themselves regarding applicability of the substantive law, the Arbitral Tribunal has the authority to apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute and the Arbitral Tribunal may decide *ex aequo et bono* or as *amiable compositeur* only if the parties expressly authorise the Arbitral Tribunal to decide on this basis. It is the bonded duty of the Arbitral Tribunal to take into account the usages of trade applicable to the transaction. Where the number of arbitrators is more than one, the decision shall be taken by the majority.[15]

(ii) Arbitral Award

The Arbitral Tribunal has been conferred with the authority to encourage settlement of disputes with the agreement of parties and to this end it may use mediation, conciliation or other procedures at anytime during the arbitral proceedings to encourage settlement. Where the settlement is arrived during the course of arbitral proceedings, the arbitral award shall be made on agreed terms having the same status as an arbitration award on the substance of the dispute within the agreement.[16]

The arbitral award shall be made in writing, signed by the members of Arbitral Tribunal or in any case by the majority members and shall state the reasons for making the award unless the parties have specifically requested that no reason be given or the award is in terms of a settlement arrived at between the parties. The award shall also state the date and place of arbitration. A copy of the said award duly signed shall be delivered to each party. The Arbitral Tribunal also has the authority to make an interim award on any matter with respect to which it may make a final arbitral award. The Arbitral Tribunal shall also determine the costs to be paid by the respective parties as well as the amount and the manner in which the cost shall be paid including fees and expenses of the arbitrator and witnesses, legal fee and expenses, administrative fee and similar other expenses.[17] On the making of the arbitral award the arbitral proceedings shall be terminated and an order to this effect shall be made by the Arbitral Tribunal.[18]

G. Recourse Against Arbitral Award

There is no appeal against an arbitral award. However, a party who is aggrieved with an arbitral award may take recourse by going to a Court against the said award on the grounds *inter-alia* that the party was under some incapacity or that the arbitration agreement is not valid under law to which the party is subjected to or that the party was not given proper notice of the appointment of arbitrator or of the proceedings and that the arbitral award deals with a dispute not contemplated by or not valid within the terms of submission

to arbitration. The arbitral award may also be impugned on the ground that it contains decision on matters beyond the scope of submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not so submitted to arbitration may be set aside. The party may also successfully impugn the arbitral award on the composition of the Arbitral Tribunal or the arbitral procedure, the composition or the procedure being in violation of the agreement among the parties.[19]

Where the Court finds that the subject matter of dispute is not capable of settlement by arbitration or that the arbitral award is in conflict with the public policy of India, the Court is vested with the power to set aside the arbitral award. An award is deemed to be in conflict to the public policy of India if the making of award was induced or affected by fraud or corruption or is in violation of Section 75 or Section 81.

The application for setting aside an arbitral award must be made before three months have elapsed from the date on which the party making application has received the arbitral award or within three months from the date on which the application of the party before the Arbitral Tribunal had been disposed of. In case the party is in a position to establish sufficient cause, the Court may entertain the application within a period of 30 days after the expiry of 3 months and no application for setting aside the arbitral award can be made thereafter. While deciding the matter, the Court may give an opportunity to the Arbitral Tribunal to resume the arbitral proceedings or to take such action which will eliminate the ground for setting aside the arbitral award.[20]

H. Finality And Enforcement of Arbitral Award

The arbitral award is final and binding between the parties and other persons claiming under them. Where the time of making the application to set aside the arbitration award under Section 34 has expired or such application has been made and the application is refused, the award may be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court. Section 36 of the Act makes a clear departure from the Arbitration Act, 1940 in as much as under the later the parties had to make an application to the Court to make the award a rule of the Court and only thereafter the ruling could be executed. The Act has done away with this procedure. This will result in saving of time of the litigants in execution of the arbitral award. In fact the arbitral award has now been given a similar status as any other decree of the Court and it may be enforced in accordance with Order XXII of the Code of Civil Procedure.

I. Miscellaneous Comments

The Arbitral Tribunal has been vested with the powers to call upon the parties to make payments or deposits towards advance for cost or such other purposes. In addition, the Arbitral Tribunal has been conferred a lien on the arbitral award for any unpaid costs of arbitration and the Arbitral Tribunal may refuse to deliver the award except on payment of cost demanded by it. The Court may also assist the Arbitral Tribunal in this matter by directing the applicant to effect payment in the Court and only thereafter the Arbitral Tribunal may be directed to submit the arbitral award before the Court.[21] The arbitration agreement shall not be discharged on the death of the parties and the mandate of an arbitrator shall not be terminated on the death of any party by whom he was appointed.[22]

The provisions of the Limitation Act, 1963 have also been made applicable to arbitral proceedings by virtue of Section 43 of the Act.

IV. New York Convention Awards And Geneva Convention Awards

Chapters 1 and 2 of Part II of the Act relate to awards made under the New York Convention and the Geneva Convention respectively. The enforcement of a foreign award may be refused if the applicant furnishes evidence before the Court that the agreement which was entered into between the parties was invalid or that the party was suffering from some incapacity or that the party did not receive proper notice of the appointment of the arbitrator or arbitral proceedings or was otherwise unable to present its case. The other provisions relating to enforcement of foreign award are similar to that of the domestic award and there is no difference so far as enforcement of award in concerned.

V. Conciliation

Part III of the Act fills a need for another method of settlement of disputes among parties which have been accorded similar status as an arbitral award *i.e.* conciliation. Any dispute arising out of legal relationship whether contractual or not may be referred for conciliation by the parties. The party initiating the conciliation is required to send a written invitation to the other party to take recourse to conciliation and identify the subject of the dispute. The conciliation proceedings commences only when the parties accept in writing invitation to conciliate.[23] In case the other party rejects the invitation, there will be no conciliation or in case the inviting party does not receive a reply within 30 days from the despatch of the invitation or within such other period of time as specified in the invitation, it may elect to treat this as rejection of invitation to conciliate and if it so elects, it shall inform in writing the other party accordingly.

A. Appointment of Conciliator

Unless the party agrees to the contrary one conciliator shall enter into the conciliation. In case of agreement two or three conciliators may also enter into conciliation. When the parties agree to take recourse to conciliation with one conciliator the parties may name the sole conciliator. Where the number of conciliators is three, each party may appoint one conciliator and both parties may agree upon the third conciliator who may act as the presiding conciliator.[24]

The assistance of suitable institutions or persons may be sought for the appointment of conciliator if the parties feel the need to do so.[25]

B. Role of Conciliator

When the conciliator is appointed, he may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party is also required to send a copy of such statement to the other party. Additional statement may also be made which may be supplemented by any documents or other evidence which the parties deem appropriate. Copies of all statements, documents or other evidence are to be given to the opposite party. The conciliator may request a party to submit to him additional information as he deems appropriate.[26] The conciliator has a free hand and is not bound by the provisions of the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

The conciliator has the role of assisting each of the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.[27] In doing so the conciliator shall be guided by principles of objectivity, fairness and justice, background of the parties, the usages of trade and the circumstances surrounding the dispute including any previous business practices between the parties. Even in conducting the proceedings the conciliator has the freedom to conduct them in any manner he considers appropriate including adherence to the wishes expressed by the parties and in case the parties so desire hearing oral statements. The paramount consideration is the need for speedy settlement of dispute.

The conciliator may at any stage make proposals for a settlement of the dispute which need not be in writing and need not be accompanied by a statement of the reasons thereof. However, the conciliator is not to take any information behind the back of the parties and when the conciliator receives factual information concerning the dispute from a party it is his duty to disclose the substance of the information to the other party to furnish them with an opportunity to present an explanation whenever considered appropriate. However, if a party furnishes information to the conciliator with a specific

request that such information be kept confidential the conciliator shall not disclose that information to the other party.[28]

The party submitting to conciliation shall under good faith cooperate with the conciliator and shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.[29] The parties are also free on their own initiative or at the invitation of the conciliator to submit to the conciliator suggestion for the settlement of dispute.[30]

C. Settlement Agreement

Where it appears that the parties may arrive at a certain agreement the conciliator may formulate the terms of possible settlement and submit to the parties for their observations. On receiving the said observations of the parties, reformulation of the terms may take place keeping in view the possibility of settlement in light of the observations made. Also the parties themselves may arrive at an agreement. They may draw up and sign a written agreement referred to as settlement agreement or the conciliator may be called upon to draw up or assist the parties in drawing up the settlement agreement. Once the parties sign the settlement agreement it shall be final and binding on the parties. The conciliator is required to authenticate the settlement agreement and furnish a copy of the settlement agreement to each of the parties.[31] The settlement agreement on being drawn up and authenticated shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal.[32]

The parties to the conciliation proceedings shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings. But where in the opinion of the party, arbitral or judicial proceedings are necessary to preserve its rights, it may resort to those proceedings.[33] For example, when a matter is about to become barred by time under the provisions of the Limitation Act, 1963, the party may be left with no other option than to initiate judicial proceedings. A time barred matter cannot be the subject matter of a suit. Even when the party has been involved in other litigation, time shall not be extended for filing a fresh suit.

The conciliator has the duty of keeping confidential all matters relating to conciliation proceedings including settlement agreement except where disclosure is necessary for the purposes of implementation and enforcement.[34]

The conciliator cannot act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is subject of conciliation proceedings. The conciliator cannot be presented by the parties as a witness in any arbitral or judicial proceedings by the parties.[35] Parties may, however, agree to the contrary if they so desire.

VI. Conclusion

Some of the areas of litigation have been reduced by the Act. A very significant step is that of equating the arbitral award and the settlement arrived at during conciliation proceedings with a decree of the Court. A better definition of an arbitration agreement has been provided. It would have been better had a standard arbitration clause incorporated in the Act. However, arbitration is a process which is a creature of the parties. It will become necessary to determine the intention of the parties before it may be determined whether a particular clause amounts to an arbitration agreement or not. The real test of the Act shall be when the parties begin the process of arbitration and conciliation under the provisions of the Act.

Notes and References

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1. Section 85, Arbitration and Conciliation Act, 1996.
2. AIR 1987 J & K 21.
3. *State* v. *Hari Pada Santra*, AIR 1990 Cal 87.
4. *State* v. *Tipper Chand*, AIR 1980 SC 1522.
5. *Ram Lal* v. *State*, AIR 1961 J & K 58.
6. *Union of India* v. *Rati Lal R. Tonk* (1962) ILR Cal 527.
7. *M/S Veer Construction Technocrats Pvt. Ltd.* v. *M/S Saraswati Enclave Co-operative Group Housing Society Ltd.*, AIR 1996 Del 12.
8. *Supra* n.1, Section 2(f).
9. *Heera Lal Sharma* v. *XV Additional District Judge, Kanpur*, (1983) ALL LJ 916.
10. *Supra* n.1, Section 12.
11. *Id.*, Section 24.
12. *Id.*, Section 25.
13. *Id.*, Section 26.
14. *Id.*, Section 27.
15. *Id.*, Section 28.
16. *Id.*, Section 30.
17. *Id.*, Section 31.
18. *Id.*, Section 32.
19. *Id.*, Section 34.
20. *Ibid.*
21. *Id.*, Section 39.
22. *Id.*, Section 40.
23. *Id.*, Section 62.
24. *Id.*, Section 64(1).

25. *Id.*, Section 64(2).
26. *Id.*, Section 66.
27. *Id.*, Section 67(1).
28. *Id.*, Section 70.
29. *Id.*, Section 71.
30. *Id.*, Section 72.
31. *Id.*, Section 73.
32. *Id.*, Section 74.

THE DEBT RELIEF LAWS-RELIEF TO THE DEBTORS OR CREDITORS?

*Vijay Kumar**

Indebtedness of the rural people is peculiarly linked with the character of the rural set-up in the same way as the other factors like poverty, illiteracy and feudal hold *etc.* It is, therefore, basically the lop-sided rural set-up with its inherent contradictions in the relationship between land and the people which is responsible for the problem of indebtedness. The rural people, with meagre or no resource base living in perpetual poverty require financial help in one form or the other and, thus, fall prey to indebtedness. It was way back in 1928 during the British regime in India that the Royal Commission on Agriculture had to acknowledge the sordid fact that "innumerable people are born in debt, live in debt and die in debt, passing on their burden to those who follow."[1] The situation has not improved much after independence because the relationship between land and the people has not changed substantially despite the changes introduced by the much publicised land reform legislation. The zamindari abolition laws despite their professed goal of zamindari abolition, maintained it, albeit in a different form and the ceiling laws virtually made the state play the role of a middleman in the transaction of sale of a little quantity of unproductive land by the land holders to the poor allottees of the weaker section of the rural society.[2] The debt relief laws enacted to lessen the debt burden of the rural people particularly the agricultural labourers, artisans and the small farmers, seem to supplement the land reform measures. The effort here is to analyse these laws and their effects on the poor rural people in the given rural set-up. It would be worthwhile to mention in this respect that even after the implementation of the land reform measures, with the feudal intermediaries and their henchmen dominating the rural scene, the rural set-up continues to have feudal relationships. Indeed, the rural society with a large number of bonded labourers, agricultural labourers, tenants and small and marginal farmers on the one hand and a small class of big land holders with all their money and muscle power on the other, can unfold no other relationship. The little penetration of capital in agriculture has not been able to make any change in the rural relationships. The experience shows that such a system has its own limitations for development and the welfare laws operating in such set-up not only become circumscribed by such limitations but often are designed in line with such limitations. The debt relief measures are no exception to this.

I. The Dimensions of Rural Indebtedness

The poor rural people mostly needing credit for their daily needs and for special purposes like marriage and other ceremonies are mainly indebted to employers, traders, money lenders, friends, relatives, landlords, Government, cooperative societies, commission agents and commercial banks. Though, in the past they owed debt mostly to agriculturist and professional money landers, gradually they also became indebted to institutions like cooperatives and the commercial banks. The *All India Debt and Investment Survey* 1981-82 revealed that the percentage of cash dues outstanding against institutional agencies in respect of rural household was 61.2 percent. Among them the share of cooperatives was highest at 28.6 percent followed by commercial banks including regional rural banks (28.0 percent). Dues against the Government were only 4.0 percent. On the other hand, the dues outstanding against the non-institutional agencies were 38.8 percent, out of which 8.6 percent were against the agricultural money lenders, 8.3 percent against the professional money lenders, 4.0 percent against landlords, 3.4 percent against traders, 9.0 percent against relatives and friends, 4.9 percent against other sources and 0.6 percent against sources not specified.[3]

It may be pointed out that though the percentage share of dues against the non-institutional money lenders is comparatively less than that of the institutional agencies, still the agriculturist money lenders, professional money lenders, landlords and traders share nearly 1/4th of the total dues. This is a pointer to the fact that the institutional agencies have not penetrated much in the rural society particularly among the non-cultivators in respect of whom the percentage of dues is only 36.8 percent compared to cultivators in respect of whom the dues are 63.3 percent.[4]

The *Survey report* shows that at the all India level the percentage of indebtedness among the cultivator households was 22.34 percent as against 12.35 percent among the non-cultivator households. Statewise, the highest percentage of indebtedness was found in Tamilnadu (28.69) and the lowest in Assam (4.81).[5] So far as the purpose of debt is concerned, it came to light that in the case of rural cultivators, the percentage of loan for farm business was 63.8 percent while in the case of rural non-cultivators, it was only 14.3 percent. But the percentage of loan for household expenditure in the case of non-cultivators was much more being 51 percent and it was only 20 percent in case of cultivators.[6]

Thus, both cultivators and non-cultivators took loan merely for subsistence. The fact that the percentage of such a subsistence loan was much more in case of non-cultivators, is indicative of their resourcelessness.

II. The Legislative Trend

A. Pre-Independence Legislation

Historically, the legislative activity regarding indebtedness appears to have started more than a century back in colonial times with the enactment of the Encumbered Estates Relief Acts and the Court of Wards Acts between 1860 and 1890 empowering the courts, *interalia*, to determine the amount of principal and fix instalments for paying the debts.[7] However, it was the Deccan Agriculturists Relief Act, 1879 which provided for consideration by courts of history of debt transactions and determination of amounts of principal and interest separately disallowing conversion of accumulated interest into principal. Later, the Usurious Loans Act, 1918 empowered the Court to reopen the transaction in case of the interest being excessive and the transaction being substantially unfair and relieve the debtor of the liability to pay the excessive interest.[8] The Act, however, did not prescribe any limit beyond which the interest could be considered as excessive. Needless to say, these and other measures, taken between 1860 and 1930 with a view to assuage the feelings of discontent among the peasantry could not mitigate their heavy debt burden.[9]

The debt measures between 1930-1946 passed in different states shifting a bit from earlier ones mainly provided for moratorium, conciliation and compulsory reduction of debts. The moratorium laws sought to stay the proceedings against the agriculturist debtors in respect of debts or arrears of rent *etc.* and to prevent the transfer of land or other assets of the debtor to the creditor for a certain period.[10] The debt conciliation measures attempted to make settlements of debts between creditors and debtors enabling the debtors the repayment of debts within a certain time.[11] The legislations regarding compulsory reduction of debts and redemption of mortgages were mainly concerned with the determination of principal and interest by the judicial authorities, compulsory reduction and scaling down to debts, payment of debts in instalments, redemption of mortgages and protection of the debtors' land and other assets.[12] The Madras Agriculturists Relief Act, 1938 also provided for discharge of debt in case the agriculturist had paid twice the amount of the principal to the creditor.[13] But such a discharge was indeed penal for the debtor and beneficial for the creditor as the debtor was forced to pay an extra amount equivalent to the principal for being able to be discharged. These laws, however, being *status quoist* and litigation oriented, were more in favour of the creditors than the debtors.

B. Post Independence Legislation

Various debt relief laws enacted by different states[14] after 1947 though seem to depart somewhat from those enacted in pre-independence period, yet basically they retain the colonial linkage. These laws either discharge the

debtor or provide for the reduction or scaling down of the debt.

(i) The Penal Discharge

The laws wholly discharging the debt though appear to wipe off the total liability of the debtors, a close look at these laws reveals that such a discharge is more tilted towards the creditors. For instance, the Punjab Agricultural Indebtedness (Relief) Act, 1975 wholly discharged a debtor,[15] of his debt owed by him on the commencement of the Act,[16] but in case of the debtor being a small farmer,[17] the debt was to be wholly discharged only if the small farmer had, in the discharge of his debt, paid a sum exceeding or equivalent to one and a half time the amount of debt at any time before the commencement of the Act or after the commencement, he had paid a sum which together with any sum already paid in the discharge of such debt was equivalent to one and a half times the amount of debt. The Act, thus, forced a small farmer to pay an extra sum of fifty percent of the amount of debt although he might have already paid the whole amount of debt at the commencement of the Act. This indeed makes the intentions of this so-called beneficial measure questionable. The Act, thus legalised the payment of the excess amount and thereby imposed a penalty on the debtor in the grab of discharging the debt.

Though the Andhra Pradesh Agricultural Indebtedness (Relief) Act, 1977 and the *Madhya Pradesh Gramin Rin Vimukti Adhiniyam,* 1982 did not make any such difference between small farmers and other debtors, they were narrow in application. Under the Andhra Act, every debt including interest, if any, owing to any creditor by an agricultural labourer,[18] a rural artisan[19] or a small farmer[20] was deemed to be wholly discharged[21] and the civil courts were barred from entertaining any suit or other proceeding against the debtor for the recovery of any amount of the debt, including the interest.[22]

Likewise, under the M.P. Act referred above, every debt advanced before 16th August, 1982 including the amount of interest payable by a marginal farmer, a landless agricultural labourer, a rural artisan and small farmer to a creditor was deemed to be wholly discharged and the jurisdiction of the civil courts was barred in this respect.[23] But in view of the fact that they were defined narrowly, the coverage of the Act was obviously less. For instance, a marginal farmer was defined as a person holding agricultural land not exceeding one hectare of irrigated or two hectares of unirrigated land in case of a member of Scheduled Caste or Tribe and not exceeding half hectare of irrigated or one hectare of unirrigated land in case of other persons.[24] Here the coverage has been further narrowed down in case of marginal farmers not belonging to Scheduled Castes or Scheduled Tribes. Besides, both the Andhra and M.P. Acts mentioned above disentitled the debtor for refund of any payment towards the debt,[25] even though he might have repaid quite in excess of the amount of

principal and interest. Even the total discharge of debt was, thus, geared to suit the creditors. The sphere of these laws becomes further limited wherein monetary limit of income of the debtors was prescribed for the applicability of these laws. For instance, the Gujarat Rural Debtors Relief Act, 1972 wholly discharged the debt of only that debtor (being a marginal farmer or rural labourers or rural artisan) whose income did not exceed Rs. 2,400/- per year. Moreover, the debtors of these categories falling in the income bracket of Rs. 2400/- to Rs. 4800/- could be deemed to be wholly discharged if such debtors had already paid an amount equal to or exceeding twice the amount of the principal and in any other case was deemed to be reduced to one half of the recognised debt, provided that the amount which remained to be paid by the debtor did not exceed twice the amount of the principal.[26] By fixing the limit for discharge of the debt at twice the amount of the principal and making provision for refund of amount only in excess of twice the principal by the debtor,[27] the Act allowed the creditor to retain not only the principal amount but also an equal sum in addition to the principal amount of debt, thus obligating the debtor to repay the debt twice. This is not only against the tenor of beneficient legislation but also unfair, causing injustice to the poor debtors. These laws, thus, do not appear to depart in any significant respect from the colonial laws in that the similar provision existed in the Madras Agriculturists Relief Act, 1938 providing for discharge of debt if it exceeded twice the amount of the principal.[28]

(ii) The Dubious Scaling Down

The laws providing for adjustment and scaling down of the debts are of much limited efficacy in comparison with the laws discharging the debts in view of the fact that the debtor had to pay to the creditor even after the enactment of the Act although he might have already paid much more than the principal amount. For instance, the Mysore Agricultural Debtors Relief Act, 1966 provided for reduction of debts by forty percent in the case of transaction which commenced before the 1st January, 1941 and by thirty percent in the case of transactions commencing on or after the 1st January, 1941, but before the 1st January, 1950.[29] The Act allowed for scaling down the amounts due under Section 21 from a debtor pro rata to his paying capacity in case of unsecured debts. But if the debts were secured, such debts could be so scaled down only if the total amount of such secured debts was more than sixty percent of the value of the property belonging to the debtor. In case the debts were both secured and unsecured, the secured debts were to be further scaled down pro rata to sixty percent of the value of the property on which such debts were secured if the total amount of secured debts was more than sixty percent of the value of the property on which such debts were secured. The unsecured debts were scaled down pro rata to sixty percent of the value of the other property

belonging to the debtor over which no debts were secured.[30]

The Mysore Act though passed in 1966, reduced the debts incurred during 10 years only upto 1st January, 1950 and left out of its coverage a long period of sixteen years before its enactment. Moreover, its provisions for scaling down of the debt to the paying capacity of the debtor appear to be vague and have the consequence of involving the poor debtor in unnecessary litigation as before scaling down of the debt, paying capacity of the debtor had to be determined by the court. The Act was already limited in application not only in confining to debtors of a particular category[31] but also in limiting the amount of debt to Rs.20,000/-.[32]

(iii) Facilitating the Creditor

There are, then, laws which merely facilitated the debt repayment by the debtor without having regard to his or her paying capacity. For instance, the Kerala Agriculturists Debt Relief Act, 1970 made provisions for payment of debts in instalments and the deposit of debts in court. Generally, if any debt was repaid in seventeen equal half yearly instalments together with interest on the principal outstanding at the time of each payment, the whole debt was deemed to be discharged.[33] In case of the creditor being a banking company, such instalments were to be twelve in respect of the debt amount upto Rs.3,000/- and eight if the debt amount exceeded Rs.3,000/-. This indeed appears to be quite unreasonable. However, the provision that in case of default in payment of three consecutive instalments, the whole debt together with interest became payable forthwith,[34] indicates that the aim of the law was basically not to protect the poor debtors but to facilitate the recovery of debt by the creditors. There appears to be no other plausible explanation for the insertion of this penal provision. Moreover, the provision regarding the settlement of the liabilities of the debtor,[35] unable to pay his debts, proves this with added force. In leaving only one-fourth of the entire assets, not exceeding Rs. 6,500/- in value, and allowing for distribution of the rest three-fourth of the assets among the creditors,[36] the Act makes its intention quite clear. In the garb of giving relief to the poor debtor it made him pauper by usurping his meagre assets. Again, these measures being litigation oriented, are obviously more suited to the wealthy creditors in a legal system of adversary litigation. Section 18 of the Act already excluded from its benefits an agriculturist who with a view to defeat or delay his creditor had voluntarily transferred any interest in immovable property within six months immediately preceding the date of publication of the Kerala Agriculturists' Debt Relief Bill, 1968 in the Gazette.

The *Madhya Pradesh (Anusuchit Jati Tatha Anusuchit Jan Jati) Rini Sahayat Adhiniyam*, 1967 enacted for the relief of indebtedness of members of Scheduled Castes and Scheduled Tribes, speaks in the same tone. The Act

made provisions for the establishment of Debt Relief Courts,[37] and empowered them to reopen all transactions made 34 years before the last transaction or before 1st January, 1964 in relation to members of Scheduled Tribes and before 1st January, 1966 in relation to members of Scheduled Castes whichever was earlier and to ascertain the amount of principal actually paid to the debtor and the date on which it was originally advanced, calculate the interest[38] as also to prepare a scheme of repayment of the debt.[39] However, the laudable motive of these laws was belied in view of the fact that in case of non-payment of any instalment by the debtor before the due date, such an instalment became recoverable by the Collector or the authorised Revenue Officer as an arrear of land revenue.[40]

III Conclusion

These laws, thus, remained pro-creditor in approach inspite of having the nomenclature of debt relief laws. Although every care was taken to see that the creditor got back his principal sum alongwith the interest thereon, these laws generally did not provide for taking back the excess amount paid by the debtor to the creditor. Instead, they penalised the debtor by disentitling him to take refund of any part of a debt already paid by him or recovered from him before the commencement of the laws.[41] The *M.P. (Anusuchit Jati Tatha Anusuchit Jan Jati) Rini Sahayata Adhiniyam,* 1967, however, empowered the Debt Relief Court to pass necessary order directing the creditor to refund the excess amount to the debtor.[42] But the Gujarat Act, 1976 though having provision for refund, did so in respect of the amount exceeding twice the amount of the principal paid by or recovered from the debtor before the appointed day.[43] This, means that the creditor could retain not only the principal sum but also an amount equivalent to the amount of the principal. This excess amount with the creditor could be nothing but the usurious interest which the Act allowed in the name of giving debt relief. This was so inspite of the fact that these laws were mainly intended to save the poor debtors from the clutches of the greedy money lenders and landlords since they generally left out of their purview the institutional creditors like banks, cooperatives and governments.[44]

It would, thus, appear that in the garb of saving the poor debtors from exploitation, these laws were twisted to suit the creditors and could hardly stand upto their avowed aim. Needless to say, being limited to particular periods and not touching the basic relationship in the rural set-up, these laws could not benefit the rural poor.

Notes and References

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1. *Report of the Royal Commission on Agriculture* (1928) cited in Agricultural Labour Enquiry, Government of India; *Report on Intensive Survey of Agricultural Labour*, 1 All

India (1950-51) at 55.

2. Vijay Kumar, *The continuation of Zamindari by the Zamindari Abolition Laws*, 13-15 Kurukshetra University Law Journal (1987-89); *Fallacy of Distributive Justice in Land Relations in Rural India*, 34 Journal of Indian Law Institute (1992).

3. *Report of the All India Debt and Investment Survey*, 1981-82; *Assets & Liabilities of Households as on 30 June 1981*, R.B.I., Department of Statistical Analysis & Computer Services, Bombay, 38 (1987).

4. *Ibid.*

5. *Id.* at 31.

6. *Id.* at 57.

7. *Agricultural Legislation in India, Government of India*, 8 Relief of Agricultural Indebtedness (1958) at IX.

8. Section 3 of the Act.

9. *Supra* n. 7 at XXVII.

10. *Id.* at X.

11. For instance, see The Central Provinces Debt Conciliation Act, 1933; The Punjab Relief of Indebtedness Act, 1934; The Bengal Agricultural Debtors Act, 1935 and The Madras Debt Conciliation Act, 1936.

12. For instance, see The U.P. Agriculturist Relief Act, 1934; The Madras Agriculturist Relief Act, 1938; The Punjab Debtors' Protection Act, 1936 and The U.P. Debt Redemption Act, 1940.

13. See Section 8(2) of the Act.

14. The matter pertaining to relief of agricultural indebtedness falls under Entry 30 of List II-the State List of the Seventh Schedule to the Constitution.

15. A 'debtor' has been defined to mean a rural artisan (not holding any agricultural land and not owning assets exceeding Rs. 50,000/- in value) primarily engaged in production of repair of traditional tools or other things used for agricultural purposes or earning his livelihood by practising a craft in the rural area and includes agricultural labourers, not owning any agricultural land and not owning assets exceeding Rs.50,000/- in value.

16. See Section 4 (a).

17. A 'small farmer' means a person who owes a debt and who earns his livelihood mainly by agriculture and (a) who owns agricultural land not exceeding two hectares or (b) whose total assets do not exceed Rs. 50,000/- in value.

18. An 'agricultural labourer' was defined to mean a person who did not hold any agricultural land and whose principal means of livelihood was by manual labour on agricultural land in the capacity of a labourer on hire or on exchange whether paid in cash or in kind or partly in cash and partly in kind. See Section 3 (b) of the Act.

19. According to Section 3(r) 'rural artisan' means a person who does not hold any agricultural land and whose principal means of livelihood is production or repair of traditional tools, implements and other articles or things used for agriculture or purposes ancillary thereto, and includes a fisherman and any person who normally earns his livelihood by practising a craft either by his own labour or by the labour of all or any of the members of his family in rural area.

20. In terms of Section 3 (t) a 'small farmer' means a person whose principal means of

livelihood is income derived from agricultural land either by personal cultivation or as a tenant or share cropper or mortgagee with possession, the area of such land not exceeding one hectare of wet land or two hectares of dry land in the case of persons other than the members of the Scheduled Tribes and two hectares of wet land or four hectares of dry land in the case of the members of the Scheduled Tribes. This definition excludes a person whose annual household income other than from agriculture exceeds Rs. 1200/- in any two years within three years immediately preceding the commencement of this Act.

21. See Section 4(1), THE ANDHRA PRADESH AGRICULTURAL INDEBTEDNESS (RELIEF) ACT, 1977.
22. *Id.* Section 4(2) (a).
23. See Sections 3 (a) and 3 (b), *M.P. Gramin Rin Vimukti Adhiniyam,* 1982. Earlier the *Gramin Rin Vimukti Tatha Rin Sthagan Adhiniyam,* 1975 discharged debts advanced before its commencement on 16th October, 1975 including the amount of interest payable by marginal farmers, landless agricultural labourers and rural artisans.
24. See Section 2(g), *M.P. Gramin Rin Vimukti Adhiniyam,* 1982. Section 2(1) of the Act defines a 'small farmer' as a person holding agricultural land not exceeding two hectares if irrigated or not exceeding four hectares if unirrigated in case of a member of a Scheduled Caste or Scheduled Tribe and not exceeding one hectare if irrigated and two hectares if unirrigated land in case of others.
25. Explanation to Section 4, THE ANDHRA PRADESH AGRICULTURAL INDEBTEDNESS (RELIEF) ACT, 1977 and explanation to Section 3, the *M.P. Gramin Rin Vimukti Adhiniyam,* 1982.
26. Section 3.
27. Section 4, THE GUJARAT RURAL DEBTORS RELIEF ACT, 1972.
28. Section 8(2) of the Act.
29. Section 21.
30. Section 30, the MYSORE AGRICULTURAL DEBTORS RELIEF ACT, 1966.
31. *Id.,* Section 2(5). An indebted individual agriculturist not having an aggregate annual income exceeding Rs.5000/- and an indebted Undivided Hindu Family not having an aggregate annual income exceeding Rs.10,000/- transferring their land as a mortgage, being the debtors come within the purview of the Act.
32. *Id.,* Sections 11 and 19.
33. Section 4(2), KERALA AGRICULTURISTS DEBT RELIEF ACT, 1970.
34. *Id.,* proviso to Section 4(5).
35. *Id.,* Section 16.
36. *Ibid.*
37. Section 4, *Madhya Pradesh (Anusuchit Jati Tatha Anusuchit Jan Jati) Rini Sahayata Adhiniyam,* 1967.
38. *Id.,* Section 14.
39. *Id.,* Section 15.
40. *Id.,* Section 17 (1).
41. For instance, see Section 51, THE PUNJAB AGRICULTURAL INDEBTEDNESS (RELIEF) ACT, 1975; explanation to Section 4 of THE ANDHRA PRADESH AGRICULTURAL INDEBTEDNESS (RELIEF) ACT, 1977; and explanation to Section 3 of the *M.P. Gramin Rin Vimukti Adhiniyam,* 1982.

42. Section 14 (7).
43. Section 4, The Gujarat Rural Debtors' Relief Act, 1976.
44. Section 3, The Punjab Agricultural Indebtedness (Relief) Act, 1975; Section 3(1), The A.P. Agricultural Indebtedness (Relief) Act, 1977; Section 5, *M.P. Gramin Rin Vimukti Adhiniyam*, 1982;Section 27, The Gujarat Rural Debtors' Relief Act, 1976; Section 2(4), The Kerala Agriculturists Debt Relief Act, 1970; and Section 6 of *The M.P. (Anusuchit Jati Tatha Anusuchit Jan Jati) Rini Sahayata Adhiniyam*, 1967.

BORDER MEASURES FOR TRADE MARKS IN INDIA AND TRIPS

*Ashwani Kumar**

The law relating to import of goods in India is governed, *interalia*, by Foreign Trade Regulation Act, Customs Act, Import Policy and Tariff Act. The law does not prohibit import of any goods applied with particular trade mark. Though the tariff chargeable for any particular goods may be higher for the goods bearing some prestigious trade mark yet all imports under any trade mark are subject matter of regulation by law to protect rights of trade mark owners or to protect public from false trade marks or from false trade descriptions by virtue of a notification under Customs Act and Section 118 of Trade and Merchandise Marks Act, 1958 (hereinafter referred to as TMMA).

I. Import of Trade Marked Goods

The Central Government is empowered[1] to prohibit, by notification in the official gazette, the import or export of any goods for the protection of the patents, trade marks and copyrights. The Central Government has prohibited by notification[2] issued under Section 11 of Customs Act *inter alia* the import into India of the following goods:

i. ...

ii. ...

iii. ...goods having applied thereto a false trade mark within the meaning of Section 77 of the TMMA;

iv. goods having applied thereto a false trade description within the meaning of clause (f) of sub-section (1) of Section 2 of the TMMA, otherwise than in relation to any of the matters specified in sub-clauses (ii) and (iii) of clause(u) of that sub-section;

v. goods made or produced beyond the limits of India and having applied thereto any name or trade mark being, or purporting to be, the name or the trade mark of any person who is a manufacturer, dealer or trader in India unless—

(a) the name or trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of India, and

(b) the country in which that place is situated is in that indication, indicated in letters as large and conspicuous as any letter in the name or trade mark, and in the English language;

vii. goods which are required by a notification under Section 117 of the TMMA to have applied to them an indication of the country or place in which they were made or produced or the name and address of the manufacturer or the person for whom the goods were manufactured, unless such goods show such indication applied in the manner specified in the notification;

viii. ...

The notification does not prohibit import of any goods into India for the reason that they are applied with a trade mark but the trade mark on goods imported should not be false.[3] The law also prohibits importation of goods bearing a false trade description as required by the notification under Section 117 of the TMMA.

II. Import of Goods Applied with a Name or Trade Mark Similar to one Already Operating in India

Presently, even the goods applied with Foreign Registered Trade Marks which are similar or identical to the trade marks of any person in India, irrespective of the fact that the Indian person has any affiliation, business connection or parent- subsidiary relationship with the foreign supplier, are allowed to be imported subject to two conditions. In other words, clause V of the above referred notification specifically allows the parallel importation[4] of the same or identical Foreign Registered Trade Mark into India.

The conditions on 'parallel importation' of goods applied with a Foreign Registered Trade Mark are, that such goods should have an indication of the country, where the Foreign Registered Trade Mark enjoys protection, in letters as large and conspicuous as any letters in the trade mark and in the English language.

If these two conditions are not fulfilled, such a Foreign Registered Trade Mark having an identical or similar Indian counterpart, may amount to falsification of the Indian trade mark.[5] The notification issued under the Customs Act, 1962 allows importation of goods applied with identical or similar trade marks but can not mitigate the rights of identical trade mark right holder in India.

There is a need to protect the trade mark rights holder in India whether it be a FTM or domestic trade mark. The trend in the United States and the United Kingdom is not to allow parallel imports, of the identical or similar trade mark, even when parties derive the title to the trade mark from same source without

the permission of the right holder in the country of import.

III. Import of Goods Bearing False Trade Marks

The goods bearing false trade marks cannot be imported into India.[6] The trade marks of foreign origin which enjoy protection in India are essentially Indian trade marks, but are popularly known as FTMs. The goods applied with FTMs, and covered within Section 77 of the TMMA, cannot therefore be parallely imported into India. If a FTM is falsified abroad, such goods will not be released by the customs into the territory of India. Necessarily false trade mark would be considered with reference to the marks in India under Section 77 and not the marks registered elsewhere.

Intervention By Custom Officers

Section 118 of the TMMA, facilitates the stoppage of entry of goods bearing false trade marks into India. Any person can make a representation to the Chief Customs Officer that the trade marked goods being imported into India are applied with a false trade mark.[7] The goods bearing a false trade mark or false trade description are prohibited to be imported into India, and are liable to be confiscated.[8]

The Chief Customs Officer upon such representation, if he has reason to believe that the trade mark may be false, may require the importer or his agent to produce any documents in his possession relating to the goods and to furnish information as to the names and addresses of the consigner and consignee of the goods.[9] If the importer fails in furnishing the documents and information, he is punishable with fine.[10]

The Chief Customs Officer is permitted to part with the above information in favour of the registered proprietor or registered user[11] implying thereby that the proprietors of unregistered trade mark may not be entitled to receive the information. Narayanan opines that the Customs Officer is not prohibited from communicating the information to the proprietor of an unregistered trade mark.[12] The proprietors of Indian trade marks including the FTMs are facilitated to take action against the overseas counterfeiters.

The proprietor of a Foreign Registered Trade Mark not registered or used in India may not be in a position to complain to the Customs Officer under this provision. The falsification of the Foreign Registered Trade Mark does not come in the purview of the definition of the False Trade Marks under the TMMA.[13] Equally, the Foreign Registered Trade Mark goods being imported pursuant to clause V of the notification, shall not amount to importation under a false trade mark, inspite of the fact that the Foreign Registered Trade Mark is similar to the Indian trade mark.

It is suggested that the notification issued under the Customs Act is obsolete and does not protect the trade marks including FTMs of this country. The notification which is a piece of delegated legislation is in conflict, with Sections 11, 12 and 28 of the TMMA. The Government should suitably amend the notification to safeguard the trade marks right holders in India whether of the FTM or a domestic trade mark. If it so desires it may provide for international exhaustion of the trade mark rights,[14] but allowing the imports simpliciter of an identical foreign mark is not fair in the interest of the trade marks rights holders in India. It needs to be emphasised that the TMMA is binding on the Government[15] and any notification under the Customs Act can not be allowed to conflict with the TMMA.

It is further suggested that if the Indian trade mark owner derives title from the same source or owner of the mark, his capacity to object to parallel imports should be curtailed; more so if the denial of parallel imports will increase the price of those goods in India. On the other hand, if the Indian trade mark owner is independent of foreign right holder, it is the duty of the Government to protect his exclusive right in the Indian territory. Such imports may cause confusion and deception in the public mind and the market. The independent Indian right holder should be in a position to restrain the import of goods with a similar mark. In any case it appears that such an independent right holder would be in position to obtain injunction against sale and advertising of such imported trade marked goods. Such imports would also constitute unfair competition to the Indian right holder.

IV. Prohibition as to Representation as Registered Trade Mark

In India, only those trade marks can be represented as registered which are entered in the 'register'[16] of the Trade Marks referred to in Section 6 kept at the Trade Mark Registry. Section 81 (2) enacts penalty for falsely representing that a trade mark is registered in India if it is not so entered in the register.[17]

A trade mark which has been registered elsewhere than India can be represented as registered trade mark in India as follows: Section 81(3) carves out an exception. The goods bearing the trade mark of foreign registration representing the trade mark as registered in another country, should sufficiently indicate so.[18] If the word or expression, used to suggest a foreign registration is delineated in as large characters as that of the trade mark, it is not treated as false representation as to registration of the trade mark.[19]

Section 81(3) of the TMMA does not envisage any preventive or punitive action against the parallel presence in the market of the trade marks registered in foreign countries which might be similar to Indian trade marks (including FTMs). As stated above, imports under the trade marks of foreign origin,

identical to that of the Indian trade marks are authorised as per the notification issued under the Customs Act, 1962.

Though the TMMA in Section 81(3) enacts that a trade mark registered in a foreign country would not offend the law if the country of registration is conspicuously stated. But Section 81(3) does not purport to impinge the monopoly right conferred by Section 28(1) as to the use of the trade mark registered in India. If the title to the trade mark is not derived by the Indian owner from the same source, as that of the exporter of identical Foreign Registered Trade Mark,[20] there is no justification for diluting the exclusive right of Indian rights holder. It also amounts to implied recognition of all the trade marks registered in foreign countries without paying even the registration fee to the Indian Trade Marks Registry.

V. Border Measures Under Trips Agreement

The Agreement on TRIPs is divided into eight parts and each part is divided into sections containing 73 Articles in all.

Part I of the Agreement, containing Articles[21] 1 to 8, contains general provisions and basic principles. Article 1 details with the nature and scope of the obligations by stating that member countries[22] shall be free to determine an appropriate method of implementing the provisions within their own legal system and practice. Members are not obliged to give more protection than required by this Agreement[23] which is the touchstone for the intellectual property protection.

A. Enforcement of the Intellectual Property Rights (IPRs)

Part III (Articles 40 to 61) of the proposals on the TRIPs concerns with the enforcement of the IPRs in member countries. Article 41 lists the general principles which run through the rest of articles requiring the members to provide for the following in their national laws so as to ensure effective action for enforcement of the IPRs with a view to :

1. curbing the infringement of the IPRs (Article 41 (1));
2. deterrents to curb further infringements (Article 41 (1));
3. avoid the creation of barriers to legitimate trade (Article 41 (1));
4. provide safeguards against the abuse of the IPRs;
5. to avoid unnecessary costs or delays (Article 41 (2));
6. to avoid unreasonable time limits (Article 41 (2));
7. reasoned decisions, after hearing and furnishing of the evidence (Article 41(3));

8. minimum one review by the judicial authority except in the cases of acquittal in criminal cases (Article 41 (4)).

Para 5 of Article 41, recognises the sovereignty[24] of the members, by stating that there is no obligation on the members to create a separate judicial system for the IPRs protection distinct from that for the enforcement of laws in general. Nor does it prescribe any distribution of resources between the enforcement of the IPRs and the enforcement of other laws.

B. Border Measures

Articles 51 to 60 list special requirements to be taken as border measures. More important of the obligations contained in TRIPs Agreement are as follows.

Subject to *de minimis* rule enshrined in Article 60, to exclude small quantities of goods of non-commercial nature contained in travellers' luggage or in small consignments, Article 51 prescribes that national laws of member countries should protect industrial property rights at the borders by suspending the release of infringing goods by the custom authorities. A mechanism is proposed wherein the customs are required to suspend the release of goods, into free circulation if a right holder applicant alleges them to be counterfeit trade mark or pirated copyright goods. It purports to stop the delivery of such goods to the importer, if the applicant right holder[25] states that his rights in the trade mark under the law of the country of import, is likely to be infringed.

Article 51 desires the member countries that they may make such provisions for curbing the infringement of other IPRs. They may also make provision to suspend the release of infringing goods destined for exports from their territories. In case of counterfeit trade marks or pirated copyright goods such enabling provision is made essential.

Articles 52 to 60 endeavour to prescribe the detailed model law for effective implementation of the principle enshrined in Article 51. The definition of 'counterfeit trade mark' reads:

> For the purposes of this Agreement:
>
> ... counterfeit trade mark goods shall mean any goods, including packaging, bearing without authorisation a trade mark which is identical to the trade mark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trade mark, and which thereby infringes the rights of the owners of the trade mark in question under the law of the country of importation.[26]

Essentially, this means that the parallel imports can be restricted by the right holder[27] as they may not be authorised by the right holder in the country

of importation. It has been seen that more often the restriction on parallel imports operates against the interests of the developing countries, and in such a situation instead of source/origin function, the trade mark rights perform a property function. The attempts to mitigate against restriction on parallel imports by the application of international exhaustion of rights are also frustrated by insertion of Article 6. An authorised application of the trade mark in one country could be unauthorised in another importing country, and as per the present definition it may be treated as counterfeit trade mark goods.

It is submitted that there ought to be provision like preferential treatment in case of parallel exports to the developed countries from the developing countries. It should also be appreciated that parallel imports into the developing countries normally introduce cheaper prices except in case the margin is pocketed by the parallel importers.

In relation to counterfeit trade marked goods, there is no conflict of opinion and no country officially encourages such an activity. Though, in many developing countries including India such a practice is on an increase. There are no data available except as asserted by various United States studies as to the quantum loss caused to them by counterfeit activity in various countries including India. Such a practice is prevalent in cases of the trade marks which are in actual use in India. The counterfeits are also available in the market where the foreign manufacturer, infact, is not supplying trade mark goods to Indian market.

The above referred notification prohibits false trade marks, but is doubtful that a trade mark validly placed under the authority of the same trade mark owner in a foreign country and carrying the name of that country as place of origin of goods can be treated as the false trade mark, when objected to by an exclusive licensee (right-holder) in India. Whether common control exception as applied in the United States would be followed or there shall emerge an Indian jurisprudence based on the aspirations and needs of the people of India cannot be precisely stated. The exhaustion principle has been ruled out in Article 6. In the present context, when the political authority in the country is weak, it appears that the Government shall fall in line with the demands of the developed economies disallowing any meaningful exercise by the Courts or experts in the country.

The procedure for suspension of release may be summed up as Article 51 enabling an application by the right holder with sufficient description of the goods to make these recognisable by the customs officials. Under Article 52, the customs officers may require, the applicant for suspension of release of goods, to furnish security to protect the defendant from any loss as also to curb the abuse of the IPRs. It is desired by United States that the security should not

be unreasonable which may deter recourse to these procedures. The right holder applicant may request the custom authorities to take ex-officio measures or act on their own initiative to suspend such release of counterfeit trade marked goods.[28] In such a situation, the right holder shall be relieved of the payment of security requirement or payment of compensation for the losses suffered by the defendant importer.[29]

While importer and applicant are to be notified of the suspension of the release,[30] Article 55 prescribes a period of ten working days, for the applicant, after notice of suspension to initiate proceedings to obtain a decision or provisional decision on merits of the case, otherwise the goods shall be released by the customs officials. However, they can in appropriate cases extend the period by ten working days.[31]

Curiously, in case of the IPRs relating to the industrial designs, patents, integrated circuits etc. the suspension provisions in Article 53(2) require that while releasing the goods in favour of the importer on the lapse of period provided in Article 55, the customs authorities can require the defendant importer to furnish security to protect the right holder from any infringement; but no such payment of security by importer is envisaged in relation to the trade marked or copyright goods.

Notes and References

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1. Section 11(1) read with sub-section 2(n) of the Customs Act, 1962. Sections 90 and 92 of TMMA refer to Section 18 of the Customs Act, 1878, (since repealed) Section 11 of the Customs Act, 1962 is a corresponding provision to Section 18 of the Customs Act, 1878.
2. *MF(D.R.) notification No. 1, (Customs) dt. 18th January, 1964* as cited by P. Narayanan, Law of Trade Marks and Passing Off (Calcutta: Eastern Law House, 1991) at 664.
3. The trade marks being territorial in nature, the term false trade mark would derive its meaning from TMMA.
4. Parallel imports have a technical meaning, i.e. when the goods with an identical mark are imported. Normally the identical mark is placed under the authority of the same owner in different countries. Whether the difference in the name of producing country written in as large letters as that of the trade mark, would amount to parallel imports or not, has not been commented upon. If it is to be treated differently, then in India there can be two types of parallel imports.
5. *Infra.*
6. Section 118 of TMMA.
7. Section 118(1) of TMMA.
8. Section 11 of Customs Act read with referred notification.
9. Section 118(1) of TMMA.
10. Section 118(2) of TMMA.

11. Section 118(3) of TMMA.
12. Narayanan *supra* n. 2 at 667.
13. Section 77 of TMMA.
14. Composite view will have to be taken keeping in view Article 6 of the TRIPs and conclusions in relation to the exhaustion principle.
15. Section 130 expressly declares that the provisions of the TMMA are binding on the Government. Even, without this provision the TMMA would be binding.
16. Section 81(1)(a) read with Section 2(p) of the TMMA and explained in Section 81(3) of TMMA.
17. Under Section 81(2) penalty can be imprisonment upto six months or fine upto Rs. 500/- or both.
18. Section 81(3)(b) of TMMA.
19. Section 81(3)(a) of TMMA.
20. That too if it is decided to apply the principle of exhaustion of rights.
21. The references to the Articles in this section are to the Articles of URUGUAY FINAL TEXT, GENEVA, 15th December, 1993.
22. The expression member country will be used as against PARTIES as the term PARTIES can have two meanings - one, used in the sense of referring to any of the members and the other, as PARTIES acting jointly as an organisation, for example, under Article XXV of GATT or as Council in Article 68 of this draft Agreement on the TRIPs.
23. Article 1, para 1.
24. It might be recalled that the GATT under the auspices of which the agreement was negotiated did not prescribe the enactment of new legislation and the compliance was necessary to the extent of executive authority of the Government.
25. Footnote 13 to Article 51, wherein it is the option of right holder.
26. Footnote 14 to Article 51, Annex 1C of TRIPs AGREEMENT of WTO Text.
27. See Ashwani Kumar, *Markets Allocation by IPRs: Grey Goods, Exhaustion principle and India*, in P.S. Sangal and Ponnuswami, ed., INTELLECTUAL PROPERTY LAW, (Delhi, 1994) at 107-119.
28. Article 58.
29. Article 56 requires the applicant to pay compensation to defendant importer for wrongful suspension of release.
30. Article 54 of the TRIPs.
31. Article 55 of the TRIPs.

JUDICIAL REVIEW AND THE CONTRACTUAL POWERS OF GOVERNMENT

Sarbjit Kaur

The 'Administrative Law' is a branch of law which is being increasingly developed to control arbitrary exercise of power by the Government and keep the executive and its various instrumentalities and agencies within the limits of their power. The rule of law which constitutes one of the basic features of the Constitution requires that every organ of the State must act within the confines of the powers conferred upon it by the Constitution and the law, and administrative law is that branch of the law which seeks to ensure observance of the rule of law.

As the concept of an intensive form of Government requires active participation of the State in welfare and service activities, carrying on of any trade or business, aquisition, holding or disposing of property, it becomes necessary for the Government to enter into contract with private individuals.[1] The transactions carried out by the Government with the individuals or industrial or commercial organisations, for the purpose of sale, purchase, construction, aquisition of services are called 'government contracts'. Government has large funds at its disposal. It is the biggest buyer and procurer of supplies and services in many countries of the world. Therefore, the subject of government contracts is becoming more and more important day by day. At the same time there is threat of abuse or misuse of the vast discretionary power conferred on the Government. So, the main problem is how to control the exercise of such vast discretionary power to ensure that these powers are not misused.

Government contracts are not similar in all respects to private contracts as both contractual and administrative powers intersect here.[2] Government occupies a different position as compared to an individual, as it deals with public money. It involves some public interest in it. The law relating to government contracts is not evenly developed in different countries of the world. In countries following civil law system and the United States, this branch of law is very much developed. In France, a distinct branch of law, *Droit administratif* has arisen to take care of distinctive feature of government contracts. However, in India the law relating to the government contracts is still in the process of evolution. There is no separate branch of law dealing

specifically with the government contracts. These are governed both by provisions of the Constitution and general law governing private contracts.

I. Formation of the Government Contracts

The statutory provisions specifically dealing with the government contracts in India are Articles 298 and 299 of the Constitution. Article 298 provides for the power of the Government to enter into contracts. Article 299 (1) contains certain procedural formalities which a government contract must fulfil. These formal requirements are (i) all contracts made in exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be; (ii) all such contracts and all assurances properly made in exercise of that power shall be executed on behalf of the President or Governor, and (iii) it shall be executed by such persons and in such manner as may be directed or authorised by the President or the Governor. However, the constitutional code of public contracts is not complete. For the rights and liabilities of the parties arising under a government contract, the Indian Contract Act, 1872, the Sale of Goods Act, 1930 and a number of other Acts have to be consulted.

Contracts Not in Conformity With Article 299 (1)

A government contract which is not in compliance with Article 299 of the Constitution is void, not even capable of ratification.[3] The question which becomes relevant here is that in the absence of a valid contract, can the party claim compensation under Section 70 of the Contract Act. There are three essential conditions to be fulfilled for application of Section 70 of the Contract Act. Firstly, a person should lawfully do something for another person or deliver something to him. Secondly, in doing so, he must not intend to act gratuitously and thirdly, the other person for whom something is done or to whom something is delivered must enjoy the benefits thereof. If these three conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the things done or delivered.

The question of relationship between Article 299 (1) and Section 70 was discussed elaborately by the Supreme Court in *State of West Bengal* v. *B.K. Mondal & Sons*[4] where the court said that the fields covered by the two provisions are separate and distinct. Article 299 (1) deals with contracts and provides how they should be made, while Section 70 deals with the cases where there is no valid contract and provides for compensation to be paid in a case where the three requisite conditions prescribed by it are satisfied. So, according to the court, there is no conflict between the two provisions. Section 70 in no way detracts from the binding character of Article 299 (1) nor does it amount to circumvention of Article 299 (1) in any way. It may, rather, be read as

supplementing the provisions of Article 299 (1). The court also emphasized that it was necessary to invoke Section 70 both as a matter of administrative convenience and justice to the people. Like the ordinary citizen even the Government ought to be subject to Section 70 which prevents unjust enrichment.

Same view was reiterated by the Supreme Court in *New Marine Coal* v. *Union of India*[5] where it was held that the Government must make compensation for the coal supplied which had been consumed by it, even though the contract was not in compliance with the requirements of Article 299 of the Constitution.

However, question of applicability of Section 70 of the Contract Act also arises in a situation where a person has done something for the Government under a void contract but the Government has not obtained any benefit under it. As one of the requirements for the application of Section 70 is that the person to whom something is delivered must have enjoyed the benefit thereof. Such a situation came before the Supreme Court in *State of Uttar Pradesh* v. *Murari Lal & Sons.*[6] In that case an officer of the Government Department of Agriculture who was not authorised to sign contracts on behalf of the Government contracted for a space in cold storage for potatoes from the Agriculture Department, which never came. The proprietors sued for damages which they suffered for keeping the space vacant. The Supreme Court held that since the requirement of Article 299 are not complied with, the contract was void and was also not capable of ratification, which presupposes a valid contract. Section 70 of the Contract Act was also not applicable as the Government had not derived any benefit under the contract.

Therefore, regarding the liability of the Government, the position as it emerges is that a government contract which does not comply with the requirements of Article 299 of the Constitution is void, not even capable of ratification and the party shall have no claim whatsoever either against the Government or the officer except where the Government has taken any benefit under the contract. This state of law is entirely unsatisfactory. As the proprietors, in *Murari Lal, supra,* who kept their space vacant under a contract with the Government officials were compelled to suffer a loss without any remedy, simply for the reason that the officer of the government department was not authorised to enter into a contract on behalf of the Government.

In *State of Bihar* v. *Hindustan Agencies*[7], a Government official entered into a contract with the respondants for supply of pipes. The same was done without inviting tenders. No advertisement in the newspapers was published to invite tenders for supply of pipes. It was found that the Government official had no authority to place the order, the rules and regulations were also violated.

Therefore, the Government cancelled the supply order made by an officer of the government department not authorised to do so. Again innocent respondants were forced to suffer harm.

In the age of intensive form of Government, it is not possible for anyone to keep himself uptodate with the list of Government officials authorised to negotiate public contracts in various departments. The main reason for such a difficulty with the law relating to government contracts is that there is no distinct branch of law dealing specifically with the government contracts. The government contracts are governed both by the provisions of the Constitution and the general law governing private contracts. The application of general law governing private contracts to the government contracts as well is the root cause of the problem as by such application injustice and arbitrariness is bound to occur. In countries following civil law system, there are separate and specific statute dealing with every aspect of government contracts. In the absence of special law dealing specifically with the government contracts it is for the courts of India to pay attention towards the applicability of general law governing private contracts to public contracts as well and try to mitigate the hardships to the innocent public.

II. Judicial Review and the Government Contracts

Although this cannot be denied that any intensive form of Government cannot function without the conferment of discretionary powers on its officials, but this is also to be accepted that discretion can never be absolute. 'Discretion' here means choosing from amongst the various available alternatives with reference to the rules of reason and justice, and not according to the personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular as Article 14 of the Constitution strikes at arbitrariness in administrative action and ensures fairness and equity of treatment. The important question, therefore, is how to limit and control the powers of extensive form of government, so as to prevent its arbitrary application or exercise and to uphold the rule of law in administration.

The government contracts have often been challenged by the private contractors as being discriminatory and arbitrary and therefore violative of Article 14 of the Constitution. It has been alleged by contractors that their lowest tenders have been wrongfully and arbitrarily rejected[8], the contract which has already been awarded to a particular contractor has been arbitrarily cancelled to prefer another contractor resulting in unequal treatment[9] or sometimes that a particular contractor has been wilfully and arbitrarily blacklisted so as to deprive him from entering into contracts with the Government thereby causing discrimination[10]. The main question herein involved is whether the Government discretion to award contracts is amenable

to judicial review? If yes, to what extent such review is possible?

A. Judicial Review of Government Contracts - A Profile

Formerly, the tendency of the courts was not to interfere with the Government's discretion to award contracts. The reason given was that like an individual, it is perfectly open to the Government to decide with whom it would like to have contractual relationship, as a contract which is held from Government stands on no different footing from a contract held from a private party.

The state of law, however, was unsatisfactory as Government does not occupy the same position as a private individual. Some distinction is inevitable between the position of the Government, whose main concern is the betterment of the society as a whole and an individual who view his own benefit.[11] So, Government has to act as a Government and not as a private trader. Even if a person may not claim a fundamental right to do business with the Government, nevertheless he has a right to be treated fairly and in a non discriminatory manner. It is necessary to ensure that injustice is not to be done to an individual by the State or its instrumentalities.

To a limited extent, the Government's broad power to enter or not to enter into a contract with any person came to be subjected to one restriction by the court in *Eurasian Equipment & Co Ltd.* v. *West Bengal,*[12] Wherein the Supreme Court invoked Article 14 to impose on the Government the requirement of giving a hearing to the person who was being blacklisted by it for entering into contractual relationship. The reason being that a person who is on the approved list of the Government, when blacklisted, becomes unable to enter into advantageous relationship with the Government and a disability is thus imposed on him.

In the landmark case *Ramana Dayaram Shetty* v. *Indian Airport Authority,*[13] the Supreme Court objected to the International Airport Authority entering into a contract for running a cafeteria at the airport with a person who did not fulfil the conditions mentioned in the notice inviting tenders. Bhagwati J. enunciated the crucial principle in this regard as where the Government is dealing with the public, whether by way of giving jobs or entering into contract or granting other forms of largesses, it cannot act arbitrarily at its sweet will. It cannot like a private individual, deal with any person it pleases, but its action must be in conformity with standards or norms, which is not arbitrary, irrational or irrelevant. Same view was taken by the Supreme Court in *M/s Kasturilal* v. *Jammu and Kashmir*[14] that where the Government is dealing with the public, it must exercise its power in non arbitrary manner. It is necessary to ensure fairness in every action of the State.

This principle also flows directly from Article 14 of the Constitution which strikes at arbitrariness in State action and ensures fairness and equality of treatment.[15]

It has been firmly established that the discretionary powers given to the governmental or quasi-governmental authorities must be hedged by standards, procedural safeguards or guidelines, failing which the exercise of discretion and delegation may be quashed by the courts.[16]

With the passage of time, the judicial trends in relation to the government contracts has undergone a substantial change, emphasising more on administrative aspects of Government contracts and moving away from purely law approach. The position now is that the Government no longer enjoy absolute discretion to enter into contract with anyone it likes. The Government has to choose the party in non-discriminatory manner. So having regard to the constitutional mandate of Article 14 and also to the judicially evolved rules of administrative law, the Government must exercise its power in a regular and reasonable manner and not in an arbitrary manner.

B. Limitations and Extent of Judicial Review

Though it is true that every action of the State or public authority whether contractual or public must be open to judicial review, however, courts generally held that the scope of judicial review vary with reference to the type of matters involved. So question arises how far do the public law principles of judicial review apply to the exercise by the government body of its contractual powers? The courts generally find certain inherent limitations in the exercise of that power of judicial review.

There has been a notable increase in the number of reported cases in which the exercise of contractual powers has been challenged on public law grounds, and in several cases the courts have accepted that judicial review is available. However, it would be premature to say that the courts now accept that the contractual powers of public authorities are subject to review in the same manner as other powers of Government. Generally, it is the tendency of the courts to point out some 'public law' element in particular case to remove it from the realm of purely contractual nature and thereby justify its conclusion. The ambivalent attitude of the court is neatly highlighted by the recent Supreme Court decision in *Shrilekha Vidyarthi* v. *State of U.P.*[17] It was a case of mass termination of district government counsels in the State of U.P. In this case the Supreme Court took the view that the contractual powers of public authorities should generally be amenable to judicial review under Article 14 for being arbitrary, yet it sought existence of public element in the instant case to justify its decision. It was a case of non government servant holding a public office, on account of which it was held to be a matter within the public law field.

It is really the nature of its personality as State which is significant and not the nature of its function contractual or otherwise and this should not be the decisive factors for examining the validity of the act. Even assuming that it is necessary to import the concept of presence of some public law element in a state action to attract Article 14 and permit judicial review, the ultimate impact of all actions of the State or public body being undoubtedly on public interest, the requisite public element for that pupose is present also in the contractual matters.[18]

On the question of limits of judicial review, the Supreme Court in *Sterling Computers Ltd.* v. *M. & N. Publications Ltd.*,[19] while holding that the actions of public authorities could be judged and tested in the light of Article 14, laid at the same time that some more discretion should be given to these authorities in contractual matters having commercial element. The public authorities should be given liberty to assess the overall situation for the purpose of taking decision as to whom the contract should be awarded and at what terms, so that they may enter into contract with persons, keeping an eye on the augmentation of the revenue.

The extent of permissible judicial review of State activity in contractual matters was indicated in *Dwarkadas Marfatia and Sons* v. *Board of Trustees of the port of Bombay* [20] by saying that actions are amenable to judicial review only to the extent that State must act readily for a discernible reason, not whimsically for any ulterior purpose. The court in *Mahabir Auto Stores* v. *Indian Oil Corporation*[21] agreed with *Dwarkadas Marfatia* while holding that the scope of judicial review is limited in contractual matters.

What is evident from these two decisions is that the power of Government in contractual matters is reviewable only on the ground of arbitrariness and on no other grounds. The wisdom of the policy or lack of it or the desirability of better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case.

The Supreme Court in *Shrilekha* opined that the scope of judicial review in respect of disputes falling within the domain of contractual obligations might be more limited and in doubtful cases the parties might be relegated to adjudication of their rights by resort to remedies provided in for adjudication of purely contractual disputes.

It is strange why the courts are not in favour of adopting a uniform approach in this regard and thereby subjecting the contractual powers of Government to

judicial review in the same manner as its other powers. When remedies available in private law field are applied to government contractual activities as well, injustice and arbitrariness is bound to occur. It is to be kept in mind that government contract is not similar to contract between private individuals as it involves some public interest in it.

The scope of judicial review of power of the Government in contractual matters came to be dealt elaborately by Mohan, J. in *Tata Cellular* v. *Union of India.*[22] The court was of the view that though the principle of judicial review would apply to the exercise of contractual powers by the government bodies in order to prevent arbitrariness or favouritism, but there are inherent limitations in exercise of that power of judicial review. It is the basic principle of administrative law that by way of judicial review the court is not expected to act as a court of appeal while examining an administrative decision and to record a finding whether such finding could have been taken otherwise on the facts or circumstances of the case. The duty of the court is to confine itself to the question of legality. The rule laid down by the court in this regard is while the court cannot interfere with government's freedom of contract, yet the invitation of tender and its refusal which pertain to public policy must not be decided arbitrarily, unfairly and illegally.

This is a welcome step wherein the court clearly leaned towards the view that all action of the public authorities, whether contractual or public are subject to review in the same manner on the grounds of illegality, irrationality, procedural impropriety, arbitrariness or unfairness. But the position is still uncertain.

C. Present Position in India with Regard to Judicial Review

It is pity to note that in many recent decisions, the Supreme Court has refused to apply public law principles of judicial review to contractual activities of the Government.

In *State of Gujarat and Others* v. *M. P. Shah Charitable Trust and Others,*[23] the Supreme Court refused to allow the writ petition as it was a public law remedy and not applicable in the private law field e.g. where the matter was governed by non-statutory contracts. In this case, the State Government resolved to discontinue the 12 donor seats in M.P. Shah Medical College, Jamnagar. The respondant-trust challenged the resolution by filing writ petition before the High Court. The Court observed that in 1954-55 there was no medical college in Saurashtra and that a college could be established only with the help of donation from Shri M. P. Shah. The provision for nomination by the said donor in consideration of donation, the court held was reasonable. Appeal was made against the decision of the High Court, which was allowed by the Supreme Court. One of the arguments put forward on behalf of the

respondant-trust was that in the facts and circumstances of the case, the contract between the parties could not have been terminated unilaterally without observing the principle of natural justice. The Supreme Court held that there was no substance in the argument that the termination of arrangment without observing the principle of natural justice (*audi alteram partem*) was void. The termination was not a quasi-judicial act; hence it was not necessary to observe the principles of natural justice. It was not also an executive or administrative act to attract the duty to act fairly. It was a matter governed by contract between the parties, therefore, the writ petition being a public law remedy was not available in private law field.

The court in this case relied on *Assistant Excise Commissioner and others* v. *Issac Peter*.[24] In that case, the court took the view that the doctrine of fairness or duty to act fairly and reasonably was the doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action was administrative in nature. Just as principle of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the action is administrative. However, in case of contract freely entered into with the State, there is no room for invoking the doctrine of fairness or resonableness against the party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happened to be the State. In such cases the mutual rights and liabilities of the parties are governed by the terms of the contract and the law relating to the contracts. These contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of State power being involved in such contracts. The State does not guarantee profit to licencees in such contracts. There is no warranty against incurring loses. It is a business for the licencees, whether they make profit or incur loss is no concern of the State.

It would be unreal and non pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State action that are required to be non-arbitrary and justified on the touchstone of Article 14. The requirement of Article 14 and contractual obligations are not alien concepts and can co-exist. Bringing the State action in contractual matters also within the purview of judicial review is inevitable.

III. Conclusion

The aforesaid discussion leads to the inescapable conclusion that the government contracts are neither governed exclusively by the principles of private law nor exclusively by the public law. The contractual relationship between the Government and the contractors is regulated both by the principles

of private law as well as public law, which is sole cause of difficulties with law relating to the government contracts in India. It is unfortunate that there is no separate branch of law dealing specifically with the government contracts, as is *Droit administratif* in France, which has developed to take care of distinctive features of the government contracts. So, it is advisable for our legislatures also to recognise the separate entity of government contracts. In the absence of legislation in this regard role of courts become more important so far as applicability of private law to the field involving public interest is concerned. Judicial review is an important weapon in the hands of courts to check any abuse or misuse of power by the State or its intrumentalities. Although, it is true that the court must not usurp the discretion of the public authority, however, it should also be kept in mind that the discretion can never be absolute under our constitutional scheme. Such discretion must be governed by some norms and procedures in public interest and for public good. There is nothing wrong in imposing legal limits on such authorities by the courts even in contractual matters because the whole concept of unfattered discretion is inappropriate to a public authority, which is expected to exercise such powers only for the public good. It is difficult to appreciate why the simple fact that the power in question is a contractual one should affect the scope of judicial review, where it is admitted that the public interest is involved. The court should adopt the same approach to the judicial review of contractual powers as they do to the review of other activities of the Government. However, there may be valid reasons for limiting the operation of judicial review in specific areas involving the exercise of contractual powers. It may also be necessary to limit content of some of the specific public law doctrines for practical reasons e.g. it may not be practical for all applicants for government contracts to be given a hearing. So, the way left for the courts is to recognise that as a general principle the contractual powers of public authorities are subject to judicial review in the same manner as its other powers which may be negated or limited by specific policy factors.

Notes and References

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1. M.P. Jain and S.N. Jain, Principles of Administrative Law (Agra, Nagpur : Wadhwa and Company, 1993) at 808.
2. *Id.* at 809.
3. See *Mulam Chand* v. *State of M.P.*, AIR 1968 SC 1218.
4. AIR 1962 SC 669; (1962) SCR Supp. 876.
5. AIR 1964 SC 152.
6. AIR 1971 SC 2210; (1971) 2 SCC 449.
7. (1995) 4 SCC (Supp) 607.

8. See *C.K. Achtuan* v. *State of Kerala*, AIR 1959 SC 490; *Trilochan* v. *State of Orissa*, AIR 1971 SC 7333; *Indira* v. *Walaiti Ram*, AIR 1971 SC 2295; *G.E. & Co.* v. *Chief Engineer*, AIR 1974 Ker 23; *Purxotoma Ramanta Quenin* v. *Makan Kalyan Tandel*, AIR 1974 SC 651.
9. *Supra* n. 7.
10. *Punnen Thomas* v. *State of Kerala*, AIR 1969 Ker 81; *Eurasian Equipment & Co. Ltd.* v. *West Bengal*, AIR 1975 SC 266; *Nova Steel (India) Ltd.* v. *MCD and Others*, AIR 1995 SC 1057.
11. *C.K. Achtuan* v. *State of Kerala*, AIR 1959 SC 490; *Punnen Thomas* v. *State of Kerala*, AIR 1969 Ker 81; *Trilochan* v. *State of Orissa*, AIR 1971 SC 733; *Union of India* v. *Walaiti Ram*, AIR 1971 SC 2295; *G.E. & Co.* v. *Chief Engineer*, AIR 1974 Ker 233; *Purxotoma Ramanata Quenin* v. *Makan Kalyan Tandel*, AIR 1974 SC 651.
12. AIR 1975 SC 266. Also see, *Joseph Vilangandan* v. *Executive Engineer*, AIR 1978 SC 930.
13. AIR 1979 SC 1628.
14. AIR 1980 SC 1992.
15. see *E.P. Royappa* v. *State of Tamilnadu*, AIR 1974 SC 555; *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.
16. see *R.R. Verma* v. *India*, AIR 1980 SC 1461; *Subash Chandra* v. *State of U.P.*, AIR 1980 SC 800; *State of Punjab* v. *Gurdial Singh*, AIR 1980 SC 319; *Accountant General* v. *D. S. Dooraiswamy*, AIR 1981 SC 783.
17. AIR 1991 SC 537.
18. *Supra* n. 15.
19. (1993) 1 SCC 445.
20. AIR 1989 SC 1642.
21. AIR 1990 SC 1031.
22. (1994) 6 SCC 651.
23. (1994) 3 SCC 552.
24. Judgement Today (1994) 2 SC 140.

CONVERSION AND POLYGAMY

Sarla Mudgal v. Union Of India, 1995 (3) Scale 286 — A Comment

*Usha Tandon**

Marriage laws in India have unequivocally shown a clear preference for monogamous marriages,[1] with the notable exception of Muslim law which permits polygamy. Except Muslim law, every other personal law and the secular law of marriage in India, render the bigamous marriage not only void,[2] but also criminal under Sections 494 and 495 Indian Penal Code, 1860.[3]

Again, barring Muslim law[4] none of the personal laws treats conversion by a spouse, from his/her religion to another religion, as a ground for automatically dissolving the marriage. Under other personal laws conversion of spouse is only a ground for divorce to the aggrieved spouse.[5]

Because of the fact that Muslim law in India allows polygamy, a husband who intends to contract a bigamous marriage finds conversion to Islam as the easiest way out to enter into another marriage, without divorcing his wife under the earlier monogamous personal law. Can such a husband be held guilty of bigamy under Section 494 IPC?

This is exactly the question which was raised in *Sarla Mudgal* v. *Union of India*.[6] In this case, a Hindu husband married under Hindu law, solemnized the second marriage according to Muslim law after effecting conversion to Islam. On being prosecuted for bigamy under Section 494 IPC,[7] he contended that being a Muslim he could contract second marriage and IPC would not be applicable to him.

An examination of the Section 494 of IPC may help us to find a solution to this issue. The ingredients of the Section as pointed out by the Court are: (1) having a husband or wife living, (2) marries in any case, (3) in which such marriage is void, (4) by reason of its taking place during the life of such husband or wife.

It may be noted here, that the expression "marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife" in Section 494 IPC, means that a person who marries second time during the life of his or her first spouse would be punished under the Section, only if such second marriage is not recognised by his or her personal

law. The above expression merely emphasises the fact that unless a person is prohibited by the law to which he is subject in the matters of marriage and divorce from marrying more than one wife, he is not to be punished under Section 494 IPC.[8] It is because of this reason that no Muslim male (marrying according to Muslim law) can be punished under Section 494 for taking the second or third or the fourth wife.

It is a well settled principle of matrimonial jurisprudence that in connection with marriage the personal law must be applied.[9] In testing whether the first marriage of a Hindu husband with a Hindu woman was subsisting or not at the time of his second marriage with a Muslim women, after he became a convert to Islam, the principles of Hindu law should be applied; but in testing the validity of his second marriage, the principles of Muslim law should be applied.[10]

In other words, in the case of second marriage after conversion, the question whether a person's second marriage is void for deciding whether he should be exposed to the penalty of Section 494 IPC, involves reference to the personal laws of the parties to the second marriage. Thus, unless and until the second marriage of the apostate is void under the personal laws of the parties to the second marriage, the requirements of Section 494 are not fulfilled and consequently there could be no prosecution.

In *Sarla Mudgal* case their Lordships of the Supreme Court, while ruling that all the four ingredients of Section 494 are satisfied observed :

> "A second marriage by an apostate under the shelter of conversion of Islam would nevertheless be a marriage in violation of the provisions of the Act."[11]

This observation is surprising. It is not understood as to how the validity of the second marriage be judged according to Hindu Marriage Act. Although Hindu Marriage Act makes monogamy a rule of law, there is no provision by which the second marriage, solemnized outside Hindu law, can be rendered void. This is evident from an analysis of the relevant provisions of the Hindu Marriage Act.

According to Section 5(i), marriage may be solemnized between two Hindus, if neither party has a spouse living at the time of the marriage.

Section 11 rendering such marriage void provides *inter alia*, that any marriage solemnized after the commencement of this Act shall be null and void and may on a petition presented by either party thereto against the other party, be so declared by a decree of nullity, if it contravenes the condition specified in clause (i) of Section 5.

Section 17 of the Act providing punishment for bigamy states that any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living, and the provisions of Sections 494 and 495 of the Indian Penal Code, 1860, shall apply accordingly.

One of the grounds of divorce under Section 13(1)(ii) is that the other party has ceased to be a Hindu by conversion to another religion.

It is clear from the above provisions of Hindu Marriage Act (hereinafter referred to as HMA) that the scope of the Act is limited only to the marriages between two Hindus. If a man and a woman, both Hindus, want to marry, then one of the requirements of a valid marriage under the Act is that neither of them should have a spouse living. If any of them has a spouse living, then the requirements of clause (i) of Section 5 is not satisfied, and marriage becomes void under Section 11 and subject to penalty under Section 17 of the HMA and Section 494 IPC. In case of the marriage of apostate husband with a Muslim woman, none of the parties to the marriage is Hindu, therefore the provisions of HMA making the second marriage void and penal, are not applicable to such marriage.

The Supreme Court has made reference to some old cases to emphasise that conversion to another religion by one or both the Hindu spouses does not dissolve the marriage and therefore the second marriage is void. Interestingly, however, all the cases referred by the Court are those cases where the apostate wife after embracing Islam contracted the second marriage. Since Muslim law does not recognise the right of Muslim woman to have more than one husband, the second marriage was held void and consequently the offence of bigamy was made out. But, not even a single case has been mentioned by the Court where the apostate was the husband.

The Supreme Court found support in a judgment of the Madras High Court,[12] wherein a Division Bench of the High Court dealing with a marriage under the Special Marriage Act, 1872 held :

"The Special Marriage Act clearly contemplates monogamy and a person married under the Act cannot escape from its provisions by merely changing his religion. Such a person commits bigamy if he marries again during the lifetime of his spouse and it matters not what religion he professes at the time of the second marriage...."

The Supreme Court's reliance on this decision does not appear to be appropriate in as much as the provisions of Special Marriage Act are different from those of the HMA which came to be adverted to in *Sarla Mudgal*. The relevant provisions of Special Marriage Act, 1872 under which the Madras

decision was given are :

Section 2 (corresponding to Section 4(a) of the 1954 Special Marriage Act) provides that marriage may be celebrated under this Act when neither party at the time of the marriage, has a husband or wife living.

Section 15 (corresponding to Section 43 of the 1954 Special Marriage Act) lays down that every person who, being at the time married, procures a marriage of himself to be solemnized under this Act shall be deemed to have committed an offence under Section 494 or Section 495 of the Indian Penal Code, as the case may be, and the marriage so solemnized is void.

Section 16 (corresponding to Section 44 of 1954 Special Marriage Act) is important in our context, according to which every person married under this Act who, during the lifetime of his or her wife or husband contracts any other marriage, shall be subject to the penalties provided in Sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage.

It was on the basis of these provisions, that the Madras High Court has held, that the persons married under the Special Marriage Act could not escape from its provisions by changing religion. A person married under the Act commits bigamy and is subject to penalties provided in Section 494 IPC, if he marries again during the lifetime of his spouse, and it matters not what religion he professes at the time of second marriage.

Unfortunately, however, there is no provision in the HMA corresponding to Section 16 of 1872 Special Marriage Act (Section 44 of 1954 Special Marriage Act). The HMA, does not render a bigamous marriage outside the Act, a void marriage.

Admittedly, in *Sarla Mudgal,* the second marriage of the apostate husband was not under the HMA but was under the Muslim law. The validity or the invalidity of the second marriage of the apostate Hindu husband could, therefore, not be said to be in violation of the HMA, as seemingly held by the honourable Supreme Court in the decision.[13]

In India, in the absence of a uniform matrimonial law, the validity of a marriage (be it the first marriage or the second marriage) depends upon two factors. First, the religion of parties to the marriage and secondly, the performance of ceremonies constituting the marriage. Validity of the marriage is always seen with reference to the personal law of the parties to the marriage. In this case, if the validity of the second marriage of the apostate Hindu husband has to be seen, it will be with reference to the law of the parties to the second

marriage i.e. the apostate husband and the Muslim women. HMA may not help to test its validity. It may be noted that under Section 11 of the HMA a petition for nullity of bigamous marriage can only be filed "by either party thereto, against the other party." For example A, a Hindu man who is lawfully married to B, a Hindu woman, marries again C, a Hindu woman, then, the above marriage between A and C is void, as at the time of this marriage B was alive. However, in this illustration B can not present a petition for nullity of marriage (of A and C) under the HMA. This petition can only be filed by A or C, that too against C or A, as the case may be.[14]

Viewed in this perspective it is difficult to understand as to how in the absence of any specific provision under the HMA, the second marriage of an apostate husband be in violation of the provisions of the Act and illegal *qua* his first wife. The decision of the Supreme Court appears to be unconvincing in this respect.

Under Hindu law, conversion of a spouse does not have the effect of dissolving a Hindu Marriage.[15] On the other hand, in Muslim law, the renunciation of Islam by husband operates as automatic dissolution of marriage.[16] Suppose A, a Muslim husband by embracing Hinduism marries a Hindu girl under the Hindu Marriage Act. His second marriage will not be a bigamous marriage and he would not be liable for prosecution under Section 494 IPC. It is so, because at the time of his second Hindu Marriage, his first Muslim marriage is dissolved automatically on his conversion and consequently the Muslim woman had lost the status of a spouse. Under Hindu law, however, conversion of a spouse is merely a ground of divorce. And this ground is available only to the non-convert spouse. The convert spouse himself/herself cannot avail this ground either.

In the opinion of the Hon'ble Supreme Court, "the real reason for the voidness of the second marriage is the subsisting of the first marriage which is not dissolved even by the conversion of the husband".[17] Assuming however, as ruled by the Court that the second marriage by the convert during the subsistence of his first marriage was void in terms of Section 494 IPC, all the four ingredients of the section are not fulfilled.

One of the requirements of the section relates to the meaning of the expression "marries in any case". This expression came up for interpretation before the Supreme Court in *Bhaurao Shanker Lokhande* v. *State of Maharashtra,*[18] wherein a bench of three judges observed :

> "*Prima facie* the expression "whoever marries" must mean 'whoever ... marries validly' or 'whoever... marries and whose marriage is a valid one.' If the marriage is not a valid one, according to the law applicable to the

parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises".[19]

Now, it has to be seen, whether in the case in hand, this requirement of Section 494 IPC has been fulfilled. This depends upon whether at the time of second marriage the husband in question was treated by the Court as Muslim or Hindu. Hon'ble Justice Kuldip Singh has not made it clear in his judgment whether the conversion of the apostate husband was bad or the conversion was recognised but not the right to marry again. If the Court has tested the genuineness of the conversion which was not inspired by religious feelings but was resorted to merely with the object of creating a right to have more than one wife, then the husband never became Muslim. He remained Hindu. However the ceremonies of second marriage were not according to Hindu rites. Therefore the requirements of Section 17 of Hindu Marriage Act by which Section 494 IPC is made applicable are not fulfilled.

It appears however, that his conversion was not attacked but only his right to marry again as is evident from the following observation of the Court :

"Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the Act to marry again without getting his earlier marriage under the Act dissolved".[20]

This shows that the Supreme Court is blowing hot and cold in the same breath. On the one hand it is giving the right to embrace Islam, on the other hand it is denying the rights under the new religion on the basis of the old religion. Either a person can be held to be Muslim or non-Muslim. He can't be recognised Muslim for some purposes but non-Muslim for other purposes.

Though the Hon'ble Supreme Court claims that all the four ingredients of Section 494 IPC are satisfied *viz.* (i) he has a wife living, (ii) he marries again, (iii) the marriage is void, (iv) by reason of its taking place during the life of the first wife,[21] it is shocking that it has not touched the second requirement on which there is a plethora of consistent case law from the highest court.

To sum up, Justice Kuldip Singh has made an attempt to bring harmony between two systems of law, but unfortunately, his judgment has resulted in hotch potch. The judgment has touched and decided many vital issues, but the ruling is not supported by satisfactory interpretation of personal laws. It is submitted with due respect, that academically it is not a convincing judgment for the reasons stated above.

Notes and References

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1. See Section 5(i), Hindu Marriage Act, 1955; Section 4, Special Marriage Act, 1954; Section 4, Parsi Marriage and Divorce Act, 1936; Section 60, Christian Marriage Act, 1872.

2. Section 11, HINDU MARRIAGE ACT; Section 24, SPECIAL MARRIAGE ACT; Section 4, PARSI MARRIAGE AND DIVORCE ACT; Section 19(4), THE INDIAN DIVORCE ACT, 1869.

3. Section 17, HINDU MARRIAGE ACT; Sections 43 and 44, SPECIAL MARRIAGE ACT; Section 5, PARSI MARRIAGE AND DIVORCE ACT.

4. Renunciation of Islam by a Muslim husband automatically dissolves the marriage, whereas the renunciation of Islam by a Muslim wife does not have the same effect. See Section 4, THE DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939.

5. Section 13(1)(ii), HINDU MARRIAGE ACT; Section 32(j), PARSI MARRIAGE AND DIVORCE ACT; Section 10, INDIAN DIVORCE ACT.

6. 1995(3) Scale at 286. The Judgment delivered in this case becomes significant, as it has expressed concern over the Government's in action in the matter of providing Uniform Civil Code and called for having a fresh look at Article 44. It also directed the Government of India through Secretary, Ministry of Law and Justice to file an affidavit in the Court by August 1996, indicating therein the steps taken by the Government of India towards securing a Uniform Civil Code for the citizens of India.

   However, in a recent Review Petition filed in respect of the Supreme Court's aforesaid decision, Justice Kuldeep Singh has orally resiled his earlier stand on Uniform Civil Code issue and described the earlier observations as obiter dicta only.

7. Section 494 IPC states that : Whoever, having a husband or wife living, marries in any case in which such marriages is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

8. See *Mst. Payari* v. *Faquir Chand*, AIR 1961 Punj 167 at 168-170.

9. See *Advocate Gen. of Bombay* v. *Jimbabai*, 41 Bom 181; *Datta* v. *Sen*, ILR(1939) 2 Cal 12 at 16.

10. See *Budansa Rowther* v. *Patima Bi*, AIR 1914 Mad 192 at 194.

11. *Supra* n. 6 at 291.

12. *Andal Vaidyanathan* v. *Abdul Allam Vaidya*, AIR 1946 Mad 446.

13. This is further evident from its observation : "The second marriage of an apostate would therefore be illegal marriage *qua* his wife who married him under the Act, and continues to be his Hindu wife. Between the apostate and his Hindu wife, the second marriage is in violation of the provisions of the Act and as such would be *non-est.*" *Supra* n.6 at 293.

14. See *Kedar Nath* v. *Suprana*, AIR 1963 Pat 311.

15. *Supra* n. 5.

16. *Supra* n. 4.

17. *Supra* n. 6 at 294.

18. AIR 1965 SC 1564 at 1565.

19. This ruling has been consistently followed by the Supreme Court in later cases. See *Kanwal Ram* v. *H.P. Admn.*, AIR 1966 SC 614; *Priya Bala* v. *Suresh Chander*, AIR 1971 SC 1153; *Shanti Dev* v. *Kanchan*, AIR 1991 SC 816; *Laxmi Devi* v. *Satya Narayan*, (1994) 5 SCC 545.

20. *Supra* n. 6 at 294.

21. *Id.* at 295.

BOOK REVIEWS

COMMENTARY ON THE CONSUMER PROTECTION ACT, 1986. By J.N. Barowalia. Delhi : Universal Law Publishing Co. Pvt. Ltd., 1996. Pp. LXII + 1061, Rs. 625/-, ISBN 81-7534-016-9.

The book under review is a standard treatise on the very important and relevant subject concerning the protection of rights of the consumers in society. It is a slogan atleast, in Europe and America that in modern industrialised society it is the buyers who decide the market. The modern world may be influenced by the buyers but because of the media boom it is basically the sellers who provide the direction to the buyers. Therefore, when a seller is selling his goods and services he is aware of the goods and their quality. Moreover, with the competition there are so many choices to choose from that the buyers cannot be expected but to be in the trap of the sellers. Hence it is very important these days that if the sellers are not able to provide the proper goods or services or the professionals do not give services efficiently or perform professional duties negligently, that the consumers should have a quick remedy to claim damages which under the ordinary common law would require lengthy procedures to get the same. It is with the above object in view that now the consumers movement have gained importance and in order to protect the interests of consumers, the Consumers Protection Act, 1986 has been enacted.

The present commentary on the Consumer Protection Act, 1986 by J.N. Barowalia (hereinafter referred to as Barowolia's commentary) is an exhaustive treatise on the subject. The author has got the foreword from Hon'ble Justice A.M. Ahmadi, the Chief Justice of India. A small introduction has been given by Hon'ble Justice K. Jayachandera Reddy, the Chairman Law Commission of India. The reviewer's job has become easier because of the fact that the author has already got praiseworthy foreword and excellent introduction to the book which itself shows the authenticity, quality and the utility of the book. The author himself is in judicial service of Himachal Pradesh and as such has been able to write it with all the relevant cases and other materials necessary for writing a book on a subject like consumer protection.

The book has been written in a very simple language which should be useful to a starter in the legal profession. Apart from the text of the book which is compelete in all respects for the subject of consumer protection, the book contains the Consumer Protection Rules framed by the Central Government as well as Rules framed by the State Governments in India which add to its comprehensiveness and utility. The book provides Model forms to be used at

various stages before the District Forum, State Commission as well as National Commission. Therefore, any person who is interested to get the redressal under the Consumer Protection Act, 1986, would find it as a complete code to rely upon. To provide for the comparisons of the consumer protection, the author has also given the text of the U.K. Consumer Protection Act, 1987.

The author has very correctly stated that the book being a commentary is a systematic section-wise treatise with a complete review of the Act and it incorporates the latest statutory amendements and the law laid down by the Supreme Court of India. Comprehensive as it is, it also provides the decisions of the National Consumer Disputes Redressal Commission as well as various State Commissions.

Indeed, the book would prove useful for the Bar, as well as the Bench. It would be handy both for the public and private undertakings. Students and scholars would definitely have comprehensive knowledge available on the subject. And this reviewer is sure that it will go in many future editions.

Barowalia's Commentary is a practitioners volume which has been priced at a reasonable price of Rs. 625 in these days of high prices. It must be kept in all Libraries. This reviewer congratulates the Universal Law Publishing Co. Pvt. Ltd. for having beautifully published the book on the Consumer Protection which is so relevant in the present times.

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JURISPRUDENCE — THE PHILOSOPHY AND METHOD OF THE LAW. By Edgar Bodenheimer. Delhi : Universal Book Traders, First Indian Reprint, 1996. Pp. VIII+463, Rs. 340/-, ISBN 81-7494-009-X.

The book under review has been written in 1962, although the genesis of the book goes earlier to 1940, and continues till date as a text book for the law students, law scholar and teachers throughout the world. The basic purpose of the book is to give aid to students of law and politics who are interested in the general aspects of law as an instrument of social policy. The book under review comprises of XVIII Chapters and has been divided into three parts. Part I is devoted to historical introduction to the philosophy of law which is sub-divided into 9 Chapters. Chapter I deals with Greek and Roman legal theories such as Zeus, Delphe, Plato and Stoic Philosophers. Chapter II deals with the legal philosophy in the middle ages and early Christian doctrines, the thomist philosophy of law and the medieval nominalists. Chapter III deals with the classical era of natural law with reference to Grotius and Pufendorf, Hobbes and Spinoza, Locke and Montesquieu. Chapter III includes the philosophy of natural rights in the United States, Rousseau and his influence and the practical achievements of the classical law of natural law school. Chapter IV, German Transcendental Idealism covers legal philosophy of Kant, Fiche and Hegel. Chapter V comprises historical and evolutionary theories of law and deals with Savigny, the historical school in Germany, England and the United States, Spencer's Evolutionary Theory of Law and Marxian Doctrine of Law. Chapter VI is concerned with utilitarianism and discusses Bentham and Mill and Jhering. Chapter VII deals with analytical positivism which includes John Austin, Kelsen and neo analytical and linguistic jurisprudence. Chapter VIII, socio-logical jurisprudence is concerned with Pound, Cardozo, Holmes, American legal realism and Scandinavian legal realism. Chapter IX, the revival of natural law and value oriented Jurisprudence, deals with neo-Kantian natural law, Duguit, Lasswell and McDougal. Part II, the nature and functions of law is composed of five Chapters. Chapter X, the need for order is concerned with general theory of prevalance of orderly, patterns in nature, social life, the psychological roots of the need for order, anarchy, depotism, independence and autonomy of law and legal system. Chapter XI, the quest for justice deals with justice and rationality, conceptual scope of justice, natural law and justice of freedom, justice of equality, security and common good. Chapter XII, deals with the law as a synthesiser of order and justice is concerned with the relationship between order and justice, stability and change in law, the imperative and the societal elements in law and validity of legal norms. Chapter XIII, deals with law as distinguished from other agencies of social

control, law and power, law and administration, law and morality and law and custom. Chapter XIV deals with the benefits and drawbacks of the rule of law.

Part III, the sources and techniques of the law comprises of four Chapters. Chapter XV, the formal sources of the law, expounds and illustrates the treaties and precedent as source of law. Chapter XVI, non-formal sources of law is concerned with standards of justice, equity, public policies and administrative law. Chapter XVII, law and scientific method is concerned with the formation of concepts, analytical reasoning, the role of value judgments in law and the aim of legal education. Chapter XVIII, the techniques of the judicial process is devoted to interpretation of constitutions, statutes, doctrine of *stare decisis*, and discovery and creation in the judicial process.

The treatment of the subject as referred to above is diverse and highly critical. In Part I, the historical introduction to the philosophy of law, the author has essentially described the philosophy and their legal theories in the way these philosophers have expounded their philosophy and there is no critical apprisal of these philosophers. However the merit lies in the way these philosophers have been dealt with as it makes no room for confusion. The treatment of these philosophers are more than sufficient for the teachers to teach these philosophers and their philosophies. It would be the duty of the teacher to describe these philosophers and lay bare the great works of these philosophers who have an everlasting influence in moulding the law, legal theories, and legal thinking. The treatment of the various philosophers in Part I makes one to discern that the author has developed a thread of earlier philosophies and the same has been spread to the modern philosophies and well developed theories such as historical, analytical and sociological. The author has come out very successfully. It may be pointed out that Part I is essentially the evolution of jurisprudence and the treatment encapsulates centuries of development wherein jurisprudence has been unending and beset with many difficulties. In reality from past to present, the problem of achieving justice in human relations is the most challenging and vital problem of social control through law. Above all, it is one which is by no means impervious to the method of rational arguments. Philosophy as dealt in Part I have used different methods to reach conclusions as to how the law can achieve the purpose of social control. The author has tried his best to demarcate the approaches and methods implied in various philosophies and philosophers with detachment and has discussed the issues which these philosophers have thrown up in relationship to law and society with detachment and full sense of justice to these philosophers. Secondly, the author's treatment of these philosophers have provided tools for the teachers teaching the subject of jurisprudence so that the teachers can convincingly demonstrate the nuances of the various legal philosophies provided by the various philosophers with the materials con-

tained in the book, teachers can with little difficulty put across to the students the essential of these philosophies.

With the legal theories as the basis of jurisprudence, it partially explains the totality of law, legal system and its relationship to society. However, this partial explanation can be explained with the philosophers work which is the outcome of their own historical times and to understand the historical times, the best legal philosophies are required. The author beset with these philosophers have been the best philosopher of their time and have tried to explain the law and legal system as found and felt in their historical times to the best of their understanding. It may be that inequality in society in those days was strongly threatening the foundation of the society and the quest of the philosophy was for greater equality and social change. Part II of the book deals with the treatment of substantive problems of general legal theories and the author has developed themes on certain methodological assumptions which are implicit in any approach, to the subject of jurisprudence. Therefore, the author has convincingly co-related the questions concerning the achievement of equilibrium in human relations notwithstanding the difficulties which the author may encounter while attempting to develop such a relationship. Part III accordingly deals with an overall social relationship and how the legal system had essential function of achieving order and justice. The law and its relationship with order and justice, is highly amorphous and the author in this part of his book has described the concept of order in terms of existence of some major infirmity, continuity and consistence in the operation of natural social process. The narration of its order on the other hand indicated the problems of discontinuity and irregularity and absence of inteligibility pattern manifesting in the occurrence of unpredictable jump from one state of affairs to another. The author has done a remarkable job in developing the thought in this part of the book and the discussions are not only absorbing but highly illuminating. The author has really made subject matter of this part pregnant with instruction. Part IV of the book, the sources and techniques of law needs further comments. The treatment of the subject legislation, custom and precedent as source of law are interesting. The distinguishing feature between formal and nonformal sources in terms of categorisation of the source of law have been clearly maintained. The formal source of law such as legislation, custom and precedent has been dealt extensively and the author has given an overall view of the sources. So far as non formal source of law are concerned, the author illustrate the non formal source in terms of standards of juriprudence, equitable social policies, the reasonableness of customs and treats this subject very well. In terms of aims of legal education, the author emphasizes that the lawyer who has engaged in any lawyering capacity either as legislature, adviser, lawyer, counsel, deciding the cases as judge, there is a major need to train these lawyers

and make them understand the institution, law and the problems of contemporary society. The second aim is to arm the lawyer with the techniques required for professional expertise, so that the lawyers can solve the problems with ease. However, if the teacher is not himself a professional lawyer and half baked in his understanding of law and the tasks the lawyer has to achieve, teacher of law cannot be a true treacher of law. A teacher having some proficiency in the theories and least knowledge of practice of law and legal system, is always handicapped in approaching problems of law and legal system, as the law is a part of total life society and does not exist in vaccum. Law cannot be compartmentalised as a self sufficient social science discipline to be sealed off from practice of law as many decisions of courts and structural innovations in institutions and otherwise cannot be understood and properly analysed unless the teachers have practised the law and have seen the institutions from close quarters. In case the teacher is completely berefet of actual practice of law and instutitional understanding the teacher merely teaches from ivory tower and lawyer produced by him will be a block head. In the final analysis the institutions of legal learning must provide teachers and instructors who can teach the students to master art of legal argument and reasoning and also should go beyond to give the students a true view of the profession. For that the teachers must not only have an academic degree but also professional competency and the book under review is perhaps one of the tools with the teacher for developing legal arguments.

In the final analysis the subject matter of jurisprudence dealt in this book is very broad encompassing various thoughts and developing relationship between the law and judicial process. The author has done extremely good job in presenting the complexities of the subject in simple and straightforward manner, within the limitation which the writer of the book of jurisprudence encompass. The book under review is scholarly and can be pursued by an average student of law and legal profession.

It is a great contribution to the literatural of jurispurdence. It is one of the best books in the field of jurisprudence which has also been in existence for the last four decades and has achieved a status of its own. No lawyer, no judge, no law practitioner and law scholar can do without this book.

It is highly praiseworthy on the part of the publishers, Universal Book Traders who have brought out an Indian reprint which would make the book accessible to all those who are interested to pursue the science of jurisprudence, a *sine-quo-non* for every lawyer, law student, law professor and judges of the Courts.

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LEARNING LEGAL RULES. By James A. Holland & Julian S. Webb. Delhi : Universal Publishing Co. Pvt. Ltd., 1996. Pp. XXIII+300, Rs. 210/-. ISBN 81-7534-013-4.

The aim of the authors of Learning Legal Rules has been to bring together the theory, structure and practice of legal reasoning. The ultimate solution to any legal problem is to be found in the application of basic principles to ascertained facts. The difficulties which obstruct the ultimate solution lie in the selection of appropriate principles and rejection of irrelvant facts. The authors set out to teach the art of conducting the legal trial and try to answer the questions which every lawyer and every Judge should ask himself from time to time.

For the students, the first task is to become well acquainted with the instruments of law. Chapter 1 of the book deals with what is law? Apart from primary legislation, delegated legislation and Judicial authorities, the authors take into account recent changes to the court system and also examine the permeating influence of European Community (EC) law, upon the Acts passed by the English Parliament. In cases where there is conflict between principles of directly enforceable EC Law and English Law, EC Law must prevail.[1] It is the duty of a British court, when delivering final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of EC law.[2] The principle of legal supremacy of EC law over the constituent members of EC was well established, when the Britain joined the community. Thus by joining EC, British Parliament voluntarily accepted limitations to its sovereignty. The authors present a checklist to find the relevant law to solve the problems of conflict of laws of EC & English Law.[3] In case of conflict one has to take into account whether the conflict is statutory or whether the conflict is of the delegated authority. Is there any delegated legislation? What must be the commitment of EC & England about case law? Invariably all such conflicts must be looked at from the point of view of each party.

Chapter 2 deals with Finding the Law and also deals with use of computer databases for developing the appropriate skills. For finding the law, the authors stress that to do the job i.e. library and research, proper skills may be learnt to do the job. Law is, above all a library-based subject. One must be prepared to spend a substantial amount of time doing library-based research. Since 1970s the three main computerised legal information retrieval (IR) systems—LEXIS, JUSTIS and LAWTEL are available. Each system has its own user manual, and the authors advise the researchers to be familiar with them.[4] The advantages of

such systems are obvious. They have the potential to store, with relative ease, large quantities of information in electronic form, as a database. This information can also be searched thoroughly and accessed to for more quickly than by traditional means.

Chapter 3 deals with Reading the Law. To interpret the legal text three questions might be asked, what is called what, how & why of law, that is :

(a) What kind of law is it?

(b) How does it affect existing law?

(c) Why was it made?[5]

The enquiry broadly relates to 'Mischief Rule' in Heydon's case.[6] The authors suggest critical reading, analysing or challenging the ideas presented and considering how the arguments have been developed by posing the following questions:

(a) Are the assumption unsupported or unrecognised?

(b) Are the conclusion reached unsupported by the arguments put-up?

(c) Are the existing counter - arguments ignored?

The authors further deal with note-taking techniques and to harness 'Mind Maps' e.g. at the centre, place the question, or concept, you are seeking to analyse. From the centre, move out to your first stage of development, and write down the overall themes you wish to develop. From each of those themes, you may then radiate outwards, noting specific arguments and examples that you need to develop in respect of those themes.[7]

However, the process of reading the law does not operate in a vaccum; it is not an arid activity, but one that is applied in real legal disputes. Going to law is not simply a case of lawyers dusting down the appropriate statutes and cases, and reading them (though that will inevitably be part of it); it is, at its heart, a process of re-constructing disputed events ('the facts') and proposing a legal solution to them.[8]

Language is the means of disclosing facts, expressing ideas, applying principles and analysing facts. Chapter 4 Law, Fact and Language, deals with the interplay of law, fact and language. The authors illustrate the fact that the flexibility of words affords a danger to logic as well as an effective aid to explanation. Rhetoric and jargon may disguise principle and obscure uncomfortable fact. Law, fact and language give the Judges a high degree of flexibility in deciding cases. The framework of rules and principles within which Judges operate does impose some constraints on them. But these guiding principles of precedents and interpretation are capable of revision by the Judiciary itself. A

sense of legal tradition may guide lawyers, but it is the lawyers who reshape and mould it for the future.[9]

Chapters 5 and 6 are invaluable guides to the discussion and application of precedents—the themes which enable the lawyer and the Judge to determine the presence or absence of compatible variations. In English law, the main rules of interpretation are the literal rule, the golden rule, the michief rule and secondary aids to construction. In European system logic and legal reasoning mainly are the methods of construction. The authors have incorporated some key new decisions affecting English legal method and reasoning; notably the House of Lords decision in *Pepper* v. *Hart*[10] concerning the interpretation of statutes. Chapters 7 & 8 mutually grapple with these problems.

In chapter seven, authors explain that European legislation is structured in a manner that it is very different from English Acts of Parliament. The civilian tradition emphasise simplicity of drafting and a high degree of abstraction.

Chapter 8 emphasise that Civil Law approach to rules of statutory interpretation is far more 'purposive' than rule of law system. British lawyer may attack the English courts, the civil law system as a 'naked usurpation of the legislative function'. The question then would be how House of Lords would react to the situation? The question is should House of Lords adopt or is adopting this more purposive style of interpretation - the 'grand' style?

The difference in approach is increasingly being recognised by English Judges when considering community legislation, or even when considering English legislation that has been passed to fulfil an obligation under European community law. In *Bulmer* v. *Bollinger,*[11] Lord Denning MR proposed the view that when considering community legislation, the national court should adopt the civil method of interpretation. Again, in *Macarthys* v. *Smith*[12] and *Buchanan and Co. Ltd* v. *Babco Forwarding and Shipping (UK) Ltd*[13] the Court of Appeal, and particularly Lord Denning, stressed the use of the civil method on the more general level.

However, English courts still seem to be unwilling to comprehend the Jurisprudence of Court of Justice of Economic Community (CJEC). This problem also arose in Factortame case.[14] The House of Lords deflected the arguments on interim protection by arguing (per Lord Bridge) that the principles cited by the applicants were drawn, in effect, from obiter statements of CJEC. Yet as Gravells notes, 'the distinction between *ratio decidendi* and *obiter dicta* has no place in the Jurisprudence of the European Court.'[15]

Finally, in Chapters 9 and 10, the art of reconciling fact, principle and language in English law and in Community law is explained. The authors describe the decision making techniques as follows: structure the problem,

identity alternative courses of action, determine your objectives, assess the consequences, identify uncertainty and finally evaluate your remaining alternatives. The authors warn that these techniques are not fool proof albiet, nor is it a substitute for relying upon any decision making.[16]

In the last Chapter 10, authors briefly describe the sources of European law mainly as Treaties, Acts of the Institutions, Regulations, Directives and Decisions and explain importance and effects of each in the application of English law. The authors conclude the book with a note that it is the English lawyer who will have to change, more than his continental counterpart and will have to embrace purposiveness in interpretation.

Learning Legal Rules is not like the substantive law subjects where one is to learn and memorise the law. 'Thinking like a lawyer' is a technique that one has to develop by practice. The book is readable and user-friendly. The book is not only valuable to law students, lawyers and Judges, it is equally useful for the intellectuals and legislatores of developing countries like India to understand intricacies of the transient process which is silently being evolved and is transforming the English law adapting with the realities and the influence of European community, of which UK is going to become an integral part in not too distant past.

*V. K. Gupta**

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5. *Id.* at 50.
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DISHONOUR OF CHEQUES - LAW AND PRACTICE. By Rajesh Gupta and Gunjan Gupta. Delhi : Bharat Law House Publication, 1996. Pp. 40 + 440, Rs. 300/-.

Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 inserting Chapter XVII comprising of Sections 138 to 142 in the Negotiable Instruments Act, 1881 represents a hallmark in the development of the law on the problem of dishonouring of cheques. Prior to coming into force of this amendment, the problem of dishonour of cheques had gained gigantic proportions cripling the trade and commerce. The remedies then available were inadequate and ineffective, and far away from being purposeful and deterrant.

Recent developments in the law relating to the dishonour of cheques exhibit that now a person aggreived of the dishonouring of cheques has two more remedies besides the traditional remedies. Traditional remedies were the offence of cheating under Section 420 of the Indian Penal Code, 1860; ordinary civil suits and summary procedure as envisaged under Order XXXVII of the Code of Civil Procedure, 1908. New remedies were injected by way of institution of Chapter XVII to the Negotiable Instruments Act, 1881 in the year 1988 and enactment of Consumer Protection Act, 1986.

Although Consumer Protection Act, 1986 had come into operation offering a speedy trial of the cases relating to dishonour of cheques, the menace remained unchecked largely due to the fact that firstly, these laws are remedial and secondly, for the reason of their limited jurisdiction they can entertain cases of dishonouring of cheques only against the bankers and not otherwise. However, in contrast to this, the remedy offered by the Amendment Act, 1988 to the Negotiable Instruments Act is comparatively purposeful and deterrant though it does not break out the slow motion justice system which is lethargic enough as it takes sometimes 3-4 years in just summoning the accused for presummoning evidence.

The corpus of the law dealing with the problem of dishonour of cheques consists of hetrogenous and overlapping legal rules enshrined in different statutes of civil and criminal nature. Judicial pronouncements in this area as given in last 4-5 years also contributed a lot in shaping this new regime and it is for this reason that a comprehensive analysis is required.

The work under review is a unique and most comprehensive endeavour to present at one place the entire gamut of statutes and precedents with model forms of complaints and notices on the subject. It contains micro case law

analysis having a wide coverage of laws, statute as well as precedent, touching almost all conceivable topics even commenting on such topics on which no precedent is available.

The book under review is arranged into six parts. Part I contains overview of the subject which is descriptive enough to enable the reader to have an all round idea of the subject. Part II presents a comprehensive critical study relating to Section 138 of the Negotiable Instruments Act, 1881. Part III provides a study on the summary procedure as envisaged under Order XXXVII of the Code of Civil Procedure, 1908. Part IV discusses the relevance of cheating as defined under the Indian Penal Code, 1860. Part V introduces for the first time a nexus of law relating to consumer protection in India and the law relating to dishonouring of cheques. This innovative idea of introduction of law relating to consumer protection in the study relating to dishonour of cheques perhaps is because of the present authors' specialisation on the law relating to consumer protection in India as they have written two texts on that subject as well. Part VI contains model forms of notices and pleadings to make it self contained treatise.

The book and its chief characteristic is not only analytical but simple exposition of the alternate remedies available to a person aggrieved of dishonour of cheques. The work constitutes the widest possible expanse of the subject covering all its aspects from different angles with their specialities under one roof - a kind of light house on any kind of question relating to dishonour of cheques. The work presents a blend of 'precedent in theory' and 'precedent in practice' juxtaposing the difference of opinion of various judicial authorities maintaining at the same time the originality of the text of their judgements.

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FORM IV

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