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PROFESSOR INCHARGE'S PAGE

I, on behalf the Law Centre-II, Faculty of Law and the Editorial Committee present volume II of the *National Capital Law Journal* to the readers. I maintained the continuity in the membership of atleast two teachers on the editorial committee, namely Prof. A.K. Koul and Mr. V.K. Ahuja with a view to ensure timely publication of this issue. Despite my sincere desire, 1997 issue of the *journal* could not be published before the expiry of 1997. Mr. V.K. Ahuja left the services of the Law Centre II for some time. Prof A.K. Koul on my insistence, accepted the convenorship of Law Admission Committee, a thankless job. So I also share the responsibility for delayed publication of this issue of the *journal*. Efforts will be made in future to keep pace with time.

I am overwhelmed with the response, the first issue of the *journal* got. It is evident from the fact that we have received several articles for favour of publication in this issue but the editorial committee has not been able to include all the articles in this issue. I express my regret for the same and assure the authors of those works that the editorial committee will consider the inclusion of those articles in the next issue. The materials for this issue have been collected, edited and put together in shape by Prof. A.K. Koul and Mr. V.K. Ahuja who are the pillars of the editorial committee. I am given to understand that the editorial committee has taken some steps to improve the form and substance of this volume.

It is a matter of pride that Law Centre II despite all its odds has been able to publish its *journal* and it will be our endeavour to publish the *journal* regularly in future too. I invite from the readers suggestions and even happy criticism of any shortcomings in this issue so that we may further improve the quality of the *Journal*. I thank the members of the editorial committee and also the printer for production of this issue of the *journal*.

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Professor S.S. Vats
Professor-in-Charge

EDITORIAL

The Editorial Committee is very happy in getting a favourable response from the readers on the publication of the first issue of the *National Capital Law Journal*. Readers from India and abroad have appreciated and welcomed our maiden attempt. We are extremely thankful to them. In the first issue we published articles on various subjects, such as constitutional law, family law, intellectual property rights, environmental law, international trade etc. and the depth of the articles have been borneout by the fact that the articles from the first issue have been quoted and acknowledged by the writers and legal academicians to whom we express our sincere thanks for acknowledging the merit of the *Journal*.

We have immense pleasure in placing the second volume of the *Journal* in the hands of our esteemed readers. The second issue again is devoted to the analysis of legal problems of topical interest and covers a wide area from arbitration, international trade, intellectual property rights, family law, labour laws etc.

We have tried our best to publish the second issue in the same best traditions of the first issue to correspond with international standards of legal writing. We are hopeful that the articles of this issue would be of equally interest to the readers and they would be proferred by the quality and contents of the articles. We are expressing our deep sense of gratitude to the overwhelming response of contributors to the second issue.

We invite the readers and legal academicians to contribute articles, notes and comments for publication in the *Journal*. Any comments, suggestions and advice for improving the quality of the *Journal* are welcome.

Once again, we express our sincere thanks to the Printers M/s Shivam Offset Press, New Delhi for publishing the *Journal* in an effective manner.

A.K. Koul
V.K. Ahuja

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BOOK REVIEWS

TRIBAL REVOLTS AND EVOLUTION OF LAND TRANSFER REGULATIONS : A CRITICAL APPRAISAL

*M. Sridharacharyulu**

I. Introduction

Constant efforts by the British and independent Indian governments to frustrate protective legislations are the main reasons for the uprising of tribals against non-tribal intrusions in the Godavari belt of Andhra Pradesh.

Bows and arrows are parts of tribal life, used only for hunting. Political forces, driven by vested interests, and bureaucracy influenced by political bosses have forced tribals to aim them at the migrant intruder. Astonishingly, both imperial rulers and those of independent India made wonderful laws to protect the life, property, land and culture of tribals. But tardy and, at times, wilful non-enforcement engendered resentment. In fact, every new protective legislation is the immediate consequential product of a tribal uprising. Governments, however mighty, have had to yield to innocent but revolutionary, truthful but terrific, poor but powerful tribal struggles.

II. Historical Background of Tribal Revolts and Evolution of Law

Tribal tensions in the Godavari belt are not new. The history of tribal areas is replete with revolts spread over two centuries. According to V.N.V.K. Shastry,[1] an officer who made an in-depth study of the life of tribals of Andhra Pradesh, the earliest recorded revolt of tribals against oppression, and undue interference from outsiders, was in 1724.[2] It is attributed to socio-economic and political factors. Shastry refers, in his research paper, to the greed of the British administration to plunder natural wealth in the tribal belt of Godavari, and then their response to several revolts of exploited classes. He states :

> The period from 1800 to 1813 saw the then Mansabdar of Rampa in his worst form when he plundered some of the plains villages. In order to make friendship with this landlord, the British in 1813 gave these villages to mokhasas (free gift of villages to maintain law and order). People of those days must have been shocked over this decision of the British in which the maintenance of law and order was entrusted to the plunderer himself.[3]

There were disturbances in other parts of tribal areas and their influence over British administration was remarkable. Disturbances were taking place in other parts of tribal areas in the state like Golugonda in 1832-34 and in tribal areas of other states, like the Kol insurrection (1831-32) after which the British brought about the Regulation XIII of 1833 by which Chotanagpur was declared as a non-regulated area to separate these areas for purposes of administration (mostly law and order).[4] Even though these disturbances were not related to each other, they have one thing in common; the tribals did not accept undue domination by outsiders. Later on, the Santhal rebellion in 1855, Sardari agitation in 1887, Munda revolt in 1895 etc., rocked the tribal areas of those regions for similar reasons.

K. Mazumdar stated that in case of highland of Ganjam, the tribals resisted the practice of free labour and free gifts around 1832 as the tribal chiefs have a strong spirit of independence.[5] The Madras Government deputed George Russel, first member of the Board of Revenue, to investigate the causes of tribal unrest during the 1830s. After a study of Godavari district, Russel recommended exclusion of tribal areas from the purview of the general laws as the tribals were fond of autonomy and non-interference and advised that those areas be placed under the district collector who would be vested with powers of administration of civil and criminal justice.[6]

Tribals questioned the exploitation by non-tribals, which assumed serious proportions in 1836, compelling the then Government of Madras to enact Ganjam and Visakhapatnam District Act, 1839, the first piece of legislation exclusively for tribals.[7]

An inquiry by Madras Government in 1879 revealed that a head constable Shaik Tanny extorted a bribe of Rs. 60/- for which he was kidnapped and beheaded by rebel tribals. Later, the inquiry report also quoted an incident in which a police station at Krishna Deva Peta was attacked, five constables were killed and arms and ammunition looted in 1891.[8] This was in retaliation for the killing of Thagi Virayya Dora, a Kondadora fighting exploitation by a police constable. Rebels looted the house of that constable and emptied the police station before it was set ablaze. It means the tribals had rebelled three decades even before the uprising under the dynamic leadership of Alluri Seetharmaraju in 1921.

The Godavari district saw several such revolts. Korukonda Subbareddy, a leader from Kondareddy tribe, fought the British regime. An armed force comprising 60 police personnel was despatched from Rajahmundry to arrest him. They met with stiff resistance in the hill areas of Koruturu and Ennagudem in 1865. The British Government responded, for the first time, with protective legislation called the "Scheduled District Act, 1874." This was meant to

provide for separate administration for tribal areas under an officer called "Agent". Areas under his control were described as "Agency Areas." The word "district" in this enactment corresponded to a specified area and not to the present revenue division. Interestingly, the exclusion of tribal areas from the purview of ordinary laws, begun under the Act of 1839, and continued till the country adopted the Constitution.

In response to the Rampa rebellion, the British Government enacted Agency Tracts Interest and Land Transfer Act 1917. As the tribals considered land as their livelihood and did not value it in terms of money or bother to acquire a patta, which is just a piece of paper for them, the government felt the need to protect their livelihood, *i.e.*, land. Their innocence and instant need for some money made them prone to exploitation by moneylenders, sahukars and petty traders.[9] The Act was meant to prevent land alienation and saving tribals from moneylenders. It decreed that any transfer of immovable property situation in the Agency Tract by a member of a tribe shall be absolutely null and void, unless it is in favour of another member of the Scheduled Tribe and it empowers the Agent to restore the possession of the property to the transferor or his heir. The Regulation of 1917 had further evolved into the Government of India Act 1919, which provided the Governor-General in Council with powers to declare any territory in British India to be a backward tract and that no Indian legislation should apply to such backward tract until the Governor-General so directed.

The legislation of 1919 was a forerunner of the Government of India Act, 1935, and the Government of India Order, 1936, which provided for declaration of backward regions inhabited by the tribal population as "excluded areas." The statement of objects and reasons for the 1917 Act said that it was expedient to limit rate of interest and to check transfer of land in the Agency Tracts of Ganjam, Visakhapatnam and Godavari districts.

This Act also remained on paper while the ignorant tribal continued to be exploited by outsiders. But in 1920, the tribal belt of Godavari and Visakhapatnam district started responding to the calls of freedom movement. Tribal groups rebelled under the leadership of Alluri Seetaramaraju against free labour; *vetti*, between 1922 and 1924, which was suppressed after the killing of Raju in 1924.[10]

The Government of India Act, 1935, did not take a positive look at tribal areas as the Secretary of State of India dealt with political necessity for limiting the number of partially or wholly excluded areas rather than with the criteria on which they should be constituted. However, one important aspect of this Act was that no Act of the federal legislature or the provincial legislature could apply to the excluded or partially excluded areas unless directed by the

Governor. This imposed an absolute ban on automatic extension of any general law to the scheduled areas and the burden of examining any law before applying it to the scheduled areas was kept on Governor.

This compulsion is not built into the Fifth Schedule of the Constitution which left it to the Governor to enact new laws for examining the relevance of the existing laws to a scheduled area as and when the need arose, which was possible only when this was specially brought to the notice of the Governor by the government. However, the Constitution provided for a protective and promotive policy regarding the tribals. The concept of tribal development projects and tribal sub-plan were introduced. But the problems relating to land, moneylending, land alienation and forest conservation regulations continue to bother tribal life.

The Constitution enjoins upon the state to protect the Scheduled Tribes from all forms of exploitation and promote their economic and educational interests. In exercise of the powers conferred under para 5(2) of the Fifth Schedule, the Governor of the Andhra Pradesh made regulations to protect the land of the tribals in scheduled areas. The Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959, was regarded as the best piece of legislation which could protect the land-related interests of tribals, and there was a demand for similar laws all over the country. The Regulation 1 of 1959 was originally made applicable to the scheduled areas of Srikakulam, Vizianagaram, Visakhapatnam, East Godavari and West Godavari districts, and later extended to the scheduled areas of Adilabad, Warangal, Khammam and Mahabubnagar districts, by Regulation II of 1963 to bring uniformity of the law throughout the scheduled areas of state.

The statement of objects and reasons for the Regulation 1 of 1959 mentions that the Act of 1917, which intended to safeguard the interests of tribals from unlawful transfers of lands belonging to the scheduled tribes to the plainsmen and to regulate the rate of interest collected from the tribals, was being circumvented in various ways and hidden transfers effected, rendering the Act of no practical use to tribals. It was suggested at the Agency conference, held at Madras in December, 1949, that if the hill men were to be given effective protection against exploitation by moneylenders of the plains areas, this Act should be suitably amended.

In pursuance of this recommendation, it was proposed to revise the provisions in a self-contained regulation to be made under paragraph 5(2) of the Fifth Schedule of the Constitution. This Act provides that in the scheduled areas transfer of immovable property by a member of a scheduled tribe to anybody other than a member of a scheduled tribe, without permission in writing from the competent authority, shall be null and void. Section 3(1) (a)

protects this Act from any other Act or general law, including Indian Limitation Act, and that point was specifically mentioned under section 7.

This means that no one can claim any adverse possession by lapse of time or prescription which are available under general laws. Section 3B, which was inserted by Regulation 1 of 1978, restricts registration of documents pertaining to land alienation between a tribal and a non-tribal. Section 3 allows the transfer of land to a member of a scheduled tribe or a co-operative society totally made up of members of the scheduled tribes. In case a scheduled tribe member wanted to sell his land but no other scheduled tribe member was ready to purchase it on reasonable terms, he had to apply to the 'Agent' who was the competent authority, or the Agency divisional officer or any other prescribed officer for the acquisition of such land by the state government, and the Agent could take over such land on payment of compensation in accordance with the principles specified in section 10 of the Andhra Pradesh Ceiling on Agricultural Holding Act, 1961, and such land shall thereupon vest in the state government and shall be disposed of only in favour of STs. [Section 3(1)(C)].

In case of any transfer in contravention of these provisions, the Agent may, on application by any one interested or on information given in writing by a public servant or *suo motu* decree the eviction of any person in possession of the property claimed under the transfer, after due notice to him, and might restore it to the transferor or his heirs. If it is not possible to hand over the possession back to the transferor or his heirs, either because they are not willing or their whereabouts are not known, the Agent may order assignment of that land to any other member of ST. [Section 3(2)]. Besides restoration of land to the original transferor, section 6A (inserted in 1978) provides for imposition of rigorous punishment upto one year and/or fine upto Rs. 2,000/-. Section 6B made these offences cognisable.

Inspite of this Regulation, exploitation could not be checked as land alienation continued unabated. As there is no proper record available to establish ownership of the land, and because the Act of 1917 provides for transfers with the permission of the Agent, non-tribals put forward the fictitious claims over tribal lands, defeating the purpose of the legislation. Even the reports submitted by the government at different times on this issue tried to project the case of non-tribals under the cover of Agent's permission. The latest report suggests that most of the non-tribals occupied tribals' lands with the permission of the Agent. An officer of the social welfare department, who pleaded anonymity, said it was wrong, and not borne by record that no non-tribal obtained permission from Agent under the Act of 1917 to be the transferee of a tribal land.[11]

To remove the persisting lacunae in the Land Transfer Regulation 1 of 1959 and to check unabated alienation of tribal land, it was amended by Regulation 1 of 1970 which is now popularly known as 'Act 1 of '70'. It substituted sub-section (1) of section 3 of Regulation 1 of 1959 by placing absolute prohibition on transfer of immovable property in the scheduled areas by a person, whether or not such a person is a member of a scheduled tribe to any person who is not a member of a scheduled tribe.

Another important aspect of the change brought about by Act 1 of '70 is drawing of a statutory presumption that, until the contrary is proved, any immovable property situated in the scheduled areas and in possession of a non-tribal shall be presumed to have been acquired by such a person or his predecessor in possession through a transfer made to him by a member of the scheduled tribe. This amendment also imposes an obligation on a non-tribal holding lands in a scheduled area, either by partition or devolution, to transfer, in case he wanted to sell, only to a tribal. This means an absolute ban on transfer of land among non-tribals also. Where a tribal or non-tribal is unable to sell his land to a tribal on reasonable terms, it shall be open to him to surrender the land to the government which shall thereupon be obliged to acquire it on payment of appropriate compensation for its allotment only to a tribal. Act 1 of '70 wholly prohibited the transfers of land in favour of non-tribals.

The presumption that any non-tribal holding land must have acquired it from tribal makes him a violator of the provisions of the Act of 1959 and he can be evicted from the land by the government at any time as it is not possible to prove the contrary. The burden of proof that is vested on a non-tribal by the amendment means, in practical terms, that he has to prove the ownership of the land from the period prior to 1917. The dissatisfaction among the non-tribals is due to this fool proof protection of tribal land interest, leaving only one way — nonenforcement to circumvent the cumulative effect of the Act of 1959 and 'Act 1 of '70'.

Lack of political will in the government, and usual lethargy, coupled with heavy pressures from vested interest, rendered the enforcement of the Regulation impossible. Whenever there was a dynamic officer who could gear up the machinery to restore the tribal lands by evicting non-tribals, he was shifted under political pressure. Examples of sudden shifting are those of D. Subbarao, Collector of Khammam district in 1979, and Phani Kumar, Special Deputy Collector, Eturnagaram of Warangal district in 1986, etc. The enforcement machinery created under the Act remained inactive in many districts.

III. Constitutional Validity of Land Transfer Regulation Act, 1959

Constitutional validity of the Land Transfer Regulation Act of 1959, and its Amendment in 1970, was challenged by P. Rami Reddy and others in 1988.[12]

The non-tribals pleaded that they had immovable properties in the scheduled areas of Andhra Pradesh and had been cultivating their lands for the past many years. Some of them acquired these lands in the remote past and some in recent past by purchase, some from the non-tribals. As the amending regulation impugned all acquisitions of immovable property by transfer from tribals and non-tribals alike and declared them null and void, the appellants were affected by it. They expressed a grievance that the regulation cut at the root of their right to immovable properties, which had been in their possession for the past many years. The principal plea of the appellants before the Supreme Court was that in so far as the impugned provision sought to control or restrict the right to transfer of immovable properties by a non-tribal person, it was void. They challenged the regulation as violative of Article 19(1) of the Constitution as the restrictions imposed under it were unreasonable and not essential for the protection of the interests of the scheduled tribes.

In its counter, the state sketched the socio-economic landscape against the backdrop of which the compulsion to legislate was occasioned. The non-tribals who arrived in tribal areas late in the 19th century and in early 20th century found the tribals, who were in occupation of vast lands, an easy prey for the schemes of exploitation. The non-tribals lent money to tribals and took the land belonging to them as security, though nothing was taken in writing from a tribal. The rates of interest charged ranged between 25 to 50 per cent and in certain cases it was as high as 100 per cent.[13]

Tribals, who were traditionally honest and simple in their thought and habits, fell an easy prey to the exploiting schemes of non-tribals. None of these money lenders ever credited any amount paid by the tribals towards their debt, and whatever entries were made in the books of the money lenders were implicitly believed by tribals. They were not aware that when produce was sold to non-tribals, they used a larger weight and that a smaller weight was applied for selling outside goods to tribals.

The indebtedness of the tribal has taken the form of bonded labour in many cases. The debt could never be repaid by the tribals. Money lenders continued to be in occupation of most of the lands and tribals became their serfs. Non-tribals have also forcibly occupied some of the lands. Tribals were ignorant and were not aware that they could go and report to the concerned authorities about the contravention of the regulations protecting their rights. Non-tribals had been taking full advantage of their ignorance and exploited them and were continuing to exploit them. The government of Andhra Pradesh, in its counter before the Supreme Court, said that the above circumstances resulted in tribal communities joining hands with the so-called revolutionaries, and again there was an uprising in the tribal area against non-tribals which had started spreading to the plains also.

In total contrast, the report signed by Chief Secretary M.S. Rajaji, submitted to the meeting in the Chief Minister's chambers on February 17, 1977, attributes the occupation of tribal lands by non-tribals to the "permission of Agent" under the Act of 1917. If what was submitted to the Supreme Court on behalf of the government is believed to be true, there was absolutely no effective enforcement of regulations, and the exploitation went on unabated. And the tribals did not even know about the laws protecting their interests. The counter-affidavit of the Andhra Pradesh government stated:

> The tribal communities, which went into the grip of revolutionaries were not able to extricate themselves from the grip. It was only after the tribals were promised by the government that the land would be restored to them and exploitation by non-tribals would be checked, and after arresting several revolutionaries peace had prevailed in several parts of the scheduled areas.

The government also agreed that if the tribals were not put back in possession of the land and measures were not taken to prevent exploitation by non-tribals, peace would not prevail in the scheduled areas.

It was observed by several committees that non-tribals were able to find ways and means to circumvent the provisions of Regulation 1 of 1959 by entering into benami transactions and other clandestine transactions with unsophisticated tribals. It is absolutely necessary to create conditions for peace and maintain peace and prevent the new non-tribals from settling down in the scheduled areas. Quoting a sample survey, the government stated that in Chintapalli and Bhadrachalam it was found that the average size of holding per family was only three to four acres. But even this extent of land was either mortgaged or otherwise transferred in favour of non-tribals and they are in possession of the lands. The Government reiterated its stand by saying that without restricting or prohibiting the alienation of lands in the possession of non-tribals the objectives cannot be achieved.

An additional counter filed by the state in the high court is buttressed by the contents of a treatise authored by a well known research scholar Christoph Von Furer Haimendorf.[14] The treatise is the culmination of laborious research carried out in respect of the very areas which form a part of the scheduled areas of Andhra Pradesh in respect of which the impugned legislation has been enacted. It has been stated therein that more than 40 million Indians belong to tribal communities, distinct from the great mass of society. They are aboriginal races from the Dravidian architects of ancient south Indian civilisations. The dramatic change in the peaceful co-existence between tribals, on the one hand, and the more dynamic section of society, occurred when improved communications opened up previously inaccessible tribal areas, and rapid growth of the Indian population led to pressure on the land's resources.

According to Haimendorf :

> In the past 40 years, most of the tribal societies have come under attack by economically more advanced and politically more powerful ethnic groups who infiltrated into tribal regions in search of land and new economic possibilities. These population movement triggered a struggle for land in which aboriginal tribesmen were usually the losers and were deprived of their ancestral land, turned into impoverished landless labourers.

Haimendorf also quoted the distressing forecast made by Nirad C. Chaudhari in his book "The Continent of Circe", (1965) wherein he has lamented :

> In an industrialised India the destruction of the aboriginal's life is as inevitable as the submergence of the Egyptian temples caused by the dams of the Nile .... It is to be feared that the aboriginal's last act will be squalid, instead of being tragic ....[15]

It cannot, therefore, be gainsaid, stated the state, that the tribals not only require to be protected in respect of their economic and educational interest but they also require to be immunised from social injustice and exploitation. The framers of the Constitution have, in their wisdom and foresight, taken cognisance of this vital aspect as is evidenced by the provisions embodied in Articles 15(4) and 46.

The Supreme Court, upholding the constitutional validity of Regulation Acts of 1959 and 1970, refused to accept the contention of the appellants that there was no rational basis for restraining transfer of properties from tribals to non-tribals which does not change the party to the transfer and diminish the extent of the properties, and hence such restriction was unreasonable rendering that aspect unconstitutional. Because originally all lands in these tracts were owned by the tribals and the change of ownership was a result of exploitation, the Supreme Court held :

> A legislation which, in essence and substance, aims at restoration to the tribals of the lands which originally belonged to the tribals but which passed into the hands of non-tribals in an unreasonable manner .... The scanning must be done through the tinged lens of appellants whose economic interests may be prejudicially affected by the impugned provisions.[16]

Finally, the Supreme Court held :

> As a matter of fact, it would be unreasonable and unfair to hold that the impugned provisions are unreasonable on this account. Surely, it is not unreasonable to restore unto the tribals what originally belonged to them but of which they were deprived as a result of exploitative invasion on the part of non-tribals. In the first place, should lessons not be drawn from past experience to plug the loopholes and prevent future recourse to devices to flout the law? The community cannot shut its eyes to the fact that the competition between the tribals and the non-tribals partakes of the character of a race between a handicapped one-legged person and an able-bodied, two-legged person.

The government won the case, but it is yet to heed the advice to draw lessons from past experiences to plug the loopholes. Instead, it issued a G.O.Ms. No. 129 (Social Welfare Department) dated 13.8.1979 permitting all non-tribal landless poor in occupation of lands in the scheduled areas upto five acres of wet lands or 10 acres of dry land to continue to have it in their possession. The attempt by the government was to override the Regulation Acts by a G.O., which rendered them not to be evicted. But this G.O. was quashed by the Andhra Pradesh High Court in 1980.

Then the non-tribals approached the High Court devising a new ground to stall the enforcement of the Act of 1959. They stated that if the population of scheduled tribes was either minimal or less than half, it could not be treated as part of the scheduled area and the Act of 1959 was not applicable to that village. The High Court granted a stay on implementation of the Act based on this point in 1992. There are nearly 32 cases pending on this point.

IV. Tribals and Non-Tribals : Unequal Relationship

The life, friendship or fight, between tribals and non-tribals was always unequal. While laws supported the tribal cause, successive governments tried to secure the interests of those who exploited tribals. The law, which could not be struck down on any ground by the judiciary, was rendered useless by its tardy implementation or non-enforcement.

Moneylenders, petty traders and sahukars used to enter into "friendship" with the tribals. That was nothing but a promise to continue as friends from that moment, calling each other *nestham* and *nestham* before they consumed a little toddy together. From that moment onwards, the tribals used to believe that his *nestham* would never ditch him, and accepted all terms, dues and claims made by the exploiters only to become their servant, finally losing his property to *nestham* (a friend).

Many non-tribals started keeping tribal women as concubines. Some of them married them as second wives only to circumvent the land transfer regulations. They acquired large plots of lands in scheduled areas from tribals and get the sale deeds executed in the names of their tribal concubines or wives. They also grabbed benefits from various schemes for the development of tribals in the names of their concubines. They hold some of the lands in the names of tribal farm servants and under pseudo tribal certificates.

Much of the land in the scheduled area of Andhra Pradesh was covered under the feudal systems of land tenure like Zamindari, Jagirdari, Muthadari and Mahaldari systems under which land holders had the right to evict a tenant if someone offered a higher rent. These estates were abolished, by extension of Madras Scheduled Areas Estates (Abolition and Conversion into Ryotwari) Regulation, 1951 to the scheduled areas in Srikakulam, Vizianagaram, Visakhapatnam, East Godavari and West Godavari agencies, except Nugur taluk in the present Khammam district and the muttas, sub-muttas and mokhasas in the Rampachodavaram and Yellavaram taluks of East Godavari district. Mahaldara and Muttalas became oppressive. They were also abolished in 1969.

The survey operation, which began in 1970, was full of deficiencies and large areas were left unsurveyed and unaccounted for. Hence, a comprehensive survey operation and updating of land records was taken up in the scheduled areas of the state in 1986. Dr. P.V. Ramesh, Director, Tribal Welfare, during 1995, stated in a report:

> The doctors of the land, *i.e.*, the revenue authorities, had administered fatal medicine down the ages and had created chronic and intractable pathologies pertaining to land. Manipulation and tampering had been the order of the day. Lands had been assigned, illegal transactions had been sanctified, titles had been transferred and regularised in favour of rich non-tribals in blatant violation of the Agency Regulation .... Several admirable and progressive legislations that were enacted to protect and promote the interests of tenants, marginal farmers, landless agricultural labourers, in general, and tribals, in particular, had not yielded the desired results because of certain gross distortions created by the instruments of *status quo*. This fact has eroded the confidence of the tribal in the fairness of the administration and seriously undermined the credibility of the government institutions as instruments of progressive transformation.

One of the main distortions referred above was legalisation of the occupation by non-tribals of vast lands in 1976-88 violating the Land Transfer

Regulation of 1959 and Regulation 1 of 1970. Eligible tribal tenants were also not conferred ownership rights.[17]

Ramesh quoted a case study from Utnoor division (Adilabad) to illustrate the serious distortions in the implementation of Andhra Pradesh Land Reforms (Ceiling on Agricultural Land Holdings) Act, 1973.

> A tribal who was in actual possession of only five acres of land was decreed as a surplus holder and was ordered to surrender his entire holding and was reduced to absolute penury only because he was recorded as Pattedar for 148 acres in the pahani. On the contrary, makthadars and izardars owning several villages had not only managed to surrender government lands, the lands of the tenants and the lands that have been sold long ago but continued to collect cess from the cultivators till as late as 1987. The land records continued to record these persons as "Pattedar Cultivator" for thousands of acres of land, and one of them even claimed 'compensation' under Land Acquisition Act for 742 acres, and not an inch of this land either belonged to him or was under his cultivation. His only claim was that he was recorded as pattedar-occupant-cultivator in the land record.

According to Ramesh, less than 30 per cent of the land held by non-tribals in scheduled areas is subjected to the operation of the Land Transfer Regulation and the remaining land can be tackled through effective implementation of land reforms which, again, is rendered impossible. He says:

> No legislation or regulation, however progressive, could make even a marginal difference to land reforms in the prevailing atmosphere of feudal socio-economic relations, archaic and chaotic land records, low literacy and consciousness among tribals and insensitive, apathetic administration.

Though the settlement operations were completed long back, the government which was silent for several years over the woes of tribals suddenly woke up to help non-tribals and appointed a settlement officer under G.O.Ms. No. 661, Revenue, dated 9.8.1996. The constitution of the Settlement Court helped non-tribals through early disposal of their fresh claims in 1995 and these measures helped them drag on for some more time with illegal occupations. Velamas from Buttayagudem side and Kammas from Polavaram to Koyyalagudem side and Rajus held their sway over the lands and lives of tribals, with the support of ministers belonging to their caste in every government, including the present.

According to performance budget[18] of the tribal welfare department, submitted recently to the Legislative Assembly, the tribal land under the occupation of non-tribals is 2.80 lakh acres, and 1.06 lakh acres of land was restored to tribals, while non-tribals were favoured by permitting them to retain 1.30 lakh acres. These figures amply prove how objectives of the protective legislation were being achieved. A report submitted by Dr. Ramesh during 1995 said that atleast 7.51 lakh acres of tribal land were in possession of non-tribals in the scheduled areas of the state. The report says:

> It is significant that in 57,150 cases covering the extent of only 2.44 lakh acress, there was *prima facie* evidence that provisions of the Act of 1959 have been violated and, hence, proceedings were initiated under the Regulation. Percentage of disposal in favour of non-tribals is 49.63 while it is 50.08 in favour of tribals.

If non-tribals occupy the tribal lands by dubious means, the government and its bureaucratic machinery assumes the position of the first culprit by acting in gross violation of the law and orders. According to a writ petition filed by SAKTI[19], a voluntary organisation at Rampachodavaram, out of thousands of acres of land assessed as Assessed Waste Dry in 1932, the government machinery allowed non-tribals to continue in occupation though they have to be evicted and lands have to be transferred to tribals. A full Bench of the High Court in 1993 ordered in a dispute between non-tribal parties that none would be eligible to get lands returned or retained except the original tribals. No action has been taken so far. SAKTI made a specific mention of Swarnavarigudem village where the Special Deputy Collector passed the orders of eviction of non-tribals in 1980 in 14 cases but no action was taken till 1993. Appeals were filed in 1993 and even when no stays were granted non-tribals are not evicted till today.

V. Suggestions and Conclusion

The Director, Tribal Welfare, in his report during 1995 suggested several amendments to solve the tribal land problem. To overcome the legal hurdle imposed by High Court in 1977, an amendment is necessary to give retrospective effect to the provisions of Land Transfer Regulation with effect from August 14, 1917, in Andhra region, and October 1, 1949, in Telangana. The definition of "transfer" in Land Transfer Regulation of 1959 should be amended to expressly include all methods of moneylending, mortgage and hypothecations through which non-tribals were trapping tribals in an unending cycle of indebtedness, resulting in loss of land. A new clause should be introduced to restrict transfer of land to a female member of a scheduled tribe, who is married to or kept as a concubine by a non-tribal. In most of the cases where tribals institute cases against non-tribal transferors, the onus of provid-

ing that the transfer of immovable property is in violation of Land Transfer Regulation be cast on the tribal transferor. It is, therefore, necessary to incorporate a section casting the entire burden of proof on the non-tribals transferee. The report suggested restrictions on transfer of land from tribal to tribal, ban on assignment of lands to non-tribals in scheduled areas and imposition of a time limit for restoration of land after the orders were granted.

Centuries of practical experience suggest that no amount of legislation will help bring freedom from exploitation or for development in the absence of strong political will and a comprehensive understanding of social, psychological and traditional life of tribals. Prevention of exploitation by non-tribals is important but not the only goal. An awakening among tribals to acquire knowledge and skill to face this deceptive society and to assertively mix with others is very important.

A tribal member of the Constituent Assembly of India said on December 11, 1946 :

> So far as I have been able to count, only five of use are here. But we are millions and millions and we are the real owners of India. It has recently become a fashion to talk of Quit India. I do hope that this is only a stage for the real rehabilitation and resettlement of the original people of India. Let the British quit. Then, after that, all the later-comers quit.

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* Lecturer, Pendekanti Law College, Himayathnagar, Hyderabad.

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2. V.N.V.K. Sastry, *Two Hundred years of Tensions in Tribal Areas of Andhra Pradesh* in K.P. Kumaran, ed., RURAL TENSIONS IN INDIA,DIMENSIONS & IMPLICATIONS, (Jaipur) at 109.

3. *Id.* at 113.

4. Venkata Rangaiah, M., 1965, *The Freedom Struggle in Andhra Pradesh (Andhra)*, Vol. I (1800-1905 AD), Govt of A.P., Hyderabad.

5. Mozumdar K., *The Ganjam Agency 1839-1900 - Some Problems of Tribal Administration* in Misra P.K. ed., CULTURE, TRIBAL HISTORY & FREEDOM MOVEMENT, (London : Trubner and Co., Ludgate Hells, 1989).

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7. THE GANJAM AND VISAKHAPATNAM DISTRICT ACT, 1839 was later extended to entire British India by SCHEDULED DISTRICTS Act, 1874.

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9. Haimendorf C.V.F., *Aboriginal Rebellions in the Deccan*. Man in India, Vol. XXV, No. 4, 1945.

10. Sumit Sarkar, *Primitive Rebellian and Modern Nationalism* in Pannikar, K.N. ed., National & Left Movement in India, (New Delhi : Vikas Publishing House, 1980).

11. The latest report was submitted by the Social Welfare Department at a meeting held in the Chambers of the Chief Minister on Feb. 17, 1997.

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14. Haimendorf, Christoph Von Furer, Tribes of India: The Struggle for Survival, 1982-83.

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Additional References

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   ASP warns of cases against those inciting Girijans.

2. The Indian Express, March 25, 1997
   Jeelugumilli Mandal tribals accuse policy of looting their houses.

3. Deccan Chronicle, March 22, 1997

   Red Alert, flag march in Agency villages. 40 Tribals remanded for defying prohibitory orders.

4. The Indian Express, March 23, 1997
   39 Tribals remanded till April 1.

5. The Indian Express, March 7, 1997
   20 Tribals arrested.

6. The Hindu, August 3, 1995
   Awakening among tribals in agency tracts.

7. NEWSTIME, October 19, 1995
Tribals for eviction of encroachers

8. THE HINDU, October 21, 1995
Row over tribal lands hotting up.

9. DECCAN CHRONICLE, July 11, 1996
Tribals surround Police Station.

10. THE INDIAN EXPRESS, July 17, 1996
Land disputes in agency areas deepen.

11. THE HINDU, August 8, 1996
115 Tribals arrested.

12. NEWSTIME, August 8, 1996
Tribal, non-tribal ties worsen
Tribal, non-tribal feu turns bitter.

13. DECCAN CHRONICLE, August 9, 1996
73 suspects nabbed in land dispute case.

14. THE HINDU, August 13, 1996
Disputes that remain unresolved.

15. THE HINDU, September 19, 1996
Government grilled over arrest of tribals.

16. THE HINDU, December 13, 1996
Tribals snatching crop.

17. THE INDIAN EXPRESS, December 16, 1996
Crop snatching in rural West Godavari.

18. THE HINDU, 20, 1996
65 Policemen being held captive by tribals.

19. THE HINDU, December 21, 1996
Show of solidarity by tribals.

20. THE INDIAN EXPRESS, Deceber 29, 1996
Parties instigating tribal youth
Ouminous signs from agency areas in West Godavari.

21. THE INDIAN EXPRESS, January 9, 1997
Clashes between tribals, non-tribals farmers feared.

22. THE INDIAN EXPRESS, January 11, 1997
Disputed lands in agency villages to be surveyed.

23. THE INDIAN EXPRESS, January 16, 1997
Tribals abstain from peace talks.

24. THE INDIAN EXPRESS, January 31, 1997
Tribals take possession of lands.

25. THE INDIAN EXPRESS, February 12, 1997
Allow surveyors to assess agency land, tribal told.

26. The Hindu, February 13, 1997
Stage set for distribution of land to tribals.

27. Deccan Chronicle, February 26, 1997
Vested interests behind unrest in scheduled area : Minister.

28. The Indian Express, March 1, 1997
Ban orders in 2 agency mandals.

29. Deccan Chronicle, March 2, 1997
Tribals, non-tribals sign MOU.

30. The Hindu, March 4, 1997
Prohibitory orders in tribal areas flayed.

INDUSTRIAL RELATIONS : A NEED FOR REORIENTATION WITH REFERENCE TO FREE MARKET ECONOMY IN INDIA

*Harish Chander**

I. INTRODUCTION

In any industrialised society the industrial disputes between employers and the workmen are inevitable because of the clash of the conflicting interests of the employers and that of the workmen. Such an inherent industrial climate in any country in the modern times requires the presence of the dynamic industrial relations system in order to encourage and maintain cordial and healthy relations between the management and the working class. It is observed that the system of industrial relations management in a country is dependent upon the nature of the political, social structure and legal system of the society. Precisely for this reason if we view the industrial relation systems comparatively in the U.S.A., the U.K., Japan, Australia, India, Africa etc., the systems are substantially distinct in each country from the other.

After independence India chose the Nehruvian model of mixed economy for our country. It worked well for a long time but ultimately it was found that substantial investments made in the public sector started making huge losses at the cost of the tax payers. Thus for the last six years our Government has been making efforts to bring about economic reforms in the economy towards a free market economy. Some basic reasons, *inter alia*, towards this shift could be listed as following :

(*i*) The trend of the world towards globlisation in which India could not remain isolated particularly when there was change in economic system in Eastern Europe, the collapse of the U.S.S.R. and the shift towards new economic model in the region, as well as Chinese concern also for transition from Communism to a competitive market oriented economy.

(*ii*) To raise the rate of economic growth (GDP) which could be possible only through efficient running of industries with competitive approach and profit motive.

(*iii*) To privatise those PSU's which were not running on efficient, protective and profit basis, so that they could compete with other industries.

(*iv*) To liberalise the economy with a view to encourage more investment particularly from the foreign countries. And thus the Indian Government started projecting the liberal economic policies in the form of free market economy.[1]

In order to survive in this competitive world economy India has to strive hard and change towards free market economy and globlization which should bring about substantial increase in GDP and encourage the foreign investors to invest in India. The object of change in the system should be to raise the economic standard of the poor class and increase in the annual economic growth rate. The above goals can be achieved only by making the economy competitive, with lesser state controls, and more and more investment. We know that at the level of present economic development we cannot have sufficient investment unless we also allow and encourage foreign investments at least in the priority sectors, power and in the infrastructure. The focus of this paper is to analyse and point out in what manner our labour laws and industrial relations system should adapt themselves so that the economy becomes competitive and also encourages foreign investment. Some fundamental reforms are suggested in the labour laws and industrial relations in India which should gear the present economy towards the free market competitive economy and induce the foreign investors to invest in India.

II. Basis of Employer-Employee Relationship

While discussing about industrial relations we are basically concerned as to how the relations between the employers and workers are governed under the law in a given society. Historically, one may be surprised to note that it was in the year 1771 in the famous *Sommersett's* case[2] that Lord Mansfield for the first time made it clear that slavery was incompatible with the English common law. In feudal times when agriculture was the main source of employment the employment of agricultural labour was described in terms of *landlords* and *serfs* which implied partial slavery because the serf could not choose his employer and if the landlord sold his land to another person then the serf also changed hands and became the serf of another landlord. During the period of industrial revolution individualism of *laissez faire* was the basis of determining the relationship and was called as 'master and servant' relationship where the principle of 'hire and fire' as propagated under the pure law of contract between the employers and the workers operated. However, it may be emphasised that the modern trend all over the world is of a welfare state and consequently the common law concept of 'servant' in the law of 'master and servant' is substituted with that of an 'employee'. And thus the relationship can now best be described as the relationship of employer and an employee. Hence labour laws and industrial relations must have a human approach which ensures labour human dignity.

III. Unionism and the Law

Modern industrial relations have to be based on proper industrial democracy for the workers and employers. And for a balanced system industrial relations based on democratic lines, it is essential that both the workers' unions and employers' associations/unions are allowed to flourish in the industrial society. The best method for the resolution of industrial disputes is collective bargaining between the employers' and the labour unions. For this, it is imperative that there should be such trade union law that encourages proper unionism and at the same time makes the unions and their leaders responsible as partners in the process of industrial democracy. In India there are some basic flaws in the trade union law which have to be removed so that we can encourage collective bargaining as a method of resolving industrial disputes. In this respect, the following changes in the Trade Union Act, 1926 are suggested;

(*a*) Presently under the Trade Unions Act, 1926, any seven or more members of a trade union by subscribing to the rules can apply for registration.[3] Such a provision encourages multiplicity of trade unions in industrial settings. Such a scenario under the law is not good for sound trade unionism and determining the 'sole bargaining agent' for purposes of collective bargaining. Therefore, under the law of trade unions a provision should be introduced wherein a trade union should be allowed to register only if atleast 20% of the members of the establishment or industry apply for registration as a trade union.

(*b*) At present, under the trade union law there is no obligation on the part of the employers to recognise a majority union for the purposes of collective bargaining like in the U.S.A. Such a situation under the law encourages the unscrupulous employers and the union to thwart the process of healthy trade unionism by recognising the bogus unions in the establishment and discouraging genuine trade unions. Many a times the employers and corrupt union leaders set up a union as opposed to the genuine union in the establishment. This lacunae in law is a major reason of the unpopularity of collective bargaining in India. Thus it is important that a provision providing for compulsory recognition of the majority union should be introduced in the Trade Unions Act, 1926.

(*c*) Under the Trade Unions Act, a provision for conducting secret ballot should be introduced before a union can go on strike and only if the majority of the union members want to go on strike, the strike should be considered legal. Such a provision would avoid industrial strife purely on the whims and fancies of the union leaders and would encourage workers participation in the industrial democracy.

(*d*) Under the law, no officer or member of a registered trade union shall be held liable for criminal conspiracy for activities of the trade union in furtherance of trade disputes.[4] Moreover, no trade union, official of a trade union or member of trade union should be liable for any tortious or civil liability for an activity of unions or members in furtherance of a trade dispute.[5] In *Rohtas Industries Staff Union* v. *State of Bihar*[6], it has been ruled by the Patna High Court and confirmed by the Supreme Court of India that the trade unions are not liable to pay damages to the employers for participation in a strike whether it is legal or illegal. Such kind of civil immunity to the trade unions has made the trade unions irresponsible. In fact as in the U.K., a provision in the Trade Unions Act should be introduced wherein if the motives of the union leaders are not genuine in industrial dispute and they resort to strike which is unfair then the union shall be liable to pay damages to the employers depending upon the size of the union membership. Such a step should make the leaders of the unions and workers more responsible and they would indulge in genuine industrial disputes only.

IV. Mechanism for the Settlement of Industrial Disputes

The nature of industrial disputes is quite distinct from ordinary civil disputes. The industrial disputes are economic in nature and basically disputes of interests between the employers and workmen. The industrial disputes are not disputes about rights and liabilities under the law. In industrial disputes in a society it is not only the interests of the employers and workmen which are at stake. The interests of the society are also affected if there are industrial disputes and industrial strife. Therefore, speedy and effective methods, mechanism and forums have to be devised to resolve and settle industrial disputes. The effective and speedy mechanism for the resolution of industrial disputes is much more imperative in the present policy of economic reforms and free market economy in India. It has been observed that investment in various priority sectors and infrastructure industries is short of the required level because the foreign investors are afraid of the rigid labour laws and dialatory mechanism for the settlement of industrial disputes. Such a scenario in industrial relations does not induce and encourage the foreign investors to invest in India. Accordingly, the following suggestions have been made with respect to the dispute settlement mechanism available in India.

(*i*) It is well recognised all over the world that collective bargaining is the best method for the resolution of industrial disputes between the employers and the workmen. In India, though it is accepted by the employers and the workmen that collective bargaining should be resorted to for the settlement of industrial disputes yet it is very seldom that the employers and unions or workmen resort to collective bargaining. In fact, both the employers and unions have become

accustomed to the compulsory adjudication by the labour courts and industrial tribunals. Adjudication of industrial disputes by industrial tribunals is very dialatory and time consuming process which hampers healthy relations between management and the workmen. In this regard, it is suggested that a provision under the Industrial Disputes Act, 1947, similar to the provision under the National Labour Relations Act, 1935 of the U.S.A., should be incorporated making it obligatory for the parties to first of all resort to collective bargaining bonafidely for the settlement of industrial disputes. And in any case where a party to the industrial dispute refuses to collective bargaining then it should be treated as unfair labour practice under the law. Such a step would give a boost to the popularity of collective bargaining in India also.

(*ii*) If in the process of collective bargaining the management and union leaders fail to negotiate an agreement then in the process of settlement the use of the conciliators and mediators may be resorted to so that the industrial disputes should be resolved speedily and effectively. And supposing still the disputes cannot be settled than disputes should be referred and preferred by the management and unions to be decided by the voluntary arbitrators under section 10A of the Industrial Disputes Act. Reference to labour courts and industrial tribunals for adjudication of industrial disputes should be the last resort by management and unions for the resolution of industrial disputes. Such measures would help in creating healthy en· ·onment in industrial relations in India and would also encourage the faith of foreign investors in the Indian industrial relations system which is so imperative for the economic reforms of free market economy and globlisation in India.

V. Some Important Issues under the Industrial Disputes Act

A. Unfair Labour Practices

During the period of industrial strife, both the management and unions and their workmen have the tendency to resort to unfair labour practices. Such practices by the management or the unions create unhealthy climate of industrial relations in an industry. Such practices not only affect the production but also jeopardise the day to day working relations between the management and workmen. And some times such practices lead to law and order problems in the society. Therefore, such practices need to be prevented and curbed in industries.

In India, the unfair labour practices on the part of the management as well as the workman and unions are provided under the Fifth Schedule of the Industrial Disputes Act. An employer or a workman or a union is prohibited to commit any unfair labour practice.[7] However, the only remedy available for

the commission of unfair labour practices by the employer, a workman or a union under the law is the prosecution for a criminal offence with the prior permission of the 'appropriate government'.[8]

Prosecution for the offence of commission of unfair labour practices is not a sufficient remedy because neither the employer nor the workman nor the union is interested in the criminal prosecution. The need is for the prevention and curbing of such practices when these are being committed by the employer, or a workman of a union. In this respect, it is suggested that there should be provision under the Industrial Disputes Act providing for an agency to listen to the grievance of the affected party and the agency should have the power to issue cease and desist orders against the party who is either engaged or commits unfair labour practice. Such a provision exists under the National Labour Relations Act, 1935 in the U.S.A. where the National Labour Relations Board is empowered to deal with the complaints of the aggrieved party and issue appropriate cease and desist orders against the party which engages in or commits the unfair labour practice. Such kind of provision would help in developing healthy and cordial industrial relations between employers and the workmen.

B. Strike and its Consquences on Workmen

In the process of collective bargaining between employers and the workmen, strike is one of the most important weapon in the armoury of workers and unions. There is no doubt that this right of strike in furtherance of industrial disputes should be well recognised. However, the right of strike cannot be left completely unregulated under the law. Sections 22 and 23 of the Industrial Disputes Act provide for the grounds declaring the strike illegal. Section 24 of the said Act makes the strikes illegal if any of the grounds under sections 22 and 23 of the Act have not been observed. For participation in illegal strike, for instigating an illegal strike and giving financial aid in furtherance or support of illegal strikes are declared as offences under the Industrial Disputes Act.[9] Any active participation in an illegal strike by workmen can also lead to disciplinary action against him in the form of termination or dismissal from job.[10]

In the U.K. and U.S.A., the workmen are not entitled to wages for the period of strike. However, in India the workmen have been paid wages even for the strike period particulary where the strike is legal and is also justified. It was for the first time that a categorical ruling from the Supreme Court in *Bank of India* v. *T.S. Kelavala*[11] held that the principle of 'No Work No Pay' should be followed. But again the Supreme Court in the case of *Syndicate Bank, Canara Bank and the State Bank of India* v. *Their Workmen*[12] held that in case the strike is legal and justified then the workmen are entitled to wages. The

above ruling of the Supreme Court has diluted the principle of 'No Work No Pay' for the payment of wages to workmen for the strike period. It is submitted that in case the workmen are entitled to wages for the strike period also then there is no pressure on the workmen for going on strike and make the unions and workmen irresponsible. Such a law is one of the factors which deters the foreign investors to invest in Indian industries. Hence, it is suggested that 'No Work No Pay' principle should be adhered to for the payment of wages for the strike period.

C. Unfair Dismissal and Reinstatement of Workmen

It is well conceded that law and the industrial tribunals must give proper relief to the workmen in case of unfair dismissals. However, it has been observed that in almost every case of unfair dismissal reinstatement of the workman on the job with back wages is the rule in India. It is expected of the employer to conduct an elaborate domestic enquiry following the strict principles of natural justice just like ordinary courts, before taking an action in the form of dismissal or discharge. It is suggested that in each and every case, for all types of industrial employments, a detailed enquiry need not be insisted by law. It is found that in most of the cases the matter is agitated before the labour courts. And in case the dispute is raised before the labour court or tribunal, let the labour court or the tribunal decide on the merits of the case. Reinstatement of the workman should not be made in each and every case by the labour court or industrial tribunal merely on the grounds of technical illegalities like no proper enquiry etc. The reinstatement of a workman on the job should be on the substantial merits of the case. It is suggested that as in the U.K., the labour court or industrial tribunal in India should give the option to the employer for reinstatement of a workman or a heavy compensation in lieu of reinstatement for an unfair dismissal of a workman.

D. Lay-off, Retrenchment and Closure

Under Chapter V-B of the Industrial Disputes Act, if an industrial establishment has employed not less than one hundred workmen on an average per working day during the preceding twelve months, then the employer cannot lay-off, retrench or close the establishment without the prior permission of the appropriate Government.[13] It has been found that whenever the employers apply for the prior permission for lay-off, retrenchment or closure to the appropriate Government the permission has not been granted generally. These provisions for permission are very stringent and deter the employers to invest in industries and have much more deterrent effect on the foreign investors who do not feel encouraged or induced to invest in Indian industries. It is recommended that these provisions should be repealed from the Industrial Disputes Act so that more liberal foreign investments flow in industries and the industries can freely compete in the free market economy.

VI. Workers Participation in Management

Labour used to be treated like a commodity at the beginning of the industrial revolution. However, it is now considered that in the industrial process of production, labour is equally a partner with the capital. Thus, it may be pointed out that there is an imperative need to ensure proper workers participation in management to enhance the GNP in the Indian Economy. Workers participation in management is not only good for workers but is also essential for developing cordial relations between the employers and workmen. Workers participation in management also ensures proper management of industrial organisations and establishments.

Article 43 A of the Constitution of India enjoins that the state shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in industry. However, little has been done in India to secure workers participation in management of industries. In the year 1990, a Bill titled the Participation of Workers in Management Bill, 1990 was introduced in the Parliament. The Bill of 1990 provided for Shop Floor Councils[14] and the representation of workers at the board of management.[15] It is earnestly suggested that the law on the lines of the 1990 Bill should be enacted as early as possible so that there is proper growth of industries in India.

In conclusion, it may be reiterated that India has rightly chosen the path of liberalisation, globalisation, and free market economy. India cannot remain isolated when the whole of the world is progressing towards free and competitive economic system. However, the goal of a free market economy cannot be achieved without requisite changes in the industrial relations system. There are various provisions in law as discussed in this paper which do hamper healthy industrial relations between the management and workmen. Such provisions also negate the goal of competitive and free market economy. In fact to reorient the industrial relations system in India necessary reforms and changes in industrial relations law will give a new orientation as suggested above in this paper which will go a long way in ensuring healthy industrial relations as well as achieving the goal of free market economy which will encourage the foreign investors to invest in India which is so essential to increase the level of economic development in India.

Notes and References

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1. See Harish Chandra, *Reflections on Free Market Economy in India*, 18 Delhi Law Review (1996) at 220-221.
2. (1771) 20 S.T. 1.

3. See section 4 the TRADE UNIONS ACT, 1926.
4. See section 17 the TRADE UNIONS ACT, 1926 and *Ruikar* v. *Empror,* AIR 1935 Nag 149.
5. See section 18 of the TRADE UNIONS ACT, 1926.
6. AIR 1962 Patna 170.
7. See section 25 T of the INDUSTRIAL DISPUTES ACT, 1947.
8. See sections 25 U and 34 of the INDUSTRIAL DISPUTES ACT, 1947.
9. See sections 26 to 28 of the INDUSTRIAL DISPUTES ACT, 1947.
10. See *Gujrat Steel Tubes* v. *Its Workmen,* AIR 1980 SC.
11. (1990) II LLJ 235 SC.
12. AIR 1995 SC.
13. See sections 25-M, 25-N and 25-0 of the INDUSTRIAL DISPUTES ACT, 1947.
14. See section 4 of the PARTICIPATION OF WORKERS IN MANAGEMENT BILL, 1990, which provides for equal number of representatives of the employer and workmen at the Shop Floor Level Council.
15. See section 6 of the PARTICIPATION OF WORKERS IN MANAGEMENT BILL, 1990.

MAKING ADR TECHNIQUES MANDATORY IN INDIA : PROPOSED CPC AMENDMENT

*V.K. Ahuja**

I. INTRODUCTION

The alternative dispute resolution techniques (hereinafter referred to as 'ADR Techniques') are not alien to the justice dispensing system of India. In ancient India, people used to get their disputes resolved by arbitrators or tribunals not established by the King. Yajnavalkya and Narda stated that Village Councils (*Kulani*), Corporation (*Sreni*) and Assemblies (*Puga*) used to decide law suits. These institutions have been described as arbitral tribunals which have a status of *Panchayat* in modern India.

The *Panchayats* have played a very important role in resolving the disputes in ancient India. These *Panchayats* were generally located in the rural areas. They proceeded in an informal way free from technicalities of procedural law. If a person transgressed the permissible limits of the unwritten social, caste or quasi-legal rules of conduct, the aggrieved party could summon a *Panchayat* and place his case before it. The moral influence of these *Panchayats* was so great that the offending party could not easily dare to tell a lie before the *Panches*. It is also worth mentioning that these *Panchayats* were often influenced by local sentiments and factions and thereby became susceptible to prejudice and bias. Harsh and unfair decisions of village *Panchayats* were rampant. Even today, one can find barbaric decisions of the *Panchayats* in rural areas.

The simple and informal system of arbitration through *Panchayats* though useful was ineffective to deal with the complex legal, social and economic problems. The *Panchayat* system underwent considerable changes during the colonial period of British Raj. A number of statutes were passed providing for arbitration as a mode of dispute settlement.

The first statute providing substantive law on arbitration - the Indian Arbitration Act was passed in 1899. Its application was restricted only to Presidency towns of Calcutta, Bombay and Madras. This was not a complete law and suffered from many defects. In 1908, the Code of Civil Procedure (hereinafter referred to as 'CPC') was re-enacted and provisions relating to

arbitration were set out in the Second Schedule of the CPC in the hope that this would be transferred to a comprehensive arbitration act at a subsequent date.

Ultimately in 1940, the Arbitration Act was passed repealing the Indian Arbitration Act of 1899 and provisions relating to arbitration in CPC. In addition, Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961 were also adopted in India to meet the needs of domestic and certain aspects of international arbitration.

The Arbitration Act, 1940 though an attempt to provide a comprehensive code on arbitration was deficient in several respects and became increasingly outmoded and discredited. The Act could not meet the objectives for which it was enacted. The Supreme Court in *M/s Guru Nanak Foundation* v. *M/s Ratan Singh & Sons* observed[1] :

> However, the way in which the proceedings under the Act are conducted and, without exception, challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical, accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts being clothed with 'legalese' of unforeseeable complexity.

With the liberalisation, globalisation and privatisation of the economy, it was felt that the economic reforms would remain incomplete without a system providing for a quick and efficacious settlement of commercial disputes involving international transactions.

In a meeting of the Chief Ministers and Chief Justices in 1993, it was also felt that the courts were not in a position to bear the entire burden of justice system[2] and that a number of disputes deserved to be resolved by alternative modes such as arbitration, mediation and negotiation. The desirability of disputants taking advantage of procedural flexibility of ADR methods, saving of time and money and avoidance of stress of a conventional trial was also emphasised in the meeting.

To remove the deficiencies in the Arbitration Act, 1940 as well as to provide quick, efficacious and less expensive settlement of disputes including commercial disputes, Arbitration and Conciliation Bill, 1995 was introduced in the parliament which was subsequently repealed by an Ordinance of 1996 and finally was replaced by Arbitration and Conciliation Act, 1996.

Section 85 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as an 'Act') has repealed the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

II. ADR Techniques - An Overview

As the primary object of ADR system is avoidance of vexatious and expensive recourse to traditional justice dispensing machinery, the ADR techniques encourage the disputants to arrive at a settlement without going to court. It helps in avoiding delays and promotes access to justice for all. The techniques are extra-judicial in character and can be used in almost all contentious matters which are capable of being resolved, under law; and by agreement between the parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes.

The main techniques include (*a*) negotiation; (*b*) mediation/conciliation; (*c*) arbitration; (*d*) fast-track arbitration; (*e*) conciliation-arbitration; (*f*) mini-trial; and (*g*) fact-finding expert committee.[3]

Negotiation is a voluntary non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute. Mediation and conciliation are generally used as interchangeable terms. Both are non-binding procedures in which a neutral third party assists the disputing parties in mutually reaching an agreed settlement of the dispute. In both the procedures a successful completion of the proceedings results in a mutually agreed settlement of dispute between the parties. However, mediation is treated as distinct from conciliation in as much as in mediation the emphasis is on more positive role of the neutral third party than in conciliation. Arbitration is a procedure in which dispute is submitted to an arbitral tribunal consisting of a sole or an odd number of arbitrators which gives its decision in the form of an award that is binding on the parties. Fast-track arbitration is a form of arbitration in which the arbitral tribunal completes the arbitral proceedings and makes an award in a short time. Conciliation - arbitration is a procedure where the parties agree to settle their dispute first by attempting a conciliation within a specified time, failing which by arbitration. Thus, this procedure combines conciliation/mediation with arbitration. No arbitral proceedings can be initiated where the dispute has already been resolved by conciliation or mediation. Mini-trial is a non-binding procedure in which the disputing parties are presented with summaries of their cases to enable them to assess the strengths, weaknesses and prospects of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser. Fact-finding expert committee

is constituted by the disputing parties to investigate into certain specific issues of fact, technicality or law. After investigation, the parties decide whether to resolve the dispute through negotiation, mediation or otherwise. However, the above techniques are not exhaustive.

III. Role of Lok Adalat in Dispute Resolution

Since the institution of Lok Adalats, a non-formal method of settling disputes, Lok Adalats have achieved a fair distinction of deciding about 68.86 lakh cases which related primarily to motor accidents, land acquisition, family disputes, mutation of land, encroachments on forest land, bank loans, workmens' compensation and compoundable criminal offences. A total of 17,633 Lok Adalats have been organised in different parts of the country.[4]

The Lok Adalats started initially as voluntary organisations for informal resolution of disputes and were mostly manned by retired judges supported by lawyers and social workers. Lok Adalats have received the statutory recognition in the Legal Services Authorities Act, 1987 which came into force on November 9, 1995.

Lok Adalats under the Legal Services Authorities Act, have jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal or revenue court or any tribunal constituted under any law for the time being in force in the area for which the Lok Adalat is organised.[5] Lok Adalats also act expeditiously to arrive at a compromise or settlement between the parties and are guided by legal principles of justice, equity and fair play.[6] It is open to a party where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, that the party may take recourse to court of law.[7]

The award of the Lok Adalat is deemed to be a decree of a civil court and every award made by it is final and binding on all the parties to the dispute. No appeal shall lie to any court against the award.[8] The proceedings before a Lok Adalat are deemed to be judicial proceedings.[9]

IV. The Arbitration and Conciliation Act, 1996 : Salient Features

The Arbitration and Conciliation Act, 1996 provides that the arbitral tribunal with the consent of the parties, may use mediation, conciliation or other procedures at any time during the arbitral proceedings.[10] The parties may also settle the dispute during the arbitral proceedings.[11] Thus, the Act allows the parties and the arbitral tribunal to use mediation and other ADR techniques to resolve the disputes.

The main objectives of the Act are to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation; and to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration. The Act provides that the arbitral tribunal gives reasons for its arbitral award and ensures that the arbitral tribunal remains within the limits of its jurisdiction. It minimises the supervisory role of courts in the arbitral process and permits an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes. The Act provides further that every final arbitral award is to be enforced in the same manner as if it were a decree of the court; and that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal. For the purposes of enforcement of foreign awards, the Act provides that every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

The Act contains 86 sections and three schedules, and is divided into four parts.

A. Arbitration

Part I deals with arbitration. In the matter of composition of the arbitral tribunal and appointment of arbitrators, the parties may either agree on the number and procedures for appointment by themselves or agree to abide by an existing procedure for appointment. Section 11(2) of the Act empowers the parties to agree on a procedure for appointing arbitrator. It also provides the basis for institutional arbitration so far as the parties may, before or after a dispute has arisen, agree to abide by the rules of procedure of an arbitral institution for the purpose. Since the procedure for appointment of arbitrators is one of the most important aspects dealing with in the arbitration rules of all arbitration institutions, which makes it enabling provision from the point of view of arbitral institutions. It is worth mentioning that the Act takes into account the contingency of appointment of arbitrators by the Chief Justice of the respective High Court when the parties do not agree on a procedure for appointment of arbitrators.[12]

Unlike the Arbitration Act of 1940, the present Act allows the parties to challenge the appointment of arbitrator on specified grounds.[13] The arbitral tribunal shall decide on the challenge.[14] In addition, the arbitral tribunal has a self same jurisdiction, including ruling on any objections, with respect to the existence or validity of the arbitration agreement.

There are no legal procedural fetters on the arbitral tribinal and it is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The parties are free to adopt any procedure for settling disputes by the intervention of the arbitral tribunal.[15] In addition, parties are free to decide the place of arbitration and the language of arbitral proceedings. Unlike Arbitration Act, 1940 detailed provisions have been laid in with regard to the conduct of arbitral proceedings.

Under Chapter VI of the Act which lays down provisions for the making of arbitral award and termination of arbitral proceedings, the arbitral tribunal decides the dispute submitted to arbitration in accordance with the substantive law for the time being in force. In addition, the arbitral tribunal is obliged to decide a dispute *ex aequo et bono* or as *amiable compositeur* if the parties have expressly authorised it to do so.[16] It means that arbitral tribunal may deviate from substantive law while deciding a dispute if the parties to the dispute authorised the tribunal to do so. As section 30(1) provides that an arbitral tribunal may, with the agreement of the parties, use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement, which shall not be incompatible with an arbitration agreement the Act thus, encourages the parties to resolve their dispute not only by arbitration or conciliation but also by any other mode of ADR.

The Act obliges the arbitral tribunal to state the reasons upon which its arbitral award is based. However, if the parties agree that no reasons are to be given, this obligation can be dispense with.[17] This provision is a significant departure from the provisions of the Arbitration Act, 1940 which contained no such mandatory provision. However, doubts have been expressed as to the wisdom of making it mandatory under the law to give reasons for the award. It has been contented that giving reasons in the award may invite criticism where ends and means of the award do not reconcile.

(i) Grounds for Setting Aside an Award

Under Arbitration Act, 1940, an award could be set aside on three grounds namely (*a*) that an arbitrator or umpire has misconducted himself or proceedings; (*b*) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid; (*c*) that an award has been improperly procured or is otherwise invalid.[18] The Arbitration and Conciliation Act, 1996 widens the scope of setting aside the award on the following grounds :

(*i*) the party was under some incapacity; or

(*ii*) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law for the time being in force; or

(*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(*iv*) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or

(*v*) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

The court may also set aside an arbitral award if it finds that —

(*i*) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(*ii*) the arbitral award is in conflict with the public policy in India.[19]

The award can be considered conflicting with public policy only if making of the award was induced or affected by fraud or corruption or was in violation of section 75 which obliges conciliator as well as parties to keep conciliation proceedings confidential, or section 81 which provides for inadmissibility of evidence of conciliation proceeding in other proceedings.[20]

The time limit has also been provided for setting aside the arbitral award. An application for setting aside of award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33 which lays down rules regarding correction and interpretation of award and for making additional award, from the date on which that request had been disposed of by the arbitral tribunal. However, the court may entertain the application within a further period of maximum thirty days, if it is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months.

(ii) Appeals

Appeals can be made against the arbitral awards in limited cases. The grounds for making an appeal have been laid down in section 37 of the Act. Section 37(1) provides that an appeal shall lie from the following orders to the court authorised by law to hear appeals from original decrees of the court passing the order, namely —

(*a*) granting or refusing to grant any measure under section 9;

(*b*) setting aside or refusing to set aside an arbitral award under section 34.

There are also provisions for interim measures as conceived in section 9 which provides that a party may appeal to the court before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced :

(*i*) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceeding; or

(*ii*) for an interim measure of protection in respect of (*a*) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (*b*) securing the amount in dispute in the arbitration; (*c*) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration; (*d*) interim injunction or the appointment of a receiver; (*e*) such other interim measure of protection as may appear to the court to be just and convenient.

An appeal also lies to a court from the order of the arbitral tribunal where it accepts the plea that it does not have jurisdiction[21] or that it is exceeding the scope of its authority.[22] Apart from this, an appeal can also be made against the order of arbitral tribunal where it grants or refuses to grant an interim measure under section 17.[23] Section 17 authorises the arbitral tribunal to order a party, at the request of another party, to take any interim measure of protection in respect of the subject-matter of the dispute. The arbitral tribunal may also require a party to provide appropriate security in connection with aforesaid measure.

The Act provides further that no second appeal shall lie from an order passed in appeal under this section. But parties shall have a right to appeal to the Supreme Court.[24]

In no other cases an appeal shall lie under the provisions of the Act.

(iii) Finality and Enforcement of Arbitral Awards

An arbitral award shall be final and binding on the parties and persons claiming under them respectively subject to the provisions of Part I of the Act.[25] Thus, *inter alia*, the provisions of section 34 dealing with recourse against arbitral award and section 37 dealing with appeals will be applicable to an award before it becomes final.

An arbitral award is enforceable under CPC where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused. The award shall be enforced in the same manner as if it were a decree of the court.[26] This provision is a departure from the provisions of the Act of 1940.

There are some important questions such as, what remedy is available to the parties if the dispute has not been decided by the arbitral tribunal in accordance with the substantive law for the time being in force in India as is provided under section 28(1) (a) of the Act? Will such an award become final and binding on the parties and operate as *Res Judicata?* Since no qualification has been prescribed for the arbitrator, how can it be ensured that an arbitrator shall be acquainted with the substantive law including Supreme Court's judgements etc.?

B. New York Convention Awards and Geneva Convention Awards

The Act repeals the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. However, the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force, whereas this Act shall be applicable in relation to arbitral proceedings which commenced on or after this Act came into force. In addition, all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.[27] Thus, India continues to perform its obligations under New York Convention on Recognition of Enforcement of Foreign Arbitral Awards, 1958 (First Schedule of the Act), the Geneva Protocol on Arbitration Clauses, 1923 (Second Schedule of the Act), and the Geneva Convention on the Executive of Foreign Arbitral Awards, 1927 (Third Schedule of the Act).

C. Conciliation

Part III of the Act deals with conciliation. This is a significant improvement upon its predecessor Act. Though the Act encourages the settlement of disputes by mediation and other procedures also but specific mention has been made for conciliation by laying down detailed provisions in this regard.

Generally, there shall be one conciliator unless the parties agree that there shall be two or three conciliators.[28] It is noteworthy that the maximum number of conciliators is restricted to three and there can be even number of conciliators also. Though the provisions of this Part apply to conciliation of disputes arising out of legal relationship, whether contractual or not, but the conciliator shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.[29]

The Conciliator is obliged to assist the parties in an independent and impartial manner in his attempt to reach an amicable settlement of the dispute. For this purpose, the conciliator is guided by principles of objectivity, fairness and justice giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circum-

stances surrounding the dispute, including any previous business practices between the parties.[30]

The conciliator is under an obligation to formulate the terms of a possible settlement and submit the same to the parties for their observations where he feels that settlement may be acceptable to the parties. If the parties agree to the settlement, a written settlement agreement may be drawn up and signed by the parties.

The settlement agreement has the same status and effect as that of an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

It is obligatory for the parties not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute which is the subject-matter of the conciliation proceedings. However, a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.[31]

For the preservation of justice, it has been laid down by the Act that unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of the same dispute. Moreover, the parties are not allowed to present conciliator as a witness in any arbitral or judicial proceedings.[32]

All conciliation proceedings including settlement agreement are to be kept confidential except where disclosure is necessary for purposes of implementation and enforcement.[33] It is also obligatory for the parties not to rely on or introduce as evidence in arbitral or judicial proceedings any views, suggestions or admissions made by the other party or proposals made by the conciliator etc.[34]

Part IV of the Act which deals with supplementary provisions, empowers the High Courts and Central Government to make rules consistent with this Act for certain purposes.

V. Making ADR Compulsory in India

The legislative policy in India is to cast a duty upon the court to make efforts and to assist the parties in arriving at a settlement in litigation by or against the Government or public officers in their official capacity, litigation relating to matters concerning the family such as suits/proceedings for matrimonial relief, guardian and custody, maintenance, adoption, succession etc.[35]

The mechanism of conciliation has also been introduced for settling industrial disputes under Industrial Disputes Act, 1947. However, in order to appreciate and find out whether ADR methods can substitute the formal method of settlement of disputes within the framework of formal procedures conceived in CPC and other enactments, the Government asked the Law Commission to look into the matter. Justice Malimath Committee was also appointed to study the subject. The terms of reference of the Law Commission was how far conciliation can be introduced into the urban litigation.

A. Recommendation of Law Commission

The Law Commission in its 129th Report examined at length the nature of litigation in urban areas and highlighted the staggering pendency of cases in various courts of urban areas. It was pointed out that as on 31st December, 1984, 2,48,845 cases were pending in Sessions courts, 77,41,459 cases in Magisterial courts, 29,22,293 cases in Civil courts of original jurisdiction and 10,91,760 cases on the Appellate side.[36] Special attention was given in the Report to house rent / possession litigation in urban areas and as an alternative to the present method of disposal of disputes under the Rent Acts, four distinct modes were considered.[37] They are :

(*i*) Establishment of Nagar Nyayalaya with a professional Judge and two lay Judges on lines similar to Gram Nyayalaya and having comparable powers, authority, jurisdiction and procedure;

(*ii*) Hearing of cases in Rent Courts by a Bench Judges, minimum two in number, with no appeal but only a revision on questions of law to the district court;

(*iii*) Setting up of Neighbourhood Justice Centres involving people in the vicinity of the premises in the resolution of dispute; and

(*iv*) Conciliation court system now working with full vigour in Himachal Pradesh.

In respect of suits involving disputes as to inheritance, succession, partition, maintenance and those concerning wills, which are generally blood relations, it has been recommended by the Law Commission that Conciliation Court system must be made compulsory by an effective amendment to the CPC on lines of rule 5B, order XXVII. Rule 5B of order XXVII of the CPC makes it obligatory for the court in a suit against the Government or public officer, to assist in arriving at a settlement in the first instance.[38]

In respect of all other kinds of suits, it was recommended that an attempt would be made at the pre-trial stage by the lawyers of respective parties for a reasonable settlement of the dispute on give and take basis and that in case the

dispute is not resolved or fully resolved, litigation may start but in that case the matter should be referred to the Conciliation Court and if such court finds that its persuasion to the parties to go in for a fair settlement has failed the party who was recalcitrant and unjust in approach must be fined with heavy costs.

The Law Commission recommended in the field of criminal cases, the reintroduction of the system appointing Honorary Magistrates who should be drawn from amongst the retired personnel of the judiciary. Such Honorary Magistrates should be empowered to do any work which a Stipendiary Magistrate can undertake and they should take over all the old cases.

The recommendation of Law Commission regarding service related matters was that State Government must take steps for setting up State Administrative Tribunals under the Administrative Tribunals Act, 1985.[39]

The Law Commission in its 126th Report on Government and Public Sector Undertaking Litigation recommended that the Central Government should issue a binding directive to the Public Sector Undertakings regarding reference of disputes *inter se* between them or between them on the one hand and the Government on the other to arbitration. The introduction of conciliation procedure in Writ matters, and the establishment of the Grievances' Cell to deal with disputes and complaints of employees of Public Sector Undertakings and the Government in regard to service matters and reference to compulsory arbitration of issues involving law points in certain eventualities has also been recommended by the Law Commission.

B. Malimath Committee's Recommendations

The Malimath Committee while making a study on 'Alternative Modes and Forums for Dispute Resolution' endorsed the recommendations made in the 124th and the 129th Report of the Law Commission to the effect that the lacuna in the law as it stands today, arising out of the want of power in the courts to compel the parties to a private litigation to resort to arbitration or mediation, requires to be filled up by necessary amendment being carried out. The Committee stated that the conferment of such power on courts would to a long way result in reducing not only the burden of trial courts but also of the revisional and appellate courts, since there would be considerable divergence of work at the base level and the inflow of work from trial courts to the revisional and appellate courts would thereby diminish.[40]

C. The Code of Civil Procedure (Amendment) Bill, 1997

Following the recommendations made by Justice Malimath Committee, Law Commission in its 129th Report and the Committee on Subordinate Legislations (11th Lok Sabha), the Code of Civil Procedure (Amendment) Bill, 1997 was introduced in the Rajya Sabha on 14th August, 1997, keeping

in view, among others, that every effort should be made to expedite the disposal of civil suits and proceedings so that justice might not be delayed.

Clause 7 of the Code of Civil Procedure (Amendment) Bill, 1997 proposes to insert a new section 89 in the Code of Civil Procedure, 1908. The section reads as :

"Settlement of Disputes outside the Court

89. (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for —

(*a*) arbitration;

(*b*) conciliation;

(*c*) judicial settlement including settlement through Lok Adalat; or

(*d*) mediation.

(2) Where a dispute has been referred — (*a*) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act; (*b*) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat; (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act; (d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

Rule 1 of order X of CPC is also proposed to be amended consequently and new rules 1A, 1B and IC are proposed to be inserted. Rule 1 ascertains whether allegations in pleadings are admitted or denied. It provides that at the first hearing of the suit, the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials.

The proposed rule 1A intends to provide that after recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89 namely arbitration; conciliation; judicial settlement including settlement through Lok Adalat; or mediation. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

The proposed rule 1B provides that where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

The proposed rule 1C provides that where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.

No suit in which issues have been settled before the commencement of proposed amendment, shall be affected and every such suit shall be dealt with as if no amendment had come into force.[41] Clause 35 of the Bill intends to enable the parties to claim refund of court fee in case the matter in dispute is settled outside the court.

The Code of Civil Procedure (Amendment) Bill, 1997 is a welcome initiative in resolving the disputes through ADR methods and reducing the number of cases in the courts.[42] But unfortunately, no progress has been made by the present government over the Bill. This is high time when government should take up this Bill and amend the CPC in order to clear backlog in court cases and encourage the litigants to resolve their disputes through ADR methods. Settlement of disputes through ADR shall not only be beneficial to the litigants but help also in reducing the excessive burden of the courts, enabling them to concentrate on more important issues of law requiring judicial attention.

NOTES AND REFERENCES

* Lecturer, Law Centre-II, Faculty of Law, University of Delhi, Delhi.

1. AIR 1981 SC 2075 at 2076.
2. The mounting arrears of cases were estimated to be about 25 millions in about 8000 courts throughout India. See A.C.C. Unni, *The New Law of Arbitration and Conciliation in India - Some Significant Aspects*, ICSI BACKGROUNDER ON ALTERNATIVE DISPUTE RESOLUTION, 1996 at 7.
3. P.C. Rao, *Alternatives to Litigation in India*, ICSI BACKGROUNDER ON ALTERNATIVE DISPUTE RESOLUTION, 1996 at 2-3; see also Sarvesh Chandra, *ADR : Is Conciliation the Best Choice*, ICSI BACKGROUNDER ON ALTERNATIVE DISPUTE RESOLUTION, 1996 at 16-17.

4. THE HINDUSTAN TIMES, July 3, 1998.
5. Section 19(3) of the LEGAL SERVICES AUTHORITIES ACT, 1987.
6. *Id.*, section 20(4).
7. *Id.*, section 20(5).
8. *Id.*, section 21(2).
9. *Id.*, section 22(3).
10. Section 30(1) of the ARBITRATION AND CONCILIATION ACT, 1996.
11. *Id.*, section 30(2).
12. *Id.*, sections 11(4), (5) and (6). See also Unni, *supra* n. 2 at 8.
13. *Id.*, section 12.
14. *Id.*, section 13(3).
15. *Id.*, section 19(1) and (2).
16. *Id.*, section 28.
17. *Id.*, section 31(3).
18. Section 30 of the ARBITRATION ACT, 1940.
19. Section 34(2), *supra* n. 10.
20. *Ibid.*
21. *Id.*, section 16(2).
22. *Id.*, section 16(3).
23. *Id.*, section 37(2).
24. *Id.*, section 37(3).
25. *Id.*, section 35.
26. *Id.*, section 36.
27. *Id.*, section 85.
28. *Id.*, section 63.
29. *Id.*, section 66.
30. *Id.*, section 67(1) and (2).
31. *Id.*, section 77.
32. *Id.*, section 80.
33. *Id.*, section 75.
34. *Id.*, section 81.
35. Rule 5 B of Order XXVII and rule 3 of Order XXXII - A of the CODE OF CIVIL PROCEDURE, 1908. See also sections 23(2) and (3) of the HINDU MARRIAGE ACT, 1955 and section 9(1) of the FAMILY COURT'S ACT, 1984.

36. Law Commission of India, 129th Report on *Urban Litigation - Mediation as Alternative to Adjudication*, 1988, para 2.9.

37. *Id.*, paras 3.16 - 3.21.

38. *Id.*, para 4.1.

39. *Id.*, para 4.5.

40. *Report of Justice Malimath on Alternative Modes and Forums for Dispute Resolution*, para 8.57.

41. Clause 33(2) (e) of the CODE OF CIVIL PROCEDURE (AMENDMENT) BILL, 1997.

42. There are nearly 30,00,000 cases pending in the 18 High Courts and nearly 2,50,00,000 in the 500 - odd district and lower courts in the country, see THE TIMES OF INDIA, April 26, 1998.

FOREIGN INVESTMENT AND GLOBAL NEGOTIATIONS : EMERGING ISSUES

*Jawahar Lal Kaul**

I. INTRODUCTION

International trade and Foreign Direct Investment (FDI) has grown over the years substantially. It has grown at much faster rates than national income and production. International trade has proved to be an important factor in increased interdependence between the nations with serious challenges to domestic constituencies, particularly the decision making authorities. Inspite of this, the trading nations have pursued vigorously the liberalization of international trade mainly through General Agreement on Trade and Tariffs (GATT). The Uruguay Round of Trade Negotiations was the penultimate and indeed a comprehensive round in terms of liberalization of international trade. In addition to fortifying the substantive GATT structure, it endeavours to expand its jurisdiction in various other subjects, which had hitherto been outside the GATT discipline. It has also brought into existence; a most powerful international trade organization (WTO), which forms the centre piece of GATT to administer the rules in new dispensation and also to deliberate on all issues linked directly and indirectly to international trade.

Foreign investment has come to the centre stage in the new GATT dispensation also. With an independent and separate chapter on Trade Related Investment Measures (TRIMs) in GATT, FDI has taken the shape of a core issue in international trade in any future negotiations having a profound impact particularly on developing countries (LDCs). The Singapore Ministerial Declaration (1996) underscores the importance of FDI in global negotiations vis-a-vis international trade, although negotiations on FDI have simultaneously continued in separate channels.

The object of this paper is to examine the issues pertaining to FDI, which have been focussed in global negotiations (bilateral and multilateral) and the linkages between FDI and international trade, to the extent as to whether FDI should be covered under WTO discipline. Part II will give an overview of FDI in the present scenario. Part III deals with the restrictions on foreign investment which have been in vogue and have been on the negotiating table between the developed countries (DCs) and LDCs. Part IV analyses the reasons for a thinking on multilateral dispensation on foreign investment. Part V discusses

the theme issues involved in any discussions on foreign investment. Part VI deals with summary and conclusions.

II. Foreign Investment : Growth and Trends

Foreign direct investment have played an important role in the international economy since latter part of 19th century. The economic climate of investments have improved drastically after the Second World War, when foreign companies opened majority or wholly owned subsidiaries for productive purposes overseas. Initially much of the investment took place in the developed countries. However, over the years the volume of direct investment has expanded in 'absolute and relative terms' in the LDCs as well.[1] At the same time foreign investment around the world has taken place in newer forms, as contrasted to the traditional forms of investment.[2]

The reason for the growth and increase of foreign investment over the years has been the tremendous growth of transnational corporations (TNCs). They have become responsible for internationalization of production and they are the ones to whom LDCs look forward for capital, technology and other expertise. TNCs form an essential link between the governments and the investments as they provide the much needed access to the resources. Since the TNCs sharply react in the movement of factors of production[3] in the event of unfavourable operating base(s), it has paved the way for drastic changes in the economic policies of the governments particularly in LDCs.[4] Over the years, these policies have been favourably disposed toward the TNCs thus leading to an overall increase in FDI in LDCs.

The 1980s have radically altered the international economic scene, in expanding the role and importance of FDI. It grew faster than the merchandise exports or average gross domestic product with total FDI stocks reaching nearly $1.9 trillion by 1991. Investment decisions have also influenced world trade flows.[5] FDI has undoubtedly been the most important manifestation of transnationalization. Admittedly the flows of FDI have shifted in direction from the production of goods to production of services; the leading areas being ones related to finance and trade. At the aggregate levels FDI has become as important as trade, as a means of delivery of services to foreign markets apart from enormous investments made nationally to provide services in trade and other areas. This indicates that not only the magnitude but even the sectoral compositions and organizational forms of investment have undergone considerable changes over the years.[6]

Investment flows in 1995 increased by 40%, to an unprecedented $315 billion. Developed countries were the key force behind the record FDI flows, investing $ 270 billion. The spectacular growth of FDI among developed

countries was accompanied by a hefty rise in flows into developing countries, which at $100 billion set another record in 1995. Outward investment from developing countries also rose reaching $47 billion. Investment flows to Central and Eastern Europe nearly doubled to $12 billion in 1995 after stagnating in 1994.[7]

The latest surge in investment flows reflects the fact that an increasing number of firms including the ones from the LDCs are becoming more active globally in response to competitive pressures, liberalization and the opening up of newer areas of investment by LDCs *e.g.*, infrastructure investment provides a great opportunity. At the same time new techniques are being used by the companies to gain market and competitive advantages.[8]

FDI is a major component in shaping of globalization. It has acted as an incentive for international integration in the international economy. Over the years all countries have realized the importance of FDI as an important factor in sustaining economic growth. In the developing world, China, East and South-East Asia have become the favourite targets of FDI.[9]

III. Restrictions on Foreign Investment

The emergence of TNCs in the post war era posed unique challenges to the national governments. These corporations were directly subject to each nations authority, where they operated, yet appeared fully controllable by no single political sovereign. The host countries particularly the LDCs were averse to the free entry of TNCs in their economies. Some countries through express investment legislations, some through administrative guidelines kept away these enterprises, and in case they did allow, they were subjected to restrictions of various sorts. Essentially the move was to curtail the dominance of TNCs in their national economies and to 'preserve' and 'prevent' the outflow of their costly foreign exchange.

Seidman[10] has characterized the strategy evolved by the LDCs towards the foreign enterprises in their initial phase of development planning. The strategy that emerged from the new thinking of the LDCs was to impose (limits upon FDI) rather than to induce it. Rather than freeing the surpluses earned by the foreign capital, law should ensure against its export and its redistribution into new productive investment within the country. Rather than granting freedom from import licensing, the poor country should ensure that foreign exchange goes to purchase only truly necessary imports, the poor countries must insist upon openness and disclosure by the foreign enterprises. Instead of tax heavens to the foreign investors, the host countries should tighten its tax administration to ensure against leaks by way of transfer pricing and other fiddles. Rather than angling indiscriminately for foreign investors, a poor

country should admit into the country only the few foreign investors who can uniquely contribute to the countries' development. Rather than laws that encourage a dependant alliance between the great corporations and the host government and its beauracracy, laws should ensure that officials use their powers and discretion in country's interest.[11]

Despite the above strategies, the character of TNCs allowed them to disregard local governments' regulations and policy directives. The TNCs could because of their composition yield resources and options for international integration avoiding hosts' policy and other constraints.[12] Consequently, LDCs suffered a double disadvantage, in the sense that they could neither invite a commensurate investment, nor could they properly regulate these corporations. Thus during sixties and seventies frequent clashes occurred between TNCs and national governments particularly the LDCs, and even between the home countries of the investors and the host countries over a range of regulatory provisions affecting the TNCs.[13] Asante notes that these measures were essentially an expression of the permananent sovereignty over natural resources by the LDCs. Further they were an instrument of an effective control over the development of their economic resources.[14]

However, by the end of the decade, the earlier post war approaches to investment, which often stressed control and restrictions on the FDI were reversed mainly as a result of debt crises and of the changing perception about the role of FDI.[15]

As a result a shift from 'ideological hostility' to 'warm response' to FDI was clearly emerging in the LDC leading to liberalization and promotion of FDI in these countries.[16]

Changes in the international economy has posed greater opportunities for international integration particularly for LDCs. With FDI providing greater stimulus to improved growth, job creation and development, the same has provided greater challenges in terms of requirements of adjustments by the host countries, particularly the LDCs. The LDCs have had to reciprocate. They did so in terms of their renewed invitation to the foreign investment. The emphasis in the new thinking is that foreign investment is necessary for securing scientific, technical, industrial knowledge and capital equipment. For securing that an encouraging atmosphere in terms of laws and policies governing investment had to be, and in fact are evolved. The emphasis on the selectivity of the past has given way to consciously encouraging the FDI inflow.[17]

It must however, be emphasised that changes were not only induced, but were necessary even economically, particularly for the TNCs. Because of mega-competition among them, there was an intense pressure for them to

rationalize production, cut internal costs and serarch for least expensive productive bases, later could only be found in the LDCs. This has led to what one author calls 'decolonization of production'.[18] At the same time international trade was squeezing because of increased barriers to international trade, which led to the realization of FDI as a substitute. Although regional arrangements for fostering international trade were entered into, even they also created a niche for fostering and promotion of foreign investment.[19] The above suited not only the TNCs but even their home countries, which constitute the maximum bases of these corporations. Because of high stakes in 'trade and investment' the home countries initiated bilateral and even multilateral investment promotion programmes[20] in the form of FCN treaties, bilateral investment treaties (BIS) and Free Trade Agreements (FTA).[21] These arrangements vouched for a broader framework within which foreign investment had to be treated. These arrangement also provided an institutional device for the developed countries to push in their terms and conditions on foreign investment.[22] They provided a filip to finalize the changes in the investment policies of the LDCs and to facilitate relaxation of investment restrictions by the LDCs.[23] The home countries caught up the tempo for alterations in international economic arrangements for securing a better access to their corporations overseas in order to expand their export markets for goods and services.[24] The IMF and World Bank were being made instrumental in initiating changes in the investment policies of the LDCs. The World Bank (1992) Guidelines on Treatment of Foreign Investment is symptomatic of the evolving thinking on the subject.[25]

IV. Towards a Multilateral Framework on Foreign Investment

The question of a multilateral framework on foreign investment has come to the forefront. Already same aspects concerning investment have figured in the Uruguay Round of negotiations, namely GATS, TRIPs and TRIMs. Although there was a discernible disagreement between the developed and the developing countries on bringing these items for discussion in the international trade negotiations particularly the GATT, but in the ultimate the latter yielded because of some pressures.

The inclusion of investment as an agenda of multilateral negotiations must be seen in the hindsight of its past. As we have seen foreign investment had been subject to tighter controls by the LDCs. Since investment has become important for the DCs therefore it was but natural that issues concerning investment came to centre stage. Because FDI has become a vehicle and stimulus for home countries export, nations know very well that investment is an excellent way to develop markets for parts and components made in their countries; thus a sift towards liberalization of controls on investment.[26] It has

been argued that measures that liberalize trade also tend to encourage investment. Evidence suggests that most direct investment takes place between countries that trade large amounts with each other rather than between countries that trade less.[27]

With the growing appreciation of the role of foreign investment in development, and the convergence of national attitudes in favour of market oriented policies, the home countries particularly the US has showed a new 'aggressiveness' to internationalize the investment question. In order to create new 'domestic constituencies', the US sought to internationalize the subject of de-regulation of controls on foreign investment. It emphasizes an international framework within which all questions of investment has to be dealt with. At bilateral levels, wherever it has found a receptive partner, it entered into bilateral investment treaties.[28] It was evidently because foreign countries had closed their home markets for infant industries and had used a variety of 'unfair' practices. Clearly as Lovet explains, the only appropriate US response was to : (1) seek more open markets overseas; (2) tougher American bargaining; (3) stronger American trade laws; (4) increased US adjustment assistance; and (5) a stronger industrial policy with new institutions.[29]

The renewed interest about the international concern on FDI should also be viewed from the point of interlinkage between trade and investment. It is strongly argued that these interlinkages are important for several reasons.[30]

1. The role of trade as positive factor in growth and development has been long recognized and gets reflected in trade policies. FDI increasingly influences the size, direction and composition of world trade, as do FDI policies.
2. Similarly the FDI has also a positive factor in growth and development. Trade and trade policies can exert various influences on the size, direction and composition of FDI flows.
3. Both have a synergestic effect on the maximization of development objectives.
4. Since both trade policies and FDI policies are autonomous and formulated independently, the two sets of policies may not fully support each other in policy objectives and their efficient implementations.

From a functional viewpoint, there does exist an important relationship between trade and development. The LDCs wanted to have the best of investment and thus chose to effectively monitor the entry and even the performance of the foreign investors. Nevertheless, governments do sometimes through their policies resort to practices that may distort, restrict or place

unnecessary restrictions on FDI.[31] But in all these the important missing link is the extent of their impact on trade. TNCs would not like to have separately evolved, frequently conflicting FDI and trade policies, often administered by loosely connected agencies. These inconsistent policies risk creating an environment in which trade and FDI policies neutralize each other or even could prove counter productive.[32]

Because investment is fundamentally inter-twined to trade, trade issues being linked to investment, it has been argued that, it should be incongrous to negotiate a trade regime intended to open the border and not do the same for investment. For, the businessmen do not separate trade issues from investment.[33]

The attempts to negotiate a multilateral framework are not new. Several attempts to reach an agreement on foreign investment have failed. After much deliberations a sub-chapter on 'international investment' was added to the much debated Havana Charter (1948). ICC Code of Fair Treatment for Foreign Investment (1949), the Abs-Shawcross Convention on Investment Abroad (1958) and OECD Draft Convention on the Protection of Foreign Property (1963) are some other endeavours to provide an operative framework for investment at multilateral levels.[34]

A distinction should be made between the earlier approaches and the new initiatives. While the earlier discourses were concerned only with some of the contentious issues of foreign investment namely nationalization and the settlement of disputes. The new attempts would deal with whole range of foreign investment activities right from making investment, investment concerning activities of the host governments, repatriation of profits and the legal protection to the foreign investors and their investment. It would be as one author argues 'Bill of Rights' for western TNCs investment. What is being argued is that the LDCs should undertake binding legal commitments in the area of foreign direct investment in as much as they have agreed in international trade. Although most of the LDCs have opened up their economies to foreign investment in a big way, yet they are not favorably disposed towards a binding international dispensation on foreign investment. Because for them foreign investment represents a core issue of the exercise of their sovereign powers. And particularly in the context of development, developing countries would like to utilize FI in the way they deem it fit. On the other hand the TNCs would not like to have any kind of barriers to their investment anywhere in the world. The proposed multilateral agreement on foreign investment would certainly confer overriding rights to the TNCs and their investments across the globe, which in turn could be taken up by their home countries through WTO. Already TRIMs have found acceptance in the WTO. Its deliberate incorporation underpins the greater aspirations of the US and other western investors. Even

if TRIMs was discussed with a limited objective of their impact on exchange of goods and services, but as American policy has shown, they viewed investment as one of the key areas, which needed to be dealt with precisely and separately. Thus they have demanded an absolutely open environment for American investment and have argued for a 'scrorched-earth razing' of investment barriers, a 'wide open' investment regime, taking investment in broadest possible sense. Secondly, the American intransigence has been derived from the belief that LDCs are going to concede in due course of time, although playing tough for some time.[35]

Major new efforts in this direction include the OECD (1995) initiative to draft a binding international agreement on investment, to which non-members will also be invited. Also the APEC has also drafted Guidelines on investment (1994). The WTO has infact an ambitious 'inbuilt agenda' which would cover foreign investment also. Many obstacles however, stand in the way as has been shown in the December (1996) Ministerial meeting at Singapore, although it did establish, a working group to study 'relation between trade and investment'.[36] With these dispensations in mind, it should be quite determinative in shaping the scope and content of eventual discourse on the whole gamut of foreign investment at multilateral levels.

V. Foreign Investment : Core Issues

The importance of the foreign investment in the international economy has thrown open issues of 'public policy' and 'legal relevance' in meeting the new challenges and requirements.[37] The international legal order does not present a widely accepted balanced formulations on how to protect the genuine rights and interests of the foreign investors and how to meet the requirements of the host countries. Intutively the problems concerning investment are inextricably linked to the perceptions of new world economic order, which is increasingly beyond the confines of existing situations.[38]

The discussions on the core issues of foreign investment have continued in adhoc negotiations in the form of 'investment friendly' treaties for 'securing and protecting' investment apart from other non-binding guidelines. The immediate object of these negotiations were : to steadily decontrol the barriers to investment; to treat the foreign investor and his property according to certain internationally accepted rules and to create an environment conducive to attracting foreign investment.[39] To some it reflected a pragmatic approach to the profound changes in the global trading environment. And practically because it was a way to overcome the deficiency of the international legal order and also to maintain 'mutuality and exclusivity'.[40] These deliberations were necessary because of greater interaction between FDI, trade, finance, labour movements and exports.[41]

The discussion on the promotion and protection of investment has become important for three main reasons. Firstly, partly as a reaction to the wave of international measures for the regulation of TNCs in eighties[42] and partly because DCs have intensisfied their efforts for securing assurances for the protection of the investments of their TNCs. Secondly, LDCs faced with mounting indebtedness have turned to TNCs as a possible source of resource flow. Thirdly, there is a wide divergence between the countries about internationally accepted principles about treatment of foreign investment.[43]

Given the nature and complexity of the foreign investment, common interest requires that both the capital exporting and importing countries seek mutually acceptable principles on investment related issues. However, in the context of present dispensation, it seems to be heavily loaded in favour of protection of TNCs and their interests. The existing treaty and state practice suggest that the following aspects of FI would be too contentious to achieve consensus among the Dcs and LDCs. In the event of an eventual multilateral agreement on investment, the LDCs would be forced to compromise on their earlier approaches to foreign investment, as has been the case with GATT negotiations. These areas are;

I. Admission of Investment.

II. Principles of Treatment.

III. Expropriation and Compensation.

IV. Guarantees,

V. Transparency of Laws and Procedures.

VI. Settlement of Disputes.

These are not the exclusive area. There are other issues *e.g.* concerning RBP, employment, transfer of funds and the right of temporary entry of foreign investors in relation to the investment related activities.[44]

VI. The Future

The emerging order on international trade is absolutely different, yet so intertwined to GATT philosophy. Not only has it undertaken a study of wide areas of international trade (with large implications for LDCs) but has also been posited to overcome weaknesses in international trade law and advance it along the path towards global government. Indeed some commentators have spied into the WTO a 'judicialization' that contributes to the steady accumulation of legal process in international trade.[45]

The policy implications of GATT/WTO discipline only indicates the ideal of 'one rule for all', that is stoic. It does not take into consideration the

exigencies of economic cooperation which the members of the international community are required to develop in an increasingly inter-dependant world. The progress of the international trade law suggests that governments often and do rely on both utopia and cynical views in their interaction with international legal structures. In that context foreign investment is not an exception. Of course, the initiative smeaks of a renewed attempt to secure legal commitments to aim at international standards of treatment much higher than national treatment. Be that as it may, the vital question for GATT/WTO is whether development through liberalization is more likely with a model that aims at deregulation with certain 'exceptions' for certain measures; or with a model that aims at uniform rules and standards across national boundaries. Foreign investment is perhaps not yet ready for the latter, for the requirements are too many and possibilities too uncertain. As Carlisle notes : A premature effort to free countries out from all protection would almost certainly fail and would probably damage WTO negotiations already under way. A strong appreciation of political reality in avoiding any giant leaps to global free trade is well in order.[46]

While one accepts the idea that there are economic (and consequently social) gains from international trade, yet these theoritical foundations say little about how the economic benefits of liberalization should be distributed. Indeed the dogma is 'first secure trade liberalization with which to pursue other ends'. The consensus on trade liberalization speaks of political compulsions into the deliberations on the components of trade, rather than immaculate measures to achieve objectives of sustainable development. The requirements of developing countries are too big which just can not be achieved by a mere liberal order. Unless the international order seeks equity in the international economic relations, a mere collection of rules do not meet the requirements of a sustainable development.

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4. See UN. CTC, 2 (1993) Dec., 148-62.
5. John Kline, *International Regulation of Transnational Business*, 2 TNC (Feb. 1993) 153-64.

6. See Nagesh Kumar. Multinational Enterprise and Industrial Organization (1994) at 40.
7. See UNCTAD WORLD INVESTMENT REPORT (1996), E. 96-11-a-14.
8. *Id.* at 86.
9. *Id.* at 90.
10. See Robert Seidman, *Foreign Private Investor and the Host Country,* 19 JOURNAL OF WORLD TRADE, No. 6 (1985), 637-665.
11. *Id.* at 660.
12. Kline, *supra* n. 5 at 153; see particularly John Martinusen, REGULATIONS IN VAIN, (1990) for an indepth analysis of the impact of section 29 of FERA on foreign TNCs in India.
13. See UN TRANSNATIONAL CORPORATION IN WORLD DEVELOPMENT (1988), ST/CTC/89.
14. Expropriation and Nationalization of foreign investor's property was deemed to be an ideological weapon of exercise of such soverignty, particularly by Latin American Countries. See Samuel Asante, *International Law and Foreign Investment : A Reappraisal*, 37 INTERNATIONAL COMPARATIVE LAW QUARTERLY (1988) 588-628 at 594. See also Amy Chua, *Privatization-Nationalization* Cycle, 95 COLUMBIA LAW REVIEW (1995) 223-303.
15. Kline, *supra* n. 5 at 155.
16. *Supra* n. 7 at 103.
17. Nagesh, *supra* n. 6 at 158. According to P. Chidambaram," .... attractive policies will have to be put in place if $ 10 billion FDI has to be met. We must ensure that regulations governing FDI are transparent and attractive in comparison with other Asian Economics...". See THE HINDUSTAN TIMES, January 18, 1997.
18. See, Klaus Schwab & Claude Smadja, *Power V Policy in New Economic World Order,* HARVARD BUSINESS REVIEW, (December, 1994), 20-36.
19. Wu and Langley, *A US-Mexico Free Trade Agreement,* 25 JOURNAL OF WORLD TRADE, No. 3 (1991) 5-14.
20. See Jackson, THE LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (1986) at 1035.
21. See UN TNC IN WORLD DEVELOPMENT : TRENDS AND PROSPECTS (1988) ST/CTC/89, 331-68.
22. See. Rabby *infra.*
23. Wu, *supra* n. 19.
24. Paradoxically however, the US irrespective of its open policy on investment, has been adopting in an adhoc manner specific restrictions that discriminate against foreign investors, *e.g.* Exon-Florio prevision, 1988 authorizes the President to suspend or halt a merger, acquisition or take over of a US firm by a foreigner on the ground that it would threaten national security. Villa, *Legal Aspects of Foreign Investment in the US,* 16 INTERNATIONAL LAW (1982) at 1; see also Fry and Radebaugh ed., REGULATION OF FOREIGN DIRECT INVESTMENT IN US AND CANADA (1984).
25. See Jackson, *supra* n. 20.
26. See. J. Rabby, *The Investment Provision of the Canada-US Free Trade Agreement,* 84 AMERICAN JOURNAL OF INTERNATIONAL LAW(1990) 399 at 402.
27. A. Rughman quoted in *id.*
28. See. M. Sornajah, *Protection of Foreign Investment in A.P. Economic Co-operation Region*, 29 JOURNAL OF WORLD TRADE, No. 2 (1995) 105-30.

29. *Supra* n. 26.
30. *Supra* n. 7 at 92-97.
31. Rabby, *supra* n. 26.
32. *Supra* n. 7 at 101.
33. The earliest attempt was the International Treatment of Foreigners (1929). See Nwogugu, LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES (1965).
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35. Rabby, *supra* n. 26. See also Book Review in 89 AMERICAN JOURNAL OF INTERNATIONAL LAW, (1995) 666-8.
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39. See *supra* n. 13.
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43. *Id.*
44. See Sornajah, *supra n. 28*; see also *supra* n. 7.
45. See e.g., Proceedings of ASIL, 86 (1992) 69.
46. *Is the World Ready for Free Trade,* FOREIGN AFFAIRS, (December, 1996) 113-27 at 114.

WTO - GENERAL AGREEMENT ON TRADE IN SERVICES : AN ANALYTICAL APPRISAL WITH SPECIAL REFERENCE TO INDIA

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With the establishment of World Trade Organization, the world trade has mainly been organised on three pillars such as, the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and the General Agreement on Trade in Services (GATS).

In the world of trade, services are among the fastest growing sector. Nearly one - fourth of the world trade is accounted for by services. In 1995, trade in services in the world reached a whopping $ 1,200 billion. In USA, trade in services partially offset the trade deficit in goods.[1] In European Union (EU) the audio-visual market of $ 30 billion accounts for almost one - third of the world trade. In India, the services contribute to about 40% of its GDP.[2] Thus, though the services were always a key sector in the world economy, they were brought within the ambit of multilateral trading system by GATS only in 1994.

The General Agreement on Tariffs and Trade, 1947 did not concern itself with services, however when post -1970 era witnessed a boom in the service sector in the developed world, the issue of its inclusion in GATT was formally raised for the first time during the Tokyo Round of Tariff Negotiations (1973-79). Developing countries like India, Brazil and Mexico although opposed tooth and nail the inclusion of services in the GATT, yet the services continued to be negotiated mainly due to sustained efforts of the developed countries. Uruguay Round of Multilateral Trade Negotiations (URMTN) 1986-94, culminated into GATT, 1994. To meet the deadlines set for GATT, 1994; several annexes to GATS were attached in order to extend the time limit for filing exemptions to Article II (MFN principle).[3] This enabled services in various sectors to be further negotiated at later dates. Thus, GATS was finally signed on July 26, 1995 and three protocols have been signed and made effective since then.

I. General Agreement on Trade in Services — An Analysis

GATS is a framework agreement. The Agreement required the WTO members to give specific commitments on market - access in various service

sectors. The Agreement immediately applied few general commitments e.g., MFN treatment and transparency. Bulk of the GATS obligations becomes operational only when a member has actually negotiated concessions and made specific commitments.[4]

GATS contains three basic elements: a basic agreement applicable to all members; specific commitments undertaken by various countries; and recognition of special needs of the specific sectors of the member countries.

GATS makes a departure from GATT, where commitments relating to tariffs and non-tariffs are binding in nature. The GATS present a set of voluntary commitments by member countries with an undertaking for further opening of the services which have been left for future negotiations and commitments.

The GATS is divided into six parts. Part I determines the scope of service sector. Part II includes the basic agreement applicable to all members i.e., MFN treatment, transparency, increased participation of developing countries through access to technology, improvements in distribution channels, information network, liberalization of markets and exports. Part III deals with market access commitments, specifically undertaken by member countries. Part IV declares progressive liberalization as the basis of negotiations for the further improvements in national schedules of commitments. Part V includes institutional arrangements for consultation, dispute settlement and establishes a council on services. Part VI clarifies various concepts like measures, supply of a service, commercial presence, monopoly supplier of a service, juridical persons etc. Protocols on Financial Services; Movement of Natural Persons; and Basic Telecommunications have been attached to GATS Agreement.

A. Scope and Definition

Service sector mainly includes the following fields : distribution services including wholesale, retail and on the basis of franchise; educational services; health-care services; communication services like telecommunication, courier and audio-visuals; computer software services; professional services like accounting, auditing, advertising and legal ones; management and consultancy services; architectural, designing, engineering and construction services; international transport services like taxi, rail, bus, truck, air and maritime, travel and tourism; hotels, bars and restaurant services; and financial services such as banking, insurance and securities.

GATS manifest itself into various categories of regulations, laws and procedures applied by governments and authorised non-governmental organizations.[5] Trade in services is defined as the supply of a service from one member to another; directly to the consumers (for example tourism); commercial

presence (for example banking) or by natural persons (for example computer software, construction or consultancies).[6] Supply of a service includes the production, distribution, marketing, sale and delivery of a service in any sector.[7] However, it specifically excludes the services supplied by governments or under their authority as these services are neither on a commercial basis nor carry the element of competition with one or more suppliers.[8]

B. General Obligations and Disciplines

The central theme of the GATS is most favoured nation (MFN) treatment. However, exceptions can be made by individual member countries for specific service sectors. The Agreement provides for review of these exemptions before 2000 A.D. and a general limitation for continuation of exemptions upto 2005 A.D.[9] WTO allows conferring special advantages to regional groupings like EU, SAARC of which a country is a member, over and above other members. MFN requires that equal treatment should be provided on a non-discriminatory basis and a treatment no less favourable than it accords to like services and service providers of any other country.[10]

Equal or national treatment under GATS for services is different than for goods under GATT. In some cases, same requirements for foreign and domestic service suppliers may mean that the foreign suppliers are actually worse off in the sense that the requirement for holding reserves locally for insurance or banking companies or minimum coverage for telecommunication service providers, may not provide foreign suppliers level playing field. Therefore, the national treatment principle in services include *de jure* as well as *de facto* identical treatment.

Administration of laws, regulations and guidelines in respect of specific commitments must be carried out in a transparent manner coupled with objectivity and reasonableness. Notion of transparency connotes that border measures should be explicit, changes in the relevant laws and guidelines or introduction of measures should be promptly published, and notified to Council for Trade in Services.[11] A machinery should be set up by a member, to review administrative measures/decisions, within a reasonable period of time. These measures[12] relate to the purchase, payment or use of a service, the access to and use of services which are offered to the public directly, the commercial presence of a member in the territory of another.[13] Commercial presence means and includes any business or professional establishment constituted, acquired or maintained through a juridical person, or the creation or maintenance of a branch or a representative office; within the territory of a member for supplying the service.[14]

If any specific information in respect of any measure or agreement, whether bilateral or international is requested by any member, it should be

supplied promptly. Members, especially developed countries should establish enquiry point/s to provide specific information to other members, especially to developing and least-developed members. They should provide information, in respect of their markets; commercial and technical aspects related to the supply of services; requirements in respect of professional qualification recognition and registration, availability of the technology in service sectors.[15]

Transparency provisions are considered an onslaught on the economic sovereignty of a member, as they are required ultimately to amend its laws and regulations. They are also discriminatory in nature in the sense that while governments are required to provide disclosures, the commercial interests of multinational corporations are fully protected in the garb of confidentiality.[16]

Developed countries are under general obligation to increase participation of the developing countries in world trade, by making technology available on commercial basis so as to strengthen domestic service capacity; to increase efficiency and competitiveness in providing services; to improve service distribution channels and information networks; and to liberalize market access in sectors of export interests.[17]

Article 5 of GATS deals with custom union and free trade areas. The article is analogous to Article XXIV of GATT, 1994. The Agreement does not prevent members to establish full integration of economies or labour markets.[18] For example, European Union provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay employment and social benefits.

GATS puts general obligation on members that they must not constitute unnecessary barriers to the trade. However, it does not defer a member to lay down disciplines relating to qualifications, such as competence and the ability to supply the service; and technical standards to ensure quality of service. Procedure for licensing should not result into a disguised restriction on the supply of service itself.[19] In disciplining professional services, the emphasis should be on achieving international standards and to encourage co-operation with the relevant international organizations. Due importance should be accorded to professional bodies regulating the services, whether they are governmental or non-governmental ones.[20] The Agreement visualises that recognition requirements should be achieved through harmonization and internationally agree criteria.[21]

The Agreement provides that member should ensure that monopoly and exclusive service providers do not abuse their positions.[22] Monopoly service supplier means any person, public or private who has effectively become as the sole supplier of that service, in the market of a member.[23] Monopoly conditions

prevail when a member formally or effectively (*a*) authorizes or establishes a small number of service suppliers and (*b*) substantially prevent competition among those suppliers, in its territory.

The Agreement recognizes that certain restrictive practices of service suppliers may restrain competition.[24] Restrictive practices should be subject to consultation between members with a view to eliminate them. However, GATS, does not contain any anti-dumping remedy, as they sometimes even throttle legitimate competition. The Agreement simply provides that an emergency safeguard mechanism should be negotiated.[25]

The GATS conceives that in the event of serious balance of payments conditions, free flow of services may be restricted by a member, even in those areas in which they have taken specific commitments. In such a situation, the members may give priority to the supply of services which are more essential to their economic or development programmes. However, these restrictions should be non-discriminatory and consistent with the Articles of Agreement of IMF. The restrictions should be applied in a manner so as to avoid unnecessary damage to the commercial, economic and financial interests of the other members. The restrictions should be minimum for dealing with situation. They should be temporary in nature and must be progressively phased out as the situation improves.[26] Datas assessed by IMF relating to foreign exchange, money reserves, and balance of payments shall be the basis for imposing or continuation of these restrictions. Member imposing the restrictions, is under general obligation to notify them to the General Council of WTO and to the Committee on BOP Restrictions.

The member country must enter into consultation with these bodies, with a view to progressively phase out such restrictions, taking into account, *inter alia* such factors as: (*a*) the nature and extent of the BOP and the external financial difficulties; (*b*) the external economic and trading environment, and (*c*) alternative corrective measures that may be available.

The GATS does not prevent to adopt or enforce the following measures necessary; (*a*) to protect public morals or to maintain public order in case of genuine and sufficiently serious threat to the fundamental interests of the society; (*b*) to protect human, animal or plant life or health; (*c*) to secure compliance with laws or regulations consistent with the Agreement, to prevent deceptive or fraudulent practices or default on service contracts; or to protect privacy of individuals, records and accounts and maintain safety standards in the society. The Agreement contains both general and security exceptions which are similar to Articles XX and XXI of GATT, 1947. It allows discriminatory treatment to domestic and foreign service providers for ensuring equitable or effective imposition or collection of direct taxes. It also

permits to apply provisions inconsistent with MFN principles, where the discriminatory treatment is necessary to implement any double taxation avoidance agreement (DTA).[27]

Members are not obliged to supply any information, disclosure of which is contrary to its essential interests. Security interests are taken care of relating to the supply of services provided to military establishments; fissionable or fusionable materials; during war or other emergency conditions in international relations; or to maintain international peace and security, under UN Charter.[28]

The general MFN principle, market access commitments and national treatment provisions do not apply to procurements of services by government agencies provided they are for governmental purposes and are not for commercial sale or resale.[29]

GATS does not discipline subsidies. It calls for negotiations to develop disciplines on trade-distorting subsidies. Members should also look into appropriateness of countervailing procedures. However, flexibility is accorded in negotiations in cases where subsidies play a role in development programmes of developing countries. Members should exchange information concerning all subsidies provided to their domestic service suppliers. If a member is adversely affected by a subsidy provided by another member, it may request consultations, and is entitled to sympathetic consideration.[30]

C. Specific Commitments

Members have submitted national schedules as part of the GATS, and thus have made certain binding commitments in respect of market-access and national treatment. Several members have maintained their stand still positions in these schedules i.e. continuation of current policies, even then such prepositions have a salutary effect on the service scene; as they restrain members to impose no more negative conditions.

In the case of market access each member shall accord services and service providers of other members treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedules.[31]

Specific commitments regarding market access must be extended on MFN basis. The Agreement contains a "black list" of six types of restrictions such as (*a*) limitations on the number of service suppliers allowed; (*b*) limiting the total value of assets or transactions; (*c*) restricting the total number of service operations or total service output; (*d*) fixing the quota for natural persons to be employed in a particular sector; (*e*) measures restricting or requiring specific types of legal entity or joint ventures through which the service is supplied (for

instance, a branch, but not a subsidiary); (*f*) limiting foreign equity capital in terms of maximum percentage limit or on total value of individual or aggregate foreign investment.[32]

Licensing requirements are subject to proportionality tests, such as: (*a*) objectivity and transparency should be maintained; (*b*) licensing should not be aimed, as a restriction on supply; (*c*) licensing should not restrict unnecessarily; and (*d*) licensing may be used to ensure quality of service.

The market - access and national treatment are complimentary to each other in the sense that while the former seeks to secure entry of foreign service suppliers into the market of a member, irrespective of the position of national suppliers, the later tries to ensure that a foreign service supplier should be treated like local suppliers.[33] Furthermore, the market - access and national treatment obligations overlap each other as the limitations with respect to one also applies to another.[34]

National or equal treatment to foreign and domestic service suppliers is applicable only to the specific services negotiated and included in the schedule to the agreement of each member, subject to such terms and conditions as may be stipulated in schedules.[35] Thus, the Agreement accepts the principle of parity between domestic and foreign players but allows countries to assess cost and benefit analysis and take necessary measures before opening any field. The Agreement does not exclude the possibility of two different sets of regulations for domestic and foreign service suppliers, provide the condition of competition is not modified in favour of service providers.

Although no timetable has been finalised, these deviations are to be reviewed periodically, and finally abolished by 1 January 2005.[36]

D. Progressive Liberalization

Part IV of the Agreement establishes the basis of progressive liberalisation in the services area through successive rounds of negotiations and the development of national schedules.

The specific commitments of members are provided in country schedules. In these schedules, members have specified terms, limitations and conditions for market-access; conditions and qualifications for national treatment.[37]

The schedules bind members in respect of market access and national treatment. A distinction is made between horizontal commitments that cut across all service sectors and vertical commitments that are made for a particular sector. Commitments in both categories are then sub-divided according to four different modes of supply : cross - border supply, directly to customers from abroad, commercial presence and temporary entry of natural persons.

The GATS permits for modification of schedules. Article XXI permits that after a period of three years, parties can withdraw or modify commitments made in their schedules. However, such measure would require negotiations with interested parties and offer them compensatory package in lieu of withdrawal or modification. For example, if India makes any modification in its schedule of commitments say by increasing duty on the import of second hand tyres from USA, it may offer compensation to make up for the loss to the USA by reducing duty on almonds which are imported mainly from USA.[38] The affected party, if dissatisfied with the measures offered in the package, may ask for arbitration proceedings to determine compensation to be paid by defaulting members. If no affected member has requested arbitration, the modifying member shall be free to implement the proposed modification or withdrawal.

Progressive Liberalisation in the Field of Specific Commitments

The Agreement seeks from members to enter into periodic negotiations, among themselves to achieve progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services or measures as a means of providing effective market-access. Efforts shall be made with a view to promote the interests of all members on a mutually advantageous basis, and to secure an over all balance of rights and obligations.

The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors. There shall be appropriate flexibility for developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and when opening markets to foreign service suppliers. The Agreement provides for special treatment to least developed countries.[39]

E. Institutional Provisions

Part V of the Agreement contains institutional provisions, including consultation, dispute settlement and enforcement, establishment of a Council for Trade in Services, technical cooperation and relationship with other international organizations. The responsibilities of the Council are set out in Ministerial Decisions.[40]

(i) Consultation, Dispute Settlement and Enforcement

Each member should consider and provide opportunity for, consultation on any representation received from any other member with respect to any matter affecting the operation of the Agreement. The Dispute Settlement

Understanding (DSU) applies to such consultations. In case no satisfactory solution is arrived through consultation, then the Council for Trade in Services or the Dispute Settlement Body (DSB) may take up the matter, at the request of a Member, for consultation with any member or members. When two members enter into Double Taxation Avoidance (DTA) agreement and in case of disagreement between them as to whether a measure should be resolved under DTA provisions or under GATS rules, it shall be open to either member to bring this matter before the Council of Trade in Services. The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.[41]

If any Member is of the opinion that any other Member fails to carry out its obligations or specific commitments, it may reach for DSU, so that the matter may be resolved with mutual satisfaction. If any member considers that it is not getting any expected benefit from the other member, under specific commitment, it may have recourse to DSB. If DSB, determines the matter in its favour, then the affected member shall be entitled to a mutually satisfactory adjustment.[42]

Ministerial meeting decided that a roster of panelist should be maintained to select the panelists. Members may suggest names of individuals for inclusion in the panel. Panels shall be composed of well-qualified governmental and non-governmental individuals who have experience in issues related to GATS and/or trade in services, including associated regulatory matters. Panels for disputes regarding sectoral matters shall have the necessary expertise relevant to the specific services sectors to which the dispute concerns. Panelists shall serve in their individual capacities and not as representatives of any government or organization. The secretariate shall maintain the roster and shall develop procedures for its administration in consultations with the Chairman of the Council.[43]

(ii) The Council

The highest decision-making body of the WTO is the Ministerial Conference, which is to meet at least once in every two years. It is authorized to take decisions on all matters under any of the Agreements under WTO. During the intervals between the meetings of the ministerial conference, the General Council will conduct its functions. For the three main instruments of WTO, three separate councils have been formed, besides the General Council : Council for Trade in Goods, the Council for TRIPs and the Council for Trade in Services.

The Council for Trade in Services (The Council) is responsible for facilitating the operation of the Agreement and advance its objectives. The

Council under GATS is authorised to set up subsidiary bodies, as required for the effective discharge of its functions.[44] Any subsidiary bodies that the Council may establish shall report to the Council annually or more often as necessary. Each such body shall establish its own rules of procedure, and may set up its own subsidiary bodies as appropriate.

Any such sectoral committee with respect to the sector concerned shall be responsible:

(*a*) to keep under continuous review and survelliance the application of the Agreement;

(*b*) to formulate proposals or recommendations for consideration by Council;

(*c*) if there is an annex pertaining to the sector, to consider amendments to that annex, and to make appropriate recommendations to the Council;

(*d*) to provide a forum for technical discussion, to conduct studies on measures of the members and examine any other technical matters;

(*e*) to provide technical assistance to any developing country negotiating accession to the Agreement;

(*f*) to co-operate with other subsidiary bodies.[45]

In addition to this, there shall be a separate committee for over seeing the working under GATS.

The Council under GATS shall ensure that measures related to qualification requirements, procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade and services.

(iii) Technical Co-operation

Member in need of technical assistance to developing countries shall have access to the services of contact points set up under para 2 of Article IV. Technical cooperation to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided by the Council.[46]

(iv) Relationship with Other Organizations

The General Council of WTO shall make appropriate arrangements for consultation and co-operation with UN and its specialised agencies as well as with other inter-governmental organizations concerned with services.[47]

F. Final Provisions

(i) Denial of Benefits

Benefits of GATS may be denied if any service is being supplied from or in the territory of a non-member; or in the case of maritime service, the vessel

is registered or operated by a person from a non-member country.[48]

(ii) Amendments

Any member or the Council for Trade in Services may initiate a proposal to amend the provisions of the GATS by submitting such proposals to the Ministerial Conference. The Conference, unless it so decides, within 90 days of the submission of the proposal to it, shall take a decision, preferably by consensus, otherwise by a two - third majority, whether to submit the proposed amendment to the members for acceptance.[49]

Amendment to Article II (1) of GATS shall take effect only upon acceptance by all members. Amendments to parts I, II and III of the GATS and the respective annexes shall take effect for the members that have accepted them upon acceptance by two-third of the members. The ministerial conference may decide by a three-fourth majority when any amendment made effective is of such a nature that any member which has not accepted it within a period specified by ministerial conference in each case is free to withdraw from the WTO or to remain a member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of the GATS and the respective annexes shall take effect for all members upon acceptance by two-third of the members.[50]

(iii) Successive Round of Negotiations

There shall be successive rounds of negotiations to achieve progressive liberalisation of trade in services. Next round shall begin not later than 5 years from the start of the Agreement on Services *i.e.* July 1, 1995.

With respect to on-going or future negotiations, priority objective of the developed world is to reduce barriers to foreign direct investments in the service sectors. Countries like India are for liberalising movement of natural persons while developed countries insist more on recognition of professional qualifications.

II. Protocol on Financial Services

A financial service is any service of a financial nature offered by a financial service supplier of a member. Financial services include insurance banking and services provided by other financial institutions.[51] They may be supplied either by the private sector or by the public sector. Services supplied in the exercise of governmental authority shall not be covered by the Agreement. They include:

(*i*) activities conducted by a central bank or monetary authority in pursuit of monetary or exchange rate policies;

(*ii*) activities forming part of a statutory system of social security or public retirement plans; and

(*iii*) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the government services.[52]

Any commitment under this Agreement is to be implemented on MFN basis; however it allows exemptions to the MFN principle.[53] It means that a country is not obliged to open its doors automatically in the field of financial services. It may still require bilateral negotiations. No presumption has been created as to degree of liberalization to which a member is committing itself and the Agreement.[54] The provision takes care of worries of countries like India; whether its banks and financial institutions will get as much easy access to the highly advanced markets of the developed countries, as the latter will get in India.

GATS allows its members to take measures for the protection of investors including institutional ones, deposit holders and policy holders to ensure the integrity and stability of its financial system.[55] GATS permits the use of temporary non-discriminatory restrictions on transfers in the event of serious BOP or financial difficulties. The Agreement does not require a member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in possession of public entities.[56]

However, a further understanding on financial services would allow those members who choose to do so to undertake commitments on financial services through a different route. With reference to market access, the understanding contains more detailed obligations on monopoly rights, financial services, purchase by public entities, cross-border trade e.g., insurance and re-insurance services; financial data processing and transfer of information, the right to establish or expand a commercial presence and the temporary entry of personnnel.[57]

Each member shall list existing monopoly rights and shall make efforts to eliminate them or at least reduce their scope.[58] In case of purchase or acquisition of financial services by public entities, MFN and national treatment policies shall be adopted.[59] In the case of cross-border trade in services like insurance of risks relating to maritime shipping and commercial aviation and space launching and freight including satellites, insurance will cover any or all of the followings : the goods transported, the vehicle transporting the goods and any liability arising therefrom, goods in international transit, and re-insurance business. Each member shall permit non-resident service suppliers

to supply as a principle or through an intermediary, and under terms and conditions that accord national treatment.[60]

Each member shall grant financial service suppliers of any other member the right to establish a commercial presence or expand within its territory, including the acquisition of existing enterprises.[61] A member may, however, impose terms and conditions and procedures for authorization of the establishment and expansion of a commercial presence in so far as they do not circumvent the members' obligations and are consistent with the other obligations of this Agreement.[62]

No member shall take measures that prevent transfer of information, including transfer of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfer of equipment which are necessary for the conduct of the ordinary business of a financial service supplier. However, every member has a right to protect its personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.[63]

Each member shall permit temporary entry of senior managerial personnel possessing proprietary information essential to the establishment, control, and operation of or specialists in the operation of the financial service supplier, which is establishing or has established commercial presence in the territory of the member. Commercial presence means an enterprise within a member's territory for the supply of financial services and includes wholly or partly owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchise operations, branches, agencies, representative offices or other organizations.[64] Each member shall permit, subject to the availability of qualified personnel in its territory, temporary entry of specialists in computer services, telecommunication services and accounts, actuarial and legal specialists associated with a commercial presence of financial services supplier.[65]

The provision on national treatment refer to access to payments and clearing systems operated by public entities and to official funding and refinancing facilities. They also refer to membership of, participation in, self-regulatory bodies, securities or further exchanges and clearing agencies.[66]

Ministerial meeting has established a committee on financial services to monitor the progress on liberalization in the field and to report it periodically.[67]

A WTO study lists the following benefits of liberalization in financial sectors:

(*i*) enhance competition and improve efficiency, leading to lower costs, better quality;

(*ii*) improve financial intermediation and investment opportunities through better resource allocation and through better means of managing risks and absorbing shocks; and

(*iii*) induce governments to improve management, interventions in credit markets and financial sector regulation and supervision.[68]

Insulation from competition and over protected banking and insurance brings inefficiencies. Liberalization and opening of financial sector to global winds in place of closed regimes have brought faster growth for developed and developing countries. Many developing countries like Pakistan, Indonesia, Argentina, Brazil, Ghana and Hungary have integrated their financial sector with world markets.[69]

India has opened up services sector where there are spin off benefits by way of technology transfer, investment or employment. On Insurance our offer is limited to insurance of freight and re-insurance. On retail banking the offer is limited to a stand still and the commitment being undertaken is not more than five licence a year for foreign banks.

III. Protocol on Movement of Natural Persons

Developing countries interests lies in export of services to developed countries through the modality of movement of natural persons skilled as well as unskilled ones. Developed countries are eager to exploit vast untapped service markets of developing countries, where competition is almost nil and profits are high, through their commercial presence in the form of foreign direct investments.

Higher education in countries like India is highly subsidised, producing annually a vast pool of skilled professionals. The cost of training in developed countries is comparatively high. Due to lack of adequate infrastructure, services of highly skilled persons cannot be fully utilized; while West faces a shortage of such personnels. Similarly, due to high living standards of the West, their nationals do not find it lucrative enough to indulge in jobs requiring hard or unpleasant work. Neo rich Arab World is also in need of unskilled or semi skilled workers from the developing countries. Developing countries were ready to supply cheap labour for these jobs. This created a situation, where developed and rich Arab countries allowed temporary movement of natural persons and even carried liberal immigration policies for skilled persons.

This led to brain drain from developing countries, which was considered as an unfair practice. However, economic boom of sixties and seventies changed to slowing down of the economics of the West in the eighties and nineties, with the result of growth in unemployment in developed countries.

With the changed scenerio, where West was having less and less jobs to offer; and also due to increase in social tensions in developed world, it started imposing strict measures in respect of recognition of professional qualifications.

Countries like India are keen that restrictions on service operator's movement should be relaxed in some categories of skilled personnel to a range of labour intensive service, in the key target markets. Developed countries may allow India to get greater access in the fields like consultancy services, construction, engineering and computer software. The repatriation earnings from the natural persons have proved to be a boon for India. India considers that provisions for mobility of personnels are not adequate, and gains can further increase through negotiations on give and take basis.

In this context the Agreement under GATS concerning the movement of natural persons gains importance for both the spheres of the world, as it is linked with opening of markets. It permits members to negotiate specific commitments applying to the movement of people. It recognises that people covered by a specific agreement shall be allowed to provide the service in accordance with the terms of commitments.[70] The Agreement permits exemptions from MFN rule under specific sectors. It recognises to impose restrictions in terms of qualifications, recruitment procedures, technical standards, visa and other requirements.

A footnote to the Agreement says that integration of such services provides citizens of the parties concerned with a right of free entry to the employment market of the members and includes measures concerning conditions of pay, other conditions of employment and social benefits. However, it recognizes the need for temporary movement of the skilled personnel to the developed countries. The Agreement does not cover areas like citizenship, residence or employment on permanent basis.[71] Ministerial meeting decided to form a group to carry on negotiations on further liberalization of movement of natural persons for the purposes of supplying services, beyond the conclusion of Uruguay Round, with a view to allowing the achievement of higher levels of commitments by participants under GATS. The group shall establish its own procedure and shall report periodically to the Council on Trade in Services.[72]

Recognition of the right of cross-border movement of personnels, leads to a situation, where specific commitments can be negotiated with industrialized world. The Agreement does not prevent a country from applying measures to regulate the entry of natural persons into, or their temporary stay, in its territory. In 1994, the US offered a quota of 65,000 persons per year for 'speciality occupations' in the bilateral negotiations with India. But a condition was attached to it that US employer who would so wish to employ the

foreign personnel would have to undertake the obligation of recruiting and training sufficient number of US personnel in the speciality occupation. This condition has effectively nullified the contents of the offer.

It would be in the interest of our country to link opening of sectors like financial services and sectors for foreign direct investments with the opening of opportunities for opening the west for movement of natural persons, skilled as well as unskilled ones.

GATS provide for a "right of establishment" for capital, but the 'right of residence' in the case of labour - intensive services has not been given.

IV. Protocol on Basic Telecommunications

Protocol on Basic Telecommunications was signed on 15 february 1997.[73] Protocol has become effective from January 1, 1998.

Telecommunications means the transmission and reception of signals by any electromagnetic means.[74] Public telecommunication services include, *inter alia,* telegraph, telephone, telex and data transmission typically involving the infrastructure which permits telecommunication between and among defined net work termination points.

Telecommunication has a dual role :

(*i*) as a distinct sector of economic activity; and

(*ii*) as transport means for other economic activities.

The Protocol relates to measures that affect access to use of telecommunication services and networks. Its scope does not extend to cable or broadcast distribution of radio or television programmes.

The Protocol apply only if the member has bound himself through its schedules in the fields of establishing, constructing, acquiring, leasing, operating or supplying telecommunication services and networks.

It provides that service suppliers of other countries may be permitted to purchase or lease terminals, inter connect private leased or owned circuits with public networks for the movement of information within and across borders. It further provides that conditions attached to the use of public networks should be no more, than is necessary to safeguard the public service responsibilities of their operators, to protect the technical integrity of the network and to ensure that foreign service suppliers do not supply services unless permitted to do so through a specific commitment in the schedule.

The Agreement encourages technical cooperation to assist developing countries in strengthening of their own domestic telecommunication sectors;

and to participate in the development programmes of international and regional organizations, including the International Telecommunication Union (ITU), United Nations Development Programme (UNDP) and the International Bank for Reconstruction and Development (IBRD or World Bank).[75]

It was proposed to include a clause in the annex on pricing of basic telecommunication services. Though the clause was not binding, it concerned India, as it would have enabled issues concerning pricing for coming in for discussion, even though pricing policies are outside the purview of GATS. The proposal was however, dropped.

Telecom accord is expected to eliminate telecom monopolies and ensure full play of market forces. It has opened up global market of US $ 600 billion. India has offered to allow 25% foreign equity participation in domestic companies, although under the present policy parameters, 49% equity may be allowed for the equipments brought in by these companies, as equity participation. Similarly through holding companies foreign service suppliers may retain 74% equity. Now major issue before the country is whether reduction of tariff will help IT - Telecom equipment component industry, especially when non-tariff barriers are increasing.

V. GATS : A Criticism

According to critics, GATS Agreement is not in the national interest. Indian service sector is still at a nascent stage and it needs protection from giants. It does not provide anti-dumping protection in services. There is no adequate provision for mobility of labour; there is no mention of consultancy services. Our banking services are threatened, and telecom services have security implications. Sectors once opened up for access cannot be controlled and provisions relating to equity participation and transfer of funds would limit the control of the Government of India.

Inadequate provisions have been made in case of BOP difficulties. Takeover of services by MNCs is apprehended, under the guise of liberalisation. MNCs will control and use services in the following fields: financial, shipping, transport, telecom, health, education, professional services and media.

It seeks India to give up the right to determine the policies and regulations for the mobilisation and creation of resources for development. Banks and Insurance sectors in India are dependable source of finance capital and a major channel of mobilising public savings. They would come under an un-equal competition and will be swamped by the much vaster resources that the MNCs can muster. Transparency provisions mean introducing changes in laws and regulations. The clearance by trading members is a violation of economic

sovereignty. There seems to be nothing included by way of obligations on the part of foreign investors.

The Agreement provides that members shall not be required to provide confidential information which would prejudice legitimate commercial interests of particular enterprises. It means that while Government of India will be required to amend its laws and regulations, the commercial interests of MNCs would be fully safeguarded. It will cause distortions in financial services, health-care system, education, media, telecom and transport systems.

Government's ability to take measures to support the weak and vulnerable sections of the society would be curtailed seriously. MNCs would not only get control over the utilization of Indian savings and investments, but also get hold on education, health-care culture and communication.

VI. GATS : Opportunities for India

Enlarged opportunities would arise for India, in the following sectors : foreign investments; technology; exports; GDP increase; inter-linkages in other countries, contact points, designing and evolving of training programmes.

The action plan for academicians, research institutes, trade, industry and government is as follows:

There is a need to assess the overall benefits that could accrue to India from GATS. The academicians need to undertake study at micro level to identify segments in services where prospects for India are bright. The concerns about the ability and speed with which Indian suppliers would be able to establish commercial presence in other countries to deliver services have been expressed in view of the fact of very high cost of office space, communication cost and staff salaries in foreign countries. It requires study of cost-benefit analysis.

Several new investors will enter India for the first time, this opportunity should be taken full advantage of by Indian services sector. The essential pre-requisite for such favourable opportunities to be harvested would be the ability of the Indian service suppliers to be competitive, provide timely services and ensure a high quality performance.

Government should establish counter post agencies in India and tap contact points in developed countries to asses wide range of information in the areas of service sector and ensure diffusion of such information through appropriate measures to a wide range of suppliers of services to enable efficient diffusion system which will reduce unit cost of such information to Indian customer. Government can entrust carefully designed responsibilities to some institutions.

VII. Conclusion

GATS sets out the framework under which governments can negotiate market access in various sectors. It provides that MFN principle and national treatment can be differed in certain sectors, by individual countries, on a temporary basis. Conditional offers are permissible in individual service sectors. GATS does not oblige its members to provide access across the board to foreign service providers. It has to be negotiated between members on the basis of reciprocity. It provides scope to members to seek concessions on movement of personnel as well as on investments in the service sector. Greater access for the movement of skilled and professional people to render services in developed countries will enable India to increase the export earnings from the service sector. Punjab and Kerla are examples of prosperity brought in through repatriation of savings, by people employed in Gulf countries.

Further, GATS does provide for imposition of restrictions for BOP reasons. Modification or withdrawal of concessions is provided and procedures have been prescribed for such modifications.

The International Trade Commission (ITC) of the US, recently investigated into schedules of commitments submitted by Australia, Hong Kong, India, Indonesia, Korea, Malayasia, New Zealand, Phillipines, Singapore, and Thailand. The investigation was requested by US Trade Representative, for examination of Asia Pacific trading partner's schedules of commitments, under GATS.[76] The report concludes that the schedules include few liberalising commitments and are generally in the nature of stand still positions *i.e.* continuation of current policies. Though they do not liberalize trade, such commitments establish benchmarks that identify trade impediments. Moreover they deter implementation of further restrictions.[77]

The report indicates that services in sectors like tourism, telecommunication, architectural, engineering and construction are not heavily restricted. However, Asia and Pacific countries appear more reserve to commit to open markets for professional services, audio-visual services and social services such as education and health care. Foreign direct investment in service sector include several restrictions in the schedules. Five of the ten trading parties limit the foreign equity participation, ranging from 30% in Malayasia to 60% in the Phillipines.[78] It is interesting to note that developing countries have tried to trade offs between different issues to their advantage. For example, Thailand linked reforms in telecommunication with concessions on other issues, such as agriculture.[79] This suggests that, in future rounds of negotiations to reduce market access barriers, the technique of negotiating package deals may find favour again.[80]

India has offered access in those sectors only where it has economic advantage in foreign enterprises established in India. During transit period, India has given certain advantages to domestic enterprises. For example, 1998-99 budget has opened up insurance sector for domestic private service providers.[81]

It is interesting to note that in the field of movement of natural persons across the boders, India's approach is not in self interest. The country should tackle the issue with realism and caution. It is a double edged weapon. On the one hand, it opens the doors to developed world for our skilled labour; on the other hand it may result into flooding of citizens from neighbouring countries like Bangladesh. Ultimately, it may cause more harm than good on the economic front.

NOTES & REFERENCES

* Reader, Law Centre II, Faculty of Law, University of Delhi, Delhi.

1. WORLD TRADE SCANNER, Delhi, August 1-15, 1997 at 3.
2. K.V. Swaminathan *Emerging opportunities in the Service Sector* in V. Ramachandriah ed., GATT ACCORD : INDIA'S STRATEGIC RESPONS (New Delhi : Commonwealth Publishers, 1994) at 309.
3. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) Time limit was extended to file Exemptions under Article II.
4. The GATS provides a framework for specific commitments; see Part III (Articles XVI to XVIII) and Part IV (Articles XIX to XXI).
5. *Id*, Article XXVIII (a) read with Article I (3)(a).
6. *Id.*, Article I (2).
7. *Id.*, Article XXVIII (b) read with Article I (3) (b).
8. *Id.*, Article I(3) (b) and Article 1(3) (C) read together.
9. *Id.*, Annex on Article II Exemptions 3 and 6 read together.
10. *Id.*, Article II (1).
11. *Id.*, Article III(3).
12. *Id.*, Article III bis.
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14. Article XXVII (d).
15. *Id.*, Article IV read with Article VIII.
16. *Id.*, Article IV.
17. *Id.*, Article V read with Article XXVIII (e).
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19. *Id.*, Article VI(4).
20. Ministerial Decision on Professional Services (2) read with Article VI (4) and (6) of GATS.

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NOTES & COMMENTS

WTO DISPUTE SETTLEMENT MECHANISM AND DEVELOPING COUNTRIES

*Autar Krishen Koul**

I. INTRODUCTION

The GATT, 1947 in the legal technical sense did not conceive of a specific procedure 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 was there any provision in the GATT, 1947 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 questions of interpretations have been a recurring phenomena and surprisingly enough GATT, 1947 has resolved many more disputes and evolved umpteen interpretations and interpretative techniques to make run the international trade smoothly.[1] However, Professor Jackson, notes that there are nineteen clauses in the GATT which obligates GATT contracting parties to cousult in specific instances including the instances of customs valuation, and invocation of escape clauses.[2]

The main task of the GATT, 1947 settlement of disputes is the reduction of tariffs in the various rounds of tariff negotiations which should not be diluted by the actions of other contracting parties. The contracting parties are under an obligation to observe whatever commitments they have made under the GATT counter as well as the contracting parties must observe the substantive norms of international trade. Accordingly, Article X in the GATT, 1947 conceived an important obligation towards achieving the abovesaid obligations by mandating that the contracting parties must publish laws, regulations, periodical decisions and administrative rulings of general application pertaining to the treatment of products for customs duties.[3] Such instruments are to be published promptly in such a manner that the governments and traders are acquainted with them. Similarly, 'agreements-affecting international trade policy' in force 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.[4]

Articles XXII and XXIII have been described as conceiving formal mechanism 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 the substantial provisions of the GATT. Article XXIII has been expressly incorporated in various WTO agreements, as a standard for dispute settlement or a very similar provision is contained in other agreements.

In 1964, Part IV to the GATT, 1947 added Articles XXXVI, XXXVII and XXXVIII[5] although it was an attempt to give legal recognition to the special status of the developing countries in GATT, yet on balance it was the first step towards providing some dispute settlement mechanism for developing countries, howsoever rudimentary it may mean. In 1966, certain procedures were incorporated in Article XXIII of GATT[6] for settlement of disputes in keeping in view the special needs of developing countries by providing (*a*) utilisation of the good offices of the Director-General of the GATT when the bilateral negotiations fail[7]; (*b*) time frame to establish panel, submit its report[8] and comply with its decision[9]; and (c) the provision for suspension of concessions in case of non-compliance with the recommendations.[10] However, the 1966 procedures proved only symbolic for the developing countries.[11] In 1979 after the Tokyo Round of Tariff Negotiations, Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance[12] 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. From the developing countries' perspective, the 1979 understanding did not yield much to the developing countries except to conduct a regular and systematic review of the developments in the trading system with regard to matters affecting the interests of developing countries and recognised the need for appointing a panelist from developing countries when the dispute was between a developed and a developing member country.

With the establishment of the World Trade Organisation (WTO), the dispute settlement mechanism in international trade has become not only rule oriented but more innovative with the entry into force of the Understanding of Rules and Procedures Governing Disputes (DSU) annexed to the WTO.[13]

In the overall structural design of the WTO dispute settlement system, it is important to underpin how and in what respects the less-developing countries are arranged as the basic premise of the WTO recognises that, "there is a need for positive efforts designed to ensure that developing countries especially the least developed among them, [should] secure a share in the growth of international trade commensurate with the needs of their economic development".[14] It is all the more important to underscore how the developing countries have been integrated in the WTO dispute settlement system. Accordingly, this article is developed firstly, to describe GATT/WTO dispute settlement system from the perspective of developing countries and secondly, whether the developing countries could make use of the WTO dispute settlement system more effectively and finally in what respects developing countries fears of weak bargaining power and disparity would reinforce confidence of the developing countries in the WTO dispute settlement mechanism.

II. WTO Dispute Settlement Procedures

A. WTO in General

The WTO essentially is geared for the development of a rule of law whose main purpose should be liberalisation of trade and non-discrimination of member states. The WTO and its robust dispute settlement mechanism and surveillance are binding on all member states. The richness and revolutionary character of WTO can be catalogued as under;

- WTO is now established as a permanent international institution, headed by a Director-General of a stature equivalent to the Heads of the IMF and World Bank and similarly endowed with an independent secretariat and a regular, ministerial-level conference to provide policy directions.

- The ambit of global trade rules now extends to many more countries : 130 countries are now members of the WTO and more countries are likely to gain and by the next decade WTO will be regulating all of world trade and investment.

- The patchwork of previous GATT obligations has been replaced with an integrated, single undertaking that applies to all members. Obligations covering the full array of GATT disciplines have been substantially deepened through a series of binding agreements and understandings.

- GATT-like principles, rules and procedures have been extended to cover trade in services and the protection of intellectual property, while disciplines to govern trade in agriculture and trade in textiles and clothing have been strengthened and integrated in the GATT.

- The trade and trade related policies and practices of WTO members are steadily converging, providing traders and investors with increasing stability and confidence in their ability to do business on a global basis. All WTO members have now bound their regimes for trade in goods in schedules attached to the main Agreement, and indicated the extent of their commitments on services in schedules attached to GATS.

- Special and differential treatment for developing countries has been curtailed as a permanent feature of international trade obligations; instead there is growing recognition by developed and developing countries alike that developing countries need to be full and active members of the WTO, with no more than time-limited departures and technical assistance programmes marking the difference between them and developed members.

- The protocol of provisional application for the 23 original members, and its echo in the protocols of susequent acceding members, have disappeared. Instead each member has accepted the positive obligation "to ensure the formity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements."[15] In effect members have agreed to the superior claim of their WTO obligations over domestic law. As well, 'waivers' as political escape value for the members troubled by the bite of an obligation have been made exceedingly difficult, further consolidating members' obligations.

- Members have agreed to subject their trade laws, policies and practices to periodic public scrutiny and review.

- The possibility of the further extension of GATT-like principles, rules and procedures to competition issues, to investment, and to labour and environmental standards has become steadily more plausible. It is now possible to forsee WTO members gradually developing a seamless code of conduct governing the full contestability of global markets.[16]

B. Dispute Settlement Mechanism

The Understanding on Dispute settlement embeds a number of critically important principles and procedures in the WTO besides formally accepting adherence to Articles XXII and XXIII of the GATT, 1947. The Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994 (DSU)[17] came into being only after the WTO Agreements came into force.[18] The rules and procedures of the DSU are applicable to the Agreements establishing the WTO; Agreement on Trade in Goods; Agreement on Trade in Services (GATS); Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and Dispute Settlement Understanding (DSU).[19] 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 such as Anti-dumping; Technical Barriers to Trade; Subsidies and Countervailing Measures; Customs Valuation; Sanitary and Phytosanitary Regulations; Textiles; General Agreement on Trade in Services (GATS); Financial Services; Air Transport Services; and Ministerial Decisions on Services Disputes.[20]

The main features of Dispute Settlement of WTO can broadly be characterised as (*a*) the right of every member to have its complaint addressed by a panel of experts; (*b*) the promise that the panel will act expeditiously and independently on the basis of clear rules and procedures; (*c*) the commitment that panel reports will be adopted by the WTO unless an objecting member can successfully organise a consensus to block adoption; (*d*) the right to have decisions and reasoning of panels subjected to review by a permanent appellate body; (*e*) the obligations of members to implement adopted panel findings by taking action to remove the basis of complaint; the right to compensation or to authorized retaliation while possible in order to give teeth to this obligation, does not let a member off the hook; (*f*) the confidence that panels will have the assistance of a qualified, capable, independent group of officials with legal training in analysing the issues and reaching decisions; and (*g*) the promise that decisions will accumulate into a body of precedent that will further strengthen the rule of law in international trade and trade-related activities.[21]

III. WTO/GATT Disputes and The Participation of Developing Countries

A statistical analysis of the level of participation of developing countries in the GATT and WTO[22] shows that out of a total of 236 GATT dispute settlement matters, developing countries had initiated only 35 of them against the developed countries, i.e. about only 14.83 per cent of the total. But the corresponding percentage in the WTO is already as high as 31.08 per cent i.e. 16.25 per cent increase. The numerical participation of developing countries in the WTO dispute settlement system based on dispute settlement matters brought by them has increased by 28.50 per cent in the WTO, compared to the GATT. Correspondingly, there is also an increase in the number of disputes against developing countries in the WTO, an increase of 14.15 per cent.[23]

Between 1961 to 1977, in a span of 16 years there were only three complaints brought by the developing countries before GATT and in 1978-79, the number increased to four. Since 1979 there has been a gradual increase of complaints of developing countries between 1980-1990. Since the coming into

force of WTO in 1995 up to march 1998 the disputes brought before the WTO has gone to more than 100 just in a short span of two years. The nature of the disputes is quite varied. Some of the disputes involved import prohibition, quantitative restrictions, subsidies etc. The commodities that are involved in the developing country complaints in the WTO are primary commodities which can be explained that agriculture has been included in the WTO. Also the complaints concerning textiles has also increased as textile regime has been integrated into WTO and many of the restrictions envisaged in the Agreement on Textiles and Clothing are no longer present.[24] It is also interesting to note that cases against developing countries involve the new issues such as Agreement on Trade-related Investment Measures, Trade Related Aspects of Intellectual Property Rights (TRIPs) and the General Agreement on Tariffs and Trade.[25]

A. GATT Cases

A brief summary of cases brought by the developed countries before the GATT since 1962 to 1995 with the establishment of WTO reveals a pattern that although developing countries' trading interests and their status of special and differential treatment was harmed yet the developing countries had no courage to challenge the developed countries for fear of reprisals and economic loss. In 1962 Uruguay filed a complaint against 576 trade restrictions in 15 developed countries affecting Uruguan exports.[26] The first panel set up for this case declined to consider the overall imbalance on the ground that it fell outside Article XXIII. The panel declined to decide the claim because the claim was not supported with information and arguments. The complaint was viewed more as an attempt to call attention to the problems of developing countries than an attempt to obtain specific relief for Uruguay. The case also demonstrated that small countries have basic problems in trying to invoke the dispute settlement system, particularly when they need to collect exclusive information to support complicated legal arguments.[27]

With respect to part IV of the GATT, four complaints such as *Brazil* v. *EU* (1978)[28] *Chile* v. *EU*[29]; *Argentina* v. *EU, Canada and Australia*,[30] and *Hong Kong* v. *Norway* (1978),[31] the pleading of part IV as commitments and joint action was completely ignored. In *Brazil* v. *EU* which arose out of EU refusal to join the International Sugar Agreement, the panel observed that the EU's failure to join the International Sugar Conference although constituted a failure to collaborate jointly to further the objectivities of GATT, particularly the Article XXXVIII (1) yet it was not in violation of Part IV. Similarly in the case of *Chile* v. *EU*, Chile pleaded that discriminatory quantitative restrictions on Chilean apples by the EU was violative of Part IV. The panel held that Part IV was not violated. In the case of *Argentina* v. *EU, Canada and Australia,*

Argentina claimed that restrictions on Argentina imports in consequence of the Falkland war was violative of Part IV, however, there was no ruling by the GATT panel. In *Hong Kong* v. *Norway*, the panel noted that the objectives of Part IV did not justify derogation from Part II. Thus, it can be concluded that the disputes brought under Part IV were more of a statement of principles and intent than changes in the rules governing trade.[32]

The problem of developing countries were sufficiently demonstrated in 1983 when Nicaragua initiated a complaint against the United States, in which Nicaragua alleged that the United States decision to reduce the amount of Nicaraguan sugar allowed to be imported into the United States under the United States sugar quota system violated GATT rules on the administration of quotas. Although a GATT panel sided with Nicaragua, the United States refused to oblige.[33] Nicaragua could not retaliate as it feared that the United States could harm Nicaragua more in other areas of trade than impose restrictions on imports from United States to Nicaragua.

B. WTO Cases

The Uruguay Round had done away with special and differential treatment principles for developing countries and the dispute settlement mechanism is strengthened and some major trade sectors such as textiles, agriculture, TRIPs and TRIMs have been brought into WTO dispute settlement machinery. In the WTO, the Agreement on Textiles and Clothing have been pleaded in five out of six cases[34] dealing with textiles. The Multifibre Agreement restrictions are no longer present and the developing countries have been successful before WTO in tackling the complaints concerning textiles. In *Costa Rica* v. *United States*; and *India* v. *United States*, the WTO has successfully redressed the grievances of these developing countries against the United States.[35]

Agriculture was treated differently under the GATT unlike the other sectors. From 1960-95 there were only ten cases initiated by developing countries but in WTO, there was almost an equal number of agricultural disputes initiated by the developing countries in two years (1995-1997).[36] As the agriculture sector was outside the pale of GATT, the policies of developed countries since the inception of GATT had acted impediments to the exports of several tropical and temperate products of the developing countries to the markets of the developed countries. The domestic agricultural programmes in the European Common Agricultural Market and the United States, the world prices of several agricultural products which are of interest to developing countries (like sugar, spices etc.) are well below the normal market prices which these agricultural products would have fetched in the international market. In the Uruguay Round Agreement on Agriculture, the impediments to trade in agriculture have been removed in converting all non-tairff barriers to

tariffs and binding all tariffs at the end of the implementation period with a commitment that there shall be minimum access for all products where non-tariff barriers were imposed. The Agreement calls for an average reduction in tariffs and tariff equivalents by 36 per cent for imports of agricultural products, over a period of six years for developed countries and 10 years for developing countries. Also for tropical agricultural products, which account for half of exports from developing countries of agricultural products, a 43 per cent reduction in tariffs will be implemented by developed countries.[37] The Agreement defines the permissible upper limit in the use of export subsidies by country (21 percent) and commodity and embodies these limits in individual country schedules, although the export subsidies have not been phased out. It is expected that the Uruguay Round Agreement on Agriculture would stabilize world food markets, providing great trade opportunities for developing countries. The developing countries have been offered special and differential treatment in the Agricultural Agreement such as tariff reductions would be as low as two thirds of developed countries and domestic subsidies that are part of the economic development of developing countries are exempt from controls. The developing countries are given ten years instead of six to implement all changes.[38]

The cases involving Voluntary Export Restraints (hereinafter referred to as VERS) under the GATT, 1947 namely *Korea* v. *EU* (1978)[39]; *Chile* v. *EU*[40]; *Hong Kong* v. *Norway* (1978)[41]; and *Portugal* v. *USA* (1985)[42] demonstrated that VERS were clearly illegal under GATT but were frequently used by the developed countries to control the imports from the developing countries. In the *Korean case* (1978) restrictions imposed by EU on imports of TVs from Korea ended up in a bilateral understanding. In the case of *Chile* v. *EU,* Chile argued that Article XIII (1) was violated because similar competing suppliers were restrained by VERS while Chile was restrained by a direct QR, however the panel held that the VERS with other suppliers were not similar to the QR placed on Chile. In the case of *Hong Kong* v. *Norway* (1978), the complaint concerned discriminatory VERS on textile imports to certain developing countries which was latter on settled mutually.

In the field of trade related intellectual property (TRIPs) and services, which are completely new areas in the GATT, the developing countries are bringing cases to WTO frequently.

Four complaints have been filed by the developing countries with respect to subsidies before the WTO. Two of the complaints are between the same parties, Brazil and Canada regarding the same subject-matter, i.e. aircraft subsidies. The other two complaints are directed against Hungarian agricul-

tural export subsidies by Argentina and Thailand in a joint complaint. However, it is too early to comment on the role of WTO in the matter of subsidies.[43]

The developing countries as a group faced several import restrictions and under the GATT, 1947 cases such as *India* v. *Japan; Hong Kong* v. *Norway* (1978); and *Hong Kong* v. *EU* (1971), however all these cases were settled without a direct and final finding. In the WTO, there have been complaints initiated by developing countries which deal with Articles XI or XII or with both but several of these are joint complaints involving the same subject-matter. India, Malaysia and Pakistan filed a joint complaint against the US import prohibition on shrimp and shrimp products under section 609 of US Public Law 101-62 followed by Phillipines on the same subject-matter. Ecuador, Guatemala, Honduras, Mexico and the United States jointly filed a complaint against EU laws regarding importation, sale and distribution of bananas, invoking GATT Article XI and the Agricultural Agreement among other legal provisions. India, Hong Kong and Thailand have entered into consultation with Turkey in regard to import prohibition on textiles. Singapore and Malaysia settled an import prohibition case through mutual consultations.[44]

IV. The Future

The future of the developing countries in the overall mechanism of settlement of disputes in GATT/WTO is difficult to assess. Firstly, in a recent case WTO Panel on European Community Regime for the Implementation, Sale and Distribution of Bananas (EC Bananas case)[45] the United States and Mexico successfully opposed the prescence of some private attorneys to represent St. Lucia, a developing country before WTO is not good for the interests of developing countries as majority of the developing countries are not fully equipped with the legal, economic and other technical nuances of the subject as important as that of international trade and WTO. If developing countries' economic interests are to be safeguarded properly and satisfactorily within the framework of the international trade agreements concluded under the aegis of WTO, it is imperative for the WTO to allow the representations of the developing countries through their accredited legal counsels and attorneys. It is important for the WTO to maintain impartiality in the panel proceedings and the impartiality can be maintained only when the facts and circumstances are properly marshalled before the panel. Such marshalling of facts and circumstances can happen only when the countries are represented by legal counsels and attorneys. The developing countries must be given a proper opportunity of having been heard, *audi alteram partem*. In the settlement of disputes in WTO, the panel procedures are contentious and WTO members automatically accept the compulsory jurisdiction of the DSB (Article 6 : 1

DSU), hence the panel decisions and reports have a judicial characteristics settling disputes between contracting parties.

Secondly, the developing countries' increasing recourse to WTO dispute settlement mechanism can be attributed to the more legalistic and improved dispute settlement mechanism systems in the WTO as well to the inclusion of other sectors of international economy under the purview of WTO such as agriculture, textiles and others with the result that the developing countries have more areas to contest before the WTO than the GATT, 1947. The developing countries by and large have much more stakes in strengthening the dispute settlement mechanism of WTO as the problems confronted by them are developed country origin such as subsidies, import restrictions, Voluntary Export Restraints & Non-tariff Restraints.

In the final analysis, the participation of developing countries in the GATT/WTO settlement of disputes procedures is a reflection of how best the trading interests of the developed and the developing countries can be accomodated in a multilateral legal regime of World Trade Organisation.

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RELIGION AND ELECTION LAW

*Parmanand Singh**

In election law, use of religion in elections constitutes a corrupt practice and entails penal consequences. An analysis of the constitutional policy and cases involving appeal to religion under the Representation of People Act, 1951 reveals that the judicial approach has remained inconsistent and no clear principle can be culled out from the authoritative pronouncements. For example the conceptualisation of Hinduism and Hindutva by the Supreme Court in Hindutva judgments delivered in November, 1995 has proved to be troublesome for future of secular democracy as it may reinforce the hegemony of dominant Hindu religion in public life. The efforts to delink religion from politics have remained a distant dream.

In the present paper some questions have been raised in order to explore how religion can be eliminated in political life.

I. Should Religion and Politics be Mixed?

In S.R. Bommai v. *Union of India*[1], a nine-judge bench of the Supreme Court described "secularism" as a basic feature of the Indian Constitution. In drawing this conclusion, the court referred to sections 29-A, 123(3) and (3A) of the Representation of People Act, 1951. Section 29-A requires political parties to swear allegiance to the principles of secularism and allotment of symbols. Sections 123(3) and (3A) define two corrupt practices : appealing for votes on the ground of religion and promoting feeling of enmity or hatred between different communities. Referring to these provisions of election law P.B. Sawant J. held :

> Religion can not be mixed with any secular activity of the State. In fact encroachment of religion into secular activities is strictly prohibited.

In the words of Justice K. Ramaswamy :

> The secular government should ... bring order in the society ... the manifesto of a political party should be consistent with ... secularism ... fraternity, unity and national integrity .... Even in its manifesto a political party cannot escape constitutional mandate—after it was registered under section 29A .... Introduction of religion into politics is not merely a negation of the constitutional mandates but

> also a positive violation of the constitutional obligation, duty, responsibility and positive prescription of prohibition specially enjoined by the Constitution and Representation of People Act.

The learned judge continued further;

> A political party that seeks to secure power through a religious policy or caste-orientation policy disintegrates the people on the grounds of religion and caste. It divides the people and disrupts social structure on the grounds of religion and caste which is obnoxious and anathrema to the constitutional culture and basic features. Appeal on grounds of religion offends secular democracy.

Justice B.P. Jeevan Reddy was more explicit about the role of religion in politics:

> It is clear that if any party or organisation seeks to fight elections on the basis of a plank which has proximate effect of eroding the secular philosophy of the Constitution it would certainly be guilty of following an unconstitutional course of action. Political parties are formed and exist to capture or share state power. The Constitution requires the state to be secular in thought and action, the same requirement attaches to political parties as well. The Constitution does not recognise, it does not permit, mixing religion and state power.

The following points emerge from *Bommai's case* :

(1) No political party can fight an election on the plank of religion.

(2) It is the duty of the courts to interpret sections 123 (3) and (3A) of the Representation of People Act in a way that religion is not allowed to overplay in elections.

(3) The Election manifesto should eschew religion altogether for electoral gains.

(4) It is the duty of the courts to interpret the law so as to ensure that the candidates set up by a political party espousing a particular religion should not escape the charge of corrupt practices.

(5) Law does not permit recognition of communal parties as political parties.

II. Should Religion be allowed to influence the Government?

The question that arises is whether law relating to use of religion in election can be reconciled with the constitutional conception of secularism as enunci-

ated in *Bommai's* Case. Is the use of religion altogether forbidden in election speeches?

Section 123 (3) reads :

> The appeal by a candidate or his election agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Section 123 (3A) reads :

> The promotion of or attempt to promote feeling of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community or language by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

The consequences of the foregoing provisions can be summed as;

(a) violation of the foregoing provision is a basis for setting aside an election under section 100 (1) (b) of Representation of People Act, 1951.

(b) Violation of section 123 (3A) (not section 123 (3)) is also a basis of criminal punishment under section 125 of the Representation of People Act, 1951 and section 171-C of the Indian Penal Code.

The underlying policy of sections 123(3) and (3A) is that the Government should not act on religious basis. In other words, religion should not be influenced through elections. The purpose is also to prevent voting on the ground of religion. The underlying policy, therefore, is that those who return to power through elections should not be allowed to pursue a religious ideology through governmental policies or actions. It is even a constitutional requirement that voters should not be religiously motivated.

III. Is the Use of Religions Absolutely Prohibited in Elections?

In *Ebrahim Sulaiman Sait* v. *M.C. Mohammad*[2], it was alleged that Sait had said in an election speech that the Jan Sangh, a political party leaning towards Hindus, had caused killings of Muslims and burning of mosques in North India. The question was whether Sait committed corrupt practice under section 123(3) of the Representation of People Act?

The Supreme Court held that even though the speech had a communal tone, it did not make an appeal in the name of religion. The court observed :

> communal parties were allowed to function in politics in India. An appeal made to voters on communal basis, should not, therefore, be viewed as corrupt practice.

Earlier in 1965 in *Kultar Singh* v. *Mukhtar Singh*[3], the Supreme Court held that appeal to uphold the honour of the Panth was an appeal to vote for Akali Dal, a political party and was not an appeal in the name of Sikh religion.

Implicit in this holding is a view that it is not illegal for a political party to have a religious identification. Chief Justice Gajendragadkar in *Kultar* held that 'Panth' could indicate Sikh religion that it only denoted Sikh politics. It is submitted that the Supreme Court in this case did not realise that Akali Dal is identified by Sikh religion and it is clear from the fact that this party had been asserting a claim for a Sikh homeland on the basis of religious identity.

In *Raman Bhai* v. *Dabhi*[4], Madholkar J. was confronted with a case where the symbol of star was alloted to the candidate's party. The allegation related to the misuse of symbol by giving it a religious colour when an appeal was made on behalf of the candidate through distribution of pamphlets drawing upon the imagery of the polar star Dhruva. In mythology Dhruva was dedicated to religion. The pamphlet clearly showed that the candidate devoted to Hindu religion. It was certainly an appeal in the name of religion. Yet, Justice Madholkar held that the pamphlet did not amount to corrupt practice because Dhruva was served but not worshiped as God. The learned Judge emphasised that Dhruva has not been raised to the status of divinity.

In *Z.B. Bukhari* v. *Brij Mohan Mehra*[5], Beg J. seem to be troubled by *Kultar*. Bukhari's election was challenged on the ground that he had alleged that another Muslim candidate was not a true Muslim because he was member of Congress (I) which was interested in the change in Shariat (Muslim personal law). Bukhari's election was set aside under section 123(3) of Representation of People Act.

Justice Beg in a brilliant opinion developed his own concept of secularism in interpreting election law. Rejecting the argument that presentation of personal laws was not a religious issue he held that in an election a candidate could not be allowed to tell electors that their rivals are unfit on grounds of their religion. The aim of sections 123(3) and (3A), according to him was to eliminate divisive factors in elections. A secular state had to ensure that the existence or exercise of a political or civil right or the right or capacity to occupy any office or position under it or to perform any duty did not depend upon the profession or practice of any religion.

In *Harcharan* case,[6] S. Mukharji J., resurrected Justice Beg's opinion in *Bukhari* and rejected *Kultar's* approach of drawing a distinction between direct and indirect appeal to religion. The court in *Sait* had virtually accorded legitimacy to communal appeals. *Harcharan* like *Bukhari* appealed to secularism in determining the question of appeal in the name of religion.

In *Harcharan*, an Akali Dal candidates's election was set aside on the ground of section 123(3). It was proved that hukumnamas were issued by Akal Takht seeking support for Akali Dal candidates. There was no direct but indirect appeal to vote for the candidates set up by Akali Dal. The speeches given by Akali Dal leaders with the same concern were also proved. Mukharji J. made a very instructive observation :

> It would not be an appeal to religion if a candidate is put by saying vote for him because he is a good Sikh or he is a good Christian or he is a good Muslim, but it would be an appeal to religion if it is publicised that not to vote for him would be against Sikh religion or against Christian religion or against Hindu religion or to vote for the other candidate would be an act against a particular religion. It is the *total effect of such appeal* that has to be borne in mind in deciding whether there was an appeal to religion as such or not.[7]

IV. Are the Hindutva Judgement Consistent with the Value of Secularism?

The link between religion and politics or between religion and community has become the most intensely debated issue today. Faced with the demolition of Babri Masjid in 1992, the Narsimha Rao government tried to make a law to delink religion from politics. The two Bills moved by the Government namely, The Constitution (Eighteeth Amendment) Bill, 1993 and the Representation of the People (Amendment) Bill, 1993 failed and due to strong opposition of certain political parties these two Bills were withdrawn for further consultation.

The statement of objects and reasons to the amendment to section 29 (A) (1) added by 1989 amendment and by inserting 29 (B) proposed by the 1993 Bill stated that the aim was to prevent the registration of political parties bearing a religious name. It has, however, been noted above that the delinking of religion from politics was achieved by *Bommai* by detailed reference to sections 123(3) and (3A) of the Representation of People Act. It is in this background that we should consider *Hindutva* Judgements.

On December 11, 1995 a three judge bench of the Supreme Court speaking through Justice J.S. Verma delivered seven judgments to dispose of thirteen election appeals against the decisions of Bombay High Court. All these

thirteen petitions related to the challenging of elections of Shiva Sena - BJP combine candidates. In all these cases (namely *Yeshwant Prabhoo, Manohar Joshi, R.G. Kapse, Ramakant Mayker, Movshwar Save, Chandrakanta Goyal* and *S.V. Mahadik*), the common issue was whether invoking Hindutva ideology by the Shiva Sena and BJP leaders or the candidates etc. constituted corrupt practices under sections 123(3) and 3(A) of the Representation of the People Act.

In *Yeswant Prabhoo,*[8] Justice J.S. Verma addressed fully to the Hindutva argument and decided it which he followed in all the judgements. Of all these seven judgments, the decision of the court in *Manohar Joshi*[9] generated, national debate. The principles which the court laid down in these cases are :

(*a*) No precise meaning can be ascribed to the terms Hindu, Hindutva or Hinduism.

(*b*) No meaning in abstract can confine these terms to the narrow limits of Hindu religion alone or to strict Hindu religious practices, unrelated to the content of Indian culture and heritage or culture and ethos of the people of India.

(*c*) The term Hindutva is related more to state of mind and the way of life of the people in the sub-continent.

(*d*) In view of what has been said above, the terms Hindutva or Hinduism *per se* cannot be assumed to mean and be equated with Hindu fundamentalist bigotry.

(*e*) For the same reasons, the terms Hindutva and Hinduism cannot be construed to fall always within the prohibition in sub-sections (3) and (3A) of section 123 of Representation of People Act, 1951.

(*f*) Whether reference in an election speech to Hindutva or Hinduism is hit by sections 123 (3) or (3A) is a question of fact.

(*g*) Misuse of these terms to promote communalism cannot alter their true meaning.

(*h*) The word Hindutva is also used and understood as synonym of 'Indianization' i.e. development of a uniform culture by obliterating the differences between various cultures co-existing in the country.

(*i*) The assertion by a candidate in an election speech that he would set up the first Hindu State on the Indian soil did not amount to an appeal to religion, it was at best a hope expressed by him.

In deciding the meaning of the terms 'Hindutva' and 'Hinduism', Justice Verma relied on *Shastri Yagnaprushodji* v. *M.B. Vaishya*[10] and *C.W.T. Madras* v. *Sridharan.*[11]

The last point (i) was made by the learned judge in *Manohar Joshi's* case. The verdict was widely acclaimed by the Sangh Parivar as victory of truth. Critics of the judgment described it as giving free hand to voters of communal politics.

In *Mohd. Aslam* v. *Union of India*[12], in response to an Article 32 petition, J.S. Verma J., clarified *Manohar Joshi* (1996) as follows:

(*i*) *S.R. Bommai* was not relevant in *Manohar Joshi's* case because it was not related to interpretation of sections 123 (3) and (3A) of Representation of People Act.

(*ii*) Criticisms of *Manohar Joshi* is based upon misleading of the judgment.

(*iii*) The standard of proof required under the aforesaid provisions was not satisfied to establish the commission or corrupt practice by *Manohar Joshi.*

(*iv*) The apprehensions and misgivings expressed in the writ petition are imaginary and baseless.

(*v*) *Manohar Joshi* does not conflict with *Bommai.*

(*vi*) The judgment cannot enable misuse of religion for making an appeal for votes in an election.

(*vii*) The deficiency if any in section 123 (3) has to be cured by legislation and not by the judiciary. The legislative efforts to separate religion from politics has unfortunately been abandoned.

V. Hindutva Judgment : Some Important Questions

A. Whether Bommai was Irrelevant to Hindutva Judgments?

As has been stated above, *Bommai* referred to sections 123 (3) and (3A) as well as section 29 A and therefore it is incorrect to say that in *Bommai* the question relating to meaning of these provisions neither arose nor was decided. The substance of *Bommai* is that no political party can contest an election on the plank of religion. The Bombay High Court declared the election of *Manohar Joshi* as void as the speeches given by top leaders of BJP-Shiva Sena combine was based upon the plank of Hindutva. These speeches were made at the election meetings in the presence of Manohar Joshi. In his own speech Joshi announced that the first Hindu State will be established in Maharashtra.

The Supreme Court overruled Bombay High Court and held :

> The so-called plank of the political party may at best be relevant only for appreciation of the context in which a speech was made by a leader of the political party during the election compaign, but no more for the purpose of pleading corrupt practice in the election petition against a particular candidate.

The aforesaid finding completely ignores *Bommai* that no election can be contested on the plank of religion. The finding also ignores the political reality that when a candidate contests election on the plank of Hindutva and his supporters as well as he himself gives speeches on that plank, commits corrupt practice. *Bommai* also suggests that sections 123 (3) and (3A) should be interpreted in the context of secular democracy connoting complete separation of religion from politics and not on the technical grounds like absence of an express plea of consent in the petition as has been done by the court in this case.

B. Whether Hindutva is a way of life?

The meaning of the terms Hindutva or Hinduism as connoting a way of life or the culture of people of India is said to be based upon two judgments of the Supreme Court in *Shastri Yagnapurushadji* (1966) and *CWT Madras* (1976). In the former case, it was held that Swami Narayan sect is a part of Hindu religion. The judgment in that case refers to many authorities and concludes that Hindu religion does not claim any prophet, it does not worship any one God, it does not subscribe to any dogma or believe in any one philosophical concept and that it may broadly be described as a way of life and nothing more. In relying upon this judgment, Verma J., overlooked the following observation in the same judgement :

> Beneath the diversity of philosophic thoughts, concept and ideas expressed by Hindu philosophers who started different philosophic schools lie certain broad concepts which can be treated as basic.

In the judgment, it is further observed that amongst these basic concepts is the acceptance of Veda as the highest authority in religious and philosophical matters and also the belief in rebirth and pre-existence. The judgment also mentions that *Moksha* or *Nirvana* is the ultimate aim of Hindu religion and philosophy. Then it says that Hindu religion can be safely described as a way of life based on certain basic concepts to which we have already referred.

From the above, it follows that certain basic concepts central to Hindu religion are different from those of Muslims, Christians and other religious communities. It is therefore, submitted that the view of Justice J.S. Verma that Hinduism is a way of life of the people of India including non-Hindus is not correct. No such conclusion can be derived from *Yagnapurushadji* if understood in the full contexts.

Even the judgment of 1976 relating to wealth tax does not lead to the aforesaid conclusion. In that case, a father and his son born from christian wives were held to form a joint Hindu family for the purpose of wealth tax. Both *Commissioner of Wealth Tax* and *Yagnapurushadji* quote with approval the definition of Hindu religion given by B.G. Tilak in Geetarahasya :

> Acceptance of Vedas with reverence; recognition of the fact that the means or ways of salvation of the truth that the number of gods to be worshipped is large that indeed is the distinguishing feature of Hindu religion.

The Supreme Court was therefore, wrong in holding that Hindutva is a way of life of the people of India and an appeal for votes based upon Hindutva or Hinduism does not by itself amounts to corrupt practice. Further, it is unclear how these two judgments decided in different context relevant in interpreting sections 123 (3) and (3A) and how *Bommai* was irrelevant which specially referred to those provisions in the Representation of People Act.

C. Whether the Statement the first Hindu state will be established in Maharashtra amounted to appeal in the name of Hindu religion?

To answer this question let us recall the observation of Justice S. Mukharji in *Harcharan* that the total effect of such appeal that has to be borne in mind in deciding whether there was an appeal to religion and also the observation of Justice B.P. Jeevan Reedy in *Bommai* that political parties are formed and exist to capture or share state power.

The court in *Manohar Joshi*, it is submitted overlooked the social reality that during election campaign the audience comprises of common men and the manner in which a statement would be understood by such an audience has to be kept in mind. When Manohar Joshi, a candidate of Shiv Sena - BJP combine, which is known for advocating Hindutva ideology and for being hostile to Muslim community, was announcing that if BJP-Shiv Sena was voted to power, the first Hindu State will be established in Maharashtra, an average voter in the audience will not understand Hinduism as a way of life or as connoting culture of the people of India. And it is almost impossible to believe that a Muslim understands Hinduism or Hindutva as a way of life and not as Hindu religion.

Therefore, the finding of the court that the statement made by Manohar Joshi was not an appeal to voters in the name of religion but "expression, at best of such a hope" is disturbing and unvincing. In a secular democracy such hopes are not expressed. If the use of Hindutva is permissible in law, there would be nothing illegal for an Akali candidate to express a hope for

establishing a Khalsa state or for a Kashmiri muslim from advocating an Islamic State.

In a sense Hindutva judgments invite a seasoned discourse on secularism and its relation with political democracy. There seems to an internal tension between secular democracy and limits on the constitutional rights to adult suffrage and rights to organise political activities for sharing power. For instance whether appeal to oppressive Hinduism sustained by Brahamanical ideology for protective discrimination or political reservation for backward communities is an appeal in the name of religion?

Is Hindutva not a politically constructed civil religion? Has *Hindutva* judgment not disregarded *Bommai's* insistence on separation of politics from religion? The crucial issue that should be debated today is how to strike a balance between values of secularism on the one hand and respect for individual's right to free speech, conscience, religion, language, and culture? If the election manifesto of a political party seeks to preserve ethnic identities or religious identities of a group, then should all the candidates of that political party referred to power be unseated on grounds of secularism? Is religion totally irrelevant for the formation of a social structure in relation to elections? And if religion is relevant in politics, will this not end up in moral hegemony of dominant Hindu religions in public life?

D. Is the Use of Religion permitted in election in the exercise of freedom of religion?

One thing however, is clear that sections 123(3) and (3A) of the Representation of People Act embodies a principle that neither the candidates nor the voters be religiously motivated and that the government should not be influenced by religion. The aim of election law is to promote the secular character of the government by prohibiting appeal to religion in elections. But an election speech made in conformity with fundamental right to freedom of religion guaranteed under Articles 25 to 30 of the Constitution can not be treated as anti-secular to be prohibited by sections 123(3) and (3A) of the Representation of People Act, 1951. This has been held by J.S. Verma J., in *Yeshwant Prabhoo.* He observed :

> A speech referring to religion during election compaign with a secular stance in conformity with the fundamental right to freedom of religion can be made without being hit by the prohibition contained in sub-section (3), if it does not contain an appeal to vote for any candidate because of his religion or to refrain from voting for any candidate because of his religion.[13]

It is thus clear that religion can be used in political speeches during elections so long as there is no appeal to religion of the candidate or of his rival.

The learned judge exemplifies his view by referring to a speech when it alleges discrimination against any particular religion and promises removal of the imbalance and discrimination. Such an election speech is not prohibited. In other words a mere mention of religion in election compaign is not forbidden. So long as it does not amount to vote in the name of religion. When it is said that religion and politics should not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage.

VI. What Standard of Proof is Required to Prove a Corrupt Practice?

In order to constitute a corrupt practice, it must be established that it was committed by the candidate or his election agent or any other person with the consent of the candidate or election agent. If the appeal to religion has been made by the supporters of the candidate without the consent of the candidate or his election agent or even contrary to his instructions, the election cannot be set aside unless it is proved that the result of the election was affected by such an appeal. [Sections 123(3), (3A) read with sections 100 1(b), 1(c) (iii) and section 100 2(a)].

The required consent must be proved and cannot be assumed. Thus the top political leaders supporting the candidates set up by the party if made an appeal to religion, the election of the referred candidate cannot be held void in the absence of the proof of the consent of the candidate. For example in *Manohar Joshi,* the following statements were made by Shiv Sena Chief Bal Thackery and BJP leader Pramod Mahajan at Shivaji Park :

(*a*) To handle the Congress (I) hoodlums, the Shiva Sainiks may take law in their hands and use fire arms if necessary (Thackeray).

(*b*) To save 'Hindutva', vote for BJP - Sena nominee (Pramod Mahajan).

(*c*) Mr. Rajiv Gandhi does not know his own religion, and he has no right to speak on Hinduism (Pramod Mahajan).

(*d*) If in Maharashtra the flame of Hinduism is extinguished, then anti-national Muslims will be powerful and they will convert Hindustan into Pakistan.

(*e*) We must protect Hindutva at all costs and for that we must protect Hindutva at all costs (Pramod Mahajan).

(*f*) Rajiv Gandhi speaking on Hindutva is like a prostitute lecturing on fidelity. (Mahajan).

(*g*) (Referring to Rajiv Gandhi), wife christian, mother Hindu, father a Parsee and therefore himself without any (Hindu) culture (Mahajan).

Since the requirement of the consent of returned candidate (Manohar Joshi) was not pleaded, these speeches appealing the Hindutva were held not

amounting to corrupt practices committed by Manohar Joshi. It is surprising that Manohar Joshi did not commit corrupt practice when these objectionable speeches were made in his presence. Why could the court not imply the consent of Joshi to these speeches when the leaders of the political party were making campaign on the plank of Hindutva. The court found that there was only one allegation of corrupt practice in election petition which raised a troubled issue and that is the statement that "the first Hindu State will be established in Maharashtra".

It is true that the proceeding in an election petition alleging corrupt practice is quasi-criminal in nature and thus the provisions must be construed strictly but they should not be construed so narrowly so as to defeat the very object of law.

The reply of J.S. Verma J., in *Mohd Aslam* is that the loopholes in law or defeciencies in section 123 can be cured by law reform and not by judicial activism. What reforms or legislative change are required to be done in section 123 of the Representation of People Act is a matter of serious legal debate.

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COPYRIGHT IN MUSIC : EVOLUTION & CONFLICT OF RIGHTS

*P.M. Dhar**

The main objective of the copyright law is to give authors an incentive to create and to promote their creative activity by giving full protection to their intellectual moral and economic interests. The moral rights are important for protection of moral interests of the authors. These essentially include the right to make public a work which has yet not been published; right to decide whether his true identity on the original work should be disclosed or it must appear as pseudonym; the right of protection of integrity of his work against distortion, mutilation or other modification against his will. Over and above these, the exploitation of a work prejudicial to the honour or reputation of author constitutes violation of his moral rights.

To sustain creativity along with moral rights, certain economic rights are also given to the creators of original work in the nature of exclusive rights to make profit by commercial exploitation of the work created by them. 'Adaptation'[1] of a work as the exclusive right of the creator of original work is included in the copyright law of India with a view to reward authors and allow them commercial exploitation of their work in related fields.

To do justice to any writing on copyright in music, its history and evolution must be traced first. The western commercial interests of today claim that Indian music is at best ORAL and cannot be written down in notation. As the copyright is available only in a work which is in writing[2] and has a definite form, they argue, that creators of Indian music can not enjoy the protection of any copyright laws. They conveniently forget the fact that the earliest form of music writing is found in the shape of rock inscription in Tamil Nadu.[3] This inscription in clear form indicates the names for the sharps and flats of the notes in the octave. This inscription which has withstood the fury of nature for almost thirteen centuries strongly refutes the western allegation of impossibility of putting Indian music in written form.

The current concepts of copyright which depend mainly on west have been solely responsible for non-availability of complete copyright protection to Indian music. To understand this, it is important to know the socio-economic conditions under which authors worked and developed. Small communities being the norm in ancient India, creativity was at the root of community living.

Bards created songs for various festivals. This creation was more of a duty than a means of subsistence. The professional musician was born when this group of creators of music developed their skill and moved from one place to another and entirely depended on their music for their sustenance. They were patronized by kings and the temple trusts to write, sing and perform in their praise. Their life was easy and they were earning adequate amounts for their sustenance. This was a period of glory for the Indian music.

With the British coming as merchants and then taking over the administration in India, the musicians were reduced to abject poverty because the foreign rulers took over most of the kingdoms which supported these musicians. Since these people had come mostly as traders and their interests were commercial, the gramophone disc manufacturers also entered the country. This gave a new lease of life to local musicians for dissemination of their creations.

Though these gramophone companies were competing with each other, their approach to local talent was ruthless. For one time payment to these creators, these companies took away all the rights in the works of these musicians. Unfortunately, this practice of one time payment for all rights in one's creation, which has continued uninterrupted into 20th century is responsible for exploitation of all creative people.

The Indian Copyright Act, 1957 in clear term gives ownership of copyright in a musical work to the composer by making him the first owner of his work.[4] The Act defines composer[5] of a work as the person who actually composes a musical work. This means that the law recognizes the right of authorship only of a person responsible for planning, arranging and composing a work. The fact that he has utilised the materials procured by others is not relevant, if he has not copied it.

It seems that the Act gives sweeping rights to authors,[6] but in fact adding proviso to these rights, the authors are greatly restrained in the exploitation of these rights by making the employer the *first owner of copyright* in a work if executed in the course of his employment or under 'contract of service'. A person is presumed to work in the course of his employment if he creates a work in the performance of a duty under his 'contract of service'.[7] A person is under contract of service if he is employed by another to do work for him under his control, so that he can direct the time when the work is to be done, direct the means to be adopted to do the work and control the method in which the work is to be carried on.

The Indian Copyright Act, 1957 provides that copyright shall, subject to the provisions of this section and other provisions of the Act, subsist throughout India in the following classes of work, that is to say :

(*a*) original literary, dramatic, musical and artistic works;

(*b*) cinematograph films; and

(*c*) records.[8]

The plain reading of this section implies that the protection is available to the literary, dramatic, artistic or musical works provided they are original. The word' 'original' is not confined to a field which has not been explored hitherto by any other person, either in respect to ideas or material comprised therein.[9] The copyright law is not concerned with originality of ideas but with the expression of thought in print or writing. The originality which is required relates to the expression of thought, but the Act does not require that the expression must be in an original or novel form, but only that the work must not be copied from another work and that it should originate from the author.

Thus to be entitled to copyright, the paramount element of *novelty* and *originality* must be present in the musical work.[10] The protection of copyright can not be availed if these are only variations from or additions to an already existing musical work nor is this available if the old tunes are made use of by a person.[11] The musical piece to be original need not essentially be a new creation, an absolutely new arrangement of an old piece may be subject fit for protection under the copyright laws. In case where the musical work is more than a slavish copy with changes, the new composition must clearly show exercise of creative genius as distinguished from a mere application of mechanical skill.[12] Unfortunately, in the sphere of popular music the concept has been narrowed to include slight variation in rhythm or harmony of accent and tempo to give it the colour of originality.[13]

The Indian Copyright Act designates musical work as any combination of melody and harmony or either of them, printed reduced to writing or otherwise graphically produced or reproduced.[14] Thus the plain reading of this section shows that the musical work in printed, written or graphic representation only are covered and does not afford protection to the work in its acoustic representation. Like literary or dramatic work, copyright to musical work does not depend on its merit. Mere collection of notes constituting composition is a good subject matter and can afford protection to such a composer. The question of infringement can arise only if to an average person the two melodies sound the same. The lack of musical merit has never been and can never be an impediment under copyright law.[15]

In India, the best medium for dissemination of music has been the Indian cinema, since music forms an essential and integral part of this medium of mass entertainment. The Indian Copyright Act makes the composer the author, consequently the owner of the copyright in his composition[16] and the producer or owner of the film on its completion as its author or owner.[17] According to

Indian Act, "the copyright in a cinematographic film or record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made".[18] This coupled with other provisions open up possibilities of multiple rights in the inputs that have gone into giving the film its final form by showering an exclusive right on the author of a musical work an exclusive right to perform the work in public.[19] Unfortunately, the Act also showers the owner of the film with the right to cause the film to be seen and heard in public.[20]

This right given to the composers for public performance cannot possibly be exploited by them since the film maker who has a conflicting right of public dissemination always binds them by 'contract of service' rather than 'contract for service'.

This conflict of interest between Indian Performing Rights Society and the Exhibitors Association of India came before the Supreme Court of India in 1977.[21] In 1969, the IPRS imposed fees for public performance of composers of musical works. Copyright Board having jurisdiction under section 35 of the Act held that the composers of music retained copyright in musical works which formed part of the sound track of the film if these works were written and the composers had not validly transferred these rights to the owners of the film.[22] The High Court while reversing this decision of the Copyright Board held that the producer of the film becomes the first owner of copyright where there is valuable consideration. Composer can claim copyright only if the producer by agreement in writing and signed by him allows the composer to retain the copyright in music which forms part of the film. Thus, the High Court made it amply clear that the composers of music had no copyright in such musical works which could be validly assigned to the Performing Rights Society.

The Supreme Court in appeal took up two questions:

(*a*) Are existing and future rights of composers entitled to assignment under sections 18 and 19 of the Copyright Act, 1957?

(*b*) Can the same rights be defeated by a film producer with the help of section 17 of the Copyright Act, 1957.

The Supreme Court while reversing the ruling of the High Court on the question of composers' rights of assignment held that the composers and lyricist have a right of assignment present and future by virtue of sections 18 and 19 of the Indian Copyright Act.[23] On the second question the court accepted the possibility of conflict of interests between the two. The court, in order to settle the dispute, invoked the principle of "harmonious and rational construction" and negatived the idea of "mechanical construction". The court observed:

> According to proviso [b] to section 17, when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for purpose of making his cinematograph film or for composing music or lyrics i.e. the sounds for incorporation or absorption in the sound track associated with the film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed, unless there is a contract between the composer on the one hand, and the producer of the film on the other.

From the above, it is clear that the court held that the rights of the composers and lyricists can be defeated by the film producers by taking the help of section 17 of the Copyright Act. This ruling of the Supreme Court somehow overrides the views expressed in 1968 by Andhra Judge[24] who had held that an author engaged on a fixed remuneration is not the servant of the publisher and unless a contrary view is expressed in the contract, the copyright vests in the author.

The Andhra decision shows that to decide the question of copyright when section 17 of the Act is involved, the court must proceed with abundant caution before denying the rights to the authors. Unfortunately, the Supreme Court did not go in for close analysis which would have revealed many more conflicts.

It could have found that the Act clearly defines and allows multiple rights unaltered by assumed rights of the film producer. The scrutiny would have revealed the clear protection afforded by the Act to the combination of melody and harmony and not the material on which it is printed or graphically reduced. The Supreme Court's decision has, therefore, by not putting emphasis on terms of contract and findings on the basis of evidence, continued the uncertainty which allows the continued exploitation of composers and lyricists by owners of the copyright in films of which music is an essential part.

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TORTURE AND DEATHS IN POLICE CUSTODY — A VIOLATION OF RIGHT TO LIFE

Balvinder Kaur

Right to life is an evolution from the concept of natural rights. Natural rights are inherently moral rights which every human being at all times ought to have simply because of the fact that he is a rational and a moral being.[1] The natural rights are given by God to man. They are inherent, fundamental and sacred rights which can neither be taken away by any individual nor be restricted by any authority.[2]

The doctrine of natural rights passed into a realm of practical reality and influenced the drafting of the Magna Carta (1215 A.D.), British Bill of Right (1689), The Declaration of Independence (1776), The Declaration of Right of Man and Citizen (1789) and formed part of the US Constitution.[3] Gradually, the concept of natural rights developed. The traditionally known natural rights came to be known as fundamental rights in modern democracies.[4] The US Constitution served as a beacon. Taking a cue from it almost every modern constitution contains a chapter on fundamental rights. The constitution makers of India also incorporated them in Part III of the Indian Constitution and called them "Fundamental Rights."[5] The Indian Constitution guarantees the right to life under Article 21, which reads as;

"Protection of life or personal liberty –

> No person shall be deprived of his life or personal liberty except according to procedure established by law."

It guarantees right to life and personal liberty as our fundamental right which nobody can be deprived of except according to procedure established by law. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings.[6] It also includes protection against torture or cruel, inhuman or degrading treatment in any form. It was held by Bhagwati, J., that any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or temporarily would be within the inhibition of Article 21 of the Indian Constitution.[7] Everyone has a

right to live with human dignity. Neither the Central Government nor the state government has the right to take any action which will deprive a person of the enjoyment of these basic essentials.[8]

The responsibility of protection of the right to life lies in the hands of the government of the country and its various organs. In a democracy, policeman is a custodian of law.[9] Police is the branch of the government which is charged with the preservation of public order and tranquility, the promotion of the public health, safety and morals and the prevention and detection of crimes.[10] The police while being a visible symbol of the authority of the government are expected to safeguard the interest of citizen with regard to their basic right.[11] But the protectors of these rights have become their major violators. There are numerous incidents of torture and deaths in police custody. Torture by police comes into the picture during interrogation. Police is under a legal duty and has a legitimate right to arrest a criminal and to interrogate him of an offence. But the law does not permit a policeman to use third degree methods or torture of the accused in custody during interrogation with a view to solve the crime. When a policeman indulges in third degree methods he only degrades himself to the level of the criminal or perhaps he compares even less favourably with the criminal in his custody.[12] Torture by police becomes an issue of concern when those who are entrusted with the task of protecting the life and liberty of the people violate it. It further degrades the image of the police.

"Torture" has not been defined in the Constitution or in other penal laws. "Torture" of a human being by another human being is essentially an instrument to impose the will of the "strong" over the weak by suffering.[13] Torture includes any harassment that causes suffering, physical or mental. Rudeness by word of mouth, repeatedly calling a man to the police station, and then making him wait for long hours is also a brutality of a kind.[14] Physical assault, denial of food, drink, sleep and toilet facilities, continuous interrogation over long period, use of third degree methods, stripping of men and womenfolk, rape of women and death in police custody are the ways of torture by police.[15] Torture and deaths in police custody is a daily routine in one part of India or the other, though the type of torture inflicted and the number of deaths in police lockups varies from state to state. The victims are ordinarily men and women mainly belonging to the socio-economically disadvantaged strata of the society, their defencelessness as a factor grows against them.

In this background there are certain key questions which require consideration and in this paper an attempt has been made to answer them. They are - (1) What is the protection provided against torture by police at the international and the national level? (2) What is the judicial response to torture and deaths in police custody? (3) What remedial measures can be adopted to eradicate torture and deaths in police custody?

There are various provisions provided for protection against torture by the police, both at the international and national levels. Internationally, members of the United Nations have committed themselves to promote and respect for and observance of individual rights and freedoms. The philosophy of the United Nations Charter affirming the dignity of man based on the pillars of social justice finds reflection in the Universal Declaration of Human Rights.[16]

The Covenant on Civil and Political Rights, 1966; the Covenant on Economic, Social and Cultural Rights, 1966 and the Optional Protocol on Civil and Political Rights, 1966 were adopted to give life and content to the Universal Declaration of Human Rights. These documents are a source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms. They are binding commitments and legal obligation made in the international arena by a state towards its own citizens and others. The provisions of these four documents have influenced various national constitutions.[17] India is one such example. Part III of the Indian Constitution which deals with fundamental rights reflect the civil and political rights as mentioned in the Universal Declaration of Human Rights.

There are two instruments *i.e.* Code of Conduct for Law Enforcement Officials adopted by the United Nations General Assembly on 17th December, 1979 and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly on 10th December, 1984. The first instrument is a code of conduct for those who exercise police powers stating that they shall respect and protect human dignity, prohibits torture, protect the health of persons in their custody.[18] The second instrument requires each state party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.[19]

All these instruments have served as beacon lights showing the path of justice and humanity to all the Nations.

The Constitution of India and the penal laws provide various provisions for the protection against torture by the police in India.

Article 21 of the Constitution of India advances the object of Article 3 of the Universal Declaration of Human Rights which provides for right to life, liberty and security and also Article 6 of the International Covenant on Civil and Political Rights 1966, which says that every human being has the inherent right to life. The Supreme Court of India has declared any form of torture or cruel, inhuman or degrading treatment, death in custody during investigation or otherwise to be a violation of right to life and within the inhibition of Article 21.[20]

Sections 330 and 331 of the Indian Penal Code deal with causing hurt and grievous hurt respectively for the purpose of extorting confession or to compel restoration of property. The principle object of these sections is to prevent torture by police. The offence is complete as soon as hurt or grievous hurt is caused to extort confession or any information. The police officer by inflicting hurt or grievous hurt becomes party to a crime or offence punishable under the Indian Penal Code.

The statutory right of the police to carry on investigation is available under Chapter XII of the Criminal Procedure Code *i.e.* sections 154 to 176. Section 164 of the Cr. P.C. provides that any Metropolitan Magistrate or Judicial Magistrate may record any confession or statement made to him in the course of investigation. No confession shall be recorded by a police officer on whom any power of a magistrate has been conferred under any law. Section 57 of the Cr. P.C. provides that no police officer shall detain in custody a person for more than twenty four hours and the detainee has to be produced before the nearest magistrate. It is the duty of the magistrate under section 54 of the Cr. P.C. to inform the arrested person about his right to get himself medically examined if he has complaints of physical torture or maltreatment in police custody. Section 176 of the Cr. P.C. makes it obligatory on the nearest magistrate to hold an inquest into the cause of death of a person in the custody of police.

Sections 25 and 26 of the Indian Evidence Act provide for confessions to police officer by the accused while in custody of the police. Section 27 of this Act provides as to how much a confession or information received from an accused may be proved. The significance of these three sections is to protect the person charged with crimes from being exposed to illtreatment by the police. It is a substantial rule of law that confession made to a police officer in the absence of a magistrate is inadmissible in the court of law.

The Supreme Court of India, through progressive and humanistic interpretation has enlarged the scope of Article 21 so as to include within its purview the rights of the suspects and the accused with a view to protecting the interest of innocent and preventing abuse and misuse of police powers. By doing this, the Supreme Court has elevated immunity against torture and deaths in police custody to the status of fundamental right under Article 21 though it does not specifically enumerate it as a fundamental right in the Constitution. The cases on torture and deaths in police custody can be classified according to the measures and guidelines delivered by the apex court. The classification is as follows - (1) state responsibility which includes guidelines to the State Government guidelines to the District Magistrate, free legal service, compensation by the State; (2) individual responsibility; (3) tortious act.

The Apex Court directed the state authorities to re-educate & inculcate in the constabulary the respect for human being,[21] to ensure that the legal requirement to produce an arrested person before a Judicial Magistrate within 24 hours of the arrest is scrupulously observed.[22] In *Sheela Barse* v. *State of Maharashtra*[23], the Supreme Court directed the government to produce pamphlets in local languages setting out the rights of the arrested persons and these pamphlets to be placed in each police station & read out to all the detainees. Also that the women detainees must be kept separate from the male detainees and a women officer present during interrogation of women detainees. Verma, J., in *Nilabati Bahera* v. *State of Orissa*[24] held that it is an obligation of the state to ensure that there is no infringement of the indefeasible right to a citizen to life except in accordance with the law while the citizen is in its custody.

It is the duty of the Magistrate or the Sessions Judge before whom an accused appears to inform the accused of his right to free legal services.[25]

Judicial activism has led to the granting of exemplary compensation under Article 32 of the Indian Constitution to the victims of police atrocities. Grant of compensation not only provides some succour and recompense to the unfortunate victims of police torture but also serves as a preventive measure to some extent. The Supreme Court in *Rudal Shah* v. *State of Bihar*[26] for the first time openly declared that compensation ought to be paid for the violation of right to life under Article 21 of the Indian Constitution. The court ruled out that the state must repair the damages done by its officers by paying compensation to the victims. But there is no basis for the quantification of the amount of exemplary costs. And this is the reason that the amount of monetary compensation varies in various cases. Quantum of compensation depends on peculiar facts of each case or is left to the individual judge who decided the case.[27] The court has further pointed out in a few cases that it would be open to the state to recover the amount of compensation from the police officer who inflicted torture on the accused. So the individual police officer is made responsible for his illegal acts and also liable to pay fine and face rigorous imprisonment. The Supreme Court in *Gauri Shankar Sharma* v. *State of U.P.*,[28] the Calcutta High Court in *State* v. *Sunil Biswas*[29], the Karnataka High Court in *V. Shekhar* v. *State of Karnataka*[30] have made the concerned police officials liable to pay fine and have also awarded rigorous imprisonment. Few cases have been directed by the Supreme Court for the CBI to investigate.[31]

Ray, J., in *Saheli* v. *Commr. of Police*, Delhi has held that the state is liable for the tortious act of its employees under the law of torts and that an action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. The same was reiterated in *Golaka Chandra*

Jain v. *D.G. Police*.[32] This point was also discussed in *Nilabati Bahera* v. *State of Orissa* and it was stated that such a claim is based on strict liability made by resorting to a fundamental right in addition to the remedy in private law for damages for the torture resulting for the contravention of the fundamental right.

The Indian judiciary has no doubt been very sensitive to the torture and deaths in police custody. The judiciary has not only provided justice to the kins of victims of police excesses but has also been policing the police. To make this a living reality for all, some practical correctional steps and measures are required to be taken by the police as well as the society at large — the people, the politicians, the bureaucrats, and the media.

It is necessary to remove the deficiencies found in the legal provisions of India. An amendment of section 54 of the Cr. P.C. making medical examination compulsory and mandatory before and after the police remand is necessary which would benefit the accused. The Law Commission of India has recommended in its 113th Report the insertion of a new section 114-B in the Indian Evidence Act to provide for a rebuttable presumption by the court against the police officer having custody of a person of causing the injury when it is proved that it was raised while the person was in custody.[34]

Intensive education and training of the police personnel at all levels is the keystone of bringing up a humanised police. The object of training should be to make the policemen skilled, competent and to have a sense of justice righteousness, professional ethics. Since torture and death in custody take place during the interrogation of suspects, the interrogating officers should possess these qualities which would reduce use of force.

It is important to encourage the use of modern techniques of investigation. Scientific aids cover a wide variety of services ranging from the sophisticated forensic laboratories to a small simple equipment at the police station level for lifting finger prints. There should be a supply of lie detectors, recording of evidence by audio visual computers, trained technicians, foot print and finger print experts, photographers at the police station level. This would help the police in collecting evidences.

The mass media can help in strengthening the police-public relations and can also police the police. This can be done by way of advertising and awakening through radio, television, newspapers, slogans, posters, leflets, tapes, calenders, etc. Delhi Police is the first police organisation in the whole country to have employed this modern tool very sincerely with the objective of informing and educating the people, and seeking their co-operation. This has been quite successful. This kind of technique should be adopted by the police

in other states also.

The non-governmental organisations (NGOs) should also be encouraged. Police organisations and the people at large should give them all kinds of assistance to curb the violation of fundamental rights. These NGOs should take up such cases, give the victims assistance and also take up their cause to the court. There should also be an organisation of the police officers who are retired to act as a watchdog and provide counselling and guidance to police rank and file.

Monitoring of torture and deaths in police custody is very essential. The government officials are not conscious of the fact that it is a grave crime and needs attention. There are no datas, records, or statistics available on torture and deaths in police custody. If there is torture, it is a crime under hurt and grievous hurt of IPC. It is very strange that all cases of torture and deaths in custody are a crime under IPC yet it is not mentioned anywhere in any of the national institute dealing with crimes *e.g.* National Buraeu of Crimes and Records. The same IPC offences, when committed by policemen against suspects and victims become much more grave and serious. It should be listed separately like any other offence only then its importance and necessity to curb will be realised.

What is essential for protecting right to life is a police system and a police force with efficient and scientific techniques which would help in reducing the use of force, torture and third degree methods. The police being the central agency of the criminal justice system cannot function in violating the human rights. It has to function with all other institutions which make it functional i.e. the prosecution, advocates, judges and functionaries in the correctional services. All have to come forward and take initiative to eradicate torture in police custody.

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UNDERSTANDING THE RAPIST, RAPE VICTIMS AND THE LAW OF RAPE

*Harish Chander**

I. INTRODUCTION

In the year 1990, the incidents of rapes against women were 9,518 and the figure of rape victims increased substantially to 12,315,[1] in India. The trend is alarming as to how and in what direction our society is drifting as regards the inhuman attitudes of men towards women. The increase of the incidents of rape against women are reported to be similar in all age groups of victims of rape.[2] Much more alarming is the fact that the incidents or Paedophilia *i.e.*, incidents of child rape are increasing at phenomenal rate. It is reported that the incidents of child rape averaged around two cases per day. In the year 1993, 634 child rapes were reported and it rose to 734 in the year 1994 showing the increase of 15.8% in a year. Caution may be added that the above figures are only the reported cases of rapes in all age groups.[3] It is believed that only a few cases are reported about rape victims particularly in the cases of child abuse and child rape incidents.

Rape by a man of a woman or a child is the most inhuman act of aggression and violence against women and the law of nature which expects men to protect and respect the integrity, dignity and womenhood of women by men. Morally and legally, it is an intrusion to the privacy of a woman and is a violation of her right to be respected, protected, loved and of her freedom of life. Being a human being who is supposed to have intellect and reason it is expected of men not to disrespect women. The very act of rape by man of woman is outrageous, inhuman against the conscience of men and women's role in society and disturbs the soul and conscience of women particularly.

II. WHO ARE RAPISTS?

All men do not have criminal tendencies to rape a women. It is true as a natural phenomenon that men are always attracted towards women and all men do not commit rape or intend to rape. The law of nature is that it is the male species which always like to cares and please the female species. The point which this writer wants to convey is that rapists are certainly of different mental make up than the normal male species or men. And rapists are absolutely abnormal men though one may find rapists from all walks of life and are to be

found among all age groups, economic strata, races, religions, nations and societies. In India when the institution of joint families was prevalent and the society was a village society the incidents of rape were rare. However, with industrialization, and growth of cities particularly the metropolitan cities the menace of rape against women has escalated tremendously. It appears from the statistics given above in this paper that the incidents of rape against women is assuming alarming proportions alongwith the growth of free market economy in India and the incidents of rape victims may be shocking in future.

The rapists are basically pathalogical people who grow in the broken homes or disturbed families, excessive drinkers, drug addicts, moneyed class men who make riches through illegal means and the like. Rapists do not commit only the crime of rape against women but they commit multiple crimes. If the rapists is sadists person then it is not only rape but he is also likely to commit murder, grievous hurt, dacoity, robbery, smuggling, illicit distillation of liqour, etc. If the rapist is a child rapist he is also likely to commit crimes of cheating, embezzlement, forgery, theft etc. In other words, the rapist is a sign and signal of alarm in society, because the rapists are likely to commit crimes as listed above. And therefore, the society has to be very concerned and careful about rapists.

At the same time we should not be oblivious that in some cases even woman may exploit a man by raising the false pretence of rape of herself or her child. The illustrative case of *Satish Mehra* v. *Delhi Administration and another*[4] (Criminal Appeal No. 1365 of 1995 dated 31-7-96) is a very serious pointer to prove the point. It is submitted that many feminist writers both men and women have negligently commented about the case without reading in depth and finding *ratio decidendi* of the case and have carelessly criticised the Supreme Court judgement.

In *Satish Mehra* v. *Delhi Administration*[5], the Supreme Court was supposed to decide whether the Sessions Judge should frame charge of sections 354 and 376 read with section 511 of IPC, against the appellant. In this case, Satish Mehra and his wife Anita were married and living in New York. But the married life was admitted by the wife "extremely painful and unhappy from the very inception". They had a daughter Nitika and the wife Anita was suffering from some kind of psychiatric condition. The wife had siphoned of huge amounts in the bank accounts in India by forging the signatures of her husband with the help of her father. The appellant husband was prepared to forego the bank accounts and also obtain divorce but was not prepared to part with the custody of children including Nitika on the ground that it would not be in the interest of the children that they should live with Anita. The wife because of strained relationship with the appellant husband and in vengeance

filed a complaint against the husband at the police station in USA alleging that her husband has sexually abused the daughter Nikita then aged four year. The police in the United States after conducting detailed investigation concluded that the allegations of incestuous abuse are untrue. The family court in New York had ordered that custody of the children be given to the appellant husband. Meanwhile, the wife has returned to India with her children. The New York court had also issued the warrant against Anita, the wife, for the custody of children to be given to the husband.

The case against the husband in India was again based on the complaint of the wife Anita who complained to the police under sections 498-A and 354 IPC and the police officer investigating the crime moved the Sessions Court for framing the charges after adding yet another offence of rape under section 376 of IPC. The Sessions Judge dropped the charge of section 498-A IPC but did frame the charge under sections 354 and 376 read with section 511 IPC. On the above facts, finding the wife has already harassed the husband falsely by filing the complaint against her husband in the USA, the Hon'ble learned Justice K.T. Thomas speaking for himself and Justice M.M. Punchi decided that if at the stage of framing the charges the Judge does not finds sufficient ground to proceed against the accused then he shall discharge the accused under section 227 of the Criminal Procedure Code, 1973 which reads as follows :

> *Discharge*—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

Under the above circumstances, the Supreme Court very wisely decided that under the special situation of the case no useful purpose would be served if the trial is allowed to be continued when in fact it would in all probability, because of the vengeful nature of the wife, the Sessions judge would not be able to convict the accused husband. In such cases, the question is, should the husband be just harassed by keeping the protracted trial on false accusation against him? This writer is of the view that in the quest for figures of women, which he advocates for women false charges by women in general and wives in particular should not be encouraged by the women activists. Such activism would lead to disharmony in the society in which men, women and children are equally concerned.

III. About the Rape Victims

The effect and consequences of rapes are so deplorable that it shatters the confidence and soul not only of the women victims but also of the society as

a whole. In this respect, the Supreme Court in *Bodhisattwas Gautam* v. *Lubra Chakraborty*[6] very cogently observed that rape is not only a crime against women, it is a crime against the entire society. Moreover, the court opined that it is a crime against basic human rights and is also violative of the victim's most cherished fundamental right, namely the right of life contained in Article 21.

In rape cases particularly in India, if looked at from proper perspective *i.e.*, from the women victims point of view and psychological, biological, moral and societal structure, one would observe that a woman victim of rape may not be able to stand the social stigma and have enough courage even to report the matter to the police. Moreover, it is also true that in the male dominated society of India, inspite of the heinous crime against women, women victims are looked with a sense of hatred and stigma against the women instead of hatred against the rapists.

In *State* v. *Ramkaran and others* (a case decided by the District and Sessions Judge at Jaipur in the year 1995) where a lady Bhawani Devi who was employed in a Rajasthan's Women's Development Programme called 'Sathin' at grass root level was gang raped by five persons when she tried to stop a child marriage as part of her active duty. First of all the local police refused to register a case against the rapists. The hospital asked that she should get an order from the Magistrate and even the Deputy Superintendent of Police still refused to register her complaint. It is only after she made frantic efforts that a complaint could be registered. And even the Sessions Judge at Jaipur acquitted all five accused giving the reasons that rape is usually committed by teenagers and since the accused are middle-aged and therefore respectable, they could not have committed the crime. An upper caste man could not have defiled himself by raping a lower caste woman. If such decisions keep on comming from the courts then it really strengthens the suspicion of women that the Indian society has a deep rooted gender bias and even the prejudices and biases relating to castes are still deep rooted in India.

IV. Critique on the Law of Rape in India

The object of this paper is not to explain the whole law of rape but to merely point out the scheme, utility and weakness under the present Indian law. Rape is defined under section 375 and punishable with life imprisonment or with imprisonment of either description for a term which extend to ten years under section 376 of the IPC.

The debate that the definition of rape should be changed in order to include other forms of intrusions on the body of a woman or insertion of other objects like fingers, or bottle or stick or any other insertable object in the vagina of a woman instead of penal penetration in the course of carnal intercourse. This

writer is of the view that there is section 354 IPC which is meant to punish an assault or criminal force to woman with intent to outrage her modesty which is punishable with imprisonment for a term which may extend to two years. Therefore, if an assault is made or criminal force is used with the intent to outrage the modesty of a woman, culprit can be punished under the said provision of the IPC. It is true that there is no other provision apart from section 354 IPC which may punish the offender more severely for inserting fingers, bottle, stick or any other object under the law. It is suggested that the definition of rape should not be changed because it is an offence against a woman only when penal penetration is done by a rapist and traditionally that is the correct language used for the purpose of rape. However, a new provision under the law is needed which should punish the offender for inserting finger, bottle or any other object in the vagina with the object of satisfying lust. In *Smt. Sudesh Jakhu* v. *K.C.J. and others*[7], Jaspal Singh, J., of the Delhi High Court, has rightly held that intrusions of other objects in the vagina cannot be brought to convict a rapist under section 376 of the IPC. The learned Judge in the above said case very cogently remarked :

> The concept of crime undoubtedly keeps on changing with the change in political, economic and social set-up of the country. The Constitution therefore, confers powers both on the Central and State legislatures to make laws in this regard. Such right includes power to define a crime and provide for its punishment. Let the legislature intervene and go into the soul of the matter. Rape is a serious matter though, unfortunately, it is not attracting serious discussions. Not even in Law Schools. The seriousness of the offence with respect to oral intercourse or vaginal penetration otherwise than with penis is realised though involves an act or sadism which is likely to cause the victim for greater pain and physical damage than rape itself.

Therefore, it is suggested that a stringent provision under the IPC is needed for punishing the offenders for penetrating other objects in the vagina and for the oral intercourse. Further, custodial rapes by a public servant, intercourse by Superintendent of Jail and remand homes *etc*; intercourse by any member of the management or staff of hospital are punishable under sections 376 to 376 D IPC. And section 376-A IPC punishes a separated husband for rape with his wife during the period of separation for a term of two years.

The writer is of the view that definition of rape is perfect and should not be altered. The only thing which is desirable that the punishment may be made stringent in the case of separated wife's rape and for the custodial rapes as these kinds of rapes involve breach of trust of the person in custody.

V. Some other Suggestions

(*a*) So far under the law there is no clear provision for providing compensation to the rape victims except that a fine can also be imposed on the rapists. In this regard, it is suggested there should be a provision for compensating the victims of the rape by imposing heavy fines at least on the rich rapists. The compensation should be classified according to the category of rape victims and this writer suggests that following categories of rape victims :

(*i*) Child below seven years.

(*ii*) Above 7 years to 14 years.

(*iii*) Above 14 years to 21 years.

(*iv*) Above 21 years to 35 years in case of married women.

(*v*) Above 21 years to 35 years in the case of unmarried women.

(*vi*) Above 35 years.

(*b*) The above classification can also be useful for sentencing a rapist because the consequences and impact on the psychology of the above categories of rape victims is distinct from one another.

(*c*) For the recidivist rapist, it is suggested that a separate provision under the IPC should be introduced which should provide for the punishment of castration as the only punishment under the law.

If the above suggestions are seriously considered by the Law Commission of India while suggesting the reforms in the law of rape and ultimately adopted by the Parliament then these would go a long way in respecting, protecting and healing the wounds of the rape victims.

Above all, it is suggested that the court dealing with rape offences should be sensitive towards the conditions of the rape victims and award punishments to rapists with great seriousness towards the women conditions in the Indian society.

Notes & References

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1. Kali's Yug, Vol 1, 1996 at 22.
2. *Id.* at 23.
3. *Id.* at 24.
4. Criminal Appeal No. 1385 of 1995 dated 31-7-96 (SC).
5. *Ibid.*
6. 1996 1SCC 490.
7. Cri R. 101/96 decided on May 23, 1996.

succession. An impression is created therefore, that whatever may be the type of property, be it a house, cash, clothes, vehicle, shop or even household goods, a daughter has an equal claim over it not merely of ownership but also of a right to possess, enjoy and alienate it in the same manner as a son. The reality however is somewhat different while going through section 23 of the HSA.

Section 23 of the HSA reads :

"*Special provisions respecting dwelling house*

> Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his property includes a dwelling house wholly occupied by members of his or her family, then notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir should be entitled to a right of residence therein; provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

Accordingly, the right of ownership of a female class-I heir is narrowed down to a right of residence only. What they are denied is a right to have their shares partitioned and specify it, and alienate it till the male heirs choose to divide the rest of it among themselves. Where the female heir happens to be a daughter, her ownership is without a right of residence and demarcation of her share unless she is unmarried, widow, or is deserted by or is separated from her husband. The purpose envisaged by the legislature for enacting this provision is to prevent married daughters from coming back on their own to the dwelling house and to defer its actual partition until the male members occupying it choose to destruct their joint status. The reason for the inclusion of this section in the HSA was explained by the Madras High Court in *Mookkammal* v. *Chitravadivammal*[3] in the following words :

> Section 23 of the Hindu Succession Act, appearing in the chain of sections of the codified Hindu law is intended to respect one of the ancient Hindu tenets which treasured the dwelling house of the family as an impartible asset as between a female member and a male member. In order to perpetuate that memorable intentions of Hindu families, Parliament took that auspicious aspect into consideration while codifying the Hindu Law.

That it is based on an ancient tenet; and its impartibility is to be preserved only between a male and a female and not between males only is therefore

> injustice to the single male heir and the very object with which the section has been enacted would be completely nullified. In such cases the hardship that would be caused to the female heir in not being able to claim partition is certainly relatively less than the injustice that could be done to the single male member.

What is noteworthy here is that the judiciary was concerned, that if the brother (who is the owner of half of the property only) is not allowed to use and occupy the share of his sister (who is the owner of the other half), it will cause gross injustice to him. But where the sister is not allowed at all to use, or even occupy her own share, the hardship to her is less than the hardship of the brother. Since when, is our judiciary advocating, that a person on his own should be allowed to use and occupy somebody else's property without her consent, and they have not stopped at the share of the sister. They have extended the application of section 23 to all class-I female heirs, including the mother and the widow of an intestate. Even a mother is incapable to have her own share ascertained and rent it out if she is financially not independent, without the consent of her son. The same goes for the interstate's own widow. Does the judiciary really understand the implication of this interpretation and the judgement? They are not only interpreting section 23, but are justifying the right of a brother, son or a grandson to enjoy the share and property of somebody else (sister, mother, or the grandmother) against her wishes. It is unconstitutional and violates her rights to own and enjoy her property.

Such reasoning appear to be incorrect on the face of it. The sister is not even looking at the share of the brother. She wants what rightfully belongs to her as she is also the progeny of the same parents who were the owner of the house. Yet our legislature and judiciary tell her to wait till her brother on his own decides to give her her share. The brother on the other hand has his share well protected, and is using the share of the sister also and if he is not allowed to do so, the judiciary says it is injustice to him. What is the job of the judiciary? To dispense justice or injustice, one fails to understand. Recently, in *Narashimaha Murthy* v. *Susheelabai*[7], the Supreme Court had the opportunity to interpret section 23, and hopes were raised of women that the court would give an interpretation, which would do justice, and would not jealously guard the interests of men at the cost of doing injustice to women. Unfortunately the court not only adopted an orthodox approach, but went on to hold that the expression, "*Male heirs*" used in section 23 includes a single male heir, and even where the intestate has left behind a single male heir; and though the fact of partition would never arise; the sister has no option but to wait till the brother on his own decides to give her, her share. The Hon'ble judge failed to note, that the matter had come to the court only because the brother had refused to part with her share, and has been contesting on the grounds of incapability of the sister to

effect a partition. If a man refuses to give to his sister what rightfully belongs to her, and when she approaches the court for justice, contests her claim, and seeks assistance from the court to take her share, taking shelter behind section 23, should it be proper for the court to say, that she has to wait till the brother on his own decides to give her share. If he doesn't do it now, why will he do so in future? Can the court extract a promise from the brother that in future, he should give the share to the sister? To quote the court :

> The purpose of law is to prevent brooding sense of injustice. It is not the words of the law, but the spirit and internal sense of it that makes the law meaningful. The letter of the law is the body but the sense and reason of the law is the soul. Therefore, pragmatic appraoch would further the ends of justice and relieve the male or female heir from hardship and prevent unfair advantage to each other.[8]

High sounding words do not really dispense justice when the end result is overshadowed by parochial and orthodox attitudes. Unfortunately, the court could not interpret the spirit and internal sense of law to do justice, despite claiming that a pragmatic approach would further the ends of justice. The court ended up adopting an orthodox approach taking shelter behind ancient tenets and protecting their sanctity.

The court further held that the daughter would also like to preserve the sanctity of the dwelling house, so it should not be partitioned at her insistence:

> The reverence to preserve the ancestral house in the memory of the father or the mother is not the exclusive preserve of the son alone. Daughters too would be anxious and more reverential to preserve the dwelling house to perpetuate the parental memory.

By filing a suit for partition of this dwelling house, she had made it amply clear to the court that she does not want in the present circumstances to preserve its sanctity, yet the court presumes, something exactly contrary to what is intended. Further, does not the sanctity of the house get lost if two brothers partition it. How the sanctity of the house would be effected if the sister, or the mother, or the widow of the intestate seek a partition? K. Ramaswamy J. gave various examples to show how the application of section 23 as interpreted in the current case would prevent the brother from being thrown on roads. He held:

> Take a case of a Hindu male or female owning a flat in metropolis or major cities, like Bombay etc. with two room tenement, left behind by a Hindu intestate. It may not be feasible to be partitioned for convenient use and occupation by both the son and the daughter and to be sold out. In that event the son and his family will be thrown

> on streets and the daughter would coolly walk away with her share to her matrimonial home causing great injustice to the son and rendering him homeless/shelterless. With passage of time, the female members having lost their moorings in the parental family after marriage may choose to seek partition though not voluntarily but by inescapable compulsions and constrained to seek partition and allotment of her share in the dwelling house of intestate father or mother. But the son with his share of money may be incapable to purchase a dwelling house for his family and the decree of partition would make them shelterless.
>
> Take yet another instance, where two room tenement flat was left by the deceased father or mother apart from other properties. There is no love lost between brother and sister. The latter demands her pound of flesh at an unacceptable price and the male heir would be unable to buy of her share forcing the brother to sell the dwelling flat or its leasehold rights interest to see that the brother and his family are thrown into the streets to satisfy her ego. If the right to partition is acceded to, the son will be left high and dry causing greatest humiliation and injustice.

Regrettably, the above observation appears to suffer from a bias against the sister from the language used in the examples, *i.e.*, *the daughter would coolly walk away with her share to the matrimonial home, to see that the brother and family are thrown on the streets to satisfy her ego.* These are prejudiced assumptions, which shows a woman (sister) as unconcerning and deliberately vindictive.

Further, in all these examples the judiciary failed to visualise one situation. What would be the outcome of the two instances, if instead of there being one brother and one sister, there were only two brothers? Would it not be inconvenient for them to partition it? Would not one demand his pound of flesh, at an unaceeptable price, forcing either of them to sell the dwelling and rendering both of them homeless? Wouldn't the ego of one of them be satisfied in this manner? What solution would the court provide? Rule of primogeniture?

In the second example, the court makes a presumption, that there is no love lost between brother and sister and therefore the sister would demand her pound of flesh. When the relations are strained, who is responsible for it? The court has painted a pathetic picture of the brother, which is one sided and unrealistic. The reasoning and examples appear to be weighted from the side of the brother rather than based on rationale judgement. According to the reasoning, as the sister demands an unacceptable price, the brother would be

unable to buy her share, which indicates that if she had demanded the market price, it would have been possible for him to buy her share. What is the problem visualised in this situation then by the court? He is the owner of half of the flat and has the money to buy another half at the market price; combine the money; and buy another flat. Or even if that does not happen, being the owner of half of the flat, be content to live in that half. He should be satisfied with what rightfully belongs to him. Neither the court nor anyone else for that matter should help people to grab the share of somebody without her consent. Is there even a remote chance of the brother being thrown on the roads in any case. The answer to that is in the negative. Even by demanding her pound of flesh or by asking for her share, is the sister trying to grab the share of the brother? The answer to that is also in the negative. Rather, it is the brother who is grabbing her share in the reality.

Both the brother and sister are from the same parents and it is the property of these parents which is the subject matter of inheritance. What could be the basis of denial to the females their right to ascertain their shares. The reasons given for the inclusion of section 23 in the Act, were that the daughter leaves the house of the parents on marriage and joins the husband's household. Secondly, the son has the responsibility of maintaining the parents, while the daughter does not have the same, and that the relations between the brothers and sister would become strained if she is given a share in the property of her parents leading to unpleasantness and litigations. Some observations of the parliamentarians discussing the Hindu Succession Bill are worthy of examination here:

> What we honestly feel is that when you marry your daughter she goes to another family. Spiritual sacrament means a re-birth. She is re-born and she becomes part and parcel of that family organisation. She ceases to be a part of your family organisation both in law and according to religious precepts.[9]

> One has to see that once a woman becomes a wife and then a mother her allegiance is to that new family and we cannot expect that she will look back to the family from where she had gone. This is the fundamental question to be decided. If this house is pleased to find that a married woman owes more allegiance to her husband, it is dead certain that her interests either in the property or in anything else must be there and not here.[10]

> We know that the son and the daughter; both are the citizens of India and should have equal rights, but at the same time we should also see whether their duties and obligations are also equal? In accordance with our social pattern, the duties of the daughter are towards

> her husband's family after marriage and is negligible towards her parents. So the moment she marries and goes to her husband's family her rights in the father's property should cease.[11]
>
> A daughter should not get a share in the property of the father when she is married. ... If she is married in another family she should get the property of her father-in-law there. Why should she come back when there are brothers here? That would lead to disruption....[12]
>
> If a share is given to the daughter in the family property what will be the result? The results would be first of all that the daughter after getting married in another family will not be able to manage the property. She will be like an absentee landlord. Apart from her being unable to manage the property, the son-in-law or the person to whom she is married will bring about trouble and dissensions in the family.[13]

If it is the fact that daughter leaves the house of her parents on marriage and goes somewhere else, why is the disability imposed on the mother of the intestate or the widow of the intestate, who not only are living here but have already spent a longer time period in the house, in comparison with the son, and have no likelihood of leaving it in future? Secondly, why is the restriction not operative on a son, who separates from his parents during their lifetime, and lives elsewhere with his family members? Thirdly, the Court recognises the duty of the daughters and imposes it on her, when it comes to maintaining her parents, on exactly the same lines as on the son, but adopts a differential treatment, when it comes to giving her the inheritance rights, in the property of these very parents, by making it subject to the rights of a son.

When it comes to acquiring a roof over ones head, the trend of the judiciary is very surprising. A married daughter has no right of residence let alone to partition and possession of the inherited dwelling house; in presence of her brothers, a married woman has no right of residence in the matrimonial home owned by the husband without his consent. In a Bombay case,[14] the husband threw the wife out of the house and prevented her from re-entering it. She sought the help of the court to obtain an *ad interim* order restraining her husband and in laws from turning her out or trying to prevent her re-entry. The husband's appeal against the order of the trial court was granted in his favour. Rejecting the wife's claim that she should be entitled to live in the house, the court observed :

> If this argument is accepted in all its implications, it would be impossible to prevent public disorder on a very wide scale. Today it is a case of wife entering her alleged matrimonial home. Next it

> will be others, including persons with all sorts of claims, existing, bonafide, dubious and dishonest. A state subject to the rule of law cannot permit this to happen - nay not in the name of feminism nor for the protection of the deserving.

The decision is extremely relevant in the Indian context as women have been made completely dependent on the men for a roof over their heads, even in situations where they own the property. The first problem that an Indian woman is confronted with, whenever she decides or is forced to leave the household of the husband in the event of a matrimonial problem is, where to go? Many women are compelled to choose a violent home as their abode, as the other alternative for them is the roads.

It is ironical that the judiciary, while justifying the denial to the married daughters, a right of residence in her property, occupied by the brothers has come up with a totally absurd and unacceptable argument. The Karnataka High Court held:[15]

> The object of this proviso would be defeated and it will encourage the married daughters to desert their husbands or live separately from their husbands, if it is held that the daughter living on her own accord separately from her husband is entitled to a residence.

One wonders, what possible connection the court had in mind between the two; a woman's right to possess her property and her marital relationship with the husband. It means that if a woman for whatever may be the reason decides to live separately from her husband, she is to be denied a right of residence in her own property. The judgement suggests that no alternative roof should be made available to a married woman, not even in her own property or she might be encouraged to desert her husband. With one judgement, the court here has protected the right of the husband to have the company of his wife against her wishes and by the same judgement, given to another man, *i.e.*, her brother a right to use and occupy her share in the property, against her wishes. Would the court apply the same analogy to a man? Can some similar suggestion be expected from the court to discourage a man from deserting his wife? On the same analogy, if a son deserts his wife, should he also be denied the inheritance rights in the property of the parents? Would it be acceptable to anyone? The trend shows that the judiciary is overactive to protect a man's interests, when it comes to control over property. Every conceivable effort is made to deny a woman a roof over her head in her own right. It is an extremely unfortunate situation. Another apprehension of the legislature was that the conferment of the right of residence in favour of the daughters would result in the introduction of strangers in the house. A few observations of the parliamentarians at the time of the discussion of the Hindu Succession Bill are note worthy here:

> The brother-in-law and the persons who belong to the family wherein our daughters are given will pounce upon the property of the father-in-law. There are litigations because the daughter is given the property. Females are not educated and they have not had the experience of litigation.... It is but natural that the husbands of such females would like to have the loaf of the property of the family from which the female has come to the other family. This would cause a great nuisance and great unhappiness and trouble to the society.[16]
>
> If the daughter and the daughter's daughter etc. are given share in the immovable property (house) it will result in new elements coming into the family, the family system would be disrupted, there will be disorder in the family, and it will breed ill will, hatred etc.[17]
>
> It will have a very disturbing effect on the agrarian set up in this country. If you give the share to the married daughter, are you not making the son-in-law a co-sharer in the family property? It will have a very disastrous effect.[18]
>
> The brothers, two or three may stay together for some time, but the difficulty will arise when there are two daughters and two sons and only one house.... How can the property of a man be divided among two sons and two daughters if he dies leaving one house.... How can the house be divided.[19]
>
> Don't proceed on equality, otherwise you would be in trouble. It is not a question of equality, it is a question of giving the rights according to the social pattern. If you proceed on equality, everything would be spoiled.... If you give the same rights to the daughters as to a son there will be uneasiness and tensions in the country and every family will be ruined with litigation.[20]

The present social set up having vastly changed, the apprehensions of the parliamentarians also need to be examined in a different light. Noteworthy is the fact, that presently, more sons are separating from their parents, alongwith their families for a variety of reasons ranging from considerations of employment, settling abroad, or even a desire to lead an independent life. A married daughter's status is exactly equal to that of a separated son, separated not voluntarily but due to the social custom. Yet, while the legislature chose to restrict the right of the daughter it has not put any impediments on the rights of even a separated son from partitioning the parental house. From the coparcenory property, a son is handed the share immediately, on his separation; and his rights in the separate property are also well protected. Further, if the

basic reason for the denial of this right to married daughters was only that the property will go out of the family, why is this prohibition not extended to a married daughter's son. Under the Act, a deceased daughter's (marital status irrelevant) son and daughter are the class-I heirs. The prohibition to ascertain her share and a denial of right of residence in this property is appended to a daughter, and also to a daughter' daughter, but a daughter's son does not suffer from any of such disability. For example, a man having a son and a married daughter dies and leaves behind a dwelling house, the daughter being married has no claim of residence and partition of the house even though she is the owner of half of it, but if she predeceases the intestate and is survived by a son and a daughter both these children would be the class-I heirs with the intestate's own son. Her son belonging to a different family and definitely having the capability to take the property out of the family, is capable of not merely effecting a partition of the dwelling house but also of residing in it or alienating it if he so desires, yet the daughter's daughter who along with him inherits exactly the same portion of property, is incapable to partition it, because according to section 23, a *"female"* is incapable to partition her inherited dwelling house in presence of the male members. That the restriction to have their share ascertained is on females and not merely daughters is evident as the prohibition applies to all class-I female heirs, including the widow of the intestate and his mother. The house is usually constructed by the husband and wife with their joint efforts irrespective of whether she is a housewife or gainfully employed outside her home. In case of working couples a similar pattern is followed. If a land or house is bought for construction out of mutual savings usually it is in the name of the husband for various reasons, predominant being that the owner of the house deals with the land authorities or the taxation authorities, and a man would definitely be in a better position to do that. Little does a woman know that she will be denied the right to have her share demarcated or exercise any control over the very house which was constructed jointly by the wife and husband legally, the moment the husband dies and the son takes over the control of the house. One fails to see the reason, why the widow or the mother have been denied the right to have their share partitioned, as a demarcation and partition of their share; a right to rent it or sell it can always help them economically.

The policy adopted by the legislature seems to conserve the property rather than acknowledge the rights of the deprived that is the females. Smt. Subhadra Joshi, during the parliamentary debates on section 23 of the Hindu Succession Bill had said;

> For the past two hours, I have been observing with sadness that property is everything in this world. Is it more important than a human being? If the daughter or the wife gets the property, question

> is raised, what will happen to the property. Nobody asks, what will happen to the daughter, to the mother or the wife. The property has become more important that a human being today. This is the time when we must realise that the property is for the human being and the human being is not for the property.[21]

An analysis of section 23 of the HSA and its interpretation shows that it was not only Manu, who advocated dependency for a woman, the present day legislature and the judiciary also not only advocate but are actually making complete dependency a rule for a woman for a roof over head on the men. During childhood on the father, during adulthood on the husband or on the brother, and in the advanced age on the son. And in doing that, they do not even hesitate to snatch what rightfully belongs to the female and give it against her wishes to the male counterpart. The constitutional guarantees of equality of law, and equal protection of laws are again meaningless for a Hindu woman so far as section 23 is concerned.

NOTES AND REFERENCES

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2. See sections 8 to13 of THE HINDU SUCCESSION ACT, 1956.
3. AIR 1980 Mad 241.
4. AIR 1993 Ori 36.
5. *Ibid.*
6. AIR 1981 Mad 62.
7. AIR 1996 SC 1826.
8. *Id.* at 1832.
9. Sh. N.C. Chatterjee, LSD, Part-II at 8142.
10. Sh. Lok Nath Mishra, LSD Part-II at 8201
11. *Id.*, Sh. S.N. Das at 8221-22.
12. *Id.*, Sh. Altekar at 8239-41.
13. *Id.*, Sh. Mool Chand Dube at 8257.
14. *S.P. Jain* v. *N.I. Jain* AIR 1987 Bom.
15. *Kalamma* v. *Veeramma*, AIR 1992 Karn 362.
16. *Id.*, Sh. Bogawat at 8211-12.
17. *Id.*, Sh. Lakshmayya at 8209.
18. *Id.*, Sh. Sadhan Gupta at 8139.
19. *Id.*, Sh. Dabhi at 8322.
20. *Id.*, Sh. Thakur Das Bhargava at 8045.
21. *Id.*, Smt. Subhadra Joshi at 8086.

BOOK REVIEWS

AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION. By A.V. Dicey. Delhi : Universal Law Publishing Co. Pvt. Ltd., Second Indian Reprint, 1998, Pp. CXC Viii + 535, Rs. 325/-, ISBN 81-7534-102-1.

This book is, as its title imports, an introduction of the study of the law of the constitution. It does not pretend to be even a summary, much less a complete account of constitutional law. The merit of this book lies in the author's application of the analytic method to constitutional law. The author deduced certain guiding principles which according to him underlie the English constitutional machinery. His exposition of these principles was expressed in terms which seemed at the time to admit of little doubt. The clarity of his diction assisted him to make the book a classic. It deals with three guiding principles which pervade the modern Constitution of England. The principles pertain to the sovereignty of Parliament, the rule of law and conventions of the constitution.

THE SOVEREIGNTY OF PARLIAMENT

The legal rule that Parliament is supreme is unquestionable by the courts and is accepted by the administration. The question, who is legal sovereign, stands quite apart from the question, why is he sovereign and who made him sovereign. The historical facts which have vested power in any given sovereign, as well as the moral grounds on which he is entitled to obedience, lie outside the ambit of law and belongs to historical or to political philosophy or to ethics.

Keeping in view the volume of current literature which relates to the political philosophy of the doctrine of the sovereignty of Parliament, it is necessary to emphasise that the author was concerned primarily with the doctrine as a characteristic of the body which is now the Parliament of Great Britain and Northern Ireland.

The rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the English legal system rests. The sacrosanctity of the rule is an inevitable corrollary of Parliaments continuing sovereignty. The rule that Acts of Parliament have the force of law is beyond doubt.

The political supremacy of the electorate is still acknowledged as a limitation upon the exercise of legislative power, though a lawyer can claim no special qualification to say precisely how political power is exercised. The

power of the electorate is qualified by the recognition of the increased power of the cabinet, which is able to utilise the power entrusted to it by the electorate to change the law at its will. But every government is disposed to keep its ear to the ground to detect electoral rumblings. In other words, there is a change of emphasis. It is the cabinet system which is fundamental to parliamentary government. That system depends for its efficiency as an instrument of government upon being able to use the legal supremacy of Parliament (or rather the Commons) to serve its ends; it is saved from being an autocratic instrument by the knowledge that at intervals that the electorate may alter the composition of the common and so place the supremacy of Parliament in other hands. But it is the political supremacy rather than the legal doctrine which saves the democratic principle. Indeed the legal instrument of parliamentary supremacy stands in some risk of actually facilitating the creation of an extreme form of government.

It is easy today to attack author's view of parliamentary sovereignty by showing that it can be no longer examined solely by reference to the legislature of the United Kingdom. Once reduced a constitution to enacted form, the question arises, how much of the constitution can be changed by the ordinary process of legislation? If the answer is that Parliament by itself cannot enact a change, then we must seek an explanation different from the author's for the legal sovereignty in that constitution.

The Rule of Law

The supremacy of the law of the land was not a novel doctrine in the nineteenth century. Let no one suppose that the author invented the rule of law. He did of course put his own interpretation upon the meaning of that rule. The rule itself, Holdsworth has shown, may be traced back to the mediavel notion that law, whether it be attributed to a super natural or human source, ought to rule the world.[2]

In England the doctrine of the supremacy of the common law had to be reconciled with the claim of Parliamentary supremacy. The recognition of the legislative powers of Parliament precluded insistence on the part of the lawyers that in common law there existed a system of fundamental laws which Parliament could not alter but only judges could interpret. The price paid by Coke and his followers for their alliance with Parliament, which ensured the defeat of the Crown's claim to rule by prerogative, was that the common law could be changed by Parliament. But the alliance of Parliament and the common lawyers made it certain that in the long run the supremacy of the law would come to mean the supremacy of Parliament. Much of the author's analysis of the rule of law rests upon this foundation, as a comparison between

some of the principal provision of the Bill of Rights and the contents of chapters V to X of this book. He discusses what Holdsworth calls the common law of the constitution, with special reference to personal liberty, liberty of discussion and freedom of assembly.

It was the attainment of independence by the judges of the higher courts which gave emphasis to author's conception of the rule of law,[3] which rests upon the power of the courts to punish individual wrong doers. There are, of course two aspects of judicial independence; freedom from dictation by the administration and freedom from control by Parliament. It is an accepted constitutional doctrine that the minister of the Crown do not temper with the administration of justice, but Parliament indirectly has reduced the sphere of judicial independence by the character of mordern legislation. The abandonment of the principle of *laissez faire* has altered the nature of much of English law.

The common law rests upon an individualistic conception of society and lacks the means of public rights as such. The socialisation of the activities of the people has meant restrictions of individual rights by the conferment of powers of a novel character upon governmental organs. But the change of emphasis in the functions of state has not destroyed the older principles which are protected by the rule of law as the author interpreted it in the field of personal liberty.

The author's three meanings of the rule of law may be paraphrased as follows:

(i) Liberty of action by the individual in England is conditioned by the regular rules of law which the courts apply. This excludes arbitrary interference by the Government. Like private individuals, the officers and servants of public authorities are liable not only for their criminal acts, but civilly in respect of breaches of contract and tort at the suit of an injured person according to law. He was contrasting the rule of law with those systems of government which are based on the exercise of arbitrary power by the rulers.

(ii) The courts of law are alone able to determine what is a breach of the law. They apply the law equally to all men. The official position in the state of a particular defendant will not protect him. He will be judged as an individual in the civil courts and not by a special tribunal.

(iii) Foreign constitutions contain statements of guaranteed rights. Such rights proceed from the enforcement of private rights by the courts which are able to punish all illegalities. Therefore, the constitution so

far as it is concerned with the protection of private rights, comes from the common law. Such private rights are protected by the law relating to arrest, civil defamation and criminal libel, unlawful assembly, the common law prohibition on martial law, and the control by Parliament of taxation and public expenditure.

It is difficult to compare the operation of the rule to law as the author understood it in 1885 or even in 1914 with its operation today. The difficulty lies principally in the denial by the author that there was a system of administrative law in England. Moreover, he reacted unfavourably to what he originally regarded as the tyranny of administrative law, *droit administratif* in France. He was concerned not with the whole body of the law relating to administration, but with a single aspect of it, namely, administrative jurisdiction (in France, *contentieux administratif*). He was at pains to emphasize that powers of government must be exercised in accordance with ordinary common law principles, whereas in France, administrative law was contained in a separate system. There is no doubt that the author was historically correct upto a point but originally he failed to interpret the true nature of *conseil d' Etat.*

These limitations, however, did not seriously diminish the value of his interpretation of the right to personal freedom, the right to freedom of discussion and the right of public meeting. For it is in these subjects that the common law then, as now plays its important part in securing the liberty of the individual to criticise government without fear of imprisonment or other forms of suppression. It may be necessary for the state to supplement the common law on these topics by statutory provisions but so long as the law relating to arrest and the law of defamation rest on the common law. The author asserted that "no man can be made to suffer restraint on his physical freedom or to pay damages for expressions of opinion not forbidden by law"; so long too will his rights and liabilities be determined by the ordinary courts, and provided one recognises the above limitation, an individual's rights, are far less the result of the English Constitution than the basis on which the constitutional liberty (rather than the constitution itself) is founded.

There is evidence that the developments in the early part of the twentieth century had not escaped the author's notice and that he had indeed come to recognise the existence of administrative law in England. With regard to the French system equally he had come to modify the critical views which he originally had with regard to *droit administratif.* Chapter XII, the Rule of law compared with *droit administratif*, in the course of several editions underwent substantial changes. With regard to English public law, he indicated a change of heart in that he questioned the effectiveness of High Court to enforce public law. "Nor is it quite certain that the ordinary law courts are in all cases

the best body for adjudicating upon the offences or the errors of civil servants. It may require consideration whether some body of men who combined official experience with legal knowledge and who were entirely independent of the government of the day might not enforce official law with more effectiveness than any Division of the High Court."[4] It could be argued from this that the author envisaged ultimately the advent of a final administrative appellate tribunal. It would now seem that the author kept more abreast of developments across the channel than his earlier critics would have us suppose.

The changed conception of liberty narrows the field for the application of the rule of law in the sense of affording protection of the common law against the Crown, its Ministers and the other organs of administrative government, central, local or independent. The courts still restrict excesses of the prerogative so far as illegal arbitrary action against the individual subject is concerned. But it is the political control exercised through the House of Commons which grows more important as the enacted law extends the legal powers of government. The court may not declare illegal an act passed by Parliament, however, it may restrict the freedom of individuals.

Freedom of speech and freedom of association are as essential to democracy as freedom of person. For without them criticism of political institutions and social conditions is impossible. It is clear that Parliament could impose retrictions on freedom of speech, just as it has regulated the liberty of the individual to deal with his property as he chooses. But freedom of person still finds its bulwark in the common law, buttressed by the writ of habeas corpus against the administration. It is in this connection that the author's conception of the rule of law operates today. It has played, and still plays, its part in strengthening the tradition of political liberty which is the foundation of English parliamentary system. It is to the author that the politician as well as the lawyer turn whenever a threat to individual liberty is proposed.

Conventions of the Constitution

The author defined conventions as rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised. He was concerned to establish that conventions were intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State.

The author's analysis of constitutional conventions has been rightly described by his most formidable critic as a magnificent contribution to English public law.[5]

He used the term, conventions, to describe the various customs, practices, maxims and precepts of which constitutional or political ethics consists. He

then sought to explain - after a brilliant analysis of their content - the connection between the legal and the conventional elements in the constitution. If today the reasons he gave for obedience to conventions are generally rejected, we can be grateful that they afforded the author the opportunity for discussing political theory.

The author's consclusion was that conventions are supported and enforced by something beyond and in addition to public approval. His "something" was that it is nothing else than the force of law. The absence of a written constitution is responsible for the difficulty of dividing law and conventions by a clear line, but it is equally true of States with written constitution that conventions though not written in the constitution play an essential part in the working of the government. It is however, possible to enact a convention as law and yet exclude it from enforcement by an action in the courts.

The reason why conventions are obeyed may be obscure, just as their actual operation is a mystery too deep to be fathomed by the lawyer. But the fact that the cabinet government and indeed the whole administrative machine only function effectively by these means must be acknowledged. In their application to cabinet government, the author was the first constitutional lawyer to analyse their nature. His was, indeed, a magnificent contribution to English public law, if only because it led to the recognition that conventions are indispensable to an understanding of English legal institutions.

The author was absolutely right to include his analysis of constitutional conventions, perhaps the most valuable part of the book. But he had imposed upon himself the limitation to exclude politics. Conventions are political expedients, therefore, he had to connect them with law as enforced in the courts. Since he belonged to the school of thought which regarded obedience to an enforcing authority as of the essence of law, he solved his difficulty in the way he did. That this conception of obedience no longer explains the observance of the intricate mass of precepts, which furnish the key to an understanding of parliamentary government and the status of British Commonwealth, does not lessen the debt which is owed to the author for his brilliant exposition of the nature of conventions.

There is no need then to apologise for the limitations of the law of the constitution if one remembers the background in which the book was written. This does not however, explain the remarkable influence which the book had over a period of more than a century, yet no modern writer on the Constitution however critical of the authors work, fails to include some detailed comment on his principles. As book reviewers traditionally say, this book should find its

way into the library of everyone seriously interested in the subject. However, it must be read and it should provoke debate.

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REFERENCES

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1. See Holdsworth, HISTORY OF ENGLISH LAW, Vol. II (1923) at 121, 133,195, 196 and Vol. X (1938) at 647-650.
2. See Holdsworth, HISTORY OF ENGLISH LAW, Vol. X (1938) at 644-650.
3. 8th Ed.; p. XI viii.
4. Sir Ivor Jennings, *In Praise of Dicey*, 13 PUBLIC ADMINISRATION at 2.

AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW. By S.K. Verma. New Delhi : Prentice-Hall of India Private Ltd., 1998. Pp 488 Rs 225/-, ISBN 81-203-1264-3.

International law as an independent discipline has progressed by leaps and bounds over the years. It has strived to maintain peaceful relations among independent and sovereign nations. Living in an interdependent world can only be meaningful, if the sovereign nations show enough respect to rules of international law and in fact do observe rules of international law in their inter-state relations. The troubled origin and the zig-zag development of international law has not at all affected the vitality of international legal order. In fact as the world order progressed, international law has matured into a full fledged legal system in its own right. Despite the positivist outburst on legal status of international law, the reckoning as on date is that international law is the law which is binding on 'states and other subjects of international law'.

The post-war period provided new challenges to the international legal order. International law has had to adjust itself and provide new directions to problems emanating from decolonization and to meet the aspirations of peoples of the newly independent countries. These new nations challenged the universality of the Eurocentric international law, and consequently a new reorientation to international law had to be given. Partly they succeeded through United Nations and other International organizations, where all of them combined to focus on the common 'socio-economic' issues, with one voice. At the same time 'regional international law' started developing among these newly independent countries. However, this regional law has infact contributed to universality of international law and has been recognized as such. It must be recognized that today's international law is not only law governing inter-state relations but also concerns itself with governing inter-state cooperation, human rights etc. It has added new dimensions to inter-state cooperation, deviating considerably from traditional inter-state relations. To that extent, the concept of State and State sovereignty has undergone a change even though State as such can not be wished away from international legal order.

Over the years, a lot of international legislation has come into vogue primarily by the United Nations and other international organizations. These organizations are the realities of the present day international political order and have concentrated on various issues of common concern to the international community. Their work has immensely contributed to the international

law of cooperation. These general principles have enriched the jurisprudence of the international legal order. At the same time, the principles of international law have been codified as a legal system. Primarily it is the International Law Commission which is concerned with 'codification and progressive development' of international law. This has helped to clearly identify the principles of international law, and no writer can afford to overlook this phenomenon. However, there are certain areas on which if international cooperation is not achieved it will threaten the very survival of the community of nations. These subjects such as disarmament (particularly nuclear disarmament) degrading of environment; localized conflicts (which have over the years claimed more lives in aggregate); international terrorism and groping with poverty of the peoples around the world, are too important to be neglected. In fact Boutros Boutros Ghali had very eloquently elaborated upon them in his Agenda for Development. The community of nations have to stand upto these challenges. It is sad, but true that international legal order as such has not provided universal successful solutions to some of these subjects.

The growing importance of international law as independent discipline need neither be over-emphasized nor overlooked. Even though it has found favour in all law schools in developing countries yet there are certain difficulties which a person dealing with international law has to face, be it a student, lawyer or an academician. Lack of original source material, lack of formal training in international law and the swift changes which altogether changes the course of international law. At the same time lack of openings for those who specialize in international law particularly in India has perhaps vaned the enthusiasm of many a people longing to opt for international law in their course curriculum.

The literature on international law is predominantly written by western lawyers, who have given an exclusive western orientation to the international law. However, over the years third world researchers and writers including India have also written on international law. But the problem with these writings is that they do not present a coherent and lucid account of the relevant law, apart from the lack of a methodological presentation and explanation. Some writers have particularly fallen into the trap of copying verbatim from western writers, thus adding to confusion.

Given this scenario, I suppose the present book fills the void. It is unlike others, written in a simple language and very clearly elucidates the rules of international law. The author has succeeded in explaining the law in a succinct way; not quoting unnecessarily from western authors, nor leaving important sources/references. Having been written by a person of about thirty years of teaching experience and being a widely travelled person the book radiates the

matured thinking of a third world writer. The book also reflects upon some important issues, on which there is no unanimity, in her own style and porognosis.

Surely, in the event of such divergence of opinion, the state practices, the decisions of international organizations and those of national and international courts have become not only relevant but also of immense guidance. They act as sources of international law and hence have been painstakingly referred to by the learned writer. The author has equally delved on some important subjects which are not only 'controversial' but also lack 'definite and equitable' solutions. She has tried to evaluate the forthcoming opinions in a manner which befits a third world country like India. Some of these subjects include international environment, nuclear warfare and international humanitarian law. No international lawyer or an academician for that matter can turn a blind eye to these subjects.

The book is divided into seventeen chapters. Here the author has followed the conservative line of approach. However, the chapters are sequentially so arranged as to give a methodological dispensation to the major components of 'Law of Peace' and 'Law of War'. Each chapter is lucidly written and enunciates the exact position of law, its growth and present status. The learned author has eloquently reflected upon international organizations and their contribution to the development of international law. Indeed, there is a symbiotic relationship between the work of these organization and the development of a peaceful and healthy international order, as the learned author has nicely depicted.

It is not possible to review each and every chapter. But suffice it to say that the author has performed the job of writing a clear and lucid book on international law, with appropriate references to relevant sources and judicial decisions, which adds substantively to the authenticity of the rules of international law so expounded. The author has given her own arguments on various theoretical juxtapositions, which reflects her maturity and long experience. One may not accept her arguments but they do emphasize the recurrent thinking from a pragmatist, which I suppose, she is. However, there are some topics, which needed a thorough extensive treatment than the one which is given by the author e.g. intervention and Rights and Duties of States, which as on date are most vaxatious. Perhaps, that can be overlooked because the book being a single volume introduction to international law had to keep the size of the book in mind as well.

On the whole the book should satisfy each one of us who is in any way concerned with the study of international law, and is looking for a standard treatment by an author. I suppose that the author has performed her job of

putting across the substantial gamut of international law clearly and easily, very well. The reference material is equally great, to that extent it should find favour with researchers even. The book would be useful for lawyers, academicians and particularly the students. The students after going through the book would have no ground to argue that international law is too boring, for the author has taken every care, so that subject gets interesting as well. Being moderately priced, it should easily be affordable by all those who look forward for an 'absorbing and interesting' reading on international law. The publishers have done their job pretty well. One should have no hesitation in recommending the above book.

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THE ARBITRATION AND CONCILIATION ACT, 1996 - A Commentary. By P. Chandrasekhara Rao. Delhi : Universal Law Publishing Co. Pvt. Ltd., 1997. Pp. lxxxviii + 518, Rs. 450/-, ISBN 81-7534-077-0.

The book under review is an authoritative work on the recently enacted Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act'). The subject alternative dispute resolution which includes resolution of disputes by arbitration, conciliation, mediation and negotiation has become indispensable today in the wake of mounting arrear of cases pending in various courts throughout the country and the liberalisation, privatisation and globalisation of Indian economy which was started in 1991. The importance of subject increased tremendously with the introduction of the Code of Civil Procedure (Amendment) Bill, 1997 in the Rajya Sabha. The CPC Bill proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court in which it was filed.

Since the author was Law Secretary to the Government of India when the Act was being drafted, he has examined several models on the subject. Making UNCITRAL's Model Law on International Commercial Arbitration and Conciliation Rules as the basis, he has drafted the statute. He is the chief architect of the Act. This shows his indepth knowledge on the subject.

The author has not only given salient features of the Act but also pointed out the deviations made from the UNCITRAL's Model Law. He has also made a sectionwise comparative study of the Arbitration and Conciliation Act, 1996 with the Arbitration Act, 1940 and the UNCITRAL's Model Law. The author is of the opinion that the decisions of the Indian courts in respect of the earlier enactments should not be fitted in the framework of the new law. However, he contends that such decisions may be looked into, where appropriate. The author sends a message to all judges, lawyers and litigants to search the answers to various problems which have arisen or are likely to arise within the parameters of the Act as a major part of it is new. This is the reason why the section-wise commentary is very limited and does not contain cases decided under the earlier enactments.

The book can be divided into three parts. The first part contains the text of the Act; text of the Statement of Objects and Reasons of the Bill; and

introduction of the subject. The second part contains a systematic section-wise commentary with a complete review of the Act. It may be pointed out that there is an unnecessary repetition of the text of the Act which could have been avoided. The third part consists of Appendices. Appendix I contains various acts, rules, reports, U.N. General Assembly resolutions *etc.* on arbitration. Appendix II contains rules, reports and U.N.G.A. resolution on conciliation. Appendix III contains relevant provisions of the additional statutes which are relevant to the subject such as Contract Act, Stamp Act, CPC, Registration Act, Sale of Goods Act and Limitations Act. The book therefore, makes the task of reader very easy by providing all the relevant materials on the subject at one place.

The book under review is a good effort by the author on a new act which is going to get tremendous singificance in the justice dispensing system of India. However, the section-wise commentary given by the author seems to be inadequate at some places. It is expected therefore, that once the Act becomes fully operational, the author will go in many future editions.

Needless to say that the book is useful for law professors, judges, advocates, researchers, law students and others. It is worth keeping in all the libraries as it concerns all of us. The book has been priced at a very reasonable price of Rs. 450/-. It is higly praiseworthy on the part of the publishers, Universal Law Publishing Co. Pvt. Ltd. who have beautifully published the book on a new statute in order to fulfil the demands of the concerned communities.

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LEGAL FICTION. Reported by A. Laurence Polak and illustrated by Diana Pullinger. Delhi : Universal Law Publishing Co. Pvt. Ltd., Second Indian Reprint, 1998. Pp. 127, Rs. 125/-, ISBN 81-7534-096-9.

MORE LEGAL FICTIONS. Reported By A. Laurence Polak and illustrated by Diana Pullinger. Delhi : Universal Law Publishing Co. Pvt. Ltd., Second Indian Reprint, 1998. Pp. 134, Rs. 125/-, ISBN 81-7534-096-7.

FINAL LEGAL FICTION. Reported By A. Laurence Polak and illustrated by Diana Pullinger. Delhi : Universal Law Publishing Co. Pvt. Ltd., Second Indian Reprint, 1998. Pp. 117, Rs. 125/-, ISBN 81-7534-097-5.

These three books of legal fiction are a novel and amusing collection of the well known stories of ancient mythology brought into courts and are imaginary law cases founded on well known stories of operas and folk lore cases culled from the plays of Shakespeare whose familiar characters make their appearance in the modern courts.

The first book of Legal Fiction is a novel and amusing collection of the well known stories of ancient mythology brought into court and dressed in the garb of a modern trial. The book contains ten fictions of law and forms a happy blend of the real and the imaginary, in which ancient and modern conditions are brought together with the most discerning results. The drawings catch the spirit of the author's humour with telling effect. These imaginary cases present a vortex of legal system in which opportunities of observing the vagaries of actors upon the human stage in their most diverse activities so that an edifying and satisfactory solutions are found to human problems.

The imaginary cases in the book represent variety of human interface with the law and legal system from the question of paternity, negligence, service contract, winding up of a company to breach of promise to marriage etc.

The second book, More Legal Fictions, the fictions relate to legal cases which are essentially drawn and culled from the plays of Shakespeare, whose familiar characters make their appearance in the modern cases and courts. In the judgments the author neatly parodies the modern judicial idiom and reproduces features which made the original work such a success. Some of the parodies in these cases are amusing such as, a bond involving payments in flesh whether contrary to public policy; offences committed when in course of transit by broomstick whether triable; Ass's head placed on plaintiff's head whether amounting to libel or slander; survivorship of parties to suicide pact; and ghost subpoenaed as witness in murder trial.

The fictions relate to ex-parte Shakespeare, nuisance, survivorship, defamation, mistake etc. and the whole thrust is to weave humorous literature around these fictitious cases.

In the book, the Final Legal Fiction, the author weaves imaginary law cases founded on well- known stories of operas and folk-lore. Among the operas, the author has chosen Faust, Hausel, Don Giovanni, Madame Butterfly and the Flying Dutchman. The other tales are: Jack and the Beanstalk (an action for nuisance caused by excessive growth of a bean plant), Cupid and Psyche (petition by wife for divorce on the ground of desertion, she having disobeyed her husband's orders not to enquire into his identity); and the Siege of Troy, where a fifth columnist escaping from a war like object in the form of a horse, injures Cassandra by a blow on the head causing her to lose her prophetic powers.

All the three books taken together are wonderful books which can prove a wonderful gift to the discriminating readers. The cases are imaginary but relate to real life situations giving information of how the law unfolds itself. The books are legal and literary in value and will no doubt make a strong appeal to the lovers of humorous literature. The books are also of great importance to students of law and others interested in law as they can be a store house of knowledge in the shape of parody.

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THE RACING HUMAN RACE. By J.N. Singh. Delhi : Jai Publications, 1997. Pp. 177, Rs 300/-.

The human race which is racing on, beyond, with and without the planet earth, traversing through the infinite cosmic field, needs to get the right track, posture, condition and direction to reach and achieve the necessary goal, destination and objective. Therefore, it requires a lot of advancing, accelerating, speeding, manoeuvring, stopping, retreating, changing, deviating, narrowing and broadening in its thinking, attitude, policy and behaviour. This is the central thesis of the present work.

The book under review 'The Racing Human Race' contains fifteen chapters apart from introduction and conclusion. The book views at the different aspects of the life.

The first chapter is about existential reality of human beings. According to author, every living being must ensure its existence. The author attacks the human being by stating that man has proved himself to be the wildest of all the living beings on the Earth by unintelligently manufacturing and stockpiling nuclear weapons and by spreading a new fatal disease AIDS which is incurable and has already claimed many lives the world wide.

The second chapter discusses about planetary indispensability. The author suggests that we need a substantial change in our emphasis from the human oriented to the Earth-oriented planning and programmes of action to ensure the long-term interest of the humanity. In the third chapter, author warns against the inhumane use of science and technology.

The fourth chapter is devoted to religious alignments. The author discusses various aspect of religion and expresses doubts about the existence of the 'Supreme being' known by different names such as God, Ishwar, Bhagwan, Allah etc. The author also discusses critically the concepts of revelation of religious scriptures, cosmos, creation of man and woman, body and soul, illusion/*maya, mahapralaya*, reward and punishment, heaven and hell, salvation, standards of behaviour. According to author, religion is created, nourished, sustained, developed and strengthened by man only and it needs to be treated as a discipline. Religious scriptures need to be read in the context of time, place and circumstances in which they were written and also the purposes which were intended to be served.

In the fifth chapter, the author suggests that the undesirable and unwanted part of the past must not be permitted to hang on. By learning from our past

experiences, we must try to improve our present and future.

In the sixth chapter, the author suggests to avoid ideological confrontation in the world. In the seventh chapter which is about political accommodation and management, the author expresses that political accommodation and balance is needed not only between the governments of different countries but also between the people and their respective governments.

The eighth chapter is related to territorial adjustment and settlement. According to author, the threat to unity and integrity of states is not only through external aggression but also because of secessionism on the part of certain sections of the people within the state. The author has also emphasised the need of self-determination in the nature of holding of referendum in those cases where the governments do not really represent the wishes of the people.

In chapters nine and ten which deal with 'Upwards Global Economic Balance' and 'Downwards Global Human Balance', the author states that the widening gap between the economic development of developed and developing countries should be reduced substantially. He says further that since the colonial relationship has enriched the North and severely degraded the natural resource base of the South, the former is obliged to do the needful for the upliftment of the later. The author has also emphasised the need of controlling global population.

In chapter eleven, the author suggests to have social, cultural and communicational interaction among human beings as there is basic oneness, unity, uniformity, equality and homogenty among them around the globe. In chapter twelve, the author has appealed to the human beings to practise values in the form of justice, freedom, equality, peace and development etc. and ensure to the maximum.

In chapter thirteen, which deals with cosmo-global consciousness, the author tells the readers that man can not be absorbed into limited identities. The global indentity of man is not the whole. His fundamental identity is cosmic. Therefore, intellectuals, reflecting the very essence of humanity, need to come forward and dischage their essential social, international and cosmo-global responsibilities. Chapter fourteen deals with cosmo-global legal system in which the author suggests that 'law of nations', 'international law' or 'global law' should be replaced by 'cosmo-global law' and the cosmo-global legal system, besides primarily having legal dimension, also needs to have non-legal, non-human, non-formal and non-governmental extension. The main emphasis of this system must be on the achievement of objectives and not on the legalism.

In the last chapter which is about cosmo-global civilization, the author says that ours is a cosmo-global civilization which is not only confined to Earth. The author raises many questions about human life and the cosmos which generally come in the minds of each one of us such as the mystery of birth and death; evolving, growing, developing, decaying, ageing and dying process; the purpose, object and necessity of the existence of the human race; the ultimate purpose of the existence of the cosmos etc. The author, therefore, stresses the need of having a sustainable and enduring, value-oriented, nature-oriented and knowledge-oriented cosmo-global civilization.

The author concludes his work by saying that human race must not conclude its race before the time it gets cosmically terminated. It must recognize the reality that mutual survival, co-existence and interdependence have relevance beyond state to state and man to man relationship.

The book is multidisciplinary in character and covers important areas including the survival of the human race and of the planet Earth and its essential system, environment, science and technology, religion, ideology, history, political settlement, territorial integrity, self-determination, world economy, human rights, culture, communication, international legal system and human civilization.

The author has not acknowledged the sources nor has he given the bibliography. The book is otherwise interesting and written in simple language. Being multidisciplinary in character, the book is worth keeping in all the libraries. The book has reasonably been priced at Rs. 300/- in these days of high prices. The reviewer congratulates the Jai Publications, Delhi for having beautifully published the book.

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FORM IV

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