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PROFESSOR INCHARGE'S PAGE

I feel immense pleasure in presenting Volume III of the *National Capital Law Journal* to the readers. Before I took over as Professor-in-charge of Law Centre II three years back, I had a dream to publish a quality journal from Law Centre II. When I got an opportunity in 1997, I ventured to publish the first volume of *National Capital Law Journal*. Since then, this *Journal* has been blosoming and developing. The idea was to provide a facility to the law teachers to publish their scholarly work without any hassles. I am gladened to see the success of and response to this *Journal*.

I have always held the view and expressed it on another occasion that the institutions are not made of mud and mortar but the institutions are as good as the persons who constitute them. And the persons are as good as the respect and value they have for hard work, devotion, justice and dignity. The *Journal* has come to stay as a permanent annual feature of Law Centre II because of sheer hard work and devotion of the teachers of Law Centre II who constituted the editorial committee of the *Journal*. Mr. V.K. Ahuja has been a continuous link between all the volumes of the *Journal*. The present volume is being published under the able guidance of Professor Harish Chander who is the editor of this volume. It is heartening to note that we have been able to get ISSN for our *Journal*.

I have a fond hope that this volume shall also be received by the readers with great warmth and enthusiasm. The observations and the fair and frank comments from the readers shall be welcome for further improvements in the *Journal*. I thank all the members of the editorial committee and other colleagues who extended co-operation in the production of this volume of the *Journal*. My thanks are also due to the printer, M/S Shivam Offset Press, New Delhi for rendering valuable services in production of this volume.

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Professor S.S. Vats
Professor-in-Charge

EDITORIAL

The Editorial Committee has the profound pleasure to present the third volume of the *National Capital Law Journal* to our respected and learned readers. We have already published two volumes of our *Journal* under the editorship of Prof. A.K. Koul who is currently the Dean, Faculty of Law, University of Delhi. With this volume of the *Journal* we have the privilege and pleasure to congratulate Prof. A.K. Koul on his assumption of the Chair of the Dean, Faculty of Law, University of Delhi. We indeed are also thankful to him for the services rendered to the *Journal* in making it of international standards and repute.

We, in this issue have also tried to maintain the standards set in the earlier two volumes of the *Journal*. This has been mainly possible because of the eager and willing response of our readers and contributors of this *Journal*. In this volume we have published articles and comments in a wide range in the various fields of law and economy. We hope that the readers would find the contributions in this issue to be of high quality and contents useful to the lawyers and the academic community at large.

We are grateful for the overwhelming response of the contributors to our *Journal*. We, once again solicit the co-operation of our contributors and readers to contribute articles and comments for publication in our *Journal*.

We have tried our best to publish this volume, however, if any mistake which might have remained because of our fault or the printers' devil, we hope that the readers will forgive us. We should also be very happy if any critical suggestions are made for the improvement of this *Journal*.

We are indeed also sincerely thankful to our Printers M/s Shivam Offset Press, New Delhi for publishing the *Journal* in a flawless manner and in a short span of time.

Harish Chander
V.K. Ahuja

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THE POLITICAL ECONOMY OF AFRICA PAST AND PRESENT

*Harjinder Singh**

I. INTRODUCTION

Africa is passing through a very difficult period of its recent history. While its long-standing political problems continue to simmer, Africa's chronic economic strains are fast coming to a head. Population explosion, growing external debt, a serious balance of payments deficit, overal economic stagnation and a drastic fall in economic growth have marked the African scene over the past few years. The decline in per capita income has been accompained by further deterioration of the standard of living of Affrcans. According to the World Bank, "Africa's continuing economic crisis presents an extraordinary challenge to the development community.... The difficulties facing Africa are formidable"[1] and the risks of failure to reverse current trends are devastating in human terms.

At a time when African countries are striving towards unity, development and co-operation in shaping their individual destinies, a proper understanding of Africa's past can be a major contribution towards mutual understanding among the peoples of Africa and also can be a source of knowledge of a cultural heritage that belongs to all mankind. From the fifteenth to the sixteenth century or before the European invasion was a special period in which Africa developed its original culture and assimilated outside influences while retaining its own individuality.

But, unfortunately, some of the studies have projected African image "as one of nothing but poverty, barbarism, irresponsibility and chaos".[2] It is, therefore, necessary to investigate and analyse the essential features of the past economic and historical development of Africa. It is from this angle that an attempt has been made to elucidate the socio-economic conditions of African peoples before the European invasion.

II. PEOPLES AND TERRITORIAL DIVISION

While studyinhg the socio-economic conditions of African peoples, we have to proceed from the regions settled by those people and divide the whole continent into different parts. At that time the overwhelming majority of the African population belonged to three great families of

peoples. They were mostly peoples speaking Hamitic and Semitic, Sudanese and Bantu languages. In addition, there were other small groups such as Khoi-Khoi, Pygmy and tribes speaking other languages.

The regions of Africa lying North and Northeast were inhabited by peoples speaking Hamitic and Semitic languages. There are differences of opinion about the origin of Hamitic peoples. But it is a fact that from time immemorial, a large number of Hamitic nationalities inhabited North Africa (the Atlas, the Sahara, Egypt) and Northeast of the continent (Eastern Sudan, Ethiopia and Somalia). The second main element of the population of North and Northeast Africa was constituted by Semitic Peoples (Phoenician and Arabs). Arab migration into Africa increased especially from the seventh century onwards. The whole region became a territory with a mixed population of Hamitic and Semitic tribes.

The mixtures of peoples who lived in the earlier times in the region of the lower course of the Nile, south of Egypt, gave rise to a new stock the Nubian. They occupied, in common with some sudanese tribes, a great portion of what was later known as the Anglo-Egyptian Sudan. After the Arab invasion, Nubia gradually fell to small pieces, every one of them being under the control of one or the other Arab tribe. Thus, in the North Africa, the history of Egypt and Egyptian peoples is the most significant aspect of the African history. She "provided both the Maghrib and sub-Saharan West Africa with a standard of civilization, learning, luxury and temporal power".[3]

The entire population of West Africa and Central Sudan - an area between the Sahara and the Equator, the northern border from Senegal River through Timbuktu to Khartoum, while the southern border upto Upper Guniea coast - was Sudanese speaking. These peoples were not only related by languages but also to a considerable extent by culture. They formed the majority of West African population, were fairly tall, dark-skinned and had woolly hair, broad nose and thick lips. Besides more or less pure representatives of the Sudanese, there were also mixed peoples among them with marks of cultural admixture of Hamitic and Semitic elements.[4]

Initially, the lands of Sudanese tribes were the targets of continous attacks and conquest by the pastoral peoples living north of Sudan. At a later stage, Arabs also penetrated into the eastern and central districts of the Sudan. In their struggle against these peoples, the Sudanese tribes began concluding tribal alliances, but such alliances did not work properly against the stronger aliens who finally estabilshed a large number of states. This was how large ancient states of Ghana, Senghai, etc. arose in the

western Sudan. In the same way emerged the states of Kanem and Bornu. A large number of Sudanese tribes who were unable to stand against the conquerors and at the same time unwilling to submit to their power migrated to the basin of the Senegal and Gambia rivers, Gulf of Guinea and eastern Sudan.

The peoples living in the southern part of Africa with the exception of certain tribes of the Khoi-Saan group and pygmies, were Bantu speaking. They occupied at least one-third of the African continent. These peoples spoke of tongue which was either a dialect or an offshoot of the main language - the Bantu. All the Bantu peoples were also closely related to one another both by language and culture. At later stage, various groups of Bantu peoples of course followed different historical roads. But "the culture and the mode of life of all the Bantu peoples are built upon the same foundation".[5]

The original area of the Bantu peoples from where they spread out to settle in other parts of Africa seems to have been the interior parts of East Equatorial Africa. During the ancient times, the Bantu in East Africa came into contact with the Hamitic peoples while moving towards the northeast. East Africa, therefore remained for many centuries an area of struggle of Bantu tribes with Hamitic tribes. Some Bantu tribes sumbitted to Hamitic influence but others succeeded in resisting the influence of the Hamitic peoples.

The migration of the Bantu tribes from East Equatorial Africa to South Africa took place in three waves. The first wave carried them to the area between the Rowuma and Zambezi rivers. The second wave took them to the territory between Zambezi and Lipopo rivers. They were able to establish a great and powerful state of Monomotapa. This state included a series of tribes under its control and had a strong defence of natural barriers against attacks from outside. The third wave took them to South Africa. But these Bantu speaking peoples opened tens of thousands of mineral workings, whether for gold or copper or other minerals in response to manufacturing demand far from across the eastern seas.[6]

The south west corner of the African continent belonged to the Khoi-Khoi and Saan peoples. The Khoi-Khoi were born of the mixture of the Saan with the Hamitics. The Europeans found them in the South African areas by the end of the fifteenth century and they had been living for many hundreds of years before the appearance of Europeans. The Saan peoples were the most ancient inhabitants of these regions. Saan came to South Africa from north and the Khoi-Khoi from the northeast. Saan tribes were the most backward peoples of Africa. At the time of their first encounter

with Europeans, they were primitive hunters living in forest by hunting. Khoi-Khoi were also backward tribes in comparison with the Bantu peoples, but considerable superior to the Saan tribes on cultural side.[7]

III. Economic Scenario

Portuguese sources tell us a good deal about the then flourshing kingdoms of Africa. It was showing healthy progress at all levels before the European invasion. In the North and Northeast Africa, Egypt and Ethiopia were politically, economically and even culturally well advanced. The Persian traveller Nasir-i-Khusraw, who visited Egypt between 1046 and 1049 was very much impressed by the general prosperity and security found there and concluded, "I could neither limit nor estimate its wealth and nowhere have I seen such prosrerity as I saw here."[8]

(i) Egypt

Egypt prospered further during the twelfth century. Whereas in 1090, under the Fatimids, the annual revenue of all Egyptian provinces was evaluated at about 3 million dinars, a century later under Salah-al-Dín (in 1189) the amount of more than 5 million dinars was attained. Such an increase in revenue made possible the vast building activities and foundation of many waqfs, that traditionally formed the material base for the growth and prosperity of the Muslim intelligentia.[9] During the reign of the Mamluks, Egypt became the leading Arab country, both politically and economically and "enjoyed, at least during the first half of this period, a prosperity, stability and continuity of institutions shared by few other Muslim lands."[10] Regarding Cairo city, "It was indeed a splendid city, and its wealthy inhabitants surrounded themselves with every luxury and with rare and costly work of art".[11]

(ii) Ethiopia

The image which Europe began to have regarding Ethiopia from the early Crusades onwards was one of a very powerful and wealthy state. Dahlak was the only port on the Ethiopian coast of the Red Sea and there were good relations between the Zaiyad dynasty of Ethiopia and the rulers of the Dahlak. The Zaiyad princes used to receive from the ruler of Dahlak gifts consisting of slaves, amber, panther skins of the best quality and other objects. It was apparent that the attitude of Dahlak was one of deference to the much richer and stronger kingdom of the Ziyadids.

The great lords of the western Sudan grew famous outside Africa for their stores of gold, their lavish gifts and ceremonial display. Ibn Khaldum who visited the capital of Mali during the second half of the fourteenth century described the economic prosperity of that country. "The capital of

Mali was extensive place, well watered, cultivated and populated. It had brisk markets with a stopping place for trading caravans from Maghrib, Ifriqiya and Egypt.... The theft was regarded as a capital crime which was punished by death or enslavement. Trade routes across the length and breadth of Mali were safe.[12] As a result, trade flourished and merchants from other parts of North Africa were attracted to settle there.

(iii) Mali

The kings of Mali were known for their large stocks of gold. When the most powerful king of Mali passed through Cairo on pilgrimage to Mecca in the fourteenth century, his equipage included 500 slaves and he reported to have taken with him 50, 000 ounces of gold, much of which he distributed as alms and presents. This in turn ruined the price of the Egyptian gold based dinar. It disturbed the exchange rate of the gold dinar to the silver dirhams by as much as six dirhams in a dinar, a depreciation of about 20 per cent.[13]

Ibn Batuta who toured the western Sudan during the fourteenth century also said that Gao was one of the finest towns of Negrolands and it was also one of the biggest and best-provisioned towns with plenty of rice, milk and fish. For Young Leo Africanus who also visited western Sudan in the early sixteenth century, "Mali was kingdom of rich inhabitants, bounteous wares and abundant supply of millet, meat and cotton".[14]

The prosperity of Timbktu, as the seventh century Al-Sadi, author of the Tarikh-al-Sudan, said, "was the ruin of Biru (Walata) .... The market had previously been at Biru. Caravans used to come there from all points of the horizon. The pick of scholars, pious, and rich men from every tribe and country (of Maghrib and Egypt) lived there.... Then all those gradually moved to Timbuktu where they were joined by different Sanhaja groups".[15] Awdaghut and Walata, the market towns which proceeded Timbuktu, "were land-locked towns.... Timbuktu was open to the desert caravans coming from the north but at the same time had a port of the Niger, a dozen miles away. The growth of Timbuktu as a commercial centre, from the second half of the fourteenth century was closely associated with the development of the Niger waterway as a trade artery lining Timbuktu with Jenne".[16]

The emperors of other parts of the Sudan were even more wealthy and they had a large stock of gold. A sixteenth century emperor of Kanem-Bornu was even said to have equipped his cavalry with golden bits and his hunting dogs with golden chains.[17] At that time Nupe was also emerging a powerful state, strengthened by natural resources and still more by its commercial location. "Among the goods going to south or through Nupe

were horses. Nupe's resoruces in iron and silicates may also have contributed to the political power and to the economic attractiveness of the state."[18]

In 1154, Al-Idrisi described Ghana as "the greatest country in the land of the Sudan, the most populous, and having the most extensive trade".[19] At that time its main source of trade was gold from Bambuk, the district between the Sengal and the Faleme river. But the large scale exploitation had reduced the productivity of Bambuk goldfields. The demand for gold was increasing in the Maghrib. In the twelfth century new goldfields were opened in Bure on the upper Niger. This further made Ghana a more powerful and rich state in the western Sudan. According to Ibn Hawqal, "the wealth of Awdaghut and the riches of Sijilmasa were all ultimately dervied from Ghana whose king was the richest in the world because of his gold".[20]

(iv) East Africa

The main reason for migrants leaving their homelands for East Africa was the attraction of well-watered lands coupled with the prospectsof wealth and a comfortable life in a good environment. This has been explained by de Gama who sailed into the Indian Ocean in 1497 and "stumbed on a civilisation neither seen nor known before by any European. Along the whole sea-board from Quilimane onwards he and his crew touched at city after city and were repeatedly astonished by their wealth and urban comforts, their tall ships from unknown eastern countries and by their commerce in gold and ivory with equally unknown African countries which lay behind the coast-long plains".[21] In truth these cities had flourished for some two hundred years before de Gama saw them. Even today one may stand among their ruins and remain surprised at the lavish wealth with which they could raise such places and dwellings.

In East Africa, Kilwa established its importance as the leading commercial town during the twelfth and thirteenth centuries. The town had plenty of gold as no ship passed towards Sofala without first coming to this island. Of the Moors, there were some fair and some blacks; "they are finely clad in many rich garments of gold and silk and cotton and their women also with much gold and silver in chains and bracelets which they wear on their legs and arms".[22]

People who lived in the lower reaches of the middle Zambezi "were wealthy by Central African standards. They were lavishly supplied with glass bead necklaces. They used gold, both for their bangles, and to mount their conch-shell pendants. They wrapped their dead shrouds of woven

cotton or in bark cloth. Their graves were richly furnished."[23] Yao people living in Nyasaland "were economically self-sufficient, making their own bark-cloth, weaving, burning herbs for salt and working on iron for the tools they needed".[24]

A. Agriculture and Cattle raising

The two main economic activities of the African peoples were agriculture and cattle-raising. In some parts of the continent, particularly in the northern Africa, people had been for ages settled peasants. They lived a "settled existence dependent upon farming or animal husbandry. By the birth of Christ, the history of agriculture in the Nile valley was already four or five thousand years old. The annual flood of the river, by depositing a layer of rich, alluvial soil which remained after the flood receded, endowed Egypt wtih a fertility that could support a dense population to a degree of prosperity that fostered civilisation and the development of an advanced stage".[25] Agriculture and the keeping of domestic animals were also being practised in the middle Nile valley and the highlands of Ethiopia. There were no ecological obstacle to animal husbandry and grain cultivation.

(i) Sudan

There were both settled and nomadic groups in the central Sudan. But the majority of them were semi-nomads changing their residence frequently. Depending upon the circumstances, they also practised both agriculture and cattle-raising. In the western Sudan, Fulah tribes were a large group of nomadic, cattle breeding tribes. But some other tribes were agricultural labour. On the whole agriculture in the Sudanic savanna was one of the better developed in west Africa, because of adequate rainfall. The people living between the lower Senegal and the lower Gambia shared the growth of civilisation in the western Sudan to the extent that they developed animal husbandry, considerable agricultural skills and high degree of village society.

Argrculture in the long run is more rewarding. It can support much larger population than can hunting and gathering. This is the reason that in West Africa, population explosion forced its inhabitants out in search of new lands. "In west Africa the intensive penetration of the forest region was probably a by-product of the growth of dense food producing population in the savanna".[26] In fact the migration taking place from the beginning of the Christian era was one of the major events in the economic history of Africa. The dispersal was imporant not only because migrants took with them the knowledge of agriculture and animal husbandry, but also because it is quite likely that they spread the knowledge of iron

working. Iron gave superior weapons.

(ii) South Africa

In southern Africa, due to frequent migration of the Bantu tribes, agriculture became a secondary occupation, while the cattle breeding, as the only steady and reliable basis of subsistence, gained exceptional importance. In Monomotapa, the present-day Zimbabwe, the situation was somewhat different. After having occupied a vast fertile territory, they developed agriculture and cattlebreeding. The conditions of economic activities and economic development were different in the West and Central Equatorial Africa. There were two distinct areas-an area of dense tropical forests on the north and open savanna on the south stretching right to the mouth of the Congo. In the areas of tropical forests, great importance was given, besides primitive agriculture and hunting, to plant-gathering economy. The open savanna was suitable for hoe-culture.[27] Similarly, in East Africa the development of agriculture and stock-breeding took place after the migration of the Bantu tribes.

Cultivation and animal husbandry normally co-exit. But animal manure was seldom used for fertilisers. The shortage of animal manure enforced an extensive type of cultivation called shifting cultivation where land rather than crops rotate. Initially, it was widely practised by the African farmers because of the poor quality of soils in the areas of Central and East Africa and in some parts of West Africa. This involved the use of the ash of the burnt vegetation for fertiliser. But this method requires large tracts of land and there was no shortage of that. At a later stage in West Africa the increasing pressure upon land compelled the introduction of more 'intensive rotational bush fallow method' which was also introduced in some parts of the East Africa and the Sudan.[28]

Permanent cultivation was adopted mostly in those areas where fertility and water supply provided the opportunity for intensive agriculture. These areas were inland delta of the Niger, the flood plains of the upper Zambezi, some parts of the East Africa bordering Lake Victoria, the highlands of Ethiopia and Kenya. In Egypt, there was little or no rainfall outside the northern part of the Delta, but the flood waters of the Nile normally provided an almost inexhaustible fertility. The rulers of Egypt maintained with varying degree of efficiency the irrigation system in working order.[29] The area under cultivation was extended and new crops were introduced.

(iii) East Africa

In East Africa, particularly in the areas near the great lakes, the

conditions for permanent cultivation were often favourable with well-distributed rainfall. Conditions favourable to bananas were found in these well-watered areas and bananas were probably their staple rather than sorghum. The enrichment of food production was made possible by the combination of agriculture and cattle keeping, especially in manuring of poor soils. Irrigation facilities were also provided. In the Rift Valley on the present day Kenya-Tanzania border, there are the remains dated to some time after the fourteen century of an irrigation system that watered an area of more than twenty square kilometers. The irrigation canals were stone lined.[30] Similarly, in the highlands of modern Zimbabwe, irrigation and terracing were also practised.

In Central Africa, permanent cultivation existed especially in the wetter, more fertile pockets of highlands, river valley and forest margins. Where the soil and rainfall permitted, many of them added Asian bananas to their cycle crops. This increased the total food production and helped in stimulating population growth. In south Zaire, the rainfall would have been adequate for cereals such as sorghum and millet and where the ground retained its moisture well, bananas could have been grown. At later stage oil palm was also introduced which provided an important item of agricultural wealth. The degree of agricultural development can be seen by taking an example of Sanga area in southern Zaire. It is said that farming was not an important activity. "Yet it need be not doubted that a society enjoying such a variety of material possessions and employing such advanced metal-working techniques practised agriculture. Once their hunting, fishing and agricultural prosperity was established, the Lualaba communities were able to diversify their economy beyond the narrow limits of subsistence".[31]

In the Sudanic savanna, agriculture was better developed due to adequate rainfall. Farmers produced some surplus, part of which was sold in the local markets, while part was channelled through taxtion to feed the army and the administration. There seems to have been no shortage of land. In Mali, the great majority of the inhabitants cultivated millet, sorghum and rice. They were also engaged in cattle breeding. The diversity of primary products encouraged local trade and broadened the economic basis of the Empire.

Regarding methods of cultivation, the plough was adopted with various beasts in Egypt and Ethiopia. But over large parts of Africa, the diseases that prevented pastoral farming also dicouraged the use of draught animals. In such areas where plough was not used, the implements used for breaking up the earth were mainly digging sticks and hoes. The

clearance of virgin lands by burn methods and its preparatioin with hoe and digging sticks gave better output per hectare. The sickle for harvesting was many centuries older than the plough. Threshing was dsone by the hooves of animal driven round and round a circular threshing floor.[32] All these methods are still used without much modifications.

B. Craft Industry

The rulers fo Arican states were well aware of the economic and p;olitical importance of metals such as gold, copper and iron. They took maximum interest in the exploitatin of these precious metals.[33] Africa was a reservoir of gold and it was exensively used for the manufacture of objects of luxury. It was recoverable by the simple process of panning. "While to obtain the metal ore is merely a question of hammering the rock into pieces and pounding or grinding it into powder, from which the gold is then washed.[34] Such methods were used in Egypt at the early stages.

The main gold-producing areas were Nubia, the West African forests the empire of Monomotapa or modern Zimbabwe and the province of Damot in Ethiopia. When Nubia was under the control of Egypt, the main source of gold was Wawat. Nubian gold was also obtained during the heyday of Kush. Exploitation of these mines was neglected until the rediscovery of such mine by the Arabs. Egypt met most of its gold requirements from these mines until their exhaustion. In West Africa, there were four gold producing areas-those of Bambuk on the upper Senegal, of Bure on the upper Niger, of the Lobi in the Valley of Black Volta and the Akan forests of modern Ghana and eastern Ivory Coast.

The exploitation of gold deposit in Monomotapa was in response to external demand. Alluvial gold was obtained, but mining too was practised. More than a thousand prehistoric gold mines have been recovered in modern Zimbabwe. Ethiopian gold was largely alluvial and it was found near Damot. Although gold production was an important activity at that time, it is not possible to estimatge the total production of gold. But some estimates about West Africa are available which show that it had produced as mush as 3,500 tons of gold by about 1500. That gold had been produced by methods of prospecting, shaft-sinking, extraction and refinement that were technical achievements of their own.

C. Copper-mining

The most striking feature of the period under review was the development of copper-mining which created a new economic dynamism in some areas of Africa. Copper was used for the manufacture of tools, weapons and utensils. For shaping the metal, hammering hot and cold and casting

were practised. In some areas it was being mixed with tin to make bronze. Tools and weapons of copper and bronze lasted longer. Copper was produced along the Copperbelt of Katanga and Zambia and south of the Limpopo and in the Transvaal. Copper was also mined in Cape. Vasco da Gama's records show: "In this land there seemed to us to be much copper, for they wore it on their legs and on their arms and in their much curled hair.... The people of this land greatly prized linen cloth, and they gave us much of this copper for as many shirts as we cared to give".[35]

The first metal with which most Africa became familiar was iron. It is of course commonly available near the surface of the earth but it is more difficult to prepare and use it. Its high melting point meant that, until the invention of the blast furnace in mediveal Europe, casting was very difficult. But melting of iron made possible the manufacture of new tool. Charcoal was employed in melting in ancient times. The earliest type of furnance was the bowl furnace. A more advanced type was the shaft furnance, built above ground. At the later stage the quality of iron was improved by the invention of cementation. It was the Arabs who transmitted the methods of steel-making devise.

Sources of iron continued to influence the pattern of development in Africa. In the northeast of central Zambia, the people had a plentiful supply of iron. The iron was used not only for small razors, needles and bracelets, but also for large agricultural and wood-working implements. The known iron-mining peoples in West Africa were in central Nigeria, Niger and the Benue. Iron seems to have been introduced in Angola and northern Namibia, Kenya and Lake Victoria areas. But on the whole the supply of iron implements was never adequate in the sub-Saharan Africa and cultivators were more likely to use wooden digging sticks than an iron hoe.

D. Pottery

Pottery was widely practised in Africa. It was certainly the work of those who were able to live mainly by pastoralism on land that was marginally suited to agriculture. This was particularly in the case of East African region. Pots were used for transporting commodities in trade but they were also used for domestic purposes. In Northern Africa, initially pots were imported to pick up minerals. Later, pottery did become an important industry producing jars, lamps alongwith big pots. They were usually uncoloured. But wealthier people preferred the imported articles. An important advance in potery was glazing. In Egypt, where raw material in the form of soda, lime and sand was available, the glazing of pots was important. In the sub-Saharan Africa, there is evidence of the manufacture of glass.[36]

Manufacturing was greatly associated with the processing of food and drink. Meat was of course not an important part of the diet of most people and only rich prople could eat it. But in good times, average people also ate it. In North Africa, particularly Egypt, wine was produced mostly on royal and private estates for the consumption of kings and nobles. The common drink was beer made by fermenting wheat and barley loaves. This practice continued until the Arab conquest. For Muslims fermented liquor was forbidden. After that Coffee was the most popular beverage for them. In other parts of Africa, palm wine and beer were made in West and banana wine in East. A beverage produced from millet and maize was also common.

In Egypt, the manufacturer of textile was the most important industry producing a wide range of fabrics. Damietta was known for the production of high grade linen, cotton and silk. The manufacturer of textile was not only confined to Egypt in the northern Africa. In Morocco, according to Ibn Khaldun, there were four thousand handlooms. Moreover, some areas in the Maghrib were producing silk. In sub-Saharan Africa, cotton weaving was carried on extensively. Niger and Volta basin were important areas for the weaving and dyeing of lilnen and cotton fabrics. In Zambezi-Limpopo area cloth was woven from the locally produced cotton. Cloth for local consumption was also made at Kilwa and Sofala.

Regarding the organisation of industries, most industrial production was carried on by craftmen in workshops run by families or partnership. They employed slaves as well as wage labourers. Under partnership arrangements, they shared equally in profit and loss "but if one partner contributed no capital, then he was virtually wage labourer since he had to put in twice as much as the other partner, though the profit was still equally divided".[37]

In Egypt, a large number of industries flourished. The lower Delta region had a textile industry with manufacturing centres in Damietta, Tinnis and Dabiq, producing cotton, linen and silk cloth of various kinds. Glass and crystal were manufactured in Alexandria. Among other industries, those most important were pottery, metal-working and paper-making. The bigger enterprises such as paper-making, sugar refineries, textile workshops and glass factories were owned by the state or by individual entrepreneurs or by partnerships. These enterprises involved relatively large investments and employed a dozen or more workers. Guilds of same professions also emerged but they were controlled by the agency.

In West Africa, crafts were practised by the full time specialist artisans. In other parts of sub-Saharan Africa the practice of a craft was usually a spare time or seasonal occupation of individuals or families. Pottery was largely a female craft. Skills were passed on from father to son for most of the crafts and from mother to daughter for pottery. In spite of all this, the productivity of crafts remained limited owing to the predominance of hand work.

E. Commercial Markets

The existence of markets is an obvious indication of commercial activity which is an important part of economic activity. It helped to enrich the towns and to bring a comfortable standard of living to the people living in the countryside.[38] Initially, a good deal of business was carried on at annual fairs. There were regular places and times of worship and fixed festivals which provided customers to traders. But at a later stage, markets, both wholesale and retail varying in significance, became more important. Vendors were mostly classified according to the products they sold. These markets had their customs and regulation regarding fixation of prices, settlement of disputes and quality of the products offered for sale. Craft associations of vendors or local merchants had to play an important role in running the mrkets.

The urban markets opened daily. There were big markets of port of trade where the products of different regions were exchanged. The market tended to be situated on the border between different geographical zones and on inter-regional trade routes in order to provide travelling merchants with food and shelter as well as facilities for exchange.[39]

Besides, regular markets, a good deal of business in Egypt and coastal areas of East Africa was carried on at annual fairs. But in sub-Saharan Africa in general and West Africa and East Africa in particular, there were regular markets of both wholesale and retail trade. For example, "The Hausa drew a distinction between the markets or local trade, called 'ciniki' which involved the products of agriculture and small-scale crafts and was conducted chiefly by the producers themselves, and 'fatauci' or wholesale trade. This was in hands of professional merchants... who were engaged in long-distance commerce. Midway between the two were the 'yan koli' who went from one market to another buying and selling cheap goods... Within these general categories, there were other specialists, such as meat and grain dealers". [40]

F. Trade

Trade within Africa and between Africa and the world contributed much to the general prosperity of some parts of the continent. It helped not

only in the accumulation of wealth but also to sustain self-sufficiency. In ancient times, Egypt was economically more advanced and her goods, were in great demand within Africa as well as outside Africa. She exported both manufactured goods in the form of textiles, glass etc. and cattle. Her main items of imports were-timber for shipbuilding, the construction of temples and houses, gold, silver, copper, spices and certain precious stones. Trade was conducted in the eastern Mediterranean, western Mediterranean, the Middle Est and Arabia. Some trade was also conducted with Nubia. The main Egyptian imports from Nubia were gold, semi-precious stones, timber, cattle and wild animals. But due to transport difficulties, very small quantities of heavier goods could be transported.

At a later stage with determined efforts to have a bigger share of the trade, Egypt assumed greater importance and the route to India shifted from Persian Gulf to the Red Sea. Christian and Muslim foreign merchants took up residence in Egypt, each group assigned a place where it could carry on its business and reside. "While Alexandria was the centre for the mediterranean trade, it was Cairo that predominated in the trade with the Near, Middle and Far East".[41] From East, Egypt imported spices and drugs, precious stones, pearls, ivory, raw woods and cotton. Payment was made in native products such a s textiles, alum and paper. Trade was also carried on with Nubia which imported wine, mass produced pots, luxury goods of bronze, ivory and textiles. The main items of Nubian exports wer cattle and slaves. Slaves were in great demand for use as labourers, domestic servants and soldiers.

During the fifteenth century, Egyptian trade of course was over taken by a series of disturbances. "Short of bullion for coinage, the Mamluk sultans resorted to currency depreciation, and in their desire to maintain their revenues for defence, they extended their monopoly control from alum to sugar, then to pepper. Restriction on private trade led to the departure of the karimi merchants and their capital and to conflict with European governments".[42] The Sultans' attempt to extort higher prices for some products from the eastern parts forced the portuguese to search for an alternative route to the east. This opening of the route to east via the Cape had an adverse effect on Egyptian trade with India and Far East countries.

It is said that the existence of the Sahara had restricted the trade between the sub-Saharan Africa and the Mediterranean world. "In actual fact, the Sahara, even when it became a desert, has never acted as a barrier. In the first place, the Sahara was not inhabited. It was the home of nomads, who maintained very close relations with the sedentary peoples to the north and south. There is no doubt that between 1100 and 1500 the Sahara

served as a privileged thorough fare and this can be said to have been the golden age of trans-Saharan trade."[43] The trade of this area was very ancient and of course carried out under the conditions of great hardships. But trade expanded rapidly after the introduction of camel.

The great empires of Ghana, Mali and Songhai were both a consequence of and an impetus to the trade. These empires helped maximum in expansion of trade between north and south of the Sahara. The main northward-bound goods were gold, slaves, cotton cloth, pepper, ivory, hides and skins and leather goods. The southward bound goods were copper, garments, woollen clothes, turbans, aprons, all kinds of beads of glass, stones, varieties of spices and perfumes, as well as manufactured iron tools. Their slaves and agents went in caravans of seventy to a hundred camels, all loaded.

(i) Trade Routes

Some of the Saharan trade routes were very important at that time. The starting point was from the "trading towns of the Maghrib on or near the Mediterranean coast (for example, Fez, Tlemcen), passed through towns on the northern edges of the desert (such as Sijilmasa, Ghadames and Zawila in Fezzan) and the southern edges (such as Walata and Agades), where the camel caravans were assembled and disbanded at start and finish, and through desert oases (such as those of Toust and Kufra), where refreshment was available, and ended at the various trading towns of the western Sudan".[44] Walata became an important trading towns at the beginning of the thirteenth century. But Timbuktu had an advantage denied to Walata. Timbuktu was very near the Niger and trade by river was carried on regularly.

The most important item of West African export was gold which dominated the trade of the Western Sahara. Slave trade dominated the Eastern and Central Sahara. The West African exports including gold made their way from the Northern Sahara termini along the edge of the Tell across the Libyan desert via Awjila to Egypt. Initially, some of the Egyptian merchants tried to have trade with western Sudan but there was little success. It was during the fifteenth century when the king of Mali visited Cairo on his way to Mecca, that Egyptians were attracted by West African gold and in exchange they exported textiles. "Such was the extent of, principally, the gold and fabric exchange, that in the 14th century caravans with up to 12,000 camels are reported to have travelled between Egypt and Mali".[45] The Mali's gold trade was of course very important during this period, but it would be hazardous to put forward estimates of the quantity of gold exported.

The nomads, master of the desert, also profited from the trans-Saharan trade. The caravans brought them grain and cloth in exchange for meat, salt and water. "The nomads and the sedentary peoples thus complemented each other. In the immensity of the Sahara, caravans needed guides and these were provided by the nomads, who knew the crossing routes and were paid a golden price. The crossing of the Sahara had to be prepared in minute detail, the camels were fattened up during long weeks".[46]

In the "Great Desert", there were other products which were traded over limited distances. Such trading centres were not participants in international trade. In such centres, the interchange of products was in foodstuff-rice, cattle, sheep, dried fish, etc. Some of the trading towns in this region were importer of food items because they were not able to meet their local food requirements. "Trading towns in the western Sudan, like Timbuktu and Walata, were substantial food importers. Jenne, on the other hand, at the south-eastern end of the fertile and densely populated inner delta of the Niger, exported agricultural produce."[47]

In Central Africa, trade and urbanisation were much less developed. This was due to the spareness of the population and the long distance between communities. Most of the trade of this area was indirect rather than direct, seasonal without full time merchants. But it expanded when it became linked to overseas trade at later stage. The kingdom of Kongo was really dependent upon trade. Trade was carried on in salt, iron, copper, textile and pottery.

The Portuguese interest in Kongo, and in the neighbouring territories of Central Africa, was primarily commercial. Before the Portuguese reached Central Africa, their early trade in West Africa had been of two kinds. "Their skills in cabotage trade had enabled them to carry bulk goods such as cloth, beads, iron, slaves and food efficiently from one part of the coast to another. Their profits were then converted into gold, ivory and pepper for remittance to Lisbon. This cabotage trade, however, could make little contribution to Kongo... A second form of Portuguese trade therefore became more important. This was the carrying to Africa of Mediterranean manufacturers, especially North African textiles. In West Africa this trade enabled the Portuguese to cut into existing markets accustomed to trans-Saharan trade. No such long-distance trade had existed previously in Kongo, but European goods nevertheless gave Portuguese as effective and original entree there."[48] They bought cloth, ivory, dyewood and copper from Kongo for their products like cloaks of wool, cotton and even silk. The Portuguese also made their way to Senegal

and Gambia to purchase gold, slaves and ivory and sold cloth, metal utensils and tins.

The eastern Coast of Africa looks out over the Indian Ocean which is comparatively easily navigated. The main motive for voyages to East Africa was trade and the chief items of commerce were its natural products. In the fourteenth century the trade was at its height. Ivory was the most important export. This product was much in demand in China, as well as India. Gold was another item for export. Mined in what is now Zimbabwe, it was brought to ports which grew up to the north. Timber, cut from the mangrove forests found from the Lamu region and especially in the delta of the Rufiji river was always an important item of export. Slaves were exported from the north, but there is little evidence of their having been shipped from the southern part. In addition, iron is also mentioned as an export both what is now the Kenya and the Mozambique coast.

The main items of imports were cloth, especially of the finer and coloured, glass beads, silk, pottery, porcelain, glassware. Most of the goods came from India, though much of it would have been trans-shipped in Persian Gulf and Oman. Ibn Batuta who visited East Africa described Mogadishu as a major trading centre and related that 'it was customary for each merchant who arrived to choose from among the citizens a confidential agent to manage his affairs.[49] Mogadishu exported cloth to Egypt whereas other textiles were imported from Egypt and Jerusalem. But other towns of East Africa did not have relations with these countries.

Al-Idrisi tells us some of the other towns of the coast and the island naming Merca, Brava, Malindi, Mombassa, and Pangani. He mentioned Kilwa as Butahna. It was an important trading centre at that time. It imported ceramics, pottery, Chinese porcelain and glass beads. Arab sources also refer to Sofala as trading centre from where gold was exported. On the whole, trade of East African towns was profitable and was the basis of their wealth. Trade contracts were with Arabs, Persians and Indians. Despite the vast quantities of goods of Chinese origin, the Chinese did not have a direct part in trade with Africa until the early fifteenth century. But the arrival of Portuguese on East Africa at the end of the fifteenth century had a catastrophic effect on the coast towns. They were destroyed at various times for failing to pay tributes.

Trade between the interior and the coast was also very important during the fourteenth century. The traders were going up the Zambezi, purchasing gold with silk and cotton cloth, carpets and glassware, mostly for the use of wealthy people. Trade between different points in the interior was also very ancient. But this type of trade was on a small scale and

confined to the region between Zambezi and Limpopo. The important items of internal trade were salt, copper and gold. Salt was the basis of trade at Ingombe Ilede, near the Zambezi. It had large salt deposits. The area between the Zambezi and Limpopo was an importer of luxury goods of both local and overseas origin.

Slave Trade

Before the European invasion, slave trade was on a small scale. "The export of slaves from Africa in pre-European times was generally incidental to the main currents of commerce".[50] The known records on East Africa clearly show that slave trade was a minor aspect. Even the Arab writers of this period have not mentioned slave trade at all. Thus there is little evidence of an extensive emigration of slaves from East Africa between the tenth and the seventeenth centuries. Slaves were needed only for household work because there were no plantations in East Africa which could absorb large quantities of labour. The demand for slaves as such could not be enormous.

Similarly, the number of Africans forcibly transported from the western Sudan to Fezand Cairo remained small. The trans-Saharan demand was never great because there was no plantations to be tilled and few mines to be exploited. Though the portuguese might be taking home a good number of slaves every year, they were only supplementing the supply of domestic labour. But the use of slave and slave labour familiar in the medieval Europe and as in Africa, "became an altogether different matter once the Americas were discovered... Within a few years of Columbus' first voyage in 1492 the Spanish were taking West African slaves across the Atlantic". [51]

Within Africa, Slaves were used mostly for household or military services. for the accumlation of food. for gift and as a means of exchange. For example, when the new Emperor of Senghay inherited from his predecessor a large number of slaves. their slavery consisted in the obligation to provide certain goods and services. For example. blacksmith had to provide spears, fisherman had to deliver fish, cattle breeder had to bring in cattle and others had to perform household duties.

Moreover, slavery was usually for a specific period of time and it was possible to earn freedom by good behaviour. "The owner was responsible for maintenance and protection. In return. the slave performed an allotted amount of work without pay. However, in his free time. he could acquire moveable property with which to buy his freedom and re-enter society as a member in good standing".[52] It shows that slaves were not without rights

or hope of emancipation. They might be sold, given away and accepted as gift. But their conditions were different from that of slaves in the Americas.

In some areas, they were the integral part of their community "Household slaves lived with their masters, often as members of the family... They could marry their master's daughter. They could become traders, leading men in peace or war, governors and sometimes were kings. A slave who knows how to serve, ran the old Asanti proverb, succeeds his master's property".[53] The Mameluks, powerful Sultans, were originally slaves, as the name 'owned' signifies. Their influence and status in the country had grown to an enormous extent. This lasted for about two hundred years. Similarly, Kait Bey who ascended the throne in 1468 was originally a slave. He had risen in the army under successive sultans to a position of Commander-in-Chief.

There was no particular 'class' of slaves. Slaves were people who had been outlawed for criminal acts, people who had lost protection of their kinsfolk or become irredeemably indebted to others. Since slaves were not readily available, the kings began at an early stage to seek captives from outside. Border raids became a regular feature of kings and may have led to territorial expansion. The custom of child-stealing was also widespread, particularly in Sudan where no stigma attached to it.

It is a fact that a large proportion of slaves remained within Africa in general and the Sudan in particular where they were employed mostly in agricultural production and therefore the internal slave trade was not as damaging economically as the Atlantic trade which entailed a total loss of productive labour. In fact slave trade assumes greater importance in the economy of Songhay. "Royal farms were spread all over the empire from Dendi in the east to the Sahel, west of the Niger bend, with a heavier concentration in the lacustrine region, south of Timbuktu. Slaves under the supervision of a headman, who himself was a slave, produced large quantities of grain, mainly rice, for the royal granaries".[54]

The sale of African slaves to Europeans was not much different from the sale of slaves to Africans. The only difference was that the slaves were sold for transport overseas instead of transport overland. And had demand remained at the small level where it stood before the American discoveries, the slave trade with West Africa could never have influenced the course of events.

H. State Revenue

(i) Land and Trade.

The most important sources of revenue of the state were land and trade. The proceeds of agriculture supplemented by the income from the trade

were used to support an efficient administration. During the thirteenth and fourteenth centuries, the receipts from land were the main source of revenue in Egypt. The Sultans were interested to have maximum land concentration in their own hands and such lands were distributed to others to get rent. The amount per acre differed according to its productivity and was paid directly to the landlords or to the state. In 1370, the rate of rent was 40 dirhams per acre on the best land and 30 dirhams per acre on land exhausted by wheat crops.

But land was divided into different categories. Some land was kept as rent-free. In the course of time free land increased much rapidly and consequently the state revenue diminished. Moreover, landlords also found ways to cheat the treasury. "Egyptian agriculture in the course of the fifteenth century ceased to be the chief source of state income, as it had been before, and it was perhaps for this reason that Sultan Barsbay and his successors turned their attention to trade hoping to improve their desperate financial situation through monopolisation".[55] The sultans also followed other measures, such as taxes on merchants and craftsmen and currency adjustments to compensate the loss in land revenues.

After agriculture, foreign trade represented the main source of revenue of Egypt. "Customs duties on eastern goods were levied upon the arrival of a ship in a Red Sea port, and then again in Alexandria or Damietta, before the re-export. In addition to this, there were interior customs houses along the overland road on the Nile. The calcuation of customs duty, as well as other taxes, was done not only advalorem but also according to the religion of the merchants. Sometimes the duties for goods imported by Christian ships reached thirty per cent of the value, whereas the Muslim merchants had to pay only ten per cent for the same".[56] But the Muslim merchants had to pay other taxes in order to put him fiscally on the same level as his Christian counterparts.

The Sultans also followed other measures to increase revenue of the state. The most important was the proclamation of a state monopoly on sugar in 1423. The sultan confiscated all private sugar plantations and closed sugar refineries. The idea was to force the consumers to buy from the state at highly inflated prices. At a later stage the sultan also declared a state monopoly in the trade of food and spices including pepper. He purchased all the stocks available at that time in Egypt at cheaper rates and tried to sell them at higher prices. A load of pepper bought in Cairo for 50 dinars was resold in Alexandria for 130 dinars.[57]

The Sultan also forbade the circulation of European gold coins in Egypt and issued his own dinars which were of 'dubious value'. Later he

"readmitted foreign currency, thus gaining great profits to the detriment of both Egyptian and European merchants".[58] He also changed the gold and silver exchange rate. The net result of all these measures was of course the steep rise in prices of food as well as manufactured goods.

(ii) Rent

Another source of income of the Sultans was the rent from shops owned by them. In Cairo there were over 20,000 shops owned by the Caliph, who let them to shop-keepers for a rent of two to ten dinars a month. Similarly most of the brick houses in the capital belonged to him, and rents were collected every month. The income from taxes, rents and custom duties, as well as from direct participation in trade enabled the state to have strong economic and financial base. The Sultans also used the revenue helping the people during famines or other clamities.

Al-Bakri wrote in the eleventh century about the system of revenue collection that made it possible to improve economic and financial position of Ghana. The kings imposed two types of taxes-one on production and other on imports and exports. "All pieces of gold that are found in this empire belong to the king of Ghana, but he leaves to the people the gold-dust that everyone knows. Without this precaution gold would become so plentiful that it would practically lose its value".[59] He also monopolised the worthwhile pieces so as to control the market.

Regarding imports and exports, the kings applied a regular scale of duties in order to ensure that these could be collected at every market. "He took through his agents a certain weight of gold or its equivalent value as import duty on every donkey-load of salt that goes out. A load of copper coming from the north had to pay a duty of five mitcals (one-eighth of an ounce of gold) while every load of merchandise had to pay as much as ten mitcals".[60]

The main administrative function of the king of Kongo and his staff was the collection of taxes at three different levels. The village chief, the lowest level, received tributes from his people. The provincial governors received tributes from his chiefs and finally, at the top, the king received tributes form his chiefs and finally, at the top, the king received tributes form the governors. But at the same time those who paid tributes could also expect return benefits. "On material plane, each tax-collector, chief, or governor would expect to reward those who paid him, with counter-gifts. At the royal court a governor who faithfully paid his taxes in regional produce such as forest palm, coastal salt or cattle hides might expect to be rewarded with beer or clothing or perhaps dried fish and roast venison.

Only a part of the goods paid in tributes were consumed by the court, the remainder being used to reward loyal subjects'.[61] At the same time failure to pay tributes by the governor could have drastic effects. He could lose his job and become an ordinary man.

In the eastern part of Africa, the main source of revenue was trade rather than production. The important areas in East Africa produced little or nothing for sale. But the kings of such areas had monopolistic position and they controlled all the important points for purchase or trans-shipment. The most important points or "city empires" were Kilwa in south, Mombasa and Pemba in north. "Knowing their harbours to be vital for the ships of India and Arabia, and their markets not much less important for the producers of inland country, their merchant counsellors erected a mercantile system whose... efficiency can be gauged by the relatively high standard of living these cities gradually achieved".[62]

During the latter part of the fifteenth century, the king of Mombasa imposed on all merchants who used his harbour an import duty. "For each thousand lengths of cotton stuff imported into Mombasa, he extracted a mitcal of gold and then they divide the thousand lengths of cotton into two halves, of those the king takes one half while the other remains with the merchant".[63] The price of gold in Mombasa was low as compared to the prices prevailing in India and elsewhere.

The rate of import duty in Kilwa was very high, "Any merchant who wants to trade in the city has to pay an import duty of one mitcal of gold for every five thousand hundred length of imported cotton, no matter what the quality. The king of Kilwa then takes two-thirds of the imported merchandise, while the third which remains with the merchant... is again valued, and pays another duty of thirty mitcals for every thousand mitcals in value... similarly he has to pay while going out of the area."[64] Heavy duties were also applied to export of ivory.

The above analysis clearly shows that Africa was undoubtedly a prosperous and wealthy continent before the European invasion. Some of the states were politically, economically and even socially well advanced. The African kings knew well that the prosperity and fame of their kingdoms were due to the production of precious metals such as gold, copper and iron. "It was certainly not by chance that the greatest ruler in the Sudan was known as "Kaya Maghan', the king of gold; to the south, his counterpart for the countries rich in gold, copper and iron, was called Mwene Mutapa, lord of metals".[65] They recognised the importance of minerals and had full control over the production of gold. They also controlled strictly the production of other precious metals.

IV. Present African Economy

The continent is still rich in natural resources and has the necessary properties which are essential for economic development. The area stretching from the southern tip of South Africa to the northern border of Zaire has been described as the 'gulf of minerals'. There is also abundant agricultural land and a huge potential for irrigation. There is no dearth of human resources which could be a great asset. But as a result of its economic underdevelopment, it has to grapple with serious economic problems. Most of the sub-Saharan African countries are poor and belong to the low-income group. According to the World Bank,[66] more than half of the sub-Saharan African population is in this category where the GDP per head is less than $400. Thus, the situation in this region is not only hampering the economic development process but also affecting the very survival of millions of people.

The genesis of sub-Saharan Africa's economic crisis has both internal and external factors. Among internal factors, high population growth is very serious because it has eroded Africa's growth in the eighties. The population has been estimated to be about 411 million or approximately 12 per cent of the world's total.[67] The density of population is also very low and vary from country to country. On an average, the density of population is under 40 persons per square kilometer and in some cases it rarely exceeds 200. By contrast, density in Asia ranges from 42 to 600.[68] Thus, the population problem in Sub-Saharan Africa is not that there are too many people. But the problem is that the population growth rates were 2.6 per cent and 2.9 per cent respectively. But during the 1980's and the early 1990's it increased to 3.0 per cent per annum. On the basis of this growth rate, it has been estimated that the population would double in 22 years.

The fast growth of population itself is a result of declining mortality rates and high fertility. As development has made head way in sub-Saharan Africa, mortality rates have fallen and they can be expected to fall further in the decades ahead. But the high fertility rate-an average of 6.7 children per woman is the result of economic, social and cultural forces prevailing in sub-Saharan Africa.[69] These include such as the early marriage for African girls, the diminishing practice of prolonged breast-feeding and very limited use of modern contraceptives. Less than 5 per cent of couples use contraceptives in sub-Saharan Africa, as compared with some 30 per cent in India and 70 per cent in China.

The high fertility rates are also due to the low relative status of women in African society and the responsibility of women for raising the children. These women express a very high demand for children, according to a

recent survey conducted in sub-Saharan African countries. Even though most of the married women have already six children, about 80 per cent want still more. In six of the surveyed countries, women said they wanted between six and nine offsprings.[70] Since most families in sub-Saharan Africa still make their living on the land, child labour is commonly regarded as a valuable advantage despite the fact that various studies show the reverse to be the case.

With rapid population growth rate, sub-Saharan African countries find it difficult to reverse the 20-year decline in per capita food production. It would be impossible for them to achieve and maintain a rate of growth in food production that exceeds its current population growths rate of 3.0 per cent. Since food production is unlikely to grow at more than 2.5 per cent per annum for the decade, the already high levels of malnutrition will grow even worse and the years of famine will become even more frequent. The population growth will also aggravate the mounting unemployment. By the end of the century, it has been estimated that industry and agriculture combined will be able to absorb only half of the projected increase in labour force. The remaining half of the labour force will either have to depend on marginal land, or be jobless. It will require 20 years before lowered fertility-if achieved-could begin to limit the growth of labour force.[71]

Land in sub-Saharan Africa is also becoming scare and the population pressure on available land is becoming heavy. Large scale rural-urban migration and urbanisation have been responsible for the creation of slums, overcrowding, crimes and incidences of violence.[72] High population growth will also aggravate ecological vulnerabilities of sub-Saharan Africa. The population pressures have already led to a significant decline in the wood resources. The increase in demand for firewood has also resulted in widespread deforestation. At present, fuel shortage is very serious in most sub-Saharan African countries. The high population rates also put heavy strains on already overburdened educational and health care systems.[73] For example, Kenya faces a doubling or tripling of its school-age population within the next 15 years.

Thus, rapid population expansion strains virtually every part of African society. According to Robert S. McNamara, "It expands the labour force faster than new jobs. It rings the cities with slums. It over-strains the food supply and ecological life support system. It entrenches illiteracy, malnourishment and ill health. And it perpetuates a culture of poverty."[74] Therefore, there is need to tackle this problem is a more systematic and meaningful manner. But unfortunately, many sub-Saharan African coun-

tries have no clear population policy. Some of them do provide family planning services for health and human rights reasons without any explicit demographic purpose. They have not even formulated policies specially required to check the population growth.[75]

The attitudes of governments of some sub-Saharan African countries are beginning to change. In contrast to the 1947 position, more governments now recognise the importance of family planning. In 1984, at both the Second African Population Conference in Tanzania and at the U N International Population Conference in Mexico, African government appeared ready to adopt a new approach to their policy on population. A recent World Bank study found that about three-quarters of sub-Saharan African countries now endorse family planning, at least for health reasons and some have set explicit targets for population growth. National leaders are also ready to discuss the population problems and need for action to deal with it.

However, the progress achieved so far in sub-Saharan Africa is not sufficient in relation to the task of achieving viable population growth. The most important reason for this is that several sub-Saharan African governments show virtually no support for population control and in the field of family planning the government support is only a beginning. Moreover, the governments at present finance a very small share of expenditure on family planning. Governments of all political shades should now accept that whatever the path to development is followed by them, it must include sufficient attention to population issues. They must give high priority to population programs in budgetary allocations. It is also the right time for donors to increase their support for family planning activities by providing maximum financial assistance.[76]

If appropriate action is delayed in checking the population growth in sub-Saharan Africa, according to Robert S. McNamara, the problem will eventually be dealt with but at an immeasurably higher cost-by famine or by civil unrest or both.[77]

V. Agricultural Crisis

Agriculture occupies a significant place in the African economy. The relative contribution of this sector to Gross Domestic Product has, of course, declined slightly in recent years, but still it is about one-third of the GDP.[78] Agricultural exports form about 64 per cent of the total exports from Africa, and maximum percentage of economically active population is engaged in this sector. The development of agriculture is, therefore, the pre-requisite for overall economic development of Africa.

This requires a transformation of agriculture. But the past performance of the agricultural sector in Africa shows that this will be no easy task. The available information reveals that, during the past two decades, the performance of agriculture has been not only very disappointing in terms of magnitude, but also marked by large degree of instability. The annual growth rate of agricultural production was 2.3 per cent during the 1960s. It dropped to 1.3 per cent per year during the 1970s.[79] The volume of agricultural production grew at the annual rate of 1.4 per cent during the period from 1980 to 1985. Due to good weather conditions, agricultural production increased by 3 per cent in 1986. But, again, 1987 was a year of disappointment as a result of worse weather and agricultural output rose by a modest rate of 1 per cent. During the entire period of 1980s, agricultural production increased by less than two per cent while the population increased at the rate of 3 per cent. This implied negative growth rate of per capita agricultural output which was 1.2 per cent during this period. During the recent period of 1990 to 1994 the growth rate of agricultural output was negative.

The gravity is particularly evident in food situation. Since the turn of the 1960s per capita food production in Africa has declined by 20 per cent and it is estimated that if this trend continues, by the year 2000, most African countries will face severe food shortages. This region spent US$ 2 billion on food imports in 1983-84 and the projection for the whole continent is that by the year 2010, on present trend, food imports will account for US$ 28 billion against an anticipated total agricultural export earnings of US$ 12 billion.[80]

The fall in food production has already led to food shortage and famine conditions in Africa. Between 1983 and 1985, more than 20 million Africans were on the brink of starvation of died of starvation. Due to hunger and malnutrition, millions of children sustained permanent mental disabilities. As 1988 year began, famine once again appeared in Sudan, Ethiopia and Mozambique. The year 1992 was marked by nearly catastrophic drought in Southern Africa which affected millions of people and necessitated massive grain imports.[81]

In 1995, drought once again affected many parts of Southern Africa. This shows that people in this region are still living as close to the margins of subsistence that the next drought will find them facing starvation.[82] It has been estimated that unless quick action is taken, about 10 million people in Africa could die of starvation in the near future which could be more than the casualties of World War I.

VI. Causes for Poor Performance

There is a fairly widespread consensus as to the main causes for the slow progress in agriculture in general and food in particular. The disruptions caused by wars, pattern of land use and rapid growth of population which pushed cultivation into less productive areas are some of the important constraints in African countries. The existence of a large and inefficient subsistence sector presents special obstacles to development of agriculture. About 70 per cent of the land under cultivation is devoted to subsistence crops. This sector has little knowledge about new methods of crop rotation and seed protection. Research and experimentation are lacking.[83]

The lack of political commitment of African governments towards agriculture is another important factor responsible for slow agriculture performance. Many African countries have been stressing the importance of agricultural development and have established a complex set of policies. But such policies have adversely affected the growth of agriculture. Moreover, government interventions at all levels of production, consumption and distribution of agricultural products and insets have frequently resulted in greater inefficiency and low output.

The policies followed in most African countries have frequently resulted in substantial discrimination against agriculture which is very much an integral part of development strategies to project domestic industries behind high barriers. Such strategies are intended to accelerate the shifting of resources out of agriculture by lowering its profitability compared with that of industry. By lowering output prices of agriculture relative to industry and by increasing the cost of modern inputs, these strategies tax agriculture in African countries.

Further, it has been observed that many African countries have directed a substantial proportion of the agricultural investment to large agricultural farms. They are of the opinion that the implementation of high productive schemes and mechanisation of agriculture could help them to overcome the state of stagnation. But the studies conducted so far have clearly shown that the contribution of these large agricultural farms was small when compared to their costs due to overstaffing, mismanagement and under-utilisation of machinery.[84] On the other hand, the governments of African countries never realised that small farms should be the focus of a growth-oriented development strategy. The experience of Kenya proves that small farms are more responsive to opportunities for profitable innovations. They are more costeffective for raising agricultural output than the large farms are.[85]

The government policies of African countries regarding agricultural prices are also to blame for low agricultural output. For example, the import policies of these African governments have seriously affected the production of food output. Imported wheat and rice are cheaper than domestic items. Therefore, many African countries have imported sufficient amount of food items. There by causing sharp reduction in prices of food items. Similarly, in some African countries, the raising of producers' prices of export items has led to the reduction in the production of food items.

In most African countries, the marketing of food crops was controlled by the official agencies. These agencies were supposed to prevent exploitation of farmers by the private sector. Governments often justified their involvement in marketing with the argument that the private sector was inefficient and could be monopolised by a small number of traders.[86] But the various studies have compared the efficiency of private and public sectors' marketing. It has been observed in the case of Kenya that the public sector charged 15 to 20 per cent more for marketing maize than did the private sector. These marketing agencies have now been abolished in most of the African countries during the implementation of Structural Adjustment Programme.

The low consumption of inputs like fertilisers, insecticides, high-yielding varieties in Africa is another reason for the slow agricultural progress. The use of fertiliser is very low (7 kg. per hectare) in Africa as compared to European countries (251 kg. per hectare).[87] But there is ample evidence of positive correlation between the use of fertilisers and high yield. In senegal, in one of the rice schemes, for every additional kg. of nitrogen, the additional yield of paddy was 20 kg. per hectare. Similarly, in these countries the consumption of insecticides and high yielding varieties is at an experimental stage.[88]

Therefore, it is not the prolonged drought that has affected adversely agriculture in general and food in particular. Other factors such as prevalence of uneconomic production unit, high rural population, crude technology and scarcity of modern inputs, negative agricultural price policies, etc. have compound the problem caused by climatic conditions. Drought is not uncommon in Africa, but the recent one has been the worst. The urgent need at present is to provide food assistance to the affected countries of Africa.

VII. Structural Adjustment Programme

Food aid is not the solution. Africa must stand on its own foot. It is, therefore, of urgent importance for African countries to implement poli-

cies which result in an increase in agricultural output. This aspect has been emphasised in the OAU's "Africa's Priority Programme for Economic Recovery 1986-90 -A Framework for Action" which clearly states that without a solution of agricultural problem, it will not be possible to achieve economic and social progress. Agriculture has now become "the priority of priorities." It also suggests that efforts should be made to formulate and implement short, medium and long-term policies which bring about sufficient increase in agricultural production.

In response to economic crisis in general and agricultural in particular, the World Bank and the IMF have suggested policy reforms or Structural Adjustment Programme for African countries. This programme includes[89] promotion of commodity exports and foreign investment and currency devaluation; elimination of subsidies, dismantling of price controls and implementation of cost-recovery methods; rationalisation of the state sector through privatisation, wage-cuts and closures, and liberalisation of the economy guided by market forces.

There reforms cover a wide range of measures aimed at giving price, market and the private sector a greater role in promoting development in Africa. In particular, they reflect a desire to reduce government interventions in setting prices and to end monopolies on trade and marketing. As far as agriculture is concerned, these policy reforms more precisely focus on institutional changes, particularly with regard to agricultural marketing agencies with a view to increasing efficiency and reducing cost, increasing producers' prices, increasing exports by devaluation, and reducing subsidies on food and agricultural inputs.[90]

The most striking macro-policy reforms have been the devaluation of currencies. Correcting overvaluation of currencies helps to reduce balance of payments deficit. But equally important, it also shifts the internal terms of trade in favour of those who produce for export and away from those who consume imports. Many African countries have accepted the devaluation as a solution. Some of the devaluations were substantial: 372 per cent for Uganda Shilling, 311 per cent for Zambian Kwacha and 274 per cent for Somali Shilling.[91]

The governments of African countries have also improved agricultural incentives by increasing official prices. Some have even deregulated markets in order to give access to higher prices on parallel markets. Still others have lifted control on agricultural trade in order to make official prices more flexible. The agricultural sector has been given its due share in the process of economic development.

The World Bank has also recommended some measures for the development of agriculture. According to a report of the World Bank, considerable progress must be made in the area of technology, land tenure in addition to production incentives in order to achieve a reasonable growth rate in agriculture. "Technological progress in this context would consist of the development of drought resistant, high-yielding varieties of sorghum and millet, and a fast-growing, drought-resistant tree species that could serve the varied needs of rural population. Progress in land tenure systems would consist of an evolution in the traditional structure of collective ownership of the land that would stimulate on-farm investments by individual farmers. Progress in financial incentives would include reforms in food-pricing and marketing policies that would ensure that farmers could sell surpluses at attactive prices and that rural communities would be financially rewarded for the costs incurred in expanding tree plantations".[92]

The Economic Commission for Africa released in 1989 a proposal entilted "African Alternative Framework to Structural Adjustment Programme for Socio-Economic Recovery and Transformation." This also places a high priority on attaining food self-sufficiency. The various measures suggested for this purpose include: (*a*) allocation of 20 to 25 per cent of the public investment to agriculture; (*b*) technological upgrading of land production; (*c*) land reform: (*d*) minimum prices for food crops; and (*e*) reorientation of credit policies. As such, the African Alternative Framework also places considerable emphasis on the development of mutually reinforcing packages of technological services and public policies.

The African governments, should take the initiative to adopt a new technological package of improved seeds, soil nutrition methods as well as irrigation facilities depending upon the soil system. After this package is determined, it should be taken to the farmers by young professionals and young workers. The farmers should also be provided all the necessary incentives through food price policies and marketing system. If this is done, the 'Green Revolution' can also take place in Africa in the near future.

VIII. Widespread Deforestation

Deforestation, more broadly, degradation of the land is also serious and mounting problem over large parts of sub-Saharan Africa. The area under forests and woodlands has halved since the turn of the century and there have been major losses in farm tree stocks. According to the World Bank report, the loss of forest cover is taking place in almost all the

countries in sub-Saharan Africa. In West Africa, the costal forests are disappearing at the rate of 5 per cent per year. In Ivory Coast particularly which once had 30 million hectares of tropical forests is now left with only 4.5 million hectares. Similarly, in Ethiopia and Zimbabwe they are rapidly disappearing. In Kenya, Tanzania and Sudan woodcutting is proceeding at twice the sustainable level. And finally, in countries like Mauritania the forests have completely disappeared.[93]

The decline in tree stock is mostly due to the rise in population. As rising population tips the balance against nature, over half of the Africa's population is forced to over-exploit local forests beyond their natural repenerative capacity. The pressures have already led to a significant decline in the wood resources. In recent years, the demand for firewood has increased so intensely that it has resulted in widespread deforestation. Land clearance has also removed trees from boundaries and groves that are needed to maintain soil moisture and protect soils from erosion. Moreover, seedlings and mature trees have been lost to ill-managed livestock. There is also commercial logging in the higher rainfall areas without adequate reinvestment in forest reserves. It has been estimated that about 4 million hectare of African forests are disappearing every year, threatening the resource base on which food production and animal life depend.[94]

It has been observed in West Africa that families that traditionally cooked two meals a day have fuel for only one hot meal a day. This shortage of fuel has also led families to turn to cow dung and crop residues for fuel.[95] But this removal of vital nutrient from land has in turn affected adversely the productivity of land and the ability of pastures to support livestock. Deforestation is also responsible to some extent for the occurrence of drought in sub-Saharan Africa. The shrinkage of the forests, the loss of soils, the over grazing of the grass lands, and the drying out of the agricultural land have contributed to the decline in rainfall. Sub-Saharan Africa is as such caught in a vicious circle. Indirectly, overcutting of woodlands for use as fuel wood is also contributing to the desertification taking place in parts of the Sahel, since it leads to wind erosion of top soils.

Thus, deforestation in sub-Saharan Africa presents a formidable challenge. A strategy to stop the continued overuse of forests as well as to develop forests is overdue. The actions required will of course vary from country to country. But the relationship between forests, farmlands and household fuel requirements should shape reforestation strategies. A recent World Bank paper on "Deforestation, Fuelwood Consumption and Forest Conservation in Africa", reviewed the major issues in this area and

proposed an action programme. It concluded that virtually every government has recognised the threat of deforestation and taken some steps to protect forests and encourage tree plantings. But, unfortunately, forestry programmes are generally treated as a low priority. In some countries even well designed policies could not be implemented. Thus, there is clear need for public education and government commitment.[96]

Some efforts have been made by a few sub-Saharan African governments to encourage tree plantings. In the Sahel, an amount of $160 million was spent between 1972 and 1982 on reforestation projects after the drought. In Senegal, newly established village woodlots are showing good results. In the case of Kenya, treeplanting efforts under "Green Belt Movement" have helped the process of reforestation. In Rwanda, over 7,000 hectare of cropland have been improved or protected from erosion by tree produced from 170 local nurseries. But sub-Saharan Africa's reforestation efforts cannot afford a holiday. To meet the projected fuelwood deficit, an estimated 25 million hectare of trees must be planted by the end of 2020 at a cost of $2 billion.[97]

In more favourable ecological conditions, farmers and local communities are of course planting trees, especially on private owned farmlands. But the governments should design their policies which could provide incentives to them in the form of better prices for the products. In areas adjacent to cities, it will be important to establish plantations of fast-growing trees that can readily supply firewood and charcoal to urban population. Recently, a group of middle-aged farmers in Benin decided to plant trees as a saving bank to provide for when they were too old to farm. They got seedlings from fast-growing variety on credit and in a few years, the timber was ready for sale. Such programmes should also be encouraged in other areas. In areas where water supply is limited, efforts should be made to identify and develop varieties of drought-tolerant trees. The woodlands that remain must be managed properly and the wood supplied should be used more efficiently.[98]

IX. External Debt Burden

Another important component of the sub-Saharan African economic situation its external debt crisis. The debt burden which stood at $68.9 billion in 1982 rose to $102 billion in recent years. It is about 69.8 per cent of sub-Saharan Africa's GDP and 312.6 per cent of its export earnings. Debt service obligations as a percentage of exports have risen to unsustainable levels.[99] Although much of sub-Saharan Africa's loans came from bilateral and multi-lateral sources, the World Bank Group has also a long history of providing substantial loans to sub-Saharn Africa. The IMF is

easing short-term temporary imbalances of the sub-Saharan African countries.

The roots of the sub-Saharan African debt problem reach back into the turmoil of the 1970's, with the transitory commodity boom. These countries at first were unable to spend their windfall, so they built up their foreign exchange reserves. In the later years, their governments increased public spending, and subsequently began borrowing against future export earnings. However, before their spending programmes were completed, commodity prices fell.[100] Thinking that the fall was temporary, the governments borrowed even more to replace lost exports and fiscal revenue. And, within a few years they had burdened themselves with crippling debt that required immediate and painful adjustment. Matters grew worse in the early 1980's as the global recession persisted and the structural adjustment programmes were delayed. The prolonged drought over much of the region compounded the problem further, resulting in severe debt servicing difficulties.

The accumulation of debt has been for a variety of reasons. Most of the projects of programme, for which borrowing were undertaken, have failed to yield the expected returns, either due to unforeseen external factors like worsening trade and current account of unexpected internal problems such as resources bottlenecks slowing the growth in output. Further, the time periods for various schemes to yield returns, particularly of agricultural output, were not sufficient to repay the loans as scheduled. Finally, the projects or programmes employed foreign-owned resources, and consequently they had to be repatriated leaving an insufficient balance to return loans.[101]

The absolute size of the sub-Saharan Africa debt, particularly the commercial component, is of course much smaller than that of the highly publicised Latin American debt. But the reality is that the adjustments necessary to service this debt are as critical for most of the sub-Saharan African countries as are those of the major Latin American countries. Moreover, the capacity of the sub-Saharan African counties to repay the debt is not going to improve much in the near future. The performance of agricultural sector has not been satisfactory and whatever is available for export has been subjected to various restrictions imposed by the industrialised countries, gripped as they are by their own economic crisis. This has adversely affected the capacity of the sub-Saharan African countries to repay the loans. The OAU forecasts continuing stagnation in sub-Saharan Africa's overall export earnings and consequently tripling external debt by the end of 2000.[102]

The proportion of earnings from export required to meet external debt obligations (the pre-rescheduling debt service ratio) is 40 per cent, according to the OAU and may rise to 72 per cent in the near future. In the case of some countries like Sudan and Zambia, it may be about 100 per cent. Thus, "the escalating debt burden has magnitude of the debt and debt-service obligations has threatened the very foundations of our economies".[103]

Further, the debt structure of many sub-Saharan African countries has also been changing for the worse. In 1970, 'soft' loans were about 50 per cent of the total sub-Saharan African debt. But such loans are now only 38 per cent. Moreover, it is difficult to get 'soft' loans. This is the reason that most of these countries have to borrow from the commercial banks at high interest rates. It is also not easy to get loans from the IMF because most of the sub-Saharan African countries are not in a position to fulfil strong IMF conditions, often politically sensitive like devaluation, removal of price subsidies, reduction of imports, cuts in budgetary spendings, etc. Due to non-fulfilment of these conditions, some of the sub-Saharan African contries have been even refused loans by the IMF. Thus, the decline in sub-Saharan Africa's export earnings and the sharp fall in new resource flow to the continent have made it impossible for many sub-Saharan African countries to service their debts, despite their desire to honour their obligations.[104]

In order to alleviate crushing debt burden of the sub-Saharan Africa, the Organisation of African Unity at a special summit on Africa's debt crisis held in December, 1987 in Addis Ababa proposed some of the measures including ten-year moratorium on all debt service payments.[105] It urged creditors to accept multi-year debt reschedulings, covering a minimum of five years, with repayment spread over 50 years and zero interest rates. Other important recommendations include the conversion of all bilateral loans into grants; consideration by IMF of the possibility of rescheduling its credit to African countries and the lengthening of repurchase (repayment) periods; conversion of commercial credit into transferable securities with maturities of at least 25 years and lower interest rates; and doubling of the World Bank's capital, raising of the eligibility ceiling for IDA, etc.

Shortly after the summit, at a meeting of donors held under the World Bank auspices in Paris, it was decided to solve the financial problems of about 20 African contries defined by the World bank as low income and debt distressed. These countries have taken "some extremely difficult and politically risky steps to adjust their policies to get their countries back on

a path of sustainable economic growth". An amount of $2.9 billion as new aid funds was pledged for these countries. These funds, distributed in 1988-90 were to supplement money already earmarked for these countries by the World Bank through its IDA.[106]

In addition, a few creditor countries have written off some of their loans to poor sub-Saharan African countries, and they have begun rescheduling of loans with ten years grace with 20 years repayment periods. But unfortunately, they have not come to any agreement on the reduction of interest rates below market levels. The IMF has also raised substantial new funds from donors to expand the resources of the Structural Adjustment Facility, a concessional facility designed to aid low income countries undertaking adjustment programmes. It announced the establishment of an 'enhanced' SAF, adding $8.4 billion to the $3 billion available from the original facility.

At their summit conference in Toronto, the leaders of the seven leading western industrial countries, the group of seven, after months of agonizing discussion about Africa's crushing debt burden, agreed in principle to take actions to ease the plight of the worlds' most indebted, poorest nations, mostly of which are in Africa. They also agreed to a menu of options to alleviate the debt servicing burden. The options include partial debt forgiveness, reduction in interest rates and the extension of repayment periods. The Paris Club, the body which coordinates the OECD countries' strategy and tactics on debt matters, also discussed this aspect in details. Until the precise terms of the Toronto initiative take shape the full extent to which even the eligible countries will benefit will remain uncertain. Even the overall prospects for boosting net resources flows to the sub-Saharan African countries are uncertain. It has been calculated that total overseas development assistance from the Development Assistance Committee of OECD is likely to rise in real terms by more than 2 per cent a year.[107]

If the international community is to assist sub-Saharan African countries through the present economic crisis and help them to realise their potentials, it would make a commitment to larger aid flows at concessional rates as early as possible. On the other hand, sub-Saharan African countries should also take firm action in solving internal problems and revise policies in the light of experience. They should accept the proposition that without policy reforms, higher international aid will be difficult to mobilise which is very essential for social and economic development.

NOTES AND REFERENCES

* Professor & Head, Department of African Studies, University of Delhi, Delhi.

1. The World Bank, SUB-SAHARAN AFRICA - FROM CRISIS TO SUSTAINABLE GROWTH (Washington, 1989) at 1.
2. J. Ki-Zarbe, GENERAL HISTORY OF AFRICA, Part I, Methodology and African Pre-History, UNESCO International Scientific Committee for the Drafting of a General History of Africa (California: University of California Press, 1981) at 2.
3. Roland Oliver (ed.), THE CAMBRIDGE HISTORY OF AFRICA, Vol. III, From C1050 to C1600 (Cambridge University Press, 1977) at 1-2.
4. Endre Sik, THE HISTORY OF BLACK AFRICA, Vol. I (Budapest: Academial Kiado, 1966) at 18.
5. *Id.* at 56.
6. Basil Davidson, AFRICA IN HISTORY-THEMES AND OUTLINES (London: Weidenfield and Nicolson, 1968) at 57.
7. Endre Sik, op.cit., at 78-79.
8. Nasir-i-Khusraw quoted in Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op.cit., at 16.
9. *Id.* at 37.
10. *Id.* at 41.
11. Lady Amherst of Hackney, A SKETCH OF EGYPTIAN HISTORY, FROM THE EARLIEST TIMES TO PRESENT DAY (London: Methuen and Co., 1904) at 263.
12. Iba Khaldum quoted in Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op.cit. at 372-373.
13. *Id.* at 48.
14. Young Leo Africanus quoted in Robert I. Rotberg, A POLITICAL HISTORY OF TROPICAL AFRICA, HARCOURT (New York: Bruce and World, Inc., 1965) at 46.
15. Al-Sadi quoted in Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op.cit., at 373.
16. *Id.* at 374.
17. Basil Davidson, AFRICA IN HISTORY, op.cit., at 57.
18. Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op.cit., at 301.
19. Al-Idrisi quoted in Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op.cit., at 349.
20. Robert I. Rotberg, A POLITICAL HISTORY OF TROPICAL AFRICA, op.cit., at 37.
21. Basil Davidson, AFRICA IN HISTORY, op.cit., at 165.
22. Robert I. Rotberg, A POLITICAL HISTORY OF TROPICAL AFRICA, op. cit., at 83.
23. Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op. cit., at 529.
24. Marry Ter, PEOPLE OF THE LAKE NYASA REGION, EAST-CENTRAL AFRICA, Part I (London: Oxford University Press, 1950) at 8.
25. Peter Wickins, AN ECONOMIC HISTORY OF AFRICA, op. cit., at 3.
26. Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op. cit., at 5.
27. Endre Sik, THE HISTORY OF BLACK AFRICA, op.cit., at 60-61.
28. Peter Wickins, AN ECONOMIC HISTORY OF AFRICA, op. cit, at 36-37.
29. *Id.* at 36-37.
30. *Id.* at 41.

31. Roland Oliver, The CAMBRIDGE HISTORY OF AFRICA, op.cit., at 523-24.
32. Peter Wickins, AN ECONOMIC HISTORY OF AFRICA, op.cit., at 38.
33. D.T. Niane, GENERAL HISTORY OF AFRICA, Vol. IV, Africa from the Twelfth to the Sixteenth Century, UNESCO International Scientific Committee for the Drafting of a General History of Africa (University of California, 1984) at 678.
34. Peter Wickins, AN ECONOMIC HISTORY OF AFRICA, op. cit., at 70.
35. Vasco da Gama quoted in Peter Wickins, AN ECONOMIC HISTORY OF AFRICA. op.cit., at 72.
36. *Id.* at 88.
37. *Id.* at 99.
38. D.T. Niane, GENERAL HISTORY OF AFRICA, Vol. IV, op.cit., at 204.
39. Peter Wickins, AN ECONOMIC HISTORY OF AFRICA, op.cit., at 118.
40. D.T. Niane, GENERAL HISTORY OF AFRICA, Vol. IV, op.cit., at 297.
41. Peter Wickins, AN ECONOMIC HISTORY OF AFRICA, op.cit., at 144.
42. *Id.* at 146.
43. D.T. Niane, GENERAL HISTORY OF AFRICA, Vol. IV. op.cit., at 614.
44. Peter Wickins, AN ECONOMIC HISTORY OF AFRICA, op.cit., at 150.
45. *Id.* at 152.
46. D.T. Niane, GENERAL HISTORY OF AFRICA, Vol. IV op.cit., at 615.
47. Peter Wickins, AN ECONOMIC HISTORY OF AFRICA, op.cit., at 149.
48. Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op.cit., at 548.
49. Ibn Batuta quoted from D.T. Niane, GENERAL HISTORY OF AFRICA, Vol. IV, op.cit., at 463.
50. Robert I. Rotberg, A POLITICAL HISTORY OF TROPICAL AFRICA, op.cit., at 134.
51. Basil Davidson, AFRICA IN HISTORY, op.cit., at 179-180.
52. Donald L. Wiedner, A HISTORY OF AFRICA SOUTH OF SAHARA (London: G. Bell & Son, Ltd., 1964) at 45.
53. Basil Davidson, AFRICA IN HISTORY, op.cit., at 182.
54. Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op.cit., at 447.
55. *Id.* at 60.
56. *Id.* at 57.
57. *Id.* at 58.
58. *Id.* at 16.
59. Basil Davidson, AFRICA IN HISTORY, op.cit., at 75-76.
60. *Id.* at 76.
61. Roland Oliver, THE CAMBRIDGE HISTORY OF AFRICA, op.cit., at 545.
62. Basil Davidson, AFRICA IN HISTORY, op.cit., at 166.
63. *Id.* at 166.
64. *Id.* at 167.
65. D.T. Niane, GENERAL HISTORY OF AFRICA, Vol. IV, op.cit., at 678.

66. The World Bank, SUB-SAHARAN AFRICA- FROM CRISIS TO SUSTAINABLE GROWTH-A LONG-TERM PERSPECTIVE STUDY, (Washington, 1989) at 213.
67. *Id.* at 17.
68. Robert S. McNamara, THE CHALLENGES FOR SUB-SAHARAN AFRICA, Sir John Crawford Memorial Lecture, Washington, November 1, 1985 at 11.
69. The World Bank, SUB-SAHARAN AFRICA, FROM CRISIS TO SUSTAINABLE GROWTH , op.cit., at 41.
70. Robert S. McNamara, THE CHALLENGES FOR SUB-SAHARAN AFRICA, op.cit., at 17 and 18.
71. *Id.* at 18.
72. *Ibid.*
73. The World Bank, ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA- AN AGENDA FOR ACTION, (Washington, 1988) at 14.
74. Robert S. McNamara, THE CHALLENGES FOR SUB-SAHARAN AFRICA, op.cit., at 17.
75. The World Bank, FINANCING ADJUSTMENT WITH GROWTH IN SUB-SAHARAN AFRICA, 1986-1990 (Washington, 1986) at 26.
76. *Id.* at 27.
77. Robert S. McNamara, THE CHALLENGES FOR SUB-SAHARAN AFRICA, op.cit., at 45.
78. The World Bank, SUB-SAHARAN AFRICA - FROM CRISIS TO SUSTAINABLE GROWTH - A LONG-TERM PERSPECTIVE STUDY, op.cit., at 213.
79. *Id.* at 89.
80. International Food Policy Research Institute, POPULATION AND FOOD IN THE EARLY TWENTY-FIRST CENTURY (Washington, 1995) at 28-29.
81. UN, *Survey of Economic and Social Conditions in Africa*, 1991-92, Addis Ababa, 1994 at 3.
82. UN, AFRICA RECOVERY, New York, June 1995 at 3.
83. UN/ECA, *Domestic Problems and Economic Policies in African Least Developed Countries- An Agenda for Action*, Adis Ababa, 1981 at 8.
84. The World Bank, FINANCING OF ADJUSTMENT WITH GROWTH IN SUB-SAHARAN AFRICA, 1986-90, (Washington, 1986) at 18.
85. *Id.* at 51.
86. *Id.* at 59.
87. Peter Lawrance and Ian Livingston, AGRICULTURE IN ECONOMIC DEVELOPMENT IN AFRICA, AFRICA SOUTH OF THE SAHARA (1982) at 36.
88. *Ibid.*
89. D.S. Copeland, *Structural Adjustment in Africa*, THE CANADIAN JOURNAL OF WORLD AFFAIRS, March-April, 1989 at 11.
90. Simon Commander, *Structural Adjustment Policies and Agricultural Growth in Africa*, ECONOMIC AND POLITICAL WEEKLY, 24 September, 1988 at 88.
91. FAO/UN., *The State of Food and Agriculture*, 1986-87, July, 1987 at 49.
92. The World Bank, *The World Bank Annual Report*, 1984, Washington at 51.
93. Robert S. McNamara, THE CHALLENGE FOR SUB-SAHARAN AFRICA, op.cit., at 23.

94. UN, AFRICA RECOVERY, December 87, No.4 at 16.
95. *Id.* at 16.
96. Robert S. McNamara, THE CHALLENGE FOR SUB-SAHARAN AFRICA, op.cit. at 16.
97. *The World Bank Deforestation, Fuel Wood Consumption and Forest Conservation-An Action Programme for 1986-88*, quoted in the World Bank, FINANCING ADJUSTMENT WITH GROWTH, op.cit., at 31.
98. UN, AFRICA RECOVERY, December 1987, op.cit., at 16-17.
99. UN, AFRICA RECOVERY, August 1988, Vol 2, No.3 at 23.
100. *Id.* at 2.
101. Robert S. McNamara, THE CHALLENGES FOR SUB-SAHARAN AFRICA, op.cit., at 7.
102. UN, AFRICA RECOVERY, December 1987, No. 4 at 2.
103. *Ibid.*
104. *Ibid.*
105. *Ibid.*
106. *Ibid.*
107. UN, AFRICA RECOVERY, March 1988, Vol. 2, No. 1 at 23.

BUSINESS AND CORPORATE ECONOMIC CRISIS IN ASIA PACIFIC REGION : TRENDS AND LEGAL AND ECONOMIC IMPLICATIONS**

*Harish Chander**

I. Historical Perspective

The Industrial Revolution, which started in Europe during the early part of the nineteenth century, was based on the legal and economic theory of Individualism or Capitalism. Because of the inherent selfish nature of human beings, the premise of individualism though helped the political societies and freedom of human beings and the growth of democratic structure, the theory of individualism brought the exploitation of the working class by the capitalist class. The exploitation of the working class led to the propagation of the Socialism and Communism in the world. Communist and Socialist impact on the western countries was minimal to the extent of improving the wages and other conditions and standard of living of the working class but did not have much impact on the political and economic systems of the western countries. However, the impact of communism and socialism was so much in Russia, the Eastern European countries and China that these countries completely transformed their political and economic systems based on the principles of socialism and communism.

The scenario of the conflict of the ideologies of communism versus capitalism divided the world countries, by and large, into two blocks i.e., the capitalist block and the communist block. The communist block of countries consisted of the USSR, East European countries and China. Whereas the rest of the world, by and large, consisting of Western European countries, Scandinavian countries, the USA, Canada, Australia, Japan, India and other South East Asian countries relied on the somewhat democratic, liberal and capitalistic principles. In other words, the two blocks in the world context were maintaining the balance of economic and political power.

The experience of the socialist or the communist countries demonstrated that while on the one hand the people in these countries did not have/enjoy the freedom of human beings particularly in the form of freedom of speech, expression, and movement, on the other hand the

common people in these countries did not have enough food, clothing and shelter as compared to the people in the Western world, the USA and Japan etc. The common people in these countries became restive and frustrated from the kind of economic system. The dissatisfaction from the type of economic system was further accentuated by the modern means of communications and the media particularly the television. Moreover, the world market economic forces started their impact on the political and economic systems of these countries.[1] Thus, we witnessed the collapse of the USSR into various countries along with the changes in the economic system. Even the Eastern European countries had to transform their political and economic systems. China, which was hitherto considered to be a restricted economy, started opening up its economy and realized the importance of competition in the business market of the world.

After the collapse of the USSR, by and large, the world became unipolar with the economic sovereignty of the USA. This change brought the popularity of the slogan of *Globalization* and the *free market economy* in the modern business world. Globalization meant to make all the countries including the LDC's and the developed countries to follow uniformly the principles of free market economy, competition without restrictions, and to run the business of the corporate world on the global basis rather than based on the needs and requirements of the LDC's. We know that the multinational corporations mainly belong to the USA, the Western countries, and Japan etc. With the opening of the economies of various countries of the world on free market principles, the MNC's started their corporate business more vigorously particularly in the LDC's including Indonesia, Thailand, South Korea and others in the Southeast Asian region and India.

II. The Impact of Free Market Economy on the Southeast Asian Countries (Economic Trends)

The impact of free market economy on southeast Asian region was a new form of Imperialism or economic colonization started emerging. In this sort of colonization the countries like the USA, Japan and other developed countries started finding the selected countries among the developing countries like Taiwan, South Korea, Indonesia, Malaysia and Philippines to be used as captive or satellite production centers and to produce goods needed by the developed countries by exploiting cheap labour and raw materials available at much less than the global prices.[2] The result of such free market economy was the flight of profits and capital to the developed countries like the U.S.A., Japan and other western countries. The result in monetary terms was the strengthening of the *U.S. Dollar*

and the Japanese *Yen* in the world business market.

The consequent chain reaction was the recession of the economies with declining GDP of the Southeast Asian countries. Thailand had to devalue its currency drastically in June last year. It crept into other countries of Southeast Asia and now almost all the countries of the Southeast Asian region have negative growth rate, which is expected to aggravate further in future.[3]

The end result is that in real monetary value the income in the Southeast Asian countries has become almost half in the world business context because the dollar is now double the rate as compared to the currencies in these countries.[4] Even the national currencies GDP has shrunk substantially in these Southeast Asian countries.[5]

According to an eminent economist of India D.H. Pai Panandikar, the trend in near future in Southeast Asian countries will be as follows:

> Indonesia's GDP will fall 15 per cent and that of Thailand and South Korea about 7 per cent. Malaysia will not be any better. Perhaps Philippines may get off lightly.[6]

This is confirmed by DKB Hong Kong, a major investment bank, report predicts negative growth this year of 10 per cent for Thailand and Indonesia faces negative growth of 16.6 per cent this year.[7]

China is also reported to miss its official growth target of 8 per cent hitting only 7.3 per cent instead of the official target.[8]

Hong Kong will record negative growth in gross domestic product of 4.9 per cent this year.[9]

In this report DKB economists Geoffrey Barker and Qu Hougbin have observed that "Deteriorating global demand will rob Asian countries of their export engine."[10]

Until recently the expert economic observers had seen the Asian financial crisis as a localized problem. But the DKB report had opined "But it is now all too obvious that malaise is not limited to Asia or indeed to emerging markets."[11]

The dangerous effect of recession and declining GDP in the Southeast Asian countries is not merely a figment of imagination but appears to be a reality because now a days countries have become more interdependent on one another than any other period in the past history. The globe is very small with the modern means of communications and international business through the corporate world that the impact of one country's

economy on the other countries is immediately realized.

Investors of capital carry the evil of recession, which is carried by individuals and financial Institutions and other MNC's. Now a days with free market economy and with free capital convertibility of currencies, the investors want to invest more in those countries, which gives them the maximum profits. The investors do not bother about distances of countries and they prefer to have international assets in the profitable countries only. Thus the chain reaction of the effect of recession in one country of Southeast Asia is bound to have the effect of recession in other countries of the region as well as the rest of the world.

The impact of free market economy on the common man in the Southeast Asian countries is because of the inflationary rate of prices of food articles. The recession and the inflationary prices are bound to affect the common man. The result will be that rich will become more rich and the poor will become more poor. The inequality in incomes is going to affect the equilibrium of the society and may in legal terms increase the crime rate in the society. The alarming trend is certainly a cause of serious concern for the Southeast Asian countries. Moreover, unemployment is going to increase rapidly in Southeast Asian countries by downsizing the employment in the corporate business sector.

Because of the fall in real income of people in Southeast Asia, the demand of the goods and services will decline resulting into less production of goods. As the business is carried by the corporate world mainly it is also likely that many of the business corporations may either close their business or at least slow down their business ventures resulting in the decline in GDP in these countries.

III. The Economic Trends in Other Countries

The impact of economic crisis in Southeast Asian countries is not limited to them only. The effect can be seen all over the world. Rather the world scenario today is that of recession. The experts are analyzing that now there is a global recession and it is bound to continue for some time. Some experts even feel that the world economic scenario may not go that far as in the year of 1929 of world recession and depression causing bankruptcy and huge unemployment.[12]

There is recession in Russia and it has not confined only to Russia and the Eastern European countries only. Similarly the impact of the Southeast Asian countries is not confined to Southeast Asian countries alone. The process of recession has affected, in one way or the other, the other countries of the world including the USA, Japan, the Western countries; even Australia will be affected by the backlash of recession of the

Southeast Asian countries.

It is observed that Japan because of large investments in the Southeast Asian countries had to suffer great losses. Japanese banks were left to hold on large NPA's and the Japanese companies in these countries had to suffer huge losses. This process of recession in Japan started from the last quarter of the last year in 1997. This has led to a considerable decline of GDP in Japan also.

The East Asian countries, which have about 20 per cent share in the world GDP, which are in the crisis of recession, have had the impact of pulling other countries down. Many more countries are expected to suffer the backlash of recession including the USA and Australia.

In Russia the economy was made free and from the time it jumped into free market economy it suffered the set back because it changed it's economy without sufficient measures to make it workable. It is reported that last year GDP in Russia declined and income decreased 4.5 per cent causing high inflation rate, prices increased 21.5 per cent. Thus Russia is also in trouble economically and is also contributory to the world recession.

India too has witnessed the recessionary pressure with the growth rate declining to about 4 per cent and the dollar is now above forty Rupees as compared to about 34 Rupees last year. However, India has not been forced to devalue its currency because the Indian economy though is quite a free economy, by and large, yet it is still a planned economy. There is no free capital convertibility and there are restrictions and control on the foreign exchange to the outside world. Our Government through planning has the capacity to determine the nature and extent to which consumerism will be allowed, and how the savings should be encouraged. The economy has also the minimum control as to how the foreign investments should be directed towards, selective, important and desired channel of economy. India is a big country and can bear the shocks easily.

One learned author has observed:

> Despite the economic sanctions, despite the paralysis of the government's economic policy, despite the absence of industrial recovery, and despite stagnant exports, India is beginning to attract the interest of foreign investors once more. It is doing so not because anything is particularly right here but things are going so badly elsewhere.[13]

In the light of the above observation of the learned writer it can be assumed that inspite of the effect of recession Indian economy is likely to

recover soon. India is likely to increase its GDP by 6 to 7 per cent in the coming year.

The International Monetary Fund (IMF) has painted a very sombre picture in it's latest "World Economic Outlook" which has pointed out a deteriorating picture of world economic condition because of the recession in many Asian developing and emerging economies and Japan. It also points out that the Russian financial crisis has raised the spectre of default.[14] Whereas the World Bank points out a more positive looking outlook in its report on the East Asia. Though it acknowledges that the crisis in East Asia is unique in that "it fused a currency crisis, and regional financial panic into a particularly virulent strand of economic malady."[15]

The basic and fundamental cause of recession and currencies crisis in the emerging LDC's countries, particularly Southeast Asian countries and Russia, lies in blindly following the principles of free market economy. These countries did not have proper workable conditions and some minimum controls on the flow of foreign exchange to the developed countries through the MNC's. The crisis multiplies because reliance is more on the international loans for the economic development of these countries. Many countries have not repaid their loans. Thus foreign investors are even afraid to invest in these countries at least for some years before they see the recovery of the economies.

Healthy sign is that Malaysia and Russia have abandoned the convertibility of currencies of ringgnit to varying degrees. The unrestricted convertibility of currencies in these emerging countries contributes towards the flight of the capital in hard currencies reserves. Such a trend of depleting foreign exchange reserves ruins the economies of the LDC's.

IV. World's Financial Scenario

The USA which is a joint economy generates about one fourth of the world income. The impact of the USA through it's MNCs is not only felt on the LDCs or emerging countries like the Southeast Asian countries but is also significant on the developed countries of the west as well as Japan. Realizing the effects of the unipolar world that there is a union of European countries and they will have a common currency called *Euro*. Such a union with a common currency will, to a great extent, do away with the monopoly of dollar in this world. There is also a group of Oil Producing countries to protect their economic interests. However the group of oil producing countries is not on the strong and uniform currencies lines.

The point is that the monopoly of the dollar and the USA monopoly on the world economic and political scene should end. We should have

regional groupings like Asian countries, Russia and East European countries, African countries and Oil Producing countries like Western European countries to combat the monopolistic domination of any country or any group of countries on the world economic and business affairs. However, it is very difficult because of individual countries political, social and economic problems within the group of countries.

However, the IMF Managing Director Michael Camdessus has rightly foreseen that there will be multipolar world in the monetary field, with common European currency, the Euro, which will have the worth, standing and capacity as a super-currency along with the US dollar.[16] He has also said that apart from Euro, the Japanese Yen will also have an important role to play particularly after the strengthening of the Japanese financial system.[17]

World Bank's Chief economist Joseph Sliglitz has severely criticized very recently IMF's handling of global crisis. He has severely criticized the IMF for asking financially strapped countries to adopt austerity measures that have led to an increase in poverty and human misery.[18] In fact the world seems to be in favour of a proper warning system before the financial crisis begins. In this context G-22 members rightly expressed the need for greater financial disclosures. Obviously the warnings given by the IMF were not timely enough to prevent the crisis.[19] In this connection this writer is of the view that there is a need for a global regulatory authority with an appropriate advance warning system in today's world of huge financial flow. IMF and World Bank have not played the desired role in this context. A noted economist Milton Friedman has blamed interference of the IMF and other agencies for the current financial crisis and said it should be abolished as they harm more than they do good. He pointed out that present crisis is because of Government's intervention in the market both internally via loans, subsidies or taxes and externally via the IMF and other agencies.[20]

It is revealing to see the latest figures from the Institute of International Finance (IIF) that the emerging economies in the Asia pacific region received 161 billion dollars in private flows in 1996. This flow not only dropped dramatically and disastrously to 59.7 billion dollars in 1997, but it is also predicted to slump to a mere 19.4 billion dollars in 1998.[21] Such is the alarming trend of the Southeast Asian countries in terms of foreign investment in these countries from the private sources. Therefore planning and financial and economic policy of these emerging countries has to be very strategically evolved by these countries in order to attract the private foreign investors.

V. Some Corrective Measures for Southeast Asian Economic Crisis

Strategic planning is a must for the Southeast Asian countries to recover from the malaise of economic crisis for accelerating their GDP's and in financial spheres. To some extent the Indian economic planning and financial controls through proper regulations of the foreign exchange reserves and foreign investments might be helpful for these countries. Although they may continue to have liberalization and liberalized economy yet they should not continue with complete free market economy on the principle of globalization. It should not be free for all in the Economic Development and financial management. They should adopt regulatory liberalized free market economy. These countries will have to set up their priorities for the economic growth and learn to determine their priorities of the areas in which to invest particularly the foreign investment.

The economic crisis in these countries is not merely of finance and financial mismanagement though these are certainly contributory to the crisis. The fundamental cause of the economic crisis in these countries is the tendency to use the inflows for financing import of consumer goods. Giving up foreign capital-led growth and instead concentrating putting back the domestic capital at the centrestage can solve this.

One of the noted economists in India has opined that thus far the model of development in these countries was to attract foreign capital inflows, build production capacity and exports to the industrialized countries. The presumption of these countries was that demand in the industrial countries would continue indefinitely. This is where the basic error lies for the economic crisis in Southeast Asian countries.[22]

According to UNCTAD's Trade and Development Report 1998, the GDP growth in the newly industrialized countries i.e. Korea, Singapore and Taiwan was affected "due to a sharp fall of world demand and prices for such products as electronics, semiconductors, and petrochemicals."[23] It is in the decline in the demand for the products produced in the Southeast Asian countries lies the root cause of the economic crisis.

The IMF figures had forecast a growth rate of world output of 4.3 per cent in World Economic Outlook of October 1997. The IMF has scaled down the growth of the world output to 2 per cent, in 1998. This points out the weak analysis of the IMF. If IMF could not predict accurately the decline in the world demand then we cannot totally blame the Asian banks and financial institutions to have failed to anticipate the decline in the world demand of the products of these countries. Nonetheless it does not mean the Asian banks can be absolved of their responsibility. Indeed even

the Asian Banks and the financial institutions have to improve their governance under the strict monetary control of the National Banks in the respective countries.

Thus far in these countries the foreign capital inflows investments were used more for import of consumer goods. Henceforth these countries will have to use the foreign capital inflows only in investing in the priority sectors of the economy to be determined by each respective country.

The Southeast Asian countries' strategy of foreign capital investment flows and exported growth has to be drastically changed once for all. Instead these countries will have to increase domestic demand. In the absence of a buoyant world demand these countries have to look for the invert looking strategies, in order to drastically increase the domestic demand level of the products.

Jhunjhunwala, a noted economist of India, suggests that these countries should adopt complete debt standstill. He goes on to opine let the foreign investors lose money "after all, they are as much a party to the wrong investment decision as are the domestic bankers".[24]

He further suggests that then the task would be to balance the trade gap. Imposing higher import tariffs and using for the cross-subsidized exports should do this. This strategy would be akin to the China promoting her exports by 'Administrative measures'. This would certainly revive domestic production. Soon as the domestic production pickup, the wage fund will expand and create domestic demand of products in these countries. Such a step is likely to lead to the revival of the domestic economy out of the economic crisis being faced by these countries.[25]

Even to some extent the working of the corporate sector has to improve it's governance by reducing as much use of foreign capital as possible so that it does not cause strain on the domestic economy of these countries. Moreover, the Banks should function with transparency and seriously understanding the economic crisis that has crept in and should work under the control of the National Bank of the respective countries.

Last but not the least it is suggested that, if possible, the Asian countries should be able to develop the system of Asian currency reserve system. The present financial scenario is that the Asian reserves and capital flight is to the USA. This is resulting in the appreciation of the dollars every day with the parallel decline of the Asian currencies. If the Asian reserve is able to pull it's reserves from the dollar and spread it within Asia, then the dollar is bound to decline and the Asian currencies would correspondingly appreciate. Such a step would help ultimately for these countries debt

repayment a bit easier.[26]

VI. Conclusions

The Southeast Asian countries, by and large, by purely following the free market economy and globalization principles have led themselves into a deep mess of economic recession and crisis. One of the fundamental causes of such recession in the economies of these countries was the decline in the world demand of their products in the industrialized countries. As the figures have been shown in this paper even the IMF could not predict the declining trend of the world demand and consequent decline in the GDP growth of the Southeast Asian countries. Some experts have started doubting the role of the International Monetary Fund to predict such kind of economic crisis in the world. Some even go to the extent of saying that IMF should be abolished when it is not able to perform its functions properly. However, certainly the global economic crisis has made us realize that we do need an international regulatory authority to monitor the world economy with proper kind of warning system so that such crisis should be prevented before the crisis occurs in any country.

This writer has suggested some solutions for the quick recovery of the Southeast Asian countries out of the mess of the economic crisis of recession in order to generate the economic growth in these countries. The measures include to do away with the purely export oriented growth of the economy in order to resuscitate the growth on the basis of the domestic demand in these countries. It is also suggested, *inter alia*, that the need of the hour in these countries is to develop and create Asian currencies reserve system so that there is depreciation of the dollar and appreciation of the Asian currencies. If some of the suggestions as listed in this paper are followed by the respective Southeast Asian countries, the writer is quite hopeful, that the Southeast Asian countries will be out of the crisis of the economy and their economies will surge soon.

Notes and References

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1. See Harish Chander, *Impact of Trade Union Movement on Capitalist and Socialist Societies-A Comparative Study of Trade Union Movement in the* USA *and the* USSR, AICC Economic Review, June 15, 1967.
2. M.N. Buch, *Cock-eyed Economics*, The Hindustan Times, February 21, 1996. See also Harish Chander, *Reflections on Free Market Economy in India*, XVIII Delhi Law Review, 1996.
3. D.H. Pai Panandikar, *Global Recession*, The Hindustan Times, September 21, 1998 at 16.
4. *Ibid.*

5. *Ibid.*
6. *Ibid.*
7. Quoted in *Economy and Business*, THE HINDUSTAN TIMES, October 15, 1998 at 25.
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*
11. *Ibid.*
12. *Supra* n. 3.
13. Prem Shankar Jha, *The Economy: A Window of Opportunity*, THE HINDUSTAN TIMES, October 10, 1998 at 13.
14. Quoted by N.C. Menon, *Economy and Business*, THE HINDUSTAN TIMES, October 1, 1998 at 15.
15. *Ibid.*
16. N.C. Menon, *Business and Economy*, THE HINDUSTAN TIMES, October 10, 1998 at 15.
17. *Ibid.*
18. See *Editorial*, THE HINDUSTAN TIMES, October 10, 1998 at 13.
19. *Ibid.*
20. Quoted in *Economy and Business*, THE HINDUSTAN TIMES, October 15, 1998 at 23.
21. Quoted in N.C. Menon, *Economic Malaise: The Fund-Bank Divide*, THE HINDUSTAN TIMES, October 12, 1998 at 13.
22. See Bharat Jhunjhunwala, *Ways to Solve the Asian Crisis*, THE HINDUSTAN TIMES, October 13, 1998 at 13.
23. Quoted by Bharat Jhunjhunwala, *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*

INTERNATIONAL CRIMINAL COURT : TRIGGER MECHANISMS

*Gurdip Singh**

Many thought, no doubt, that the horrors of Second World War—the camps, the cruelty, the exterminations, the holocaust—could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time, this decade even, has shown us that man's capacity for evil knows no limits.

Kofi Annan
UN Secretary General

The concept of international criminal responsibility has recent origin. The Second World War witnessed the commission of grave crimes which shake the conscience of humanity. Millions of children, women and men have been victims of unimaginable atrocities; millions were killed or disabled; millions were uprooted from their homes; millions were gravely traumatized at the psychological level; millions of children were made orphans or lost all contact with their parents; young women were subjected to sexual violence. This led to the emergence of the concept of international criminal responsibility of the perpetrators of international crimes which were defined as crimes against peace, war crimes and crimes against humanity in the Charter of the International Military Tribunal.

International Law Commission, in 1948, initiated studies to explore the possibility of establishing a permanent international criminal court. However, no such court could be established due to prevailing political climate saturated with national rivalries and tensions. The commission of horrifying crimes against humanity in the form of genocide, ethnic cleansing and sexual violence against women in former Yugoslavia and Rwanda prompted the UN Security Concil to set up an *ad hoc* war crimes tribunal for former Yugoslavia in 1993 at the Hague and an *ad hoc* war crimes tribunal for Rwanda in 1994 at Arusha, Tanzania. Both the *ad hoc* tribunals have issued indictments and arrest warrants. The work of the Hague Tribunal and Arusha Tribunal demonstrates that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible and credible. Both

tribunals have adopted rules of procedure and evidence which now form the vital core of an international code of criminal procedure and evidence and have created positive environment for the establishment of an international criminal court.[1] On 17 July 1998, a statute for the establishment of an international criminal court was adopted at the UN Diplomatic Conference held at Rome to set up International Criminal Court at the Hague.

I. Trigger Mechanisms

One of the core issues concerning the International Criminal Court is the question of mechanism to trigger the jurisdiction of the Court. In a situation where crimes such as genocide, crimes against humanity, or war crimes covered by the Statute have been committed, when would the Court have jurisdiction to try persons alleged to be responsible for these crimes? Who has the *locus standi* to invoke the jurisdiction of the Court? Should Security Council be authorized to exclusively invoke the jurisdiction of the Court? Should the General Assembly of the United Nations have *locus standi* to trigger the jurisdiction of the Court? Should states also have *locus standi* to invoke the jurisdiction of the Court? Should inter-governmental organizations and the non-governmental organizations (NGO's) also have the *locus standi* to invoke the jurisdiction of the Court? Should individuals be empowered to trigger the jurisdiction of the Court?

The Statute provides that the Court may exercise its jurisdiction with respect to a crime covered by the Statute if a State Party refers to the prosecutor a situation in which one or more crimes appear to have been committed or the Security Council, acting under Chapter VII of the Charter, refers to the prosecutor a situation in which one or more such crimes appear to have been committed or the prosecutor has initiated an investigation in respect of such a crime.[2]

A. Referral by a State Party

The first trigger mechanism of the Statute of the International Criminal Court that could activate jurisdiction of the Court relates to a complaint lodged by a State Party or State Parties. A State Party has the *locus standi* to lodge a complaint with the prosecutor and request him to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of the alleged crime.[3] As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as in available to the State referring the situation.[4]

B. Referral by the Security Council

The second trigger mechanism of the Statute of the International Criminal Court enables the Security Council, acting under Chapter VII of the UN Charter, to refer a situation to the prosecutor. The provision regarding the reference to the prosecutor by the Security Council has been the subject of extensive debate. It was proposed that in any situation with which the Security Council is involved, the Security Council should first grant permission to the Court before the Court could act. However, some States expressed concern regarding the political nature of the Security Council and the possible veto by one of the five permanent members to prevent the Court from taking action. Since most conflict situations in the world would likely be on the agenda of the Security Council, many believed that this provision could grant the Security Council tremendous control over the Court. The Statute puts the controversy to rest by enabling the Security Council, acting under Chapter VII of the UN Charter to refer a situation to the prosecutor.

The provision empowering the Security Council to refer a situation to the prosecutor differentiates the trigger mechanism of the International Criminal Court from the trigger mechanism of the International Court of Justice wherein Security Council has no *locus standi* to invoke the jurisdiction of the Court in contentious cases involving States. In the case of International Court of Justice, the Security Council has the procedural capacity to seek the advisory opinion of the Court.

C. Trigger by the Prosecutor

The third trigger mechanism of the Statute of the International Criminal Court allows the prosecutor to initiate investigations *proprio motu* on the basis of information on crimes covered within the jurisdiction of the Court.[5] The prosecutor shall analyse the seriousness of the information received and for this purpose, the prosecutor may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that the prosecutor deems appropriate, and may receive written or oral testimony at the seat of the Court.[6] If the prosecutor concludes that there is a reasonable basis to proceed with an investigation, he shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.[7] Victims may make representations to the Pre-Trial Chamber.[8] If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the

investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of the case.[9] The refusal of the request by the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the prosecutor based on new facts or evidence regarding the same situation.[10] If after the preliminary examination, the prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he shall inform those who provided the information.[11] However, this shall not preclude the prosecutor from considering further information submitted to him regarding the same situation in the light of new facts or evidence.[12]

The trigger mechanism by the prosecutor takes account of the controversy in the UN Conference on the Establishment of the International Criminal Court on the issue of allowing a prosecutor to bring a matter to the Court. On the one hand, it was pointed out that an independent prosecutor was necessary for an independent and effective court. On the other hand, it was felt that in order to prevent abuse of power, the prosecutor's role should be checked by an independent chamber of the court. The Statute provides for the establishment of a Pre-Trial Chamber to check the prosecutor's role and to prevent abuse of power.

II. Deferral of Investigation or Prosecution

The Statute of the International Criminal Court assigns the central role to the Security Council in the mechanisms to trigger the jurisdiction of the Court. No investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect.[13] Furthermore, the Security Council also has the power to renew the request to defer the commencement of the investigation or prosecution.[14] The pivotal role of the Security Council in the investigation or prosecution proceedings may be justified in view of the primary responsibility of the Security Council for the maintenance of the international peace and security. One cannot, however, lose sight of the implications of such a commanding role of the Security Council on the judicial independence and effectiveness of the Court.

III. Issues of Admissibility

A. Inadmissibility

The Court shall determine that a case is inadmissible where:[15]

(*a*) the case is being investigated or prosecuted by a State which has jurisdiction over it;

(*b*) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned;

(*c*) the person concerned has already been tried for conduct which is the subject matter of the complaint;

(*d*) the case is not of sufficient gravity to justify further action by the Court.

B. Preliminary Rulings Regarding Admissibility

When a situation has been referred to the Court and the prosecutor has determined that there would be a reasonable basis to commence an investigation, the prosecutor shall notify all States Parties.[16] Within a month of the receipt of the notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction.[17] At the request of that State, the prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the prosecutor, decides to authorize the investigation.[18] However, the State concerned or the prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber.[19]

C. Challenges to the Jurisdiction of the Court or the Admissibility of the Case

The Court shall satisfy itself that it has jurisdiction in any case brought before it.[20] The Court may, on its own motion, determine the admissibility of a case.[21] Challenges to the jurisdiction of the Court or to the admissibility of the case may be made by:[22]

(*a*) an accused or a person for whom a warrant of arrest or a summons to appear has been issued;

(*b*) a State which has jurisdiction over a case on the ground that it is investigating or prosecuting the case or has investigated or prosecuted;

(*c*) a State from which acceptance of jurisdiction is required.

The prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.[23]

IV. The Trial

The trial of the accused shall be by the Trial Chamber which shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the respect of the victims and witnesses.[24] At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford the accused the opportunity to make an admission of guilt or to plead not guilty. Article 67 of the Statute protects the rights of the accused by providing that the accused shall be entitled to a public hearing and to a fair hearing conducted impartially.

Everyone shall be presumed innocent until proved guilty. The onus is on the Prosecutor to prove the guilt of the accused.[25]

A. The Rights of the Victims and Witnesses

Article 68 of the Statute of the International Criminal Court addresses several aspects of the rights of the victims. The Court is required to take adequate measures to protect victims and witnesses. This is essential. Since victims often fear retaliation if they testify against the accused, the Statute provides that their physical protection should be guaranteed by the Court through the provision of adequate privacy and security.

The Statute also states that the identities of the victims and witnesses should not be disclosed especially when a fear of reprisal exists. To this end, the Statute makes an exception to the principle of public hearing and provides that the Court can conduct closed proceedings or allow presentation of evidence by electronic or other special means. An accused who is a minor at the time of the perpetration of the acts or a victim of sexual violence can request in camera hearings.

Although testifying can be extremely difficult for the victims, the Statute recommends that they participate in the judicial process. It is widely acknowledged that speaking about the experience, however painful, is a part of a rehabilitation and healing process. This therapeutic process allows the victims to hear directly why the offence was committed and to relate their personal suffering.

B. Right to Compensation, Restitution and Rehabilitation

The issue of reparation to the victims has been addressed in several United Nations human rights instruments, including the Universal Declaration of Human Rights. The Convention against Torture also sets out in detail the right to reparation for the survivors of torture and payments have

been made through a United Nations Voluntary Fund for the victims of torture. Article 75 of the Statute addresses the issue of reparation to the victims. It requires the Court to establish principles relating to reparations to victims in the form of restitution, compensation, and rehabilitation. The Court may, either upon request or its own motion in exceptional circumstances determine the scope and extent of any damage, loss or injury to victims and may order directly against a convicted person appropriate reparation. Where appropriate, the Court may order for reparation to be made through Trust Fund established under the Statute for the benefit of victims of crimes and families of such victims.

V. Conclusion

International crimes are subject to universal jurisdiction in addition to national jurisdictions.[26] Therefore, International Criminal Court's jurisdiction is complementary to national jurisdictions. Accordingly, International Criminal Court will never be able to try more than a small number of defendants. Its institutional importance lies in denying impunity to those responsible for serious violations of international humanitarian law, in fostering real deterrence of major violations and in providing an effective criminal jurisdiction when state prosecutorial or judicial systems fail to investigate and prosecute in conformity with standards stated in the Statute.

The principle of individual criminal responsibility clouds the traditional view that individual is not subject of international law. International Criminal Court has jurisdiction over natural persons who commit crimes covered within the jurisdiction of the Court.[27] A person who commits a crime covered within the jurisdiction of the Court is individually responsible and liable for punishment. The Statute imposes individual criminal responsibility on persons who commit international crimes covered within the jurisdiction of the Court. However, individuals do not have the procedural capacity to trigger the jurisdiction of the Court. The procedural capacity of the individuals, under the Statute of the International Criminal Court is not at par with States who have *locus standi* to trigger the jurisdiction of the Court. In addition to States, UN Security Council and the prosecutor have the *locus standi* to trigger the jurisdiction of the Court. The General Assembly, principal deliberative organ of the United Nations, has no power to invoke the jurisdiction of the Court. The inter-governmental and Non-governmental Organizations (NGO's) also have no power to invoke the jurisdiction of the Court.

International criminal justice demands that General Assembly of the United Nations should be empowered to trigger the jurisdiction of the

International Criminal Court in view of the special privilege of the permanent members in the Security Council. The provision of the Statute empowering the Security Council to invoke the jurisdiction of the Court may, in practice, be frustrated by the exercise of veto by a permanent member. In case of failure of the Security Council to act under Chapter VII of the UN Charter for invoking the jurisdiction of the Court, the Charter makes General Assembly responsible for complying with the enforcement obligations of the Security Council. The lack of procedural capacity of the General Assembly in the trigger mechanism of the Court creates legal vaccum. The *ratione personae* jurisdiction of the International Criminal Court merits expansion to cover the General Assembly of the United Nations especially in cases where Security Council fails to act under Chapter VII of the Charter in invoking the jurisdiction of the Court.

International criminal law is focussed at bringing the perpetrators of international crimes to justice and also to bring justice to the victims. This goal would be accomplished only if the individuals, inter-governmental and non-governmental organizations have the power to ignite the jurisdiction of the International Criminal Court. The procedural capacity of the individuals should be at par with the States in the administration of international criminal justice. The very reason that international crimes occur is that the international community has so far been unable to demonstrate that those responsible would be brought to justice. Until the day when the international community can demonstrate that those who ultimately bear the responsibility for violations of the most fundamental rules for the protection of human beings are brought to justice, history will repeat itself.

NOTES AND REFERENCES

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1. Thedor Meron, *War Crimes Law Comes of Age*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW, 1998, 462 at 463.
2. Article 13 of the STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 1998.
3. *Id.*, Article 14, paragraph 1.
4. *Id.*, Article 14, paragraph 2.
5. *Id.*, Article 15, paragraph 1.
6. *Id.*, Article 15, paragraph 2.
7. *Id.*, Article 15, paragraph 3
8. *Ibid.*
9. *Id.*, Article 15, paragraph 4.
10. *Id.*, Article 15, paragraph 5.

11. *Id.*, Article 15, paragraph 6.
12. *Ibid.*
13. *Id.*, Article 16.
14. *Ibid.*
15. *Id.*, Article 17.
16. *Id.*, Article 18, paragraph 1.
17. *Id.*, Article 18, paragraph 2.
18. *Ibid.*
19. *Id.*, Article 18, paragraph 4.
20. *Id.*, Article 19, paragraph 1.
21. *Ibid.*
22. *Id.*, Article 19, paragraph 2.
23. *Id.*, Article 19, paragraph 3.
24. *Id*, Article 64.
25. *Id.*, Article 66.
26. Gurdip Singh, *International Criminal Court: Ratione Materiae Jurisdiction*, 2 INDIAN JOURNAL OF CONTEMPORARY LAW, 1998 , 1 at 3.
27. Christopher Keith Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW, 1998 at 331.

SURROGACY : LEGAL IMPLICATIONS

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I. INTRODUCTION

Irrespective of gender differences, every person has a natural right to his/her body. It forms a part of the right to life which is guaranteed by Article 21 of the Constitution of India. Procreation of children is a part of this right to life. There are revolutionary developments in medical science with significant breakthroughs in reproductive technology. Any scientific advancement is to serve mankind. Test-tube babies, artificial insemination, in-vitro fertilization, sex selection, surrogate motherhood are some of the new expressions reflecting the novel aspects of modern life posing a new challenge to the legal control of social behaviour. These new reproductive techniques have a far reaching impact on the ethical and moral standards of the society, especially the marital relations between spouses. This revolutionary medical advancement tends to offer the woman a freedom of choice to have or not to have or to space out or to design her own child or a child for an infertile group. Amongst these medical advancements the most controversial and debated issue has been the concept of "Surrogate Motherhood".

Due to increased medication, sometimes unwanted, and wide spread chemical pollution of environment affecting the general strengths of a human being, infertility is increasing alarmingly in modern society. Hitherto, adoption was the only method available to a childless couple till medical science found artificial insemination and in-vitro fertilization as the alternative processes to have a child through non-coital reproductive technique. The other natural way is coital reproduction through another woman, which may not be acceptable to pro-ethical altruistic puritans.

II. MEANING OF SURROGACY

Surrogacy is the practice whereby a woman carries a child for another with the intention that the child should be handed over after birth either for a fee or voluntarily. This carrying of a child may take different forms. A mother who cannot bear a child for herself may commission another woman to carry a child for her. The mother who asks another to carry the pregnancy for her is called "Commissioning Mother", and the woman who

pregnancy for her is called "Commissioning Mother", and the woman who agrees to bear the child in her womb is called the "Carrying Mother". The commissioning mother may provide the egg, so she is called the "Genetic Mother" also. The genetic father is the husband of the commissioning mother or an anonymous donor. The child's conception and birth involves several combinations of persons in different contexts. Surrogacy involves artificial insemination, where the carrying mother is the genetic mother inseminated with the semen of the infertile woman's husband. In case the egg and semen come from the commissioning couple through in-vitro fertilization and the resultant embryo is transferred to and implanted in the carrying mother, it is surrogacy involving artificial insemination. These are some of the possible combinations of persons who are relevant to the child's conception and birth. The advancement of science provided an alternative to reproduction through sexual intercourse, making surrogate motherhood a common form of non-coital reproduction (non-sexual reproduction).

"Surrogate Mother" is the term generally used to describe a gestating mother, who lets her womb out. According to the Oxford Dictionary, a surrogate is a substitute for a person in a specific role or office. It has explained it like this "a person acting the role of mother, a woman who bears a child on behalf of another woman from her own egg fertilized by the other woman's partner". Surrogate motherhood is not a treatment for the historical problem of infertility, but it is a means for procuring a child genetically related to atleast one person of the childless couple.

If the surrogacy involves payment of money, it is termed as "Commercial Surrogacy", if not, it is called "Altruistic Surrogacy". Altruistic Surrogacy arrangements arise out of friendship involving only friends and/or relatives.

III. Reasons for Surrogacy

A woman who cannot retain the conceived foetus due to a history of spontaneous abortion may demand her partner to go in for this arrangement to fulfil her dream of having a child. Sometimes kidney diseases or multiple sclerosis may threaten the very life of the pregnant woman.[1] In the advanced mechanical and commercial world, it may not be unimaginable for a figure conscious woman to desire that some other woman should bear a child for her. Career may also be cited as a reason for encouraging the husband to go in for a surrogate arrangement.

In practice two methods of surrogate motherhood are employed:

1. One commissioning father donates a sperm which is introduced by insemination for in-vitro fertilization with the oocytes of a woman, the

surrogate mother. The insemination can be natural or artificial.[2] The custody of the child will be surrendered to the biological father, who donated the sperm. This is the common method of surrogate motherhood.[3] This is called partial surrogacy, because the genetic origin is found in one of the commissioning parents.

2. The second form of surrogate motherhood is also through in-vitro fertilization, but preceded by transplantation of embryo from a woman's ovum after it is fertilized in vitro, into the uterus of the surrogate mother. The child will be given back to the donor of the ovum.

This procedure of utilising in-vitro-fertilization (IVF) has been termed 'full' surrogacy since the commissioning parents may have provided all the genetic material for the child. IVF surrogacy is comparatively rare. For example, the first recorded birth in Australia took place in 1988.[4] Between 1989 and 1991 eleven requests for IVF surrogacy were made to the Monash IVF programme[5] and in 1994 a failed attempt at such a procedure in Victoria was reported.[6]

IV. Historical Background

Surrogate motherhood was first reported from Britain on 4th January, 1985. For $7475, Kim Cotton agreed to bear a child. She was a 28 year old married woman with two children. She was inseminated with the hiring husband's sperm for an American couple. Within hours of the birth, the Social Service Director, Alan Gorst, the Council Authority in North London borough of Barnet, said the Council was responsible for the welfare of all the babies born in the area and opined that any money transaction involving a child would be unlawful.[7]

The report of the 16 member Committee of Enquiry chaired by Dame Mary Warnock, appointed by the Health Department in UK in 1982 emphasized that sale of a child for money consideration is inherent in nearly all cases of surrogacy. However, the Committee recommended legal recognition of heterologous artificial insemination and setting up of a statutory body to monitor infertility services and in-vitro-fertilization.[8]

V. Misnomer of Surrogacy

A Canadian writer Suzanne Rossel Scorsone says that the term "surrogate" in this sort of case is actually a misnomer. A "surrogate" is a "delegate" or a "proxy", whereas the one contracted woman is, infact, the genetic and biological mother of the child and surrogate to no one.[9] A newer form, gestational surrogacy uses in-vitro-fertilization to implant an embryo conceived from the ovum and sperm of the contracting couple in a woman who carries and nourishes a child who is not genetically related

parents at birth.

If anyone is a surrogate mother, it is the "social" mother.[10] According to Dr. Poornima Advani, Consulting Physical Therapist and a Doctorate in criminal law,[11] A procedure meant to provide the missing ingredient and yield succor to female member unable to carry a foetus to full term, has been misused, ill used and commercialised raising queer issues regarding the rights of a third party involved in the process.... Its misuse by the affluent who desire to have their genetic child coupled with the luxury of the wife not having to bear the pains of procreation has popularised the procedure more than it was intended for.

With women coming forward to receive an embryo to surrender her entire instinct of motherly love, the most sublime and divine of emotions that human beings have ever known or shall ever fathom hereafter, the question arises is this what the Almighty had created Mother's love for?[12]

Commercialisation of the surrogacy facility has allowed a free play for brokers and service agencies who advertise in the Classifieds columns of the newspapers. One such advertisement found in the "Pioneer" reads wanted motherhood on loan for a happy, educated couple. Those separated or unmarried but adult, may please contact.... Married women should have the consent of the husband. Adequate compensation. Baroda women first preference.[13]

Another advertisement talked about very large compensation. It said, 'wanted surrogate mother to bear a child for a young, rich good looking Brahmin couple. Very large compensation. If required comfortable and secure future life assured....'[14] It is expected that in near future one may find a column in the classified ads "Womb for sale" or "Womb for lease". Those giving advertisements may even want positive genetic features like good height, characteristic features, beautiful teeth line and a fair complexion.

VI. Legal Controls in Different Countries

A. USA

Regulation of surrogate arrangements vary from state to state. Nevada amended its Adoptive Statutes in 1988 but failed to specifically address the issue of surrogacy contracts. However, there is a reference in this amendment to "Illegal Surrogacy Contracts". Lousiana passed a legislation declaring surrogacy contracts null, void and unenforceable. It does not provide penalties for violation. Indiana passed a law in 1988 which declared all surrogacy agreements, written or oral, which provide compensation to be unenforceable. It does not criminalise them.

Kentucky also enacted a law making compensation for surrogates and surrogate brokers illegal and surrogate contracts unenforceable. However, if there is no written contract and no compensation involved, surrogate agreements are permissible. Penalties for violation of this law came from the Child Selling Statutes and include $500 to $2000 fines and six months imprisonment. Washington D.C. prohibited surrogate parenting contracts.[15] In Minnesota, it is a criminal offence to enter into or arrange surrogacy contracts.

Michigan legislation (1988) provides 5 years imprisonment and $50,000 fines for surrogate brokers. It is a crime to enter into or assist in the formation of surrogacy contracts for compensation. Nebraska's law make surrogacy contracts null, void and unenforceable, if compensation is involved.[16] According to New Jersey Law, surrogacy contracts are not illegal but they are unenforceable.

American Bar Association recommended uniform treatment throughout the United States. According to Association, surrogacy can be accepted as an option for a married couple with an infertile wife, with a provision that upto 180 days of conception, surrogate mother can cancel the contract; after 180 days, the child belongs to the married couple, if the contract is not cancelled.[17]

B. Taiwan

Taiwan has imposed a total ban on all surrogacy arrangements. Health Minister Chan-Chi-Shean proposed to lift the ban on surrogate motherhood as his first major policy announcement on 12th September, 1997. According to the Department of Health, the surrogate mother contracts must be certified by the courts and cannot be used for commercial purposes. Also surrogate mothers must be healthy married women between the ages of 20-40 years who have previously had atleast one child of their own. Divorced women and those whose children have died are not eligible to be hired as surrogate mothers under the new policy. These restrictions aim to avoid disputes that would occur over possession of the new borns.

According to the Department of Health Statistics, one out of every seven Taiwan couples is unable to bear children. The condition is mainly a result of the female spouse being unable to conceive due to problems with her womb. In Taiwan, the procedure to surgically implant a sperm or a fertilized egg into the surrogate mother costs about $3500. Also the couple has to pay the surrogate mother's contract fee, the child birth expenses at the hospital and the related health care costs.[18]

C. UK

The Surrogacy Arrangement Act, 1985 prohibits commercial agencies from engaging women to act as surrogate mothers. Breach of prohibition is punishable with a fine upto £ 2000 or three months of imprisonment. Surrogate mothers and commissioning parents are exempt from liability. Advertising surrogacy services is punishable with a similar maximum fine.[19]

An order of the court made under section 30 of the Human Fertilization and Embryology Act, 1990 provides for a child to be treated in law as the child of the parties to a marriage if the child has been carried by a woman other than the wife as a result of human assisted reproduction. Application must be made within six months of the child's birth and the child's home must be with the husband and wife at the time of the application.[20]

After a series of cases that highlighted the way legislation was failing to prevent commercialisation, the Health Minister, Tessa Jowell announced on June 12, 1997 that laws to impose greater controls on surrogate motherhood would be considered by an independent inquiry to be set up by the Government. There was public concern over the case of Karen Roche, who was understood to have received £ 12000 in expenses from a Dutch couple to have a baby for them. She later decided to have the child and kept it. The Dutch family made the arrangement with the help of COTS, an organisation set up by kim Cotton, Britain's first surrogate for childless couples.[21]

D. Australia

Six states in Australia regulated surrogate motherhood by enactments. These laws distinguish commercial or paid surrogacy form unpaid or altruistic surrogacy, while providing penalties for paid surrogacy. There are different laws in these six states, yet they have similar objectives. The enactments (*i*) prevents advertising of surrogacy and emergence of commercial surrogacy agenies, such as those exist in the United States; and (*ii*) make surrogacy agreements unenforceable.

In Victoria, the Infertility (Medical Procedures) Act, 1984 (IMP Act) renders both commercial and altruistic surrogacy arrangements void and therefore unenforceable.[22] Criminal penalties are imposed upon the parties to a commercial surrogacy agreement. However, an exception in the IMP Act provides that IVF procedure can be accepted only when a recipient is unlikely to become pregnant.

But the commissioning couple who get a child through artificial insemination will come under the prohibition clause of section 10 (c) of the

Status of Children (Amendment) Act, 1984 (Victoria), which deems the resulting child of surrogacy agreement to be that of the surrogate mother and her husband, while denying the relationship between the child and the commissioning sperm donor.[23] As a consequence, commissioning couple have to resort to adoption or guardianship provisions.[24]

Section 30(2) of the Infertility (Medical Procedure) Act, 1984, prohibits surrogacy agreements involving any kind of payments or an attempt for it. It may include costs of medicine, treatment and even delivery leaving the surrogate mother in lurch. Even in case of altruistic surrogacy arrangement, the surrogate mother would be left with no assistance at all, as that would be treated as commercial element, which vitiates the arrangement.[25]

In the Australian capital territory, the Substitute Parent Agreements Act, 1994, renders substitute parent agreement void.[26] This Act allows payment of expenses of the surrogate mother in altruistic agreements, while making commercial surrogacy an offence. According to this Act, altriuistic surrogacy arrangements are unenforceable in a court of law. This means that while entering an altruistic surrogacy agreement is not an offence, the agreement is legally ineffective and the surrogate mother will be the legal mother as if no agreement has been made.[27]

According to Section 5(1) of the Artificial Conception Act, 1985, where a married woman gives birth to a child as the result of artificial conception (either artificial conception by donor or IVF) with the consent of her husband, the donor of the gametes will have no legal relationship with the child and the husband is presumed to be the father of the child. Therefore, the commissioning parents will have no claim over the child. In South Australia, a surrogacy contract[28] and a procuration contract [29] are illegal and void.[30] The Family Relationships Act, 1975, distinguishes between altruistic and commercial surrogacy agreements making it an offence to be involved in commercial surrogacy agreement[31] while not penalising parties to an altruistic surrogacy agreement. A Parliamentarian Honorable R.S. Ritson gave out the reasons:[32]

> One cannot legislate to prevent private agreements amongst people to arrange for the pregnancy and birth of a child, and for a friend to have custody of that child as if that person were the parent. I guess that it will go on to a certain extent, but we need to prevent some of the distressing and unhappy litigations that have occurred in the other countries and prevent in particular, the Transatlantic trade which has occurred, where agencies in the UK have advertised surrogacy services and people from

North America have crossed to England to take advantage of those services.

Queensland's Surrogate Parenthood Act, 1988 has similar provisions, making commercial surrogacy contracts void.[33] In Tasmania, both altruistic and commercial surrogacy contracts are void and unenforceable as per the Surrogacy Contracts Act, 1993.[34] It punishes only commercial contracts.[35]

Apart from the legal controls in the aforesaid countries, France has banned surrogate motherhood as violating bodies of women and subverting adoption whereas Germany has imposed a total ban on all forms of surrogacy.

VII. Surrogate Motherhood and Legal Implications

Offering money to the woman concerned for surrogacy may lead to an invasion of their private lives. It may, thus, result in exploitation of woman in a new way. Another question is whether renting out the womb is against public policy, if it permits transfer of money for the use of woman's organ, womb? The other problems including the health may develop. In case of abortion, several other complications may not be possible to be easily assessed, and every payment could be a point of dispute.

The carrying mother may develop affection towards the child born and may breach the agreement to retain the child, resulting in new questions of law. On the other hand, the commissioning couple may reject the baby born out of the carrying mother for any reason, including genetic defect, if any.

Apart from this, the surrogate mother may claim the custody rights or any other legal relationship with the child she is carrying or give birth to. The basic problem being that the sperm and ova are drawn from two different persons, as she is not the owner of the genetic material, her relationship cannot be easily described. Except the contractual relationship, the carrying mother has neither a role nor a right over the child according to the contract. But her physical motherhood and umbilical bond, if not genetic, with the child give new dimensions to the legal dispute, if any. Surrogacy remains a complex problem either in the presence or absence of any express provisions of law.

Apart from the above, surrogacy may result in several complex socio-legal problems in the family of the surrogate mother. At times, her marital home may be broken, or it may remain a social stigma for ever and may result in an identity crisis of the child. The commercial element of surrogacy on one hand and the genetic complexities on the other hand are

two issues which made "surrogacy" unique puzzle of law.

A. Nirmala Episode

Nirmala, a poor housewife from Chandigarh raised a basic issue, by asking the court to permit her to bear a child for a childless couple on consideration for a sum of money. Forced by poverty and illness of her husband, Nirmala (30 years old) asked the court to allow her to rent out her womb. For the first time in the history of the country the law was faced with a peculiar situation where the woman pleaded before the Chandigarh court to declare her proposal to "rent out her womb" as legal and constitutional. She also demanded "legitimacy" for the 'yet to be born child'. Her husband, Chand Ram was bedridden for a couple of years after being incapacitated by a paralytic attack following a bout of high fever. Faced with penury and no means to pay for the expensive medicines prescribed by the doctors for her husband, Nirmala agreed to enter into a contract with the childless couple. 'They approached me to bear his (a retired Air Force Officer) child and offered to pay Rs. 50,000/-, a decent place to live and sufficient food for the family' Nirmala said.[36]

If it is accepted that there is a need to regulate the possible demand from several women like Nirmala for a similar declaration due to different reasons, including poverty what type of controls can be imposed on surrogacy? Legislation on the subject is bound to be complicated. There are several problems like health hazards relating to pregnancy and medically assisted methods of conception such as IVF. Whether such legislation should surrogate conception through sexual intercourse, it will lead to several other questions like how many times a woman can rent out her womb etc. The rights and duties of men and women in the roles of commissioning couple and carrying woman have to be redefined. The rights of the child and the relations with the two couples and other aspects also need to be legally explained.

B. Baby M Case (1986)

This highly publicised case involves a custody dispute between a father and a surrogate mother. The father William Stern had contracted with the mother, Mary Beth Whitehead, to bear a child through artificial insemination. The contract provided the following terms:

Ms. Whitehead would assume the risks of pregnancy and child birth. She would submit to a psychiatric evaluation for which Mr. Stern would pay. Mr. Stern had the right to name the child. That in the event of death of Mr. Stern, the child would be placed in the custody of Mrs. Stern. Ms. Whitehead would not abort the child. In addition, she would undergo

aminocentesis and if the child were found to have genetic or congenital abnormality, it would be aborted. Mr. Stern would assume legal responsibility for the child once it was born with any genetic disorder. Ms. Whitehead has to be paid $10000 and all medical expenses.

The mother did not agree to part with the baby after birth pleading that the baby and become part and parcel of her intrinsic system. The New Jersey Supreme Court held that the man who provided the sperm was the legal father and the woman providing the egg was the legal mother. There was a legal battle for the custody of the child between the genetic father and surrogate mother, which resulted in handing over of the child to the genetic father, the surrogate mother left with visitation rights.[37]

The lower court held that the surrogacy contract was enforceable and the Sterns were given custody of Baby M. The Whiteheads appealed, asking the court to determine "surrogacy contracts" as unenforceable and void. The court determined the contract to be invalid and unenforceable because it was contary to public policy as it determined custody before the birth of the child without considering the best interests of the child.

The court further held that the issue of custody is determined solely by the child's best interests and it agreed with the lower court that it was in Melissa's best interest to remain with the Sterns. However, Ms. Whitehead, as Baby M's legal and natural mother is entitled to have her own interest in visitation rights considered.

Reviewing this judgement Bonnie Steinbock in his article "Surrogate Motherhood as Prenatal Adoption"[38] says respect for individual freedom requires us to permit people to make choices which they may later regret. She quoted 'abortion and adoption' as such choices. She preferred regulation to total prohibition of surrogacy as an alternative reproductive technique.

Dr. Poornima Advani equated surrogate motherhood with adultery.[39] According to her, impregnation of a woman by a man whom she is not married to makes it similar to adultery. This also complicates the issue of legitimacy of the child which depends on many factors like change of mind of one or both of the intended parents or even the surrogate, an intervening break in marriage etc. She felt that surrogacy agreements violating the principles of human rights, were unethical and contrary to public policy, besides violating the statutory requirement that babies were not goods. She recommended the consent of the husband as a necessary factor to negate charges of adultery and adoption as a legal requirement to establish the status of the child with rights of inheritance.

It is wrong to say that surrogate motherhood is an answer to infertility.

The use of a woman's body for the sake of producing children reduce women to baby-making machines. The practice violates many already established legislations and moral values concerning baby selling, privacy and procreation. Surrogacy distorts the family unit into contractual agreement. The effects this practice has on the children, the family of the intended parents and the surrogates further dismantles society's initial base. Potential abuses and the irrevocability of contracts will only lead to further destruction of an already corrupt world.

This practice of selling babies is morally and socially inexcusable. The fact is that the child's father is one who purchases the child from the child's mother. It is a wicked manipulation of privacy and procreative rights.

When there was a dispute regarding the legal parents of a child, the court held the genetic parents to be the legal parents as their embryo has been carried by the gestational surrogate mother. The court granted them the right to have their names on the birth certificate.[40]

In Arkansas, the law creates a presumption that the mother of a child conceived by artificial insemination and born to an unmarried surrogate is the intended mother.[41] Arizona legislation grants the status of legal mother of the child to the surrogate mother and if married, her husband is presumed to be the legal father. In Florida, the intended parents are presumed to be the legal parents as a determination that at least one intended parent is genetically related to the child, otherwise the woman giving birth is presumed to be the legal mother. According to New Hampshire and Virginia laws, only by a judicial order signed before the pregnancy, the parental rights will vest in the intended parents.[42]

VIII. A Contractual Arrangement

As it involves two couples for this kind of non-coital reproduction, there is a need for surrogate motherhood contracts. Whether a woman has the right to enter into a contractual agreement to bear a child and receive money for the service? What is the public policy as to the enforcement of these contracts? Does it interfere with the autonomy of a woman? It involves definitely the interference with the person of the woman and so it is an interference with her personal right. The right to life is a comprehensive one. Does it include the right to procreate children? Whether these contracts of surrogate motherhood and their enforcement of prohibition is a violation of that right to procreate?

There are two schools of thought. One says that as the woman has the right to her person, it includes the right to procreate which facilitates surrogate motherhood contracts too. Once she has a right to enter into a

contract to procreate children for other childless couples, it should be enforceable. The second type of opinion is that it amounts to interference of a third person into the private partnership of the couple and changing the process of procreation. The private conjugal life of a validly married couple cannot be interfered with as a matter of law and any interference can be viewed as a violation of the privacy of the couple and of the woman too. Another important problem is that as a consequence of this surrogate motherhood contract, the relationship between the mother and the child gets distorted, leading to several social problems of identity. From moral and religious point of view, the very concept of conception and purpose of marriage, which is regarded as the procreation of children for continuing the line of the clan, gets basically changed with this unprecedented scientific invention of new styles of reproduction. There are two basic questions: (*i*) Who is the legal mother? (*ii*) Are contracts for surrogate motherhood enforceable?

A. Israel Law

According to Israel law, genetic mother is the legal mother of the child without the need for legal adoption.[43] But there are two contentious arguments; one saying that genetic mother is the real mother and the other saying that the surrogate who gives birth is the real mother.

B. USA Law

American jurisprudence also has not reached a consensus on surrogate motherhood. There is neither a Federal law nor a decree by the Supreme Court of USA. Virginia law declared surrogate mother as the real mother and the child will be deemed to be the legitimate and natural child of the surrogate mother. Alternatively, California Civil Code states that the genetic mother is the legal mother.

C. English Law

England proposed to define mother as the woman who has carried the child as a result of the placing in her an embryo or of sperm and eggs and no other woman is to be treated as the mother of the child.[44] This proposal was highly criticised by the Bar in England. The Bar advised to consider the commissioning mother as the real and legal mother.[45] After the Bar's recommendation, the House of Commons added a provision providing the court to declare genetic mother as the real mother.[46]

IX. Surrogacy - Social Complications

Besides the above discussed legal issues, surrogacy raises several important social problems like identity crisis, commodification of womb

and child, quality of product, embryological exploitation etc.

A. Identity Crisis

Besides raising all contradictory legal issues, surrogacy leaves the child in an identity crisis, which is a totally different dimension. First the child's mother is doubtful and secondly the doubts about the identity continue beyond the mother also. Even under the natural law, motherhood is conclusive proof and fatherhood is a presumption. In surrogacy, the law is incapable of deciding the basic question i.e. which of the two women is the real and legal mother of the child. Child's life, future and social existence would become a very complex problem in the absence of a correct identification.

B. Child Commodification

The birth of a child is regarded as a sacred event and it is an occasion for joyous celebration. That is commercialised and child is commodified by tagging a price card to the just born child or for the gestating mother's womb.

C. Quality of Product

Once you introduce a market mechanism for acquiring a child, it fosters and generates a demand for "Product Quality". The commissioning couple, paying large sums of money to obtain a child may reject an imperfect child.

An example of this is the 1983 "Baby Doe" case. Mrs. Judy Stivers, a Michigan housewife agreed to bear a child for Alexander Malahoff and his wife for a fee of $10000. All went well until the child was born, when it was discovered that he suffered from microcephaly, a condition whereby the child has an abnormally small head and often turns out to be mentally retarded. Mr. Malahoff no longer wanted the child and told the hospital to withhold treatment. Mrs. Stiver also rejected the child, saying that there had been no maternal bonding. The hospital went to court and won permission to care for the child and the Michigan Department of Social Services fostered the child.[47] The Stivers accepted that the child was their own. Mr. Malahoff reacted by suing Stiver for not producing the child he contracted for and the Stivers countered by suing their doctor, lawyer and psychiatrist for not advising them properly about marital sex. They also sued Malahoff for invading their privacy by making the matter public and alleged that the child's illness was caused by a virus transmitted in Malahoff's sperm.[48]

Commercialisation, market economy, product quality are the words which are not suitable for human reproduction. Commodifying the child

and consumerism of womb are sufficient grounds for prohibiting commercial surrogacy.[49]

Once surrogacy is commercialized those having positive genetic qualities may demand more price. That means surrogates being selected for the positive attributes they offer, that tall surrogates with classic profiles and straight teeth might command higher prices for their goods than might short, swarthy surrogates with crooked noses and over bites.[50]

Kowall[51] points to the "surrogate mother spring directory" produced by the Bio Ethics Foundation Inc., where potential surrogates offer photos, tell their heights and weight, IQ[52] college grade point average, and language skills. Thus we can conclude that the market mechanism, which is a vital part of commercial surrogacy will lead to surrogates being selected for the positives they offer, the couple as wanting the child for their own ends.

In this kind of commodification of child, scant regard is paid to emotional and psychological impact on the child. The motherhood and the childhood, their umbilical bond, motherly touch, affection and identity with the mother are very vital aspects which will go a long way till the end of the child's life. Surrogacy causes an emotional disturbance to the child creating a problem of serious crisis of identity. With two mothers or two fathers, a child's life would be much more miserable than any illegitimate child. Thus this mechanism of surrogacy leads to bastardization of progeny, simply in the name of satisfying the desire to have a child. It will affect the psychosocial well being of the child, after knowing that its gastating mother conceived only to give up after delivery.[53] It may even lead to commodification of parenthood.[54]

Reproduction involving gestational and genetic services, scientific assistance, money, transfer of reproduction services will lead to further devaluation of parenthood.[55] In case of absence of reasonable care and caution in carrying out the procedures, there would be health problems. As suggested by Dr. Poornima Advani, persons with a family history of malformation, mendelian disorders or chromosomal derangement should be barred from being donors. They should also be free from diseases like asthma, juvenile diabetes, mellitus, epileptic disorder, hypertension, pshychosis, leucoderma, malignancy and the like, specially those with hereditary trends already confirmed.

X. Conclusion and Suggestions

As several legislative enactments and moral codes oppose commercial surrogacy, love and affection are necessary for replacing the "fee" element

to generously help a childless couple to get a child. Altruistic surrogacy is permitted by several legislative measures based on the moral fabric of human society. But in a mechanical and a need based world, such a human gesture is either very rare or impossible. Though ostensibly the arrangements are altruistic, several indirect favours, gifts, monetary returns or properties will be worked out, as the carrying mother feels entitled to some reciprocation, while commissioning couple continue to live under the obligation to repay the debt. In the absence of real or genuine altruistic surrogacy arrangement, there will be no difference between alturistic or commercial surrogacy. Infact, such undefined and uncertain consideration in altruistic kind, may make it a worse arrangement than simple commercial surrogacy with a fixed price. Sometimes altruistic surrogacy is more exploitative than commercial surrogacy, as it makes it impossible for surrogate mother to keep the child if she so desires, the loss of her family as a retribution may be too much for her to give up, whereas, it may be easy for a commercial surrogate mother to cancel the contract.[56]

Allowing one's womb to accommodate others child for money, cannot be claimed as a matter of right to body because using other woman's womb for her child will be a violation of that right belonging to the surrogate mother by commissioning couple. In the name of exercising a right, one cannot permit mothers to violate it for a price. Right to person, right to bear a child, right to motherhood are undoubtedly the natural rights available to every person as long as the process is natural. There is no right to have unnatural usage of one's own body. As such, right to one's own person is limited by the laws of obscenity, unnatural sexual offences like sodomy etc. and immoral trafficking. If scientific advancement and technological innovations are permitted to split motherhood into genetic mother and social mother, society would further split the family ties and umbilical bonds creating several problems. Aesthetic figure protection, luxury of not bearing one's child and suffering pangs of delivery and socialisation for about nine months without pregnancy cannot form valid reasons for surrogate motherhood business. If childlessness and a strong desire to have a child is the genuine purpose, adoption is the only right course available. Even the western laws suggested adoption as a measure to end the legal conflicts. At the same time it is not advisable to totally disuse the scientifically evolved techniques of continuing the progeny of the clan through surrogacy and IVF methods.

However, in the best interests of the society and the new born child, there is a strong need to restrict the application of the new technique to help only childless couples on considerations of love and affection including payment of expenses. In addition, its commercial application, brokerage,

advertisements through media, for protecting the "figure" and for the luxury of avoiding conception and delivery pains, for avoiding the "wastage" of time (nine months in pregnancy and then years for rearing the child) should be totally banned. A regulating authority with medical and legal experts should be formulated to process and permit the application of childless couples and those coming forward to surrogate. The medical and legal records regarding the surrogacy contracts must be kept confidential, with the provision for access to children born out of such arrangement. All agreements and arrangements beyond this authority must be treated as null, void and unenforceable.

Surrogate mothers, in permitted cases, should be given visiting rights and the right to share affection of the child she gave birth to. Medical problems, if any, shall be dealt by the commissioning parents in consultation with the regulating authority and other medical experts. For all legal, social, economic and practical purposes, the genetic parents should be treated as the "real parents" of the child.

Notes and References

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1. L. Haberfield, *Surrogate Motherhood in Victoria: What now for Altruistic Surrogacy?* Unpublished paper, 1988, Monash University at 37.
2. J. Leeton, *The Current Status of IVF Surrogacy in Australia,* 31 (3) Australian and New Zealand Journal of Obstetrics and Gynaecology, 1991 at 260; and J. Areen, *Baby M Reconsidered,* 76 Georgetown Law Journal., 1988, 5 at 1741.
3. In the last 20 years in the United States over 1000 births using this method have been reported. See J. Leeton, *ibid.*
4. This was the birth of Alice Kirkman.
5. J. Leeton *supra* n. 2 at 261.
6. J. Leeton & K Dawson, *A Case of Attempted IVF Surrogacy in Victoria: Breaking the Law or Breaking the Deadlock?* 34 (5) Australian and New Zealand Journal of Obstetrics and Gynaecology, 1994 at 586.
7. The Hindustan Times, New Delhi, 6 January 1985.
8. Bernard Knight, Legal Aspects of Medical Practice (Churchill Livingstone, 1992) at 271.
9. Suzanne Rozell Scorsone, *Surrogate Motherhood and its Human Costs,* 1 Electronic Journal of Law, Canada.
10. Regina Greyear & Deeny Morgan, The Hidden Gender of Law (The Federation Press, 1990) at 232.
11. Dr. Poornima Advani, *The Song of the Hired Mother : The Lyrics of Surrogacy,* 3 Law and Medicine, 1997 at 107.
12. *Id.* at 109.

13. The Pioneer, Delhi, 19 April 1995.
14. The Pioneer, Delhi 5 August 1994.
15. D.C. Code Ann (1993), 16-401.
16. Valencia Community College, West Campus Learning Resources Center, Overview of Laws, Legal Precedents Affecting Surrogate Arrangements.
17. *American Bar Association Outlines Plan for Legalization of and Enforcement of Surrogacy Contract*, New York Times, 9 February 1989, 13C.
18. Image, *Infertile Women want Ban on Surrogate Motherhood Lifted*, Electronic Journal.
19. Oxford Dictionary of Law, 3 ed at 391.
20. *Id.* at 361.
21. *New Laws may curb Surrogate Mothers*, Times 12 June 1997.
22. Section 30(3) 'A contract or agreement (Whether made before or after the commencement of this section) under which a woman agrees with another person or persons to act as a surrogate mother is void'.
23. L. Haberfield, *supra* n. 1 at 37. See also The Family Act, 1975.
24. Sec. 12, Adoption Act, 1984 (Vic).
25. Family Law Council, *Creating Children : A Uniform Approach to the Law and Practice of Reproduction Technology in Australia*, AGPS, Canberra, 1985.
26. Sec. 9, Substitute Parents Agreement Act, 1993 (ACT).
27. This is because parenthood of the child is established by other legislation. See for example The Birth (Equality of Status) Act (ACT); The Family Law Act, 1975 (CTH) and The Adoption Act, 1993 (ACT). For a discussion of the effect of this legislation see the ACT, Attorney General's Dept., Discussion Paper on *Surrogacy Agreements in the ACT 1993*.
28. Family Relationships Act, 1975 (SA). Sec 10 (f) defines "Surrogacy Contract" as 'A contract under which (a) a person agrees (i) to become pregnant or seek to become pregnant; and (ii) to surrender the custody of, or rights in relation to a child born as a result of the pregnancy; or (b) a person who is already pregnant agrees to surrender the custody of, or rights in relation to a child born as a result of the pregnancy'.
29. Family Relationships Act, 1975 (SA). Sec 10(f) defines "Procreation Contract" as 'A contract under which (a) a person agrees to negotiate, arrange or obtain the benefit of a surrogacy contract on behalf of another; or (b) a person agrees to introduce prospective parties to a surrogacy contract'.
30. Sections 10 g(1) & 10 g(2), Family Relationships Act, 1975 (SA).
31. This is punishable by a fine or imprisonment. See secs. 10(h) (a&b), Family Relationships Act, 1975 (SA).
32. Parliamentary Debates (Hansard) Third Session of the 46th Parliament, 16.02. 1988, 2764.
33. Sec. 4(1) Surrogate Parenthood Act, 1988 (QLD). Sec. 2(2) of the Surrogate Parenthood Act, 1988 defines a "Prescribed Contract' as 'a contract made between two or more persons, whether formally or informally and whether or not for payment or reward, under which it is agreed (a) that a person shall become or shall seek or attempt to become the bearer of a child and that a child delivered as a result thereof shall become and be treated, whether by adoption, agreement or otherwise, as the child of any person or persons other than the person first mentioned in this paragraph (a); or (b) that a child delivered from a person who is the bearer of the embryo, foetus or child at the time when the prescribed contract is made shall become

and be treated, whether by adoption, agreement or otherwise, as the child of any person or persons other than the person first mentioned in this paragraph'.

34. Sec. "Surrogacy Contract" is defined as 'a contract, agreement or arrangement, with or without payment or reward, under which (a) a person agrees to become or is already pregnant and agrees to surrender to another person the custody or guardianship of, or rights in relation to child born as a result of the pregnancy; and (b) the other person agrees to accept custody or guardianship of such a child'.

35. This distinction is interesting given the Tasmanian Committee to investigate artificial conception and related matters (1985) which concluded that "Surrogate Motherhood" in general and commercial surrogacy arrangements in particular are unacceptable to the Tasmanian Community at the present time. See also M. Otlowski, *Surrogacy Contracts Act, 1993*, 2 AUSTRALIAN HEALTH LAW BULLETIN, 1993 at 26.

36. THE HINDU, 10 June 1997.

37. M 217 N.J. Super 313, 512; Re Baby M 525 A 2ed. 1128 (N.J. Super ch. 1987).

38. Bonnie Steinbock, *Surrogate Motherhood as Pre-natal Adoption*, ELECTRONIC JOURNAL.

39. Poornima Advani, *The Song of the Hired Mother, The lyrics of Surrogacy*, 3 LAW AND MEDICINE, 1997 at 107.

40. No. 85, 53201402, Michigan Circuit Court, Wayne Case, 14th March 1986.

41. Keye, Chang, Rebar and Sailes, INFERTILITY EVALUATION AND TREATMENT (WB Sunders Co., 1995) at 893.

42. *Ibid.*

43. Michael Bell, Law Society's Gazette (London) Human Embryology Legislation, 2nd March 1988 at 25.

44. *Cumbria County Council* v. *X*, THE TIMES (London), 25 June 1990, quoting Human Fertilization and Embryology Bill proposed in front of the House of Commons on 9th June 1990.

45. *Ibid.* The Bar also condemned the provision making the husband of the surrogate mother the legal father of the child.

46. Michael Bell, Law Society's Gazette (London) Human Embryology Legislation, 2nd March 1988 at 25, citing Glanville Williams (ed.) CRIMINAL LAW, 1978 at 678.

47. L.Tager, *Surrogate Motherhood, Legal Dillemma*, 103 SOUTH AFRICAN LAW JOURNAL, 1986 at 393.

48. K.Andrews, *The Educative Role of Law : Options for Regulation in Surrogacy, Surrogacy - In Whose Interest?* Proceedings of the National Conference, 1991, Mission of St. James and St. John at 98.

49. P.Singer and D. Wells, THE REPRODUCTION REVOLUTION : NEW WAYS OF MAKING BABIES (London: Oxford University Press, 1984) at 119. See also H. T. Krimmel, *The Case Aganist Surrogate Parenting*, 13 HASTINGS CENTER REPORT, 1983 at 37.

50. S.O.' Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 NORTH CAROLINA LAW REVIEW, 1986 at 127.

51. Kowall, *The Commercialisation of Reproductive Technology* in JA Scutt (ed.), THE BABY MACHINE : COMMERCIALISATION OF MOTHERHOOD (Sydney: Mc Culloh Publishing, 1988) at 118.

52. Many articles point to the fact that positive eugenics is practiced in artificial insemination. For example see a 1980 report of a sperm bank established with all donors being Nobel Prize

Winners in C Sappideen, *The Surrogate Mother - A Growing Problem*, 6 UNSW Law Journal, 1983, 79 at 97.

53. C. Overall, ETHICS & HUMAN REPRODUCTION (Allen & Unwin, 1987) at 111; 26% had a voluntary abortion, 9% had relinquished a child for abortion.

54. M. J. Radin, *Market Inalienability*, 100 HARVARD LAW REVIEW, 1987 at 8.

55. M.J. Radin *supra* n. 54. For example, Radin has warned of the "Domino Effect" of commodification of women's reproductive capacities, she claims that this leads to the commodification of children and ultimately to the commodification of everyone.

56. R. Rowland, *Surrogacy - A Feminist Perspective on Ethics, Surrogacy - In Whose Interest*, Proceedings of the National Conference on Surrogacy, 1991, Mission of St. James and St. John M. Meggie (ed.) at 70.

PARIS CONVENTION AND INDIAN TRADE MARK LAW

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I. INTRODUCTION

Paris Convention for the Protection of Industrial Property has been the main plank of industrial property rights till the conclusion of WTO (Annex 1C) or Agreement on Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (hereinafter referred to as TRIPs Agreement) in December 1993. In 1989, the USA and other developed countries successfully asserted and brought Trade in Services and TRIPs on the active agenda of Uruguay Round of GATT negotiations. Till then or during the late seventies and early eighties, the developed countries led by the USA had been pressurizing the developing countries to provide better protection to the intellectual property rights. Their effort was for developing countries to join the Paris Convention for the Protection of Industrial Property, 1883 (Stockholm Act of 1967)[1] (hereinafter referred to as Paris Convention).

The developing countries wanted the Paris Convention to be amended so that some concessions could be ensured for the developing countries before they could join it.[2] There were afloat many proposals[3] to amend the Paris Union but the attempts of developing countries aborted in the wake of Uruguay round negotiations. These proposals were put on hold till the conclusion of Uruguay round. This GATT round firmly established TRIPs without any need to revive those amendment proposals in Paris Convention.[4] Infact, the WIPO and all the treaties have become subservient to the mother treaty of TRIPs, having implications for and integrated with trade in goods and services. Thus hereafter, all developments in the field of intellectual property apparently are likely to take place in the negotiations in the TRIPs Council as against under the auspices of WIPO with an impact on the treaties done under WIPO. This paper examines the protection afforded by Indian trade mark law to trade marks already and that, which is additionally required or insisted upon by developed countries through Paris Convention.

India is a member of WTO from its formation in 1995 and has acceded to the Paris Convention on 8th December 1998. A scrutiny of Indian trade

mark law vis-a-vis Convention obligations would be useful to determine its compatibility with the Convention. What are the changes required in the Trade and Merchandise Marks Act, 1958 (hereinafter referred to as TMMA) to bring it in conformity with the international regime or to subserve needs of Indian business? This paper would serve useful purpose when the Draft Trade Marks Bill, 1999 which is purportedly ready with Industries Ministry, is made public to weigh whether the Government of India or its officers or political parties make an effort to defend Indian interest or are satisfied by complying the prescriptions of TRIPs Agreement or Paris Convention allegedly done to favour right holders in developed countries. It is thought that the activists in intellectual property rights (IPRs), the trade and industry should oversee that Indian laws besides complying with international obligations seek to advance the interest of Indian traders wherever and howsoever possible. There is a lot of scope to protect the interest of developing countries through legislation, which does not conflict with TRIPs Agreement. If various interest groups or NGOs are willing to take a stand and take up the cause then it is not difficult to muster the political will in developing countries. Mostly the IPRs are in possession of the nationals of developed countries and protection of IPRs either under Paris Convention or TRIPs Agreement caters to developed countries. Whether there is need for provisions keeping in view the developments in other country's laws or the contemporary needs of Indian business? Is it that the makers of the Draft Bill are willing to show some ingenuity and subserve the interest of developing countries particularly using the authorised gateway of Article 40 of TRIPs Agreement. It is submitted that Article 40 can be usefully combined with Articles 7 and 8 of TRIPs Agreement.

All WTO members have to abide by Articles 1 to 12 and Article 19 of the Paris Convention by virtue of TRIPs Agreement in addition to matters contained in Articles 15 to 21 of TRIPs Agreement. Members of the Paris Convention have to comply with all the provisions of Paris Convention and India became member of the Paris Convention effective 8th December 1998. India can enforce the provisions of Paris Convention in other member countries of Paris Convention and those incorporated in TRIPs Agreement. Therefore, the discussion is free of national overtones. It be kept in mind that these are two independent treaties. More often there have been dissenting voices in relation to TRIPs Agreement in almost all countries. Even if TRIPs Agreement falls at some future date the countries concerned will have to honour commitments under Paris Convention. Paris Convention is on totally different footing, as it is not inter-dependent and has not been coercive. Obligations emerging from TRIPs Agreement

are not subject matter of this Paper.[5]

II. Interface of TMMA with the Paris Convention

The provisions of the Paris Convention concerning trade marks are discussed in three categories:[6]

(i) National treatment and TMMA, 1958;

(ii) Right of priority and TMMA, 1958;

(iii) Obligations on member states - Rules detailing minimum standards of protection: requiring or permitting the member countries to enact legislation following these rules and TMMA, 1958.

(iv) Administrative framework of Paris Convention not discussed here.

A. National Treatment Principle

Articles 2 and 3 of the Convention contain the most important provision of national treatment. National treatment means that each party to the Paris Convention must grant the same protection to nationals of the other countries as it grants to its own nationals. Article 3 of the Convention requires that national treatment must be granted even to nationals of non-member countries, provided such persons are domiciled or have an industrial or commercial establishment in a member country. The term "domiciled" does not require a domicile in the strict legal sense of the term. A mere residence, as distinct from a legal domicile, is sufficient,[7] but the establishment be real and effective. This means that there must be actual industrial or commercial activity. A mere letter box or the renting of a small office with no real activity is not sufficient.

The trade marks of foreigners are not only to be protected, but will not be discriminated against in any way. Without the rule of national treatment it would be very difficult to obtain adequate protection in foreign countries for trade marks. The term "national" includes both natural persons and legal entities. Generally, no nationality is granted to the legal entities by the various national laws, and some difficulty arises in determining the same. The state owned enterprises of a member country or the other entities created under the public law of such country are to be considered as nationals of the member country concerned. Legal entities created under the private law of a member country will usually be considered a national of that country. If they have their actual headquarters in another member country, they may also be considered a national of the headquarters country.[8]

The national treatment rule means that the national domestic law, as it is applied to the nationals of a particular member country must also be applied to the nationals of the other member countries. The national treatment rule in Article 2(1) excludes any possibility of discrimination to the detriment of nationals of other member countries. Thus a country gives protection to foreigners (nationals of a member country) equal to its own nationals. There is no requirement to provide the same protection what the foreign country gives to your nationals.

(i) Exclusion of Reciprocity of Protection

Any requirement of reciprocity of protection is excluded. For example, India has a trade mark duration of seven years and another member country X has the duration of ten years. India will provide a trade mark duration of seven years to the nationals of X whereas country X will continue to provide ten years duration to the trade marks originating from or belonging to the nationals of India. Thus, the reciprocity requirement has to be structured equivalent to what a member country provides to its own nationals or nationals of any other country. The reciprocity requirement cannot be used to curtail the rights of nationals of another member country if the same is provided to its own nationals. This principle applies not only to the codified law, but also to the practice of the courts (Jurisprudence) and to the practice of the trade marks office or other administrative governmental institutions, as it is applied to the nationals of the country.[9]

The application of the national domestic law to the national of another member country does not prevent him from invoking more beneficial rights specially provided in the Paris Convention. These rights are expressly reserved. The national treatment principle must be applied without prejudice to such rights.[10]

In India, sections 131 and 132 of TMMA recognize these principles and refer to a 'Convention country', though India is not member of any Convention. Section 131(1) states that:

> ...with a view to the fulfilment of a treaty, convention or arrangement, with any country outside India which affords to citizens of India similar privileges as granted to its own citizens, the Central Government may, by notification in the Official Gazette, declare such country to be a Convention country for the purposes of this Act.

The arrangement has been existing with Denmark, which has been declared a Convention country. Effective 8th December 1998 India had to notify 150 members of Paris Convention as Convention Countries and for

fulfilling TRIPs Agreement obligations w.e.f. 1 January 2000 India would have to notify the remaining members of the WTO to include as Convention countries. The Central Government can notify in the Official Gazette the name of Paris Convention and TRIPs Agreement and the list of member countries. On such notification, the nationals of the notified countries would be eligible for the enforcement of the national treatment and priority period of six months, in line with the Paris Convention, [section 131(2)]. The method of reckoning the period in section 131(3) from earliest of applications is in line with the Paris Convention. The provision in section 132 as to the reciprocity is in conformity with the Paris Convention.

(ii) Negative Treatment

Section 132 of TMMA, in converse language authorises the Central Government to specify the country(s) which do not accord the same rights to Indians as it or they accord to their own nationals. If a country is specified by the Central Government, then no national of such country(s) can apply for registration, or be registered as the proprietor of a trade mark, or be registered as assignee of a trade mark, or apply for registration or be registered as registered user in India of any trade mark. [11] It appears that the nationals of such a country can become proprietors of unregistered trade marks in India, as there does not appear any express bar against the same. It needs to be emphasised that from the commencement of TMMA in November 1959, the Central Government has not specified any country for such negative treatment.

(iii) Exceptions to the National Treatment Rule

Article 2(3) reserves the national laws relating to judicial and administrative procedure, as well to jurisdiction and the requirements of representation. If national laws impose certain requirements of procedural nature or special conditions on foreigners for the above purposes, they can be imposed on the nationals of members countries also. An example, is a requirement for foreigners to deposit a certain sum as security or bail for the costs of litigation. Another example is expressly stated: the requirement on foreigners to either designate an address for service or to appoint an agent in the country in which protection is requested. These are perhaps the most common special requirements imposed on foreigners, and is a permitted exception from the national treatment rule.[12] In India, only these requirements are applicable to foreigners in relation to the trade marks. Registration procedure requires an address within India to be designated and security for costs[13] can be asked.

B. The Right of Priority

The right of priority contained in Article 4 means that registration application for trade mark filed by an applicant in one of the member countries entitles that applicant (or its successor in title), to apply for protection in all or any of the other member countries within a period of six months for the trade marks. All such applications filed within six months are regarded as if they had been filed on the date of first application. These later applications enjoy a priority status with respect to any application relating to the same trade mark, filed in the intervening period in member countries. They also enjoy a priority status with respect to all acts accomplished after that date which could destroy the rights of the applicant, for trade mark registration.[14] Sections 131 and 132 of TMMA are in conformity to give effect to these requirements.

The effect of the right of priority is that the later application must be treated as if it had been filed simultaneously at the time of the first filing, in another member country. The right of priority offers basic advantage to the applicant in so far that he is not required to present all applications at home and in foreign countries at the same time, since he has six months at his disposal to request protection and to organize with due care the steps to be taken to secure protection in the countries of interest to the applicant.

The right of priority can be based only on the first registration application for the same trade mark, which must have been filed in a member country. The first application must be "duly filed" as a regular national filing to give rise to the right of priority which can adequately establish the date on which the application was filed in the country concerned. The "national" filing includes applications filed under bilateral or multilateral treaties concluded between the member countries.[15] The right of priority subsists even where the first application generating that right is no longer existent. The later application must concern the same trade mark as the first application, the priority of which is claimed. The same trade mark or industrial design must be the subject of both applications. It is not allowed to follow a first application by a second improved application and then to use that second application as a basis of priority for the obvious reason of stopping the endless chain.[16]

The right of priority may also be invoked by the successor in title of the first applicant. The right of priority is allowed to be transferred to a successor in title without transferring at the same time the first application itself. This allows the transfer of the right of priority to different persons for different countries, a practice which is quite common.[17] In India section 131 entitles the assignee of the first applicant belonging to a Convention

country to get the priority.[18] On India joining the Paris Convention the provision of section 131 is applicable to nationals of all the member countries of the Paris Convention effective 8th December 1998 to be extended to WTO- TRIPs members on 31 December 1999.

Desired Action

On joining the Paris Convention, a country needs a developed trade mark information system as to filings in other member countries and in its own territory for effective utilization of the benefits of the Paris Convention for its own nationals. Without such a network, in the absence of information about the nationals filings of other countries, there may occasion a wasteful effort in filing the trade mark registration applications to find that the same or similar trade mark is already in operation in another member country.

For building market for its products with its own trade marks, so as to give boost to export efforts of the country, this provision and that of national treatment can be extremely useful to enterprises which desire to open up internationally.

C. Paris Convention Obligations on Member Countries

The Convention does not unify the trade mark legislation of member countries and each country is free to regulate the trade marks in its territory except for the specific obligations which the member countries are required to follow. These obligations are discussed below:

(i) Use of Trade Marks

Article 5C(1) relates to the necessary actual use of registered trade marks required by some countries within a certain period. If the use requirement imposed by any national law is not complied with, the trade mark is expunged from the register. "Use" is generally understood as the sale of goods in the course of trade bearing the trade mark in the market.[19] If compulsory use is required, the trade mark's registration may be cancelled for failure to use the trade mark, only after a lapse of resonable period and only if the owner cannot justify his failure to such use.[20] Length of the "reasonable period" is left to the national legislation of the member countries.[21] This reasonable period affords an opportunity to arrange for the use, and is beneficial in the globalization of operations or where the owner has to use his mark in several countries. Before cancellation of a mark's registration the owner be allowed to justify the failure to use his trade mark based on legal or economic circumstances beyond the owner's control. Import ban is suggested as sufficient defence.[22]

Art 5C(2) authorises the use of a trade mark in a differing form which do not alter its distinctive character in one of the countries shall not entail invalidation of the registration nor diminish the protection granted to the mark. Unessential differences are allowed between the form of the mark as it is registered and as it is used, for example, in cases of adaptation or translation of certain elements for such use.[23] The national authorities, are to decide in actual practice as to the nature of differences and whether they are permissible or not, as per their own law.[24]

In India, section 46 of the TMMA requires compulsory actual use of trade marks as otherwise it can be expunged on the motion of an aggrieved person. The cancellation of trade mark can only take place if the period of 5 years has elapsed and five years is considered very reasonable as per trade mark literature of other countries internationally. Section 46 allows the owner to justify non-use for special circumstances. In India, normally import ban has been considered sufficient justification for non-use. But in 1990 the Bombay High Court drew a dichotomy between the marks registered before the import ban and when the ban was continuing. In the later case, the court was of the opinion that the owner of trade mark at the time of registration should have had in contemplation production of the trade marked goods either by itself or through a registered user.[25] The differences in fact get up in actual use of the trade mark from the trade mark which is registered, not touching upon its distinctiveness is allowed by section 54. Thus, the TMMA is in conformity with the clause (2) of Article 5C of the Paris Convention.

(ii) Concurrent use of the same mark on similar goods

The possibility of the same mark being used for identical or similar goods by two or more establishments considered as co-proprietors of the trade mark is addressed by Article 5C(3). It is provided that such concurrent use will not impede the registration of the trade mark nor diminish the protection in any country of the Union. The trade mark may be registered for each of the concurrent users except where the said use results in misleading the public or is contrary to the public interest. If the concurrent use misleads the public as to the origin or source of the goods sold under the same trade mark, it may not be registered. Further, if the quality of such goods covered by concurrent users differs to the point where it may be contrary to the public interest to allow the continuation of such inconsistency, national legislation may address the situation as it is thought fit.[26]

In India, the provisions in sections 12(3), 28(3) and 33 or 34 of TMMA deal with concurrent use and are justifiable under this Article. They

provide the necessary safeguard as contemplated by the Article 5C(3) of the Convention. Equally, section 11 of TMMA or the remedy of passing off would not allow confusion in the market place even if there is a vested right to use the trade mark.[27]

Section 28(3) may be taken as declaring the concurrent registered proprietors as co-proprietors - see the case of Field Marshal trade mark.[28]

The provision of Article 5C(3) does not cover the case of concurrent use of the mark by enterprises which are not co-proprietors of the mark. For instance, when use is made concurrently by the owner and a licensee or a franchisee. These cases are left for the national legislation of the various countries to regulate.[29]

(iii) Grace Period for the Payment of Renewal Fees

Article *5bis* requires that a period of grace be allowed for the payment of the renewal fees. The trade mark registration and other rights can be maintained by renewal in perpetuity. A failure to renew the registration normally entails the lapse of the registration, and in some cases the expiration of the right to the mark. The grace period provided is intented to diminish the risks of a trade mark being lost by an involuntary delay in the payment of fees.[30] A grace period of at least six months for the payment of the renewal fees is envisaged, but the countries are free to levy a surcharge when such fees are paid within the grace period and can provide for a longer grace period.

During the grace period, the registration remains provisionally in force.[31] If the payment of the renewal fees (and surcharge where appropriate) is not made during the grace period, the registration will lapse retroactively as of the original date of expiration.

In India, section 25 of TMMA provides for the conditions of payment for renewal of registration. The Registrar is required to send a notice to the owner for payment of fees; therefore, there is no chance of any inadvertent delay on the part of the owner as stated by the WIPO as a justification. Section 25(4) confers on the Registrar of trade marks discretion. If he thinks just to do so, he may allow the payment of renewal fee within a period of one year and restore the mark. The Act does not mention the provisional trade mark registration remaining in force for a period of six months provided in Paris Convention. But the effect is same as section 26 of the TMMA deems lapsed registration for non-renewal to be treated as continuing, for a period of one year for the purposes of registering another mark which is similar to lapsed non-renewed mark, subject to certain conditions in which Registrar may exercise discretion.

Be that as it may, the substantive provision is in accord with the Paris Convention. On joining the Convention, in the initial six months the Registrar should be obliged to permit under section 25 the payment of the renewal fee without any strings and the justification will be presumed. This can be done by making a rule. Thereafter, in the remaining period of six months the Registrar may exercise his discretion. There is no need of amendment for complying with this provision of the Paris Convention and the period of grace can be availed by the nationals of member countries not only to the minimum limit of six months, but for an extended period of one year.

(iv) Independence of Trade Marks

Article 6 establishes the important principle of the independence of trade marks filed or registered in the country of origin from those filed or registered in the other member countries. Article 6(1) states the basic principle of national treatment to the filing and registration of the marks. Regardless of the origin of the trade mark a country has to apply only its domestic legislation in determining the fate of the registration applicaton. The trade marks are independent in different countries of the Paris Union.

Article 6(2) makes provisions for applications by applicants entitled to the benefits of the Convention. An application for the registration of a mark, filed in any member country may not be refused, on the ground that filing, registration or renewal of the mark has not been effected in the country of origin. Sameway a registration may not be cancelled on the above grounds. Obtaining and maintaining a trade mark registration in any country should not be made dependent on the application, registration or renewal of the same mark in the country of origin of the mark. Thus, no action is required in the country of origin.

Article 6(3) states that a mark duly registered in a member country shall be regarded as independent of the trade marks registered in the other countries of the Union, as also the country of origin. Thus, a mark once registered will not be automatically affected by any decision taken with respect to similar registrations for the same trade mark in other countries. In this respect, the fact that one or more such similar registrations are, for example, renounced, cancelled or abandonned, will not ipso facto affect the registrations of the mark in other countries. The validity of these registrations will depend only on the provisions applicable in accordance with the legislations of the each of the countries concerned.

In India, the TMMA does not refer to any of the obligations imposed by the country of origin, nor it requires home country registration of the trade mark for registration in India. The TMMA is having a territorial

jurisdiction. The registration of the trade marks in India does not have any relationship with the registration of same or similar trade marks in other countries. For example, when Johnsons *Stayfree* trade mark[32] was registered in the UK, it had to disclaim the word stayfree. But in India, it was registered without a disclaimer and the word stayfree is in exclusive use of the propreitor. This important principle of independence of trade marks, registered in different member countries and that after registration they are to be governed only by the respective laws of each country, irrespective of their abandonment or any other situation in other countries is complied with by India.

(v) Well-Known Trade Marks

Article 6*bis* is an important article. It has been referred to in Article 16.2 and 16.3 of the TRIPs Agreement. The subject of Famous, well-known or reputed marks has made the law of trade marks quite involved.[33] A lot of work is going on the meaning of well known marks.[34] How the expansion of well known marks to different goods or products and different services by TRIPs Agreement shall operate is yet to be seen. In view of its importance, Article 6*bis* is reproduced as under:

> (1) The countries of the Union undertake, ex-officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trade mark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well-known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.
>
> (2) A period of at least five years from the date of the registrarion shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.
>
> (3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

The effect of this Article is to extend protection to a trade mark that is well-known in a member country even though it is not registered or used

in that country. The mark should be well-known and belong to a person entitled to benefits of this Convention. Protection under Article 6*bis* (1) is for identical or similar goods.[35]Well-known marks are deemed to have acquired goodwill and reputation. The registration of a conflicting or confusingly similar mark may be prejudicial to the interest of general public.[36] The decision whether mark is well-known or not rests with the protecting country. A trade mark may not have been used in a country in the sense that goods bearing that trade mark have not been sold there, yet the trade mark may be well-known in that country because of publicity there or as a result of advertising in other countries.[37] Protection of Article 6 *bis* has not been mandatory and arises if legislation so permits or at the request of interested party.[38] The following is the extent of protection:

Firstly, a member country should refuse the application for registration of a trade mark conflicting with well-known trade mark for identical or similar goods.

Secondly, the member country must cancel the registration of a conflicting mark if registered. A member country is to allow a period of 5 years from the date of registration with in which the owner of well-known trade mark may make a request for cancellation of the conflicting trade. If the conflicting trade mark is registered in bad faith then there is no time limit.[39] It is clear that a conflicting mark if not removed in 5 years can not be removed as per the Paris Convention.

Thirdly, the member country must prohibit the use of conflicting trade mark for making a request for which a period of more than 5 years has to be fixed. The justification for all the above protection of the well-known trade mark results from the mere fact of its reputation.

In India sections 11 (a), 27 (2) and 32 of the TMMA are the enabling provisions, which may be resorted to for protecting well-known marks. TMMA does not provide for removal of an already registered trade mark, which conflicts with a reputed mark only because of the reputation of a well-known mark in India. Section 56 read with sections 32 (b) , 11 (a) and 11(e) may be said to be providing removal mechanism if the use of conflicting mark is likely to cause confusion not only in relation to same or similar goods, but also in relation to different goods. For similar or different goods the court would have to be approached.

An existing registered mark may be expunged if well-known mark is used in India, but the use can be established by acts of advertising. If the objection is taken at the time of registration or fast enough, the court shall grant an injunction.[40] In recent times the protection has been extended to

such trade marks which were not used in India.[41] While protecting such trade marks the courts have not dwelled on the theory of their being well-known as such, but their protection is justified on the grounds that a trade mark has aquired goodwill and reputation. Because the registration or use of a confusingly similar trade mark would, in most cases be prejudicial to the interests of the public, who would be misled by the use of a conflicting trade mark for the same or identical goods. In reality the courts have gone further and protected reputed trade marks from being used on goods of different description, whereas Article 6*bis* provides for measures only for identical or similar goods. There is a line of such cases.

Thus, in relation to the Article 6*bis* there shall be need to enact some consequential legislation, yet the substantive requirements are fulfilled by the Indian laws. Article 16.2 of the TRIPs Agreement has sought to authorise looking at 'promotion' of the trade mark and reputation in the sector. It is also to be noted that Article 6*bis* when seen in context of Article 16.3 of the TRIPs Agreement, it has to be applied even in case of dissimilar goods. For these matters provision has to be made before 1 January 2000.

(vi) State Emblems, Official Hallmarks and Emblems of International Organizations

The distinctive signs covered in the Article 6*ter* are the following: armorial bearings, flags and other emblems, official signs and hallmarks indicating control and warranty and any imitation of those signs from a heraldic point of view. The Article 6*ter* obliges a member country, in certain circumstances, to refuse or invalidate the registration and to prohibit the use, as trade marks or as part of the trade marks, so as to restrict commercialization of the distinctive signs of member countries and certain international and intergovernmental organizations; but it does not purport to create industrial property in favour of these signs.[42] If the concerned states or organizations allow the use of their signs as trade marks, then Article 6*ter* shall not have any application.

The reasons for this prohibition are; that such registration would violate the right of the state to control distinctive signs of its sovereignty. The use of emblems and hallmarks as trade marks might mislead the public with respect to the origin of the goods to which such marks would be applied. To secure this purpose, the distinctive signs of the countries and intergovernmental organizations concerned are communicated to the International Bureau of WIPO, which in turn transmits these to all member countries for protection.

In India, section 11 generally and sub-section (b) particularly, of the TMMA needs attention. Section 11 prohibits the registration of the marks *inter alia* the use of which would be contrary to any law for the time being in force. Section 23 of the TMMA authorises the Central Government to issue general or specific directions in relation to the registration of trade marks. The directions had been issued under section 16 (1) of the TMMA, 1940, which are continued under section 23 by virtue of section 136(2) of TMMA. The list of marks which are declared as not registrable pursuant to this power can be referred to.[43]

In this sphere another important legislation is the Emblems and Names (Prevention of Improper Use) Act, 1950. Section 3 of the Act prohibits the use of any emblem or name listed in the schedule, without the previous permission of the Central Government and subject to such conditions as may be prescribed by the Central Government. Section 4 authorizes the Central Government to add to or alter the schedule. Section 4 enjoins all competent authorities not to register a trade mark or design which bears any emblem or name the use of which is prohibited under section 3 of the said Act. Presently, the schedule does not contain prohibitions in relation to signs etc. of other nation states, but does prohibit the signs of international and intergovern-mental agencies. It is within the executive authority of the Central Government to notify all such other marks, which are prohibited under the Convention, to be so prohibited from registration in India. A notification to that effect would be necessary.

(vii) Assignment of Trade Marks

Sometimes a trade mark is used by an enterprise in various countries, and it is desired to make a transfer of the trade mark rights in one or more of those countries. Some nations allow an assignment of the trade mark without a simultaneous or corresponding transfer of the enterprise to which the trade mark belongs. Others require the simultaneous or corresponding transfer of the enterprise. Art 6*quater* regulates the assignment of trade mark.

Sections 36 and 37 of the TMMA allow the assignment of a registered trade mark with or without the goodwill of the business. In India, there is a distinction between the assignment of registered and unregistered trade marks. Unregistered trade marks can be assigned only together with the goodwill of business or in association with the registered trade marks.[44] But that does not require the plant and machinery employed by the owner to be transferred. it is sufficient if the entire goodwill of the business undertaking owning the registered trade mark in India, is transferred to the assignee. Thus, the TMMA is in conformity with the Paris Convention.

The law in India, fulfils the requirement in article 6 *quarter* which states that it shall suffice for the recognition of the validity of the assignment of a trade mark in a member country that the portion of the business or goodwill located in that country be transferred to the assignee, together with the exclusive right to manufacture or to sell in the said country, the goods bearing the trade mark assigned. A member country is free to require, for the validity of the assignment of the trade mark, the simultaneous transfer of the enterprise to which the trade mark belongs. This requirement in a country must not extend to parts of the enterprise (owner of TM) that are located in other countries.

In India, the transfer of the enterprise is required only in the case of unregistered trade marks. The transfer or assignment of the trade mark rights in other countries with or without the transfer of the enterprise are not the concern of the TMMA and are not required at all for recognition of assignment of the trade mark in India. A member country is free not to regard as valid the assignment of a trade mark, if the use of that trade mark by the assignee would be of such a nature as to mislead the public, particularly as regards important features of the trade marked goods. This freedom to avoid any confusion in market place is necessary and sections 39 and 40 in the TMMA are directed towards this end.

(viii) Protection of Trade Marks registered in one country of the Union in other countries of the Union.

The Paris Convention establishes a special rule for the benefit of the owners of trade marks registered in their country of origin in Article 6*quinquiness* of the Convention, which provides for extra-territorial effects of the registration.

Article 6*quinquines* provides that a trade mark which fulfils the required conditions must be accepted *telle quelle* (french) for filing and protected- or as is (English version)[45] in the other member countries, subject to the following exceptions:

Firstly, where the trade mark infringes rights of the third parties acquired in the country where protection is claimed. These rights can be either rights in trade marks already protected in the country concerned or other rights, such as the right to a trade name or a copyright.

Secondly, when the trade mark is devoid of distinctive character, or is purely descriptive, or consists of a generic name.

Thirdly, where the trade mark is contrary to morality or public order, as considered in the country where protection is claimed. This ground

includes, as a special category, trade marks which are of such a nature as to deceive the public.

Fourthly, if the registration of the trade mark would constitute an act of unfair competition, as Article 6*quinquies* is subject to application of Article 10*bis*.

Fifthly, where the trade mark is used by the owner in a form which is essentially different from that in which it has been registered in the country of origin.

Unessential differences may not be used as grounds for refusal or invalidation.[46]

The TMMA, without referring to the country of origin, presently accepts marks for registration all or any mark whether registered in the country of origin or not. All marks permitted registration subject to the requirements and prohibitions for registration laid down in the TMMA.

On scanning the exceptions listed above *vis-a-vis* the grounds for refusal of registration in the TMMA, it can be safely said that the prohibitions in the TMMA are fully and squarely convered by these exceptions and are not beyond the scope of above. Further, there exists rule 36 in the Trade Mark Rules for furnishing the particulars of an application to register the trade mark in the Convention country. The applicant may submit a certificate from the Registrar of that country in this regard. The TMMA fulfils the obligations imposed by the Convention in the Article 6*quinquies*.

(ix) Service Marks

A service mark is a sign used by enterprises offering services, for example, hotels, restaurants, airlines, tourist agencies, car rental agencies, employment agencies, laundries and cleaners, etc., in order to distinguish their services from those of other enterprises.[47]

Article 6*sexies* was introduced into the Paris Convention in 1958 to deal specifically with service marks. It provides that member countries undertake to protect service marks, but are not required to provide for the registration of such marks. A member country is permitted to comply with for the protection of the service marks, by granting such protection by any means, and it is not necessary to introduce special legislation, for example, in its laws against unfair competition. This method has been adopted in India also. The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) w.e.f. 1984 and the Consumer Protection Act (CPA), 1986 provide for an honest and fair regime in relation to the services. The

two statutes protect the consumers as also the competitors from any unfair trade practices in the matter of rendering services. Sections 36A(1) (i) and (x) of MRTP Act would hit false use of a service mark. A misleading impression as to the sponsorship would be covered under section 36A(1) (iv) of MRTP Act. The Indian law is in conformity with the Convention. The service mark can also be protected as an intellectual property under the Copyright Act, 1957. However, full-fledged service marks are required to be introduced by 1st January 2000 by virtue of Article 15 of the TRIPs Agreement.

(x) Nature of the Goods to which a Trade Mark is Applied

Article 7 of the Paris Convention stipulates that the nature of the goods to which a trade mark is to be applied shall in no case be an obstacle to the registration of the mark. The purpose of this rule is to make the protection of the trade mark independent of the question as to whether such goods may or may not be allowed to be sold in the country concerned.

Sometimes a trade mark may concern goods, which for example, do not conform to the safety requirements of the law, and can be sold only after permission from the competent authorities. In all such cases, it would be unjust to refuse registration of a trade mark concerning such goods. The safety or quality regulations may change and the product may be permitted for sale later on. In those cases where no such change is contemplated but the approval of the competent authorities of the country concerned is still pending. If such approval is imposed as a condition to filing or registration in that country, it may be prejudicial to an applicant who wishes to make a timely filing for protection in another member country.[48]

In this regard, TMMA does not pose any obstacle in the registration of a trade mark. The TMMA is not at all concerned with features, quality or safe standards prescribed for the goods. The registration of the trade mark can be proceeded with, irrespective of the nature of goods. The use of the trade mark may sometimes be affected by other laws. Article 7 also negates the alleged quality function claimed by some authors.

(xi) Trade Names

Article 8 of the Paris Convention obliges the member countries to protect the trade names. A trade name is the name of the enterprise engaged in sale of goods or services and may or may not be owing the trade mark. A trade name, may become known, even if it does not own any trade mark. The protection to trade names is to be extended without any obligation of filing or registration as required for the trade marks. Article 8 also clarifies that a trade name need not form part of a trade mark or *vice-versa.*

In India, the courts steadfastly protect the trade names without any condition that the name is registered, if there is any attempt to appropriate the business reputation, an injunction is issued.[49] Under various laws there arises an occasion to register the names, for example, in the Companies Act, 1956; the Partnership Act, 1930; the Societies Registration Acts; and the Shops and Establishments Acts of various states and the union territories of the Union of India. In all these statutes, a provision is normally inserted that a confusingly similar trade name may not be either registered or brought on record. Various companies with same names are found to be registered in different states and even in the same state.[50] It seems it occurs because of the lack of infrastructure and facilities.

(xii) Importation of Goods unlawfully bearing a Trade Mark or Name

Article 9 of the Paris Convention provides detailed rules in relation to seizure of goods, which bear a trade mark or name unlawfully. Article 9(1) requires the seizure of such goods is required to be made in those countries where such mark or name is entitled to protection. There is some practical difficulty in implementing Article 9(2), which requires seizure to be effected in the country, where the unlawful affixation of the mark occured. For example, the enforcement authorities do not have the information as to the marks protected in other countries and if they are affixed in India on goods, it will be very difficult to fulfil this requirement. The seizure to be effected in the country of import under Article 9(2) is qualified by the fact of entitlement to legal protection in the country of import. In the absence of an interested party, in the developing countries like India, it is rather impossible to fulfil the obligation. Indian laws prohibit the importation of goods with false trade marks or false trade description. There is a detailed procedure to facilitate the detection of false trade marks or names. From the absence of any judicial interventions in regard to similar trade names, it appears that these laws have not been frequently invoked.

(xiii) Collective Marks

Article 7*bis* of the Paris Convention obliges a member country to accept for filing and to protect, in accordance with the particular conditions set by that country, collective marks belonging to "associations." These will generally be associations of producers, manufactures, distributors, sellers or other merchants, of goods that are produced or manufactured in a certain country, region or locality or that have other common characteristics. The Paris Convention does not cover collective marks of states or other public bodies.

A Collective mark serves to distinguish the geographical origin, material, mode of manufacture, quality or other common characteristics

of goods or services of different enterprises, which simultaneously use the collective mark under the control of the owner of trademark. The users are normally members of the owner. The users more often use the collective mark with another mark of their own.

Presently, the TMMA does not provide for collective marks, though there is a detailed mechanism for the registration of certification marks, which are different from collective marks but may be said to a species of collective marks. Even non-members can use certification mark if the criteria are fulfilled but collective mark is permitted to be used by members only of course on fulfilling the criteria.

(xiv) Appellations of Origin, Indication of Source

Though, appellations of origin, indication of source, and unfair competition are matters sufficiently related to the trade marks but they do not form part of this study and the provisions with regard to them are not compared.

III. CONCLUSION

The TMMA is substantially in compliance with the obligations imposed by the Paris Convention as has been noted corresponding to each obligation. The national treatment is already in force. The priority mechanism to the member countries can be enforced by the executive authority.

Use requirement is in compliance with the Convention. In relation to independence of the trade marks, the unilateral action of any country cannot change the position. In this regard, the Bombay High Court made certain observations purporting to internationalize the trade mark. It appears they are of no avail. In relation to well-known marks, though the court practice is in conformity with the Paris Convention, but there is no specific enabling law complying with Article 6*bis* (2) and (3). Prohibitions in relation to the signs, emblems and hallmarks of other countries are within the realm of the executive authority. Provisions in relation to assignment of trade marks are liberal.

Article 6 of the Paris Convention projected as protection but actually listing the permissible prohibitions is complied with. In relation to the nature of goods to which trade marks are applied, there is no impediment under the trade mark law. The intervention of other laws, except in case of pharmaceuticals is negligible. Pharmaceutical sector requirements are justifiable because of the social and economic conditions obtaining in India *viz.* backwardness and illiteracy. Trade names are protected. The lack of judicial pronounce-ments may go to show poor enforcement in relation to unlawful importation, though the legal mechanism is sufficient.

Services have been now on active agenda of the country. In 1984 and 1986 two important legislations namely Monopolies and Restrictive Trade Practices Act, 1969 and Consumer Protection Act, 1986 have been enacted with provisions giving relief in relation to the services, to the consumers and to the enterprises providing these services.

New trade mark law is on the cards, which would incorporate provisions for the registration of the service marks and collective marks. It also appears that registration of registered user may be delegated back to the Registrar from the Central Government.

In developing countries mostly the trade marks are used by way of licenses. It would be in fitness of things to strengthen the position of licensees *vis-a-vis* proprietors by law. Thus, if the proprietor fails to exercise quality control the registration as user should not be cancelled. In case of allegation of poor quality of goods, instead of accepting the verdict of prop as to quality, quality as prescribed may be tested and if it is found okay the registered proprietor has to be penalized for abuse of IPRs or for not exercising quality control. In no case the licensee should be penalized without his fault and the license must continue.

Apart from this the proprietor should not be able to terminate the license without any fault of the licensee. No fault termination of license power be deemed as abuse of IPRs and such a clause in any license be declared as void with agreement allowed to subsist.

In relation to fixed duration licenses, if the licensee is willing to continue with the license, there should be direction to prefer such a licensee. Compulsory license is not suggested.

Law should envision a mechanism to share the advertising cost and benefit accrued to goodwill between licensor and licensee. There has to be relationship among the royalty paid, advertising cost incurred and the escalation in goodwill of the trade mark in the country.

If there are any restrictive business practices then the court should declare these practices or clauses of the agreement void and continue with the rest of the agreement as a valid license of trade mark.

In addition, if there is found any coercive package licensing or forced technology transfer or back flow of technology without payment, the same should be deemed to be abuse of intellectual property and only the necessary license required by the licensee be continued and rest be declared void. In such a situation, the licensee of intellectual property should be compensated suitably or the rights of the licensor be declared to

be incapable of being exercised even though the rights continue to exist (as was done in EEC to make the rights unenforceable for free circulation within EEC).

NOTES AND REFERENCES

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1. Article 1(1) of the Paris Convention declares the member countries as constituting a Union for the protection of industrial property.
2. In the year 1974 on the recommendation of Coordination Committee an ad hoc group of experts was set up for the purpose.
3. For list of amendments suggested refer to non-repititive documents of WIPO.
4. The revision of Paris Convention was deferred in 1991 till the outcome of Uruguay Round of GATT.
5. For obligations in relation to trade marks under WTO-TRIPs AGREEMENT, see Ashwani Kumar, *Trade Related IPRs (Annex. IC of WTO): Importance of Trade Mark and Indian Law*, I JOURNAL OF CONTEMPORARY LAW, 1998 at 85. See also Ashwani Kumar, *Border Measures for Trade Marks in India and TRIPs*, I NATIONAL CAPITAL LAW JOURNAL, 1996 at 144.
6. International Bureau, WIPO, *The Paris Convention for Protection of Industrial Property*, paper presented at the NATIONAL WORKSHOP ON INTELLECTUAL PROPERTY TEACHING, Delhi, October 21-25, 1991, at 5 (WIPO/ DEL/ 91/ 4*bis*).

   International Bureau is the secretariat of WIPO and responsible for administering various conventions and treaties. The Bureau keeps preparing papers, background materials and country profiles for international cooperation in relation to the areas covered by various conventions.
7. *Id.*, para 25.
8. *Id.*, para 19.
9. *Id.*, para 21.
10. *Id.*, para 22.
11. Section 132 (a), (b) and (c) of the TMMA.
12. WIPO /Del / 91/ 4*bis*, *supra* n. 6, para 24.
13. See the case of *Revlon* v. *Kemco*, 1987 IPLR 32 (Cal.).
14. WIPO, BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY (Geneva, 1988), at 52.
15. WIPO / Del / 91/ 4*bis*, *supra* n. 6, para 34.
16. *Id.*, para 32.
17. *Ibid.*
18. Section 131 of TMMA.
19. See the contrast situation accepted by Indian Supreme Court wherein advertisements have been treated equal to use of the trade marks. It needs to be appreciated that the action of Indian Supreme Court has gone in favour of right holders belonging to developed countries. It is submitted that even while judicial discourse of *Budewiser* case of U.K. could be followed which would have protected the interest of developing countries, but the Supreme Court for considerations not properly reflected in the judgement of *Dongre* v. *Whirlpool* have gone

the way it has gone. In view of Art 16.2 of TRIPs, promotion of trade mark has to be kept in view.

20. Article 5C (1) of the PARIS CONVENTION.
21. WIPO/DEL/91/4 *bis*. *supra* n. 6, para 77.
22. *Id*., para 78.
23. *Id*., para 79.
24. *Id*., para 80.
25. *Reynolds* v. *ITC*, 1990 IPLR 85.
26. WIPO, *supra* n. 14 at 81.
27. See *Bajaj Electricals Ltd* v. *Metal and Allied Products*, AIR 1988 Bom 167.
28. *P.M. Diesels* v. *Thukral Mechanical Works*, AIR 1988 Del 282.
29. WIPO/DEL/91/4 *bis*, *supra* n. 6, para 82.
30. *Id*., para 83.
31. *Id*., para 85.
32. *Christine Holden* v. *Johnson & Johnson*, 1990 IPLR 96.
33. See Frederick W. Mostert, FAMOUS AND WELL KNOWN MARKS- AN INTERNATIONAL ANALYSIS, (Butterworths, 1997) generally and for law of 15 countries and other profiles.
34. Protection of Well-Known Marks: Results of the study by the International Bureau; and Prospects for improvement of the existing situation: Committee of experts on Well-Known Marks 13-16 Nov.1995. Earlier work by AIPPI in response to Q 100 at Barcelona 1990.
35. Difficulty arises in India as TMMA 1958 does not use the expression similar goods. In various forms of protection either it is same goods or the protection is without mention of goods; which may include similar or substitutive or different goods.
36. WIPO, INTELLECTUAL PROPERTY READING MATERIAL, publication no. 476E, 1995, Geneva, para 18.90.
37. When UK decided *Budewiser Beer* case, Art. 6*bis* was applicable on UK and they in the interest of the trade of their country decided that actual physical sale of goods must take place within UK for any kind of reputation or Goodwill in UK. But India which was not bound even by Art. 6 *bis* developed its own theory of transborder reputation to defeat the interest of its traders, who would have profitably sold back the pirated trade mark to interested parties or might have settled for licensee status as has been common.
38. If Indian legislation does not go to protect in terms of Article 6 *bis*, there is no obligation to enact laws to make available the protection desired in Art. 6 *bis* but the position changes when Article 16 of TRIPs Agreement desires the same kind of protection, then the law will have to be enacted, but the ingredients of goodwill or reputation shall be determined by national legislation.
39. Thus every application would also allege that conflicting mark has been registered in bad faith for jurisdiction to arise. Thus all such provisions determine the legal environment only and the position of small market trade marks in developing countries become vulnerable at the hands of their own courts, which tend to oblige all the big name advocates and big name trade marks.
40. See the observations of Bombay High Court in *Kamal Trading* v. *Gillette*: Delhi High Court in *Apple Computer* v. *Apple Leasing*, 1993 IPLR 63; Madras High Court in *Haw Par Bros* v. *Tiger Balm* Co., 20 IPLR 265; Bombay High Court in *Cartier* v. *Ramesh Sawhney*, 19

IPLR 214, and finally Delhi High Court in *N R Dongre* v. *Whirlpool*, 20 IPLR 211 and S.C in appeal no. 10703 judgement dt 30 Aug. 1996.

41. *Blue Cross* v. *Blue Cross*, 15 IPLR 92.
42. WIPO/DEL/91/4 bis, *supra* n. 6, para 97.
43. Narayanan, TRADE MARKS AND PASSING OFF (Eastern Law House, 1991) at 858-865.
44. Section 38 of the TMMA.
45. See WIPO, *supra* n. 14 at 181.
46. *Id.* at 182.
47. Meaning of service mark as elaborated by International Bureau. See WIPO, *supra* n.6, para 119.
48. *Id.*, para 125-28.
49. See Ashwani Kumar, *Expansion of Passing-Off*, paper circulated in WIPO-DU training programme, April 22-26, 1996.
50. Chalapati Rao, K.S. and K.V.K. Ranganathan, Working paper on *Working on Directory of Joint Stock Companies, 1992*, Institute for Studies in Industrial Development.

US ATTACK ON SUDAN AND AFGHANISTAN : DOES THE ACTION FALL UNDER ARTICLE 51 OF THE UN CHARTER?

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I. INTRODUCTION

Following terrorist attacks on American embassies in Tanzania and Kenya in mid 1998 which claimed lives of a number of American people, the United States retaliated by attacking the terrorist sites in Sudan and Afghanistan which it claimed were being maintained by the multi-millionaire terrorist Osama bin Laden. According to information available, about 70 Tomahawk missiles were fired from the Arabian Sea and the Red Sea, traversing 1000 to 1500 miles in each case.[1] These missiles overflew the coastal waters and air space of countries other than those which were targeted. Neither the targeted countries nor the countries whose territorial seas and air space were involved were given any advance information.

The missiles fired on the Khartoum Chemical factory in Sudan achieved pre-designated damage, whereas those fired into Afghanistan destroyed more than the specific target. It is noteworthy that a couple of missiles fell inside the Pakistani territory also.

The United States argued that it targeted a group which had carried out anti-United States terrorist activities and which was likely to undertake further violent activities against the United States personnel and establishments. It argued further that punitive action taken by it were actions under the right of self-defence as contained in Article 51 of the United Nations Charter. The allies of United States and a number of South American, African and Asian countries have welcomed the decisive action against the international terrorism. On the other hand, the majority of Muslim countries and many developing and non-aligned countries have criticised it as a violation of international law. The paper makes a study of Article 51 of the United Nations Charter in order to find out whether the attack by the United States on Sudan and Afghanistan can be justified as actions taken in self-defence. The paper at the same time also makes a study of Article 2 paragraph 4 of the United Nations Charter which prohibits threat or use of force against the States, in order to find out whether the actions taken

by United States were violative of the aforesaid Article.

II. Prohibition of Use of Force : Article 2 Para 4 of the U N Charter

The Charter of the United Nations was formed to cover all the gaps found in the earlier instruments prohibiting use of force *i.e.* Covenant of League of Nations and Pact of Paris popularly known as Kellogg-Briand Pact of 1928. The League of Nations was formed to regulate the conduct of states regarding their rights to go to war. But it did not touch upon all aspects of the states power to use force *e.g.* in self-help or undeclared war situation. To fill the gaps found in the Covenant of League of Nations, the Pact of Paris was signed between United States and France which was later on, signed by sixty three states. Although the Pact denounced war as an instrument of national policy and emphasized on the pacific settlement of disputes, but it too failed to impose an absolute prohibition on states to use force.

In 1945, the allied nations gathered at San Francisco and signed a multilateral treaty to give effect to their determination "to save succeeding generations from the scourge of war..." and "to ensure, by the acceptance of principles and the institution of methods that armed force shall not be used save in the common interest...."[2] Thus, they created a new organisation namely United Nations Organisation to prevent future wars. The state parties also committed to settle their international disputes by peaceful means.[3]

Article 2 para 4 of the UN Charter provides as under:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The framers of the Charter, in order to broaden the scope of restrictions upon the right of state to go to war, used the term 'threat or use of force'. In doing so, the intention of the framers of the Charter was to avoid intricate problem of defining war which was existed under the League of Nations.

The term 'threat' has not been defined anywhere in the Charter. Threat of force may be brought into being through a number of situations created by the conduct of one state against another. The plain meaning of the word 'threat' is a declaration of hostile determination or of loss, pain, punishment or damage to be inflicted in retribution for or conditionally upon some course.[4]

The term 'territorial integrity' implies the effective control of an area and authoritative jurisdiction as well.[5] Thus, a state would be acting in violation and in breach of its obligations under the Charter, if it commits an act of force within the territory of another state in order to obtain redress even without the intention of interfering with the territory or integrity and thereby undermining the political independence of that state. The actions against the 'political independence' of a state are actions directed at controlling the government and other institutional bodies of a state, either by setting up a particular form of government with defined ideological propensities or by forcing existing institutions to act in the interests of the foreign power.[6]

Article 2 para 4 imposes a restriction on states' rights to use force. The right to use force has been given by states to United Nations and an individual state can use force within the Charter and only in certain conditions. These conditions may be enumerated as below:

(*i*) the use of force in individual and collective self-defence under Article 51 of the UN Charter;

(*ii*) joint and several action against enemy states of World War-II under Articles 53 and 107 of the UN Charter;

(*iii*) collective action by United Nations under Chapter VII or action taken by states under the authority of United Nations under Chapter VII or VIII.

In addition, force may also be used under the following conditions:

(*i*) for enforcing the right of self-determination which has been incorporated in the Preamble and Purposes of the UN Charter under the authorization of United Nations; and

(*ii*) for the liberation of occupied territories under the authorization of United Nations.[7]

Thus, force can not be used except in the aforesaid conditions. As stated earlier, Article 2 para 4 covers not only war, which is extensive armed hostilities or the highest degree of destructive use of military instruments but also use of physical force of lesser intensity or magnitude, which in the past has been characterized as short of war situations or self-help. Self-help can be described as an act of state through the use of force to remedy an illegal act of the other in order to get satisfaction. The distinction between self-help and self-defence is that, self-defence operates to protect a state against irreparable harm where no other means are available, aims at the restoration of the *status quo*, whereas self-help has

a remedial or repressive character in order to enforce legal rights.[8] The use of force in the form of self-help is not justified under the UN charter.

III. Right of Self-Defence : Article 51 of the UN Charter

Member states voluntarily surrendered their sovereign right to use force in favour of the Security Council of the United Nations. The Security Council has assumed the responsibility of maintaining international peace and security. States are not allowed to use force either to enforce their rights or to prevent possible aggression. However, in case of an armed attack a state may either alone or in consort with other states, use force in self-defence without prior authorization of the Security Council. Such a right of self-defence is an inherent right which exists in the nature of a state. The UN Charter does not grant right of self-defence. It simply recongizes this inherent right under Article 51. The right of self-defence, however, be exercised only when the armed attack occurs and ceases the moment Security Council steps in.

The right of self-defence was also available under the Covenant of League of Nations. The Covenant, however, did not define the right of self-defence and therefore, its extent remained uncertain. In the Kellogg-Briand Pact also, the right of legitimate self-defence of the members was not touched. Under general international law, the anticipatory right of self-defence has been recognized. This right was available to states in case of an imminent threat, leaving no choice of means and no moment of deliberation.

Under UN Charter, the right of self-defence is contained in Article 51, which reads as under:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence, if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of the self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

According to Article 51, the inherent right of self-defence is available to a member state only when an armed attack occurs against it. Thus, the anticipatory right of self-defence is not available under the UN Charter. In addition, the right of self-defence is available to member states until the

Security Council has taken measures necessary to maintain international peace and security. The right of member states to act in self-defence would cease once the Security Council has taken necessary measures for the maintenance of international peace and security in regard to the given situation. Actions taken by member states will immediately be reported to Security Council. The action taken by individual state under the right of self-defence does not in any way affect the power of Security Council to maintain international peace and security. It can at any time interfere in the situation and take necessary action to maintain international peace and security. Even if the Security Council is unable to act in the first instance, its authority to take action subsequently shall not be affected.

IV. US Punitive Action Against Sudan and Afghanistan

The argument of United States when it took punitive action against Sudan and Afghanistan was that it acted in self-defence under Article 51 of the UN Charter. Although it has targeted the group which had carried out anti-United States terrorist activities even then these actions shall be called as punitive actions against Sudan and Afghanistan as force has been used against the territorial integrity of these States.

After examining Article 2 para 4 and Article 51, the questions arise whether US actions fall under Article 51 or have been taken in violation of Article 2 para 4. Since Article 51 is restrictive in scope and provides the right of self-defence to a member state only in case of an armed attack, it becomes important to find out whether terrorist attacks on a member's embassies in third state may be equated to an armed attack on it especially where three is no direct involvement of states in which the terrorists have a base. A plain and simple reading of Article 51 makes it abundantly clear that terrorist attack can never be equated to an armed attack by a state. Terrorists are not equal to a state and therefore, Article 51 cannot be invoked to punish terrorists. Force can be used in self-defence under Article 51 only against a state and not against a terrorist group. Moreover, a state which is taking action in self-defence is obliged to report its action to Security Council. This obligation has not been performed by the United States as it did not report its actions to Security Council. By attacking Osama bin Laden led terrorist group in Sudan and Afghanistan, the United States has taken punitive actions against these states in reality.

Although it is true that the problem of international terrorism has become acute throughout the world and to curb this problem is a duty of each state, yet no state is allowed to perform this duty in blatant violation of international law. The United States should have raised the problem of international terrorism in Security Council which is primarily responsible

to maintain international peace and security instead of taking punitive actions against the two countries. To sum up, the use of force by United States against the two countries was not in self-defence but in violation of Article 2 para 4. Apart from this, the United States has violated the territorial jurisdiction of a number of countries.

V. Conclusion

This is not the only incident after the establishment of United Nations Organization, where United States has taken actions against other sovereign states in violation of international law. It has already taken actions in violation of international law against Lebanon, Libya, Panama, Haiti and Yugoslavia. After taking punitive actions against Sudan and Afghanistan, it has categorically stated that it would carry out further unilateral strikes against its terrorist enemies if necessary. This creates a dangerous and destabilising precedent. If the actions of United State are not condemned today then in future a state which is powerful and immune from retaliatory action, can indulge in unilateral and coercive military operations against other countries or sections of their people at will. This will defeat the very purpose of the UN Charter and result in obstructions to the development of international law.

Notes and References

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1. J. N. Dixit, *US Tomahawks in Sudan and Afghanistan : A Precedent with Potential*, Indian Express, September 2, 1998.
2. See Preamble of the UN Charter. .
3. Article 2 paragraph 3 of the UN Charter.
4. S.R. Chowdhury quoted in S.C. Khare, Use of Force Under UN Charter (New Delhi, 1985) at 44.
5. R. Higgins, The Development of International Law Through the Political Organs of the United Nations (London, 1963) at 182.
6. *Id.* at 183.
7. See also Khare, *supra* n. 4 at 31.
8. Bowett, Self-Defence in International Law (Manchester, 1958) at 11.

THE CONSTITUTIONAL SCHEME FOR THE PROTECTION OF ENVIRONMENT IN INDIA : JUDICIAL PERCEPTION

*B. Aruna Venkat**

The original Constitution of India which came into force in 1950 did not deal with the subject of protection of environment in the country. In a way the Indian Constitution was silent in this regard. It was only in 1976 that the Indian Government thought it necessary to amend the Constitution to provide for the protection of environment by incorporating a few provisions in the Constitution. The result was the enactment of the Constitution (Forty-Second) Amendment Act, 1976.

It may be interesting to note that the Indian efforts at the protection of environment in India began only after the Stockholm Conference in 1972. This Conference, it may be noted, was the real milestone in awakening the concern of the Indian Government towards environmental pollution. Before this Conference neither the Indian Constitution nor any of the Indian laws dealt with the problem of environment expressly. It was only after this Conference that both constitutional and legislative reforms have been effected in India to meet and combat the environmental problems in the country.

I. Protection of Environment : Constitutional Provisions

The Constitution (Forty Second) Amendment Act, 1976 added two important provisions to the constitution. These provisions are Articles 48A and 51A(g). Article 48A, which finds its place in Part IV of the Constitution entitled "Directive Principles of State Policy", declares :

> The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.[1]

The second important provision added by the Constitution (Forty Second) Amendment Act is Articles 51A. This provision, which finds a place in Part IVA entitled "Fundamental Duties" *inter-alia*, states :

> It shall be the duty of every citizen of India - to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.[2]

A close look at these provisions in the light of the scheme of Part IV of the Constitution indicates that there is constitutional conceptualization of the inter-relationship between development and environment. The Directive Principles of State Policy as embodied in Part IV of the Constitution are "fundamental in the governance of the country". They impose a constitutional duty on the state to apply these principles in making laws aimed at the attainment of certain social and economic developmental goals by the state.[3] These directive principles *inter-alia,* envisage socio-economic development of the country and the people.

Thus, the state is obliged to formulate its socio-economic policies in such a way as to subserve the larger constitutional environmental policy perspectives.[4] The state is also obliged to secure a social order in which justice, social, economic and political shall inform all the institutions of national life.[5] The state shall, in particular, direct its policy towards ensuring that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; that the health and strength of workers, men and women, and the tender age of children are not abused; that citizens are not forced by economic necessity to avocations unsuited to their age or strength; that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity; and that youth are protected against exploitation and against moral and material abandonment.[6]

It is of great constitutional significance that Articles 48A and 51A(g) along with other Part IV provisions provide the necessary constitutional edifice for the concept of "sustainable development" in the country by outlining a blueprint of social and economic development within the larger framework of environmental protection strategy. It may be noted that while Article 48A imposes a constitutional obligation on the state to protect and improve the environment, and to safeguard the forests and wild life of the country, Article 51A(g) obliges the citizens of India to protect and improve the natural environment including forests, lakes, rivers and wild life etc.

It is of immense interest to note that while the Indian Constitution imposes a constitutional duty both on the state and individual to protect the natural environment by taking all possible appropriate measures, it does not confer a constitutional right to healthy environment on the individual. This brings us to the question as to whether or not there should be a constitutionally guaranteed right to a hygienic environment.

II. The Right to Hygienic Environment : Constitutional Position

It is submitted that the constitutional scheme for the protection of environment as originally envisaged at the time of the enactment of the Constitution (Forty- Second) Amendment Act, contained a serious lacuna which was later on removed by the judicial innovation. It may be appreciated that Article 48A, which imposes a constitutional obligation on the state, is non-justifiable in nature.[7] This means that if the state fails to discharge its constitutional obligation to protect, preserve and improve environment, such failure is not judicially questionable. This is the position, so long as the problem of protection of the environment remains as the state's non-enforceable imperfect positive obligation.[8] If it fails to discharge its constitutional obligation, there is no judicial remedy. If the state wilfully damages or destroys or threatens to damage or destroy the natural environment which the state is constitutionally obliged to protect, the citizens of the country would have no constitutional remedy. This is an important anomaly, which has been removed by judicial creativity and innovation.

Thus, the scheme of the Constitution, as it stood before the Supreme Court's creative interpretation of the fundamental right to life guaranteed in Article 21 of the Constitution, was that it obligated the state to protect and improve the environment without investing the individual with any enforceable constitutional right in this regard. Again the original constitutional scheme, unwittingly, was to impose a constitutional duty on the individual without the conferment of any justifiable constitutional right in favour of the individual.

Normally, the interests of the state and of the individual citizens in the protection of environment are not supposed to come into conflict, for they expected to co-operate and collaborate to usher in a new environmental order in the country. But sometimes due to differences in their perceptions, the interest of the state may come into conflict with those of the citizens. This was what precisely happened in the State of Kerala when the State Government of Kerala sought to deforest a stretch of forest, nearly 8952 hectares in extent, known as the "Silent Valley" for the construction of a dam for processing a hydro-electric project for power generation and supply of electricity. This was contested by a petition before the Kerala High Court.[9] Justice Gopalan Nambiar, while dismissing the petition observed:

> We do not think it necessary to cover the entire gamut of the material - whether scientific, technical, technological or ecological - placed before us in great detail. It is not for us to

> evaluate these considerations again as against the evaluation already done by the Government. It is enough to state that we are satisfied that the relevant matters have received attention before the Government decided to launch the project. There has been no non-advertence of the mind to the salient aspects of the project. We are not to substitute our opinion and notions on these matters for those of the Government.

Perhaps, the learned judge would not have made this observation had the citizens been guaranteed a constitutionally enforceable right to a decent environment.

Similar is the recent unresolved controversy that is raging around the viability of Narmada and Sardar Sarovar Projects in the State of Gujarat. Antagonists of these projects, which the government of the State of Gujarat is eager to push through, claim that the implementation of these projects would cause irreversible environmental degradation by submerging 37000 hectares of land and by destroying several lakhs of trees. These projects, in their wake, have brought to the fore the rehabilitation and environmental issues.

As earlier mentioned, this anomaly in the constitutional scheme has been remedied by the Supreme Court of India when it creatively expanded the contours of the fundamental right to life so as to subsume the right to healthy and pollution free environment.

III. The Right to Hygienic Environment : A Derivative Right of the Right to Life

The right to life is one of the fundamental rights guaranteed by Part III of the Constitution, which is entitled "Fundamental Rights". The Supreme Court has been assigned the role of "a sentinel on the quivive"[10] to safeguard the fundamental rights from both legislative and executive encroachments"[11]. Towards this end, the apex court is also vested with concurrent original jurisdiction.[12] The Supreme Court using its power of judicial review as conferred by Article 32[13] of the Constitution has evinced an unprecedented judicial activism with regard to the interpretation of fundamental rights. Articulating the Supreme Court's new judicial approach to the interpretation of fundamental rights. Justice Bhagwati (as he then was) observed in Maneka Gandhi v. Union of India[14]:

> The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of contraction.[15]

In consonance with the spirit of this new judicial perception, the Indian apex court is no longer content with its traditional adjudiciary role with all its constraints. It claims to assume and play a more activist and creative role in order to ensure the efficacy and effectiveness of some of the most basic fundamental rights guaranteed to the Indian people. It is heartening to note that the Indian Supreme Court has not only widened the meaning and contents of fundamental rights by its creative interpretation but also expanded their reach and ambit by innovating new judicial strategies for their effective enforcement and enjoyment.[16]

(a) The Right to Life : Meaning and Content

In *Munn* v. *Illinois*,[17] Justice Field, dissenting from the majority, spoke of the right thus[18]:

> By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm, or leg, or the putting out of an eye, or the extraction of any other organ of the body through which the soul communicates with the outer world.

In India the above view of the right to life has not only been judicially approved but also been further expanded.

Thus, in the Indian constitutional jurisprudence, Article 21[19] of the Indian constitution which guarantees the right to life and personal liberty has come to occupy the position of "brooding omnipresence" in the scheme of fundamental rights. This provision has become a "sanctuary for human values" and therefore has been rightly termed as the "fundamental of fundamental rights". Like the right to personal liberty, which has been given a new content,[20] the right to life has been infused with the dynamic concept of human dignity, which is the foundation of all other human rights. In *Francis Caroline Mullin* v. *Delhi Administration*[21] Justice Bhagwati (as he then was) elucidated the import of the right of life as follows[22] :

> The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something more than just physical survival. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed... this would include the faculties of thinking and feeling. But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace

> something more. We think that the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries 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 commingling with fellow human being. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of oneself.

Thus, the right to life has been given an expansive reach to encompass the right to live with human dignity, which in turn would include the basic needs of life such as food, clothing and shelter[23] etc. Further, the right to life has been held to include the right to livelihood. In *Olga Tellis* v. *Bombay Municipal Corporation,*[24] Chief Justice Chandrachud observed[25]:

> The right to life does not mean merely that life cannot be taken away extinguished as, for example, by the imposition and execution of the death sentence, except, according to procedure established by law. That is but one aspect of the life. An equally important aspect of it is the right to livelihood. If the right to livelihood is not treated as a part of the right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. In view of the fact that Articles 39(a) and 41 require the state to secure an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of life.

Evidently, the right to life seems to be the main right from which many more basic human rights emanate. The right to the quality of life,[26] the right to unpolluted environment,[27] the right to the preservation of nature's gifts,[28] the right to one's own tradition, culture and heritage,[29] the right to education[30] have all been held to be integral parts of the right to life.

(b) The right to Life and the Right to Pollution Free Environment

Coming to the right to pollution free environment as a right emanating from the right to life, the first case where the Supreme Court recognized the right to clean environment as an aspect of the right to life is *Rural Litigation*

and Entitlement Kendra v. *State of U.P.*[31] In this case, the relevant issue for the purpose of our discussion was whether limestone mining activities in the Mussorie-Dehradun region caused ecological disturbance and thus violated the right to life of the people in that region. The Supreme Court declared that these activities polluted the environment and thus violated the right to life of the people. While ordering the closure, some of the lime stone quarries the Supreme Court implicitly read the right to clean environment in the right to life. Without referring to Article 21 of the Constitution, the apex Court observed:[32]

> This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment.

Similarly, in *Charan Lal Sahu* v. *Union of India,*[33] in his concurring opinion Justice K.N. Singh observed:[34]

> In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by Constitution under Articles 21, 48A and 51A(g), it is the duty of the State to take effective steps to protect the generated constitutional rights.

Similary, in *Subhash Kumar* v. *State of Bihar*,[35] Justice K.N. Singh declared:[36]

> Right to life is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life .

It may also be mentioned that following the ratio of the Supreme Court in the above-mentioned cases some of the High Courts articulated their perception of the right to environment. Thus in *Damodar Rao* v. *S.O., Municipal Corporation, Hyderabad*,[37] Justice P.A. Choudhary observed[38]:

> Examining the matter from the above constitutional point of view, it would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's

> gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Article 21 of the Constitution.

To mention one more High Court decision, in *D.D. Vyas* v. *Ghaziabad Development Authority, Ghaziabad,*[39] the Allhabad High Court held the same view. It observed:

> Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything damages or impairs that quality of life in derogation of law, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of air, which may be detrimental to quality of life.

Thus, it may be appreciated that the higher judiciary in India has, by judicial innovation and creativity, removed the anomaly by reading the right to wholesome environment in the right to life as a penumbral right. The effect of ISO reading has been to obligate the State to take both legislative and administrative measures necessary to protect ecology in the country.

It may be noted that so long as the right to clean environment continues to be penumbral right to its adequacy and efficacy depends upon the continued cooperation of the apex court. In this context, it has been observed, rightly, that "it is not appropriate to leave such an important and vital right to judicial vagaries" and that "it is imperative that this right finds an express mention in Part III of the Constitution".[40]

NOTES AND REFERENCES

* Legal Editor, Butterworths India Ltd., New Delhi.

1. See Article 48A of the CONSTITUTION OF INDIA.
2. See Article 51A(g) of the CONSTITUTION OF INDIA.
3. Article 37 of the CONSTITUTION OF INDIA declares: "The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."
4. That is the effect of a holistic reading of Part IV provisions.
5. See Article 38 of the CONSTITUTION OF INDIA.

6. See Article 39 of the CONSTITUTION OF INDIA.
7. See *supra* n. 3.
8. B. Errabbi, *Environmental Protection: Constitutional Imperatives - Indian Experience* and also S.P. Sharma, *Constitutional Perspective for Environmental Protection in India: A Brief Study* in R.P. Anand, Rahmatullah Khan and S. Bhatt, ed., LAW, SCIENCE AND ENVIRONMENT (1984) at 188 and 244 . See also P.C. Rao, *The Environmental Perspective in the Indian Constitution*, 23 INDIAN JOURNAL OF INTERNATIONAL LAW, 1983 at 88.
9. *Society for Protection of Silent Valley* v. *Union of India*. This case has not been reported and therefore, it has been taken from P. Leelakrishnan ed., LAW AND ENVIRONMENT (1984) at 13-138.
10. See *State of Madras* v. *V.G. Rou.*, AIR 1952 SC 196, 199. See also Article 32(1) of the CONSTITUTION OF INDIA which declares: "The Right to move the Supreme Court for the enforcement of the rights of this Part is guaranteed".
11. Article 13(2) of the CONSTITUTION OF INDIA states: "The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of the contravention, be void".
12. Article 32(2) of the CONSTITUTION OF INDIA reads: "The Supreme Court shall have power to issue directions or orders or writs, including, writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by this Part".
13. See *supra* n. 10 and 12.
14. AIR 1978 SC 597.
15. *Id.* at 622.
16. In several cases, the Supreme Court encouraged public interest litigation to vindicate the rights of the deprived sections of the society.
17. 94 US 113 (1877).
18. *Id.* at 142.
19. Article 21 of the CONSTITUTION OF INDIA declares: "No person shall be deprived of his life or personal liberty except according to procedure established by law".
20. See *supra* n. 31.
21. AIR 1981 SC 746.
22. *Id.* at pp. 752-53 (Emphasis added).
23. See also *Santistar Builders* v. *Union of India.* (1990) ISCC 520.
24. AIR 1986 SC 180.
25. *Id.* at 193.
26. *State of HP* v. *Umed Ram*, AIR 1986 SC 847.
27. See *Rural Litigation and Entitlement Kendra* v. *State of UP*, AIR 1987 SC 2426; *Damodhar Rao* v. *SO. Municipal Corporation, Hyderabad*, AIR 1987 AP 171; *Chhetriya Pardushan Mukti Sangharsh Samiti* v. *State of U.P.*, AIR 1990 SC 2060; and *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420.
28. *Ibid.*
29. In *Rama Sharan Antyanuprasi* v. *State of Bihar*, AIR 1990 SC 630, the Court held (at 637)

that the right to life also "includes all that gives meaning to a man's life including his tradition, culture and heritage and protection of that heritage in its full measure".

30. *Unnikrishnan* v. *State of Andhra Pradesh,* JUDGEMENTS TODAY, 1993 (1) SC 474.
31. AIR 1985 SC 652.
32. *Id.* at 256.
33. AIR 1990 SC 1480; (1990) 1 SCC 613.
34. *Id.* at 713.
35. AIR 1990 SC 420.
36. *Id.* at 424.
37. AIR 1987 AP 171.
38. *Id.*, at 181. In a similar view, in *Lakshmipathi* v. *State* (AIR 1992 Kant. 57 at 70), the Karnataka High Court observed : "the right to life inherent in Article 21 of the Constitution of India does not fall short of the requirements of qualitative life which is possible only in an environment of quality where an account of human agencies, the quality of air and the quality of environment are threatened or affected, the Court would not hesitate to use its innovative power within its epistolary jurisdiction to enforce and safeguard the right to life to protect public interest. Specific guarantees in Article 21 uphold penumbras shaped by emanations from those constitutional assurances which help give them life and substance". Again, in *Law Society of India* v. *Fertilizers and Chemicals, Travancore Ltd.* (AIR 1994 Ker 308 at 370) Justice Varghese Koliath observed:" Deprivation of life under Article 21 of the Constitution comprehends certainly deprivations other than total deprivation. The guarantee to life is certainly more than immunity from annihilation of life. Right to environment is part of the right to life". In this connection, see also *P.A. Jacob* v. *SP Kottayam and others*, AIR 1993 Kerala 1 and *General Public of Saproon* v. *State of HP,* AIR 1993 HP 52.
39. AIR 1990 All 157.
40. See *supra* n. 8. See also Dr. C.M. Jariwala, *Emerging Right to Environment: An Indian Experience*, Souvenir of Indian Law Institute International Conference.

JUDICIAL REVIEW AND ADMINISTRATIVE TRIBUNALS IN INDIA

Sarbjit Kaur

I. INTRODUCTION

A number of tribunals as alternative forums of adjudication have come up. The tribunals have to possess certain attributes of a court but which have to be free from the constraints of courts. The tribunals as alternative fora dispute adjudication are supposed to be quicker, economical, less formal and possessed of expertise in a subject compared to the courts. They are cheap and quick because they are not bound by the Law of Evidence as much as the courts. Tribunals can design their own procedures, however, they must abide by rules of natural justice.

Part XIV of the Constitution was inserted through Section 46 of the Constitution (42nd Amendment) Acts, 1976 with effect from March 1, 1977. It comprises of two provisions: Article 323A and 323B empowering the legislature to set up Administrative Tribunals. The object of this new "part" is to create a system of tribunals outside the system of courts. It empowers the legislature to create tribunals in the areas of civil service, levy, assessment, collection and enforcement of any tax; foreign exchange, import and export across custom frontiers; industrial labour disputes; land reforms by way of acquisition by the State of any estate, etc.; ceiling on urban property; elections to the legislature; production, procurement, supply and distribution of food stuff and such other goods notified by the President to be essential goods including control of their prices. Even offences in relation to all these matters could be tried by these tribunals.

II. CONSTITUTION OF ADMINISTRATIVE TRIBUNALS

A. Administrative Tribunals under Article 323A of the Constitution

Article 323A of the Constitution stipulates that the Parliament may by law, provide for the adjudication by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to the public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of

any corporation owned or controlled by the Government. In pursuance of the power conferred upon it by clause (1) of Article 323A of the Constitution, the Parliament enacted the Administrative Tribunals Act, 1985. The Act provides for the adjudication of the disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation or society owned or controlled by the Government in pursuance of Article 323A of the Constitution for matters connected therewith or incidental thereto.[1]

The question of transfer of jurisdiction of courts in some matters to Administrative Tribunals has been engaging the attention of law reformers in India for quite a long time. Since independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. The problems of clearing the backlogs of the High Courts is, nevertheless, one that has been the focus of study for close to a half century. Over time, several expert Committees and Commissions[2] have analysed the intricacies involved and have made suggestions to relieve the High Courts of their increased load. After analysing the situation existing in the High Courts at length, the Law Commission of India in its 124th report,[3] made specific recommendations towards the establishment of specialist tribunals. The Law Commission of India noted the erstwhile international judicial trend which pointed towards generalist courts yielding their place to specialist tribunals. Describing the pendency in the High Courts as "catastrophic, crisis ridden, almost unmanageable, imposing an immeasurable burden on the system", the Law Commission stated that the prevailing view in the Indian jurisprudence that the jurisdiction enjoyed by the High Court is a holy cow required a review. It, therefore, recommended the trimming of the jurisdiction of the High Court by setting up tribunals while simultaneously eliminating the jurisdiction of the High Courts.

In *K.K. Dutta* v. *Union of India*[4] the Supreme Court had, while emphasising the need for speedy resolution of service disputes, proposed the establishment of service tribunals. The statement of objects and reasons of the Administrative Tribunals Acts, 1985 indicates that it was in express terms of Article 323A of the Constitution and was being enacted because a large number of cases relating to service matters were pending before various courts, it was expected that the setting up of such Administrative Tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of various courts and thereby giving

them more time to deal with other cases expeditiously but would also provide to the persons concerned by the Administrative Tribunals speedy relief in respect of their grievances.

Pursuant to the provisions of the Act, the Central Administrative Tribunal (CAT), with its principle Bench at New Delhi and additional benches at Allahabad, Bombay, Calcutta, Madras was established on November 1, 1985. Subsequently the Benches of Central Administrative Tribunal were established at Jabalpur, Jodhpur, Cuttack, Ahmedabad, Bangalore, Patna, Chandigarh, Guwahati and Hyderabad. Apart from Central Administrative Tribunal, State Administrative Tribunals have been established in Andhra Pradesh, Himachal Pradesh, Karnataka, Madhya pradesh, Maharashtra, Orissa, Tamil Nadu, West Bengal, Gujarat, Haryana, Arunachal Pradesh.

B. Administrative Tribunals under Article 323B of the Constitution

Article 323B of the Constitution empowers the Parliament or the State Legislatures, as the case may be, to enact laws providing for the adjudication or trial by tribunals of disputes, complaints or offences with respect to a wide variety of matters which have been specified in the nine sub-clauses of clause (2) of Article 323B. The matters specified cover a wide canvas including *inter alia* disputes relating to tax cases, foreign exchange matters, industrial and labour cases, ceiling on urban property, election to the State Legislatures and the Parliament, essential goods and their distribution, criminal offences etc. The tribunals that have been created under Article 323B are the West Bengal Taxation Tribunal which was set up in 1989 under the West Bengal Taxation Tribunal Act, 1987; the Rajasthan Taxation Tribunal which was set up in 1995 under the Rajasthan Taxation Tribunal Act, 1995. The State of Tamil Nadu has set up two tribunals under Article 323B. The Tamil Nadu Land Reforms Special Appellate Tribunal which was established in 1990 under Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1985 to deal with all matters relating to land reforms arising under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. The Tamil Nadu Taxation Special Tribunal was established in 1985 under the Tamil Nadu Special Tribunal Act, 1992 to deal with cases arising under the Tamil Nadu Central Sales Tax Act and Additional Sales Tax Act.

These tribunals constituted under Article 323A and 323B of the Constitution are not subject to the writ jurisdiction under Article 226 and supervisory jurisdiction under Article 227 of the Constitution vested in the High Courts and the writ jurisdiction of the Supreme Court under Article 32.[5] As the power of judicial review is a necessary concomitent of the

independence of judiciary, it is an integral and essential feature of the Constitution constituting part of its basic structure, the question therefore arises, whether clause (2)(d) of Article 323A and clause (3)(d) of Article 323B excluding the power of judicial review of High Court under Article 226 and 227 of the Constitution and under Article 32 of the Supreme Court are constitutional and valid?

III. Judicial Review of Decisions of Administrative Triunals

A. Judicial Review and Legal Provisions

Article 323A (2)(d) empowers the Parliament to totally exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints, referred to in clause (1) of Article 323A. Similarly, section 28 of the Administrative Tribunals Act, 1985 provides for exclusion of jurisdiction of the courts. Section 28 when originally enacted, was in the express terms of clause (2)(d) of Article 323A of the Constitution. The only exception made in it was in respect of the jurisdiction of the Supreme Court under Article 136 of the Constitution. The provision was amended in 1986, to save the jurisdiction of the Supreme Court under Article 32 of the Constitution.[6]

Article 323B (3)(d) empowers the Parliament or the State Legislatures, as the case may be, to totally exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136 of the Constitution with respect to all or any of the matters falling within the jurisdiction of the said tribunals. Legislations enacted by the State Legislatures in pursuance of power conferred upon them by clause (1) of Article 323B contain 'exclusion of jurisdiction' clauses, ousting the jurisdiction of the High Courts in all matters within the jurisdiction of the tribunals created under these state legislations.[7]

We have seen how these constitutional and legislative provisions exclude the judicial review of the decisions of the Administrative Tribunals constituted under Articles 323A and 323B of the Constitution. However, the essence of the power of judicial review is that it must always remain with the judiciary and must not be surrendered to the executive or the legislature. Therefore, the main issue herein involved is regarding the constitutional validity of these constitutional and legislative provisions ousting the jurisdiction of the courts.

B. Judicial Review and the Judicial Decisions

The main controversy is whether the power conferred upon the Parliament and the State Legislatures by Article 323A(2)(d) and Article

323B(3)(d) of the Constitution to totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323A and with regard to all or any of the matters specified in clause (2) of Article 323B, runs counter to the power of judicial review conferred on the High Courts under Article 226/227 and on the Supreme Court under Article 32 of the Constitution?

To answer this question we must understand the concept of judicial review; whether our constitutional scheme permits the setting up of such tribunals as substitutes for High Courts? Whether these tribunals as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? As the tribunals created under Articles 323A and 323B were intended to perform a substitutional role with regard to the High Courts. The Supreme Court in *Sampath Kumar* v. *Union of India*[8] held that though judicial review is a basic feature of the Constitution, the vesting of power of judicial review in an alternative institutional mechanism, after taking it away from the High Courts, could not do violence to the basic structure so long as it was ensured that the alternative mechanism was an effective and real substitute for High Courts. Using this theory of effective institutional mechanisms as its foundation, the Supreme Court proceeded to analyse the provisions of the Acts in order to ascertain whether they passed constitutional muster to be accepted as satisfactory. The Supreme Court came to the conclusion that the Act, as it stood at that time, did not measure up to the requirements of an effective substitute and to that end, suggested several amendments to the provisions governing the form and content of the tribunals established under the Act. The suggested amendments were given the force of law by an amending Act of 1987 after the conclusion of the case but the Act has since remained unaltered.

A facet which is of vital relevance to the controversy before us is that Section 28, when originally enacted, was in the express terms of clause (2)(d) of Article 323A of the Constitution and the only exception made in it was in respect of the jurisdiction of the Supreme Court under Article 136 of the Constitution. However, before the final hearing in *Sampath Kumar* case the provision was further amended also to save the jurisdiction of the Supreme Court under Article 32 of the Constitution. Since the court had restricted its focus to the provisions of the Act, it expressed itself to be satisfied with the position that the power of judicial review of the apex court had not been tampered with by provisions of the Acts and did not venture to address the larger issue of whether clause (2)(d) of Article 323A

of the Constitution also required a similar amendment pertaining to High Courts.

We may now analyse the "post *Sampath Kumar* cases" involving the said controversy. In *J.B. Chopra* v. *Union of India* [9] the Supreme Court had the occasion to consider the question whether the Central Administrative Tribunal created under Article 323A of the Constitution had the authority and jurisdiction to strike down a rule framed by President of India under the proviso to Article 309 of the Constitution as being violative of Articles 14 and 16(1) of the Constitution? The broad issue involved herein is whether the tribunals constituted either under Article 323A or under Article 323B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule? The Supreme Court analysed and followed the decision in *Sampath Kumar* case to arrive at the conclusion that the Administrative Tribunal being a substitute for the High Court had the necessary jurisdiction, power, authority to adjudicate upon all disputes relating to service matters including the power to deal with all questions pertaining to the constitutional validity or otherwise of such laws as offending Articles 14 and 16(1) of the Constitution.

An aspect which needs to be emphasised here is that the Supreme Court in *Sampath Kumar* case had not specifically addressed the issue whether the tribunals under the Act would have the power to strike down statutory provisions or rules as being constitutionally invalid. However, the Supreme Court in *J.B. Chopra* case, felt that this proposition would follow as a direct and logical consequence of the reasoning employed in *Sampath Kumar* case.[10] It was also ignored that the Supreme Court in *Sampath Kumar* case after analysing the provisions of Administrative Tribunals, Act 1985 concluded that the Act did not measure up to the requirements of an effective substitute for the High Courts and suggested several amendments.

In *M.B. Majumdar* v. *Union of India*[11] it was contended that the Members of Central Administrative Tribunal must be paid the same salaries as were payable to judges of the High Courts. The contention was based on the premise that in *Sampath Kumar* case, the Supreme Court had equated the tribunals established under the Administrative Tribunals Acts, 1985 with the High Courts. The Supreme Court, after analysing the text of Article 323A of the Constitution, the provisions of the Act and the decision in *Sampath Kumar* case, rejected the contention that the tribunals were the equals of the High Court in respect of their service conditions. The Supreme Court clarified that in *Sampath Kumar* case, the tribunals under the Act had been equated with the High Courts only to the extent that the

former were to act as substitutes for the letter in adjudicating service matters; the tribunals could not, therefore, seek parity for all other purposes.

In *Amulya Chandra Kalita* v. *Union of India*,[12] the Supreme Court had to consider the question whether a dispute before the Central Administrative Tribunal could be decided by a single Administrative Member. Sub-section (2) of Section 5 of the Administrative Tribnals Acts, 1985 requires every Bench to ordinarily consist of one Judicial Member and one Administrative Member. Sub-section (6) of Section 5, enables the tribunal to function through single Member Benches. The Supreme Court took note of sub-section (2) of Section 5 of the Acts and the relevant observations in *Sampath Kumar* case, to conclude that under the scheme of the Act, all cases should be heard by a Bench of two Members. It seems that the attention of the Supreme Court was not drawn towards sub-section (6) of Section 5, which enables a single Member of a tribunal under the Act to hear and decide cases.

The same issue arose for consideration before another Bench of the Supreme Court in *Dr. Mahabal Ram* v. *Indian Council of Agricultural Research*.[13] The Supreme Court, after analysing the decision in *Amulya Chandra* case held that sub sections (2) and (6) of Section 5 were to be harmoniously construed. Sub- section (6) of Section 5, which is the focus of controversy here, reads as under:

> Notwithstanding anything contained in the foregoing provisions of this Section, it shall be competent for the Chairman or any other Member authorised by the Chairman in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, power, and authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or special order specify: provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members the case or matter may be transferred by the Chairman, or as the case may be, referred to him for transfer to such Bench as the Chairman may deem fit.

The Supreme Court tried to make a distinction between the cases, where complex question of law would be involved, i.e., where the dispute would require serious consideration and thorough examination and cases where no constitutional issues or even legal points would be involved and held that while allocating work to the single Member - whether Judicial or

Administrative in terms of sub-section (6), the Chairman should keep in view the nature of the litigation and where questions of law and for interpretation of constitutional provisions would be involved they should not be assigned to a single Member.[14] In fact, the proviso itself indicates Parliament's concern to safeguard the interest of claimants by casting an obligation on the Chairman and Members who hear the cases to refer to a regular Bench of two Members, such cases, which in their opinion require to be heard by a Bench of two Members. It was added by the Supreme Court that it would be open to either party appearing before a single Member to suggest to the Member hearing the matter that it should go to a Bench of two Members. The Members should ordinarily allow the matter to go to Bench of two Members when so requested. This view was confirmed by the Supreme Court in *L. Chandra*[15] case wherein Section 5(6) was held valid and constitutional. The position now is—where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso to Section 5 (6) will automatically apply and the Chairman or the Members concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member[16]. Such an approach is made to ensure that questions involving the *vires* of a statutory provision or rule will never arise for adjudication before a single Member Bench or Bench which does not consist of a Judicial Member.

In *R.K. Jain* v. *Union of India*[17] the Supreme Court dealt with the complaints regarding malfunctioning of the Custom, Excise and Gold Control Appellate Tribunal (CEGAT), which was set up by exercising the power conferred by Article 323B. Ramaswamy, J. analysed the relevant constitutional provisions and judicial decisions and concluded that the tribunals created under Articles 323A and 323B could not be held to be substitutes of the High Courts for the purpose of exercising jurisdiction under Articles 226 and 227 of the Constitution. It was held that judicial review was the basic and essential feature of the Indian Constitutional Scheme entrusted to the judiciary, therefore, it could not be dispensed with by creating a tribunal under Article 323A and 323B of the Constitution. Any institutional mechanism or authority in negation of judicial review would be destructive of basic structure of the Constitution. According to the Supreme Court, so long as the alternative institutional mechanisms or authority set up by an Act is not less effective than the High Court, it is consistent with the constitutional scheme.[18] The alternative institutional arrangements must, therefore, be effective and efficient. The Supreme Court, however, was not satisfied with the working of these alternative

institutional mechanisms. It was recorded that their performance had left much to be desired. It was suggested that an expert body like the Law Commission of India should analyse the working of the tribunals since their establishment and give necessary recommendation to make the alternative institutional mechanisms effective and efficient means of justice.

In *Sakinala Harinath and others* v. *State of Andhra Pradesh*,[19] the Andhra Pradesh High Court had declared Article 323A (2)(d) of the Constitution to be unconstitutional to the extent it empowered the Parliament to exclude the jurisdiction of the High Court under Article 226 of the Constitution. Section 28 of the Administrative Tribunals Act, 1985 had also been held to be unconstitutional to the extent it divested the High Courts of jurisdiction under Article 226 in relation to service matters. This decision of the High Court was challenged before the Supreme Court and was decided in *L. Chandra* case.[20] In the same case, court had the occasion to discuss the matters relating to certain problems that had arisen in the functioning of tribunals created by Article 323B especially in respect of the manner in which they exclude the jurisdiction of their respective High Courts. The Supreme Court had discussed two matters: one, arising as a result of conflicting orders issued by the West Bengal Taxation Tribunal and the Calcutta High Court and second, relating to the decision of the Madras High Court. Certain petitioners had challenged the constitutional validity of some provisions in three legislations enacted by the West Bengal Legislature before the West Bengal Taxation Tribunal. The West Bengal Tribunal, by its order, upheld the constitutional validity of the impugned provisions. Thereafter, the constitutional validity of the same provisions was challenged in a writ petition before the Calcutta High Court. During the proceedings, the State of West Bengal raised the preliminary objection that by virtue of Section 14 of the West Bengal Taxation Tribunal, the Calcutta High Court had no jurisdiction to entertain the writ petition. However, the High Court declared the impugned provisions to be unconstitutional. These developments had resulted in an interesting situation, where the same provisions had alternatively been held to be constitutional and unconstitutional by two different fora, each of which considered itself to be empowered to exercise jurisdiction. Second matter discussed by the Supreme Court, was relating to the decision of the Madras High Court that the Legislature of the State had no power to infringe upon the High Court's power to issue writs under Article 226 of the Constitution and to exercise its power of superintendence under Article 227 of the Constitution. It was held that the establishment of the Tamil Nadu Land Reforms Special Appellate Tribunal would not affect the

powers of the Madras High Court to issue writs.

The Supreme Court in *L. Chandra*, after analysing the judgments of the Supreme Court in *Sampath Kumar* case and post *Sampath Kumar* cases on one hand and judgments of Andhra Pradesh, Calcutta and Madras High Courts on the other hand, on the question of exclusion of judicial review of the courts declared that Article 323 A (2) (d) and Article 323 B (3)(d) of the Constitution to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution respectively, to be unconstitutional. To appreciate the decision of the Supreme Court, it becomes necessary to ascertain the true import of the concepts of judicial power, judicial review and the related aspects.

(i) Concept of Judicial Review

Under our constitutional scheme the Supreme Court and the High Courts are the sole repositories of the power of judicial review, *i.e.*, to determine the legality of executive action and the validity of legislation passed by the legislature. There is an inherent distinction between the individual provisions of the Constitution and the basic features of the Constitution. While the basic feature of the Constitution cannot be changed even by amending the Constitution, however, each and every provision of the Constitution can be amended under Article 368. The identification of the features which constitute the basic structure of our Constitution has been the subject matter of great debate in Indian Constitutional Law. Seven of the thirteen judges in *Kesavananda Bharti* v. *State of Kerala,*[21] observed that Parliament in the exercise of its amending power under Article 368, could not alter the basic structure or framework of the Constitution. However, it is not possible to ascertain, from the opinions they delivered, as to what constituted the basic structure or which of the provision of the Constitution, formed parts of the basic structure, which was beyond the amending power of the Parliament under Article 368.

The Supreme Court had an occasion to refer to the doctrine of basic structure in *Indira Nehru Gandhi* v. *Raj Narain,*[22] popularly known as Election case. In this case, the appellant, Mrs. Indira Nehru Gandhi, the then Prime Minister, filed an appeal before the Supreme Court from the Judgment of the Allahabad High Court, in which the High Court had invalidated the election of the appellant to Lok Sabha, on the ground of having committed corrupt practice under the Representation of the People Act, 1951. During the pendency of the appeal before the Supreme Court, the Parliament enacted the Constitution (39th Amendment) Act, 1975. The 39the Amendment, *inter alia*, inserted a new Article 329A in the Consti-

tution, to nullify the effect of the High Court judgment and also withdrawing the jurisdiction of all courts, including the Supreme Court, over disputes relating to the elections involving the Speaker and the Prime Minister including the present appeal pending before the Supreme Court. Clause (4) of new Article 329A, which is directly concerned with this appeal stated that no law made prior to the commencement of 39th Amendment, in so far as it related to election petitions would apply or should deemed to have applied to election of the Prime minister to either House of Parliament. It further provided that such election would not be deemed to be void or ever to have become void and that notwithstanding any decision of any court before 39th Amendment, declaring such election to be void. Though all five judges delivered concurring judgments to strike down clause (4) of Article 329A and declared judicial review, free and fair election, rule of law and right to equality as constituting the basic feature of the Constitution, their views on the issue of judicial review are replete with variations. Beg, J. clearly expressed his view that judicial review was a part of basic structure of the Constitution. Ray, C.J. and Mathew, J. pointed out that unlike in the American context, judicial power had not been expressly vested in the judiciary by the Constitution of India. Therefore, Parliament could, by passing a law within its competence, vest judicial power in any authority for deciding a dispute. It was held that in election matters, judicial review could be ousted. Khanna, J. took the view that it could not be said to be necessary, within a democratic set up, that disputes relating to the validity of elections be settled by Courts of Law; he, however, felt that even so the legislature could not be permitted to declare that the validity of a particular election would not be challenged before any forum and would be valid despite the existence of disputes.

Chandrachud, J. pointed out that the Constitution itself excludes judicial review in a number of matters[23] and felt that in election matters, judicial review was not a necessary requirement.

In *Minerva Mills* v. *Union of India*,[24] the Supreme Court had considered the validity of certain provisions of the Constitution (42nd Ammendment) Act, 1976 which, *inter alia*, excluded judicial review. The majority judgment held the impugned provisions to be unconstitutional. The judgment for the majority delivered by Chandrachud, C.J. for four judges, contained the following observations:

> Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. *It is the function of the judges, nay their duty, to pronounce upon the validity of laws.* If courts are totally

> deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. [25]

It may, however, be noted that the majority in *Minerva Mills* case did not hold that the concept of judicial review was, by itself, part of the basic structure of the Constitution. It is the solemn duty of the judiciary under our Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. Our Constitution has created an independent machinery, i.e. judiciary, which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution. It is for the judiciary to uphold the constitutional limitations. That is the essence of the rule of law, which *inter alia*, requires that the exercise of power by the State whether it be the legislature or the executive or any other authority be conditioned by the Constitution and the law. It is for these reasons, in his minority judgment in *Minerva Mills* case, Bhagwati, J. held that the power of judicial review was an integral part of our constitutional system; the power of judicial review was unquestionably be a part of basic structure of the Constitution. However, he made it clear that, while saying so, he should not be taken to suggest that the effective alternative institutional mechanisms or arrangements for judicial review could not be made by the Parliament. Such a theory of alternative institutional mechanisms enunciated by Bhagwati, J. finds no prior mention in the earlier decisions of the Supreme Court. It is to be noted that in *Sampath Kumar* case, both Bhagwati, C.J. and Mishra, J. in their separate judgments have relied on the observations in the minority judgment of Bhagwati, J. in *Minerva Mills* case to lay the foundation of the theory of alternative institutional mechanisms.

We may now analyse certain other authorities for the proposition that jurisdiction conferred upon the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution respectively, is part of the basic structure of the Constitution.

Dr. Ambedkar, the Chairman of the Drafting Committee of the Constitutent Assembly while expressing his views on the significance of draft Article 25, which corresponds to the present Article 32 of the Constitution, stated:

> If I was asked to name any particular Article in this Constitution *as the most important*-an Article without which this Constitution will be a nullity-I could not refer to any other Article except this one. *It is the very soul of the Constitution and the very heart of it* and I am glad that the House has realised its importance.[26]

In *Fertiliser Corporation Kamgar Union* v. *Union of India*,[27] Chandrachud, C.J. appears to have somewhat revised the view adopted by him in *Indira Gandhi* case as he took the view that the jurisdiction conferred on the Supreme Court by Article 32 was an important and integral part of the basic structure of the Constitution.

In *Kihoto Hollohan* v. *Zachillu and Others*,[28] the constitutional validity of paragraph 7 of the Tenth Schedule to the Constitution, excluding judicial review, was challenged. The judgment for the minority, delivered by Verma, J. struck down the provision on the ground that it violated the rule of law which was a basic feature of the Constitution requiring that decisions be subject to judicial review by an independent outside authority.[29] The majority judgment delivered by Venkatachaliah, J. also struck down the offending provision, but for different reasons. The majority judges did not find it necessary to express themselves on the question whether judicial review was part of basic structure of the Constitution.[30]

In the *Special Reference* case,[31] while addressing the issue of judicial review. Gajendragadkar, C.J. stated that the existence of judicial power under article 226 and 32 must necessarily and inevitably postulate the existence of a right in the citizen to move the court in that behalf; otherwise the power conferred on the High Courts and the Supreme Court would be rendered virtually meaningless. It was said, that the judicial power conferred on the High Courts and the Supreme Court was meant for the protection of the citizen's fundamental rights, and so, in the existence of the said judicial power itself would necessarily be involved the right of the citizens to appeal to the said power in a proper case.[32]

An analysis of the manner in which the framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with declaring the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of judges as well as the mechanism for selecting judges to the superior courts.

The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The judges of the superior courts have been entrusted with task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the judges of the superior judiciary are not available to the judges of subordinate judiciary or to those who man tribunals created by ordinary legislations. Therefore, judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretations.[33]

These are the sound reasonings on which is based the decision of the Supreme Court in *L. Chandra* case, that the power of judicial review vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure and it cannot be ousted. The Supreme Court held that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdiction was also part of the basic structure of the Constitution. The Supreme Court in this landmark judgment made it clear that Article 323A(2)(d) and Article 323B(3)(d) of the Constitution to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Article 226/227 and 32 of the Constitution respectively, would be unconstitutional. Section 28 of the Administrative Tribunals Act, 1985 and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent be unconstitutional.

After the analysis of the above mentioned authorities on the broad issue of 'excludion of judicial review of the courts', the position that emerges is that the jurisdiction conferred upon the High Courts under Article 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of the Constitution and it cannot be ousted.

(ii) Theory of Alternative Institutional Mechanisms

When the Supreme Court in *Sampath Kumar* case adopted the theory of effective alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time[34]. At this stage we have to see how the theory of alternative institutional mechanisms is functioning in practice? Whether these Administrative Tribunals established under Article 323A and 323B of the Constitution, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives? What steps can be taken to make the tribunals effective and efficient means of justice.

(1) How the Theory of Alternative Institutional Mechanisms is Functioning in Practice?

Report of the Arrears Committee (1989-90) popularly known as the Malimath Committee Report, had dealt with the issues of tribunals set up under Article 323A and 323B of the Constitution. The experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985 has not been widely welcomed by the Committee. The overall picture regarding the tribunalisation of justice in our country according to the Committee is not satisfactory and encouraging. The Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned.

In *R.K. Jain*, the Supreme Court had the benefit of more than five years experience of the working of alternative institutional mechanism in service metters, anguish was expressed over their ineffectiveness in exercising the high power of judicial review. The dismissal picture presented by the working of the Custom, Excise and Gold Control Appellate Tribunal created under Article 323B, was noted by the Supreme Court in this case.

It is a facts that the Administrative Tribunals which were conceived as substitutes for the High Courts have not lived upto expectations and have instead proved to be inadequate and ineffective in several ways. They have not inspired confidence in public mind. The reasons that are mentioned in the Malimath Committee Report for failure of the Administrative Tribunals are: (1) the lack of competence, objectivity and judicial approach, (2) their constitution, power and the method of appointment of personnel thereto, the inferior status and the casual method of working, (3) their actual composition; men of calibre are not willing to be appointed as presiding

officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning, (4) the remedy provided in the parent statutes by way of appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective on accountant of heavy cost and remoteness of the forum, there is virtual negation of the right to appeal. Same view was taken by the Supreme Court in *R.K. Jain* case.[35]

(2) Should the Theory of Alternative Institutional Mechanisms be Abandoned?

The various tribunals have not performed upto expectation is self-evident and widely acknowledged truth.[36] Question now arises whether the theory of alternative institutional mechanisms should be abandoned? Whether the impugned constitutional provisions be struck down? The Supreme Court observed in *L. Chandra* case that such a step; would instead of remedying the problem, contribute to its worsening. In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Court has substantially increased. The reasons for which the tribunals were constituted still persist; indeed, those reasons have become even more pronounced in recent years.

Moreover, our constitutional scheme permits the setting up of such tribunals. Clause (3) of Article 32 of the Constitution reads as under:

> Article 32: Remedies for enforcement of rights conferred by this part -
>
> (3) without prejudice to the power conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

If one power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution.[37] Apart from the authorisation that flows from Articles 323A and 323B, both the Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to the Parliament under entries 77, 78, 79 and 95 of List I and to the State Legislatures under entry 65 of List II, entry 46 of List III

of Schedule VII to the Constitution can be availed of both by the Parliament and the State Legislatures for this purpose. When the framers of our Constitution bestowed the power of judicial review of legislative action upon the High Courts and the Supreme Court they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have passed since independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. It is against such a backdrop, the Supreme Court in *Sampath Kumar* case adopted the theory of alternative institutional mechanisms.

On the jurisdictional power of these tribunals, it was held in *L. Chandra* case that the tribunal created under Article 323A and 323B of the Constitution would be competent to hear matters where the *vires* of statutory provisions were questioned. however, in discharging this duty, they could not act as substitutes for High Courts and the Supreme Court rather their role would be supplementary and all such decisions of the tribunals would be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned tribunal would fall. The tribunals would, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It would not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the *vires* of statutory legislation (except where the legislation which created the particular tribunal was challenged) by overlooking the jurisdiction of the concerned tribunal.

This is a welcome step, as the Supreme Court on the one hand emphasised the need for these tribunals, also on the other hand, made all decisions of tribunals, whether created under Article 323A or Article 323B of the Constitution, subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution. The Supreme Court by its interpretation has removed the infirmity relating to these tribunals arising from the remedy provided under the existing system, by way of direct appeal to the Supreme Court under Article 136 of the Constitution. The remedy was alleged to be too costly and inaccessible for it to be real and effective. The effect of this decision is that the aggrieved party is entitled to move the High Court under Articles 226/227 of the Constitution.

(3) Need to Reinvigorate these Administrative Tribunals

Need for the Administrative Tribunals cannot be denied. The tribunal system offers the advantages of cheapness, easy accessibility, expeditious disposal of disputes, expertise, freedom from technicality, flexibility of

approach, informal approach, informal atmosphere *etc*. At the same time it is also necessary to overcome the difficulties faced by the tribunals, making them capable of dispensing effective, inexpensive and satisfactory justice. A sound justice delivery system is a *sine qua non* for efficient governance of a country wedded to rule of law. Therefore, the alternative institutional mechanisms should be effective and efficient. Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal which is intended to supplant the High Court, is legal training and experience and judicial acumen, equipment and approach. [38] To maintain independence and imperativity, the Supreme Court in *R.K Jain* case had suggested that the personnel should have at least modicum of legal training, learning and experience. Therefore, functional fitness, experience at Bar and aptitudinal approach are fundamental for efficient judicial adjudication.

It has been urged by the Malimath Committee that the appointments of Administrative Members to Administrative Tribunals be stopped. It is important to mention here that one of the important characteristics of tribunals is that they consist of both judicial and administrative members. The setting up of these tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge be better equipped to dispense speedy and efficient justice. To hold that the tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constitued. Since the Selection Committee is now headed by a judge of the Supreme Court, nominated by the Chief Justice of India, it can be expected that the Committee would take care to ensure that the Administrative Members are chosen from amongst those who have some background to deal with such cases.[39]

One reason why these Tribunals have been functioning ineffectively is that there is no authority charged with supervising and fulfilling the administrative requirements of these tribunals. There is no uniformity in their administration. Until a wholly independent agency for the administration of all such tribunals can be set up, it is desirable that all such tribunals should be, as far as possible, under a single nodal Ministry; which will be in a position to oversee the working of these tribunals. The Ministry, according to the Supreme Court,[40] should be Ministry of Law. It would be open for the Ministry to appoint an independent supervisory body to oversee the working of the tribunals. However, such a supervisory authority must try to ensure that the independence of the members of all

such tribunals is maintained. For this purpose, procedure for selection of members of the tribunals, the manner in which funds are alloted for the functioning of the tribunals and all other consequential details will have to be clearly spelt out.[41]

From the whole discussion, we arrive at the conclusion that the Administrative Tribunals created under Article 323A and 323B of the Constitution are undernourished. Appointments are not made in time. No procedures are laid down for ensuring the appointments of persons with proper motivation. The tribunals are not provided with adequate infrastructural facilities and that mars their efficiency. Much needs to be done to reinvigorate them. The working system of the tribunals need fresh look and regular monitoring is necessary.

It is high time now for the Union of India to pay attention to discover reasons and to take remedial steps to overcome the handicaps and difficulties in the working system of the tribunals and to make the tribunals effective and efficient instrument for making judicial review efficatious, inexpensive and satisfactory.

NOTES AND REFERENCES

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1. Preamble to the ADMINISTRATIVE TRIBUNALS ACT, 1985.
2. Shah Committee for setting up Independent Tribunals; Administrative Reforms Commission that suggested for Civil Services Tribunal to be set up.
3. Law Commission of India, 124TH REPORT ON HIGH COURT ARREARS - A FRESH LOOK (1988).
4. (1980) 4 SCC 38.
5. See Article 323A(2)(d) and Article 323B(3)(d).
6. This aspect has been noted in the judgment of Mishra, J. in *Sampath Kumar* v. *Union of India* (1987) 1 SCC 124.
7. WEST BENGAL TAXATION TRIBUNAL ACT, 1987; RAJASTHAN TAXATION TRIBUNAL ACT, 1995; TAMIL NADU (FIXATION OF CEILING ON LAND) AMENDMENT ACT, 1985; TAMIL NADU SPECIAL TRIBUNAL ACT, 1992.
8. *Supra*, n. 6.
9. (1987) 1 SCC 422.
10. *L. Chandra Kumar* v. *Union of India & Others* (1997) 3 SCALE 40 at 51.
11. (1990) 4 SCC 501.
12. (1991) 1 SCC 181.
13. (1994) 2 SCC 401.
14. *Id.* at 404.
15. *Supra* n. 10 at 77.
16. *Ibid.*

18. *Id.* at 171.
19. decided by a full Bench of Andhra Pradesh High Court in Civil Appeal No. 169 of 1994.
20. *Supra* n. 10
21. (1973) 4 SCC 225.
22. (1975) (Supp) SCC 1.
23. Article 136(2) and 226(4) exclusion of review in laws relating to armed forces; Article 262(2) in respect of exclusion of review in river disputes; Article 103(1) in respect of exclusion of review in disqualification of members of the Parliament; Article 329(9) for exclusion of review in laws relating to delimitation of constituencies and related matters.
24. (1980) 3 SCC 625.
25. *Id.* at 644.
26. CAD, Volume VII, at 953.
27. (1981) 1 SCC 568.
28. (1992) Supp. 2 SCC 651.
29. *Id.* at para 181-182.
30. *Id.* at para 120.
31. (1965) 1 SCR 413.
32. *Id. at* 493-494.
33. *Supra* n. 10 at 69.
34. *Id.* at 70.
35. *Supra* n. 17 at 176.
36. *Supra* n. 10 at 74.
37. *Id.* at 70.
38. MALIMATH COMMITTEE REPORT (1989-90) at para 8.65A.
39. *Supra* n. 10 at 76.
40. *Id.* at 77.
41. *Ibid.*

THE "WRITING" REQUIREMENT IN ARBITRATION AGREEMENT UNDER NEW YORK CONVENTION, 1958: A CRITICAL COMMENT

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International commercial arbitration with its various aspects has become a much written about topic, but surprisingly very little has been written about the arbitration agreement in commercial arbitration. Perhaps this is because the form and validity of the arbitration agreement are considered more or less settled. However, this is not so. The requirements of the arbitration agreement may seem uniform under the New York Convention of 1958 (hereinafter referred to as NYC), but in reality this fact is still covered in mist and it is this mist we must attempt to lift and in the process find answers to questions that arise about the written form requirement of the arbitration agreement.

I. The New York Convention of 1958

The NYC, till date is the most important international treaty relating to international commercial arbitration. The only conventions prior to 1958 were the Geneva Protocol of 1923 and the Geneva Convention of 1927. The NYC is plainly a considerable improvement on the Geneva Convention of 1927, as it provides for a much simpler and more effective method of obtaining recognition and enforcement of foreign arbitral awards. It also gives a much wider effect to the validity of arbitration agreements than does the Geneva Protocol of 1923.

The most recent laws include the Uncitral Model Law on international arbitration. The Model Law had also initially originated as a review of the working of the NYC.[1] It was later concluded that the necessary harmonization of the enforcement practices of the states, and the judicial control of arbitral procedure could be achieved more effectively by the promulgation of a model or uniform law, rather than by any attempt to revise the NYC or to supplement it by means of a protocol, and it was then that the Model Law was enacted. Therefore, the Model Law too (which is the only other document which comes close to the NYC in matters of recognition and acceptance) was drafted completely on the lines of the NYC. No

convention, however has had even a fraction of the impact of the NYC.

II. Form of the Arbitration Agreement

The NYC in Article II requires the arbitration agreement to be in writing. The written form of the arbitration agreement is a general and direct requirement under the NYC and under all other texts[2] dealing with international arbitration. Article II (2) defines the term "agreement in writing" as an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. This definition can be divided into two alternatives:

(a) an arbitration clause in a contract or a separate arbitration agreement, the contract or the separate arbitration agreement being signed by the parties; and

(b) an arbitration clause in a contract or a separate arbitration agreement contained in exchange of letters or telegrams.[3]

This shows that the requirements of the Convention on the validity of the arbitration agreement are both absolute and categorical. Although the second alternative of the arbitration agreement being contained in an exchange of documents may seem to broaden the meaning of the "agreement in writing", yet it is not necessarily so. The courts of the contracting states express different views as to when the exchange can be deemed accomplished especially when it comes to sales confirmation forms. One view is that the document itself should be returned by the party, which received it, to the party which dispatched it. Another view is that it is suffice when a reference is made to the document in a subsequent letter, telex, telegram etc. emanating from the party to which the document was sent. The latter view is taken by the Supreme Court of Italy[4] which held that a purchase confirmation sent by one party which had not been "agreed by letter or telegram" by the other party does not meet the requirement of Article II (2) of the NYC.

Thus the history of Article II (2) confirms that the drafters of the NYC wished to exclude the oral or tacit acceptance of a written proposal to arbitrate.[5]

The definition of what constitutes a written arbitration agreement given in Article II(2) can be deemed an internationally uniform rule which prevails over any provisions of municipal law in those cases where the NYC is applicable. However, it is increasingly questioned whether the uniform rule character can be maintained. A number of courts while construing Article II(2) state that it is allowed to rely on national law for

determining compliance with the written from of the arbitration agreement.[6] The number of such courts is increasing. So it is evident that the rule of Article II(2) is losing its uniformity. Some foreign courts have held the NYC inapplicable where an arbitration clause in one parties' communications (typically order forms or invoices) was not affirmatively accepted in writing by the other party.[7] On the other hand, many other courts have held that an arbitration agreement is valid by implied acceptance of a form quotation containing an arbitration provision[8]. By requiring the written form, Article II(2) of the NYC means to exclude arbitration agreements concluded orally or tacitly. This provision of the Convention is actually strict in comparison with several foreign legal systems. Article II therefore, sets not only a maximum but also a minimum requirement.[9]

One of the best examples of the views taken by different contracting states is that of the United States.The "writing" requirement of the Federal Arbitration Act (hereinafter referred to as FAA) is much less stringent than the NYC's analogous requirement. The FAA also applies to arbitration agreements which are in 'writting' only but it is fairly clear that it does not require a single and integrated written contract. Nor is there any requirement that an arbitration agreement be either formally executed or signed; rather, ordinary contract principles determine who is bound by such written provisions and of course parties can become contractually bound. Many courts have found the 'writing' requirement of the FAA satisfied by "tacit" acceptance of a written set of terms and conditions which included an arbitration clause. In fact the lower US courts have held that the parties' acceptance, either orally or by conduct, of an unsigned written contract containing an arbitration clause satisfies section 2 of the FAA. They have also found section 2 satisfied where there were exchanges of writings — typically, order forms and invoices - only some of which contained an arbitration provision.

The definition of 'writing' in the NYC appears very strict even when compared to the new French law. The requirement of a writing is more loosely defined under Article 1443 of the New Code of Civil Procedure, which states that the arbitration clause can be contained in a 'writing' within the principle agreement of the parties or in another document incorporated by reference. According to the French Supreme Court, Article II(2) does not exclude the incorporation of an arbitration clause by reference but it is necessary that the existence of the clause be mentioned in the main contract, unless there exists between the parties a long standing relationship which ensures that they are properly aware of the written conditions normally governing their commercial relationship.

When the new Dutch Arbitration Act came into force in 1986,[10] all that

was required was that 'evidence' of the arbitration agreement must be in writing. This includes acceptance by an agent on behalf of a party, and includes the explicit or tacit acceptance of an arbitration clause contained in standard conditions referred to by an instrument in writing that comes from one of the parties (for instance a sales confirmation). There is no room for such an acceptance of a sales confirmation under the NYC. The arbitration clause in a sales or purchase confirmation will meet the written form requirement of Article II only if:

(a) the confirmation form is signed by both the parties; or

(b) a duplicate is returned, whether signed or not; or

(c) the confirmation is subsequently accepted by means of another communication in writing from the party which received the confirmation to the party who dispatched it.

In particular, a tacit acceptance of the confirmation is not sufficient for the purposes of Article II(2).

The written form required by the NYC is the rule in all countries that have ratified it. However, it is noteworthy to refer a case of loose interpretation of the NYC by a British Court of Appeal. In Zambia Steel & Building Supplies v. James Clarke & Eaton Ltd.[11] the English sellers had sent to the Zambian buyers a quotation which was no more than an invitation to make an offer and which contained an arbitration clause. The contract was concluded orally in Zambia on the terms of the quotation. The Court of Appeal held that the buyers had orally assented to the written terms and that therefore, there existed an agreement in writing to submit to arbitration within the meaning of section 7 of the English Arbitration Act, 1975. The reason put forward by one of the judges for accepting agreement valid under the NYC as an arbitration agreement signed by one party only, was that it could be proved that the arbitration agreement was concluded by evidence drawn not necessarily from the written act. In the words of LJ Ralph Gibson:

> It is clear to me that the Convention by Article 2 para 2, did not impose upon the contracting state an obligation to recognize an agreement in writing to submit to arbitration, unless it is signed by the parties or unless the agreement is contained in an exchange of letters or telegrams in the sense that the assent to be bound by both the parties is given in writing by such document. If, however, Parliament enacts such legislation which requires the courts of this country to recognize agreements in writing of that nature, the obligation under the Convention is fulfilled. If

> the enactment also requires our courts to recognize an agreement in writing, in which proof of assent to the written terms is provided outside the document, there is no basis for regarding such provision as constituting departure by this country from any obligation assumed under the Convention.[12]

Although this judgement and its predecessor in *Excomm Ltd.* v. *Ahmed Abdul-Qavi Bamaodah*[13] was subject to severe criticism for not adhering to the formalities of the NYC, it raises a few important questions on the inflexible writing requirement of the Convention. Have not the judges in the above judgements sought to widen the scope of the Convention? If so, then the NYC must be examined in a different light to accommodate the interpretations adopted increasingly by most contracting states.

Almost 50 years have passed since the drafting of the NYC, and may be the time has come to reconsider the strict interpretation of Article II(2). At a time when international business transactions have increased tremendously and when arbitration has become an accepted form of dispute resolution in international trade, is it necessary to adhere so severely to the 'written form' requirement of 1958? The international scenario today is not the same as it was 50 years ago and it is not possible to restrict an assent to the arbitration agreement to the two alternatives provided for in Article II (2). Room has to be made to increase the scope for the interpretation of this article and to accommodate such situations which the NYC could not foresee.

A classic case would be when the sales confirmation form is accepted by one party by conduct instead of singing the contract or replying by way of a letter.[14]Another case would be when the contract is accepted by means of a letter but without any specific reference to the arbitration clause present in the draft contract. In both these hypothetical cases, a contract would have been concluded between the parties, but not necessarily a valid "written" arbitration agreement, the validity, as laid down by the norms of the NYC. The evidence of the agreement of both the parties to submit to arbitration may not be obtained only by signatures or an exchange of letters. What is really important in an arbitration agreement is the intent of the parties to opt for arbitrtation,[15] and where this intent can be gathered from actions outside the given rule, the writing requirements may prove to be an unnecessary technical hindrance to the parties' intention to submit the dispute to arbitration.

The main purpose of the written form requirement, sometimes referred to as the arbitration's special statute of frauds, is *inter alia*[16] to ensure that a party entering into an arbitration agreement is fully aware of the facts that

it is agreeing to submit a dispute to arbitration. Indeed, agreeing to arbitrate means to forego the possibility to bring a complaint in a judicial forum, a possibility reognised as a fundamental right in most legal orders.[17] Today, when in international comercial transactions, arbitration is the most accepted form of dispute resolution, the importance given to the writing formalities decades ago is no longer needed. By this it is not necessarily implied that the agreement need not be in writing at all, nor should oral agreements be promoted. It is conceded that agreements should be reduced to writing[18], but it is only the harsh interpetation given to 'writing' in Article II(2) of the NYC that should be refrained from. In interpreting international arbitration agreements, states should generally apply the common law of contract interpreation that is expressly and vigorously "pro-arbitration".

III. Conclusion

The spirit of the New York Convention lies in the advancement of arbitration in international trade and this pro-arbitration policy carried on by the Convention stands to be frustrated by such a narrow and confined approach given to the arbitration agreement. The extent of the provision laid down in Article II(2) must be broadened so as to reconginse other forms of upholding the agreement. As almost fifty years have elapsed since its drafting, does it not seem justified to bring its interpreation in accordance with views generally held today, with respect to the conclusion of contracts that contain an arbitration clause? It is high time when the rigid and inflexible character of the NYC should be reconsidered in order to encourage and ensure that arbitration becomes the more convenient forum for dispute settlement in international trade.

Notes and References

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1. This was in response to a request in 1977 by the Asian-African Legal Consultative Committee (AALCC) for a review of the working of the NYC, in relation to the lack of uniformity in the approach of national courts to the enforcement of awards.
2. See also the UNCITRAL Model Law.
3. Consolidated Commentary on the NYC, XXI Year of Commercial Arbitration, 1996 at 419.
4. *Robobar Ltd.* v . *Finncold,* XX Year book of Commercial Arbitration, 1995 at 131.
5. A.J. Van Den Berg, *The New York Arbitral Convention* (1981), 196. (The drafting history of the Convention suggests that these provisions were intended to exclude either oral agreements to arbitrate or the acceptance of a written offer containing an arbitration provision through conduct or oral statements.)

6. The Model Law although follows the NYC in requiring written form is even stricter than the Convention in that it disallows reliance on the "more favourable provision" in the subsidiary national law as is possible under the Convention by virtue of Article VII(1).

7. *J.A. Van Walsum NV* v. *Chevelines SA*, 64 *Schweizersche Juristen*-Zeitung ,1968 at 56 (Art.II(3) not satisfied by tacit acceptance of sales confirmation which contained an arbitration clause); *Confex* v. *Ets Dahan*, XII YEAR BOOK OF COMMERCIAL ARBITRATION, 1986 at 484. French Supreme Court, (Art.II(3) is not satisfied by a tacit acceptance of letter asserting that contract was subject to certain standard conditions which incorporated arbitration agreement.)

8. *Zambia Steel and Building Supplies Ltd.* v. *James Clark and Eaton Ltd.* [1986]2 LLYODS REPORT, 225 (Art.II(3) satisfied by a tacit acceptance of a written quotation containing an arbitration clause). *Chemicals and Phosphates Ltd.* v. *NV Algemeene Oliehandel*, NEDERLANDSE JURISPRUDENTIE No. *470*, 1971 (Art.II(3) satisfied where seller sent buyer a written sales contract containing an arbitration clause and buyer did not object until months after taking delivery of goods).

9. Obviously, a contracting state may not impose stricter requirements as to form.

10. Under the old law, in Netherlands, the arbitration agreement could be concluded orally; a party could even be obliged to submit a dispute to arbitration without any agreement to arbitrate if in the branch of trade concerned, arbitration was customary.

11. [1986] 2 LLYODS REPORT, 225.

12. F.A. Mann, *An "Agreement in Writing" to Arbitrate*, ARBITRATION INTERNATIONAL, 1987 at 171-72.

13. (1985) 1 LLOYDS REPORT, 403.

14. *Filantro SpA* v. *Chilewich Intl. Corporation,* 789 F. Supp. 1229 (S.D.N.Y.) 1992. Under German law too, a contractual offer which has not been refused is sufficient to establish the existence of an arbitration agreement. See *Israel Chemicals Phosphates Ltd* v. *NV Algemene Oliehandel: Rechtsbank Rotterdam*, June 26, 1970, I YEAR BOOK OF COMMERCIAL ARBITRATION, 1976 at 195.

15. In *Rukmani* v. *Collector,* AIR 1981 SC 479, it was held that "an arbitration clause need not be in particular form", intention of the parties should be clear. According to the FAA also the intent of the parties must be clear to render arbitration the exclusive remedy, held in *Riverdale Fabrics Corp.* v. *Tillinghast Stiles Co.,* 128 N.Y.S.2d(1954).

16. A second purpose of the writing requirement is to witness the existence of the agreement.

17. Matter of Presbyterian Hospital of New York City, N.Y.L.J. 21 (April 13, 1990): 'The rule is that a party is not to be compelled to surrender his right to resort to the courts, with all of their safeguards, unless he has agreed to do so in writing'. And BGE 102 at 582 (1976) (stressing that nobody can without his consent be deprived of his own natural judge (Art. 58 Swiss Constitution).

18. The Delhi High Court in *U.P. Rajkiya Nirman Nigam Ltd.* v. *Indure Pvt. Ltd.*, AIR 1994 Del 60 has held that it is not necessary that the arbitration agreement should be signed by the parties. All that is necessary is that there should be an agreement for arbitration reduced to writing. It is necessary to have a written agreement to submit future or present differences to arbitration. Sec. 2(a) does not enjoin that the arbitration agreement be signed by both the parties.

JUDICIAL LEGISLATION AND SEPARATION OF POWERS

Visaka v. *State of Rajasthan* (1997) 6 SCC 241 — A Comment

*Alka Chawla**
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Visaka v. *State of Rajasthan*[1] is a case of providence and prudence where judiciary has proved that it is the protector, defender and guardian of the people of India. A writ petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India. It was brought as a class action by certain social activists and NGO's with the aim of assisting in finding suitable methods for realisation of the true concept of "gender equality" by preventing sexual harassment of working women in all work places through the judicial process. This method was resorted to as there was no legislation in existence to deal with such situations. The immediate cause for the filing of the writ petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan.

The effective exercise of the fundamental right to carry on trade, profession or occupation depends upon the presence of safe and conducive environment at the work place. The Supreme Court in this case emphasised the importance of this very factor. While delivering the judgment it conceded that the primary responsibility for ensuring such safety and dignity, through suitable legislation and mechanism for enforcement is of the legislature and the executive. But, at the same time, it realised it's own obligation for the enforcement of fundamental rights in the absence of such legislation. This obligation was viewed along with the role of judiciary envisaged in the Beijing statement of Principles of the Independence of Judiciary in the LAWASIA region and the provisions in the "Convention on Elimination of all Forms of Discrimination against Women."

The Supreme Court laid down guidelines and norms to prevent sexual harassment of women for due observance at all work places until a legislation was enacted for this purpose, in the exercise of the power available under Article 32, for the enforcement of the fundamental rights. The court emphasised that this would be treated as law under Article 141 of the Constitution. The Supreme Court has reiterated in *Vineet Narain's*

case[2] that it is the duty of the executive to fill the vacuum by executive orders because it's field is coterminus with that of the legislature and where there is inaction even by the executive for whatever reasons, the judiciary must step-in, in exercise of it's constitutional obligation laid down in Articles 32, 141 and 144 to provide a solution till such time as the legislature acts to perform it's role by enacting proper legislation to cover the field.

Visaka's case has given rise to a host of important questions, viz. Are the courts merely to act as judicial clerks, mechanically interpreting the law or are they the Judicial Managers of the country managing the 'justice' system? If latter is the answer then how far do the limits of their powers in imparting justice extend? Can they legislate in legislative vacuum *i.e.* step into the shoes of the legislature or executive in the name of 'complete justice' as envisaged under Article 142 of the Constitution.

This paper is concerned with the role of judiciary *vis a vis* the doctrine of Separation of Powers prevalent in India. The doctrine expects each limb of the government to perform it's own primary and essential function.

The Role of Judiciary

Traditionally the judge operates within the legislative frame work, the creativity of the judge being 'limited' by legislation which is essentially the domain of legislature. The court is to apply the law, howsoever unsatisfactory it may be, but cannot change the law, which remains exclusive province of legislature. However, within certain narrow and clearly defined limits, new law can be created by the judiciary. Whenever a court applies an established rule or principle to a new situation or set of facts, new law is being created. But, such process is, a step by step progression.[3] In other words, the traditional difference between legislature legislating and judicial legislation is that the legislature apart from any constitutional limitations is legally free to make any innovation as it sees fit and deal in any abstract way with all future cases. The power of a court, on the other hand, is limited to the actual issues and parties before it.

There have been two varying attitudes of judges within the constricted field of judicial law making. One, where the judges bind themselves to the previous decisions and hold on to the statute. Second, where courts are endeavouring consciously to develop the law to meet new social and economic conditions. Sometimes, the court takes a bolder step, by laying down a new rule or principle which itself contains the potentiality of creative expansion and development.[4] J.S. Verma, Sujata V. Manohar and B.N. Kirpal JJ. have taken this bold step in *Visaka's* case for providing

justice to working women by legislating in legislative vacuum and by holding that the meaning and content of the fundamental rights guaranteed in the Constitution of India were of sufficient amplitude to encompass all the facets of gender equality including 'prevention' (emphasis added) of sexual harassment or abuse. The Supreme Court as a vehicle of transforming the Nation's life has responded to the Nation's need and interpreted Article 32 read with Article 142 with pragmatism to make constitutional animation of equality a reality.

The nature and ambit of Article 142 was discussed in the *Skipper's* case.[5] The court had thought advisable to leave the power of court under this Article undefined and uncatalogued so that it remained elastic enough to be moulded to suit the given situation. The very fact that this power was conferred upon Supreme Court and no one else is itself an assurance that it will be used with due restraint and circumspection keeping in view the ultimate object of doing complete justice between the parties. But while exercising this power can they violate one of the basic features of the Constitution *i.e.* the separation of powers? It is often said that the judge's duty is to declare law and not make it (*Judgment jus declare non dare*) by holding on to the literal meaning of the words used in the statute (*Declaratory theory*). But with time, this has been gradually replaced by the purposive interpretation by taking into account the sociological and constitutional angulation.

In a recent English case of *IRC* v. *MC. Gukian*[6], Lord Steyn said that towards the end of last century Pollock characterised the approach of the judges to statutory construction as follows: "Parliament generally changes the law for worse, and...the business of the judge is to keep the mischief of its interference within the narrowest possible bounds...." Whatever the merits of this observation may have been when it was made or even earlier in this century, it is demonstrably no longer true. During the last 30 years there has been a shift away from the literalist approach to purposive methods of construction. When there is no obvious meaning of a statutory provision the modern emphasis is on the contextual approach designed to identify the purpose of statute and to give effect to it.

Judiciary has thus rightly taken the role of rationally reconstructing the concept of 'complete justice' by keeping socio-legal structure of the contemporary society in mind. A good judge is one who takes a conscious 'creative' attitude towards existing law rather than just being a literal mouthpiece of norms already existing.

The Doctrine of Separation of Powers

Disastrous consequences of concentrating powers in one single

authority led Montesquieu, a French scholar to formulate the doctrine of Separation of Powers (*des pouvoirs*). Separation of the three organs of the state—Legislature, Executive and Judiciary, was found to be the safest form of government as it avoided monopoly of governmental authority in single individual or group. He expressed:

> when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Again, there is, no liberty if the judicial power be not separated from legislative and executive, were it joined with the legislative the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator, were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individual.[7]

For Montesquieu, the doctrine implied three things[8]:

1. The same person should not be part of more than one of the three organs;
2. One organ of the state should not interfere with any other organ of the state;
3. One organ of the state should not exercise the functions assigned to another.

The main emphasis was to avoid absolutism by not conferring power in the hands of any single person or organ of the state and maintaining separation both at the personnel as well as functional level.

However, the writers feel that the doctrine has been diluted to a considerable extent having regard to the exigencies of a modern welfare state. Dilution has mostly occurred in the field of administrative law where government is being vested with many roles and functions to perform. The doctrine still seems to be unrealised.

Applicability of the Doctrine of Separation of Powers

It appears that the doctrine of separation of powers has been firmly rooted in the USA. Article 1, sec. 1 vests all the legislative power in the Congress; Article II, sec. 1 vests all the executive power in the President and Article III, sec. 1 vests all the judicial powers in the Supreme Court.[9] This doesn't mean that the doctrine is followed in the USA with absolute

rigidity. The US Constitution makes departure from the theory of absolute separation of powers. For example, the President has a check over the legislature by his power to veto and his authority to call special session of congress; the legislature exercises check over the executive by its power to confirm major appointments and to ratify treaties and through power of impeachment. The Congress has delegated rule making power to administrative agencies. The encroachment by the authority of one branch upon another is justified on the doctrine of checks and balances, a doctrine that is designed to be complementary rather than opposed to the doctrine of separation of powers.[10] While the latter provides for the independence of the three branches of the government, the former secures each department against the invasion of the others.

Further the practical and pragmatic consideration have overruled the theoretical objections and thereby justifying encroachment by one organ of the state upon the another. Justice Cardozo has rightly said in *Panama Refining Company* v. *Ryan*[11] that the doctrine of separation of powers is not a doctrinaire concept to be made use of with peadontic rigour. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of government which can't forsee today the development of tomorrow in their nearly infinite variety.

In UK the three powers are vested in the three organs of the State and each has its own essential feature (legislature to legislate; executive to execute; and judiciary to adjudicate), but it can't be said that there is no 'sharing out' of powers of the government. Thus, the king though an executive head is also an integral part of the legislature. Similarly all his ministers are also members of one or other Houses of Parliament. The Lord Chancellor is head of judiciary, chairman of the House of Lords (legislature), a member of executive. The House of Commons controls the executive. The judges of the superior courts can be removed on address from both Houses of Parliament.[12]

India has a parliamentary form of government where executive is a part of the legislature. The doctrine of Seperation of Powers has not been recognised with absolute rigidity, but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the state, of functions that essentially belong to another.[13] The doctrine emphasises upon the broad division of power which essentially belong to the three organs *i.e.*, legislature to legislate, executive to execute, and judiciary by adjudicating the matter. The Constitution demarcates their jurisdiction minutely and

expects them to exercise their respective powers without overstepping their limits. They should function within the spheres alloted to them.[14]

In *Kesvananda Bharti* v. *State of Kerala*[15] Beg, J. stated that "separation of powers was part of the basic structure of the Indian Constitution. None of the three organs of the Republic can take over the functions assigned to another. This scheme of the Constitution cannot be changed even by resorting to Article 368 of the Constitution". However, if one analyses constructional provisions, one finds functional as well as personnel overlapping among the three organs of the state. Apart from the directive principle laid down in Article 50 which enjoins seperation of judiciary from executive, the constructional scheme does not embody any formalistic division of power.[16] There exists co-ordination and overlapping among the three organs of the state for which the Constitution itself lays down the limits. For example—The executive *i.e.* President/Governor performs legislative functions by promulgating ordinances when both Houses of Parliament are not in session; giving ascent to the bill passed by both Houses of Parliament. It also performs judicial function by granting pardon, reprieves, respites or remissions of punishment or suspending, remitting or commuting sentences of any person convicted of any offence. Again the legislature performs judicial function by imposing penalty whenever there is breach of privilege, impeachment of President. Similarly judiciary performs legislative function by making rules for regulating the practice and procedure of the courts.

This mutual co-ordination and overlapping is envisaging a system of checks and balances. No single agency of the state should emerge as dominant one by assuming greater power in its hands and each of them should exercise a check upon the other so that none of them exceeds the authority vested in it by the Constitution.[17] The rationale is to develop adequate checks and balances to prevent arbitrariness. Justice Chandrachud has rightly opined:

> the practical usefulness of the doctrine of separation of powers is now widely recognised. The reason of this restraint is not that the Indian Constitution recognised any rigid seperation of powers. The reason is that the concentration of powers in any one organ may by upsetting that fine balance between the three organs destroy the fundamental premises of a democrative government to which we are pledged. The principle of S.O.P. is a principle of restraint which has in it the precept, innate in the prudence of self preservation that discretion is better part of valour.[18]

The Supreme Court in *Asif Hamid v. State of J&K*[19] observed that judicial review is a powerful weapon to restrain unconstitutional exercise of power by legislature and executive; the only check on our own exercise of power is the self imposed discipline of judicial restraint. Recently in *Madhu Kishwar* v. *State of Bihar*[20], the Supreme Court emphasised that the court should exercise self restraint.

The power of judicial review should be exercised to supplement necessities of the time having regard to social inequalities, and the imbalances existing in the society. Common sense has always served in the courts ceaseless striving as a voice of reason to maintain the blend of change and continuity of order which is sine qua non for stability in the process of change in a parliamentary democracy.[21]

Conclusion

The honourable judges in *Visaka's* case affirmed by *Vineet Narain's* case have exercised sufficient restraint on themselves as they have neither legislated for the legislature nor have they directed the legislature to lagislate but have taken upon themselves to lay down norms and guidelines to be followed till there is a legislative vacuum. Thus any opinion holding judiciary guilty of trespass is to be brushed aside. The judgment deserves a bouquet rather than a charge of transgressing the domain of legislature. Lloyds has rightly observed that, "For a legal order to exist no group must occupy a permanently dominant position or have an inherent right to Government".[22]

Judges have always filled the gap left by Rules by using their discretion. Positivistic Jurisprudence from Austin to Hart has placed emphasis on the part played by judicial discretion. Judges should, in all fairness, fill the gap left by the legislators as has been done by our learned Supreme Court of India.

Notes and References

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1. (1997) 6SCC 241.
2. *Vineet Narain* v. *Union of India,* AIR 1998 SC 889.
3. *Sonthera Pacific Co.* v. *Jenson,* 244 US 205 (1997). Holmes J. had called it legislating "interstitially", that is, within the interstiees of the existing fabric of law.
4. M.D.A. Freeman, Lloyd's Introduction to Jurisprudence (1994, sixth edn.) at 1283.
5. AIR 1996 SC 2005.
6. (1997) I WLR 991.
7. *L Espnt des Liix* (1748) Ch. 12.

8. Wade and Phillips, CONSTITUTIONAL LAW, Part II, Chapter 1.
9. See CONSTITUTION OF USA.
10. Madison, THE FEDERALIST PAPERS.
11. (1935) 293 US 388 (400).
12. Upadhyay J.R., ADMINISTRATIVE LAW at 43.
13. *Ram Jawaya* v. *State of Punjab*, AIR 1955 SC 549.
14. *Golaknath* v. *State of Punjab*, AIR 1967 SC 1643; *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802.
15. AIR 1973 SC 1461.
16. Upendra Baxi, *Developments in Indian Administrative Law*, PUBLIC LAW IN INDIA (1982).
17. Kesari U.P.P., LECTURES ON ADMINISTRATIVE LAW at 19.
18. *Indira Gandhi Nehru* v. *Raj Narain*, AIR 1975 SC 2299.
19. AIR 1989 SC 1899.
20. AIR 1996 SC 1864.
21. *State of Karnataka* v. *Appa Balu Ingale*, 1995 Supp (4) SCC 469; *Lever Ltd.* v. *Ashok Vishnu Kate*, 1995 SCC 1385; *P.N. Krishulal* v. *Government of Kerala*, 1995 SCC (Cri) 466.
22. *Supra* n. 4 at 543.

THE DOWRY MENACE AND MATRIMONIAL CRUELTY: A REFLECTION ON JUDICIAL INSENSITIVITY IN *STATE OF H.P.* V. *NIKKU RAM* [1995 CR LJ 4184 (SC)]

VANDANA*

The provisions of Indian Constitution are a magnificent illustration of the incorporation of all basic freedoms and human rights of the individual which can be contemplated and cherished in a civil society. Unfortunately, for nearly one half of the population i.e., the Indian women, the cherished goals of the Constitution remain an euphoria and 'freedom' for them is defined more in terms of biological sex, gender, economics and power than in the language of human rights. The women are considered as 'economic parasites'[1] who lack the earning capability and the (equal) property rights in real practice.[2] The inferior socio-economic and political position of women in society is the precursor of gender violence against them which takes various forms and occurs at various stages in the life span of a woman. The occurrence of 'dowry offences' is one such manifestation of disbalanced power equations and gender violence, to which the married women are prone to be subjected.

Indian society profoundly believes in the universality of marriage particularly in case of females. Marriage which has been an institution of great sacred value, a 'samskara' as per Hindu philosophy, which leads to the union of two souls for several births, has got reduced to a calculated and negotiated alliance between two families.[3] The shastric approved (Brahma) form of marriage involves the performance of ceremony of 'kanyadan' which is incomplete without offering of the 'vardakshina' i.e., gifts, cash etc. given to the bridegroom by the bride's father.[4] The gifts etc. which were voluntary and given to the bride by her parents, relatives and friends, out of affection constituted her dowry. Both the concepts of vardakshina and dowry have received ugly knots and twists of modern times. The modern concept of vardakshina is more in the nature of monetary compensation given to the groom and his family to shelter the economically dependent and socio-politically inferior bride, hypothetically for the rest of her life.[5] Initially, various expensive dowry articles were given by only the rich and affluent who cared to flaunt their wealth but now the practice has percolated to all stratas of society and has become

a mandatory requirement to be fulfilled by the bride's parents. Precisely, for this reason, dowry has taken the form of 'extortionate demands' which are recurrent throughout the life time of the married woman right from the beginning of marital alliance, on various festivals after marriage, on childbirth or at any time thereafter. The combination of inflation and commercialisation of the institution of marriage, aggravated by the insufficient earning capability of the groom has contributed to the hardening of the ugly demands for dowry, which may be limitless and endless in time. The failure of bride's parents to meet such demands may result in coercion and her harassment, the infliction of mental or physical cruelty to her and in extreme cases she may be strangulated, poisoned or burnt alive. Still a novel way adopted in some cases is coerced, forced and abetted suicide preceded by unendurable mental and physical violence.

To combat this unique problem of Indian socio-legal system and to curb the menace, the legislature enacted Dowry Prohibition Acts, 1961 which is popularly referred to as a 'social legislation' instead of a criminal statute[6] and thereby 'dowry offences' are perceived more as a social evil than crimes deserving severe penalty.[7] With the narrow definition of dowry, earlier the act punished both the giver and the taker of dowry.[8] The offences under the Act were non-cognizable and also the initiation proceedings meant the imposition of punishment on the giver of dowry as well, that is how there was hardly any legal action under the Act between 1961 and 1983.[9] The 91st Law Commission Report[10] acknowledged two main impediments in dowry cases - (1) that the facts do not fit into the pigeon hole of any known offence and (2) the peculiarities of the situation are such that the proof of directly incriminating facts is rendered difficult.[11] These impediments led to acquittal even if the case was initiated on an extremely rare occasion.

To take care of such situation which had become emergent in view of sharply increasing number of dowry harassment and death cases, the Acts was amended twice-in 1984[12] and in 1986[13] and a few new provisions were incorporated in the Indian Penal Code, 1860;[14] the Indian Evidence Act, 1872,[15] and the Criminal Procedure Code, 1973[16] to give teeth to the earlier existing soft statute.

THE LEGAL POSITION

A new chapter XX A titled "Of Cruelty by Husband or Relative of Husband" containing a lone provision section 498-A was inserted in Indian Penal Code, 1860 by the Criminal Law (Amendment) Act, 1983[17]. If a married woman is subjected to cruelty or harassment by her husband or his relative, section 498-A IPC is attracted which prescribes a punish-

ment which may extend upto 3 years and fine. The explanation attached to section 498-A gives inclusive definition of 'cruelty' contained in its two limbs. Explanation (a) makes cruelty *per se* an offence. It covers both physical as well as mental cruelty, the existence of dowry demand being immaterial for the application for clause (a) explanation (b) brings, any harassment to the woman with a view to coerce her or her relative to succumb to the dowry demand, under the purview of cruelty.

Where such cruelty inflicted by the husband or his relative immediately precedes the woman's death caused by burns or bodily injury or occurs otherwise than in normal circumstances, within 7 years of marriage then section 304-B IPC is attracted. This provision has been brought on the statute by the Dowry Prohibition (Amendment) Act, 1986 .[18] This section provides for a mandatory minimum punishment of 7 years imprisonment which may extend upto life for causing dowry death. In a landmark judgment, *Shanti* v. *State of Haryana,*[19] the Supreme Court analyzed section 304-B IPC and gave four essentials for its application[20].

1. The death of the woman should be caused by burns or bodily injury or have occurred otherwise than under normal circumstances.
2. Such death must have occurred within 7 years of marriage.
3. She must be subjected to cruelty or harassment by the husband or his relative.
4. Such cruelty or harassment must be for or in connection with demand for dowry.

The Supreme Court also included the suicide committed by such woman under the purview of section 304-B as it is a case of death which does not occur under normal circumstances.[21]

Since dowry deaths are committed within the safe precincts of a residential house and the criminal is a family member, the circumstances are always hostile to the discovery of truth.[22] To detect and curb dowry deaths and to strengthen the hands of prosecution, certain presumptions can be raised by the Court where certain foundational requirements are fulfilled. Section 113 B is one such presumption inserted in the Indian Evidence Act, 1872 by the Dowry Prohibition (Amendment) Act, 1986.[23] It lays down that if death of the woman occurs within 7 years of marriage and that if soon before the death such woman has been subjected to cruelty or harassment by husband or his relative for or in connection with any dowry demand, then the Court shall presume that such person has committed dowry death.

It must be clear that if there is proof of the accused having intentionally caused her death, that would be a case of murder under section 302 IPC. Where a woman takes her life with her own hands though she is driven to it by ill treatment by the husband or his relative, such person will be liable to be punished under section 306 IPC for abetment to suicide. The punishment under the provision may extend upto 10 years along with the fine.

In *State of Punjab* v. *Iqbal Singh*,[24] the Supreme Court has ruled very clearly:

> ... [W]here the husband or his relative by his wilful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of section 306 IPC. In such a case the conduct of the person would tantamount to inching or provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide.[25]

It is pertinent to point out that such crimes are committed in privacy of residential homes and in secrecy rendering it very difficult to get the direct and independent proof .[26] That is why a presumption clause section 113A was inserted in the Indian Evidence Act, 1872 by the Criminal Law (Amendment) Acts, 1983.[27] This presumption can be raised in case of the suicide by a married woman within 7 years of her marriage and where it is disclosed that the husband or his relative subjected her to cruelty as defined in section 498-A IPC.

CRITICAL REVIEW OF THE JUDGMENT

Besides legislative consideration and endorsement, a judiciary educated in the content, intent and effect of the legislation is a pre-requisite for the purposeful existence of any legislation.[28] Lacunae can be found in all legislations, dowry provisions are not free of them but more importantly, judges dealing with such cases need to display more sensitivity so that it does not result in denial of justice to the victims. The judiciary needs to show more concern to the assaults on the dignity of women. In dowry cases also it appears that the courts have not been able to comprehend the psychology of dowry victims [29] and have also shown a lack of required understanding in interpretation and application of dowry laws. One such reflection of such judicial insensitivity is *State of H.P.* v. *Nikku Ram.*[30]

The deceased Roshni was married to Nikku Ram on 6.2.1985 and was allegedly harassed from the very beginning by the husband, mother- in-

law and sister- in- law for bringing less dowry. She was cruelly treated by them when their demands for T.V., electric fan and buffalo were not fulfilled. So much so that on 20.6.88 the mother- in -law inflicted an injury on the deceased's forehead by giving a blow with a drati (a sickle like instrument for cutting). On the same day, being unable to bear the torture, the deceased consumed naphthalene balls which proved fatal and she died due to cardio-cascular arrest. The death occurred after 3 years and 4 months from the date of marriage.

According to the autopsy report there were two injuries present on the body of the deceased:

(*i*) a vertical incised wound on the right side of the forehead, 1 1/2"× 1/2" bone deep with tapering ends.

(*ii*) T shaped contusion, 1 1/2" × 1/2" with slight discharge from one end.

Both the injuries were not fatal in nature. The police recovered the sickle on the disclosure made by the mother- in- law.

The three accused were charged with the offences under section 304-B, 306 and 498-A IPC. The trial court examined father, brother, brother-in- law and maternal uncle of the deceased among the 18 witnesses in the case. Some letters written by the deceased were also put on record. All accused were acquitted by the trial court on the ground that the prosecution failed to establish the charges beyond reasonable doubt. The High Court refused to grant leave to appeal. In the appeal preferred to the Supreme Court the matter was examined afresh by considering the evidence on record.

Two important observations were made by the Court. Firstly, the Court corrected the error of the trial court in applying the unamended definition of the word 'dowry'.[31] It was observed that the definition of 'dowry' has been altered substantially by the two amendment Acts.[32]

Secondly, the Court stressed that even under the unamended definition, demands made after the marriage would constitute dowry demands. It would be pertinent to point out here that though the trial court was convinced about the existence of demands after the marriage but opined that only those articles are dowry which are given or agreed to be given for solemnization of marriage at that time and anything given after marriage is only for the happy matrimonial relationship and would not be dowry.[33] For reaching this conclusion, the trial court relied on a Delhi High Court judgment — *Inder Sain* v. *State*,[34] in which it was held that the valuables

demanded, or given must be in 'consideration for the marriage'. The very fact that the trial court erred and inadvertently ingnored the two amendments to the relevant provision and also relied upon a pre-amendment judgment which was more than a decade old, spells out the urgent requirement of sensitization of judges, who deal with sensitive issues like 'dowry offences'. Special training programmes for the purpose can be useful and benefited by them, the judges may be better equipped and contribute towards imparting justice efficaciously.

Fortunately, the Supreme Court ratified the error of the trial court and remarked - 'As the demand, in the present case has been made after the marriage, the trial court concluded that the same would not be dowry'[35]. The Court clarified that even if demand is made long after the marriage the same could constitute dowry, if other requirement of the section are satisfied.[36]

The hon'ble Court considered the application of sections 304 -B, 306 and 498-A IPC to the facts of the case. The application of section 304-B was ruled out and the court observed in para 14 of the judgment:-

> the injuries as found on the person of Roshni could not have caused her death, despite the demands being dowry, the offence would not attract the mischief of section 304-B. [37]

One fails to understand as to how the existence of any fatal injury is relevant for the application of section 304-B. There are four essentials for the application of section 304-B as spelt out in *Shanti* v. *State of Haryana*[38] and even the language of the section reveals that the legislature has envisaged many modes of causation of death other than by bodily injury.

Further, the Court examined whether the deceased was subjected to cruelty as defined in section 498-A IPC. The Court analyzed the facts in the light of explanation (b) to section 498-A only and held that the trial court rightly disbelieved the existence of any dowry demand because only one of the four relatives of the deceased had deposed about the dowry demand whereas other three did not say anything. The Court observed in para 16 of the judgment that there was no reliable evidence to hold that Roshni was being harassed within the meaning of explanation (b) of section 498-A[39] thereby ruling out the applicability of section 498-A as well as section 306 IPC.

There are several inconsistencies in the observations of the Court in various paras of the judgment regarding the existence of dowry demand. In para 8, the Court has corrected the trial court in its conclusion that the demands were not dowry demands as they were made after the solemni-

zation of marriage. This observation clearly reveals that the only problematic factor before the trial court was the time at which demands were made and not the existence of demand itself. In para 14, ruling out the application of section 304-B, the wordings of the Court are very clear that the injury on the deceased's body was not fatal *'despite the demand being dowry'*, section 304-B was not attracted. In para 16, the Court held that there was no reliable evidence regarding the existence of dowry demand. It is remarkable that how the Court has taken different views on the same factual circumstances in the different paras of the judgment. It is interesting to note that the Court while very rightly ratifying the error of the trial court regarding the time at which the demands were made and clarifying the law point involved probably got confused about the existence of the demand. Also the whole judgment is silent about the contents and veracity of letters written by Roshni.

Another noteworthy aspect in the judgment is that the Court has completely overlooked the invocation of the explanation (a) to section 498-A which brings any willful conduct of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or death (whether mental or physical) of the woman, under the purview of section 498 A. Explanation (a) can be applied in a case where there exists cruelty independent of the dowry demand and the provision accommodates the instance of mental cruelty as well. In the present case, mother-in-law had inflicted a bone deep, 1 1/2"x1/2 injury with the help of a sickle like instrument. It is a matter of grave shock that how an incident of physical cruelty, aptly coverable under section 498-A, explanation (a) has failed to attract the attention of the Court. It has been irreparably detrimental to the prosecution case as the non-existence of cruelty brought the case completely outside the purview of sections 306 and 113 A of the Evidence Act as well.

In the present case, Roshini committed suicide within 7 years of her marriage and the factum of cruelty as contemplated in explanation (a) to section 498-A also existed. Had the Court considered the application of explanation (a) to section 498-A, conviction of accused under section 306 IPC for abetting the sucicide could not have been ruled out, by any plausible logic.

It was held that the offences under section 304-B, 306, 498-A IPC were not made out against any of the three accused. The mother-in-law was convicted under section 324 IPC for voluntarily causing hurt by dangerous weapon. Keeping in view the age of mother- in- law, who was 80 years old at that time the Court imposed a fine of Rs. 3000/- and one month simple

imprisonment in default. The fine was to be paid to the parents of Roshni.

The parents of Roshni got Rs. 3,000/- for the loss of their daughter whereas the accused escaped with the nominal punishment which could extend upto 10 years under section 306 IPC or at least 3 years under section 498-A IPC, even if the dowry demand was taken as 'not proved' and only if the Court was not reluctant to invoke explanation (a) to section 498-A IPC.

The facts in *Brijlal* v. *Prem Chand*[40] are quite similar to the present case. The deceased wife had committed suicide by burning herself to death and the Court invoked the presumption as to abetment of suicide under section 113-A of Indian Evidence Act and convicted the accused under section 306 IPC. It was observed that:

> By reason of section 113-A, the Courts can presume that the commission of suicide by a woman has been abetted by her husband or relation if two factors are present viz. (1) that the woman committed suicide within a period of seven years from her marriage and (2) that the husband or relation had subjected her to cruelty.[41]

Another notable decision is *Akula Ravinder Kumar & Ors* v. *State of Andhra Pradesh*,[42] in which 'asphyxia' was the cause of death of the deceased wife and as per medical report the death was not suicidal but homicidal in nature. The Court ruled out the application of section 304-B IPC as it considered that the death was 'only due to asphyxia'[43] which was not found to have occurred in otherwise than under normal circumstances. It is a matter of great regret that within four years of this case, the Supreme Court has pronounced the present judgment laying down another vague proposition that section 304-B IPC is not applicable in a suicide case where *ante mortem* injuries found on the body of the deceased are non fatal in nature.

On the other hand, there is a commendable landmark decision of the Apex Court, delivered in 1990 - *Shanti* v. *State of Haryana*[44] in which the wife was harassed for bringing less dowry and her death occurred within 7 years of her marriage. The body of the deceased was cremated in undue haste and the police could recover only bones and ashes. There was no opportunity to hold any autopsy so there was no evidence whether the death was suicidal or homicidal. The hon'ble Court considered the 'undue haste' in cremating the body to be a sufficient ground for conviction under section 304-B IPC as it indicated that the death must have occurred otherwise than in normal circumstances. But as stated earlier in the text,

such decisions are by way of an exception and not the rule.

Punjab Sakharam Raut & Ors v. *The State of Maharashtra*[45] pronounced by Bombay High Court just a few days before the present case deserves a mention. It was a case of suicide by the deceased wife within 2 months and 8 days of the marriage, the Court successfully operated explanation (a) to section 498-A and convicted the accused under section 306 IPC. Unfortunately, being a High Court decision, it will not have any binding force against *Nikku Ram*.

Conclusion

The present judgment is a grave reflection of judicial insensitivity towards the offences involving the women victims. Due to patriarchal biases of the judiciary, there is a tendency not to accord due consideration to cases of matrimonial violence. Quite often the instances of severe cruelty are treated with a casual approach and are described as a matter of normal friction in the married life instead of a serious offence under the penal law of the land.

Situation gets further deteriorated in dowry harassment cases. The courts must understand the psychology of dowry victims in a male dominated society. Due to the sanctity attached to the institution of marriage, it becomes very difficult for the subjugated woman victim to first realize and accept her situation and then to apprise her parents and police about it. More so, in case of dowry death, it becomes extremely difficult to adduce direct evidence regarding the commission of crime hence the courts should accord due weightage to the invocation of sections 113-A and 113-B the presumptions introduced in the Indian Evidence Act, 1872.

The present decision throws light on the fact that there is a misconception in the mind of the judiciary that dowry demand is a pre-requistie for the offence of cruelty. It must be acknowledged by the judiciary that harassment due to dowry demands is only one of the innumerable possible ways of inflection of cruelty to married women, so that the provision enacted by the legislature in section 498-A IPC can be given a complete meaning to achieve its effective implementation.

Failure to invoke explanation (a) to section 498-A IPC leads to many wrongful acquittals or the accused gets away with a nominal punishment which frustrates the objective behind the enactment and amendments of dowry provisions.

Such wrongful acquittals in dowry cases undoubtedly act as a disincentive to parents and other family members of the deceased wife who have already suffered the loss of a loved one to come forward and initiate

the criminal process against the accused persons.

It is only through the sensitization of the judiciary that it will be possible to convict the accused in cases of matrimonial violence and the loud mandate of the legislature can be carried out to impart justice efficaciously.

NOTES AND REFERENCES

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1. Yogesh Atal and Meera Kosambi, ed., VIOLENCE AGAINST WOMEN : REPORTS FROM INDIA & REPUBLIC OF KOREA, (1993) at 3.
2. The loud provisions of HINDU SUCCESSION ACT though protect a few of the property rights of Hindu women, do not accord equal property rights to the daughters. See REPORT OF JOINT PARLIAMENTARY COMMITTEE TO EXAMINE THE WORKING OF DOWRY PROHIBITION ACT, 1961 (11.08.82).
3. *Supra* n.1 at 4.
4. Alladi Kuppuswami, revised, MAYNE'S HINDU LAW AND USAGE, 14th ed., (1996) at 116.
5. Rani Jethmalani, *Dowry and the Law-Subversion of Human Rights,* Paper circulated in WARLAW SEMINAR ON VIOLENCE AGAINST WOMEN, Oct. 1994.
6. Even at the time of enactment of 1961 Act, there was a conflict among the Parliamentarians if intervention of the state was desirable in dowry cases. Ila Palchoudhri was apprehensive that entry of police in this arena (of dowry offences) would detract from the colourful ceremony and the beauty of Indian marriage. Sh. Hem Barua spoke that the legislation is going to be a refrigerator legislation only and saw the possible eradication of dowry system in the economic emancipation of women. See - Ila Palchoudhri, col 3440 LSD- 4.12.59 and Hem Barua col 3475 LSD-4.12.59.
7. Lotika Sarkar, Usha Ramanathan & Madhu Mehra, GENDER BIAS IN LAW : DOWRY (1994) at 5.
8. Unamended section 2 and section 4 of DOWRY PROHIBITION ACT, 1961. Insertion of section 7(3) in the ACT in 1986 saves the givers of dowry.
9. JPC Report, *supra* n.2 and *supra* n.7 at 10.
10. 91ST LAW COMMISSION REPORT ON DOWRY DEATH AND LAW REFORM : AMENDING THE HINDU MARRIAGE ACT, 1955, THE INDIAN PENAL CODE , 1860 AND THE INDIAN EVIDENCE ACT, 1872, August 10, 1983.
11. *Id.* at 1.
12. THE DOWRY PROHIBITION (AMENDMENT) ACT, 1984 (63 of 1984).
13. THE DOWRY PROHIBITION (AMENDMENT) ACT, 1986 (43 of 1986).
14. Sections 498-A and 304-B, INDIAN PENAL CODE, 1860.
15. Sections 113-A and 113-B, INDIAN EVIDENCE ACT, 1872.
16. Sections 174 (3) and 198-A, CODE OF CRIMINAL PROCEDURE, 1973.
17. 46 of 1983.
18. 43 of 1986.
19. AIR 1991 SC 1226.

20. *Id.* at 1229.
21. *Id.* at 1230.
22. *Supra* n.10.
23. *Supra* n.17.
24. AIR 1991 SC 1532.
25. *Id.* at 1537.
26. *Supra* n.10. The Law Commission pointed out that the direct proof of instigation, encouragement or other conduct which amounts to 'abetment' under criminal law, is very hard to obtain conserving the very nature of the offence.
27. *Supra* n.17.
28. *Supra* n.7. The authors have given four stages to be passed by any legislation to achieve purposeful existence:
    I. Legislative consideration & endorsement.
    II. Strong and purposive implementation regime.
    III. Judiciary educated in content, intent and effect of legislation.
    IV. An informed public, alive in response to the issue.
29. *Supra* n.5.
30. 1995 Cr LJ 4184 (SC).
31. Unamended section 2 of DOWRY PROHIBITION ACT, 1961- Dowry means any property or valuable security given or agreed to be given either directly or indirectly:-

(a) by one party to a marriage to the other, or

(b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person,

at or before or after the marriage as consideration for the marriage of the said parties....

32. 63 of 1984 and 43 of 1986. In amended section, the words "in connection with the marriage of the said parties" substituted for the words "as consideration for the marriage".
33. 1995 Cr LJ 4184 at 4185.
34. 1981 Cr LJ 1116.
35. *Supra* n.33.
36. Interestingly, the clear mandate of the Supreme Court judgment, is being ignored in the latter High Court cases. *Nunna Venkateswarlu* v. *State of A P* 1996 Cr LJ 108 (AP) and *Reguri Sampath Reddy* v. *State of AP,* 1996 Cri LJ 1528 (AP) are the illustrations in which the High Courts have held that in the absence of any agreement between the parties, entered into at the time of solemnization of marriage, there can be no dowry demand in existence.
37. *Supra* n.33 at 4186.
38. *Supra* n.20.
39. *Supra* n. 33 at 4187.
40. AIR 1989 SC 1661.
41. *Id.* at 1669.
42. AIR 1991 SC 1142.
43. *Id.* at 1143.
44. *Supra* n.20.
45. 1995 Cr LJ 4021 (Bom).

BOOK REVIEWS

THE SUPREME COURT AND THE IDEA OF THE PROGRESS. By Alexander M. Bickel. Delhi: Universal Law Publishing Company Pvt. Ltd., First Indian Reprint, 1998, Pp. XVI+210, Rs. 200/-, ISBN 81-7534-112-9.

The book, Supreme Court and the Idea of Progress written by A.M. Bickel is a commentary on the paradox of the American judicial system in which the author tries to underpin how the judicial review makes the Supreme Court as the ultimate authority not only to interpret the Constitution of the US but also to make the Supreme Court the ultimate arbiter of the interpretations of policy perspectives not only of the Constitution but also of the state as a whole. The US Supreme Court has had the good fortune of the best judges of the world namely Justice Frankfurter, Justice Holmes, and Justice Warren and in the present day Justice Reinhart. The craftsmanship of these judges in developing the judge made law is profoundly expressed in cases such as *Brown* v. *Board of Education* or the *Dennis* v. *US* or *Miranda* v. *Arizona* or the earliest of the cases *Marbury* v. *Madison*. Mr. Bickel therefore is appreciative of how the conflict and choice of law between the various benches have been overcome in setting the goals for the judicial priority corresponding to executive policies formulations.

In Chapter I, Bickel starts how Warren Court opened new vistas of declaring some activities such as segregation, separate and equal treatment without waiting for the Congress to remove those abnoxious activities as ultra-vires the Constitution. The Warren Court subsequently declared Bible reading and all other religious exercises in public schools unconstitutional. It also ordered the reapportionment of the National House of Representatives, of both houses of state legislatures and of local government bodies on a one-man, one vote basis. Warran Court reformed numerous aspects of state and federal criminal procedure, significantly enhancing the rights of the accused, influencing juvenile offenders. Warren Court further held that wire tapping and eaves dropping are subject to the Fourth Amendment's prohibition against unreasonable searches and seizures and that evidence obtained in violation of that prohibition may not be admitted in state or federal trials and it laid down a whole set of new rules governing the admissibility of confessions, and in effect, the conduct of police throughout the country towards persons arrested on suspicion of

crime.

Mr. Bickle in Chapter II "The Heavenly City of the Twentieth Century," adopts a holistic approach and tries to marshall philosophical and jurisprudential ruminations which have been the basis of the judgements of the Supreme Court from the beginning of the establishment of the Supreme Court to the present day. Mr. Bickle, of course in a brief and lucid manner have deliberated how the Supreme Court of the yore has laid down the functional parameters which became the role models of the present day Supreme Court.

In Chapter III "The Web of subjectivity," Mr. Bickel underlines vicissitudes through which the Supreme Court of the US has gone through and has drawn explicitly the variables of the various amendments to the Constitution which essentially were the hand work of the Supreme Court of the US while not upholding the various executive or legislative measures. This chapter presents a variety of situations within which various countervailing judicial opinions have been rendered by the Supreme Court of the US and tries to suggest that the constitutional interpretation and the judgements are a high policy making functions performed in a political democracy and the Supreme Court for that matter has to act as a deviant although the presumption is that the government of the day is organised on a populist and a majoritarian rule. This chapter encapsulates major premise that the Supreme Court has usuruped to itself too much powers which the founding fathers may not have conceived.

Chapter IV, "Remembering the Future," Mr. Bickel by taking the help of Warren Courts and other judgements presents a stimulating discourse as to how the US society is being governed and how the public at large is being educated of the problems arising from the public perception of democracy, segregation, liberty, secular education, religion etc.

Mr. Bickel also commented how the various public schemes where given fillip by the courts intervention and as a matter of priority, the Supreme Court in some cases has gone beyond its brief for the fact that it has realised that the US has to live as a progressive state capable of facing the challenges of the world and times. Therefore, remembering the future, Mr. Bickel sums up that the US society presents a vortex of cultural, social and economic values and the Supreme Court has to make a balancing act which incidently has been the major source and succor to its sustenance. It is no denying the fact that the public support and sympathy of the court has invariably been forthcoming, in the face of the Congress debates so that there is a judicial monoply which the executive wants to break to have an equal partnership between the congress and the court if not complete

congressional supremacy. It may not be out of place to support Mr. Bickel thesis that the secret of the survival of the US Supreme Court is not in the universe of changes which are taking place or have taken place but may be in the Courts' practices, the jurisprudence it evolved and the policy perspectives in which the court has endured over these years. The progress of the court is commensurate with the progress of the society and in keeping with the traditions which the Congress may set for the nation.

In sum, the book has been written in a non-traditional manner deriving a relationship between the legal and the political process in the US where the two are uniquely intertwined. Mr. Bickel while criticising something done by the courts for the stated purpose of speeding school desegregation, did not favour state imposed racial discrimination rather he abhorred it. Mr. Bickel concludes his book that judicial power is important so long as it keeps itself within limits.

The book is a valuable edition to the existing literature on the discourses of the relevance and effectiveness of the Supreme Court of the US in drawing upon the court craft and the limits of changes which take place in the society in a hidden manner.

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UNIVERSAL'S ENVIRONMENT AND POLLUTION LAW MANUAL. By S.K. Mohanti. Delhi : Universal Law Publishing Company Pvt. Ltd., 1998. Rs. 250/-, ISBN 81-7534-022-3.

The environmental law has got a lot of significance in the recent past. The protection and improvement of environment has become a major issue throughout the world. The gravity of seriousness attached to the environmental problems is evident from the fact that in most of the countries, scientists, economists, policy-makers and administrators have given serious thought to such problems. In India, public awareness of environment, incorporation of environment related subjects in the curricula of various courses, legislations and judicial activism in this field have given serious thought to the environmental problems. A number of Supreme Court and High Courts' judgements on public interest litigations have contributed substantially to the development of environmental law in India.

The book under review is a manual on environment and pollution law. The book contains a total number of twenty three Acts and Rules and digest of important Supreme Court judgements on the subject. The book is divided into nine parts. Part I contains laws on air pollution. It consists of the Air (Prevention and Control of Pollution) Acts, 1981 and the Air (Prevention and Control of Pollution) Rules, 1982.

Part II contains Acts and Rules on environment protection and management and handling of hazardous wastes. It consists of the Environment (Protection) Act, 1986; the Environment (Protection) Rules, 1986; Hazardous Wastes (Management and Handling) Rules, 1989 and Manufacturer, Storage and Import of Hazardous Chemical Rules, 1989.

Part III deals with water pollution laws. It contains the Water (Prevention and Control of Pollution) Act, 1974; the Water (Prevention and Control of Pollution) Rules, 1975; the Water (Prevention and Control of Pollution) Cess Acts, 1977 and the Water (Prevention and Control of Pollution) Cess Rules, 1978. Part IV provides for the text of the National Environment Tribunal Acts, 1995.

Part V provides for the laws on the protection of wild life. It contains the Wild Life (Protection) Act, 1972; the Wild Life (Transactions and Taxidermy) Rules, 1973; the Wild Life (Stock Declaration) Central Rules, 1973; the Wild Life (Protection) Licensing (Additional Matters for Consideration) Rules, 1983; the Wild Life (Protection) Rules; 1995 and the Wild

Life (Specified Plants-Conditions for Possession by Licensee) Rules, 1995.

Part VI contains Acts and Rules on forest conservation. It provides for the Indian Forest Act, 1927; the Forest (Conservation) Act, 1980 and the Forest (Conservation) Rules, 1981.

Part VII provides laws on public liability insurance. It contains the Public Liability Insurance Act, 1991 and the Public Liability Insurance Rules, 1991. The objective of enacting a law on public liability insurance was to provide for mandatory public liability insurance for installations, handling hazardous substances to provide minimum relief to the victims. Such an insurance, apart from safeguarding the interests of victims of accident, enable the industry to discharge its liability to settle large claims arising out of major accidents. Earlier, the employers used to escape their liability on the grounds of 'assumed risk' or 'contributory negligence', but now the Public Liability Insurance Act, 1991 protects the workers' interests.

Part VIII is a digest of important Supreme Court judgements. It contains summary of some very important Supreme Court judgements such as Shri Ram Gas Leak case (AIR 1987 SC 965; AIR 1987 SC 982; AIR 1987 SC 1086); Ganga Pollution Case (AIR 1988 SC 1037); Bhopal Case (AIR 1990 SC 273; AIR 1990 SC 1480); Taj Mahal Case (Writ Petition (Civil) No. 13381 of 1984 Supreme Court, decided on December 30, 1996) etc.

The final part i.e. part IX contains the recently enacted statute, the National Environment Appellate Authority, 1997 which provides for the establishment of a National Environment Appellate Authority to hear appeals with respect to restriction of areas in which any industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986.

The book, no doubt is very useful for judges, lawyers, researchers and academicians as it provides for a collection of Acts and Rules on environment and pollution related matters. The book, thus provides for the substantive as well as procedural laws on the subjects. The book becomes more useful as it contains brief comments on the sections. The utility of the book, however, could have been increased had the book incorporated environment related provisions from the Constitution of India and other statutes such as Indian Penal Code. This would have provided entire codified law on environment at one place. The book gives summary of very limited judgements of the Supreme Court. Many important judge-

ments of the court have been left out. The comments on sections could have been enlarged by incorporating important points and referring important judgements. Finally, the categorization of parts could have become more attractive had part IX been clubbed with part IV. Part IV provides for the National Environment Tribunal Act, 1995 and part IX provides for the National Environment Appellate Authority Act, 1997. The book does not contain systematic page numbers which make the task of readers more cumbersome.

The book, inspite of some shortcomings is worth keeping in the libraries. It is valuable for all concerned especially for those who are practising, teaching or doing research in environmental law. The book has been priced at a very reasonable price of Rs. 250/-. It is highly praiseworthy on the part of the publishers, Universal Law Publishing Company Pvt. Ltd. who have beautifully published the manual on such a topical subject.

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THE LEAST DANGEROUS BRANCH - THE SUPREME COURT AT THE BAR OF POLITICS. By Alexander M. Bickel, Delhi: Universal Publishing Co. Pvt. Ltd., First Indian Reprint, 1998, Pp. XII + 303, Rs.250/-, ISBN 81-7534-113-7.

The justification for and the scope of judicial review are the fundamental questions of constitutional law in a democratic country. In the 1803 case of *Marbury v. Madison*, Chief Justice Marshall of the Supreme Court of the US established the authority of the Court to review, under the Constitution, the actions of other branches of the government.

In the book under review, the aim of the author has been to point out that the Supreme Court's exercise of judicial review should be better understood and supported and more sagaciously used. It is a classic work on the role of the Supreme Court in the American system. The Author traces the history of the Court and assesses the merits of various decisions along the way.

The book is prefixed with a foreword by Harry H. Wellington and is arranged in six chapters. In Chapter-I, the author analyses the legitimacy of judicial review and the modalities of its exercise. He begins with *Marbury v. Madison,* where Chief Justice Marshall held that a federal court has the power to strike down a duly enacted federal statute on the ground of its repugnancy to the Constitution. The author is of the opinion that this case gives shaky support to judicial review and the Supreme Court has usuruped to itself too much powers which the founding fathers may not have conceived. The central concern is with the undemocratic nature of judicial review as a countermajoritarian check on the legislature and executive. The Supreme Court Justices are appointed for life. Legislators are electorally accountable. Judicial review is undemocratic as it thwarts the will of the representatives of the people by denying policy making power of representative institution.

This concern with the undemocratic nature of judicial review has led many of today's scholars on a quest for the distinctive judicial quality that justifies this established practice. Professor Bickel claims that the "point of departure is a truism, perhaps it even rises to the unassailability of a platitude" (p.24). He maintains that many actions of government have two aspects: their immediate necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. These values must be continually

derived, enunciated and seen in relevant application. Professor Bickel believes that the Supreme Court is the institution of the government best equipped to be the pronouncer and guardian of these enduring values.

In Chapter II, "The Premise of Distrust and Rules of Limitations", the author views the process of judicial review with greater particularity, through a highly selective treatment of certain commentators and schools of thought. Dealing with writers who approach the process from a premise of distrust i.e., reluctance to give it the freest rein, author critically expounds the working of James Brandley Thayer's "Rule of the clear Mistake"; Judge Hand's "Rule of the Successful operation of the Venture at Hand"; Herbert Wechsler's "Rule of the Neutral Principles" and the "Lincolnian Tension". Justice Hand had in effect recorded his dissent to Justice Marshall's opinion. Professor Wechsler had filed a concurrence rejecting the negativism of Justice Hand and affirming the concept of the principled decision. Professor Charles Black had written an affirmation of judicial review that stands as a compelling theoretical justification for the later work of the Warren Court.

Professor Bickel joined Wechsler in finding unpersuasive, Justice Hand's arguments against judicial review. For him a functional analysis of American government is the most significant reason for subscribing to judicial review. The author observes that the court wields a three fold power - it may strike down legislation as inconsistent with principle; or it may validate legislation as consistent with principle; or it may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.

Chapter III, "The Infirm Glory of the Positive Hour" deals with the schools of thought that comes to judicial review with greater certitude about its broad usefulness and hence with a more hospitable attitude towards its rigorous exercise. Criticising the neo-realists who see the judges as free to achieve immediate results as they like, when they like, without necessary relation to any particular category of principles, the author comments that the function of judicial review is to evolve and apply, although in a limited sphere, fundamental reasons of principle on which to base men's actions, and which should cut across men's uncontrolled instincts and interest. Referring to literalist, absolutes and activist like Justice Black, the author says the court should consult not only the origin of the constitutional provisions and amendments but also the line of their growth.

In Chapter IV, " The Passive Virtues", the author first refers to two episodes where the Justices of the Supreme Court refused to render

advisory opinions liable to be administratively revised. They said the Constitution vested in the Courts the judicial power i.e., power of rendering final judgments only. The author feels these cases provide limitation of the power of judicial review as there has to be "standing" and "case and controversy" for judicial decision. The author in this Chapter illustratively unfolded some of the devices for deciding not to decide - devices for disposing of a case while avoiding judgement on the constitutional issue it raises. The Court has the discretion in deciding whether, when and how much to adjudicate. The devices of not doing, passive virtues, explained here are lack of ripeness, vagueness, delegation, statutory construction or procedure. The author is of the opinion that not declaring unconstitutionality of executive or legislative action not only have contemporaneous results but also portentous aftermaths and is as much important as declaring the action unconstitutional.

In Chapter V, "Neither Force Nor Will", recognizing that the court is a court of law and accepting the thesis that when a court reaches the merits of a case it must decide in accordance with neutral principles because it is binding on other institutions. The author also discusses the relativity of passive virtues - of the techniques for not deciding when a decision would be improvident for the nation. The author believes that we can profit from judicial review in a democracy so long as we understand the limits of decisional law and have a court composed of practical lawyer.

Finally, in the last Chapter, "The Supreme Court at the Bar of Politics", author discusses the *School Segregation Cases* of 1954 in detail and emphasise that federal government and the Courts have to join hands for finding and enforcing solutions to the social problems. The book ends with a subject index.

The book is a valuable addition to the existing literature on the role of the US Supreme Court in setting and moulding the societal values. It presents a relationship between the legal and political process in the US.

It is highly praiseworthy on the part of publishers, Universal Law Publishing Co. Pvt. Ltd., who have brought out the first Indian reprint of the second edition of the author's work. It would make the book accessible to Indian students at a reasonable price.

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FORM IV

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