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NOTES AND COMMENTS

BOOK REVIEW

CONSTITUTIONAL MULTICULTURALISM — CONCEPTUALISATION AND JURISPRUDENTIAL SIGNIFICANCE

*P. Ishwara Bhat**

I. INTRODUCTION

The term multiculturalism is often employed in American juristic writing in recent decades.[1] Although there is no consistent or coherent set of ideas behind it to make it an 'ism', it theoretically represents a sensibility of openness to the enormous cultural difference that has always existed in American life. As opposed to assimilationist approach, multiculturalism or cultural pluralism emphasizes the importance of "manyness, variety and differentiation". According to Horace Kallen, "democracy involves, not the elimination of differences, but the perfection and conservation of differences... It involves a give and take between radically different types, and a mutual respect and mutual cooperation based on mutual understanding".[2] According to him, it is a pious stupidity to strive at unison of culture.[3] The other alternative, harmony, requires concerted public action in conformity with the fundamental law. "Starting with our existing ethnic and cultural groups, it would seek to provide conditions under which each may attain the perfection that is proper to its kind".[4]

'Melting pot' or 'amalgamation' concepts seek fusion of cultural groups to bring new cultural identity and in practice unify society around

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* Reader, Department of Studies in Law, University of Mysore, Manasagangotri, Mysore.

1. See Charles R. Lawrence, *Race, Multiculturalism and the Jurisprudence of Transformation*, 47 STANFORD LAW REVIEW, 1995 at 819; Jurgen Habermas, *Multiculturalism and the Liberal State*, 47 STANFORD LAW REVIEW, 1995 at 849; Doriane Lambelet Coleman, *Individualising Justice through Multiculturalism: The Liberal's Dilemma*, 96 COLUMBIA LAW REVIEW, 1996 at 1093; Leti Vol pp, *Talking 'Culture' : Gender, Race, Nation and the Politics of Multiculturalism*, 96 COLUMBIA LAW REVIEW, 1996 at 1573; Robert C. Post, *infra* n. 2.
2. Horace M. Kallen, CULTURE AND DEMOCRACY (1924) at 61; Also see H. Kallen, CULTURAL PLURALISM AND THE AMERICAN IDEA (1956) Cited by Robert C. Post. *Cultural Heterogeneity and Law : Pornography, Blasphemy, and the First Amendment*, 76 CALIFORNIA LAW REVIEW, 297 at 301.
3. See Horace M. Kallen, *Democracy versus the Melting-pot: A Study of American Nationality* in Werner Sollars, ed., THEORIES OF ETHNICITY (New York: New York University Press, 1996) at 90.
4. *Ibid.*

the cultural values of one dominant group. Contrary to this, according to Robert Post, pluralist law attempts to create ground rules by which diverse and potentially competitive groups can retain their identities and yet continue to co-exist.[5] Harold Laski considers that very structure of federalism seeks to the extent possible to preserve the heterogeneity inherent in local and regional differentiation.[6] Cultural pluralism is defined by R. Havighurst as "aspiring toward a plurality of cultures with their members seeking to live together in amity and mutual understanding and mutual cooperation, but maintaining separate cultures".[7]

Although Horace Kallen and others use the phrase 'cultural pluralism' or 'multiculturalism' in a larger sense to include diversity in race, religion and language, the post-Brown development on racial equality in public life has made the academicians to use the term to denote racial equality, the situation of multiracial schools and the school syllabus to promote amicable racial relations.[8] An important point made out in these writings is that right to equality is destined to herald a jurisprudence of transformation in racial relations and that relative invisibility of people of colour and women shall be cured by the extension of civil rights movement of the 1960s.[9] However, there are also research articles by authors like Robert Post and D.L. Coleman, in which the term multiculturalism is used in a larger context of heterogeneity in community's customs, religious beliefs and cultural group's estimation of pornography.[10] The idea of equal rights of all cultural groups is employed by the American courts in cases relating to blasphemy, hate speeches on religions, cultural defences is favour of lesser punishments and language rights in education.[11]

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5. Robert C. Post, *supra* n. 2 at 302-3.
6. Harold J. Laski, STUDIES IN THE PROBLEM OF SOVEREIGNTY (1917) at 275; also see Robert Post, *supra* n. 2 at 302.
7. R. Havighurst, ANTHROPOLOGY AND CULTURAL PLURALISM: THREE CASE STUDIES, AUSTRALIA, NEW ZEALAND AND USA (1974) cited by Robert Post *supra* n. 2 at 302.
8. See *supra* n. 1; Also see John D. Bheuker and Lorman A. Ratner, MULTICULTURALISM IN THE UNITED STATES (1985).
9. Charles Lawrence, *supra* n. 1.
10. Robert Post, *supra* n. 2; D. L. Coleman, *supra* n. 1; Also see Joseph Grinstein, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE LAW JOURNAL, 1996 at 1347; William N. Eskridge, *A Jurisprudence of Coming Out: Religion. Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE LAW JOURNAL, 1997 at 2411. *Yniguez* v. *Arizona for Official English*, 42 F 3d 1217 (9th cir 1994), 69 F 3d 920 (9th cir 1995).
11. *Beauharnais* v. *Illinois*, 343 US 250 (1952); *Cantwell* v. *Connecticut*, 310 US 296 (1940); *People* v. *Aphaylath*, 499 NYS 2nd 998 (1986); *People* v. *Kimura* (Supra Ct. L.A. County Nov. 21, 1985). Also see D.L. Coleman, *supra* n. 1; *Meyers* v. *Nebraska*, 262 US 390 (1923); *Pierce* v. *Society of Sisters*, 268 US 510 (1925).

II. Constitutional Multiculturalism — Conceptualisation

The concept of multiculturalism has a wider canvas and explicit basis in Canadian constitutional law. It is a unique genius of Canadian constitutional jurisprudence that protection of individual rights is integrated with tradition of cultural pluralism. According to Joseph Magnet, "Canada's fundamental commitment to cultural pluralism is entrenched deep into its constitutional structure by the creation of special autonomous status for aboriginal communities; self governing institutions for denominational education; distinct protection in the machinery of government for linguistic minorities; and protection of the linguistic integrity of certain minority language electoral districts".[12] Reinforcing this tradition, section 27 of the Canadian Charter of Rights and Freedoms 1982 provides, "The Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". The broad sweep of the text is applied to wide variety of situations by judiciary, and the direction of development is towards realisation of equal liberty and opportunity for all cultural communities.

In *R* v. *Big M. Drug Mart*,[13] while invalidating a federal statute which imposed Sunday as a day of rest for avowedly religious reasons, Dickson C.J. maintained that the statute was not consistent with "the preservation and enhancement of the multicultural heritage of Canadians". According to the learned judge, the diversity of belief and non-belief, the diverse socio-cultural background of Canadians made it constitutionally incompetent for the Parliament to provide legislative preference for any one religion at the expense of another religious community.[14] Similar approach was adopted in *R* v. *Edwards Books*[15] where the statutory exemption accorded to Saturday observers from Sunday closure law as making invidious discrimination amidst cultural minorities.

Minority education rights are also construed in the light of multicultural values. The Ontario Court of Appeals in *Re Education Act on Ontario* held that "minority language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably be said to reflect the

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12. Joseph E. Magnet, Constitutional Law of Canada: Cases, Notes and Materials, 4th ed., Vol. 2 (Cownsvilla: Editions Yvons Blais Inc., 1989) at 38. Also see Jerome B. Paradis, *Language Rights in Multicultural States: A Comparative Study*, 47 Canadian Bar Review, 1970 at 651.
13. (1985) 1 SCR 295 at 337-8.
14. *Ibid* at 351.
15. (1986) 2 SCR 713.

minority culture and appertain to the majority".[16] Section 93 of the Constitution Act 1867, which protects the rights and privileges of denominational (or separate) schools which were prevalent in 1867, is regarded as special right of minorities, and state's funding to them has been upheld in *Ontario Separate School Funding*[17] case by rejecting the argument based on right to equality. The court was looking to the affirmative action policy involved in minority protection underlying section 93.

International legal norms also have emphasized the duties of States to ensure co-existence of culture. The Universal Declaration of Human Rights (UNDHR) 1948, International Covenant on Economic Social and Cultural Rights (ICESCR) 1966 and International Covenant on Civil and Political Rights (ICCPR) 1966 have required the States to guarantee human rights to all persons without distinction of any kind such as race, colour, sex, religion and national origin. According to Article 27 of ICCPR, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own religion, or to use their own language". Article 27 of UNDHR and Article 15(1) of ICESCR require the States to ensure that everyone has the right to freely participate in the cultural life of the community. The UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities 1992 aims to constant promotion an realisation of rights of these minorities as an integral part of the development of society as a whole and within a democratic framework based on the rule of law. Despite the 'individualist' phrasing of the right, the communitarian and institutional focus in the cultural right towards the goal of preserving 'their own' cultural identity can be significantly noticed.[18] Since the international conventions have been considered as important guidelines in constitutional interpretation in recent times,[19] the thrust of these conventions towards the value of multiculturalism can be regarded as having far reaching impact.

The concept of multiculturalism, as understood in the West, is well-known and recognised in the Indian polity from the very inception of the Constitution and even earlier. In fact, in 1950 multiculturalism as a constitutional policy was not popularly practised in America and Canada. Indian Constitution makers pioneered the idea of the multiculturalism as a constitutional policy. A well planned scheme for multiculturalism is laid

16. (1984) 47 OR (2nd) 1 CA at 39.
17. *Re Bill* 30 (Ontario Separate School Funding), (1987) 1 SCR 1148.
18. Parteck Thornberry, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (Oxford: Clarendon Press, 1991) at 188-189.
19. *Vishakha* v. *State of Rajasthan*, (1997) 6 SCC 241.

down by them in the Constitution. It mainly consists in (*i*) equal entitlement of all sections of society having distinct language, script or culture of their own to conserve the same (Art. 29(1)), (*ii*) right of linguistic and religious minority to establish and administer educational institution of their choice (Art. 30(1)), (*iii*) non-discrimination on grounds of race, religion, caste, sex and place of birth (Arts. 15(1) (2) , 16(1) (2), 29(2)), (*iv*) equal religious freedom of all persons (Art. 25 (1)), (*v*) autonomy of religious denominations in the matters of religion (Art. 26), (*vi*) non-imposition of Hindi upon non-Hindi speaking people and opportunity for regional official languages in the States and (*vii*) protection and development of tribal people by securing their customary laws, land holdings and institutions of self government (Art. 244 and 5th and 6th Schedule) and (*viii*) fundamental duty of citizens towards cultural harmony (by Constitution (Forty Second Amendment) Act 1976 it is provided under Art. 51A that it shall be the duty of every citizen of India, (*e*) to promote harmony and spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, and (*f*) to value and preserve the rich heritage of our composite culture), (*ix*) ideal of fraternity and unity and integrity of the Nation through a Socialist, Secular, Democratic Republic (Preamble).

From the above constitutional scheme it can be inferred that protection of cultural identity, equality in religious and other freedoms, equality in language rights, non-discrimination and tribal development along with commitment to just social order through state and individual actions form the major theme of constitutional multiculturalism in India. As viewed by M.N. Venkatachalaiah J. (as he then was), "The purpose of law in plural societies is not the progressive assimilation of the minorities in the majoritarian milieu. This would not solve the problem; but vainly would seek to dissolve it... in the words of Lord Scarman, "... the purpose of the law must be not to extinguish the groups which make the society but to devise political, social and legal means of preventing them from falling apart and so destroying the plural society of which they are members".[20]

The non-assimilationist policy emphasized by Justice M.N. Venkatachalaiah is truly reflecting the Indian constitutional scheme referred to above. A different shade of opinion is traceable in the observation of S.R. Das C.J. *In re The Kerala Education Bill.*[21]. The learned judge observed, "Throughout the ages endless inundations of men of diverse creeds, cultures and races - Aryans and non-Aryans, Dravidians

20. M.N. Venkatachalaiah J., *Law in Plural Society* cited in *M. Ismail Faruqui* v. *Union of India*, AIR 1995 SC 605 at 630-1.
21. AIR 1958 SC 956 at 986.

and Chinese, Scythians, Huns, Pathans and Mughals - have came to this ancient land from distant regions. India has welcomed them all. They have met and gathered, given and taken and got mingled, merged and lost in one body". Referring to Rabindranath Tagore's poem to the effect that none shall be turned away from the shore of the vast sea of humanity, i.e. India and also to the stanza in National Anthem which hails the throne of the Nation being adorned by the presence of Hindus, Buddhists, Sikhs, Jains, Parsees, Mussalmans, and Christians, and woven in a garland of love that brings the hearts of all people into the harmony of one life. Das C.J. concludes that "the genius of India has been able to find unity in diversity by assimilating the best of all creeds and cultures".[22]

It is submitted, while Indian culture has welcomed different cultures, creeds and races, the factor of assimilation is not a reality either in policy or practice. Even the poetic sentiments the learned judge relies upon, presuppose existence of plurality of religions and languages. While overemphasis on national unity has resulted in flourish of rhetoric, his reference to 'unity in diversity', juxtaposed with 'assimilation' and 'merged and lost in one body' reflects some confusion. 'Unity in diversity' suggests continued diversity within the bond of unity. Perhaps the learned judge confuses assimilation for cultural syncretism or cultural give and take. Further in another part of this advisory opinion Das C.J. observes, "The minorities evidently desire that education should be imparted to the children of community in an atmosphere congenial to the growth of their culture".[23] It is submitted, this presupposes coexistence of diverse cultures but not a phenomenon of 'merged and lost in one body'. Moreover, when we look to subsequent constitutional development a clear picture emerges.

The right to equality in religious freedom and the idea of harmonious coexistence of religions has been greatly emphasized in *S.R. Bommai* and *M. Ismail Faruqui*. P.B. Sawant J. in *S.R. Bommai* observed, "religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. It is our cardinal faith".[24] In *Ismail Faruqui* J.S. Verma J. referred to Bahai literature with approval to the following effect, "Fear, suspicion and hatred are the fuel which feed the flame of communal disharmony and conflict.

22. *Ibid.*
23. *Id.* at 984.
24. *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1917 at 2003.

Though the Indian masses would prefer harmony between various communities, it cannot be established through the accommodation of 'separate but equal', nor through the submergence of minority culture into majority culture - whatever that may be ... The diversity created by God has infinite value, while distinctions imposed by man have no substance".[25] Upendra Baxi views that constitutional perspective of secularism, as developed by judiciary, provides parameters to determine the true worth of alternate discourses on secularism which are assiduously sought to be privileged by practices of power.[26] In juristic writings a central role for right to equality in religious freedoms has been emphasised for assuring secularism.[27]

Right to equality and protective discrimination are the major tenets of constitutional policy on ethnic diversity and special situation of tribals. K. Ramaswamy J. in *Samata* observes, "it is seen and bears recapitulation that the purpose of the Fifth and Sixth Schedules to the Constitution is to prevent exploitation of truthful, inarticulate and innocent tribals and to empower them socially, educationally, economically and politically to bring them into the mainstream of national life. The founding fathers of the Constitution were conscious of and cognizant to the problem of exploitation of the Tribals. They were anxious to preserve the tribal culture and their holdings. At the same time, they intended to provide and create opportunities and facilities, by affirmative action, in the light of the Directive Principles in Part IV, in particular, Articles 38, 39, 46 and cognate provisions to prevent exploitation of the tribals by ensuring positively that the land is a valuable endowment and a source of economic empowerment, social status and dignity of persons. The Constitution intends that the land always should remain with the tribals".[28]

From the above analysis of judicial perceptions it is clear that security of cultural identity through egalitarian principle is, and 'melting pot' is not, the constitutional policy in India. Fundamental Duty under Article 51A (e)

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25. AIR 1995 SC 605 at 644.
26. Upendra Baxi, *The Struggle for the Redefinition of Secularism in India: Some Preliminary Reflections* in Rudolf C. Heredia and Edward Mathias ed., SECULARISM AND FEDERATION (New Delhi: Indian Social Institute, 1995) at 54 to 63. Alternate discourses of Ashish Nandy, *The Policies of Secularism and the Recovery of Religious Tolerance* in Veena Das, ed., MIRRORS OF VIOLENCE (Delhi: Oxford University Press, 1990) and T. N. Madan, *Secularism in its Place*, 46 JOURNAL OF ASIAN STUDIES, 1987 at 747-9 are referred.
27. G.S. Sharma, *Rule of Law, Legal Theory and Secularism* in G.S. Sharma, ed., SECULARISM: ITS IMPLICATION FOR LAW AND LIFE. (Bombay: N.M. Tripathi, ILI, 1966) 195 at 200.
28. *Samata* v. *State of Andhra Pradesh*, (1997) 2 SCJ 539 at 587. Also see M. Hidayatullah, THE FIFTH AND SIXTH SCHEDULES TO THE CONSTITUTION OF THE INDIA (Gauhati: Ashok Publishing House, 1979) at 68, 91.

and (f) reinforces this idea. Under Article 51A (e) the spirit of harmony and brotherhood are to 'transcend' religious, linguistic and regional or sectional diversities. According to E.S. Venkataramaiah J., "It does not necessarily involve the elimination of various types of diversities. Diversities will exist; but they should be 'transcended'. Without eliminating their existence - an elimination which would not be possible - citizens can still develop a mental outlook that will enable them to go beyond those diversities; to rise above narrow cultural differences and 'to strive towards excellence in all spheres of collective activity'.[29]

Under Article 51A(f) intellectual process of appreciating the heritage of composite culture and physical activity of preserving the same are presupposed. According to Rasheeduddin Khan, "A thing is called composite, when it is made up of various and disparate parts or elements, but existing as an organic aggregation of distinct parts. Philosophically, 'composite culture' would mean that peculiar brand of culture that represents the rejection of uni-cultural regimentation or mono-cultural domination and positively reaffirms the value of pluralism and sycreticism, as the valid, stable and desirable basis for cultural afflorescence in a mixed society and plural polity like India".[30] It is compositeness that lends greater vitality and larger acceptability for a system of values in group life.

From the above discussion it can be gathered that instead of assimilationist policy, the principle of equal opportunity of all cultural communities for meaningful survival, institutional autonomy and reasonable exercise of their rights forms the kernel of constitutional multiculturalism. Right against discrimination and socio-economic marginalisation on cultural grounds, rights against arbitrary and hegemonistic superimpositions or deprivations and right to positive support from the state to overcome the social handicaps of minority character are different components of this concept. In order that the equality between the members of the majority and minority must be effective and genuine, need-based special rights of the minorities are secured by constitutional multiculturalism. Minority language educational right with certain amount of institutional

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29. E.S. Venkataramaiah, CITIZENSHIP - RIGHTS AND DUTIES (Bangalore: B.V. Naga Publishers, 1988) at 60. For the proposition that composite culture is inevitable in a living and growing society see Krishna Kripalani, *Composite Culture and its Relevance* in Radhey Mohan, ed., COMPOSITE CULTURE AND INDIAN SOCIETY (New Delhi: Zakir Husain Foundation, 1980) 25 at 27.

30. Rasheeduddin Khan, *The Problematique: The Heritage of Composite Culture as an Input in the Process of Building a New National Identity* in Rasheeduddin Khan, ed., COMPOSITE CULTURE OF INDIA AND NATIONAL INTEGRATION (New Delhi: IIAS and Allied Publishers, 1987) 24 at 39.

autonomy is a prominent right in this regard.[31] Separate territorial base for tribal people with right of self-government and security of their cultural tradition is another policy that reflects this approach.[32]

III. Jurisprudential Significance of Constitutional Multiculturalism

As constitutional multiculturalism is concerned with fairness of relations in large spectrum, of group activities in society, its place and impact in legal regime of a pluricultural society is significant.

Firstly, the rich values of constitutional multiculturalism have potentiality to inspire and compel the legislative, judicial and administrative processes to institutionalise and internalise the attitudes for tolerance and cooperation. Legislations which criminalise hate speeches or actions that target religious, racial or linguistic communities;[33] which aim to protect places of worship,[34] public order and morality regulate religious endowments and wakfs and bring social reforms like temple entry;[35] and which provide for funding of tribal development plans reflect the principle of multiculturalism at the level of subordinate policy choices. Higher judiciary has extensively relied on theoretical underpinnings of the concept in cases relating to religious and linguistic conflicts or partisan state policies. As in Canada where multiculturalism is an explicit rule of constitutional interpretation, in India also because of value based interpretation of Constitution through basic structure doctrine or purposive interpretation of Part III or by reliance on Fundamental Duties, the concept's usefulness as a parameter in constitutional interpretation is increasingly realized. *S.R. Bommai*,[36] *Ismail Faruqui*,[37] *Pradeep Jain*[38] and *Samata*[39] are some of the cases where it assisted constitutional interpretation for a comfortable result. Central and state administrations have the responsibilities of ensuring compliance with Constitution and laws[40] in the activities of state and people and this provides a practical life to the concept. Social justice programme for tribal development, establishing and running of linguistic

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31. Art. 30(1).
32. Arts. 244, 244A and Schedules 5th and 6th .
33. Sections 153A and 153B of the Indian Penal Code, 1860.
34. Religious Institutions (Prevention of Misuse) Act, 1988 and Places of Worship (Protection) Act, 1991.
35. For example, A.P.Charitable and Hindu Religious Institutions Endowment Act, 1966; Orissa Hindu Religious Endowment Act, 1951; Waki Act, etc.
36. AIR 1994 SC 1917.
37. AIR 1995 SC 605.
38. *Pradeep Jain* v. *Union of India*, AIR 1984 SC 1470.
39. (1997) 2 SCJ 539.
40. Arts. 256 and 257 of the Constitution of India.

minority schools and moulding fair policies about entitlements in public employment and education reflect the policy of constitutional multi-culturalism.

Secondly, an effective scheme and practice of constitutional multiculturalism essentially means taking the human rights seriously since protection of cultural rights synchronise with or result in better respect for human rights. Attitude of tolerance or motivation for coexistence of diverse religions, languages and ethnicities amidst people and power holders eschew group violence and build up an atmosphere conducive for enjoyment of human rights. Societal peace and happiness emerging from constitutional multiculturalism render human rights meaningful. As a corollary, integration of human rights into this concept helps in excluding cultural faultlines.

Thirdly, since constitutional multiculturalism is not averse to social justice, cultural progress keeps phase with just social order, and confers benefits to the socially disadvantaged sections like women, untouchables and tribal people. Culture is not stagnant state of affairs in a community. But its adaptability to desirable changes comes from a genuine concern for social justice. Movement of cultural communities towards perfection goes hand in hand with social justice. Refining of archaic personal laws for attaining gender justice,[41] bringing tribal development in order to protect the tribals from socio-economic exploitations[42] and rescuing the people from inhuman blind beliefs like *sati*[43] or *narbali*[44] are some of the measures that integrate well into the concept of constitutional multi-culturalism and make it a progressive instrument. Its potentiality of accommodating social justice norms has great social significance.

Fourthly, since its motto is unity in diversity it makes immense contribution to national integration. On the one hand the urge of cultural communities for retention of this distinct identities is sought to be satisfied,

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41. S. S. Nigam, *Uniform Civil Code and Secularism* in G.S. Sharma, ed., SECULARISM: ITS IMPLICATIONS FOR LAW AND LIFE IN INDIA (N.M. Tripathi: Bombay, 1966) at 153; D.K. Srivastava, *Personal Laws and Religious Freedom*, 18 JOURNAL OF INDIAN LAW INSTITUTE at 584; Duncan J. Derret, RELIGION, LAW AND THE STATE IN INDIA (1968) at 117; A.M. Bhattacharjee, HINDU LAW AND THE CONSTITUTION (Calcutta: Eastern Law House, 1994), at 2, 8-11; P. Ishwara Bhat, *Directive Principles of State Policy and Social Change with reference to Uniform Civil Code*, 25 BANARAS LAW JOURNAL, 1989, 75 at 78-79; Also see *Madhu Kishwar* v. *State of Bihar*, AIR 1996 SC 1864. Also see, *Mohammed Khan* v. *Shah Bano Begum*, AIR 1985 SC 10; *Sarla Mudgal* v. *Union of India*, AIR 1995 SC 948.
42. See *Samata* v. *State of A.P.* (1997) 2 SCJ.
43. COMMISSION OF SATI (PREVENTION) ACT, 1987.
44. *Paras Ram* v. *State of Punjab*, AIR 1980 SC 918-919.

and on the other a comprehensive scheme for national integration is constitutionally ordained. Territorial organisation of States on linguistic lines,[45] autonomy of minority educational institutions and religious denominations and Vth and VIth schedule schemes of self-government for tribal people emphasise the principle of institutional autonomy and self-determination within the framework of national unity. The potentiality of strong centre to neutralise and suppress fissiparous tendencies has come to limelight on several occasions.[46]

Fifthly, constitutional multiculturalism thrives upon balancing between group autonomy and individual right. Control over maladministration by religious denominations, minority educational institutions and tribal councils not only protects individual rights but also renders the communitarian right effective. However, since the special claim for institutional autonomy is based on the need for cultural survival, limiting its scope to factors of such need has been tried in countries like Canada and the US. Its similarity with affirmative action policy makes the factor of necessity a justifying parameter in encircling its scope. For example in Canada section 23 of the Canadian Charter Rights and Freedoms 1982 guarantees minority language educational rights only at primary and secondary levels of education. The post-*Xavier* development of allowing unlimited scope to establish and administer educational institutions at whatever levels[47] needs to be re-examined from this perspective.

Finally, the Indian concept of multiculturalism relies on individual and collective responsibility to promote harmony and the spirit of common brotherhood transcending religious, linguistic and regional or sectional diversities and to preserve rich heritage of composite culture. This requires cultivation of the spirit of responsible citizenship. According to Bhikhu Parekh, "If a plural society is to hold together, it clearly needs a shared self understanding, a conception of what it is and stands for, a national identity".[48] National identity implies supremacy of national goals as reflected in Constitution which provides community's minimum basis of

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45. Paul Brass, THE POLITICS OF INDIA SINCE INDEPENDENCE (London: Cambridge Univ. Press, 1995) at 169-175; also see Robert W. Stern, CHANGING INDIA, (London: Cambridge Univ. Press, 1993, 1998) at 104-108.
46. Instances of bringing normalcy in Punjab in late 1980s, in Jammu and Kashmir in early 1990s, in Uttar Pradesh and other places after demolition of disputed structure in Ayodhaya in 1992 (see *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1917) by exercise of power under Art. 356 can be cited to substantiate the above proposition.
47. *A.P. Christian Medical Education Association* v. *State of A.P.*, AIR 1986 SC 1490; *Nitte Education Trust* v. *State of Karnataka*, AIR 1993 Kant. 167; *TMA Pai Foundation* v. *State of Karnataka*, AIR 1994 SC 13.
48. Bhikhu Parekh, *Managing Multicultural Societies*, 35(3) UNIVERSITY NEWS, August 1997.

unity and thrives on popular awareness created by mass education. As viewed by Archibald Cox, "Tolerance and will to cooperate flow from a larger belief in the worthwhileness of the common enterprise—despite its faults, despite our selfishness, and despite our dim perception of the goal... Whether enough of us still have enough belief in the worthwhileness of our common fate for the spirit of tolerance and cooperation to prevail, and whether we share sufficient common ideals with sufficient confidence, along with the extent of belief in the rule of law, will determine the survival of constitutionalism".[49] Since multiculturalism is an approach, a state of mind and a societal discipline, to be positively nurtured by human beings and communities, meeting its demands through performance of social duties and building up of mutual confidence amidst diverse groups becomes essential. Instead of getting symmetry through the sum-total of the collective intolerances of the different communities, an union of their respective tolerances[50] becomes an appropriate policy of multiculturalism.

IV. Conclusion

Constitutional multiculturalism is a prominent constitutional value interconnected with basic values like democracy, human rights, social justice and national integration. It links the live veins of pluricultural society with state and its value system. By upholding equal opportunity of all cultural communities for their dignified existence, by promoting a balance between individual/group interest and social justice and by moulding a fair majority-minority relation, constitutional multiculturalism renders a great service to the cause of social and cultural harmony which is a prerequisite for national progress and happiness. Since its contributions are significant and its approach is progressive but not pedantic, promoting constitutional multiculturalism in practice by effective guarantee of human rights and by sincere performance of human responsibilities deserves utmost priority.

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49. Archibald Cox, The Court and the Constitution (New Delhi: Asian Books Pvt. Ltd., 1987) at 379.
50. Amartya Sen, *Secularism and its Discontents* in Kaushik Basu and Sanjay Subrahmanyam, ed., Unravelling the Nation (New Delhi: Penguin Books, 1996) 11 at 63.

SCOPE OF THE FREEDOM OF SPEECH AND THE PRESS: NEW TRENDS IN JUDICIAL INTERPRETATION

*M. Sridhar Acharyulu**

I. INTRODUCTION

The freedom of speech and expression of the individual and media does not confer an absolute right to speak and or disseminate without responsibility whatever one wishes. It is not an unrestricted or unbridled immunity for using any language. The importance and scope of a free press has been successively upheld by the Supreme Court. Recently, the Supreme Court widened the scope of this freedom, by firmly stating that there is no possibility of any prior restraint on the press freedom and included the commercial speech also within the ambit of the right to speech. At the same time the Courts restricted this right to free speech and expression saying that the press cannot refuse reply and should not publish unverified allegations recklessly against the judges. The Apex Court also restricted the freedom of expression with an emphatic no to forceful enforcement of *Bundhs* violating the fundamental rights of other citizens as a whole.

The right of freedom is restricted by the limitations imposed by a valid law. The restrictions shall be reasonable and for the purposes expressly mentioned in Article 19(2) of the Constitution of India. After three successive decisions of the Supreme Court, which liberally interpreted the freedom of the press, in *Cross Road Newspaper*[1], *Organiser Newspaper*[2] and *Bharati Press*,[3] the then Government amended the Constitution for the first time. The first amendment to the Constitution in 1951 is intended to nullify the wide implications of these judgments. The amendment added to Article 19(2) the word "reasonable" in respect of legislative restrictions on the freedom of speech, and added three grounds that permit the legislature to impose restrictions, namely (*i*) friendly relations with foreign States; (*ii*) public order; and (*iii*) incitement to an offence. By Constitution (Sixteenth Amendment) Act, 1963 another ground "the sovereignty and

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* Vice-Principal, Pendekanti Law College, Hyderabad.

1. *Romesh Thapper* v. *State of Madras*, AIR 1950 SC 124.
2. *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129.
3. *State of Bihar* v. *Shailabala Devi*, AIR 1950 SC 329.

integrity of India" was added for curbing the freedom of speech. Thus, the restrictive legislation will not be *ultra vires* if it satisfies the test of reasonableness within the ambit of Article 19(2) of the Constitution. Such a restriction may be held unreasonable either because it, (*i*) is too stringent and, (*ii*) does not fall within one of the interests mentioned in Article 19(2).[4]

The British India Government tried to curb the press for its active role in freedom movement, by passing the India Press (Emergency) Act, 1931. With this law, the British Executive started trials for press offences and the licensing system in India. Earlier, the British democracy fought against these offensive measures and got them repealed. This Act imposed an obligation on the press to furnish a security, which stood to be forfeited if it published any matter that might (*i*) promote hatred or contempt for the Government; (*ii*) incite disaffection with the Government; (*iii*) incite feelings of hatred or contempt between two different classes of subject; or (*iv*) encourage a public servant to resign or neglect his duty. After the independence, the Supreme Court declared this Act of 1931 to be *ultra vires* under Article 19(2) of the Constitution.[5]

The Press (Objectionable Matter) Act of 1951 was passed in place of the Act of 1931, for a temporary period. It provided for judicial scrutiny by the sessions judge before security could be demanded, or forfeited from a printing press, and it conferred a right of appeal to the High Court. This Act was repealed in 1957. Another enactment came in 1975 to impose curbs on free press, during emergency. The Prevention of Publication of Objectionable Matters Ordinance 1975 imposed pre-censorship and provided for stringent action against the hostile press. However, this oppressive legislation which suppressed the voice for about two years was repealed after the Indira Gandhi Government was defeated in 1977 general elections. The new Government restored the Parliamentary Proceedings (Protection of Publications) Act 1956, and revived the Press Council, which were removed by Indira Gandhi government. Another draconian law, which was in existence since the British regime was Official Secrets Act 1923, despite the opposition as being a serious limitation on the freedom of press, it remains an obstruction to the right to information even today.

II. No Prior Restraint on Freedom of Press : *Auto Shankar* Case

The Supreme Court delivered a historic judgment in *R. Rajagopal* v. *State of Tamil Nadu*,[6] stating that the Government has no authority to

4. N. Hunnings, Films Censors and the Law (1967) at 226 .
5. *Srinivas* v. *State of Madras*, AIR 1951 Mad.
6. (1994) 6 SCC 632.

impose a prior restraint on publishing an autobiography on the ground that it would be defamatory or would result in a violation of a right to privacy etc. It cannot be said before hand that a publication is going to be defamatory to some public officials. If it is alleged to be defamatory after its publication, the authorities have a remedy under the ordinary law. This is a case which emphatically opposed any imposition of a prior restraint on press freedom based on the apprehensions of possible victims. The Court also held that the press could not be prosecuted if publication was based on the "public records". When a Tamil sensational weekly "*Nakheeran*" proposed to publish the autobiography of a condemned prisoner by name Auto Shanker, with an advance announcement about sensational revelations of nexus between criminals and the public officials like police and jail authorities, the Editor of the newspaper requested the court to direct the Tamil Nadu Government not to interfere with the publication of the autobiography written by the prisoner who was convicted in six cases of murder and sentenced with death penalty. The autobiography was delivered to the news weekly, for publication as a serial, through the advocate of the prisoner, with the knowledge of the jail authorities. As the autobiography contained a narration about the nexus between criminals and authorities especially, between the prisoner and several IAS, IPS and other officers, the newspaper decided to commence publication and announced that in advance. The Inspector General of Prisons, in a letter to the editor, asked him to stop the publication as the prisoner denied that he had written any such autobiography. The IG termed it as a false autobiography. The Editor sought a direction from the Court to prevent the interference in the freedom of the Editor to choose the contents of his newspaper as per his discretion. The Division Bench consisting of Justice B.P. Jeevan Reddy and Justice Subhas C. Sen agreed with the petitioners and held that the newspaper had every right to publish the autobiography of Auto Shankar. The Supreme Court said that the newspaper could publish the life story so far as it appears from the public records even without the consent of authority. But if they go beyond the public record and publish, they may be invading the privacy and causing defamation of the officials named in the publication. However, the Supreme Court said that even if, the apprehensions of the officials were true about the defamatory contents, they could not impose any prior restraint on the publication though they have right to take legal proceedings for defamation, after publication. The Supreme Court held that the remedy of public officials and public figures, if any, would arise only after publication and would be governed by the principles indicated therein. But there was no law under which they could prevent the publication of a material which was likely to be defamatory of them. Several broad principles were

evolved in this case.

A. Freedom of Press and Right to Privacy

The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 of the Constitution. It is a right to be let alone. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

The rule aforesaid is subject to the exception, that any publication concerning the said aspects becomes unobjectionable if such publication is based upon the public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. However, decency requires that an exception must be carved out to this rule, viz, a female who is the victim of a sexual assault, kidnapping, abduction or a like offence should not further be subjected to the indignity of her name and the indecent being publicised in press/media.

B. No Privacy for Public Activity

In the case of public officials, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made with reckless disregard for truth. In such a case, it would be enough for the member of the press or media to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Where the publication is proved to be false and actuated by malice or personal animosity, it would have no defence and would be liable for damages. In matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen. However, judiciary which has power to punish for contempt of court and members of Parliament and state legislatures having privileges under Articles 105 and 194 are exceptions to this rule.

C. State cannot Sue for Damages for Defamation

So far as the Government, local authority, other organisations and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

It does not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

According to the Court, these issues were not exhaustively dealt with. The concept of impossibility of State being defamed by a media has been a well established principle of law enunciated in an English decision of 1993, *Derbyshire County Council* v. *Times Newspapers Ltd.*[7] In this case it was emphatically declared that an individual occupying a position in the State Government or local authority had only a private right to claim damages for defamation, if the publication involves adverse comments on his functioning with regard to discharge of public duties. But he cannot make the claim in the name of the office/authority and use the money of that authority for fighting the case.

The rule in *New York Times* v. *Sullivan*,[8] found acceptance by the Division Bench with reference to the Defamation as a restriction on press freedom. It was held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The Division Bench is this case opined that the Supreme Court had to wait for a proper case to make this a rule after studying its impact on Article 19(1)(a) read with clause (2) thereof, and sections 499 and 500 of Indian Penal Code. Thus in this significant decision, the Supreme Court has prepared a ground for making new legal principles on the above concepts, which may enhance the scope of press freedom in relation to commenting on the official conduct and limiting that freedom with regard to the right to privacy of a citizen.

The Supreme Court gave a note of caution, stating that the principles above mentioned were only the broad principles. They were neither

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7. (1993) 2 WLR 449; (1993) All ER 1011.
8. 376 US 254: 11 L Ed 686 (1964).

exhaustive nor all-comprehending; indeed no such enunciation was possible or advisable. The Supreme Court was of the opinion that such a law should evolve in a case-by-case development, as these concepts were still in the process of evolution.

III. Telephone Tapping : Right to Privacy

In yet another significant decision, the Supreme Court held that the telephone tapping was an invasion of right to privacy under Article 21 and freedom of speech and expression under Article 19(1)(a). *In Peoples Union for Civil Liberties* v. *Union of India*[9], the petitioner challenged the validity of telephone tapping under the guise of exercising the legal authority under section 5(2) of the Indian Telegraph Act, 1885. This section permits interception of messages on the reasons of "occurrence of public emergency" or "in the interest of public safety". The Court held that in the absence of just and fair procedure for regulating the exercise of power under section 5(2) of the Indian Telegraph Act, it was not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution. Under the guidelines laid down by the Supreme Court, an order for telephone tapping can only be issued by the Home Secretary of the Centre or State Governments. This order is subject to review by a high power review committee and the period for telephone tapping cannot exceed two months unless approved by the reviewing authority which can extend it up to six months. This power is given to the three member committee of Cabinet Secretary, Law Secretary and Secretary Communications at the central level and Chief Secretary, Law Secretary and another member other than Home Secretary at the State level. Telephone tapping also violates Article 19(1)(a) unless the restriction falls under the grounds listed in Article 19(2). When two persons are having conversation with each other, both are exercising the freedom of speech and expression and mutually communicating the ideas. Tapping is a violation of this freedom.

The right to freedom of speech and expression is considerably widened by the Supreme Court in a historic judgement in *Secretary, Ministry of I & B* v. *Cricket Association of Bengal.*[10] In this case the Supreme Court held that the Government had no monopoly on electronic media and a citizen had under Article 19(1)(a) a right to telecast and broadcast to the viewers/listeners through electronic media any important event. The Court directed the Union to establish an independent and autonomous body to supervise the electronic media, *Doordarshan* and All

9. AIR 1997 SC 568.
10. (1995) 2 SCC 161.

India Radio, so that this media would be free from the shackles of the Government control. The Supreme Court held that the fundamental right to freedom of speech and expression includes right to communicate effectively and to a large population not only in this country but also abroad. A citizen should have access to this electronic media for communication. It also warned that the airways must be used for the public good because they were the property of the members of general public. Justice B.P. Jeevan Reddy suggested relevant amendments to a century old Indian Telegraph Act as there was tremendous change due to scientific and technological advancement in the field of communication.

IV. Right to Reply: *LIC* Case

In *Life Insurance Corporation of India* v. *Manubhai D. Shah*,[11] it was held that Article 19(1)(a) includes the right to propagate one's view and to answer criticism levelled against his view through print media or electronic media. A study paper alleged that Life Insurance Corporation is charging unduly high premiums. The LIC published a counter to that allegation in its in-house journal *Yoga Kshema*. The trustee, who prepared the study paper wanted a rejoinder to be published in the in-house journal. But the LIC refused to do so. It was held that refusal to publish rejoinder to the counter in its magazine is both unfair and unreasonable and that it was an in-house journal was no excuse. The Supreme Court held that the print media had the duty to publish views and counter views. If the article written by a person was criticised in a Magazine, that writer had a right to get his counter to be published in that magazine. In this case, the Supreme Court took up the appeal from the respondent trustee on different facts on the same point of law, i.e., the scope of freedom of speech. The trustee challenged the order of *Doordarshan* refusing to telecast the documentary film "Beyond Genocide" produced by the trust based on the Bhopal Gas Tragedy. The documentary was adjudged as the best non-feature film and awarded the Golden Lotus. It was also declared that all award-winning films would be telecast over *Doordarshan*. It was held:

> A film maker has a fundamental right under Article 19(1)(a) to exhibit his film, and therefore onus lies on the party which claims that it was entitled to refuse enforcement of this right by virtue of law made under Article 19(2) to show that the film did not conform to the requirements of that law.

The Supreme Court said that it was not proper on the part of the Government to refuse to telecast on the ground that there was a criticism

11. (1992) 3 SCC 637.

against the Government and a comment that the litigation was pending in courts for a long time. The Apex Court said that these were not grounds at all. The Supreme Court rejected the appeals of LIC, and held:

> LIC is a state within the meaning of Article 12 and therefore it must function in the best interest of the community. The Community is entitled to know whether or not this requirement is complied with by the LIC in its functioning.... Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship.

V. Advertisement : A Part of Press Freedom

In *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd*,[12] the Supreme Court held that a commercial advertisement or commercial speech was also a part of the freedom of speech and expression, which could be restricted only within the limitations of Article 19(2). The Nigam permitted contractors to publish telephone directories in "yellow pages" and to raise their revenue from advertisements. These "yellow pages" used to be added to the directory published by the Nigam in white pages. The Bombay High Court allowed the appeal of the Nigam, which sought a declaration that it alone had exclusive right to publish the telephone directory and that the Tata press had no right to publish the list of the telephone subscribers without its permission as it would be violation of Indian Telegraph Act. The Tata press went in appeal to Supreme Court. Admitting the appeal, the court held:

> The advertisement as a "Commercial Speech" has two facts. Advertising which is no more than a commercial transaction, is nonetheless dissemination of information regarding the product-advertised. Public at large are benefited by the information made available through the advertisements. In a democratic economy, free flow of commercial information is indispensable. There can not be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "Commercial speech". The public at large has a right to receive the commercial speech. Article 19(1)(a) of the constitution not only guarantees freedom of speech and expression, it

12. (1995) 5 SCC 139.

also protects the rights of an individual to listen, read and receive the said speech.

Supreme Court emphatically held that the right under Article 19(1)(a) could not be denied by creating a monopoly in favour of the Government, it could only be restricted on grounds mentioned in Article 19(2) of the Constitution.

This is a welcome deviation from the judgment of the Apex Court in *Hamdard Dawakhana* v. *Union of India*,[13] wherein it was held that the commercial advertisement did not fall within the protection of freedom of speech and expression as such an advertisement had an element of trade and commerce. It was also held in that case that a law which put restrictions on the publication, through the press or other means, of advertisements to promote the sale of certain good did not violate the right to free speech or the press. But the later developments where the commercial information also became indispensable, it was rightly held in the Tata Press case that the people have right to listen and receive the commercial speech.

VI. Prior Restraint on Film Media

The Supreme Court justified the pre-censorship of film under Article 19(2) on the ground that films have to be treated separately from other forms of article and expression because a motion picture was able to stir up emotions more deeply than any other product or article. The classification of films between categories like "A" (for Adults only) and "U" (for all), was held to be valid in *K.A. Abbas*. v. *Union of India*.[14] This position remained unaltered.

In another case the petitioner filed a petition in the court to quash the certificate of exhibition given to the film "Bandit Queen" and to restrain its exhibition in India. The petitioner contended that the depiction of the life story of Phoolan Devi in this film was "abhorrent and unconscionable and a slur on the womanhood of India". He also questioned the way and manner in which the rape was brutally picturised suggesting the moral depravity of the *Gujjar* community. Delhi High Court held that the rape scene was obscene and quashed the order of Tribunal granting "A" certificate to the film. The Supreme Court allowed the appeal and held that issuance of "A" certificate by Tribunal was valid. The Supreme Court said that the film must be judged in its entirety from the point of overall impact. Where theme of the film is to condemn degradation, violence and rape on women, scenes of nudity and rape and use of expletives to advance the

13. AIR 1960 SC 554.
14. AIR 1971 SC 481; and *LIC* v. *Manubhai D Shah*, (1992) 3 SCC 637.

message intended by the film by arousing a sense of revulsion against the perpetrators and pity for the victim is permissible, held the Supreme Court in *Bobby Art International* v. *Om Pal Singh Hoon* case.[15]

VII. Bandh and Freedom of Expression

The Supreme Court gave another significant verdict[16] on the aspect of the freedom of expression. Upholding the historic judgment of the Kerala High Court[17], the Apex Court said that there was no right to call or enforce *Bandh* which interfere with exercise of fundamental freedoms of other citizens, in addition to causing national loss in many ways. The Supreme Court held:

> We are satisfied that the distinction drawn by the High Court between a *Bandh* and *Hartaal* is well made out with reference to the effect of a "Bandh" on the fundamental rights of other citizens. There cannot be any doubt that the fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of the people.

Though the *Bandh* is an expression of protest of a section of the people, a forced enforcement of that *Bandh* violates the fundamental right of carrying on business, of movement and other related fundamental rights, which cannot be valid. Thus the right to freedom of expression in the form of calling for and enforcing the *Bandh* is rightly restricted by the set of fundamental rights of other citizen or a group of people. The fundamental rights of society in general could be a valid restriction on the fundamental right to an individual or a section of the people.

VIII. Freedom of Press and Contempt of Court

Causing Contempt of Court is not part of the freedom of press. In fact, contempt of court is a ground on which the press freedom can be restricted under Article 19(2). A news item stating that two sons of senior judge of the Supreme Court and two sons of the Chief Justice of India were favoured with the allotments of petrol outlets from the discretionary quota by the Petroleum Minister was published in some newspapers. The concerned editors, printers and publishers admitted that the news item was false and was published inadvertently and without any malice to the judiciary. "The Sunday Tribune" in its issue dated March 10, 1996 published an item with

15. (1996) 4 SCC 1.
16. AIR 1998 SC 184.
17. AIR 1997 Ker 291.

a caption "Pumps for All". A similar item also was published in "Punjab Kesari". Contempt proceedings were taken up on the petition of K.T.S. Tulsi, Additional Solicitor General and other senior advocates. Supreme Court held that the newspaper did not take even ordinary care to verify the truth of the allegations and did disservice to the society by disseminating false information affecting the credibility of newspaper and causing embarrassment to the Supreme Court. The Court said that obviously this could not be regarded as something done in good faith. However, the Supreme Court accepted the apology tendered by the journalists. The Court held :

> He (senior journalist) has no doubt, committed serious mistake but he has realised his mistake and expressed sincere repentance and has tendered unconditional apology for the same. He was present in the Court and virtually looked to be gloomy and felt repentant of what he had done. This sufferance in itself is sufficient punishment for him. He being a senior journalist and an aged person and, therefore, taking lenient view of the matter his apology was accepted.

The Court directed the contemners to publish in front page of their respective newspapers within a box their respective apologies specifically mentioning that the said news items were absolutely incorrect and false.[18] However, the Supreme Court in this judgment, reiterated the importance of a vibrant free press in a democracy in the following words:

> Freedom of Press has always been regarded as an essential prerequisite of a democratic form of Government. It has been regarded as a necessity for the mental health and the well being of a society. It is also considered necessary for the full development of the personality of the individual. It is said that without the freedom of press truth cannot be attained. The freedom of the press is regarded as "the mother of all other liberties" in a democratic society. A free and healthy Press is indispensable to the functioning of a true democracy. In a democratic set-up there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way

18. *In Ire Harijai Singh and another; In re Vijay Kumar*, AIR 1997 SC 73.

in which they are being managed, tackled and administered by the Government and its functionaries.

IX. Conclusion

The Supreme Court has set an agenda for development of law on the press freedom in *Auto Shankar*[19] case. It laid down certain foundations for making new principles of law on this subject at an appropriate time in future. It was in fact waiting for a right case to arrive to study the impact of Article 19(1)(a) on the provisions of criminal defamation in Indian Penal Code, i.e., section 499 and 500. In principle the Supreme Court welcomed the wider interpretation of press freedom in *New York Times rule*[20] of US Supreme Court and *Derbyshire*[21] case in England. These judgments enhanced the scope of commenting on the public conduct of the public officials and reduced the scope of individuals occupying the public positions using the public office and public money for pursuing the actions for damages in defamation. While effectively providing for an individual civil remedy for defamation in favour of individuals there is need to review the continuance of the criminal defamation in present form.

Another gray area of development for law is the broadcast media. After holding that the state had no monopoly over the air waves[22], the necessity to make statutes to regulate the electronic media by relieving it from the shackles of government control. Exercise of press freedom in a vibrant democracy and its interpretation by active judiciary is a continuous process.

19. *Supra* n. 6.
20. *Supra* n. 8.
21. *Supra* n. 7.
22. *Supra* n. 10.

AMBEDKAR ON INDIAN FEDERALISM: AN APPRAISAL OF WATER LAW AND POLICY IN CONTEMPORARY PERSPECTIVE†

*Md. Zafar Mahfooz Nomani**

I. Ambedkar and His Ecological Vision

Among the few legendries of modern India, who have made profound contribution towards pluralistic society, democratic republicanism, constitutional culture and just and equitable social order, B.R. Ambedkar commands utmost veneration and adoration in intellectual assemblage and public alike. Experiencing tormented assault of castiest atrocities and ethnic bigotry in the hand of highest echelon of Hindu social order, Ambedkar was grossly traumatised and bewildered. Though born in *mahar* family, he demolished the much publicised notion of genetic disability and finally came of age. He went far and across the globe and graduated in intellect and justice and penultimately attained constitutional *nirvana*. The profoundity and prolixity of his scholarship handed down a novel paradigm to refurbish Indian socio-legal order *de novo*. Transcending all mundarian barriers of elitist discourses, Ambedkarism has magnated scholars of all faith and association.

Though literature abounds on his constitutional stewardship, no serious effort is being directed to focus the broad rubrics of Ambedkarite vision of ecology and hydrology.[1] The genesis of his ecological discontentment dates back to as early as 1927 when the basic human right to access to drinking water was denied to lower caste. A revolutionary in him suddenly sprang up and he declared first war of independence of downtrodden with a view to getting for them the right to drinking water from chowdar tank.[2] Launched

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* Lecturer, Faculty of Law, Aligarh Muslim University, Aligarh.

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1. Bhagwan Das, *Introductory Note on the River Valley Project* in Bhagwan Das, ed., Thus Spoke Ambedkar, Vol. 3, 1979.
2. By launching a newspaper named *Bahishkrit Bharat*, he wanted to champion the cause of the depressed classes by providing adequate representation, opening of temples and water courses for the untouchables. See generally B.R. Ambedkar, Caste in India: Their Genesis, Mechanism and Development (1917) & Annihilation of Castes (1935). See also, W.N. Kuber, Ambedkar: A Critical Study (1991) at 12-23.

at Mahad, his enviro-legal battle was being heavily resisted by upper caste people under the garb of notorious institution of untouchability. Baffled with the social order cruelly denying access to natural resources and water, Ambedkar's ecological visions started radiating. The culmination of the process concretised when he was appointed member of Viceroy's executive council incharge of labour, irrigation and power portfolio.[3] Taking little time in articulating ecological and hydrological policy specification, he tuned nascent *corpus juris* to greater sophistication in the conspectus of pan Indian federalism. However a review of existing literature reveals that little attempt has been made to collate material and carry out comparative and comprehensive assessment to highlight the potential and portent of Ambedkarite version of federalism, water law and policy. Based on classical development discourse and reductionist perspective Ambedkarite vision of hydrological fashioning of legal order discern the desideratum of adequate recognition of competing interest groups and stakeholders, operational strategies and ground realities. The present paper, therefore, examines this dimension in contemporary and beyond millennium perspective.

II. Indian Federalism: Ambedkarite Version

Ambedkar's constitutional stewardship is an impressive display of comparative constitutionalism and third world juridical perspective which he baptised by the comparative scrutiny of societies of east and west. While locating the constitutional and juridical ideology in the India's unique historical, political and cultural context he painstakingly tailored the comparative federalism to suit the needs of the country.[4] Though in principle he subscribed to federal character of constitution but in reality favoured a strong centre. A dual polity *viz.*, Union and State apparently deriving authority from constitution but being heavily guided by central legislative supremacy. Advancing the argument of pan-Indian federalism he stated the centre-state relation as coordinating not subordinating and federation not confederation. The distribution of legislative, administrative and financial authority between the centre and state, being hallmark of federalism are neither a league of States nor are the state administrative units of central government.[5] Briefly stated Ambedkarite version of federalism implies that the state is a federation in normalcy but unitary in emergency.[6] Since Indian federalism is not an outcome of mutual agree-

3. National Archives of India, International Council on Archives- Guide to Sources of Asian History: India 3.1 (1987) at 105-112.
4. Constituent Assembly Debates, Vol. VII at 38.
5. *Id.* at 33.
6. *Id.* at 35.

ment and contractual amalgam, the States and centre are wedded on emotional integration. The unique delineation of Ambedkarite federalism stands juxtaposed to Ivor Jenning, K.C. Wheare, A.V. Dicey, Patrick Bausome and W. H. Moore's line of thinking. Having a comparative analysis of working of federation over the world he was fully aware of weaknesses of rigidity and legalism. He stemmed out the pitfalls by incorporation and adoption of Article 256, 257 and 368.[7]

Indian federalism, by and large in terms of its political thrust, favours a pan-Indian central government capable of reconciling regional pulls and pressures with an inbuilt central bias.[8] Jurists have opined in more or less similar tones but variously described India as 'quasi-federal', 'a unitary state with subsidiary federal features rather than federal state with subsidiary unitary features',[9] 'as a federation with a strong centralising tendency',[10] as 'neither unitary nor federal in the strict sense of the term.' Part XI of the Constitution is a legislative grundnorm whereas Seventh Schedule of the Constitution serves as a catalogue and ready reckoner of subject matter within the legislative competency of the State and Centre which enumerates 97 items under Union List, 66 items under State List and 47 items under Concurrent List. Article 246[11] balances the power of States and the Centre whereas other Articles invariably favour the Centre in most of the legislative ventures. It is the Centre which has the authority to initiate legislation on matters included in the concurrent list when objective is to secure all India uniformity. Further the residuary powers are also vested in

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7. *Id.* at 36-37.
8. Rasheeduddin Khan, FEDERAL INDIA: A DESIGN FOR CHANGE (1992). See also Ashok Chandra, FEDERALISM IN INDIA: A STUDY OF UNION-STATE RELATIONS (1965); V.R. Krishna Iyer, A CONSTITUTIONAL MISCELLANNY (1986) at 42-64; Chandra Pal, *Indian Federalism*, JOURNAL OF CONSTITUTIONAL & PARLIAMENTARY STUDIES, 1995 at 159-91; H. Suresh, *The Need to Redefine Federal Principle* and Abdulrahim P. Vijapur, *Toward Creating A Federal Policy and Civil Society in India* 60(7) THE RADICAL HUMANIST, 1996 at 53-63.
9. K.C. Wheare, FEDERAL GOVERNMENT (1956) at 30, 47-48.
10. Ivor Jenning, CONSTITUTIONAL LAWS OF THE COMMONWEALTH (1952) at 357-8.
11. Article 246 reads:
    (1) Notwithstanding anything in clause (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in list I in the Seventh Schedule.
    (2) Notwithstanding anything in clause (3) Parliament, and subject to clause (1), the Legislaure of any State also have power to make laws with respect to any of the matters enumerated in list III in the Seventh Schedule.
    (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part there of with respect to any of the matters enumerated in list II in the Seventh Schedule.
    (4) Parliament has power to make laws with respect included in a State notwithstanding that such matter is a matter enumerated in the State list.

the Union Parliament.[12] Next to it are the enactments on State subjects passed by Parliament under Article 252 of the Indian Constitution with the consent of the respective States.[13] The entries relating to environment under concurrent list more often than not are resorted by the Centre for enacting laws on the subject. It has also power to make laws even on certain items included in the State list if it is declared by the Rajya Sabha as necessary in national interest by resolution supported by not less than two-thirds of the members present and voting.[14] Lastly, Parliament can also make law for the whole of the country for implementation of any international agreement or convention.[15] Most or the environmental statues in India have been passed to honour conventions.[16]

III. Ambedkar and Water Resource Policy

As a member of Viceroy's executive council in charge of Labour, lrrigation and Power portfolio during 1942-46 and as Law Minister in

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12. Article 248 reads:
    (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent list or State list.
    (2) Such power shall include power of making any law imposing a tax not mentioned in either of those lists.
13. Article 252 is as under :
    (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Article 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the Houses, or where there are two Houses, by each of the Houses of the Legislature of that State.
14. Article 249 runs as:
    (1) Notwithstanding anything in the foregoing provisions of this chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.
    The Water (Prevention and Control of Pollution) Act, 1974 passed under this article.
15. Article 253 reads:
    Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference association or other body.
16. See for detail, Md. Zafar Mahfooz Nomani, *Federalism Under Indian Constitution: A Study of Environmental Law*, XXIV Indian Bar Review, 1997 at 204-10.

central cabinet of independent India during 1947-51, Ambedkar initiated sweeping Changes in the existing water legislation to accord major role play to the centre under the exuberance of pan-Indian federalism, national reconstruction and development. Realising water as a symbol of 'power' he wanted empowerment of underprivileged people through a whole set of new policy prescriptions and regulatory thicket who were earlier denied free access to drinking water under hierarchically casteiest order. The Centre began prioritising the need for national water, power, irrigation, navigation and mineral resource policies for the development of agriculture and industrial sector.[17] As president of Irrigation and Electric Power Committee, Ambedkar realised that the existing regulatory framework is not conducive for radical reforms. Since Government of India Act, 1935 (GOI Act) placed development of water under the jurisdiction of provinces, the proposed changes necessitated inculcation of shared rule and co-operative federalism among States, provinces and central government. Therefore, Ambedkar had come out with rational explanation for switching over to new centrally sponsored water regime. The justification of an all India policy for irrigation and electric power development, indentification of priorities, areas of participation and nature of central intervention and creation of instrumentality of executive authority are some of tangentially pertient issues which Ministry of Labour had to address while blue printing the appropriate water resource development policy.[18] Under this backdrop a comprehensive policy statement and two high powered authorities viz., Central Technical Power Board (CTPB) in 1945 and Central Water Ways, Irrigation and Navigation Commission (CWINC) in 1945[19] came into existence to collate data, conduct survey and prepare schemes in consultation with provincial Governments and States. The smooth functioning of these bodies demanded greater participation of labour department, central government and co-operative attitude of provinces.[20] Since GOI Act, 1935 came often heavily against the safe passage to these new initiatives, Ambedkar conceived new instruments of executive authority namely *River Valley Authority*. In pursuance of this objective in 1948

17. Government of India, RECOMMENDATION COMMITTEE OF COUNCIL (1994); *Record of the First Meeting of the Policy Committee No. 3C (Public Work and Electric Power)*, Delhi, INDIA MAGAZINE, Sept 23, 1943.
18. B.R. Ambedkar, *Multipurpose Development of the Damodar Valley*, INDIAN INFORMATION, Aug 23, 1945.
19. Labour Department, *Setting up of the Central Waterways Irrigation and Navigation Commission on Personnel Basis*, File No. DWI-1 (25) CWIWC 147.
20. A letter to all provincial Government putting to them the proposal to create a Central Waterways and Irrigation Commission and asking whether provincial Government welcome this proposal. Letter by Secretary, Labour Department, Dec. 1944 File No.6 (1) P.S. Finance, Department, Planning Division.

Damodar Valley Corporation Act and Electric Supply Act were enacted by the Constituent Assembly of India.[21] For the first time we notice that essential linkages among economic planning, ecological and water resource development and socio-economic upliftment were established. Thoroughly mindful about development with human face, Ambedkar under the new regime of water law struck a balance between prosperity and poverty by ensuring the benefits of irrigation project to grass roots. Before he laid office as Cabinet minister in June, 1946 he has given concrete shape to much intriguing but crucial aspect of resettlement, rehabilitation and compensation for displaced cultivators and non-cultivators household. Framed on April 22, 1946, the 'resettlement policy' got approved by labour department in the third inter-provincial conference.[22] The policy subsequently formed the basis for other provincial government in developing inter-state multipurpose river valley project.

IV. Ambedkar's Stewardship to Development of Water Resource Law

Though the Government of India and Secretary of State exercised powers of super-intendence and direction nevertheless the provinces enjoyed greater autonomy in water resources development. The Montague Chelmlford Act, 1919 for the first time brought irrigation, canal, drainage, embankment, water storage, famine relief, agriculture and forest' under state subjects.[23] The intervention of Secretary of state in London and Government of India were almost nominal in matters of withdrawls from rivers within princely territorial limits unless these withdrawls affected the uses being made or proposed to be made by the provinces.[24] An examination of legal regime documents that inter-state or provincial disputes are generally being settled by principle and broad guidelines of customary law, common law, public interest, mutual agreements and negotiated settlement.[25]

The Government of India Act, 1935 further strengthened federal oriented water resource development by conferring exclusive powers to provinces over 'water supplies, irrigation canals, drainage, embankments, water storage and water works.'[26] The only item reserved for Central list was 'shipping and navigation on tidal waters',[27] and for Concurrent list

21. N.D. Gulati, Development of Inter-State Rivers: Law and Practice in India (1972) at 32.
22. Central Water Commission, Ambedkar's Contribution to Water Resources Development (1993) at 102-103.
23. *Supra* n. 21 at 24.
24. *Id.* at 25.
25. *Id.* at 26.
26. Entry 19 List II, The Government of India Act, 1935.
27. *Id.*, Entry 21 List I.

'shipping and navigation on inland waterways as regards mechanically propelled vessels and goods on inland water ways'.[28] The policy of non-intervention continued except when a province or princely state would take objection to some development in the adjoining province and dispute cannot be resolved by mutual agreement. In such cases the disputes were referred to Governor General who was empowered to give a decision in matters of dispute in his discretion after investigation by Commission specially appointed for the purpose,[29] he could alternatively refer the matter to His Majesty in Council. But the effect to such order shall be given to the extent provincial legislature found to be repugnant shall be repugnant. His Majesty in Council can alter the decision in the light of own or Commission so appointed and representation made by the provincial legislature.[30]

To put the record straight, it is profitable to refer the findings of Indus Commission, 1942 regarding the working of regulatory mechanism. Disputes between individual riparian owners and provinces were generally settled by common law principles, statutory law and customary law. Thus it appears that the provinces were entitled to do what it liked with all water supplies within its own boundaries unless water from any natural source of supply in federated state have been or likely to be affected prejudicially by executive action or legislation.[31]

This was the state of affair when Ambedkar took charge of member to the Viceroy's executive council. The water policy devised by him during post second world war period visualised much greater role and participation of central Government than was permitted under GOI Act. Addressing Damodar Valley conference at Calcutta, he justified the central intervention on the following ground:

> We have not taken sufficient account of the fact that there is no difference between railways and waterways at any rate those that flow from province to province. On the contrary, we have allowed our Constitution to make a distinction between railways and waterways. With the result that railways are treated as central but waterways are treated provincial.[32]

Ambedkar in his relentless pursuit of national reconstruction failed to appreciate the basic distinction of railway being a material entity and water

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28. *Id.*, Entry 32 List III.
29. *Id.*, section 130.
30. *Id.*, section 131.
31. *Supra* n. 21 at 30-31.
32. B.R. Ambdkar, *Damodar Valley Scheme: Calcutta Conference*, INDIAN INFORMATION, 1945 at 97-8.

as natural entity. This commodification and statisation of water in later times proved quite deterimental to the interest of common people in their realisation of right to natural or water resources. However, according to Ambedkar, this double morality of legal ordering was not fruitous to national development. To quote him further:

> A province needs electricity and wishes to utilise its water resource for the purpose but it cannot do so because the point at which water can be dammed lies in another province with no interest in it (for various reasons) or money to finance the project and would not allow the needs to use the site. *Complain as much as we like, a province can take such an unfriendly attitude and justify it in the name of provincial autonomy.*[33]

Anathematised to the provincial autonomy and in order to come out of the impasse, he charted two alternative strategies by creating 'inter-state river authority and' 'central electric authority', respectively. In the second meeting to Policy Committee on Electric Power Policy in 1945 Ambedker enjoined upon the provinces to come to co-operative federalistic terms.

> Little or no objection should be raised to central control where a province does not desire to take on such control or wherein the interests of regional development extending beyond the boundaries of a province the central intervention might be considered necessary.[34]

It is discernable that in the name of provincial autonomy and state's escapism the task of national reconstruction and water resource development can not be postponed further any more. Our tryst with destiny by virtue of Indian Independence Act, 1947, the GOI Act, 1935 was adopted by India (Provisional Constitution) Order, 1947 for the purpose of dominion of India with little changes in the Seventh Schedule. Initially the GOI Act was found to be myopic to the river valley development. Section 130 of the Act heavily guarded the doctrinaire legacy of Northern India Canal and Drainage Act, 1837 wherein the phrase 'water from any natural source of supply' and 'water of all river and streams flowing in natural channels and lakes' were used. In 1948, Draft Constitution of India reflected Ambedkar's vision of water policy and law. Articles 239-242 corresponding to sections 130-134 of GOI Act made significant departure from 'water from any natural source of supply' to 'inter-state water ways' and 'river valley'. Entry 74 of Union List and Entry 20 of State list are

33. *Id.* at 98-9.
34. B.R. Ambedkar, *Post-War Electric Power Development*. INDIAN INFORMATION, Feb. 15, 1945.

testimony to this effect:

Entry 74 : 'The Development of inter-state water-ways for purposes of flood control, irrigation, navigation, and hydro-electric power'.

Entry 20 : 'Water, that is to say, water supplies, irrigation and canal, drainage and embankment, water storage and water power subject to the provisions of entry 74 List I.

Both the entries were heavily premised on common jurisdiction with an edge to central legislature. In such a situation the chances of conflict and choas cannot be ruled out.[35] Therefore, on 1st September, 1949 Ambedkar moved two amendments in Constituent Assembly for the substitution of Entry 74 and new article for amicable adjudication of disputes:

Entry 74 : The *regulation* and development of inter-state *rivers* and *rivers valleys* to the extent to which such regulation or development under the control of the Union is declared by law to be *expedient in public interest*; and

Article 242: Parliament may by law provide for adjudication of any dispute or complaint in respect to the use, distribution or control of the water of, or in, any inter-state river or river valley.

To augar the 'river valley development' phrased under the Entry 74 of union list, the Constituent Assembly of India in 1948 enacted Damodar Valley Corporation Act and Electric Supply Act. Commenting on the original draft Constitution Ambedkar remarked that 'it was too hide-bound or too stereotyped to allow any elastic action that may be necessary'. These amendments were finally adopted as Entry 56 of Union list, Entry 17 of State list and Article 262 under the Constitution of India, 1950.

As a natural sequal, Inter-State River Dispute Act (ISRD Act) and River Board Act were passed to honour the mandate of Entry 56 and Article 262 of the Constitution. The objective of ISRD Act is to provide a machinery for settlement of disputes whereas the purpose of R.B. Act is to establish boards for regulation and development of inter-state river basin which would minimise friction among states.[37] Empirically established are now

35. CONSTITUENT ASSEMBLY DEBATES, Vol. IX at 830.
36. *Id.* at 1187.
37. S.N. Jain et. al., ed., INTER-STATE WATER DISPUTE IN INDIA: SUGGESTION FOR REFORM IN LAW. See also, L.N. Mathur, *A Federal Legislative History or Control of Water Pollution in India* in S.L. Agarwala, ed., LEGAL CONTROL OF ENVIRONMENTAL POLLUTION (1980) at 86-94.

the facts that these enactment met with partial success in securing inter-state agreement of water resources development. Inspite of categoric mandate of Constitution to the states in planning and development of river scheme, no important water resource scheme can be included in the Plan by a state without the clearance of Planning Commission - an extra-constitutional authority. The omnibus role of Centre has created an atmosphere of mutual distrust among the States, and the rumbling of discontentment has put a question mark on the efficacy of centrally sponsored institutional mechanism.[38]

V. Beyond Ambedkarite Vision: A Contemporary Restatement

The community of concerns reflected in Ambedkar's declaration of first war of independence against Hindu social order for the realisation of basic human right of access to water is indeed a milestone in the evolutionary transition of water law and policy in India. Water being metaphor of 'power', Ambedkar wanted to counterveil the feudal and castiest forces through the instrumentality of water law and policy. Constitutionalism, federalism and environmentalism inter-wedded, priorities and stategies were directed towards creation of equitable natural and water resources regime. But by making the same to rotate around pan Indian federalism, he by default arrested the organic growth of law. Under the centripetal legal fashioning Ambedkar has not visualised the complex web of interest groups, stakeholders apart from the state.[39] State monopolisation of water resources from hierarchically based feudal order appears to be a transfer of power and short lived transition. This not only eclipsed the democratisation, empowerment and equitable development of water resources but also revertebrated into the denial of access to water to a common man. Pan-Indian federalism no doubt led to the massive damming of river but one should not forget that it dammed the society specially the people at the lowest rung of social order. According to an estimate 226 million people in India are living without safe drinking water.[40] This alarming situation can be brought home if we take into account massive flood, severe drought, menacing water pollution, insufficient drinking water, dryed canals and tanks and perpetual downsizing of water table. The recent cognizance of complaints by National Human Rights Commission regarding poisoning of vast stretches of drinking

38. See, Md. Zafar Mahfooz Nomani, *Environment Protection under Indian Federalism: A Review of Legal and Institutional Mechanism*, XXI Academy Law Review, 1997 at 155-56; 164-65.
39. *Id.* at 145-150.
40. National Human Right Commission: Annual Report, 1996-97 at 6.
41. *Id.* at 7.

water supplies in Andhra Pradesh and West Bengal due to arsenic, well serves the logic to bring home the conclusion.[41] Under the legitimate assumption that statisation of water resources will result in equitable allocation and distribution proved an euphoria or enigma of sorts. Now it is well documented that in fact state itself is instrumental in bringing massive depletion through inappropriate and incongruent irrigation, forest, soil, agricultural and industrial polices.[42]

Ambedkar inspite of being charged with the idea of enviro-social justice, did not envision that statisation and centralisation is fraught with danger an ultimately lead to social inequity an ecological disparity.

The study of water law as study of vital life sustaining regulation, development alternatives, role of society and state in providing the very first vital need for life, necessarily involve not only the issue of management, productivity and efficiency but also for justice, equity and fairness.[43] The paradigmatic strategy for water resources conservation law *vis-a-vis* water right would enable the common man to move from the disabling doctrinaire limits and confines of 'appropriation', 'riparianism', 'discovery' and dominium' to enabling potential remedies of 'public trust', natural or fundamental right to clean drinking water.[44] The basic concepts bordering the classical water laws have their genesis more in historical and political contexts than the legal context. With the radical shift in property relationship these notions fail to adequately guide the modern prescription of justice and equity. Natural resource law be it water, forest, or environment, should be tested on the bedrock of egalitarianism, equity from the side of people and trusteeship from the side of the state.[45] The public trust doctrine under which state holds natural resources in trust for the people has yet not been translated into natural and fundamental right of the people in matters of access and use of water inspite of repeated judicial interventions to treat it as a part of right to life under Article 21 of the Constitution. From the side of the state, the traditional notions of 'sovereignity', and 'domain' are just inadequate as 'appropriation' and 'riparianism' from the side of people.[46] Based on traditional principle of sovereignty and distributive justice, Ambedkarite version of hydrological law and policy needs to be explicated in contemporary perspective.

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42. Chhatrapati Singh ed., *Water Law in India: Water Project Series* (1992) at 2-3.
43. *Id.* at 12-13.
44. *Attakoya Thangal* v. *Union of India*, 1990(1) KERALA LAW TIMES 580.
45. Chhatrapati Singh, WATER RIGHTS AND PRINCIPLES OF WATER RESOURCE MANAGEMENT (1991) at 42.
46. See, Md. Zafar Mahfooz Nomani, *Water Pollution and Conservation Law: Existing Legal Framework and Strategy for Reform* in A. Farooq Khan, ed., WATER RESOURCE MANAGEMENT: THRUST AND CHALLENGES (1998).

UNIONISATION, COLLECTIVE BARGAINING AND WORKING WOMEN IN INDIA†

*Harish Chander**

I. INTRODUCTION

Trade unionism is essentially a product of factory system and is a counteraction to the capitalistic order of society. In the year 1800 trade unions were utterly illegal.[1] Any act of combining and organising themselves for trade union activities on the part of the workers was considered to be a criminal conspiracy punishable under the combination Acts of 1799 and 1800 in Great Britain. Apart from criminal liability, the workers or union officials were also liable for damages in tort. However the socialist thinkers and particularly the Marxist ideology in the nineteenth century influenced the industrial society to realise that the workers should be given the right to organise themselves into trade unions. And for the first time in history the Trade Unions Act, 1871 recognised that the trade unions are legal bodies and enjoy immunities from criminal conspiracy and tortious liability under the law for resorting to industrial actions in furtherance of trade disputes. The British workers had to fight a long drawn out battle in the last quarter of the eighteenth and the nineteenth centuries. On the other hand Indian workers had not fought for trade union rights but struggled along with the national movement for independence.

The basic object of unionisation on the part of the workers is to secure better wages, conditions of work and terms of employment in every respect with the help of collective bargaining with the employers. Collective bargaining is crucial for the workers because individually the workers have no strength to bargain with the mighty employer. And in the process of collective bargaining, if need be, it is necessary to provide for the legality of strike and other industrial actions as weapons in the armoury of workers to put pressure on the employers to yield to accept their demands. It is for this purpose that the immunities from criminal conspiracy and from tortious liability are needed while workers resort to industrial actions in

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* Professor, Law Center II, Faculty of Law, University of Delhi, Delhi.

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1. K.W. Wedderburn, THE WORKER AND THE LAW (Penguin Books, 1968) at 214.

furtherance of industrial disputes. In India the trade union officials and members are immune from criminal conspiracy under section 17 and trade unions, their officials and members are immune from tortious or civil liability for industrial actions in furtherance of industrial disputes under section 18 of the Trade Union Act, 1926. The object of this paper is to focus the concern on whether the law of trade unions and collective bargaining has been effective means of ameliorating the conditions of working women in organised and unorganised sectors in India.

II. The Concept of Collective Bargaining

The origin of the term "collective bargaining" was for the first time used effectively by Sydney and Seatrice Webs in their famous book on the History of Trade Union Movement in Britain. The utility of the process of collective bargaining was emphasised by them as opposed to individual bargaining so that effective amelioration of the wages and conditions of the workers can be achieved.

The Geneva Convention of 1949 of the I.L.O. defined the process of collective bargaining as follows:

> Negotiations between an employer, a group of employers or one or more of organizations of employers on the one hand, one or more representatives, organizations of workers on the other, with a view to reaching an agreement over working conditions and terms of employment.

Similarly H.D. and N.J. Marshalls define collective bargaining as "a method of making decision" or "method of resolving disputes by compromise" or a "method of adjusting to change" or a "struggle between parties with the outcome dependent on the relative strength to withstand a strike".

Thus, we find that in the process of collective bargaining between the employers and the unions for the resolution of industrial disputes strike and other industrial actions short of strike are the weapons essential for putting pressure on the employers so that there is a quick compromise between the unions and the employers. These industrial actions have the sanction of the law in the form of immunities from criminal conspiracy and tortious or civil liability of the unions, officials, and members under sections 17 and 18 of the Trade Unions Act, 1926. Thus, without proper unionisation and the process of collective bargaining it is very difficult to improve the conditions and wages and terms of employment of workers. So far in India in the organised sector there is sufficient unionisation however collective bargaining as a method for the resolution of industrial disputes is not extensively used. This is primarily because our system of

resolution of industrial disputes has become accustomed to the compulsory adjudication method provided under the Industrial Disputes Act, 1947. It would certainly be better if the employers and the unions do realise the importance of "collective bargaining" as a method for resolving disputes by negotiations or by voluntary arbitration in most of the cases.

III. Working Women in Organised and Unorganised Sectors

According to rough estimates, about 20% of the total working force in the organised sector are women workers. About 40 to 45 % are the women workers of the total work force in the unorganised sector like construction workers and agriculture workers etc. In private sector even though there are unions but in many establishments and organizations women are paid less wages than the men workers. Equal pay for equal work is not strictly followed in the private sector. Moreover, it is observed that in many cases women workers are also sexually harassed by their colleagues, superiors or the employers inspite of the fact that the Supreme Court has laid down the guidelines for prevention of harassment to the women workers and the guidelines are mandatory to be followed by the organizations and establishments. It is submitted that in the organised sector because the union leadership is primarily in the hands of male union leaders who are not much bothered to improve the wages of women workers particularly in the private sector. It is therefore imperative that women workers, both in the public sector and private sector should have an important role to play in the union activities so that they could have effective and decisive say at least in the matters concerning women workers. If women workers would have effective say in the unions then in private sector women would be able to get equal pay for equal work. Moreover, once it is realised in organised sector that women are in fact united and have their say in union activities then there would be less harassment of women workers by their colleagues, superiors and the employers also.

As we know that without unionisation it is not possible to secure better wages, conditions of work and terms of employment. This is much more so in the case of women workers in the unorganised sector in a male dominated society in India. Precisely for this reason, the women workers in unorganised sector are paid less wages for manual work in the construction industry than men. It is observed that a male *baledar* gets more daily wage as compared to a woman coolie in construction industry. It has also been observed that because of no unionisation in unorganised sectors in construction industry women workers are commonly harrased sexually by the contractor, or his agent before actually the payment is made to them for the work they have already performed. Therefore, it is imperative that there should be union of women workers in unorganised

sectors where it is the women leaders who should have decisive say in improving the wages, conditions of work and prevent their harassment by the contractors, their agents and superiors at work.

IV. Conclusion and Suggestions

From the above discussion, it is amply clear that the condition of a lot of workers in general and women in particular cannot be improved without the women workers active union participation in organised industries. It is basically the collective strength of the women workers in the organised sectors that can secure them better wages, conditions of labour and terms of employment with collective bargaining with the employers. If the women workers are united then they are less likely to be harassed by the colleagues, superiors and their employers.

In unorganised sector atleast now the time has come that there should be unions of workers more particularly of the women workers. The task to organise unions of women workers is not an easy one because most of the women workers in unorganised sector are illiterate. The women in this sector are not conscious of their rights and their sad plight. For this it is suggested that some NGO's of women may provide for the leadership needed for the union activities. Even the Central Government and State Governments have to become alive to the problems of women workers in the unorganised sector.

It is submitted that in this respect the National Commission of Women and State Women's Commissions have to play a spearhead role along with the NGO's in organising unions and provide them with leadership for the union activities in the unorganised sectors. It this regard, it is also suggested that agriculture should be regarded as an industry and trade union of agriculture women workers should be permitted under the Trade Unions Act, 1926, to be registered under the said Act. Even in the organised sector there is a need for effective participation of women workers in the union activities. It is further suggested that the Trade Unions Act, 1926 should be suitably amended whereby 30% of the women workers and women outsiders should atleast be the Office bearers of Unions right up to the All India Federation of Unions.

LEGAL CONSTRAINTS ON THE PERVERSE USE OF TECHNOLOGY: THE CASE OF ANTI-PERSONNEL LAND MINES

*Gurdip Singh**

A tragedy too often forgotten is the havoc wrought by mines, millions of which lie on or in the ground, spreading terror for years or even decades after the hostilities have ended. Every year, in numerous war torn countries, thousands of men, women and children are victims of mines. Some of the mines are simple devices, while others make use of advanced technology. However, the fact remains that the mines are fighters that never miss, strike blindly, do not carry weapons openly, and go on killing long after hostilities are ended. Mines are most ruthless of terrorists and are the greatest violaters of international humanitarian law.

Mines produce damage by either blast or penetration of metallic fragments. With the explosion, dirt, mud and other debris are driven into the human tissues. The variable extent of damage and contamination by dirt and debris makes surgery for mine injury difficult because injuries of such severity and degrees of contamination are rarely seen in civilian practice and only a few surgeons have experience and skill in dealing with such wounds. The mines can be placed at the ground level and suitably covered to escape detection. These can be placed even on the posts or in trees. The mines can be triggered by foot pressure or release of foot pressure, trip wires, electronically or remotely. The mines either produce a large explosion or deliver projectiles which are metallic, either pre-formed fragments, nails, or spheres. In addition to causing appalling human injuries, the indiscriminate laying of mines makes land incultivable and results in damage to the natural environment. For certain population groups, the inability to cultivate their land is a threat to their very survival.

The present article endeavors to examine the following issues: whether the practice of deployment of anti-personnel land mines is inconsistent with the mandate of human rights jurisprudence; whether international humanitarian law regulates and controls the use of anti-personnel land mines; whether international humanitarian law needs to be strengthend so

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

as to impose an absolute ban on the recourse to anti-personnel land mines; whether the deployment of anti-personnel land mines constitutes a crime against humanity.

I. Anti-Personnel Mines and Human Rights

Article 6 of the International Covenant on Civil and Political Rights, 1996 protects the fundamental and basic human right, namely, the right to life and provides as follows:

> Every human being has the right to life. This shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 4 of the Covenant does not permit derogation from the guarantee of the right to life even in a time of national emergency. To examine the issue of applicability of Article 6 of the Covenant to the case of the use of anti-personnel land mines, it may be argued: the Covenant made no mention of armed hostilities or weapons and it has never been envisaged that the legality of the anti-personnel mines was regulated by the Covenant; the Covenant was directed to the protection of human rights in peacetime and the questions relating to the unlawful loss of life in hostilities were governed by the law applicable in armed conflict.

In the *Advisory Opinion of the International Court of Justice on the Legality of the Threat of Use of Nuclear Weapons*[1], the International Court of Justice refused to accede to similar arguments when raised with regard to the threat or the use of nuclear weapons. The Court held that the protection of the International Covenant on Civil and Political Rights did not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions might be derogated from in a time of national emergency. It was clarified that the respect for right to life was not, however, such a provision and in principle, the right not to be arbitrarily deprived of one's life applied also in hostilities. The Court further observed that the the test of what was an arbitrary deprivation of life during armed conflict would be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict. The use of anti-personnel land mines amounts to deprivation of the right to life during the armed hostilities as well as decades after the hostilities come to an end. Thus, the anti-personnel land mines laid during peacetime or continued to be laid even after the conclusion of the armed hostilities violate the guarantee of right to life contained in Article 6 of the International Covenant on Civil and

1. *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 35 International Legal Material, 1996 at 809.

Political Rights. However, the issue of the validity of the use of anti-personnel land mines during armed hostilities must be determined with reference to the law applicable in armed conflict. The question whether the use of anti-personnel land mines during armed hostilities amounts to arbitrary deprivation of life contrary to Article 6 of the Covenant would only be decided by referring to the law applicable in armed conflict and cannot be deduced from the terms of the Covenant itself.

II. Anti-Personnel Mines and International Humanitarian Law

The question arises whether use of anti-personnel mines is illegal in the light of the principles and the rules of international humanitarian law applicable in armed conflict. An examination of the Hague law and Geneva law contained especially in the Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land and the Regulations Annexed thereto, Geneva Conventions of 1949 for the Protection of the War Victims, and Additional Protocols of 1977 reveals that there are two cardinal principles underlying international humanitarian law.

The first cardinal principle in the fabric of international humanitarian law is aimed at the protection of the civilian population and civilian objects and establishes a distinction between combatants and non-combatants. It requires that the States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. The second cardinal principle prohibits to cause unnecessary suffering to combatants. It proscribes the use of weapons causing them such harm or uselessly aggravating their suffering. According to the second principle, States do not have unlimited freedom of choice of means in the weapons they use.

International humanitarian law prohibits certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. These principles also find support in the Martens Clause which was evolved by the Russian delegate De Martens during the First Peace Conference in 1899. The Clause explains that unforeseen cases should not, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders. On the contrary, the Clause provides, in such unforeseen cases both civilians and combatants would remain under the protection of the principles of the law of nations as derived from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. It implies no more and no less than that, no matter what States may fail to agree upon, the conduct of war

will always be governed by existing principles of international law. Martens attempted to balance military necessity against the requirements of humanity. By reconciling the necessities of war with the laws of humanity, the Martens Clause advocates general prohibition to use weapons which cannot discriminate civilians from combatants and cause unnecessary suffering. The Martens Clause consistently finds a place in the Hague law, Geneva law, and the United Nations Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects adopted in 1980. In the 1980 Certain Weapons Convention, States once again repeat the Martens Clause in confirming their determination:

> that in cases not covered by the Convention and its annexed protocols or by other international agreements, the civilian population and the combatants shall at all times remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

The cardinal principles of international humanitarian law lie at the roots of 1980 U.N. Convention on Certain Conventional Weapons and its three protocols, each of which regulates the use of a particular type of conventional weapons thought to pose particular risks of indiscriminate effects or unnecessary suffering. Protocol I on Non-Detectable Fragments prohibits the use of weapon whose primary effect is to injure by fragments in the human body that escape detection by X-rays. Protocol II contains detailed set of restrictions on the use of mines, booby-traps and similar devices. Protocol III restricts the use of incendiary weapons in various ways.

A. Protocol on Restrictions on the Use of Anti-Personnel Land Mines

Protocol II of the 1980 Certain Weapons Convention contains prohibitions or restrictions on the use of mines, booby traps and other devices. The Protocol is applicable in international armed conflicts and not in internal ones. However wars of national liberation are included among the international armed conflicts. A mine is defined in the Protocol as an explosive munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle and "remotely delivered mine" means any mine delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.[2] Booby-trap means any device or material which is

designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act[3]. Thus, booby-traps are possibly but not necessarily explosive. The term "other devices" means manually emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote or automatically after a lapse of time[4].

The experience of recent armed conflicts has abundantly shown the great risks incurred by the civilian population which persist long after the cessation of active hostilities as a consequence of the use of land mines and booby traps.[5] The main purpose of Protocol II on "Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices" is to curb those risks. The Protocol also provides protection to the combatants as well as United Nations Forces. The general restrictions on the use of mines, booby traps and other devices, laid down in the Protocol, are threefold: firstly, prohibition to use these weapons either in defence or by way of reprisals against the civilian population; secondly, prohibition of indiscriminate use and; thirdly, injuction to take all feasible precaution to protect civilians from the effect of the weapons.[6]

To Protect the United Nations Force or mission performing functions of peacekeeping, observation or similar function, the Protocol obliges each Party to the conflict, if so requested and to the extent of its abilities, to remove or render harmless all mines or booby traps in that area and to take all other necessary measures for the protection of the force or mission and to make all relevant information in its possession available to the head of the force or mission.[7]

Although 1980 Mines Protocol constitutes significant step in the regulation of the use of anti-personnel mines in armed conflict, it suffers from serious substantive shortcomings. Firstly, The Mines Protocol covers only international armed conflicts, namely, the armed conflicts between States and does not cover internal armed conflicts. Secondly, the Mines Protocol does not contain verification or compliance provisions to imple-

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2. Article 2 paragraph 1 of the PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES OF THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS, 1980, 1342 UNTS, 1980 at 137, reprinted in 19 INTERNATIONAL LEGAL MATERIAL, 1980 at 1523.
3. *Id.*, Article 2, paragraph 2.
4. *Id.*, Article 2, paragraph 3.
5. Frits Kalshoven, CONSTRAINTS ON THE WAGING OF WAR (ICRC, 1991) at 153.
6. *Supra* n.2, Article 3.
7. *Id.*, Article 8.

ment Protocol's obligations. During the armed conflicts of the 1980's, the number of civilian casualties caused by the indiscriminate use of anti-personnel land mines reached appalling proportions and by the begining of 1990's, the need for stricter controls on the use of anti-personnel land mines was echoed in various quarters. There was a widespread belief that Mines Protocol needed to be strengthened to deal with the catastrophe caused by the extensive and indiscriminate use of anti-personnel land mines. This led to the revision of the Mines Protocol.

In May 1996, the first Review Conference for the United Nations Convention on Conventional Weapons (CCW) completed its review of the Convention with the adoption of a revised Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices. The revised Protocol of 1996 attempts to expand the scope of the original Mines Protocol, places stringent legal constraints on remotely delivered and other land mines, requires the States to use commonly available technology to make the mines detectable, and makes the States responsible for the clearance of mines after the cessation of hostilities.

B. Expansion of the Scope of Mines Protocol

In the Review Conference of the Protocol, it was suggested by the United States and other Western delegations that in view of the great majority of civilian land mine casualities occurred in internal conflicts and therefore, the expansion of the Mines Protocol so as to cover internal conflicts was advocated. The non-aligned States especially India and China opposed applicability of the Protocol to internal armed conflicts and alleged intrusion into national sovereignty. However, both India and China finally accepted the extension of the Protocol to internal conflicts if the revised Protocol provided that the extension of the Protocol to internal conflicts would not be used as an excuse for unlawful intervention into domestic conflicts. The revised Protocol expands the scope of the original Mines Protocol and applies to internal armed conflicts and reiterates that nothing in the Protocol may be invoked to affect the sovereignty of a State or its responsibility to defend itself or to maintain law and order or to justify intervention by any other State in its internal affairs.[8]

C. Remotely Delivered Mines

Remotely delivered mines are the mines delivered by artillery or aircraft from a distance. The original 1980 Protocol imposes special restrictions on their use by requiring that the remotely delivered mines may be used only if there location in accurately recorded or they are equipped

8. 1996 *Revised Mines Protocol*, 35 INTERNATIONAL LEGAL MATERIAL., 1996 at 1206 Article 1.

with an effective neutralizing mechanism to destroy or render them harmless when they are no longer required for the military purpose for which they are deployed.[9]

The revised Mines Protocol of 1996 considerably strengthens the above features of the original Protocol by requiring that all remotely delivered anti-personnel mines be equipped with a self-destruct (SD) device and a back up self-deactivation (SDA) feature[10]. The SD device is designed to destroy the mine within a specified time after emplacement and does not leave behind a live mine after the expiry of the time period specified for the destruction of the emplaced mine. The SDA feature works as a back up self-deactivation device and ensures that a mine that fails to self-destruct will become inactive as a result of its deactivation after the expiry of the time specified for its deactivation. The combined effect of the SD and SDA features is that there is vital certainty of the mine becoming harmless after specified period of time. The 1996 revised Mines Protocol provides for a requirement for self-destruction (SD) within 30 days of emplacement with a reliability of 90% and self-deactivation (SDA) within 120 days with a combined reliability of 99.9%[11]. However, the States with millions of nonconforming anti-personnel mines have been granted by the revised protocol a transition period of upto 9 years from the date of entry into force of the revised protocol to convert or replace them. The revised Mines Protocol prohibits all transfers of non-conforming mines.

D. Non-Remotely Delivered Mines

Several States including Russia, China, India, Pakistan and Finland have been using long lived anti-personnel land mines for the defense of their border areas. These States expressed unwillingness at the Review Conference to install SD or SDA features which result in continual destruction and replacement of millions of mines deployed by them to defend their border areas. The revised Mines Protocol accommodates the strategic interests of these States and provides that non-remotely delivered anti-personnel land mines must either be equipped with SD or SDA or be confined to fields protected by specific measures to ensure that civilians are not endangered. The protective measures include: placing markings along the perimeters of the field that are clearly visible to persons about to enter; monitoring of the field by military personnel; and installing fencing or some other means sufficient to ensure the exclusion of civilians from

9. *Supra* n.2, Article 5.
10. *Supra* n.8, Technical Annex, para 3(a).
11. *Ibid.*

the area[12]. The revised Mines Protocol requires that a field where mines are deployed may not be abandoned unless it is cleared of mines or turned over to the forces of another State that has accepted responsibility for its maintenance and subsequent clearance[13]. At the event of forcible loss of control of the area as a result of enemy military action, the revised Protocol obliges the Party taking control of the area to maintain it in accordance with the requirements of the revised Protocol.[14]

E. Detectability

Some land mines cannot be detected by the commonly available magnetic mine detectors and pose severe risk to the civilians, mine-clearance persons, U.N. Peacekeeping Forces and Relief Missions that enter the mined area. Such mines are plastic mines which do not pass magnetic signature sufficient for detection. The Review Conference witnessed initiation of a proposal by the United States for imposition of barriers to the deployment of plastic mines which escape detection by the mine detection equipment. The proposal of United States was opposed by India and China who have deployed such plastic mines.

In a bid to balance the competing claims of United States *vis a vis* India and China, the revised Mines Protocol provides for a requirement that anti-personnel land mines must contain an amount of metal (eight grams of iron) which would be sufficient to enable detection by the magnetic detectors. The eight gram detectability requirement has, however, been subjected to a transition period of upto 9 years to convert or replace non-conforming mines, during which time their transfers would be prohibited[15].

F. State Responsibility for Deployment and Clearance of Mines

To discourage the practice of deliberately abandoning the anti-personnel land mines as a means of terrorizing the civilian population or denying them access to fields, roads, wells, or other facilities, the revised Protocol places the responsibility for clearance and maintenance of mines on the party that laid them[16]. The revised protocol requires that after the cessation of active hostilities, the mines must either be cleared or maintained in the controlled areas[17].

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12. *Id.*, Article 5.
13. *Ibid.*
14. *Ibid.*
15. *Id.*, Technical Annex, para 2.
16. *Id.*, Article 3.
17. *Ibid.*

In addition, the revised Protocol provides for: restrictions on the transfer of mines to the non-Party States and of the mines prohibited by the revised Protocol[18]; protection of U.N. Peacekeeping Forces and other international missions from mines laid in areas of their operation[19]; and promotion of mutual assistance and technology transfer for mine clearance and compliance with the Protocol requirements[20].

The adoption of the revised Protocol constitutes significant step to achieve the goal of total ban on the anti-personnel land mines. The provisions of the revised Protocol concerning constraints on the deployment and transfer of anti-personnel land mines, detectability of mines, and State responsibility for the clearance of land mines contribute enormously to save many lives and limbs of civilians, peacekeepers, relief workers and mine clearance personnel. The procedures of the revised Protocol provide a basis for further improvements, particularly with respect to compliance, SD and SDA requirements, and the detectability requirement[21]. The revised Protocol, however, suffers of shortcomings as it falls miles short of comprehensive ban on the use, stockpiling, production and transfer of anti-personnel land mines.

III. Towards a Global Ban on Anti-Personnel Land Mines

On September 18, 1997, the Ottawa Landmine Convention was adopted which imposes a global ban on the use, stockpiling, production and transfer of anti-personnel land mines and their destruction[22]. The Convention was concluded outside the auspices of the United Nations and without the involvement of major powers. Canada initiated Ottawa process and 90 States participated which led to the negotiation of a global ban on anti-personnel land mines in the form of a treaty. Among the non-signatories are many of the world's principal producers whose militaries consider land mines an essential defensive weapon. The non-signatories include United States, Russia, China, India, Pakistan, Greece, Turkey, Iraq, Egypt, Syria, Israel, Libya, Sri Lanka, North Korea, South Korea, and the Republic of Yugoslavia[23]. The treaty is the third international instrument on anti-personnel land mines. However, unlike the earlier instru-

18. *Id.*, Article 8.
19. *Id.*, Article 12.
20. *Id.*, Article 11.
21. Michael J. Matheson, *The Revision of the Mines Protocol*, 91 American Journal of International Law, 1997, 158 at 167.
22. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Land Mines and on Their Destruction, Arms Control Today, September 1997 at 11.
23. *Ibid.*

ments, the Landmine Protocol of 1980 and the revised Landmine Protocol of 1996 which place limits on the use of anti-personnel land mines, the Ottawa Convention obligates States Parties to forswear anti-personnel land mines and to destroy their stockpiles as well as all anti-personnel land mines in mined areas within fixed timetable.

The Ottawa Convention bans the use, development, production, acquisition, stockpiling, and transfer of anti-personnel land mines subject to two exceptions: firstly, States Parties are allowed to retain or transfer the minimum number of anti-personnel land mines absolutely necessary for the development of and training in mine detection, mine clearance and mine destruction techniques; secondly, States Parties may transfer anti-personnel mines for the purpose of destruction[24]. As regards the destruction of stockpiled mines, the Convention provides that with the exception of mines necessary for demining purposes, each State Party must destroy or ensure the destruction of stockpiled mines within four years of the Convention's entry into force for that State[25]. As regards destruction of anti-personnel mines in mined areas, the Convention requires each State Party to destroy anti-personnel mines in the mined areas within ten years of the entry into force of the Convention for that State[26].

The Convention contains provisions concerning transparency and requires the Parties to provide the UN Secretary General, within 180 days after the Convention's entry into force for that State, a detailed report of its anti-personnel land mines stockpiles, mined areas and steps taken to protect nearby populations, demining and destruction programmes, destruction inventories, and technical characteristics of mines produced or possessed to facilitate mines clearance[27].

The Convention also contains compliance provisions[28] and permits a State Party to submit, through the Secretary General, a request for clarification relating to compliance by another State Party. If the requesting State does not receive a response, the issue may be brought before the Meeting of State Parties. In the Meeting of State Parties, a fact-finding mission may be established which may be granted access to the areas, facilities and relevant persons related to its mission.

The Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and Their Destruction is designed to

24. *Id.*, Article 3.
25. *Id.*, Article 4.
26. *Id.*, Article 5.
27. *Id.*, Article 7.
28. *Id.*, Article 8.

face the challenge of removing anti-personnel mines placed throughout the World, and to ensure their destruction. The Convention reinforces the international humanitarian law that the parties to an armed conflict do not possess an unlimited right to choose their methods or means of warfare and that a distinction must be made between civilians and combatants. The effectiveness of the Convention lies in its ban on anti-personnel mines as well as the provisions concerning transparency and compliance.

IV. Conclusions

The edges of the international humanitarian law need to be sharpened to put an end to the suffering and casualities caused by anti-personnel land mines that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, destroy environment, and have other severe consequences for years after emplacement. The mandate of the principles of humanity is that the international community of sovereign States must accept the global ban on anti-personnel land mines along with transparency measures and positive commitment to comply with the ban. The ban on anti-personnel mines would also serve as an important confidence-building measure.

The stockpiling, production, use and transfer of the non-conforming anti-personnel land mines must be proclaimed as a crime against humanity entailing criminal responsibility of the perpetrators. The acts resulting in the causation of indiscriminate, superfluous, unnecessary and enormous injury to the civilians and the combatants by the unlawful deployment of the anti-personnel land mines amount to serious violation of the human rights norms, humanitarian law, and environmental law and accordingly turn into international crimes.

The international norm of criminal responsibility of the perpetrators of the crime of emplacing non-conforming mines can be enforced only if the perpetrators are exposed to prosecution as well as civil liability to make reparation. The civil liability of the perpetrator should be founded on the basis of the Perpetrator Pays Principle which requires the perpetrator to compensate the victims for the harm caused by the deployment of the anti-personnel land mines. A perpetrator is person who is responsible for the production, stockpiling, use or transfer of non-conforming anti-personnel land mines. The Perpetrator Pays Principle shall operate on the lines of the Polluter Pays Principle which constitutes a customary norm of the international environmental jurisprudence as well as Indian environmental jurisprudence. The quantum of compensation to be paid by the perpetrator

to the victims should be correlated with the potential or capacity of the perpetrator to pay.

The emergence of the public conscience underlies the process of elimination of anti-personnel land mines that uniquely endanger innocent civilians long after the fighting ends. The sanctions of the international instrument providing for the legal ban on anti-personnel land mines coupled with public conscience constitute appropriate measures to curb the menacingly injurious consequences of the anti-personnel land mines.

CONCEPT OF PATENT - INDIAN PERSPECTIVE

*V.K. Gupta**

The Indian Patents Act, 1970 has been significantly amended in 1999. The amendments cannot be considered as simplistic or minor in nature. They have taken the country in a new direction, a drastic departure from the nation's past policies and have therefore drawn equal flakes and boutiques both from its critics as well as from its votaries. This paper takes a balanced view of the challenges and opportunities that the new Act provides for India.

India ratified the Uruguay Round of Multilateral Trade Agreement , establishing the World Trade Organisation (WTO). Nine annexures have been added to it which contains 28 agreements and 130 Tariff and Service Schedules of the member countries. The General Agreement on Trade and Tariffs, 1947 is now a part of it. The agreement now covers three important *new* areas amongst other in the fields of intellectual property rights, services and investments. It also embraces agriculture and textile, which were outside the scope of GATT. The WTO is considered to be third pillar along with the World Bank and the International Monetary Fund (IMF). India wily nily found that it had not much say in the agreement as its share in international trade was negligent. Leaving the organisation would not have been a wiser step, though it contained many aspects which are disadvantageous to the country, so it joined the organisation. The agreement came into force w.e.f. 1-1-1995.

World Trade Organisation Agreement, *inter alia*, contains an Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). The TRIPs Agreement, *inter alia*, prescribes the minimum standards to be adopted by the member countries in respect of 8 areas of intellectual property. Patent is one of them.

India and other developing countries were given a transition period of 5 years (w.e.f. 1-1-1995) under article 65 to apply the provisions of the TRIPs.

Creation of WTO has brought a sea change. Today, industrialization is not sufficient to a country. What is required is to remain competitive and

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

for that technological up-gradation is sine qua non. Yesterday's age of industrialization is now replaced with the age of technologies. India has remained behind in this race. Reasons are not too far to seek. Second World War witnessed the imposition of quota, permit and licensing system throughout the world during 1939-45. However, as soon as the war was over, the developed world removed these restrictions. India continued with them. Indian entrepreneurs found themselves in swimming waters; bonded with chains. With Fifty years of our political independence, now there is realization to some extent, that many of our policies need thorough changes.

Change is the law of nature. Fashions change every 30 years. Economic theories seem to have turn around after 100 years. Today governments are starved of money and cannot afford to invest in public sector. Dis-investment process has started. Government of India may not be rich, but people of India are who can rightly take the country on the path of progress in 21st century. Quota, permit, license Raj must be demolished. Patent Act has rightly been amended.

One of the major causes of our technological backwardness is the failure of our Patent Act, 1970 to fulfill its twin objectives of development and exploitation of inventions. Technology is private property. The function of the patent law is to bring this private property into public domain, for the good of producers and consumers. If technology is made available free of cost, who will bear the cost of innovation. Innovators spend their own money into research. A proper patent law would induce both the inventors as well as entrepreneurs to disclose technological secrets and to invest capita for commercial exploitation, respectively.

Furthermore, Dispute settlement panel of WTO has decided against India. US filed a complaint about failure of India to change its patent law and provide for mailbox facility and Exclusive Marketing Right (EMRs). US argued that according to Article 70.9 of TRIPS, developing countries were obliged to take a decision on the patentability of pharmaceutical and agricultural chemicals products immediately while being able to postpone that decision with respect to all other products until 1 January 2000. The grant of an additional five years in Article 65.4 to implement the provisions on product patent protection in Article 27 had been balanced against the inclusion of obligations to establish fully functional mailbox and EMR systems in Articles 70.8 and 70.9.

The Appellate Body recently had decided in the *Wool Shirts* case[1] in which India had argued that under the Agreement on Textiles and

1. 1997, WT/DS24/AB/R at 15.

Clothing (ATC) the burden of proof should be shifted to the importing country taking temporary safeguard action. In rejecting the Indian argument, the Appellate Body had clarified that the ATC was a Transitional arrangement containing "carefully negotiated language... which reflects an equally carefully drawn balance of rights and obligations of Members...."

This characterization was equally applicable to the balance between the transitional rules in Article 65.4 and the obligations established in Articles 70.8 and 70.9 of the Agreement.

India has lost the case. Postponing of the amendment of the Patent Act would result into demanding of compensation by US for the loss suffered by its industry. Consequent upon the failure to pay compensation provides for retaliation. US has recently revived its Special 301 clause under 1974 US Trade Act. The clause deals with identification of countries to be placed on "priority watch list".

A large section of Indian populace is gripped with the foreign domination fever. However, it is overlooked that it results into huge loss to the country on account of brain drain of our scientists and technologists. MNCs in India do not invest in research and development as there is no patent protection. To them, safety of innovations is more important than the costs involved, as it may be argued that in India scientists are available at one-tenth of the costs in developed world. It is further argued that we may have to pay higher prices for the essential drugs. But these critics conveniently forget that price of a commodity is determined by the competition offered by substitute product. Compulsory licensing stays despite amendments; although it does not remain as automatic. It can be exercised in the public interest for the reasons to be given in writing. Here we should remember, that since the inception of the Act, India never exercised its option in this regard. It was always a dead letter provision, which only resulted into adverse climate for foreign investment in India. The provision never benefited India. Similarly the question of imports or domestic production is on the commercial viability of a project. No Indian will produce a product in the absence of commercial viability, even if the patent holder gives permission to produce without any payment.

Patent laws have generated lot of controversy in the following two fields:

(*a*) extension of protection of patents to plant varieties affecting farmer's interests.

(*b*) change over from process patent to product patent.

(i) TRIP's Impact on Agriculture

So far agriculture was not covered by GATT Agreement. Indian farmers will be benefited on the following counts:

(*a*) it will open world market for Indian agriculture;

(*b*) discrimination between trade in agriculture and trade in other commodities will go;

(*c*) GATT will integrate urban and rural people as lot of money will come in the rural areas;

(*d*) India may emerge as an important seed market under breeder's right. Increase in productivity can bring wonders in Indian economy.

Today India is the second largest vegetable and fruit producer in the world. It is the third largest producer and exporter of flowers. India has comparative advantage, because when summer goes in Europe, it arrives in India. What India needs is reliable air service, packaging, infrastructure and management. India must develop consortium of producers and exporters.

What India lacks is productivity and utilisation. Value addition is to be done through grading packaging and marketing. Problems of farmers and rural people should be given top priority.

The point to ponder is - Are we ready to take advantage of this new wind of change? We will have to develop culture of patenting. Research and development should be give top priority. Resources should be provided to farmers by providing Assistance Fund. If proper budgetary/ technological supports are provided to agriculture, we can become food providing Nation of tomorrow, within the next five years.

Special attention must be paid in the field of seeds, medicinal plants, endangered species, timber and biodiversity. Genetic Resource Bank must be established in every district. Local innovations should be encouraged through competitions, exhibitions and awards.

(ii) Subsidies

Fear regarding removal of subsidies under GATT is unfounded. Indian subsidies are well within the limits. In fact negative subsidies are received by our farmers. When we compare agricultural prices in Indian and international market of 20 primary agricultural products in India, we find that Government provides(-) 24,000 crores rupees, in subsidies. It is done through compulsory procurement. In India prices of food, cotton etc. is kept low, as Government imposes ban on exports. With GATT "Zero Regulation Day" will come in agriculture also, like industry.

It is the West which has to reduce subsidies under GATT, where subsidies are to the tune of 20-30 % particularly in the West. With the reduction in subsidies "Butter Mountains" and "Wine Lakes" will disappear. Subsidized regimes will be replaced with free marketing system, benefiting India.

(iii) Genes Patenting

It is estimated that by the year 2010, the human body organs/ genes trade industry will grow to US $ 60 billion. Today biotechnology companies are seeking patents over the basics that make life, like DNA, genes or complex human body material like hair, blood, semen, perspiration etc. Although 13th amendment of the US Constitution forbids patent rights in human beings, but US patent law does not differentiate between inventions and discoveries. US companies have patents base on Ayurvedic medicinal plants.

Naturally occurring micro-organisms are not patentable, only Genetically Modified Micro-organisms (GMO) are patented. Patent will be available for the trait introduced in medicine or pesticide or for the particular use of the product. GMO per se will be freely available for further research.

Union for Protection of New Varieties of Plants (UPOV) 1991 convention has provided exclusive right of the sale and marketing. If breeder's right is violated, he can stake his claim at both the stages of harvesting as well as processing. The period of protection for wines and trees is 18 years and for other varieties, it is 15 years.

The Convention allows "Farmer's Privileges" to use the saved seed, but only from his "own holding" for growing subsequent crops only in the holding. He cannot grow or sell it as a seed. The farmer is permitted limited non commercial traditional exchange of seeds within the village community. Under " Researcher's privilege" a scientist can utilize patented seed to breed another variety without the authorization of the original plant breeder.

TRIPS Agreement provides to protect plant varieties either by patents or by an effective 'sui generis' or through a combination of both. The countries are free to chose any method. According to UPOV and WIPO these systems are complimentary. They consider that patenting would be more appropriate for bio technological inventions.

India is obliged to provide Plant Breeder's Right to new plant varieties after 31.12.2000. At present, in India plant breeding is confined to hybrid seeds, horticulture and vegetable crops. India possesses a lot of agro-

ecological diversity and plant breeding capability. A vibrant seed industry can be developed in India not only to meet domestic demand but also to make India a player in the world seed industry... PBR protection will draw private investment in the agriculture field. National Seed Corporation and Indian Council of Agricultural Research can also benefit immensely.

(iv) Medicines/Pesticides

Engineering goods have always enjoyed product patent in India. Opposition to grant the same to drugs etc stems from the fear of their steep price rises on this account. But price of any product including medicines is determined by the absence or presence of replacement drugs. According to WHO report hardly 10 to 20 new molecules are introduced in the market. Furthermore, one successful product is to cover the expenses incurred on 10 unsuccessful products. Our sale and distribution system being cheaper, our prices will remain low in relation with rich nations. Even if 20 years protection is granted, at present it takes 3 to 5 years in search and granting of patents. It takes another few years to get acceptance with the medical practitioners.

India is to introduce product patent in medicines from 1 January 2005. China has already adopted product patent in 1993. India should utilize transition period for upgrading the Government machinery. Scientists should learn intricacies and pitfalls of the methods of examining the products.

(v) Exclusive Marketing Rights (EMRs)

For application filed since 1 January 1995, EMR shall be given to applicants for 5 years or until a patent is granted/ rejected whichever period is shorter. EMR may not create monopoly as in most cases substitute drugs are available.

(vi) Paris Convention and PCT

Tekchand Bakshi Committee had recommended that India should join the convention. India formally became a member of the convention from 7 December 1998. Joining PCT was a logical conclusion after our signing TRIPS Agreement. MFN treatment is at the core of the PCT. National Treatment clause provide that all countries of the union shall be treated equally. It will provide a sound information base and will facilitate technology transfer flows into India. It is hoped that in future India will become International Search Authority. TRIPS require documentation of all knowledge. We were successful in removal of patent on Haldi as we could produce proper documentation in this regard.

(vii) 167th Law Commission Report

Justice Jeevan Reddy Committee had urged the Government to take advantage of the exemptions in the national interest as provided under Article 27(2) of the TRIPs Agreement. The Agreement allows members to exclude from patentability inventions, the commercial exploitation of which is necessary to protect public order or morality including protection of human, animal or plant life or health or to avoid serious prejudice to environment. Article 27(3) enables the members to exclude from patentability diagnostic, therapeutic and surgical methods of the treatment of humans or animals. Government has pointed out it will bring a separate legislation with respect to bio-diversity and plant protection.

(viii) Directorate of Enforcement

It is finally suggested to strengthen strict enforcement of the Intellectual Property Laws; which is our weakest link. Establishment of a Directorate will be a step in the right direction.

BARS TO MATRIMONIAL RELIEF — A PLEA TO MAKE THE DIVORCE UNDER HINDU LAW JUST AND FAIR

*A.K. Gupta**

I. Role of the Theory of Relief Bars

The purpose of law of divorce is not only to dissolve a marriage union which has become undesirable, but also to protect the institution of marriage which is the very foundation of society. This aspect of law of divorce can be taken care of by the theory of bars to relief.

The theory of relief bars under section 23(1) of the Hindu Marriage Act 1955[1] provides that relief of divorce shall not be granted to the petitioner, even if ground for relief exists, if he does not come to the court with clean hands and the case is covered under one or the other bars laid down in the Act. If the court feels that it would be unfair or unjust to dissolve the marriage, even though a ground for divorce exist, it may refuse to dissolve it by applying the proper bar to relief. This is based on the principle of guilt theory of divorce that only innocent spouse can obtain divorce against the guilty spouse.

The properly constituted theory of bars in the statute become a powerful weapon in the hands of the court to avoid unjust divorce. It should also provide for safeguard or compensation to the innocent spouse for the injury done to him or her by the misconduct of the guilty spouse. The bars need not compel unwilling spouses to live together as husband and wife. Rather it should try to reasonably compensate the innocent spouse for the injury done by the other spouse by breaking the marriage.

II. Bars to Divorce Under Hindu Law

Section 23(1) of the Hindu Marriage Act, 1955 provides the following bars to a petition for divorce:[2]

1. the bar of 'taking advantage of one's own wrong or disability' [S.23 (1)(a)];

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

1. Act No. 25 of 1955 as amended by Act No. 68 of 1976.
2. Some of these bars apply to other reliefs also.

2. the bars of 'connivance' and 'being accessory' [S. 23(1)(b)];
3. condonation [S. 23 (1)(b)];
4. delay [S. 23 (1)(d)];
5. collusion [S. 23 (1)(c)];
6. want of free consent [S. 23 (1)(bb)].

(i) Taking Advantage of one's own wrong or disability

This bar is a direct manifestation of equity maxim, "he who comes to equity must come with clean hands." The petitioner must show that respondent's guilt or fault is not related, directly, or indirectly to some wrong or disability of the petitioner. If it is, the petitioner would not be entitled to the matrimonial relief sought by him even if he has been able to establish the fault of the respondent. On the other hand, if the wrong or disability has no bearing on the fault or guilt of the respondent or has no connection with the relief sought by him or her, relief cannot be denied.

In *J.S. Sodhi* v. *Amarjit Kaur*,[3] Avadh Behari J., of the Delhi High Court observed that the question of judging whether the petitioner is taking advantage of his own wrong arises, on the language of section 23 (1)(a), only after the court finds that any of the grounds for granting relief exists. If the ground on which relief is claimed does not exist, the relief cannot be granted to the petitioner, even if his conduct is free from blame.

In *S* v. *R*[4], a Division Bench of the Delhi High Court (K.S. Hedge, C.J., and Jagjit Singh J.,) distinguished the doctrines of 'want of sincerity' and 'approbate and reprobate' from the provision made under section 23(1)(a) that the petitioner cannot be allowed to take advantage of his own wrong for getting relief under the Act. It was pointed out that the two doctrines propounded by the House of Lords in *G* v. *M*,[5] were rules of English law, and while they could be applied in proceedings under the Indian Divorce Act, by virtue of section 7 thereof, they had no place under the Hindu Marriage Act.

In *Swarana* v. *Dharampal*,[6] the Delhi High Court dismissed the petition as the husband had in his petition attempted to foist a case of cruelty in an unjustifiable and clumsy manner.. In *Gurcharan Singh* v. *Waryam Kaur*,[7] I.D. Dua, J., held that in a petition for restitution of

3. 1981 HLR 331.
4. AIR 1986 Del 79.
5. (1885) 10 AC 171.
6. 1983 (2) DMC 414.
7. AIR 1960 Punj 422.

conjugal rights, the Court can take into consideration all the circumstances mentioned in section 23, such as false charge of adultery against the respondent wife and inordinate delay in presenting the petition, although these were not pleaded in the respondent's written statement. It may be noted that foisting a charge of cruelty or making false charge of adultery were surely wrongful acts but the kind of wrong contemplated by section 23 (1)(a) is such a wrong committed by the petitioner against the respondent as can be shown to be helpful in building up or creating a ground for relief in petitioner's favour. In *Chanda* v. *Nandu*[8], the respondent husband pleaded that the wife had herself insisted upon his taking a second wife as she could not give birth to a son. Krishnan, J. found the story so put forward to be fantastic, and that it was not a case where the petitioner wife could be said to be taking advantage of her own wrong.

Until their replacement as sub-section (1-A) of section 13, by the Hindu Marriage (Amendment) Act 1964, (Act 44 of 1964), clauses (viii) and (ix) of sub-section (1) of section 13 of the Act provided that a party to a marriage could sue the other party thereto for divorce, if the other party had not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation against the other party, or if the other party had failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree. The party against whom the decree was passed could not apply for divorce on the basis of that decree even by proving that the marriage had irretrievably broken down. Thus the party in the wrong could not get relief by way of divorce. And where the basis of the petition for divorce was a decree for restitution of conjugal rights in the petitioner's favour, he/she had to further establish that the other party had failed to comply with the decree. It postulated the making of an effort by the decree-holder petitioner to have the decree complied with, which could be established in most of the cases only by putting the decree into execution and proving that the result was negative. But Flashaw, C.J., of the Punjab High Court observed in *Ishwar Chander* v. *Promilla*[9], that the person who fails to comply with a decree for restitution of conjugal rights "does so at his or her own risk, and it would not even be necessary for the aggrieved party to prove that he or she had made positive efforts to make the other party comply, and the mere admission of the opposite party that he or she had made no efforts to comply would be quite sufficient." The 1964 Amendment replaced clauses (viii) and (ix) of section 13(1) by sub-section (1-A)

8. AIR 1965 MP 268.
9. AIR 1962 Punj 432.

and thereafter, either party could apply for divorce on the ground that there has been no resumption of cohabitation after the passing of a decree for judicial separation, or restitution of conjugal rights between the parties, for a period of two years (reduced to one year by Act 68 of 1976) or upwards. This enabled the Courts to decree divorce if the marriage had irretrievably broken down, notwithstanding that the petitioner's wrong was the cause of the earlier decree of judicial separation or restitution of conjugal rights, or even that the petitioner had failed to execute the decree for restitution of conjugal rights in his/her favour or to obey such decree against him/her. Section 23(1)(a) was, however, allowed to stand as it was by the Amendment Act of 1964, and even while amending it by the Amendment Act of 1976, so as to exclude the cases of voidable marriages under clause (ii) of section 5 read with section 12 (1) (b) of the Act, cases covered by sub-section (1-A) of section 13 were not excluded from the operation of that clause.

One view was that section 13 (1-A) did not confer an absolute or unrestricted right to divorce. It was subject to section 23 (1) (a) and the Court should refuse to grant divorce to a party who did not enforce, or obstruct compliance, or had refused to comply with a decree for restitution of conjugal rights, or continued to be guilty of the wrong which occasioned the passing of a decree of judicial separation against him/her[10]. The other view, which is now the accepted view, has been that in a petition for divorce under section 13 (1-A), the wrong committed by the petitioner, so as to disentitle him/her in view of section 23 (1)(a), must be a sufficiently serious wrong committed after the passing of the decree for restitution of conjugal rights or for judicial separation, and not the wrong which occasioned the passing of such decree against him/her nor is the fact of non-compliance with or disobedience of, or non-enforcement of a decree for restitution of conjugal rights, or refusal to cohabit or live with the other party after a decree for judicial separation.[11]

In *Ram Kali's*[12] case a Full Bench of the Delhi High Court held that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of section 23 (1)(a). Relying on and explaining this decision in the later case of *Gajna Devi* v. *Purshotam Giri*,[13] a learned Judge of the same High Court observed:

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10. *Laxmibai* v. *Laxmichand*, AIR 1968 Bom 332; *Chaman Lal* v. *Mohinder*, AIR 1968 P&H 287; *B.R. Syal* v. *Syal*, AIR 1968 P&H 489; *Someswara* v. *Leelavathi*, AIR 1968 Mys 274.
11. *Ram Kali* v. *Gopal Das*, ILR (1971) 1 Del 6; *Gajna Devi* v. *Purushotam*, AIR 1977 Del 178; *Madhukar* v. *Sarala*, AIR 1973 Bom 55; *Jethabai* v. *Manabai*, AIR 1975 Bom 88; *Bimla Devi* v. *Singh Raj*, AIR 1977 P & H 167.
12. ILR (1971) 1 Del 6.
13. AIR 1977 Del 178.

> Section 23 existed in the statute book prior to the insertion of Section 13 (1A)... Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of S. 23 of the Act, not entitled to obtain divorce then it would have inserted an exception to Section 13 (1A) and with such exception, the provision of Section 13 (1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore cannot be construed so as to make the effect of amendment of the law by insertion of Section 13 (1A) nugatory.
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> ...The expression 'petitioner is not in any way taking advantage of his or her own wrong' occurring in Clause (a) of S.23 (1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by S. 13 (1A)... In such a case a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree....

The controversy as to the scope of section 23(1) (a) with reference to divorce under section 13 (1A) (ii) came up before the Supreme Court in *Dharmender Kumar* v. *Usha Kumar*.[14]

The appellant contended that the allegation made in his written statement that the conduct of the petitioner in not responding to his invitations to live with him mean that she was trying to take advantage of her own wrong for the purpose of relief under section 13 (1-A) (ii).

The Supreme Court Observed:

> In our opinion the law has been stated correctly in *Ram Kali* v. *Gopal Das* and *Gajna Devi* v. *Purshotam Giri*. Therefore, it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour.
>
> In order to be a 'wrong' within the meaning of Section 23 (1)(a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be

14. AIR 1977 SC 2218.

misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

Counsel for the appellant sought to urge that the expression 'taking advantage of his or her own wrong' in clause (a) of Sub-section (1) of Section 23 must be construed in such a manner as would not make the Indian wives suffer at the hands of cunning and dishonest husbands. Firstly even if there is any scope for accepting to this case and secondly if that is so then it requires legislation to that effect. We are therefore unable to accept the contention of counsel for the appellant that the conduct of the husband sought to be urged against him, could possibly come within the expression his 'wrong' in Section 23 (1) (a) of the Act so as to disentitle him to a decree for divorce to which he is otherwise entitled to as held by the Court below. Furthermore we reach this conclusion without any mental compunction because it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife, if such is the situation it is better to close the chapter.[15]

In *Vatsula* v. *N.R. Gulwade*,[16] husband obtained a decree for restitution of conjugal rights *exparte*. Wife did not comply with that decree but filed a petition for divorce. Husband pleaded that she could not be allowed to take advantage of her own wrong. V. Mohta J., met the husband's plea by saying.

...this approach and view of the matter is contrary to letter and spirit of the amended provisions.... No doubt S. 23 (1) (a) has remained unaltered even after Act No. 44 of 1964, but it cannot be so read as to render the amendment futile and to defeat the very purpose behind it. If legislation intended that benefit of S. 13 (1-A) is not to be given to the defeated party, it would have clearly mentioned this either by incorporating an exception or by any other mode. If this was done, there was no necessity of amendment at all. It is not possible to assume that Legislation intended to indulge in an exercise in futility.

It seems to me that the purpose of both these provisions is entirely different. S. 13 (1-A) gives statutory recognition to the

15. 1984 (2) DMC 325 (SC).
16. 1982 HLR 148. See also *Bimla Devi* v. *Singh Raj*, AIR 1977 P & H 167; *Ranjit Kaur* v. *Gurbax Singh*, AIR 1977 HLR 87; *Santosh Kumari* v. *Mohan Lal*, 1980 MLC 309; *Atma Ram* v. *Kala Wati*, AIR 1982 P&H 83; *Kamla Devi* v. *Ram Dev*, 1980 HLR 469.

principle that it is in the interest of society as well as the spouses that if there is irretrievable breakdown of the marriage and all chances of reunion disappear, there is hardly any utility in maintaining a marriage as a facade in absence of emotional and other bonds which are the very essence of marriage relationship. This was intended to be achieved irrespective of the question as to who is responsible for the unfortunate situation. If two or more years have passed without resumption of marital life inspite of decree by a competent Court, it was considered unrealistic to expect that some day spouses will unite and marriage will work. The old concept of default of the spouse as furnishing a ground for refusing divorce when claimed by that party was, therefore, given up. Permitting only a decree holder to move the Court for divorce led to a stalemate. If he chose not to do so, a curious situation could arise. Opposite party was left with no remedy and the marriage was, as it were, a limbo. The 'fault' theory is, therefore, pushed back and 'breakdown' theory had been pushed a step further. This is thus codification of the principle that if marriage cannot be worked, there is no point in thrusting one spouse on the other much against his or her desire irrespective of the reasons behind.

It may be noticed that the Act came to be amended further by Act No. 68 of 1976. It not only reduced the waiting period of two years to one year but also incorporated a fresh provision, in the form of Section 13-B for grant of decree of divorce by mutual consent... New legislative intention is that all efforts to restore sick marriage to health have to be made, but once they fail, there is no point in withholding the award of a decree for divorce. It is considered better to dissolve it than meaninglessly to try to let it limp along. Not that these last amendments are relevant in the present case, but they do point out that more realistic approach is being made towards this human problem by the society. While more practical view of the marriage relationship is taken, old tradition is not given up completely. Divorce is not available merely for asking and consideration of conduct of parties has still been retained, in the form of Section 23 (1) (a). There is thus no unqualified right to divorce as soon as condition of Section 13 (1-A) are fulfilled. Decree can be refused if any spouse is taking advantage of his or her own wrong for the purposes of relief claimed...it seems that wrong prior to passing of decree is not the wrong contemplated.... It means, and act of causing some

> injury to the other side in the sense that action has some direct or indirect relation to the marital offence committed by the other spouse and on which the cause of action for the petition is based.

In *Santosh Kumari* v. *Kewal Krishna Sabharwal*[17]. Khanna, J., gave a new twist to the controversy. The parties lived together as husband and wife for a period of two years. On account of expulsive conduct of husband, wife was forced to leave the matrimonial home. The Husband moved a petition for divorce on grounds of adultery, cruelty and desertion. Wife moved a petition for restitution of conjugal rights on the ground that she was turned out of the matrimonial home and the husband did not care to have her back. Both the petitions were consolidated. Wife was allowed interim maintenance under Sec. 24. As the husband did not comply with this order his defence was struck off. Wife's petition was allowed and a decree for restitution was passed. Wife also filed a petition for maintenance under Sec. 125, Criminal Procedure Code, and a consent order was passed where in the husband undertook to pay Rs 300/- per month as maintenance. The Husband moved the petition for divorce under section 13 (1-A) (ii). She joined the matrimonial home and stayed there for about 20 days when again she was ill-treated and turned out. There was no sexual act during that period.

The Court observed :

> In cases where the couples are educated, financially and socially independent or are further well aware of the consequences of break-up of marriages and are determined to proceed in that direction, it can be said that to still hold them tied by matrimonial bonds would be wholly unjustified. It cannot be ignored that overwhelmingly our females are still illiterate & semi-literate, and have no independent source of livelihood. They are still, from dependency point of view, as appurtenances to their menfolk. While a divorcee man has little difficulty in entering into a fresh wedlock, the divorcee woman finds herself as a desolate lone voyager. There are bleak chances of her finding a new suitable partner in life. Mere providing of maintenance is no substitute for happiness and fulfilment which a person otherwise gets from marriage. Till the times when the female finds her feet, both socially and economically, divorce means leaving them in a veritable widowhood for the rest of life with all the stigma attached in society.

17. AIR 1983 Del 383.

Finally setting aside the decree of divorce, the court stated:

> After giving my utmost consideration to the entirety of the circumstances in the present case, and the case law referred to above, I am of the view that this was an extreme case where Kewal Krishan in order to first keep face with the society, and as counter to her claim for maintenance and execution proceedings admitted her back for a short duration to the matrimonial home and still did not consummate the conjugal rights. His conduct as the person responsible for breaking of the matrimonial home has been accepted in the decree for restitution of conjugal rights as well as the award of maintenance under S.125. He has treated his wife with a sort of conjugal rejection in spite of her coming to live with him. This is a strong circumstance in which recourse to S.23 can be taken.

In some cases it has been emphasised that the petitioner must not be guilty of any matrimonial wrong after the decree for restitution or separation, so that it may not be said against him/her that he/she is responsible for breaking the marriage. In *Soundarammal* v. *Sundara Mahalinga Nadar*[18] the husband had applied for divorce on the basis that there had been no resumption of cohabitation for more than two years after the decree for judicial separation that had been obtained by the wife against him on the ground that he had been living in adultery with another woman. The wife opposed the petition on the ground among others that the husband continued to live with that other woman and could not be allowed to take advantage of his own wrong for wrecking the marriage. Sathiadev J., observed that the view expressed in AIR 1977 Delhi 178, to the effect that "the petitioner for divorce, whether innocent or guilty cannot be deprived of his/her rights on the grounds which existed prior to the passing of the previous decree" was "unacceptable because the wrong that is now pleaded is a continuing wrong and a persisting cruelty."

In *Geeta Lakshmi* v. *G.V.R.K.S. Rao*[19] the wife had obtained a decree for restitution of conjugal rights on 27-10-1971, on a petition presented in 1967. After the decree she lived at the husband's place for 15 days, but was ill-treated by the husband and the mother-in-law and finally driven out of the house. She took shelter with her parents. After sometime in 1972 she filed a suit for maintenance against the husband, which was decreed on

18. AIR 1980 Mad 296.
19. AIR 1983 AP 111. See also, *O.P. Mehta* v. *Saroj Mehta*, 1984 (2) DMC 4 Del; *Anil* v. *Sudhaben*, AIR 1978 Guj 74; *Meera Bai* v. *Rajinder*, AIR 1986 Del 136; *Ashok* v. *Shabnam*, AIR 1989 Del 121.

5.4.1974. In 1976 the husband filed a petition for divorce under section 13 (1-A), which was decreed by the District Court. The Division Bench of the High Court reversed the finding of the District Court and held that the husband was in the wrong in ill-treating the wife subsequent to the passing of the decree.

The Court observed:

> ...The amendment to S.13 must be limited to the extent to which the amendments have been made. They cannot be given an extended operation. S.13 cannot be taken out of the limits of S. 23 (1)(a). If it were otherwise, the Parliament would have added the words "notwithstanding anything to the contrary" ...or would have... suitably amended Section 23 (1) (a) itself.... If the interpretation put by learned counsel for the appellant is accepted, S. 23 (1) (a) would be rendered otiose and nugatory... the provisions of S. 13 are subject to ... S. 23 (1) (a) of the Act.

It seems that in most of the cases courts have taken the view that the post-decree conduct of the petitioner is material and in case it would be found that in seeking divorce on the ground of non-resumption of cohabitation after a decree of judicial separation or non-compliance with the decree of restitution of conjugal rights, the petitioner is taking advantage of his own wrong, he would not be allowed relief.

The provision made under section 23 (1) (a) that the petitioner cannot be allowed to take advantage of his or her own wrong for getting relief is pushed back, when a petition is filed for divorce under section 13 (1-A) of the Act. It causes lots of difficulties, as in most of these cases the innocent spouse does not want divorce. It particularly creates hardships for the innocent wives if they do not want divorce. Because of the rule that when a petition is filed by the husband under section 13 (1-A), he is not taking advantage of his own wrong, but of the statutory provision, section 23 (1)(a) does not come for the rescue of the innocent wife. In some cases she is subjected to punishment of divorce without any fault of her own. For instance, if an innocent wife obtains a decree of restitution of conjugal rights against her husband on the ground that she has been turned out of the matrimonial home because the husband wants to marry another woman. This decree may prove a death warrant for her marriage; and boon for the erring husband.

In order to redeem the society from the unjust divorce, help can be taken from the theory of relief bars by changing its complexion, scope, and nature. It is suggested that the artificial and illogical difference between grounds for divorce that some grounds are based on fault theory, others on

break down of marriage or divorce by mutual consent, should be ignored in this context, as this sort of attitude, towards the grounds for divorce has done a lot of harm. It has resulted in making the law of divorce unnecessarily complicated as well as unjust.

All grounds of divorce are pointer towards the fact that the marriage has broken down in one respect or the other. Whether the marriage has broken down irretrievably or it is a case of simple broken marriage, law can not define, as it depends upon the subjective attitude of the parties, and not on the definition provided by law. A spouse can reasonably presume that his or her marriage has finally ended as a result of adultery, cruelty, desertion change of religion etc, by the other spouse, as he or she finds it intolerable. In such a case law should not impose its own concept of broken marriage on the spouse.

In almost all cases, when a petition for divorce is filed by a party on the grounds which in legal terminology are known as guilt grounds or fault grounds, it is in fact a case of broken marriage. It is better for legal reasoning to presume it a case of broken marriage, as soon as the reconciliation proceedings fail, in the court.

Petition for divorce under section 13(1-A) should not be treated different from any other divorce petition and should not be given the VIP treatment, licence to the erring spouse that he be allowed to take advantage of his own wrong, which is denied to other petitioners. There is neither any logic nor any sound reason, which entitles the petitioner under section 13 (1-A) that his or her misconduct should not attract section 23 (1) as it does in case of other petitions.

The bar of 'taking advantage of one's own wrong or disability' be applicable to all divorce petitions including the petitions under section 13 (1-A), with slight modification that it would not affect the right of a party to file a divorce petition under section 13(1-A), simply because the decree of judicial separation or restitution was passed against him or her. Instead the over all conduct of the party would be taken into consideration to decide whether it attracts section 23(1)(a) or not.

The prevailing atmosphere of the Hindu society is in favour of breakdown principle, that if the marriage has broken down without any possibility of repairs (or irretrievably) then it should be dissolved, without looking into the fault of either party[20].

The breakdown principle of marriage has two aspects:

(1) the marriage be dissolved;

(2) the fault of the parties should not be looked into.

20. See, Paras Diwan, LAW OF MARRIAGE AND DIVORCE (2nd ed.) at XIV.

Both these issues should not be confused. It is submitted that the first proposition is agreeable that a broken marriage be dissolved whatever be the reason. The fact, whether the conduct of the petitioner attracts section 23 or not ceases to be important in this context because there is no use to keep the union alive. Thus conduct or misconduct of the parties should not come in the way of dissolution of the broken marriage.

But the second proposition that the conduct of the parties should not be considered by the court at all is not sound as it leads to injustice. If both, wrongdoer as well as innocent are put at par injustice is bound to be done to the innocent spouse. It would lead to unjust divorce. So to avoid injustice, the enquiry must be made into the conduct of the petitioner and respondent to find their guilt in bringing an end to the marriage. In case the petitioner is found responsible for bringing the holy union to an end, he must compensate the innocent spouse for the loss suffered by him or her due to wrongful act of the petitioner. So long as the petitioner does not compensate the innocent spouse for the loss suffered, decree of divorce should not be made absolute.

The principles of payment of damages in law of contract and tort can be taken into consideration, to asses the quantum of damages payable by the guilty spouse to the innocent party. Depending upon the gravity of the case, the penal damages may be justified. This approach would not compel the unwilling spouse or spouses to live together as husband and wife; it would remedy the harm done to the innocent spouse. The new approach is remedial, and not penal.

The new approach will help in protection of the institution of marriage, since a spouse after the marriage will misbehave with the other spouse at his own cost, (i.e. he or she would be required to pay damages to the other spouse for his matrimonial mis-conduct).

(ii) The Bars of 'Connivance' and 'Being Accessory'

The bars of "connivance" and "being accessory to" are provided by section 23(1)(b). These bars apply to the petition of divorce on ground of adultery. In 'accessory' there is an active participation by the petitioner in the guilt of the respondent. In connivance there is corrupt intention but not active participation. To constitute connivance consent, express or implied, is necessary.

It is suggested that this bar be made a discretionary bar so that it may be applied to do justice to the parties in appropriate cases and may not lead to unjust decisions.

(iii) Condonation

Section 23(1) (b) of the Hindu Marriage Act, 1955 provide the bar of 'condonation'. The bar applies to a petition for divorce on the ground of adultery or cruelty. The condonation implies forgiveness on the part of the petitioner of the guilt of the respondent. But condonation is some thing more than forgiving, there must be resumption or continuation of the marital status. Condonation as a bar to matrimonial relief is an absolute bar. The doctrine of condonation is based on the guilt theory that if the guilt of the respondent has been condoned it ceases to be ground for divorce. The doctrine of condonation totally differs in tune and character from some other bars like 'connivance' and 'being accessory' to the respondent's adultery, as these themselves amount to matrimonial offences. But in case of condonation the petitioner is an innocent party. Here the petitioner has to lose his right of filing the divorce petition for his kind and noble act of condonation. Condonation as absolute bar may lead to injustice to the petitioner which may be avoided by making it a discretionary bar.

The real purpose of the doctrine was to strengthen the guilt theory of divorce. The basis of law of divorce under Hindu Law has ceased to be strict guilt theory, and now it is possible to take divorce on breakdown principle as well as by mutual consent. So there is no justification of condonation as an absolute bar to relief in the Act. Application of condonation as an absolute bar creates hardships in cases where the marriage is broken, and there is no possibility of the spouses living together as husband and wife.[21]

It is submitted that in case of a broken marriage the court must exercise its discretion is favour of the petitioner to avoid unnecessary hardships and injustice to the innocent petitioner, on the basis of out moded concept of guilt theory that in case the offence of the respondent is condoned it ceases to be a ground for divorce.

It is well known fact that many Hindu wives allow themselves to be subjected to the humiliation against their will, and some time in the hope of improvement prefer silence to avoid likely distress to their parents etc. The Hindu wives condonation of cruelty should not be presumed by continuance of cohabitation.[22]

The condonation as a discretionary bar would make the law of divorce more just and would also provide more stability to the institution of marriage. As a discretionary bar it would not come in the way of dissolution of broken and undesirable union.

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21. See, *Dastane* v. *Dastane*, AIR 1975 SC 1537.
22. *Satinder Gupta* v. *Sevaram Gupta*, 1981 HLR 580 (Del).

(iv) Delay

Section 23(1)(d) of the Hindu Marriage Act, 1955 provides delay as a bar to a petition for divorce. Mere delay or long lapse of time is not a bar to relief, it must not be unnecessary and improper.

The notion of the doctrine of delay is not much different from condonation as very often delay implies condonation of the guilt. It should also be made a discretionary bar.

In case of a Hindu wife in most cases the delay is of optimism, namely, the aggrieved wife still hopes very often on slender basis that things can be patched up therefore she avoids pushing matters to an issue. The wife who after prolonged optimism is disillusioned and goes to seek the assistance of the court, should not be refused discretion in her favour.

In case there are indications that she is guilty of insincerity or has taken undue advantage from the marriage, the discretion should not be exercised in her favour, such discretion in her favour would amount to unjust divorce.

Similarly, when husband is able to prove that he has been waiting for a long period to give an opportunity to the erring wife to mend her ways, discretion should be exercised by the court in his favour, so that he may not suffer for his efforts to save the marriage.

(v) Collusion

Collusion is an absolute bar to relief. In view of the provision for divorce by mutual consent under the Hindu Marriage Act there is no logic in retaining the bar of collusion. The continuation of section 23(1)(c) is anachronism after the statutory acceptance of the concept of divorce by consent and it has become a dead letter in the statute as section 13 B provides that two souls can mutually agree to part from each other amicably without bitterness.

It is therefore submitted that collusion should be abolished as bar to relief as it has out-lived its utility in the present structure of the Hindu Marriage Act.

(vi) Want of Free Consent

In case of divorce by mutual consent Supreme Court held in *Sureshta Devi* v. *Omprakash*[23] that mutual consent should continue till the divorce decree is passed and it is open to one of the spouse to withdraw the consent at any time before the court passes a decree of divorce.

23. (1991) 1 DMC 313 (SC).

The view of the Supreme Court is not correct as it has diminished the utility of the provision of divorce by mutual consent and has given a powerful weapon in the hands of the unscrupulous party to make a joke of the law and also to harass the other spouse by withdrawing the consent without any justification.[24]

Section 13-B (2) should be read along with section 23(1)(bb) and the consent is withdrawable only if the elements of force, fraud or undue influence are applied at the time of obtaining the consent.

III. Conclusion

Analysis of concept of law of divorce shows that it has three components — theory of divorce, grounds for divorce, and theory of bars to relief. These three components are like family members in the field of law of divorce. There should be co-ordination in this family. Bars to relief should take into consideration what is in the interest of Hindu society and work in that direction to create just and social order.

ADOPTION LAW AND GENDER JUSTICE

*Poonam Pradhan Saxena**

Amongst the diverse personal laws of India, governing the disparate religious communities, adoption is treated as equivalent to natural birth only under the Hindu law. In the ancient times the objective of adoption was purely spiritual, as Hindu scriptures enjoined begetting a son as one of the three primary debts that a man has to discharge during his life time.[1] The belief in the need of performance of the funeral rights as essential to the salvation of a man's soul to prevent his life after death to be ruined and coupled with the fact of the son being the only appropriate person to preform such rites, necessitated the need to have a son in the family. A son is called "Putra". Put is a kind of hell and "ra" is a person who could deliver his father from hell[2]. Thus in order to avoid going to hell to beget a son was mandatory.

Budhayana declared[3] :

> Through a son, one conquers the world, through a grandson one attains immortality, and through a great-grandson one ascends to the highest heaven.

The Veda declares[4] :

> Endless are the worlds of those, who have sons: there is no place for a man who is destitute of a male offspring.

The primary reason, thus being the accomplishment of the spiritual desire, the rules provided, that the adopted son must have a likeness of the man whose child he was to become, and accordingly, a man could adopt a child from within the family only. Adoption of a daughter, an illegitimate child, the child of a stranger, an orphan or even an abandoned child was not permissible[5]. Interestingly, the spiritual salvation through a son was the essential prerogative of a man only, and despite the fact that motherhood,

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

1. See. Paras Diwan, MODERN HINDU LAW (1988) at 207.
2. MANU, V : 138, quoted in Paras Diwan, *Ibid.*
3. MANU, IX : 137-138; VISHNU, XV : 44-46; YAJNAVALKAYA, I : 78.
4. R.K. Agarwal, HINDU LAW (19th ed. by R.K. Sinha, 1996) at 143.
5. *Supra* n. 1 at 209.

that too of a son was glorified, coupled with the fact that it is the mother who gives birth to the child, the son could spiritually benefit the father only. The explanation for it being that a woman in general is sinful and dependent, and her spiritual salvation is possible only through duty; obedience; submission; and faithfulness to the husband throughout her life. Accordingly, no woman was permitted to adopt a son for herself.

Vashishta enjoined[6] :

> Let a woman neither give nor take a son except with her husband's permission.

Thus no woman had the power to adopt in general. However, a widow was permitted to adopt a son, to enable the performance of funeral rites of the deceased husband, but only if the deceased husband had desired so and had also authorised her to effect the adoption during his lifetime. In certain cases, where the authorisation from the husband could not be proved, the consent of the sapindas was a mandatory requirement. The reason for requiring the assent of the kinsmen was explained by the Lordship as follows[7] :

> The assent of the kinsmen seems to be required by the reason of the presumed incapacity of a woman for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary right in the estate may be defeated by the adoption.

Further, where the widow proved the permission of the sapindas, it led to an implied presumption of the adoption being essentially for the benefit of the husband and the incidental motive for adoption became irrelevant except to operate as a check on the possible exploitation of this power. In *Balasu Gurulingaswami* v. *Balasu Ramalakshamana*[8], it was observed :

> The reason for requiring the assent of the sapindas is to see that the adoption was a bonafide performance of the religious duty and not due to any capricious action by the widow.

In joint families, it was necessary for the widow to consult the elders in the husband's family, particularly his father, and in divided families, she had a duty to consult the agnates of the husband. If they withheld their consent for capricious reasons, she was ordained to consult, and obtain the

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6. Vashishta, XV : 1-6, cited by Lord Hobhouse in *Balusu Gurulingaswami* v. *Balasu Ramalakshmanna*, (1899) 26 IA.
7. See, *G. Appaswami* v. *Sarangapani*, AIR (1978) 520 at 521.
8. (1868) 12 MIA 397 at 442.

consent of the remoter agnates. In such cases, the adopted child was deemed to be the child of the deceased husband of the widow and had property rights in his property as per the doctrine of relation back.

The Hindu Adoption and Maintenance Act, passed in 1956 provide as follows:

The facility of adoption is available only to Hindus; only a Hindu has the right to give a child in adoption;[9] only a Hindu can adopt a child[10] and only a Hindu can be adopted.[11]

I. Persons capable to give a child in adoption

The basic qualifications for giving a child in adoption are:

(1) the right to give a child in adoption is that of the child's biological father only. Section 9(2) provides in unambiguous terms :

> ...the father if alive shall alone have the right to give the child in adoption....

However, he cannot do so without the consent of the mother of the child. Her consent is not required if she has ceased to be Hindu by converting to any other religion; or has been declared by a court of competent jurisdiction to be of unsound mind or has finally renounced the world.

Some parliamentarians however considered it totally unnecessary to involve the mother and wanted the father to have the sole and exclusive right to take decision in these matters. Tek Chand said :[12]

> Insistence upon the consent of the mother to give away is totally unnecessary. Therefore no harm will be done, if the law is reframed, whereby the father alone has the right to give a child in adoption.

The Act was passed without accepting his suggestion.

(2) The biological mother can give a child in adoption if she is a widow and has not remarried[13]. Her own child, born to her from her deceased

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9. See, The Hindu Adoptions and Maintenance Act, 1956, sec. 9(2).
10. Secs. 7 and 8.
11. Sec. 10(1).
12. Tek Chand, Lok Sabha Debates, 13th Dec. 1956 at 2918.
13. Sec. 9(3).

husband, cannot be given in adoption, as on remarriage she ceases to have even guardianship rights over it.[14]

Where the father of the child is alive, the mother is competent to give the child in adoption if :

(*i*) the child is illegitimate;

(*ii*) where the child is legitimate, but the father has ceased to be a Hindu by converting to another religion; or has been declared by a court of competent jurisdiction to be of unsound mind; or has finally and completely renounced the world[15].

A woman who is living separately from her husband under a decree of divorce, is incapable to give her child in adoption even though the custody might be with her, the father might have remarried and may have nothing to do with the child.

It is again interesting to note, that while the re-marriage of a widow operates as a disqualification on her rights to give her own child in adoption, subsequent matrimony of the widower-father does not affect his rights at all over the child.

In absence of the parents of the child, i.e., where they might be dead, or have abandoned their child, or have finally and completely renounced the world, or have been judicially declared to be of unsound mind, or where the parentage of the child is not known, its guardian has the power to give it in adoption but only after seeking a permission from the court[16]. While granting such permission the welfare of the child is the primary consideration with the court.

II. Persons Capable of taking a Child in Adoption

The facility of taking a child in adoption is available to both males as well as females, the primary requirement of course being that they should be major and of sound mind.[17] However amongst the married couples, the right to adopt is that with the husband which he can exercise with the consent of his wife. In case he has more than one wife living the consent of all of them is mandatory. Following the similar principle of obtaining the

14. *Supra* n. 1 at 215. *Mast Ram* v. *Daroga,* AIR (1981) Pat 204. See also, The Hindu Widow Remarriage Act, 1956, sec. 3.
15. Sec. 9(3).
16. Sec. 9(4).
17. Secs. 7 & 8.

consent, the consent of all or some is not required if she has ceased to be a Hindu by converting to any other religion, or if has been declared by a court of competent jurisdiction to be of unsound mind or if she has finally or completely renounced the world.[18] After a valid adoption has been effected, if a man has more than one wife the senior most amongst them would be the adoptive mother while the rest of them would be related to the child as the step mother.[19]

A married woman can take a child in adoption only if she is a widow, or where though her husband is alive is legally disqualified to adopt.[20] A judicially separated or a deserted woman is incapable to take a child in adoption. In such a case she has to obtain divorce from the husband which may be a lengthy or cumbersome procedure.

Law Minister Sh. Patasker while presenting the Bill in the Parliament explained the scheme of adoption under the Act in the following words:[21]

> The scheme of the Act is like this. In Clause 7 which precedes clause 8, we say that a male Hindu can take a person in adoption. If he has a wife he has to take the consent of the wife.... Having said that we go over to the capacity of the female to take in adoption. Naturally, the wife whose husband is living is excepted. If she is married she is the wife of someone and she cannot adopt unless the marriage has been dissolved. Then she is no longer the wife. So it is only such woman of sound mind, not minor, unmarried, whose marriage has been dissolved or her husband is dead or has completely or finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind - it is only such woman who can take in adoption.

Thus the right to adopt was vested in the husband and the wife was granted a power to veto it. It is interesting to note that while the present provisions ignoring her rights have been challenged as gender biased, even the requirement of taking her consent by the husband was vehemently opposed in the Parliament. Primary objective of adoption was contrived by a number of our parliamentarians as according spiritual salvation intrinsically to a man and also as a channel of continuation of his family line. The primary purpose of adoption was explained as :

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18. Sec. 7.
19. Sec. 14.
20. Sec. 8 (c).
21. Pataskart, Lok Sabha Debates, 14th Dec. 1956 at 2959.

> The original idea of Hindu adoption was that the father would adopt the child because he leaves his son behind him to perform the religious duties so that he may go to heaven. The second conception was that his continuation of the thread of his race, so far as his part of the duty is concerned was safe and sure.[22]

This group of members opined that the husband should have a unilateral right in matters of adoption without the involvement of the wife at all. This proposed formality of requiring her consent could only complicate the matters. Some of their reactions are given below:

> the wife may always be opposing him at every turn of his life, in fact making his life hell. And here you say that he should not be allowed to adopt except with the consent of that very lady who has made his life hell.... So far as the man is concerned he adopts for two reasons. It may be... for spiritual benefit and in that the wife has no share.... To a man, who wants to adopt a son, it is a very serious matter. You force him to take the consent of the wife.[23]

> If is very difficult to get consent of the wife. The result is that he cannot adopt at all.... The happenings of family would be disrupted.... She can be consulted and persuaded. Her consent need not be necessary for adoption.[24]

> The capacity of a male Hindu to take a child in adoption, so far as he is being called upon to obtain the consent of his wife.... If a son is being brought in the family, then it is due to the subjective state of the mind of the adoptive father. The consent of the wife is not necessary at all.[25]

> The rule that the wife should consent is a wrong rule. There are thousands and lakhs of people whose wives will never consent.[26]

> The continuation of the race was the duty of the father and the mother was attached to the father. Now the mother is also a consenting party. Under no system of law is the mother respon-

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22. K.C. Sharma, Lok Sabha Debates, 14th Dec. 1956.
23. J.S. Bhist, Rajya Sabha Debates, 27th Nov. 1956 at 797-799.
24. Deputy Chairman, Lok Sabha Debates, 14th Dec. 1956.
25. *Supra* n. 12 at 3015.
26. Thakur Das Bhargava, Lok Sabha Debates, 14th Dec. 1956 at 3016.

> sible for the continuation of the race. It is always the male that gives the child and not the female. The female is a passive partner. Therefore even biologically it is unacceptable. Make a law on some scientific basis. This law has no science behind it.[27]

The logic stipulated here appeared full of paracholiasm, and spoke of deep rooted male chauvinism. Parliamentarians like Pt. Sharma wanted to use scientific arguments to keep a woman completely out of picture as far as the entire process of adoption was concerned. The upbringing of the adopted child is the job of the adoptive mother. But the decision whether the child should be adopted; when it should be adopted or who should be adopted, should be exclusively with the father. Once the child is adopted then it should be handed to the mother for its upbringing. This in itself sounds not only unnatural but also unjust. Further to call the mother a passive partner for the birth of the child sounds amazing. It takes two to make a child, but after the child is conceived a man's role is over and it is the woman's role that starts. For a period of nine months and even after the birth of the child the man is not even a passive partner. If we accept this scientific argument then the law should be that a woman should have a right to take a child in adoption and that the man should be consulted. It is apparently clear that while framing the law the woman's need to have a child have been clearly ignored by the legislature.

The law as it was passed by the Parliament require that the consent of the wife is necessary, but a married woman does not have a right to adopt individually in her own right. In *Lalitha Ushayakar* v. *Union of India*[28] the petitioner challenged section 8 of the Act as violative of the Constitution which confers equality before law and equal protection of laws to every citizen, irrespective of the sex. According to the Act, the petitioner alleged a married woman had been deprived of the right to take a child in adoption, by the same Act, which confers a right to a man to adopt. A woman's role is limited to giving a consent only, whether express or implied. The High Court of Karnataka, held the alleged provision non-discriminatory and said:

> Where sec. 7 gives the wife a right to give the consent, it also granted it the power to refuse consent. The Child was adopted to the family and not to an individual. Sec. 8 of the said Act, was enacted to make a specific provision in regard to woman under

27. *Supra* n. 23 at 2932.
28. AIR 1991 Kant 186.

Art. 15 of the Constitution of India without which no adoption for woman was possible at all.

The court further held that there was no discrimination on account of sex, having regard to Article 14 of the Indian Constitution. As long as the woman was in a position to *"induce her husband"* to give consent to adoption, it could not be said that she is aggrieved and rejected the petition. The court thus not only affixed a judicial stamp to the subordinate role of the wife but justified it as non discriminatory.

A single (unmarried) woman or a man can also take a child in adoption but in such cases the child would have only one parent as the future spouse of the adoptive parent would be related to the adopted child as the step parent. For example, if an unmarried woman adopts a child and gets married, her husband would be related to the child as the step father. Similarly if a man adopts a child and gets married his wife would be related to the child as his step mother.[29]

While the right of a man to adopt has always been unquestionable the idea of a single woman being allowed to adopt appeared sensational. Parliamentarians were bewildered and wanted this right to be subject to certain restrictions, primarily to act as a deterrent in the way of a young woman to adopt. It is evident by some of the reactions given below:

> My submission is that she should not marry after taking a boy in adoption... many unhappy things would result. Therefore, in old age alone, she can have an idea of taking a boy in adoption.

> I am surprised that no knowledge of general Hindu principles is there. How can an unmarried woman acquire a child without a man? How will that child be treated as legitimate? This appears to be strange. God alone knows, who will protect the Hindu community, For example, an unmarried man or a woman adopts and does not marry then this girl or boy would be without a father, that means there would be a new race started according to Mr. Patasker, that a child would be born of only a mother or a father. Such children would exist who would have no father or on mother. I feel deeply sad on this point, you have made a mockery of the Hindu culture.[30]

29. Sec. 14.
30. Lakshmayya. LOK SABHA DEBATES, 13th Dec. 1956 at 2914.

In keeping with the general trend of laying down inequitable provisions for women, there was intense opposition to the facility given to Hindu to adopt a daughter, The arguments ranged from a genuine fear of the possibility of a young girl's exploitation by the unscrupulous single males, only twenty one years their seniors to the provision being opposed to traditional Hindu law. Some therefore described it as the last nail in the coffin of Hinduism while others explained the inherent dangers of allowing a girl to be adopted.

> By means of this attempt, impressionable young girls may be exposed to serious and sinister hazards; specially when in another clause it has been provided that the ... span of age between them is going to be 21 years only... one of the notorious features of crime in our country is what is known as trafficking of young girls. In the garb of adoption of a girl of 15 by a young person only twenty one year her senior, the girls would be exposed to grave dangers... why should a man feel the necessity of adopting a girl, and a man who may not have got a wife. Permission to a male to adopt a daughter ought not to be granted under any circumstances.[31]

> By many High Courts it has been held to be illegal... that is what I am pointing out. It is neither feasible nor desirable. It will not be a step in advance; it will be a retrograde step. All that we know of this kind of adoption of girls is among prostitute class. It has been a black spot in our society and the sooner it is eradicated it is better. It is very undesirable and wherever that system has been prevalent it has been condemned by our progressive society as well as by the High Courts.[32]

A man or a woman can take a son in adoption if they do not have a living son, son of a predeceased son, or a son of a predeceased son of a predeceased son (great grand son). If any of these sons, grand sons or great grand son has ceased to be a Hindu by converting to any other religion, then even in their presence, a son can be taken in adoption. Similarly if they want to take a girl child in adoption the couple should not have a living Hindu daughter or the daughter of a son. If such a daughter has ceased to be Hindu because she has embraced another religion, the couple can take another daughter in adoption.[33]

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31. *Id.* at 2916.
32. N.C. Chatterjee, Lok Sabha Debates, 14th Dec. 1956 at 2957.
33. Sec. 11(i) and (ii).

Though the law in clear cut terms curtails the power of both a man and a woman to take a child in adoption in presence of a Hindu son, son's son or son's son's son, judiciary has brought in a curious interpretation of the same. In *Sau Ashabai Kate* v. *Vithal Bhika Nade*[34], a case before the Supreme Court, a man died leaving behind a widow and a widowed mother. The court held that the widowed mother's power to adopt is extinguished permanently even though she has no living Hindu son or any of his male descendant, as the responsibility of the continuation of the line is now with the widowed daughter in law. It further held that, the power to adopt is not revived even where the widowed daughter in law gets married again and leaves their house. This judgment suffers from many flaws. It amounts to adding when there is none yet another disability on the capacity of a widow to take a child in adoption. A woman therefore forfeits her right to adopt if her son dies issue less after getting married, with his widow also marrying subsequently. Firstly, it is a question of her right, which has expressly been conferred on her by the Act; Secondly, if she is in need of company, who will provide her with that? The court should not see and lay down the purpose of adoption in this manner in absence of an express provision. Nowhere has it been provided that the object of adoption is the continuation of the family line. Even if we assume(incorrectly) that it is the basic purpose, the court's presumption that only because a woman has a daughter in law, she cannot continue her own or her deceased husband's line appears to be incorrect. Does this mean, that if a woman's son gets married, she loses her reproductive capabilities and becomes incapable to bear a child? If not, then why is she being deprived from being a mother by adoption? The Act itself provides that its basic objective is to amend and codify the law relating to adoption and maintenance among Hindus. The primary motive of amending the then existing law relating to adoption and permitting the adoption of a daughter was to deviate from the concept of adoption being useful and essential only for the continuation of the family line and to make it as well an instrument of providing a home to the home less children and give the joy of parenthood to the childless couples. How else the court would explain the facility of adoption given to unmarried people or that of adoption of orphans and girls. According to Paras Diwan[35] :

> In the present submission the Hindu Adoptions and Maintenance Act, 1956, has steered off clearly from all religious and sacramental aspects of adoption and has made adoption a

34. 1989 Sup (2) SCC 450.
35. *Supra* n. 1 at 209.

> secular institution and a secular act, so such so that even a religious ceremony is now not necessary for adoption.... Whatever it may be the primary purpose of allowing adoption is to provide consolation and relief to a childless person. In modern law its purpose is also to rescue the helpless, the unwanted, the destitute or the orphan child.

The same courts however, and not surprisingly, took a different view when it involved the right of a man in a parallel situation. In *Bhima Kotha Dalai* v. *Sarat Chandra Kotha*[36]. the court held that a male Hindu does not lose his capacity to take a child in adoption if his son dies and his widowed daughter in law living with him. Here in this case the daughter in law had not remarried. The court said:

> ...accepting the contention of the learned counsel that a male should lose his competency to adopt if his widowed daughter in law is living would be against the settled principle that adoption is mainly for the spiritual benefit of the adopter.

If further stated that a male Hindu if otherwise competent to take a son in adoption could not lose his right merely because of the contingency wherein the wives of his predeceased sons could adopt sons to their husbands.

III. Effects of a Valid Adoption

Once a valid adoption takes place the adoptive child is deemed to be born in the adoptive family and his relations with the natural family cease in all respects except[37] :

(1) the child cannot marry any person in the natural family, who is within prohibited degree of relationship;

(2) any property which had vested in the adopted child before adoption would continue to vest in him, subject to the obligations if any attached to the ownership of the property, including the obligation to maintain relatives in the family of natural birth;

(3) the adopted child cannot divest any person of any estate which vested in him or her before adoption.

A valid adoption creates rights in favor of the child which are identical to natural birth. An adoptive child is deemed to be natural born child in the

36. AIR (1989) Ori 14.
37. Sec. 12.

adoptive family and therefore has mutual rights of inheritance in the property of his adoptive parents and all of their relations in exactly the same manner as a legitimate child has. From the date of a valid adoption the adoptive son becomes a coparcenor in the joint family of his adoptive father and consequently becomes a sharer in the ancestral property in which his adoptive father had a share. It has been held in various cases that where a widow adopts a son after the death of the husband, such son will be deemed to be the son of the husband and will be a coparcenor in exactly the same manner as his adoptive father was. These judicial interpretations have created confusing and unwarranted situations. Though the law permits a widow to adopt in her own right (unlike the law previously that a widow could adopt not to her but to her husband only) the judiciary is reluctant to endorse it. Like many of the parliamentarians, the judiciary's tenacity to hunt for a father of the child is persistent. In nearly all the cases the courts still hold, that the child adopted by a widow would be her deceased husband's child also. They go a step further and have held in many cases that the doctrine of relation back would apply and the date of adoption would be deemed to be the date of the death of the husband. A further complication is that there is absolutely no time frame within which a widow should adopt a child. She can adopt a child at any time after the death of her husband.

In *Sawan Ram* v. *Kalawati*[38] the Supreme Court held that a son adopted by a widow is the son of her deceased husband. Here though the husband had died in 1930 and the adoption took place in 1958, 28 years later, the husband's interest in the coparcenory property passed to the child by survivorship, as if he was in existence at the time of his father's death.

In *Ankush Narayan* v. *Janabai*[39] the Bombay High Court also held that where the widow of a deceased coparcenor adopts, the adopted son becomes a coparcenor with the surviving coparcenor. Here the court allowed the adopted son to divest his adoptive mother's inheritance which had vested in her absolutely. It thereby unsettled the entrenched claims that had vested in his mother prior to the adoption. J.Ramaswamy said:

> ...by adoption (on the basis of sec. 11 and 12) the child adopted by the widow becomes absorbed in the adoptive family to which the widow belongs i.e. the child adopted is tied with the relationship of son with the deceased husband of the widow and other collateral relations of the husband would be connected with the child through the deceased husband of the widow.

38. AIR 1967 SC 1961.
39. AIR 1964 Bom 174.

While admitting that the Act does not provides so the court further observed,

> It is true that section 14 of the Act does not expressly states that the child adopted by a widow becomes the adopted son of the husband of the widow. But it is a necessary implication of sec. 12 and 14 of the Act, that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband.

In *Sita Bai* v. *Ram Chander*[40] the apex court held that the adopted son of a widow becomes a coparcenor from the date of adoption. Bhargava J., while referring to sec. 5 observed that two kinds of adoptions are envisaged by the Act: One is adoption by a Hindu and the other is adoption to a Hindu. An adoption by a female Hindu, whose husband is dead, has finally renounced the world, has been judicially declared to be of unsound mind, or has ceased to be a Hindu, is covered under the later type. The Hon'ble judge further said that all ties of the child will be created in the adoptive family. The question that arose was which is the family of the widow, and that the Honble judge concluded that it would be her deceased husband's family. Accordingly the child would be deemed to be the child of her husband and would be entitled to succeed to his property, from the date of his death. A very important question arises. Can this right be pre-dated? If a man dies in 1980 and his widow adopts a child in 1998, 18 years after the death of the husband, the child would be treated as the legitimate progeny of the husband and would be entitled to succeed to his father property and become a coparcenor with him of the property as it stood in 1980, as if he was in existence at that time.

Interestingly, the courts want to find the father only for the adopted child and not the mother in reverse situations. Thus where a widower adopts a child his former wife's relationship with the child remains a mystery. The Act does not mention any thing about the relationship of the former spouse of the adoptive parent, it nevertheless clarifies the ties that are created between this child and the present and the future spouse of the adoptive parent. Accordingly, if a bachelor, maiden, widow or a divorcee adopts, the child will have only one ancestral side, either maternal or paternal. It is basically due to the fact of them being single or independent parent. But in case of a widow the judiciary's resistance to treat her as a single or independent is evident. She is deemed to be attached to the family of her deceased husband and her actions are bound to have behind them

40. AIR 1970 SC 343; See also, *Motilal* v. *Sardar*, AIR 1975 Raj 40.

his express authority. She is therefore treated as incapable to do anything for herself independently.

Where the law is clear, the judiciary has unnecessarily created a confusion with their obsession to lay down rudimentary philosophy for a woman. It is not only fictitious but also illogical and perplex. The observations also contradict with the general presumptions of paternity of the child and come in direct conflict with the provisions of the Indian Evidence Act. With these rulings the courts have related a child to a dead man, dead around 20 to 30 years prior to even the birth of this very child. The Act provides, in clear terms, that the adoptive child is deemed to be born in the adoptive family from the date of the adoption and not from the date of the death of the husband of this widow who is adopting. As other wise in each case when a widow adopts the tenure of the deemed existence of the child in the adoptive family would be different. For example three widows, A,B and C, take a one year old child each in adoption on January 1, 1999. A's husband had died in 1980; B's husband died in 1990 and C's husband died in 1995. Though the date of adoption is same in all the three cases, yet due to the interpretation of the courts, the adoption would create ties in favor of the three children from different dates. The deceased husbands of each of these widows would be deemed to be the fathers of the child respectively even though they were dead before 19, 9 and 4 years respectively. Formerly a widow could adopt only for her husband but now she can do it for herself. This is precisely the difference between the law as it stood before 1956 and now. But if the legislature still persists in forcing this child not only on the father but his entire family there would be no distinction between the old law and the present one. The primary reason before 1956, for relating the child to the deceased father was that it was the consent of this very father which had to be proved for the validity of the adoption. Further, the accepted motive of adoption was to satisfy the spiritual necessity of the father. It was the delegation of his power that enabled a widow to adopt. He consented to the adoption and consequently was treated as its father. Now a widow is no longer required to seek let alone prove his consent, or the consent of any one for that matter, nor is the motive of the adoption relevant. So if the husband did not consent to this adoption how can he be treated as the father of this child? What ever may be the position of a married woman during the presence of the husband, and despite being conferred superior rights, even a man is incapable to impose an adopted child on his unwilling wife. He has to compulsorily seek her consent unless she is judicially disqualified. Here the husband is incapable to give his consent due to the fact of his death. How can a widow impose a child on him without his consent? It becomes

her independent action for which she alone should be responsible. Taking an example, where the husband wants to adopt a child A and the wife refuses to give her consent, he cannot adopt the child and make her, the adoptive mother. Similarly, if the wife wants to adopt a child B, but the husband refuses to do that, she cannot adopt him and make him, his father. But the moment he dies, she now not only can adopt him validly, but also make him his father. The answer to that should be in the negative. Her unilateral actions should benefit or burden her alone and she alone should be treated as its parent.

Taking the second reason for relating the father to the child, that is the spiritual satisfaction of the father, it should be noted that the spiritual salvation of the father through adoption is no longer the only purpose of adoption nor was it in majority of cases where adoption of a child by the widow took place even before 1956. Shri Pataskar while explaining the intention behind this legislation had made the following observations[41] :

> In many cases you will find that adoptions are made by the widows.... That was so because a widow was generally a limited owner and probably the estate was likely to go to some other people after her death.... The widow thought that probably she would have better rights in dealing with the property by taking a son in adoption rather than being merely a limited owner.

He admitted that most of the cases of adoption by the widow were neither from a religious motive nor from any religious beliefs but purely from a secular point of view. In almost every case it resulted in litigation and all sorts of complications.

Now where a woman is no longer a limited owner of her property, nor is the adoption meant to benefit the deceased father even in theory, the fiction and application of doctrine of relation back should be abrogated. The correct interpretation should be in tune with section 112 of the Indian Evidence Act,[42] which says :

> The fact that any person was born during the continuation of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution the mother remaining unmarried, shall be the conclusive proof that he is the legitimate son of that man, unless it can be shown, that the

41. Pataskar, LOK SABHA DEBATES, 13th Dec. 1956 at 2982.
42. THE INDIAN EVIDENCE ACT, sec. 12.

parties to the marriage had no access to each other at any time when he could have been begotten.

Therefore following the provision of the Indian Evidence Act, a child adopted by the widow after 280 days of the death of her husband should be treated as her child alone. She should be equated with a divorcee or an unmarried woman and this imaginary classification of different categories of females with different consequences of their same actions should be done away with.

A study of the provisions relating to adoption laws reveal that these provisions do suffer from gender bias. Despite the Supreme Court's proud pronouncement in *Appaswami* v. *Sarangapani*,[43] that

> Equality in status is recognised in matters of adoption also.

The law is far removed from this reality. Though the rules permit adoption by a female, her marital status plays an important role in determining her rights to take a child in adoption. There has been a total denial to a married woman to either take or give a child in adoption, if her husband is not judicially disqualified. His relations with his wife and his capability to take decisions which may or may not be in the interests of the child are not the considerations which weighed with the legislature. Rather it seems that there is an implied presumption on part of the legislature that the decisions taken by the father would necessarily benefit the child. These presumptions unfortunately do not hold good in light of the changing times. As it does not foresee the possibility of a break up in the relationship of the husband and his wife. A deserted or a judicially separated wife remains incapable to either take or give a child in adoption. Does the legislature presumes that the mother is incapable to take an appropriate decision for her children? These discriminatory provisions should be deleted and the legislature should effect a parity between the rights of a man and a woman as regards the legal provisions of adoptions are concerned.

There is no reason why this facility of adoptions should not be extended to other religious communities as it benefit both the childless couples and also the orphans and abandoned children. Presently it is available only to the Hindu community in its true form. The facility of adoptions is also available to some of the Muslims who were converts from the Hindu religion and had not opted for the application of the Muslim Personal Law (Shariat) Application Act, 1937. Among the Parsi commu-

43. (1978) 3 SCC 55 at 530.

nity also there was a custom of "Palak" (adopted) son but that was done away with and was not recognised by the judiciary as creating valid rights.

Under the Guardians and Wards Act, members of other religious communities can also take children under their care and protection. The primary drawback under that Act is that unlike the situation under the Hindu Adoptions and Maintenance Act, adoption here is revocable. There is also no restriction on the number of children who can be adopted. Also as the couple taking a child are the guardians only and not the parents, there are no mutual rights of inheritance between the guardians and the wards.

Though the Adoption bill was presented in the Parliament in 1972 and was treated as a step towards securing a uniform law of adoption, it could not be passed for political reasons. The primary objection to it was from the Muslim community. Objections were also raised from the members of the Scheduled Tribes, who had certain practical difficulties relating to permissibility of adoption in their communities, but they later relented in favor of the interests of the nation. Even though it was an enabling provision to legalize adoption for the betterment of orphans and childless couples. Muslims opposition to it was on the plea of it being unIslamic in character; as empowering the Muslims, to go against the basic injunctions of the Quran, and also due to the fear of being saddled with the Hindu law of adoptions on an unwilling Muslim community.

An amended draft of the Adoption Bill was recommended in 1976, repealing the existing Hindu Adoptions and Maintenance Act, 1956, and exempting the members of the Scheduled Tribes from its application. Muslim community again raised the objection, and opposed it on the ground that even though it was an enabling provision they were opposed to the creation of opportunities which may permit some of their fraternity to deviate from the personal law. So no situation should be created which may enable Muslims to disobey Quran. The opposition was turned down by the joint committee. The Bill however lapsed without any success with the dissolution of the Parliament.

In 1980, a fresh bill substantially different from the earlier bill was introduced in the Lok Sabha, exempting Muslims from its application and bringing within its preview the members of the Scheduled Tribes. It was referred to the Minorities Commission and was now opposed by the Parsis. The Commission was against the exclusion of any community on religious grounds. But there was no chance of their recommendations being accepted as this Bill also lapsed with the dissolution of the Parliament in 1984.

There is a need to have a secular law of adoptions which is free from gender bias and is available to every Indian irrespective of his or her religion. It will not only make the life of those children better who are without a home but would also bring a ray of hope in the life of the child less couples, making their life meaningful and filled with the joy of parenthood.

INDEPENDENCE OF JUDICIARY

*Janak Raj Jai**

India is one of the largest democratic countries in the World. In this set up, there are three wings functioning independently. The first is the Legislative wing, the second is the Executive wing, and the third - the most important is the Judiciary. The Constitution of India has given a considerable importance to this wing, and has provided the Supreme Court of India at the top. The essence of fair and fearless administration of justice is a *sine-qua non* of a successful democratic Government. And, to achieve this we must have bold, fearless, independent, efficient and impartial judiciary. It is on the rock of judiciary that the democracy can stand firmly, and whenever it is shaken, the democracy is bound to crumble.

I. Respect for the Rule of Law

Respect for the rule of law, both by the society and the State is, therefore, a vital and essential ingredient for the good health of democracy in the country. And at the same time, the judiciary also should not come under the pressure from any quarter, particularly the politicians in power. The judges must always be conscious of the oath taken by them before adorning this august office. It is the faith and confidence of the people in this great institution, that matters the most. The day the administration of justice, and the rule of law are tampered with extraneous considerations and the political colour, it will shake the democratic set up of the country.

In order to achieve respect for the rule of law and administration of justice, the Bar and the Bench must work in harmony with each other. The Bar and Bench are but two sides of a page in a book, any prick from each side is bound to cause a hole and thus affect not one, but both the sides. In that event, not only both loose peace of mind, but that mars or affects the function of both having a common purpose in the administration of justice to the cause before the court.

II. Overall Denigration

It is a matter of serious concern and great anxiety that this institution has started crumbling under its own weight. There is a consistent denigra-

* Advocate, Supreme Court of India, and formerly Lecturer, Faculty of Law, University of Delhi, Delhi.

tion from all quarters; the Bar and the Bench, which are two pillars of administration of justice, are distancing day by day from each other. The Judges, by and large, keep them busy, after court hours in public relation work, meeting high functionaries in the Government, attending seminars, enjoying parties, ventilating their personal views publicly to catch the eye of the ruling party for their future prospects after they demit office, and coming very close to a selected group of lawyers for mutual gains. The bitter truth now is that there is an unrefutable impression among the litigants and the general public all over the country that, it is the face law, and not the case law that works. In the Supreme Court itself, there are about one dozen senior advocates, who have captured the maximum litigation work. Majority of the advocates practising in the Supreme Court are hardly able to make both ends meet. It is the selected few advocates, who enjoy the privilege to have the pleasant and comfortable audience as against the majority of the advocates who are in no way less competent. The same may be the case in the High Courts as also in the subordinate courts. The way the senior advocates are designated by the High Courts and the Supreme Court, needs a thorough probe in the matter. There is unfortunately no transparent method by which the courts designate the senior advocates, with the result that a good number of most competent advocates are never designated as senior advocates. Either the courts should stream-line the selection of senior advocates, or the institution of senior advocates, be abolished altogether.

III. Code of Ethics for Judges

In order to reaffirm peoples faith in the justice administration system a sixteen point code of conduct was formulated and unanimously adopted by Five Judge Committee, comprising three Supreme Court Judges, Justice A.S. Anand, Justice S.P. Bharucha, Justice, K.S. Paripoornan and two High Court Judges-Justice D.P. Mahapatra, and Justice M. Srinivasan. On 6 December 1999, 15- point code of ethics was adopted by the annual conference of the Chief Justices chaired by Chief Justice A.S. Anand which is as follows[1] :

(*i*) a judge should not contest election to any office of a club, society or other association;

(*ii*) he should not hold such elective office except in a society or association connected with the law;

(*iii*) close association of a judge with individual members of the bar, particularly those who practise in the same court, must be eschewed;

1. The Times of India, December 7, 1999.

(*iv*) a judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if he or she is a member of the bar, to appear before him or even be associated in any manner with a case to be dealt by him;

(*v*) a member of a judge's family, if he or she is a member of the bar, should not be permitted to use the residence in which the judge actually resides;

(*vi*) a judge should practise a degree of aloofness consistent with the dignity of his office;

(*vii*) a judge should not hear and decide a matter in which a member of his family, a close relative or a friend is concerned;

(*viii*) a judge must not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination;

(*ix*) a judge is expected to let his judgments speak for themselves and will not give interviews to the media;

(*x*) a judge will not accept gift or hospitality except from his family, close relatives and friends;

(*xi*) a judge will not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing the matter is raised;

(*xii*) a judge must not speculate in shares, stocks or the like;

(*xiii*) a judge should not engage directly or indirectly in trade or business either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby will not be construed as trade or business);

(xiv) a judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund;

(xv) every judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of his office.

IV. Deep Rooted Faith in Judiciary

Over the decades, the general public have come to repose absolute faith in the judiciary. In fact it occupies an exalted position in the minds of the people as the saviour of democracy. In this context, Justice Fazal Ali's

Postulation of propositions on Proper Judicial Conduct in *Union of India v. Gopal Chandra Mishra*[2] is very much relevant:

> The High Court Judges are the repository of the confidence of the people and the protectors of their right and liberties. Therefore, having regard to the onerous duties and sacrosanct functions which a judge has to discharge, he has to act and conduct himself in a manner which enhances the confidence of the people in judiciary.... Having regard to these circumstances, therefore, once a judge decides to accept a high post of a High Court he has to abide by certain fixed principles, and norms, and also certain self-imposed restrictions in order to maintain the dignity of the High Office he holds so as to enhance the image of the court of which he is a member and to see that the great confidence which the people have in the court is not lost.

Justice Ali further observed:

> The depth of respect for judges in Indian society is second only to the respect of saints and sages. One of the factors which highlight this reverence for judges is that whenever it held necessary to order a probe into a matter of public and national importance, there is a clamour of judicial investigation as distinguished from administrative investigation. This means that people have a deep rooted faith in the impartiality of judges and in their character. Therefore, a great responsibility rests on the members of the higher judiciary to sustain this respect which has been gained by a long line of distinguished judges.

V. Post Retirement Vocation by Judges

It appears that the Code of Conduct framed by the judges for themselves is silent on their post-retirement vocation or activities. It is unfortunate that some over-ambitious judges, after their retirement, or even some time before their retirement start looking for their future clients or beneficiaries. In that over-enthusiasm, sometimes they do falter in delivering impartial judgments in the hope of getting some lucrative assignments after their retirement. In some cases it has been seen that the judges start engaging themselves in political activities immediately after they demit this august office.

The judges who join legal profession immediately after their retirement, do not bring any laurals to the dignity and status which they had held while at the bench. How ridiculous does it look when they are seen visiting

2. AIR 1978 SC 694.

the lawyers chambers, looking for briefs, and appearing before a bench, consisting of judges, with whom they had shared the bench, while in office?

Former Chief Justice of India, Mr. M. Hidayatullah, in his book has said.[3]

> I was never in the mood of Lord Macaulay, who said, I shall retire early, I am very tired: I know that life meant that one must continue to occupy his time with work. In our apartment we furnished one room as a study, because I was going to embark on literary pursuits.... I had already written two slim books... and edited Mulla's Mohammaden Law.... I delivered lectures. During my spare time I advised such parties as consulted me and heard a number of arbitrations.

In private as also in post retirement life, the judges have to conduct themselves in conformity with certain time-honoured standards of a restraining nature. While some judges take the long awaited and well earned rest from the hectic life and fade away, others like Justice V.R. Krishna Iyar remain in the lime light championing laudable causes of the society at large.

In *M/s Chetak Construction Ltd.* v. *Om Parkash and Ors*,[4] Dr. A.S. Anand and Venkataswamy J.J. rightly observed that judges must always ensure that they do not allow the credibility of the institution be eroded. Justice must not only be done but it must also be seen to be done.

Justice Narayana Kurup, in *Nixon* v. *Union of India*,[5] made the following observations:

> However, there are some judges who evince keen interest in taking up another career on retirement from the Bench... the post retirement aspiration of the judge for personal career advancement may not be in consonance with or in the best interest of an independent judiciary. Recently a former Chief Justice of India entered the Rajya Sabha on a party ticket. And a former Chief Justice of this Court contested a Lok Sabha seat, the moment he demitted the office, again on a party ticket.... The public cannot be faulted if they consider a person coloured and presumptuous if he joins a political bandwagon soon after he demits the judicial office. The element of accountability

3. M. Hidayatullah, My Own Boswell at 268.
4. JT 1998(3) SC 269.
5. 1998(2) KLT 717.

arises from the very nature of judicial functions of a judge. As Justice Jackson said, "we are not final because, we are infallible, but we are infallible because we are final." Mr. Ray Mark in his book- "The lawyer, the Public and Professional Responsibilities" observed that the Bar is not private guild, like that of barbers, butchers, and candle-stick makers, but by bold contrast a public institution committed to public justice. This observation applies with equal force to the members of the judiciary too....

VI. Office of the Attorney General of India

The recent controversy on the opinion given to one private party, Chhabrias whose conduct was under investigation by SEBI has brought this august office in news. Soli J. Sorabjee, the Attorney General has filed a law suit against "Asian Age" in the Delhi High Court, claiming damages to the tune of rupees one crore, for carrying a news in the paper to this effect. The propriety of this office demanded that Mr. Sorabjee should have avoided entering into a personal litigation, being the highest law officer of the Government of India.

With all the powers conferred on this august office, there are some restrictions, as mentioned under Section 8(b) of the Law Officers (Conditions of Service) Rules, 1987, which provides:

> A law officer shall not advise any party against the Government or in a case in which he is likely to be called upon to advise, or appear for the Government of India.

The Attorney General of India in his own right is leader of the Bar, and is also an ex-officio member of the Bar Council of India. Similarly, the Attorney General of the Queen is the Chief Prosecutor of his country as also the guardian of the traditions and honour of the English Bar. After assuming the office of the Attorney General and Solicitor General, the law officers of the Crown would not engage them in private practice. According to the memorandum declared by Lord Halsbury, the Law Officers of the Crown were merely political officials. To quote:

> It makes the law officers merely political officials, it puts them under an arrangement the acceptance of which with any other client than the Crown would be punished by their having disbarred."

With this clear understanding Sir Richard Webster agreed to forgo the right to engage in private practice, and accepted appointment as Attorney General. Alluding in a public meeting shortly afterwards to his acceptance

of office under the new conditions, Webster said that his constituents would have thought very little of him had he preferred few more thousands a year from private practice to the responsible position of legal advisor to the Majesty's Government.

VII. Ethical Dimensions

Speaking on Ethical Dimension's S.Sahay, a veteran journalist, in his latest article stated:

> After all, the office of Attorney General has received wrongful publicity which even legal victory cannot wholly erase. Mud leaves its stain howsoever faint. Soli Sorabjee has the support of past law officers, but it may be pertinent to point out that M.C., Setalvad, then Attorney General was approached by the princely States to appear before the Executive to argue this case, and the fee offered was over Rs. 1 lakh but he point blank refused to do so. In passing one must sympathise with Sorabjee's lot. Here is a person who has all alone and legally fought for the freedom of the press and by a strange quirk of fate he has been reduced to suing a newspaper for defamation.[6]

Independence of judiciary demands that high standard of principles of courage of conviction, dedication, devotion, aloofness, and impartiality must be adhered to in letter and spirit, both by the Bar and the Bench to ensure the true and practical administration of justice. A fearless and independent judiciary is the very basic foundation of our constitutional edifice. Democracy cannot exist without justice and justice cannot exist without an independent judiciary.

The Law students are the future teachers, lawyers and judges of our country. To educate and enlighten them, of the desirability to maintain certain norms, values and ethics in their career, is the dire need of the hour. The services of the distinguished jurists, academicians and the retired judges can be availed of for teaching of law as well as providing training to fresh law graduates and judicial officers. These steps are very essential to keep rule of law and independence of judiciary in good health.

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6. Pioneer, December 24, 1998.

VERSTEHEN: A FUNCTIONAL IMPERATIVE IN MEDICO-LEGAL CASES†

*Jyotica Pragya Kumar**

'Verstehen', a German word usually translated as 'understanding' or 'comprehension', has been developed into a concept of great social significance by Max Weber who together with Emile Durkheim is generally regarded as the founder of the modern sociology as a distinct social science. Durkheim's attempt to found a science of sociology was based on the scientific positivism of his day, where Weber's intellectual training in neo-Kantian school of philosophy led him to distinguish sociology as a social science from natural sciences.[1] The point of distinction is that, while we might wish to establish universal laws in the natural sciences, this was not the task of social sciences since their interest is in the causal explanation and understanding of social actions in their particular historical contexts. But at the same time, Weber argued, that human society was not a matter of chance but of "probabilities" because human beings mostly act rationally and this make the study of social interaction a science, and *'verstehen'*, an indispensable tool, a method par excellence of sociology for studying people's actions[2].

As a method *verstehen* enables us to have access to the meanings people give to their actions. It consists of placing oneself in the position of others to see what meaning they give to their actions, what their purposes are, or what ends they believe are served by their actions. In this process,

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* Research Scholar, Department of Sociology, Punjab University, Chandigarh.

1. At that time, the neo-Kantian school of philosophy was associated with the names of Wilhelm Windelband and Heinrich Ricket in Germany which distinguished between *phenomena* (the external world we perceive) and *noumena* (the perceiving consciousness).
2. See, Max Weber, THE METHODOLOGY OF THE SOCIAL SCIENCES (Glencoe: Free Press, 1949). This concept forms part of a critique of positivist or naturalist sociology which analyses human action from 'the outside' on the analogy of natural science.

the researchers or social scientists direct their attention towards 'interpretative understanding of inwardness and meaning of social action' as distinguished from direct observational understanding called 'evidenz'.[3] From this perspective, the conception of *'verstehen'* is based on the perceived advantage of the social sciences over the natural sciences. In the case of the latter, comprehension is only mediate; that is, we are concerned only with functional relationship and uniformities of the various elements collectively.[4] Whereas in the case of the former, our comprehension is immediate; that is, we are concerned with the subjective intention of the actors individually.[5] Thus, in the study of a natural phenomenon there is no inside story, and we try to understand it only as a dictum-an expression of law and nothing more; whereas, in the study of a social phenomenon there is always an inside story, a meaning in the human affairs which needs to be comprehended, although we cannot comprehend them fully as these are invariably mutable.

However, there is one perennial problem in understanding a social phenomenon - the problem of 'values', which are implicit in every human action. In fact, it is these values which make human behaviour meaningful, and therefore, these cannot be disregarded in the study of human actions. If this is so, then how to make the study of social actions scientific? In this context, Weberian sociology suggests a solution. It advocates 'value-neutral' or 'value free' approach, which simply means that social scientists should study the social actions objectively; that is, without allowing their own value-judgements to come in. Raymond Aron, a French sociologist, makes this thought clear by distinguishing, 'value judgement' from 'value reference'. According to him, 'value judgements' are personal and subjective. These depend upon the individual's own beliefs and values. Whereas, 'value references' enables us to deal with social problems 'objectively'. What, therefore, according to Aron, Weberian sociology emphasises is that in understanding a social action, we should avoid 'value judgement' and not 'value reference'.

It is in this backdrop suggested that *verstehen* is an indispensable tool for a judge who bears the responsibility of understanding a 'human action' from 'within', rather than merely from 'outside', in the course of dispensation of justice. This is particularly true in medico-legal cases that are increasingly coming to the fore in the wake of commercialization of medico-legal services under the law of consumer protection.

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3. The term 'evidenz' refers to the 'direct observational understanding'.
4. Such as how the Earth revolves around the Sun, or rotates about its axis.
5. Such as, why the doctor performed an operation in a particular way.

In medico-legal cases, the courts are invariably concerned with the activities of the doctors as professionals. A 'profession' involves the idea of an occupation which requires a systematic body of knowledge through specialised intellectual training, high ethical standards, a 'self-less' non-financial orientation of service to the public interest, and autonomy over work. The occupations which are regarded as professions have four characteristics[6]: first, the nature of the work is skilled and specialized and a substantial part of it is mental rather than manual; second, commitment to moral principles goes beyond the general duty of honesty and a wider duty to community may transcend the duty to a particular client or patient; third, professional association regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics; fourth, high status is enjoyed in the community. Thus, the moral commitment to serve the community with wide discretion and professional anatomy is one of the key attributes of the profession, as distinguished from an occupation which is substantially nothing but the production or sale, or arrangement for the production or sale of commodities.[7]

Medical profession in its work orientation is supposed to serve the suffering humanity. It entails exclusive concern with intrinsic rewards and performance of a task which is typically associated with personal services involving confidentiality and high trust.[8] As an organizational form, it includes some central regulatory body to ensure the standards of performance of its individual members, a code of conduct, careful management of knowledge in relation to expertise which constitutes the basis for professional activities, and finally the control of members, selection, and training of new entrants. In India, the medical practitioners are governed by the provisions of Indian Medical Council Act of 1956. The Code of Medical Ethics is made by the Medical Council of India, which regulates the conduct of the members of the medical profession. The Code also provides for disciplinary action by the Medical Council of India or State Medical Councils against a member of professional misconduct. All this shows that the professional activities are qualitatively distinct from the ones in other occupational pursuits, and, thus, are in need of a differential treatment.

However, the increasing commercialization of medical services is causing a shift in the service orientation of some of the members of the

6. See, Rupert M. Jackson and John L. Powell, PROFESSIONAL NEGLIGENCE cited by the Supreme Court in *Indian Medical Association* v. *V.P. Shanta*, AIR 1996 SC 550.
7. Scruttom, L.J. in *Commissioner of Inland Revenue* v. *Maxse*, 1919 1KB 647 at 657.
8. See, OXFORD CONCISE DICTIONARY OF SOCIOLOGY (1994) at 321-22.

medical fraternity from 'commitment ' to 'callousness'.[9] This has led to the spurt of medico-legal cases, accusing the doctors on grounds of deficiency of one kind or the other in medical services. The resolution of the conflict problems between the doctors and the patients by the courts requires a differential approach - an approach which is qualitatively different from the one needed to resolve disputes between the ordinary consumer and the commercial producer. Since the doctors are professionals with an area of wide discretion and autonomy, the courts need to adopt *verstehen* as a methodological tool for examining the validity of their actions. In other words, through, *verstehen* the courts would be able to arrive at the full explanation of a doctor's action.

Alfred Schutz in his PHENOMOLOGY OF THE SOCIAL WORLD (1932), however develops a more elaborate conception by extending Weber's work and exploring the formation of goals from the streams of experience. This leads him to distinguish because motives (which lie in the past experience) from 'in order to' motives '(which point to a future state of affairs that the actor wishes to bring about).[10] In the context of medico-legal cases, this only means, 'because' motives would enable the court to decipher and decide about the doctor's actions contextually; whereas the principle propounded by the court on the basis of which the decision was rendered would serve as 'in order to' motives, that is, a valuable guide for the future.

Besides, there is yet another potential benefit of *verstehen* methodology. While applying the objective laws contextually, the courts are at once enabled to be creative and competent to deal with the increasingly varying situations in a pragmatic manner. Speaking conversely, if *verstehen* is avoided or ignored, we are likely to miss the meaning of the actions, putting thereby the various activities into a broad category, whereas these might be belonging legitimately to different ones.

The potentials of *verstehen* methodology we may now examplify throught the analysis of two very recent Supreme Court decisions that have been flashed across the country by our national press; namely, the *Spring Meadows Hospital* case[11] and the *Apollo Hospital* case[12].

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9. See. Jyotica Pragya Kumar, *Development through Medical Profession in the Wake of Science, Technology and Communication (A Viewpoint in Sociology)*, presented at the XXV ALL-INDIA SOCIOLOGICAL CONFERENCE held under the aegis of the India Sociological Society at Aligarh Muslim University, Aligarh, December 17-19, 1998.
10. See, *supra* n.8 at 256.
11. See, THE TRIBUNE, March 26, 1998, now reported fully as *M/s Spring Meadows Hospital and Another* v. *Harjol Ahluwalia*, AIR 1998 SC 1801.
12. See, THE TRIBUNE, November 17, 1998, now reported fully as *Dr. Tokugha Yepthomi* v. *Apollo Hospital Enterprises Ltd.*, 1998 (6) Scale 230.

In the *Spring Meadows Hospital* case, the Supreme Court held the hospital liable for reducing the life of a young child to a mere 'vegetative state'. Accordingly, it approved the award of Rs. 12.5 lakhs as compensation on grounds of negligence of the hospital doctor in favour of the child by "taking into account the cost of equipments and recurring expenses that would be necessary" for sustaining the said child in that state,[13] and Rs. 5 lakhs in favour of the parents of the child "for their acute mental agony and life long care and attention which the parents would have to bestow on the minor child".[14] This is how the conflict was resolved by the court. However, the use of *verstehen* would enable us to see the story from within and thereby reveal certain facets of the case which otherwise do not come to light. Their articulation, in our view, is of futuristic import as it provides a meaningful direction to the society at large. In this case, *verstehen* methodology requires us to ask in the very first instance, 'why did the parents of the child go to the law court against the hospital doctor?" This question is pertinent in our cultural context, because in India the doctor is regarded as a repository of extreme trust and confidence by the patients, and their yielding of themselves to his judgement is almost unqualified. But in the instant case, the answer to the pointed question is not far to seek. The sequence of the story suggests that the parents of the child must have felt terribly injured by the reckless conduct of the concerned doctor. Firstly, he himself was supposed to administer the injection, which he quite thoughtlessly, delegated this duty to a nurse who was not quite qualified to do the job. Secondly, he himself was not even present at the time when the injection was given to cover up any anticipated consequences like the sudden stopping of the heart. In fact, the absence of the doctor caused the undue delay in reviving the heart which eventually resulted in reducing the child to a mere 'vegetative state'.

It is indeed true that the court approved the award of compensation in favour of the child on grounds of negligence of the doctor, but the amount of compensation, instead of directly relating to the act of negligence, became tagged to the cost of equipment needed to sustain the child in the 'vegetative state'. Suppose the child would have died instead of being reduced to that pathetic state, obviating the need for any expensive equipment. In that case, what should have been the basis for computing the compensation. Nil? Certainly, 'no'. doing *verstehen* suggests that no amount of damages would ever be enough to compensate the irreversible loss. What is sought to be achieved through the award of damages, therefore, is the objective : to recompense the injured feelings on the one

13. *Supra* n.11, para 13 at 1807.
14. *Id.* at 1808.

hand, and to ensure that such a negligent act does not recur. The amount of compensation may, however, be computed in the same manner as the court did in order to recompense the agony of the parents of the child.

Verstehen is this case also enables us to have a peep into the motives of the Spring Meadows Hospital management that prompted them to adopt the so called "humanitarian approach".[15] When the child was discharged from the All India Institute of Medical Sciences, the Spring Meadows Hospital which itself advised the parents of the child to take the child in the pathetic state to the Institute lost no time to make an offer to take care of the child "even without charging any money for the services rendered" by them.[16] The court did disregard the plea of the so-called humanitarian approach of the hospital authorities because, in their view, "the mental agony suffered by the parents" would remain "so long as they remain alive".[17] *Verstehen* on this score, however, allows us to go deeper and discover the underlying 'counterfeit role'. The Spring Meadows Hospital's 'humanitarian approach' was simply a ploy to preclude the impending legal liability arising out of their negligent action. This sort of seeing from within through *verstehen* would enable the courts to come up with articulate solutions which are more conducive to social order and social stability.

We may take now the *Apollo Hospital* case for analysis on the basis of *verstehen*. This is the case of a doctor whose proposed marriage to a young lady was called off on the ground because his blood report testifying HIV (+) was revealed to her by the Apollo Hospital - the hospital conducting the test at the time of his blood donation. The doctor sued the hospital for damages on ground of violation of the Code of Medical Ethics; namely, the disclosure of his HIV (+) status to the lady betrothed to him. After pursuing the Hippocratic oath,[18] which constitutes the basis of the International Code of Medical Ethics,[19] and the Code of Professional Conduct made by the Medical Council of India,[20] along with the guidelines formulated by the General Medical Council of Great Britain on HIV infection and AIDS,[21] the Supreme Court held that the rule of confidentiality is not absolute, because it permits disclosure in the circumstances under which "public interest would override the duty of confidentiality, particularly, where there is an

15. *Id.*, para 14 at 1808.
16. *Ibid.*
17. *Ibid.*
18. See, *supra* n.12, para 7 at 234.
19. *Id.*, para 9 at 234-35.
20. *Id.*, para 10 at 235.
21. *Id.*, para 16 at 236.

immediate or future health risk to others".[22] Likewise, the court rejected the doctor's plea of right to privacy on the ground that it is also "not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals, or protection of right and freedom of others"[23]. Since the lady to whom the doctor was likely to be married was saved by the timely disclosure of his HIV (+) status, the same would thus not be considered violative of either the "rule of confidentiality" or "right of privacy".[24] This is how the doctor's appeal to the Supreme Court was dismissed on the merits.[25]

Verstehen in this case, however, brings to the fore a couple of issues which we consider crucial for driving home the requisite social message. The ruling of the Supreme Court in terms of popular perception simply means that "right to marry is not absolute".[26] This is something whose impact is confined to individuals as individuals, and not individuals as members of collectivity, namely the society at large. But we are given to understand that the role of the Supreme Court is not just confined and limited to resolve the conflict between the two contesting parties before it. It goes much beyond that. Its decisions are said to be "the law" - the real operative law, directing the destiny of the whole nation.[27] But the decision in the instant case does not seem to go that far. It does not critically bring into focus the doings of the appellant who himself is not just an ordinary lay person, ignorant of the potential hazards of AIDS. He knew that he was suffering from HIV (+). He knew of this furious fuming fact much before the proposed marriage to the young lady.[28] And, as a fully qualified surgeon of Grade-I, it must also surely be within his competent knowledge that although he himself was not manifesting the disease symptoms as such at the time,[29] yet he was the potential person to transmit the infection to others, and especially to his would be marriage partner.[30] The legal

22. *Id.*, para 17 at 236.
23. *Id.*, para 27 at 238.
24. *Id.*, para 28 at 238.
25. *Id.*, para 45 at 240.
26. See, THE TRIBUNE, November 17, 1998.
27. Article 141 of the CONSTITUTION OF INDIA commands that the law declared by the Supreme Court of India shall be binding on all the courts within the territory of India.
28. The sequence of events suggests that the doctor came to know about his HIV (+) status on June 1, 1995, when he donated blood, whereas he proposed marriage in the month of August, 1995, see *supra* n.12, paras 3 and 4 at 233.
29. The incubation period of AIDS is said to be as long as ten years.
30. See the case history of the young couple, reported in THE TRIBUNE, January 11, 1999 at 5, under the heading *Quaks 'Spreading' AIDS*, revealing that the husband who died in PGI on October 6, 1998, got infected by his wife, who in turn (having no history of adultry), possibly got the same through blood transfusion and died at PGI about a year ago.

consequences of such an act, however, have been rightly brought by the learned judge in the light of the express provisions of the Indian Penal Code.[31] It is categorically provided that if a person, negligently or unlawfully does an act which he knew was likely to spread the infection of a disease, dangerous to life, to another person, then he would be guilty of an offence, punishable with imprisonment for a stipulated period, or with fine, or with both.[32] Since the appellant doctor was suffering from the dreadful disease of AIDS, his proposed marriage, if fructified, would make him guilty of the offence.[33] It appears that the steps which the doctor had taken towards the culmination of marriage namely the betrothal, with the full knowledge that he was the carrier of AIDS, were not sufficient to hold him guilty under the law. Isn't it strange? What is the point in crying over the spilt milk?

On the revelation of HIV (+) status, the appellant doctor is reported to have been severely criticized and ostracized by several people including the members of his own family and the persons belonging to his community.[34] Consequently, he had to leave his job at Kohima where he was working in the Nagaland State Health Service as Assistant Surgeon Grade-I, and started working and residing in Madras.[35] However, on this count we find no comments or analysis in the judgment of the Supreme Court, although as a matter of first principal it is axiomatic to say, 'he who comes to the court to seek justice must come with clean hands'.

Be that as it may, *verstehen* prompts us to ask: why was the doctor criticized and ostracized by the members of his own family and community? Why was the reaction so strong as made him leave his service as well as home and hearth? In the normal course of life, sociological insights tell us, 'sickness' and 'healing' are well-developed social activities involving publicly organized, say health insurance scheme and large scale hospitals for housing the sick. This is so because illness represents a form of deviance from the normal duties - a deviance which draws sympathy rather than any negative sanction. Infact, within the value system we invariably make the sick person to retire temporarily from his normal duties (sick leave with full pay), and even entrust him to the care of a specialist so that he regains his health. After all, the maintenance of health is considered an

31. See sections 269 and 270 of the INDIAN PENAL CODE.
32. *Supra* n.12, para 40 at 239.
33. *Id.*, para 41 at 240.
34. *Id.*, para 4 at 233.
35. *Ibid.*

overriding practical necessity in all societies.[36] In this respect, particularly in relation to AIDS patients, the judgment of the Supreme Court admirably adds to our understanding.[37]:

> ...the patients suffering from the dreadful disease 'AIDS' deserve full sympathy. They are entitled to all respects as human beings. Their society cannot, and should not be avoided, which otherwise, would have bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them....

But then, in the instant case, it is worth pondering, why did the doctor's own kith and kins acted on the contrary? Instead of sympathising, why did they ostracize him? In the absence of full facts before us, we are left only to surmise and reconstruct the requisite sequence contextually.

The strong adverse reaction of the members of the doctor's own family and community must have been due to his own 'moral failures' some time some where. His picking up of the infective deadly disease must have been, to use the perspective words of the learned judge, "the product of indiscipline of sexual impulse" instead of by catching it, say, while performing an operation as a surgeon.[38] In the latter case, the doctor could not be held personally responsible for his pathetic condition. If that was the causal source of the deadly disease, the societal reaction would have been quite different. The society might have made doctor's recovery from the deadly disease the centre of their prime concern. If it was ' incurable' the society still might have 'prayed to God' to save the doctor to serve his own subjects, if for nothing else. On the other hand, if the doctor was found to be a victim of his own misdoings, his conduct needed to be censured by the Supreme Court in a manner a judge of the court in St. Charles (USA) did most recently,[39] so that it could serve as a warning device. The Supreme Court's condemnation of illicit, immoral and inexcusable acts would have

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36. See, 'Talcott Persons' penetrating analysis on the sick role as a part of a case study of modern medical practice to illustrate the principal elements of the social system in his classic work, *Social System* (1950).
37. *Supra* n.12 para 44 at 240.
38. *Ibid.*
39. See, THE TRIBUNE, January 10, 1999 at 1, under the heading *Injected with HIV*. The judge Ellsworth Cundiff was dealing with a man who injected his son with AIDS virus to avoid paying child support. He convicted him of injecting AIDS-tainted blood into the boy, who was then just 11 months old during a hospital visit in 1992. The child, now seven, was diagnosed with AIDS in 1996. While handing down the maximum sentence (on December 1998), for the first degree assault, the judge said he wished that the sentence could have been tougher.

served as Emile Durkheim puts it, a sort of punishment 'to heal the wounds done to the collective sentiments' by the degrading doctor.

Use of *verstehen* by the courts is, thus, a must methodology. It is indispensable in medico-legal cases, because in that we deal with professionals who enjoy a far greater degree of autonomy and discretion in serving the society. Their doings (and misdoings) cannot be comprehended fully without having the 'inside view' of their activities, and for this the discipline of sociology commends the cultivation of *verstehen* methodology as a part of continuing legal education. Else, the courts would continue to be caught in the vicious cycle of what we term 'teleology' in sociology.

EXPANSION OF SECURITY COUNCIL: INDIA'S CLAIM TO THE PERMANENT SEAT

*V.K. Ahuja**

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...". Thus, they created a new organisation namely United Nations Organisation to prevent future wars. The main purpose of United Nations is to maintain international peace and security, and to that end; to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and is conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace. To carry out this purpose, Security Council was set up as a principal organ of the United Nations.

I. Permanent and Non-Permanent Members

When the plans were being drawn up for the establishment of United Nations to maintain the post World War-II peace, it was considered that those countries primarily responsible for the conduct of war against the Axis would occupy a "special" position within the organisation. It was also realized however, that any plan concentrating the power to maintain peace exclusively in their hands would not easily be acceptable to other nations. As a result, it was decided that the Security Council should also include few other States for a fixed term with lesser powers, elected on the basis of geographical distribution.

The "Big Three" i.e. Soviet Union, the United States and the United Kingdom were expanded to "Big Five" at the same time. Although skeptical of Roosevelt's views of China's ability to play a major role in the post war world, Churchill and Stalin accepted the inclusion of China as one of the permanent members in Security Council. Churchill's insistence upon including France among this small elite group was accepted with somewhat similar skepticism by Roosevelt and Stalin as to the post war

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

position of France.[1] All the five permanent members of this elite group were given the prerogative right to exercise "veto".

II. Veto Power of Permanent Members

At the San Francisco conference, the right of permanent members to exercise a veto provoked a long and heated debate. The smaller States feared that the permanent members could act arbitrarily and render the Security Council powerless to take measures for the maintenance of international peace and security. But the Big Five, unanimously insisted on this provision as vital, and emphasized that they would work in co-operation and the main responsibility for maintaining international peace would fall most heavily on them. Eventually, the other states conceded the point in the interest of setting up the United Nations. Prof. Bowett has also observed:

> The justification for granting the exceptional status to five permanent members lies in the inescapable fact of power differential. In other words, the basic premise was that upon these members would fall the brunt of the responsibility for maintaining peace and security and therefore, to them must be given the final or decisive vote in determining how that responsibility should be exercised.[2]

At the San Francisco conference, it was suggested that a phrase be added identifying the permanent members as those "having the greatest responsibility for the maintenance of peace" to justify the special position accorded to them, but this suggestion was rejected.[3]

Under League of Nations also, the "Principal Allied and Associated Powers" were provided permanent representation on the Council. These countries were France, Italy, Japan, the United Kingdom and the United States of America.[4] The Covenant also permitted the Council, with the approval of the majority of the Assembly, to designate "additional" permanent members. Germany got a permanent seat in 1926 and the Soviet Union in 1934.[5] The United States had never joined the League although President Wilson had inspired and played a vital part for its establishment. The provision of designating additional permanent mem-

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1. Leland M. Goodrich et. al., Charter of the United Nations: Commentary and Documents (New York : Columbia University Press, 1969) at 193.
2. D.W. Bowett, The Law of International Institutions (London : Sweet and Maxwell Ltd., 1982) at 28.
3. UNCIO Documents, XI at 289.
4. Article 4 of the Covenant of League of Nations.
5. H.O. Agarwal, International Law (Allahabad: Asia Press, 1997) at 299.

bers without amending the Covenant has not been repeated in the U.N. Charter. The Covenant of League of Nations also provided for eleven non-permanent seats in the Council.

Contrary to the hopes of framers of U.N. Charter, the members of Security Council instead of being united, divided into two blocks - East and West. This happened because of the cold war which developed between them soon after the World War II was over. The veto power became weapon in their hands. It was used in an unobstructed manner by the permanent members to obstruct the working of Security Council and to make it defunct at several occasions endangering the maintenance of international peace and security. To overcome this unfortunate situation, the General Assembly adopted "Uniting for Peace Resolution" on November 3, 1950 which provides that if the Security Council, because of lack of unanimity of its permanent members, fails to exercise its primary responsibility in the maintenance of peace and security in a case where there appears to be a threat to the peace, breach of the peace or an act of aggression, the General Assembly shall consider the matter immediately with a view to making recommendations to members for collective measures, including in the case of a breach of peace or an act of aggression, the use of armed force when necessary to maintain international peace and security. It is very unfortunate that General Assembly had to adopt such a resolution because of the circumstances created by the use of veto by permanent members and their feelings of non-co-operation. The veto power has thus proved to be a curse for the maintenance of international peace and security on several occasions during cold war.

III. Criteria For the Election of Non-Permanent Members

The U.N. Charter originally provided for eleven members in the Security Council-five permanent and six elected. On 17th December, 1963 an amendment to Article 23 was adopted by the General Assembly which raised the number of non-permanent members from 6 to 10. This amendment came into force on 31st August 1965.

At the San Francisco conference, following criteria was considered for the election for non-permanent members:

> Geographical distribution, rotation, contribution of the members of the Organisation towards the maintenance of international peace and security and towards the other purposes of the organisation, guarantees concerning the active defence of international order and means to participate substantially in it, combinations of elements including population, industrial and economic capacity, future contribution in armed forces and

assistance pledged by each member state, contributions rendered in the second World War, and so on; also special assignment of non-permanent seats to certain Groups of Nations.[6]

Since the aforesaid criteria was not acceptable to the smaller nations, an agreement therefore, reached after further discussion on a compromise solution, embodied in Article 23 (1) which provides that "due regard being specially paid, in the first instance to the contribution of members of the United Nations to the maintenance of international peace and security and to the other purposes of the organization, and also to equitable geographical distribution".

The seats of the non-permanent members of Security Council are allocated according to the following formula : Afro-Asia-5; Eastern Europe-1; Latin America-2; Western Europe and others-2. Non-permanent members are elected for a term of two years and a retiring member is not eligible for immediate re-election. More and more nations are thus admitted to Security Council as non-permanent members.

After discussing in brief the composition and historical background of the Security Council, its now turn for the discussion of present day status of the Security Council.

IV. Present Day Security Council : US Dominance

After disintegration of USSR, Security Council is now being dominated by the United States which is trying to achieve its desired goals by making a mockery of the United Nations.

Following Iraq's invasion of Kuwait on August 2, 1990, US led multinational forces took enforcement action against Iraq in January 1991. Legally speaking, it was not an action taken by the UN forces. The members of the NATO joined US in taking action against Iraq under the authorisation of Security Council. Iraq was made as a testing ground by the US to test its weapons. It is noteworthy that in Gulf War, the coalition forces fired a million rounds of ammunition coated in radioactive material. Heavy metal depleted uranium was used in the battle field. This has brought tragic consequences for the people of Iraq. The genetic plague in Iraq has resulted in the birth of headless or two-headed babies. It has affected plant life too, with huge tomatoes and giant marrows. Since

6. UNCIO Documents, XI at 676-77.

depleted uranium has a long radioactive life, the food chain has been affected there.[7]

When the Gulf war was over, sanctions were imposed on Iraq by the Security Council. UN Special Commission (UNSCOM) was sent to Iraq. UNSCOM's professed goal was to locate and destroy whatever allegedly remains of Iraq's capability to produce weapons of mass destruction-chemical, biological and nuclear. In reality, the Commission-especially since it had been headed by Richard Butler, an Australian diplomat not known for his impartiality, had been dragging its feet and ensuring that the inspection process never reaches an end. The US calculation was that the longer the sanctions remained, the easier it would be to undermine the Saddam Hussein regime.

Iraq had tried hard to satisfy the demands of UNSCOM Inspectors. At the end, however, Butler wrote a report in which he stated relatively small number of instances of Iraqi non-co-operation. The Butler's report was drafted by him in close collaboration with Clinton administration officials, who were interested to make a case for military action. Within 90 minutes of Butler having presented his report to the Security Council in December 1998, the US told UN to pull out its staff from Iraq and began preparing to strike. The actual attacks came a few hours later, even though the Security Council was debating the issue.[8]

In 1998 itself, following terrorist attacks on American embassies in Tanzania and Kenya which claimed lives of number of American people, the US retaliated by attacking the terrorist sites in Sudan and Afghanistan which it claimed were being maintained by the multi-millionaire terrorist Osama-bin-Laden. About 70 Tomahawk missiles were fired from the Arabian Sea and the Red Sea, traversing 1000 to 15000 miles in each case. 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.[9]

The missiles fired on Sudan and Afghanistan destroyed more than the specific target. It is noteworthy that a couple of missiles fell inside the Pakistani territory also. The attacks in Sudan and Afghanistan were justified by the US as actions taken in self-defence.

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7. THE TIMES OF INDIA, December 23, 1998.
8. THE TIMES OF INDIA, December 20, 1998.
9. V.K. Ahuja, *US Attack on Sudan and Afghanistan : Does the Action Fall Under Article 51 of the UN Charter?* III NATIONAL CAPITAL LAW JOURNAL, 1998 at 102.

In 1999, on the initiative taken by the US, NATO forces attacked Yugoslavia on Kosovo issue. The attack was made on the pretext of safeguarding international security and for providing humanitarian assistance in Kosovo. Once again, no UN forces were involved.

Earlier also US has committed blatant acts of aggression in violation of international law. In December 1989, US invaded Panama to arrest the Panamanian leader, General Manuel Noriega, on charges of drug trafficking and help bring "democracy" to Panama. Prior to this in 1983, the US invaded Grenada. The ostensible reason given by the Regan presidency was the protection of US lives, whereas the real aim was to overthrow the Caribbean state's New Jew Movement government and bring the island back into the "western" fold. This aim of protecting American lives has also been invoked by the US to justify its armed invasion in the Dominican Republic in 1965. Other examples of the unilateral use of force by the US or the use of covert means to overthrow unfriendly governments are: Libya (1986), Chile (1973), Iran (1953), Guatemala (1954), Nicaragua (the 1980s) etc.

The US as a permanent member of the Security Council has not played the role which was assigned to it at the time of establishment of United Nations Organization. Rather it has violated international law to serve its interests.

It is interesting to note that US may incur heavy expenditure in attacking a country to serve its interests in violation of principles laid down in UN Charter, but at the same time it is not interested to pay UN dues which according to Mr. Joseph E. Connor, UN Under Secretary for Management, Dues and Other Assessments amount to $ 1.739 billion at the end of August, 1999.[10] There will be no surprise if the millennium starts for the US with the loss of UN General Assembly vote as a result of not paying its dues.[11] However, its permanent membership of Security Council will remain.

V. Expansion of the Security Council

The composition of the Security Council does not accord to the present day reality. Since 1945 when the UNO was established the world has completely changed but unfortunately no changes has been made in the composition of the Security Council except one that took place in 1963, when the number of non-permanent members was increased to fifteen from eleven. Presently, the number of members has gone up from 51 to

10. The Hindustan Times, September 29, 1999.
11. Article 19 of the UN Charter.

188. The permanent members are no longer the only States which have superior military capabilities, resources and influence. In the present changed scenario, the size of the Security Council appears to be disproportionate to the enlarged size and functions of the Organisation. The present number of the permanent members as well as non-permanent members is required to be changed so that it may have equitable and fair representation of all the regions of the world.

The matter for the expansion of the membership of the Security Council was discussed by the General Assembly which on December 4, 1993 decided by consensus to set up a Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council.[12] The Group met for the first time in January 1994 in New York. According to the informal paper issued by the General Assembly virtually all member States of the UN favoured an increase in the membership of the Security Council. But there was no unanimity on the number of seats increased. The Working Group failed to take a decision in this regard in its later meeting held in 1996. In 1995 also, the General Assembly adopted a declaration on the occasion of the fiftieth anniversary of the United Nations which accepted that the Security Council should be expanded in a way that will further strengthen its capacity and effectiveness and enhance its representative character. Diverse factors were cited regarding the criteria for Council membership, such as population, contribution to peace-keeping operations, economic potential, financial contribution, military capability, regional importance etc. Since there was no unanimity on how to proceed in this matter not much progress has been done in this regard.

VI. India's Claim to the Permanent Seat in Security Council

India has put forward its claim to the permanent seat in the Security Council before the world community from time to time. The claim of India is based on sound grounds which are enumerated below:

A. Participation in UN Peace-Keeping Operations

India has played a significant role in carrying out UN peace-keeping operations. Since 1953, India has participated in 28 UN peace-keeping operations during which as many as 88 Indian soldiers and officers have died. Some of the major operations by India have been in Korea, Congo, former Yugoslavia, Lebanon, Somalia and Combodia.

India's commitment to the peace-keeping operations has been such that it has never stopped contributing troops despite the fact that in many

12. Agarwal, *supra* n.5 at 341.

instances, the UN failed to pay salaries of the Indian soldiers in time. For instance, the UN owes money to India for the services rendered by its soldiers in Congo (Zaire) as far back as in 1960. Until October 1998, the UN was estimated to owe $ 58 million to India for its peace-keeping operations. Without waiting for the money to come from the UN, India pays its soldiers UN salaries.[13]

B. Population

India is the most populous state in the world next to China. The population of India is going to touch 1 billion mark which is 1/6 th of the entire world's population.

C. Largest Democracy

India has democratic system of Government and it is the largest democracy in the entire world. Fair and free elections are conducted in India.

D. Economic Power

India is one of the economically significant nations of the world. It is a member of G-15 which represents G-77. Recently, it has accepted the membership of the G-20, which is to be launched in Berlin.[14] To be a part of G-20 implies that the world recognises an increasing global role for India. This is also reflective of the recognition that India makes an important contribution to the evolution of international thinking and consensus on issues of global concern. G-20 would help in facilitating greater interaction between developing and developed countries.

E. Nuclear Power

India conducted its first nuclear test in 1974 and expressed its intention to use atomic energy for peaceful purposes. In May 1998, India successfully conducted a series of nuclear tests at Pokhran and shown the world its nuclear capabilities. India is now a nuclear power. It has now declared its moratorium on further nuclear tests. In its nuclear doctrine, India has expressed its intention of not using nuclear weapons against non-nuclear state. Further, it has always shown interest on a 'no first use' pact with nuclear weapon States. Thus, the military capabilities of India have been enhanced which is significant for playing a role for the maintenance of international peace and security.

13. THE TIMES OF INDIA, October 31, 1998.
14. THE TIMES OF INDIA, October 1, 1999.

F. An Allied State in World War-II

In World War-II, India fought against Axis. Since India was not independent at that time, therefore it could not be considered for the permanent seat in the Security Council. But now when it has emerged as a power on the world map, it cannot be denied what is due to it. Interestingly, Germany and Japan which were enemy States in World War -II are now being offered permanent seats in the Security Council. Although in the changed world scenario, the claim of Germany and Japan to the permanent seat may be considered, the claim of India should not be undermined.

G. Leader of the Developing Countries

India has represented developing countries at various international fora. It is an influential country among the Non Aligned Movement (NAM) countries which constitute majority in the United Nations.

Apart from the aforesaid grounds, it is noteworthy that India became a non-permanent member of the Security Council during 1951-52, 1972-73, 1977-78, 1984-85 and 1991-92[15] and thus contributed immensely for the cause of international peace and security.

VIII. Conclusion

It is high time to expand Security Council to make it more democratic by inducting some more permanent and non-permanent members. New permanent members should not be given veto powers and the present five permanent members should be stripped off this prerogative. Decision of Security Council should be taken by the 3/4th majority of the members present and voting. There should be no difference between the permanent and non-permanent members except to the effect that non-permanent members are elected for a fixed term of two years on rotational basis. The UN Charter should be amended in such a way as to make it possible to take enforcement action against the permanent members under the Charter itself. Such a permanent member should not be allowed to vote in Security Council. Presently, enforcement action against a permanent member is possible only under the Uniting for Peace Resolution, 1950 by the General Assembly. There is no provision in the UN Charter which allows the enforcement action against a delinquent permanent member of the UN Charter. This is a deliberate omission. The principle of sovereign equality which has also been recognised in Article 2 paragraph 1 of the UN Charter

15. Agarwal, *supra* n.5 at 342-43.

must be respected. Financial contribution of permanent members should be redefined. There is a need to reduce the US share as it is the major defaulter.

To free the UNO from the clutches of US and NATO, it is imminent to expand Security Council.

CONSUMER PROTECTION ACT, 1986: STRUCTURAL LOOPHOLES IN THE CONSTITUTION OF CONSUMER COURTS

*Anupam Goyal**

In view of fast global changes and globalization of economy, a need was felt for a comprehensive legislation on consumer protection in India. Though there are some laws which had provisions relating to consumer protection, such as law of Torts; Sales of Goods Act, 1930; Prevention of Food Adulteration Act, 1954; Essential Commodities Act, 1955; Monopolies and Restrictive Trade Practices Act, 1969, etc. yet they targeted on some specific aspects of consumer protection and lacked general characteristics of consumer protection. They were considered insufficient to give the desired result. The MRTP (Amendment) Act, 1984 introduced some provisions for the respite of consumers in the shape of control over the unfair trade practices, but it could not turn up so successful due to the lack of simplicity in procedure. Hence in 1986, the Consumer Protection Act (CPA), was passed to give better protection to consumers. The CPA was enacted with a view to provide, protect, preserve, enforce, and provide speedy remedy to the consumers' rights. The CPA provides a separate enforcement machinery and redressal forum with the aim to avail the consumers, simple and expedite solution to the consumer problems. The CPA has established a hierarchy of special courts known as Consumer Redressal Forums for deciding the consumer disputes, at three levels : 'District forum'[1] at lower level, 'State Commission' at state level[2] and at the union level the 'National Commission'[3].

I. Jurisprudential Questionability of 'Precedent' Application of Higher Consumer Forums' Decisions

The CPA provides a hierarchy of consumer courts i.e. District forum, State Commission and the National Commission. On the basis of the provisions of the Act, relating to the constitution of State Commission and

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

1. Section 10, Consumer Protection Act, 1986, (hereinafter referred to as the CPA).
2. *Id.*, section 16.
3. *Id.*, section 20.

National Commission, a comparison can be made of them, with the High Courts and the Supreme Court of India. The position of State Commissions and the National Commission in their hierarchy (working in consumer sphere) are analogous to that of the High Courts and the Supreme Court (established under the Constitution of India).

High Courts and the Supreme Court are declared 'Court of Record' by the Constitution of India.[4] A 'Court of Record' is a court the records of which are admitted to be of evidentiary value and they are not to be questioned when they are produced before any court.[5] Wharton's Law Lexicon[6] gives the following definition:

> Courts are either of record, where their acts and judicial proceedings are enrolled for a perpetual memorial and testimony and they have power to fine of imprison; or not of records being court of inferior dignity....

The application of doctrine of precedent presupposes the law reporting of the decisions given by the court having status of 'Court of Record'. However, for a decision of the superior court to have precedent application, it is must for the law, containing constitutional provisions of such court, to expressly provide so. It is expressly provided in the Constitution of India that "the law declared by the Supreme Court shall be binding on all courts within the territory of India".[7] Similar provision for High Courts can be traced in Article 225 of the Constitution of India, which provides:

> ...the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges, thereof in relation to the administration of justice in the Court... shall be the same as immediately before the commencement of this Constitution.[8]

Before, the commencement of the Constitution, though no enacted rule was in existence so as to consider the judgment of High Court as precedent yet through judicial decisions, the doctrine of precedent for High Court judgment was established. In a number of cases, the High Court declared the doctrine of precedent and laid down that subordinate courts were bound by the decisions of the High Courts even if the lower

4. Articles 215 and 129 respectively, CONSTITUTION OF INDIA.
5. CONSTITUENT ASSEMBLY DEBATE, Vol. VII at 382.
6. 14th ed., at 275.
7. Article 141, CONSTITUTION OF INDIA.
8. Article 225, CONSTITUTION OF INDIA.

courts did not agree with the correctness of a particular decision.[9] The Law Commission in this regard has observed:

> The decisions of the High Court have not been invested with the authority of law by any enactment. But it is well settled that the courts subordinate to a High Court are bound by its decisions and it is not open to them to refuse to follow the law as interpreted by that High Court. The High Courts have made this clear in a number of decisions and have gone so far as to characterize refusal on the part of subordinate courts to follow their decisions as being tantamount to insubordination.[10]

From the structure and working of District forum, State Commission and National Commission their perspicuously appears a pyramidal hierarchy of consumer courts, yet merely the administrative control provisions[11] and appellate jurisdiction[12] does not give the State Commissions and the National Commission the 'Higher Court' status of having 'precedent' creating power in absence of expressly laid down provisions to that effect, as there are several courts, in strata, in a district where though appeal lies yet the subordinate court can not create precedent for the court lower in rank. Salmond says :

> ...Courts of inferior jurisdiction do not create binding decisions even for courts lower in rank. Thus the magistrates' courts are not bound by decisions of courts of quarter sessions, even though appeal lies from the former to the latter. The county court registrar is not forced to follow previous decisions of the county court judge, even though appeal lies from the registrar to the judge. Courts of inferior jurisdiction are bound only by decisions of courts of superior jurisdiction, e.g., the High Court, Court of Appeal and House of Lords.[13]

State Commissions and the National Commission are nowhere declared the 'Court of Record', nor is there any provision, which invests these high consumer forums with 'precedent' creating power. On such account, the authority of judgments by the higher consumer forums to

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9. *Ramaswamy* v. *Chandra Kotaya*, AIR 1925 Mad 261; *Dhonda* v. *Mishri*, AIR 1936 Bom 95; *Vinayak* v. *Moreshwar*, AIR 1944 Nag 44, 49; *Bankey Lal* v. *Batra*, AIR 1953 All 747; *Rex* v. *Ram Dayal*, AIR 1950 All 134.
10. LAW COMMISSION, XIV REPORT, I at 626.
11. Section 24B, inserted by the CONSUMER PROTECTION (AMENDMENT) ACT, 1993 (w.e.f. 18th June, 1993).
12. Sections 15 and 19 of the CPA.
13. P.Z. Fitzgerald, SALMOND ON JURISPRUDENCE (N.M. Tripathi, 1985) at 158.

follow them is questionable on the basis of jurisprudence. It shall be a curious situation if some day a consumer forum, taking advantage of the lacuna deny to follow the ratio of a decision delivered by its higher consumer forum in a similar case.

In England where most of the law is unwritten and the 'doctrine of precedent' was followed conventionally on the basis of hierarchy of courts, there too, to remove any doubt "Judicature Act, 1873-1875 now modified by the Court Act 1971... finally recognized the courts into a hierarchic structure surmounted by the House of Lords, as the ultimate appellate court. Such a clear pyramid of authority was essential to the operation of any strict doctrine of bindingness"[14]

In India almost all the law is written, a fortiori as well, the principles of jurisprudence demand the laying down of provision to the effect of enunciating higher consumer redressal forums, i.e., State Commissions and the National Commission 'Court of Record' and specifying their decisions to have precedential power for their respective subordinate forums - as it was the intention of the Legislature in creating them in hierarchical manner.

Although section 24B was inserted[15] in the CPA, which gave the National Commission and State Commissions, administrative control on their subordinate courts, yet it is still not sufficient in terms of 'precedent' creating power on the basis of jurisprudence.

II. Majority of Non-legal Experts

The CPA in its composition provisions[16] of the consumer forums at all levels, provides that except the President (who happens to be a legal expert), all other members of any single consumer forum shall consist of persons, "who shall be persons of ability, integrity and standing, and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration."[17] As the provisions provide further, the strength of District forum and State Commission is of three members each and that of the National Commission is five (including the President). Thus, the majority of judges in a consumer forum at any level is of non-legal experts.

14. R.W.M. Dias, Jurisprudence (Butterworth, 1976) at 169-70.
15. *Supra* n. 11.
16. *Supra* n. 1, 2, and 3.
17. *Ibid.*

The intention for having the members from other than the legal profession seems to be that consumer forum should be able to understand and appreciate the over-all technical and social impact while deciding the issues under the Act. But the notion of the Legislature did not turn out to be feasible. A perusal of working of consumer forums having the majority of non-legal experts, has belied the notion behind. There are some cases where absence of legal understanding at the part of the majority of consumer courts resulted in ridiculous situations.

In case of *M/s Sri Anand Ice Factory* v. *The Assistant Divisional Engineer Elec./Operation/Rural/ & Anr*,[18] the State Commission of Andhra Pradesh held:

> When the electric power supply is used for the commercial purpose, consumer dispute is not maintainable before the Redressal Forum.[19]

If further said:

> Since the power used by the complainant is admittedly for a commercial purpose and that, therefore, the complainant cannot be a consumer and is not entitled for any relief under the Consumer Protection Act, 1986.[20]

The judgment was not sound. The supply of electric power[21] comes under the head of "service" in the Act. The phrase "commercial purpose" is applicable to 'supply of goods'[22] only. It does not apply on the 'contract of service'[23] so as to keep the consumer off the remedy under the Act. Nowhere the phrase affects the right of a user of electric power under the Act. "Service" provided under the CPA even when used for the 'commercial purpose' does not strip the complainant of his right to sue as consumer under the CPA.

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18. CONSUMER PROTECTION REPORTER, 1993 (2) 412.
19. *Ibid.*
20. *Ibid.*
21. "Service' means service of any description which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, transport, processing, *supply of electrical or other energy*, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. [emphasis added] — *Supra* n. 1, section 2(1)(o).
22. Section 2(1)(*d*)(i) of the CPA.
23. *Id.*, section 2(d)(ii).

In an incident,[24] in State of Kerala, where the President of a District forum went on leave the senior members who had no legal education, heard and decided cases for nearly two months. There was no question to start any proceedings by the members when it is expressly provided[25] that every proceeding shall be conducted by the President of the District Forum and at least one member thereof. Subsequently, the State Commission declared all their decisions null and void.

In another instance,[26] a case of breach of contract came up before a District forum. The President found that the complainant had originally erred in attempting to repair the television set on his own and damaged certain parts. Despite his protests other two members went ahead and ordered the replacement of the set and Rs. 5000/- as compensation. There have been many other such incidents which took place all over the country.

Our almost half-century chequered experience of judicial system under the Constitution of India has shown that the judicial working with legal experts at all levels has commendably worked even in face of complex and technical issues of medical, engineering, scientific, environmental and geographical importance. No need ever was felt to have a judicial chair, persons specialised in some particular field when matters thereof came in question before the courts.

Exercise of judicial power is a very technical task. Sometimes even legal experts may fall prey to mistaken interpretation. An interesting instance may be given in this regard. A question of law relating to interpretation of section 2(ia)(f) of the Prevention of Food Adulteration Act, 1954 came before the Supreme Court in case of *Municipal Corporation of Delhi* v. *Khacheru Mal.*[27] The section reads :

> "adulterated" - an article of food shall be deemed to be adulterated- if the article consists wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal or, vegetable substance or is insect-infested or is otherwise unfit for human consumption.[28]

The Court interpreted that the phrase "... or otherwise unfit for human consumption" should not be read disjunctively. It should be read

24. THE WEEK, June 12, 1994.
25. Section. 14(2) of the CPA.
26. *Supra* n. 24.
27. AIR 1976 SC 394.
28. Section 2(ia)(f) of THE PREVENTION OF FOOD ADULTERATION ACT, 1954.

conjuctively with, what precedes it. This interpretation meant that if an article be putrid, filthy, rotten or insect-infested it could not be held adulterated unless it was further established to have been unfit for human consumption due to any such factor. In other words a rotten, filthy, putrid or insect-infested article could be consumed without considering it adulterated under the Act, if it was to the extent of not harming in human consumption. This interpretion was incorrect, as the phrase "... or is otherwise unfit for human consumption" should have been read disjunctively with what precedes it. However, in the later case[29] the phrase was read conjunctively and interpretational mistake of the judgment was rectified.

When sometimes the legal experts may be subject to incorrect approach in interpreting the law due to the inscrutable nature of task of interpretation, it is difficult to expect sound judgment from non-legal experts. Though not related to the CPA but in an important recent judgment the Supreme Court considered in *All India Judges Association*[30] case :

> It is neither prudent nor desirable to recruit law graduates, without any training and background of law, as judicial officer.[31]

It further said :

> The practice of law involved much more than mere advocacy. A lawyer has to be familiar with several components of the administration of justice. Unless a person, appointed as a judicial officer is familiar with the working of the said component, his education and equipment as a judge is likely to remain incomplete. To enable a judge to discharge his duties and functions efficiently and with confidence and circumspection, he must have experience as a lawyer.[32]

In the light of above decision, where even the persons having legal knowledge were considered unfit for discharging judicial duties as judicial officer in absence of their being trained as lawyer, the appointment in consumer courts of members devoid of legal knowledge is not appropriate, where they have to discharge awesome judicial powers to punish, interpret the concerned law etc. Secondly, under section 13 of the CPA,

29. *Municipal Corporation of Delhi* v. *Tekchand Bhatia*. (1980) 1 SCC 158.
30. (1993) 4 SCC 288.
31. *Ibid.*
32. *Ibid.*

consumer courts are vested with the same powers as are vested in Civil Courts under the Code of Civil Procedure 1908, in regard of some specific matters.[33]

Expecting of sound judgments from such legally untrained members is difficult in absence of their apprisal of basic ethics of law, objectivity and fundamental tenets of rule of interpretation, where several times, interpretation of various provisions of the CPA and complicated questions of law come before the consumer forums.

III. Conclusion

In the present scenario, all technicalities of law have entered the consumer protection litigation which was thought at the time of the CPA enactment to be purely factual basis simple consumer disputes with little element of law. In view of the Supreme Court's decision in *All India Judges Association*[34] case and the applicability[35] of various provisions of the Code of Civil Procedure, 1908, for the purposes of the CPA and the increasing technicalities of the consumer protection matters under the CPA, the majority of the members having no legal background in consumer courts is not really equipped to adjudicate upon the cases.

Hence, it is incumbent upon the Legislature to bring an amendment to the effect of keeping the majority of legal experts in consumer forums and declaring the National Commission and State Commissions as 'Court of Record" and investing them with 'precedent' creating power.

33. Section. 13(6) of the CPA.
34. *Supra* n. 30.
35. *Supra* n. 33.

THE CONCEPT OF BUSINESS: AN ANALYSIS

*S.K. Kaushik**

I. INTRODUCTION

It is a matter of common knowledge that the law revolves round the power-liberty equation. The law gives a number of liberties to the individuals and a number of powers to the state. If the liberties are abused, the society tends to drift towards anarchy. If the power is abused, the society tends to drift towards monarchy. Existence and proper use of power ensures that there is no abuse of liberties. Existence and proper enjoyment of liberties ensures that there is no abuse of power. Non-abusive presence of both of them is necessary to attain a just order, which in turn can give an optimum quality of life to the individuals in the society. But the power has a potential to eat up the liberties and the liberties have a capacity to extinguish the power. Therefore, it becomes incumbent to maintain a proper balance between the power and liberties in the society. The power-liberty equation should always remain in equilibrium.

This equation can have many factors depending upon the nature of the liberty involved. There can be a liberty to speak and express oneself, or a liberty to form associations, or a liberty to move, so on and so forth; and in each case there will be a counter-balancing power with the Government to check the abuse of each type of liberty. Although in all these factors the power-liberty equation works in the same fashion yet in different factors we have different type of situations to deal with. Psychologically there is no difference in all these factors, but all of them give rise to different set of examples. They are different species of the same genesis. This paper deals with one specific liberty i.e. liberty to do business under Article 19(1)(g) of the Constitution. This liberty is subject to the reasonable restrictions which the State could impose under Article 19(6) of the Constitution. In this specific equation of liberty to do business and the power to control that, the concept of business assumes great importance.

II. OPTIONS

The term business is used under Article 19(1)(g) of the Constitution of India. That Article grants a freedom to the citizens of India. Article 19

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

being a part of the fundamental rights granted under Part-III of the Constitution, freedom to do business becomes a fundamental right of the citizens of India. But the term "business' is not defined in the Constitution. Therefore there remains a scope of debate on the point as to which activities should be included in the concept of business and which should be excluded. The inclusion or exclusion of the activities in the concept of business shall expand or contract the fundamental rights of the citizens of India. The objective is not to make a list of the included and excluded activities. An attempt is made in this paper to find out the basis on which the activities are categorized inside or outside the scope of the term "business". The paper specifically deals with one activity i.e. dealing in liquor.

Every commercial activity has two aspects which can be termed as external aspect and the internal aspect. When there is a sale of something, the exchange of commodity, the transfer of property, the change in the ownership, the mode of payment etc. are the external aspects. And the nature of commodity is the internal aspect. Say for example when Mr. X sells a car to Mr. Y for Rs. 50,000/-, change in the ownership of the car, Mr. X, Mr. Y, Rs. 50,000/- are the external aspects of the dealing and the car is the internal aspect of the dealing. In case Mr. X sells his daughter to Mr. Y for Rs. 50,000/-, the entire external aspect remains the same but the internal aspect is changed. The parties remain the same, the consideration remains the same, the ownership shall change in the same fashion, but the nature of the commodity has changed. The car is replaced by a girl, and that makes a difference! Now, to include or exclude any commercial activity in the concept of business there are two options. One may be looking simply at the external aspect or one may be considering external as well as internal aspect. In other words the concept of business may be based solely on the external aspect or it may be based on external as well as internal aspect of the dealing. If the concept of business is based solely on the external aspect it will be said that both the transactions hereinabove mentioned are business. But if it is based on external as well as internal aspect it be said that the sale of the car is a business activity but the sale of a girl is not a business activity. In other words the concept of business can be based on either solely how the commodity is dealt with or how and what commodity is dealt with. How the thing is dealt with is external aspect and what the thing is the internal aspect.

When one starts looking at what is sold to determine whether that commercial transaction is business or not he, actually, is relying on his moral judgment, When someone says that sale of cars is business but not the sale of children he is looking at what is sold and he is creating a

distinction between cars and children. This distinction between cars and children is based on his moral values and nothing else. It is his moral sense which tells him that children should not be sold. Therefore, as soon as he sees what is sold is children he says that the transaction is not a business. So, looking at what is sold or considering the internal aspect of the transaction is nothing but inviting the moral values to play a part in conceptualizing the term 'business'. This involvement of morality may seem simple in some situations like sale of cars, toys, clothes, children, wives etc. where there can be a consensus on the morality of the transaction. Perhaps the sale of cars, toys, clothes etc. will be held moral and the sale of wives, children etc. will be held immoral consensually. But it will not be easy in other situations e.g. liquor, cigarettes, pornography etc. There will be divided opinions. Even assumingly simple situations may take complicated turn in some circumstances. Sale of children or prostitution is assumingly immoral. But sale of one child by an unemployed farmer during famine to feed the remaining four is moral or immoral? To indulge in a stray act of prostitution to keep the body and soul together is moral or immoral? Experience shows that morality is not only changeable with time and place but it also has a tendency to crack under crunch situations. Actually morality is a kind of an excellence. It is a higher virtue. It undoubtedly makes a person human. But this has a role in the second inning to play; it cannot be played in the first inning. The first inning is about existence. Only when the existence is secured the excellence could be aimed for. When one is confronted with the sale of one child to save the other four, one's rigid notion of morality starts loosening up. When the matter is related with life and death the morality takes a back seat. So few important questions arise—should such an un-objective criteria be allowed to play a part in the conceptualization of the term "business"? Should the concept of business be free from morality or not?

Before discussing what the Supreme Court of India thinks about this the legal difference this morality factor could make should be discussed. It is undoubtedly clear that if the concept of business is based on morality there will be many commercial transactions excluded from this concept and the concept shall be a narrow concept: but if it is free from moral factors there will be many commercial transactions included in this concept and the concept shall be a wider concept. It we adopt the wider approach all type of commercial activities shall become business and therefore there will be a fundamental right to do all type of commercial activities. If the State is willing to prevent those activities the State shall have to pass a law and that law, by virtue of Article 13 of the Constitution, shall have to pass the tests of reasonableness etc. given in Part-III of the Constitution. This

may amount to giving more liberties to the individuals than required to maintain the balance with power. On the other hand if the narrow approach is adopted there shall be activities which will never become a fundamental right and therefore if the State makes a law or passes some order to prevent those activities such law or order shall escape the tests of reasonableness etc. provided under Part-III of the Constitution. This may amount to giving more power to the State than required to maintain a balance with liberties. In other words, the narrow approach gives the State a power to prohibit the activity without justifying the prohibitions under part-III of the Constitution. And the wider approach gives the individuals a liberty to carry on any activity in the name of business howsoever immoral or unethical that may be. So, the narrow approach shifts the power-liberty equilibrium in favour of the State and the wider approach shifts the equilibrium in favour of the citizens. Such equilibrium should be maintained for a just order. Any shifting without counterbalancing creates an unjust order.

III. Judicial Response

The first case is *State of Bombay* v. *RMDC.*[1] The case deals with many aspects of the constitutional law. The paper deals only with one aspect i.e. the conceptualization of the term "business". In this case Bombay Lotteries and Prize Competitions Control and Tax Act, 1948 was challenged as being violative of Article 19(1)(g) of the Constitution and not protected by Article 19(6) of the Constitution. The respondents in this case were carrying on a prize competition through a newspaper. The questions relevant for this paper were: (*a*) whether the activity is gambling or not? And (*b*) whether gambling is covered under Article 19(1)(g) or not? The first question was answered in affirmative. On facts it was found that the element of chance was too high in the prize competition and the element of skill was too low. Supreme Court adopted the view that if the element of chance is much more than the element of skill the activity takes the character of gambling. So on facts the Court decided that the prize competition in this case is nothing but gambling. The second question was answered in negative. The court held that gambling was not covered under Article 19(1)(g). The Supreme Court noted that the texts of Manu, Yajnavalka, Mahabharata,. and Kautilya etc. looked upon at gambling disfavourably. Some Australian and American judgments were also quoted to show the universality of the view that gambling is *res extra commercium* (outside the scope of commerce). The Supreme Court highlighted how this activity destroys the families, how the children, men and women are deprived of material comforts due to this activity. All in all

1. AIR 1957 SC 699.

the Supreme Court allowed the moral factor to play a decisive role in the judgment and decided against the respondent. It is noteworthy that ultimately, as a result of this decision, the imposition of a tax on the said immoral and res extra commercium activity was held valid.

The next case in point is *K.K. Narula* v. *State of J&K.*[2] The commodity involved this time was liquor. There was one restaurant called Glory Restaurant and one hotel called Bliss Hotel. Both of them had a license to sell liquor and both of them were situated in some congested locality of Jammu. There were some complaints against both of them with respect to their locality. Taxing and Excise Commissioner issued a notice to them to shift their business to some other place and refused to grant a renewed licence for the same place under Excise Act, 1958. The Act was challenged as being violative of Article 19(1)(g). It was contended that the right to do business includes a right to sell liquor. The court drew analogy between liquor and *ghee* and held that if dealing in one is business so it should be for the other. The court said that, the morality or otherwise of a deal should not affect the quality of the deal, though it may provide a ground for imposing a restriction on the said activity. Standards of morality should afford a guidance to impose restrictions but should not limit the scope of the right. The court decided that any real, substantial, systematic or organized activity is business. It is noteworthy that ultimately the court upheld the validity of the Excise Act, 1958, the restrictions imposed by that Act being reasonable.

Then comes *Nashrwar* v. *State of MP.*[3] In this case there was one M.P. Act and one Abkari Act, both prohibiting the trade in liquor except to the extent and subject to the conditions imposed by the legislature under them. The Acts were challenged on the basis of being violative of the right to do business under Article 19(1)(g). The court decided that:

(*a*) liquor is a commodity in a class different from other commodities and hence cannot be compared with other commodities;

(*b*) the framers of the Constitution did not intend to give a fundamental right to deal in liquor when they gave a freedom to do business under Article 19(1)(g) which is evidenced by Article 47 of the Constitution which says that the State shall endeavour to bring about a total prohibition on the consumption of intoxicating drinks except for medicinal purposes.

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2. AIR 1967 SC 1368.
3. AIR 1975 SC 360.

Then, recently in *Khoday Distilleries* v. *State of Karnataka*[4] constitutional bench of the Supreme Court has held:

> The right to practice any profession or to carry on any occupation, trade or business does not extend to practicing a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious and is condemned by all civilized societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious or injurious to health, safety and welfare of general public i.e. *res extra commercium* (outside commerce). There cannot be a business in crime....
>
> ...Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is therefore an Article which is *res extra commercium* being inherently harmful.

Almost the same sentiments are expressed in *State of A.P.* v. *Mc Dowell*.[5]

A not very extensive review reveals that the Supreme Court of India has consistently adopted the narrow approach in conceptualizing the term business. There is only one exception i.e. *K.K. Narula's* case in which the wider approach was adopted. Except in *K.K. Narula* some activities are considered *res extra commercium* consistently. Moreover the judgments were either based on moral consideration or legislative intent or medical reasons. So the law as pronounced by the Supreme Court of India could be summarized in these terms: Concept of business does not include commercial transaction in liquor (or even gambling). Therefore, there is no fundamental right to do business in liquor to the citizens of India. And this is so either because of the immorality of the transaction or because of the legislative intent to exclude the transaction from the scope of Article 19(1)(g) or because of the unhealthy effects of the commodity on human beings. In other words the concept of business of the Supreme Court is based upon three elements:

(*i*) morality;

(*ii*) legislative intent; and

(*iii*) health.

4. (1995) 1SCC 575.
5. AIR 1996 SC 1627.

IV. Evaluation

In this part the soundness of the basis of the concept of business of the Supreme Court shall be evaluated. The first factor to be evaluated is morality.

There is one clear advantage in introducing the element of morality while conceptualizing the term "business" under Article 19(1)(g) which is that some hard core immoral activities will be kept outside the scope of the fundamental rights thereby reducing the burden of the State to justify the prohibition of those activities. But as already discussed, there can hardly be any uniform opinion regarding the morality or immorality of any activity. The notion of morality is dynamic. It changes with time and place. Even within the same time frame and within the same geographical, cultural and economic limits the notion of morality takes a different colour but with the slightest change in the factual situation. It cracks under the crunch situations and we tend to classify the same activity as moral which we were hitherto been classifying as immoral. So an introduction of the moral factor creates a problem of drawing a line to divide the crunch situations and the normal situations. This distinction making process, in turn, adds a lot of subjectivity in the system. What situations are crunch situations and what are not could again be disputed. So a lot of uncertainty and subjectivity flows into the system as soon as the moral judgment is allowed to play a role in conceptualization process. This not only defeats one of the objectives of the law i.e. clarity and certainty, but this also gives arbitrary powers to the authorities to control the liberties. This will de-balance the power-liberty equation.

It is submitted that the moral factors should not play a role in the conceptualization process of the courts. This does not mean that immorality should be freely allowed in the society. Any legal concept should be free from morality does not mean that the law should include immorality. An immoral law cannot remain a law for a long period of time. Morality provides nourishment to the legal system. It is a driving force. Without morality the law is something like a body without soul. Morality is essential to keep the law alive. So, one should not be misunderstood as advocating the immorality in the legal system. People necessarily have to subject themselves to the moral views of the society. But the question is who should give voice to the moral view of the society? Judges or the legislators? Legislators are the elected representatives of the people of India and therefore they are more competent to declare the moral views of the society. Judges are appointed by the State so they do not represent the masses and therefore they are not competent to declare the moral views

of the society. So it should be the legislators who should decide the morality or otherwise of an activity. In other words the morality could be a ground for passing a law for the ban of any activity by the legislators. The courts should, then, check the reasonableness, arbitrariness etc. of the law (if challenged) under Articles 19(6), 14 etc. and then declare that law as valid or void. The courts should confine themselves to the technical job of testing the constitutionality of the laws. This will ensure a proper exercise of power by the legislators as well as by the courts. The former is there to give voice to the views (including moral) of the society by passing laws and the later is there to check the constitutionality of the enacted laws. This also maintains a division of power, which in turn ensures a check on the abuse of the power. If the judges decide cases on their moral considerations that would amount to a merger of the office of the legislator and that of the judge which would create an undesirable concentration of power.

Now one may ask that when the judge tests the reasonableness of a law he does so by allowing his moral consciousness to play a part in the testing process. So, if ultimately the judge would include his morality in testing the reasonableness of a law what's the harm in allowing him to do so in the conceptualization of the term "business." The answer is very simple. If the judge conceptualizes the term "business" on the basis of his morality he would keep those activities outside the scope of the term "business" which he would consider immoral and then he would not apply the tests of reasonableness vigorously to find out the *virus* of any law. In fact he may not apply the tests at all, and uphold the law, as a valid law only because of his conviction that the activity banned by that law is immoral. That means a law may be upheld as valid without being checked on the tests of reasonableness. One should remember that every law should not only be in conformity with the standards of morality of the society but it should also be in conformity with the standards of reasonableness of the Constitution. For example, if a law bans an activity declaring that as immoral, this is a voice given to the public morality by the legislators. It is then the duty of the judges to check whether there is a sufficient nexus between the objective of the law and the provisions of the law or not. It is their duty to check whether what is proclaimed by the legislators is actually done in the enactment or not. Whether crunch situations are taken into consideration or not. Whether the enacted law provides for the monitoring of the created authority or not. Whether relevant facts are considered and irrelevant ignored or not etc. This is the task the judges are supposed to perform while checking the reasonableness of the enacted laws. This task has to be performed without any reference to the morality or immorality of the activity banned in the law. If they allow the moral considerations to play

a role in conceptualizing they may conclude that the activity banned is immoral and therefore it is beyond the fundamental rights and hence there is no requirement of testing any further. So the law which is ideally required to conform to the standards of morality as well as reasonableness will conform only to the standards of morality. That way an unreasonable law may be held valid only because it was in conformity with the morality of the society. For example: the Central Government passes a law which prohibits homosexuality declaring that as immoral; and that law creates an authority which could put homosexuals to death without a fair trial. Now, such a law may be giving voice to the morality of the society; nonetheless this will be an unreasonable law for violating the principles of natural justice (no body should be condemned unheard). But if the judge allows his moral consciousness to play a role in conceptualizing homosexuality and is of the conviction that the activity is immoral, then he may not test the reasonableness of the punishment and the procedure given under the law vigorously. And he may uphold an unreasonable law as valid. On the other hand if he does not allow his moral judgement to intervene he, in all possibilities, will strike down the law as unreasonable in punishment and procedure, even if it was giving effect to the morality of the society.

The law should pass through the filter of morality as well as the filter of reasonableness. Both the filters are of different kind to separate different type of impurities. The filter of morality has to be applied by the legislators and the filter of reasonableness has to be applied by the judges. If the judges also apply the filter of morality and if the law happens to pass through that filter (which is very likely since the law has already passed through the same filter in the hands of legislators), it is feared that the judges, then, may not apply the filter of reasonableness properly or they may not apply the filter of reasonableness at all. Consequently, single filtered law may be served in the society where it should actually be double filtered law.

The result of serving single filtered law instead of double filtered law will be that the liberties of the individuals will not be properly protected. The liberties which should be curtailed on the basis of morality as well as reasonableness will then be curtailed solely on the basis of morality. This will result into more power in the hands of the State and relatively lesser liberties in the hands of the individuals thereby disturbing the much required balance between them.

There is one more thing worth noticing. It is clear from the above discussion that gambling, selling-liquor etc. is treated as immoral and therefore *res extra commercium*; but either a tax is imposed on that activity

and that is allowed to be carried on by the individuals or the State has taken over the activity and carried that on exclusively. This seems to be confusing. If an activity is immoral how that could be allowed to be carried on after paying taxes. Can the payment of taxes change the character of the activity? Moreover, if the activity is immoral why the State carries on the same activity unashamedly? That means if an individual is doing something then that is immoral but if the State is doing the same thing that becomes moral. It is difficult to digest. If something is *res extra commercium* being immoral it should be so for the individual as well as the State; it should be so notwithstanding payment or non-payment of taxes. There is no scope for the regulation of the immoral activities. They can't be regulated by imposing taxes on them or by taking them over by the State. There are only two choices viz. either ban them altogether or don't call them immoral. If some activities are called immoral and then are either allowed after receiving taxes or carried on by the State under it's ownership then that means the State is earning money through immoral activities.

Actually there is a lot of confusion in the mind of ordinary citizens of India; and the legislators and judges are no exception. People consume liquor and they feel guilty. Neither they stop consumption nor they accept it as any other food item. Consequently liquor becomes stigmatized but remains a lucrative item for earning profits. As far as the bad effects are concerned nobody understands that ghee, sweets, meat, rice, potatoes etc. have an equally bad effect on human health. Moreover, it is not the liquor alone which creates addiction. One can be addicted to any food item and the result will be equally harmful. So there is, practically speaking, no difference in liquor and other food items. But people don't accept this. The net result is that the commodity is treated *res extra commercium* but nevertheless sold by the State, it being a revenue generating item. The legislature and the judiciary should gather courage to treat liquor at par with other food items and perfectly moral. So they should pass the laws regarding liquor on the presumption that the commodity is not *res extra commercium* but dealing in liquor, nevertheless, requires regulations as all other perfectly moral activities require. And then the judges do amoral testing of laws with respect to liquor to find out whether they are reasonable or unreasonable.

The second factor to be evaluated is legislative intent. To base the judgment on the legislative intent is undoubtedly a sound technique of the interpretation of statutes. That meaning should be given to any law which the makers of that law intended to give. It is clear that the Supreme Court is trying to discover the legislative intent with respect to the scope of the term "business" under Article 19(1)(g) with the help of Article 47 of the

Constitution. Article 47 is a directive principle of State policy which requires the State to raise the level of nutrition and the standard of living and to improve public health. And for that purpose it requires the State to bring about the prohibition of the consumption of liquor except for medicinal purposes. The Supreme Court is reading Article 19(1)(g) with Article 47. Their logic is that since the legislators wanted the State to bring about a prohibition of the consumption of liquor except for medicinal purposes therefore they could never have intended to include the dealing in liquor in the term "business" under Article 19(1)(g). The interpretation is not free of controversy.

Article 47 is based on the understanding of the legislators of the effect of liquor on the health of human beings in 1940's. And their understanding was based on the scientific knowledge of that time. It should be kept in mind that all the statutes are meant to operate in continuum. They are presumed to remain valid in all the successive time frames. If in the time frames next to the making of the laws the knowledge or understanding of science improves we can't presume that the legislators intended to bind the successive generations with their outdated understanding. So, either the law should be adapted by giving a progressive interpretation to it or it should be changed.

The legislative intent in Article 47 was to improve the health of the public. Since their knowledge at the time told them that liquor deteriorates health they specifically mentioned that commodity to be prohibited in Article 47. Had they been aware of modern scientific understanding about liquor they would never have said so. Therefore, combined reading of Article 19(1)(g) and Article 47 can never give the meaning that liquor should be excluded from the concept of business even if that does not deteriorates health. And it does not always deteriorate health more than any other food item.

The legislative intent is clear from the State action. State never stopped selling liquor except for some time in some areas; then how can we say that the legislators intended to make that commodity *res extra commercium*. So the legislative intent is not properly found by the Supreme Court. The legislative intent cannot be said to exclude liquor from the concept of business.

As far as the third factor i.e. health is concerned, without going into the details of the medical journals, it may be pointed out that the modern scientific knowledge is clear on this point. 30 ml of liquor daily, relaxes the heart, brings down the cholesterol level and minimizes the risk of heart attacks. A moderate consumer of liquor is even more safe from heart-

attacks than a teetotaller. It also reduces the risk of kidney stones.[6] Therefore, the health factor relied upon by the court does not hold good in the conceptualization of the term "business".

V. Conclusion

The concept of business can be wide or narrow depending upon the exclusion or inclusion of the morality in the concept. The Supreme Court has generally adopted the narrow approach because of three reasons: morality, legislative intent and health. The following objections emerge:

1. subjectivity;
2. judges may be tempted not to test the reasonableness of the laws properly;
3. contradiction in the State actions.

The legislative intent is not correctly discovered inasmuch as moderate consumption of liquor is not a bad habit. Therefore, the foundation of the concept of business of the Supreme Court is fragile and has a potential to tilt the power-liberty equlibrium on the side of power. The concept of business should be kept free from moral considerations as far as possible. If it becomes inevitable to include morality it should be included by the legislators through laws. The judges should confine to the amoral testing of the laws. Morality should be included, if at all by the judges, in considering the reasonableness of the law and not in conceptualizing any term. The interpretation should be given to the law which is in accordance with the modern scientific knowledge. Legislative intent should be adapted so that the statutes may operate in continuum.

6. See Times of India, August 16, 1999.

BOOK REVIEW

HUMAN RIGHTS AND REFUGEES : PROBLEMS, LAWS AND PRACTICES. By Manik Chakrabarty. New Delhi : Deep & Deep Publications Pvt. Ltd., 1998. Rs. 500/-, ISBN 81-7100-987-5.

The flight of people in quest of refuge is as old as history and so are the inevitable sufferings of the up-rooted and homeless. Forced by man's inhumanity to man, to flee the ravaged lands of their birth, they are in search of a dignified existence, following only one law—the law of survival. Refugees are human beings undergoing traumatic experiences. Wars and many other millitary and political conflicts have brought in their wake a countless number of uprooted, including millions of refugees in search of new homes. The international legal regime for the protection of refugees evolved and developed after the end of the second world war and the establishment of the United Nations, in order to cater primarily to the situation of refugees displaced from their home countries by the war.

The book under review is an authoritative work on refugee. It contains seven chapters including introduction and conclusion. In the first chapter 'Introduction' the author gives an introductory remark on the problems of refugees by giving some historical backgrounds, referring to international conventions on refugees, discussing the role of United Nations High Commissioner for Refugees (UNHCR) and raising certain controversial questions which have been answered by him in the following chapters.

Chapter II of the book deals with international human rights laws. In this chapter, the author refers *inter alia* to rights proclaimed in the Universal Declaration of Human Rights, two international covenants of December 1966—International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, Convention relating to the Status of Refugees 1951 and Protocol 1967, Convention relating to the Status of Stateless Persons of 1954. The author also refers to the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and African Charter on Human and Peoples Rights, 1981 etc.

These conventions and many others have been referred to in the context of refugees. However, the author has failed to discuss the rights mentioned in these conventions in an elaborate manner. Only a birds eye view has been given to these significant Conventions in this chapter.

In third chapter entitled "Determination of Refugee Status : Analysis and Applications", the author deals with brief historical outline of the evolution of the refugee definition. The author examines "refugee" as defined by the various international instruments. The author further discusses the problems concerning the determination of the refugee status and how this status is terminated. The author in this chapter, does not discuss the problems of internal refugees who have moved from one part of the State to another. The discussion is confined only to the international political refugees, who move from one State to another.

According to author, the 1951 United Nations Refugee Convention, an important instrument in the development of refuge law does not suit the present situations. On the issue of who exactly merits protection under international refuge law, the author suggests a two-fold approach. First, more specific criteria must be developed, in order to eliminate the ambiguities of the 1951 Convention definition as far as possible and second, the Convention definition must be applied uniformly. According to author though the Convention, may not provide an answer to many of today's problems, but it should not be a reason for questioning its basic value in the sphere for which it was intended.

In chapter four, the author gives a survey of international humanitarian assistance for refugees. According to author, the number of people of concern to UNHCR has increased in recent years: 17 million in 1991, 23 million in 1993 and more than 27 million at the beginning of 1995. The author writes further that the total voluntary funds expenditure related to 1992 activities amounted to $ 1701. 9 million and in terms of volume of activities and related expenditure 1992 therefore represented a record year in UNHCR's history. The author also discusses the regional assistance programmes of UNHCR. Once again the author has failed to update data.

In fifth chapter, the author discusses Indian position on legal status of refugees. According to author, as of 31st August 1996, there were some 2,38,000 refugees in India comprising 1,08,000 Tibetans; 56,830 Sri Lankans; 53,465 Chakmas from Bangladesh; 18,662 Afghans; and 1043 refugees of other nationalities. In addition, there were also considerable number of Bhutanese of Nepali origin and Burmese.

The author points out that India is neither a party to the 1951 UN Convention on Refugees, nor its 1967 Protocol. Further, there is no Indian law establishing asylum or refugees status. The Government of India handles refugee matters administratively, according to internal domestic and bilateral political and humanitarian considerations. UNHCR has no formal status in India and it is usually permitted to deal only with nationals

from countries not bordering India. According to author, India does not offer permanent resettlement to refugees. Law dealing with refugee problems in India consists of the Rehabilitation Finance Administration Act, 1948, the Constitution of India, the Foreigners Act, 1946, the Registration of Foreigners Act, 1939, the Extradition Act, 1962, the Passport Act, 1967 and a few decisions of the Supreme Court and various High Courts.

In the sixth chapter entitled "Humanitarian Assistance for Refugees in India", the author discuss in detail the humanitarian assistance given to refugees from Tibet, East Pakistan, Sri Lanka, Chakma refugees from Bangladesh, Afghan refugees, Iranian refugees and Burmese refugees who came to India from time to time.

According to author, Indian philosophy is a universal philosophy of love, compassion and brotherhood, and it is therefore, despite its failure to ratify the 1951 Refugees Convention and the Protocol of 1967, India fulfilled its international obligation by providing all kinds of protection to the refugees who entered into its territory.

The author concludes his study by suggesting that Indian Government should now seriously consider to establish a permanent mechanism and procedure for handling the refugee issues in India based on a solid legal framework. It should ratify the 1951 Refugee Convention to play a rightful role in the shaping of enduring global policy towards refugees.

The book under review is a good effort by the author on an important subject which has gained tremendous significance throughout the world in the recent past. However, the author has failed to update his data at some places. It is expected therefore, that the author will go in many future editions of the book by updating his data and covering the latest developments.

Needless to say that the book is useful for law professors, judges, advocates, researchers, law students and others. It is worth keeping in all the libraries. The book has been priced at a very reasonable price of Rs. 500/-. It is highly praiseworthy on the part of the publishers Deep & Deep Publications Pvt. Ltd. who have beautifully published the book on a topical issues.

V.K. Ahuja*

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

LAW CENTRE-II, FACULTY OF LAW UNIVERSITY OF DELHI
(Foundation, Growth and Development)

*Harish Chander**

Our Centre was the only Institute when it was opened to give the concept of South Campus which was only at the planning stage at the time in the year 1971. Initially, only 1st Year of the LL.B. Course of the Faculty of Law started in the month of August, 1971. We were only six teachers initially which were sufficient enough to give proper training to the students of the Centre.

The present Professor-in-Charge was the first one to join the Centre as a Lecturer in Law.

To start with Dr. A.S. Bedi was transferred from Campus Law Centre as Reader-in-Charge of Law Centre-II. He continued for eight months as Reader-in-Charge and was the Founder Reader-in-Charge of Law Centre-II. However, due to special circumstances, Dr. A.S. Bedi resigned as In-charge and came back to Campus Law Centre. We still remember his services rendered to the Centre.

Then we had the privilege, after about two and a half years, to have Prof. Upendra Baxi who was considered as a good scholar and had come from Australia and had worked with Prof. Julius Stone who was one of the most learned Jurist and was known as international authority on jurisprudence in the World. Under the leadership of Prof. U. Baxi our Centre grew in the right direction, both in teaching and research.

As stated, we were the first Institution established in South Campus implementing the plan for South Campus of the University of Delhi. We were the Institution which deserved to have a proper building at the South Campus itself. At that time renowned scholar Prof. Amrik Singh was the first Director, appointed for the South Campus. There cannot be any doubt about the scholarship and talent of Prof. Amrik Singh. However, he lived for a short duration as Director of South Campus because he was

* Professor-in-Charge, Law Centre-II, Faculty of Law, University of Delhi.

honoured by being appointed as the Vice-Chancellor of Patiala University, Panjab.

Then we had the honour to have Prof. K.B. Rohtagi, when he was appointed as the Director, South Campus. At that time the South Campus had two rented buildings in South Extension and the office of the Director, South Campus, Prof. K.B. Rohtagi, was also at the South Extension. He was really interested to provide proper site and building for Law Centre II at the South Campus. It is unfortunate that because of some administrative problems in the University building could not materialise for Law Centre-II at that time.

By this time our first batch of LL.B. students came out very successfully compared to the batches of other Centres of the Faculty of Law. And by this time Prof. U. Baxi became the Dean, Faculty of Law. So Mr. Baldev Kohli was appointed as the Reader-in-Charge of the Centre. Under his leadership, though there was no deterioration in the academic standards, but he being a soft person, did not move towards achieving the goal of having a building for our Centre. Though there was no proper facilities and infra-structure and building for Law Centre-II at South Campus, its teachers did their work with sincerity and keen interest.

Upto this time there was no principle of rotation for Professor-in-Charge of the Centre and so some of the In-charges went for years together and this process went on.

Then again we had the opportunity when Professor K. Ponnuswami was appointed as the Dean, Faculty of Law. It is because of his vision and proper academic understanding, he thought that even In-chargeship should be rotated like the Deanship. On this basis, Prof. Tahir Mahmood was appointed as the Professor-in-Charge. After him Prof. A.K. Koul was appointed as Professor-in-Charge of the Centre. During his tenure he tried his best to see that the building for Law Centre-II should made and we were fortunate enough to have Prof. U. Baxi as the Vice-Chancellor of Delhi University who had worked with us as a reverred colleague at Law Centre-II. At that time even the foundation stone was laid down on a site at South Campus for the building of Law Centre-II. We were also informed that a grant of Rs. One crore was sanctioned by the U.G.C. for building of Law Centre-II at the South Campus. We really wonder what went wrong with the plan after Prof. U. Baxi resigned as Vice-Chancellor of the University.

Right from this time our Centre developed academically. Our students were toppers in the University and our teachers like Prof. Tahir Mahmood in Family Law, Prof. Gurdip Singh Bahri in International Law, Prof. A.K. Koul in Trade Law and Prof. Harish Chander in Criminology and

Jurisprudence, Comparative Labour Law were known not only in India but even abroad for their writings and reputation. Now we have come to know that in the site meant for our Centre, where foundation stone was laid down, has come up the Administrative Block of the South Campus. It may be mentioned that Prof. Balbir Singh provided Chairs (costing Rs. 1,50,000/-) for the building of the Centre. These chairs are still lying in the South Campus.

We have made utmost earnest efforts for procuring the building for Centre-II for training our students for LL.B., LL.M., Ph.D. and help other Centres of the Faculty also. Our teachers are renowned teachers not only in the University of Delhi but abroad also. So our Centre has maintained international standards both in academic life, teaching and research inspite of the fact that we work under stress without proper infra-structure and proper building.

Today is the age of Globlisation. In this direction, we have already started our "National Capital Law Journal" which is very popular not only in India but abroad also because it maintains international standards. As the facilities like internet, computerisation, proper auditorium etc. are essential in this age of Globlisation, we urgently need our own building for the Centre.

After having our own building for the Centre, we will be able to provide leadership to the legal fraternity not only in India but also abroad by having social scientists and good researchers who should be able to lead the international community in the field of Law and Social Sciences. Because the age is of Globlisation and we are inter-dependent on each other that is why many collaborative Institutes are coming not only in India but abroad also.

Our teachers are very dedicated, our students are really serious which come from basically South Delhi and also include students upto the level of High Commissioners who are basically living in South Delhi. In fact some of them want to study day classes at our Centre due to high standards of our Centre. Some of the students travel long distances to study in our Centre. Therefore, we deserve a proper building at the South Campus to start both day classes as well as evening classes.

We hope our goal will be achieved.

God Bless us.