NATIONAL CAPITAL LAW JOURNAL

VOLUME V, 2000

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PROFESSOR-IN-CHARGE'S PAGE

It gives me immense pleasure to present the fifth issue of *National Capital Law Journal* to the Bar, Bench and the academic community in India and abroad. Our *journal* though published for the first time in the year 1996 has gained popularity among the academic community, lawyers and the judges. In fact, many Judges of the High Courts and Supreme Court of India have personally appreciated the contributions by the scholars from various parts of the country in our *journal*.

We are proud and happy that the contributors of this issue include Justice Arun Madan of the Rajasthan High Court, Shyamlha Pappu, Senior Advocate, Supreme Court of India and Amarjit Singh Chandhiok, President of the Delhi High Court Bar Association. Their valuable contributions would further strengthen the reputation of our *journal*.

I, personally, as Professor-in-Charge, am very much indebted to all the contributors for their valuable contributions in our *journal*. I also thank the Editorial Committee of the fifth issue of the *National Capital Law Journal* for doing difficult task of editing the *journal*. Inspite of our best efforts, may be some mistakes might have remained in the *journal* for which I hope the readers of this *journal* will forgive us. We welcome critical comments and views from our readers to improve the *journal* in future.

Law Centre II,
Dhaula Kuan,
New Delhi 110021.

Professor Harish Chander
Professor-in-Charge

NATIONAL CAPITAL LAW JOURNAL

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BOOK REVIEWS

EDITORIAL

The Editorial Committee is immensely pleased to place the fifth volume of the *National Capital Law Journal* in the hands of our esteemed readers. The Committee is encouraged at the overwhelming response of the contributors and regrets that it has not been possible to include all the papers in the present issue due to space constraints. The issue is devoted to the analysis of legal problems of topical interest and covers wide range of areas, namely, custodial torture, judicial reforms, international trade, constitutional law, procedural law, environmental law and legal reasoning.

The scholarly contributions of academicians, judges, senior advocates, research scholars and students have enormously enriched the present issue of the *journal*. Prof. Subash C. Raina has conducted indepth empirical study to highlight the intricate problem of custodial torture in police stations. The paper of Prof. Raina demonstrates the combination of empirical and doctrinal approaches in the projection of the causes of custodial torture and areas of improvement. Justice Arun Madan has focussed on the growing needs of the society which call for review and updating of laws. Justice Madan's paper on "Judicial System and Reforms" examines the status of judiciary as an essential organ of the State, delays in disposal of cases, role of investigating agencies, appointment and transfer of judges, role of legal education, public interest litigation and projects the need for continuous reforms. Justice Madan emphatically reiterates that the law is imperfect and it would continue to be imperfect even if it were made by a committee of archangels. This calls for continuous reforms in the judicial system which should be tailored according to the growing needs of the mankind. The paper on "Legal Status of Precautionary Principle in Environmental Jurisprudence" crystallizes the conceptual shift from assimilative capacity principle to precautionary principle, basis of precautionary principle and operationalisation of precautionary principle. The paper projects that Protocol to the Biodiversity Convention concerning Biosafety adopted on 29 January 2000 gives expression to precautionary principle inasmuch as it provides that a decision to refuse import of goods can be taken even in the absence of full scientific certainty regarding the extent of potential adverse effects. This constitutes the application of precautionary principle which implies that measures for environmental protection cannot always wait until it is known with certainty that deleterious effects will occur. The inclusion of precautionary principle is important in the light of recent controversies in the context of the World Trade Organisation (WTO) where scientific uncertainty was not accepted as a good defence to impose environment-related import restrictions. Anupam Goyal has contributed

an interesting article wherein he has brilliantly evaluated the GATT/WTO decisions to examine extraterritorial application of GATT Article XX(g). Ravi Sharma Aryal, in his article points out that wildlife trade has been a flourishing illegal business in India and argues that Wildlife (Protection) Act of 1972 is incapable to deal with India's obligations under the Convention on International Trade of Endangered Species of Wild Fauna and Flora.

The notes and comments are of great significance and importance and are based on serious legal research. The paper entitled "Combating Corruption in India" by Justice Arun Madan is based on his presentation at the National Seminar organised by the Law Commission of India and Criminal Justice Society of India on 29 April 2000 at New Delhi. Justice Madan has critically analysed the legislative measures in India to combat corruption and highlighted inbuilt delays in criminal justice system in India as well as the futility of the requirement of prior sanction. While commenting on the malady of governance in our country, Prof. Harish Chander laments that highest functionaries of our country hide bad governance and malady of corruption in our society which has deep roots in criminalization of politics and nexus between corrupt bureaucratic functionaries. In his brief contribution, Prof. Harish Chander has suggested measures to come to grips with the complexities of issues in the area of governance. Shyamlha Pappu, Senior Advocate, has examined the role of the Constitution Review Commission and pointed out that among the eight core areas identified by the Commission for scrutiny, the Supreme Court has already pronounced on the enlargement of fundamental rights in Part III by specific incorporation of the freedom of the media, right to compulsory elementary education, right to privacy and right to information and therefore any enlargement of fundamental rights would not be necessary at this juncture. Amarjit Singh Chandhiok, Senior Advocate, has critically analysed the amendments in the Civil Procedure Code which is a product of well thought-out efforts and experimentation extending over more than half a century. He has rightly pointed out that the Code has, on the whole, worked satisfactorily and has evoked the admiration of many distinguished jurists. The real question is how far the amendments in Civil Procedure Code have removed delays in dispensing justice and to clear arrears in the courts. What has been done to the procedural system by these amendments is against the course of justice, argues Chandhiok. Pawan Chaudhary 'Manmauji', an advocate and prolific writer, has contributed a paper on "Indian Judiciary Towards 21st Century" which gives detailed account of judiciary, judicial independence, law and justice. He argues with his usual persistence that justice will become a casualty if people's will power to change the social system is not ignited. Gitanjali Nain's comment on "Religious Practices *vis-a-vis* Noise Pollution" is topical, interesting and gives critical analysis of the judgment of the Supreme Court in *Church of God (Full Gospel) in India* v. *K.K.R. Majestic Colony Welfare Association* wherein the Apex Court has pronounced on the issue whether use of loudspeakers, voice amplifiers, beating of drums which create

the problem of noise pollution should be allowed to continue within the enjoyment of right to freedom of speech and expression and that of religion. The contribution of Arunima Dhar, LL.B. student, gives detailed account of environmental audit and discloses the quality and standard of research undertaken by the students studying at Law Centre-II. Lastly, Jayna Kothari's paper on "Reasoning by Analogy" is interesting, scholarly and academically stimulating.

The members of the Editorial Committee of the *journal* have consistently worked hard to maintain international standard of the *journal*. The untiring services rendered by Dr. Kiran Gupta, Dr. Pinky Sharma and Mr. V.K. Ahuja in editing the *journal* are commendable and deserve appreciation. The contributors of the *journal* also deserve to be congratulated for writing scholarly papers which have been published in the *journal*. It is hoped that the *journal* will prove useful in legal research, writing and dissemination of legal awareness.

The printers of the *journal,* Shivam offset Press, deserve appreciation and thanks for publishing the *journal* qualitatively and expeditiously.

Professor Gurdip Singh
Editor

CUSTODIAL TORTURE IN POLICE STATIONS : CAUSES AND AREAS OF IMPROVEMENT

*Subash C. Raina**

Custodial violence by police in India is an undeniable fact while difference of opinion can exist on the quantum and frequency of occurrence. The extent of the use of custodial violence/torture by police is authenticated by the newspaper reports as well as the rate at which directions are issued by National Human Rights Commission (NHRC) to States for compensating the hapless victims of police torture. The magnitude of the police torture is confirmed by the following statistics too.

During 1995-96 the number of custodial deaths have been 444 (including 136 deaths in police custody and 308 in judicial custody) which doubled its tally to 888 in 1996-97 (including 188 in police custody and 700 in judicial custody). In Metropolis of Delhi which is the seat of two important National level institutions meant for the protection of rights of its citizens (Supreme Court and NHRC) the magnitude of the police torture exists in alarming proportion as is evident from the Table below.

Deaths in Custody

Year	PC	JC	Total
1994-95	02	21	23
1995-96	07	33	40
1996-97*	05	19	24

Source : ANNUAL REPORT OF NHRC 1995-96, 1996-97.
PC = In Police Custody
JC = Judicial custody
96-97* = The figures in 97 are only upto March 1997 (Ist three months of the year).

The data reveals that the rate of custodial deaths from 1994-95 to 1995-96 have almost doubled and in case total figures of 96-97 at an average of 8 per month (24 for three months means average of 8 per month) are added it

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could mean 96. Thus in the year 1996-97, it has again increased twice than in 1995-96. The rate of custodial deaths, therefore, in Delhi from 1994-95 to 1996-97 (3 years) have increased four times. The data regarding custodial violence in Delhi by police is further corroborated by the cursary glance over the complaints received by vigilance branch of Delhi Police against police officials for various methods they (police) use against the accused mostly during investigation.

Year	Beating	Extortion and Corruption	Misuse of authority
1995	36	67	47
1996	40	94	63
1997	21	62	41
1998	27	55	68

Source - VIGILANCE BRAND, P.H.Q., Delhi Police. Data includes complaints both substantiated and not substantiated.

The above statistics is a tip of an iceberg and does not depict the real magnitude of the problems because statistics of torture and death in police custody are mostly suppressed and only a few cases filter through the sieve for the consumption of the public. In the words of Prof. Upendra Baxi, "by the very nature of the activity, illegal violence by police is difficult to document scientifically. It is, therefore, only through reports of commissions of enquiry, judicial decisions, scholarly analysis and official reports, work of the NGO's, media and lastly the fearful attitude of the citizens towards police that we learn about the varities of the police torture."[1]

Torture seems to be an established practice of the police which they use against the accused. Much of the existing literature and a host of researches carried relate more to the extent of this practice and its possible condemnation because it is barbaric, and against humanity. Little efforts in India have been made both at micro and macro levels to know the causes of the practice of torture by police.

In the present micro level research author through empirical method has modestly attempted to focus on the causal factors of torture and suggest improvements necessary to arrest this practice in police station by

1. Upendra Baxi, CRISIS IN INDIAN LEGAL SYSTEM (Delhi, Vikas Publishing House) at 26.

inducting viable alternative methods. Needless to say that the use of this type of research was found suitable in order to combine reasoning with observation and conclusions with justification.

The present study has been undertaken with two broad objectives in mind.

(*a*) To know from the investigating officers themselves about the use of torture and intimate causes which can be attributed to the use of this practice; and

(*b*) To find out as to what interventions at this stage can be made so that torture in police custody is arrested.

The locale of study is National Capital Territory of Delhi (N.C.T.). Delhi which is the capital of India got its independent statehood (with restricted powers) on 2nd of January 1992. One specific feature is that the Police in N.C.T. of Delhi is not under the control of the State Government (as in other states as per the constitutional scheme that police is in the state list) but directly under the control of Union Government (Central Government, Ministry of Home Affairs, Government of India). Delhi has an area of 1483 sq. kms. comprising of 591.99 sq.kms of urban area and 891.1 sq.kms of rural area. It has a population of 93.70 lakhs (as per the Census of 1991). The estimated population of Delhi as on 31st of October 1998 is 120.51 lakhs.[2]

For the purpose of Policing and Administration, Delhi (N.C.T.) has been divided into three (03) ranges. Each range for the purpose of policing is looked after by one Special Commissioner of Police and one Additional Commissioner of Police. Each such range has three (03) districts, i.e. ($3 \times 3 = 9$) 09 districts exists in all. Each such district is headed by a Deputy Commissioner of Police and assisted by two Additional Deputy Commissioners of Police. Each district on an average is divided into four (04) sub-divisions. One Assistant Commissioner of Police is incharge of each sub-division ($9 \times 4 = 36$ sub-division). Each sub-divison has 3-4 (on an average 03) police stations. Thus in N.C.T. there exist one hundred six (106) police stations (including 05 police stations at Bus Terminus; 03 at Railway Stations and 02 at Airports). The total police strength (all ranks) as on 1998 in N.C.T. is 55938 consisting of 45996 as executive police only.

Delhi as an area of this research has been choosen because it is easy to communicate with the respondents in simple Hindustani, a language known to the author. Further being well acquinted geographically and having easy

2. See, STATISTICAL ABSTRACT, 1977-1996, Directorate of Economics & Statistics, Old Secretariat, Delhi at 10.

mode of transport, it was possible to carry this research within stipulated period, with limited budget.

For the purposes of this systematic study by applying simple random sampling technique one police station from each sub-division i.e. 36 police stations (excluding these which are at the Airport and Railway Stations) were included. To avoid bias and to have fair representation from each police station six (06) investigating officers through purposive random sampling have been included in the group of respondents. Thus, in all 216 investigating officers were selected, out of which 16 officers were not available during the period of study due to some official reasons, therefore, the sample size was reduced to 200 investigating officers of Delhi Police. Care with regard to age, religion/caste, educational qualifications, residential and marital status and service experience of respondents was taken while including them in the sample so as to reduce the chance of error to the maximum degree. However, 3.5% (07) female investigating officers do not form the part of the respondents.

The study is based on following three hypothesis:

(*i*) The use of torture by police is due to institutional attributes.

(*ii*) Personality traits tend to motivate police officer to resort to torturous methods of investigation.

(*iii*) Societal and administrative factors contribute to the use of torture in police stations.

For the purposes of this research, the variables use have been operationalized to give them the meaning and connotation which can be measured and analysed statistically.

I. Methodology

For the collection of primary data, a structured, close ended interview schedule was devised, carrying questions on various aspects ranging from individual problems to social and organizational ones. Thus, information was elicited from the sample selected through preferences on factors in each group (social, individual, administrative and organizational). Responses received were portrayed and analysed on sociometric matrix. The sociometric score received have been added to indicate their status of preference (desirability for contributing for the cause) in descending order.

The whole such data has been placed in Tables No. I to IV and represented through bar diagrams.

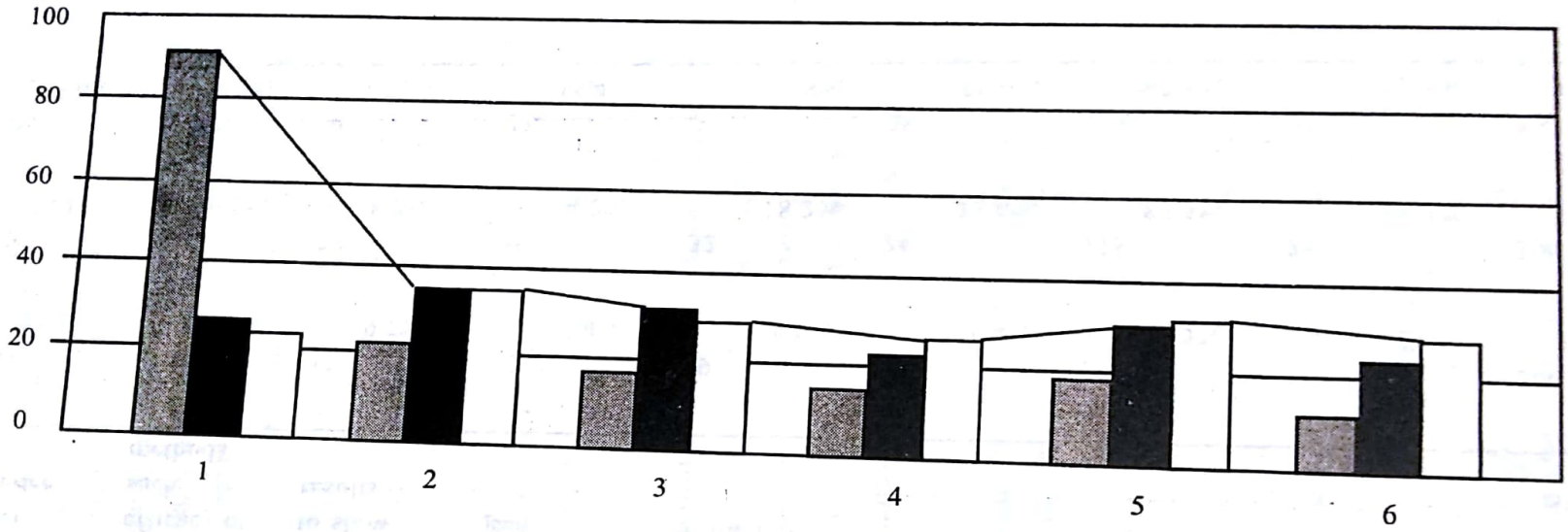
TABLE IA

Preference - wise responses to personal factors and torture in Police Custody

Prefer-ences	Stress due to over burden	Faith in the efficacy of such methods	Over-enthusiasm to show results	To have monetary gain	Professional incompetence of the I.O.	Power intoxication	Total	Not responded	Grand Total
I	93	21	17	13	19	12	175	25	200
	53.1%	12.0%	9.7%	7.4%	10.8%	6.8%	87.5%	12.5%	100.0%
II	26	36	32	25	32	24	175	25	200
	14.8%	20.5%	18.2%	14.2%	18.2%	13.6%	87.5%	12.5%	100.0%
III	24	36	30	27	33	28	175	25	200
	13.6%	20.5%	17.1%	15.4%	18.8%	16.0%	87.5%	12.5%	100.0%

TABLE IB

Frequency of respondents (preference wise) and personal factors



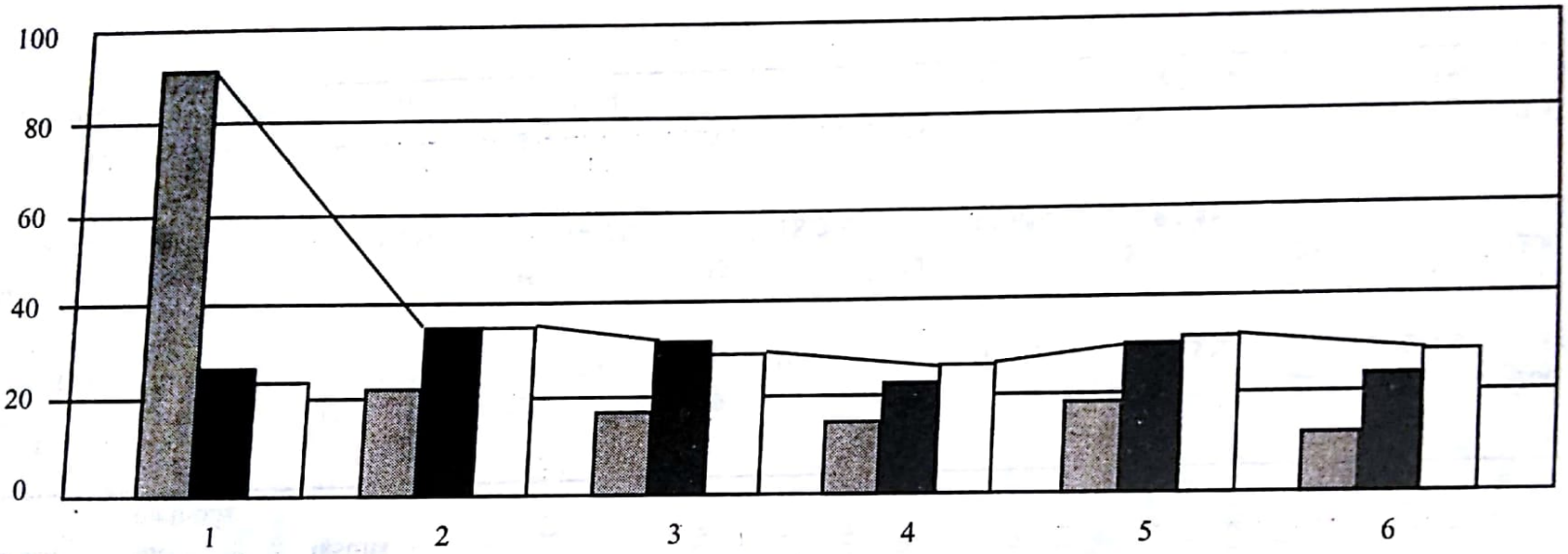
1. Stress due to over burden
2. Faith in the eficacy of such methods
3. Over enthusiasm to show results
4. To have monetary gain
5. Professional incompetence of the I.O.
6. Power intoxication

Preference

1.
2.
3.

TABLE IB

Frequency of respondents (preference wise) and personal factors



1. Stress due to over burden
2. Faith in the eficacy of such methods
3. Over enthusiasm to show results
4. To have monetary gain
5. Professional incompetence of the I.O.
6. Power intoxication

Preference

1.
2.
3.

Data thus tabulated has been analysed and interpreted. Primary data has been supported by the secondary sources wherever possible for logical presentation.

Out of the total 200 respondents 175 (87.5%) have responded in affirmation while 25 (12.5%) have not responded.

II. Individual Factors

In Table I, respondents who have responded in affirmative have given preference wise individual presume factors which contribute to the use of torture during investigation as follows. In first preference 93 (53%) have attributed it to stress due to over burden, 21 (12%) to faith in the efficacy of such method, 19 (10.8%) to professional incompetence of investigating officer, 17(9.7%) to over enthusiasm for showing results, 13(7.4%) attribute it to monetary gains and 12(6.8%) have attributed the same to power intoxication of investigating officer.

In second preference 36(20.5%) hold faith in the efficacy of such method responsible for torture, while equal number 32 (18.2%) attribute it to over enthusiasm to show results and professional incompetence of investigating officers respectively, 26 (14.8%) contribute it to stress due to over burden, 25 (14.2%) to monetary gains, and 24 (13.6%) to power intoxication.

In third preference majority 36(20.5%) hold faith in the efficacy of such method responsible for torture, followed by 33 (18.8%) to professional incompetence, while 30(17.1%) attribute it to over enthusiasm, 28 (16%) to power intoxication, 27 (15.4%) to monetary gains and 24(13.6%) speak that stress due to overburden is responsible for the same.

The gross sectional view of the Table reveals that among the primary presume factors stress due to overburden, faith in the efficacy of such methods, over enthusiasm and professional incompetence of investigating officers mostly contribute to the persistence of custodial violence in police stations while the monetary gains and power intoxication are the secondary factors responsible for the same.

The overall analysis reveals that excessive work load is the primary cause among the personal factors supported by other individual factors in proportionate amount. There seems to be enough of truth in the fact that excessive work load (asking the police to perform different roles than the one which is its primary and routine duty) results into the fatigue and that in turns causes many physical and physiological problems. The one which is prominent is the stress and the police man therefore works under an anxiety syndrome. Working under this syndrome, therefore, results into the use of

violence against accused to get the minimum of the results which are expected of him as an investigating officer within the dead line fixed and little or no alternate means at his hand. Thus, in absence of alternate methods the investigating officers also develops faith that this method (brutal) is the only efficient method to reach to the dregs quicker.

III. Social Factors

A policeman does not work in vacuum, but in the society of which he is a part. He therefore performs his duty within the society and obviously certain societal stimuli are bound to effect on his working. The responses in Table II preference-wise given indiscrete that majority 40 (22.8%) place criminalisation of politics in this preference responsible for the use of torturous methods by police against accused in police custody, while 34 (19.4%) attribute to over expectation of public from police, 27 (15.4%) to political pressure or interference in the working of police, 25(14.2%) to increase of violence in the society and 19(10.8%) equally to rampant corruption in society and negative role of the press and 11(6.2%) to ambivalent attitude of public.

In second preference too 33 (18.8%) and 30(17%) shows rampant corruption in society and political pressure in the working of police responsible respectively while 25(14.2%) equally attribute it to increase of violence in society and over expectation of public from police. However, 23(13.1%), 20(11.4%) and 19(10.8%) speak that it is the negative role of the press about police, criminalisation of politics and ambivalent attitude of public respectively, which contribute to the use of reforessive methods by police against accused in custody.

In third preference 32(18.2%) respondents equally attribute it to the political interference in police working and negative role of the press / media while 26 (14.8%) hold rampant corruption in society followed by 24 (13.7%) holding criminalisation of politics responsible, 21(12%) attribute it to increase of violence in society, 20(11.4%) to over expectation of public from police and 19 (10.8%) to ambivalent attribute of public.

In broader perspective the Table reveals that their (Policeman's) normal working is effected by the political interference, which the political people (wielding political power) exert on police to provide protection to the criminals with whom they are in hand and glove. Thus protection of criminal by politicians and its reciprocity by criminals (criminalisation of politics), has a direct bearing on the functioning of police. The investigating officer therefore is compelled to use all violent methods against even an innocent accused where he has to work as per the whim and wishes of men or groups wielding political power.

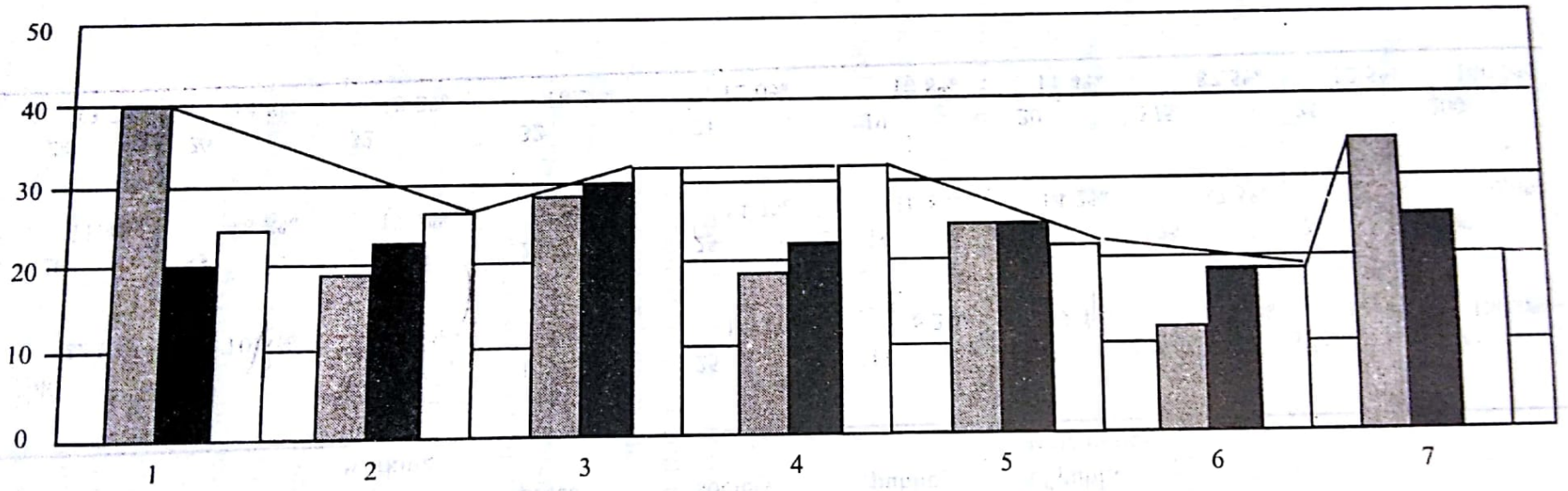
TABLE IIA

Preference - wise responses to societal factors and torture in Police Custody

Prefer-ences	Criminali-sation of Politics	Rampant corruption in Society	Political pressure in police working	Negative role of press	Increase of violence in society	Ambivalent attitude of public	Over expectation of public from police	Total	Not responded	Grand Total
I	40	19	27	19	25	11	34	175	25	200
	22.8%	10.8%	15.4%	10.8%	14.2%	6.2%	19.4%	87.5%	12.5%	100.0%
II	20	33	30	23	25	19	25	175	25	200
	11.4%	18.8%	17.1%	13.1%	14.2%	10.8%	14.2%	87.5%	12.5%	100.0%
III	24	26	32	32	21	19	20	175	25	200
	13.7%	14.8%	18.2%	18.2%	12.0%	10.8%	11.4%	87.5%	12.5%	100.0%

TABLE IIB

Frequency of respondents (preference-wise) and societal factors



1. Criminalisation of Politics
2. Rampant corruption in Society
3. Political pressure in police working
4. Negative role of press
5. Increase of violence in society
6. Ambivalent attitude of public
7. Over expectation of public from police

Preference

1.
2.
3.

Violence in society is on increase while the number of police force is not sufficient at the same. This is further compounded by the fact that public are expecting too much from the police ignoring the circumstances and condition within which police functions. Thus limited number of police and over expectations from public make the police man to resort to all brutal methods of investigation to keep up its image and try to give quick result to satisfy the public because the third degree is the only quickest and easily available method to an investigating officer. Once he by this method attempts to give some results the press (media) instead of highlighting the condition under which police works directs its accusing needle towards the police. Thus without looking to the societal pressures the police is victimised by all those who wield power; whether political, crimino-political or otherwise. The brutal methods of investigation, therefore, are directly the results of these politico-criminal friendly relationship which respondents have attributed as the major societal factors.

IV. Organisational Factors

Police is part of the whole police organisation. It, therefore, has to work as per its set patterns and to keep the prestige of the organization always up. While doing so sometimes he has to use all possible force (brute as well as otherwise) against the accused.

Majority of respondents, 64(36.5%) have given first preference to demand of quick results irrespective of means as the factors contributing to custodial violence followed by 53(30.2%) to lack of awareness and means to know the health of the accused, while 23(13.1%) attribute it to show of professional competency by undue emphasis on statistics, 18(10.2%) to lack of accountability of investigating officers and 17(9.7%) to conditioning within the organisation.

In second preference 50 (28.5%) attribute it to show of professional competence by undue emphasis on statistics, followed by 46(26.2%) and 43 (24.5%) to demand of quick results irrespective of the means and lack of awareness and means to know the health of the accused respectively, while 20(11.4%) and 16 (9.1%) to conditioning within the organisation and lack of accountability of investigating officer respectively.

In third preference again show of professional competence by undue emphasis on statistics has received support of majority of respondents 55 (31.4%) as the main cause followed by 38(21.7%) and 32(18.2%) to demand of quick results irrespective of means and conditioning in the organization respectively. 27(15.4%) attribute it to lack of accountability and 23(13.1%) to lack of awareness and means to know the health of the accused.

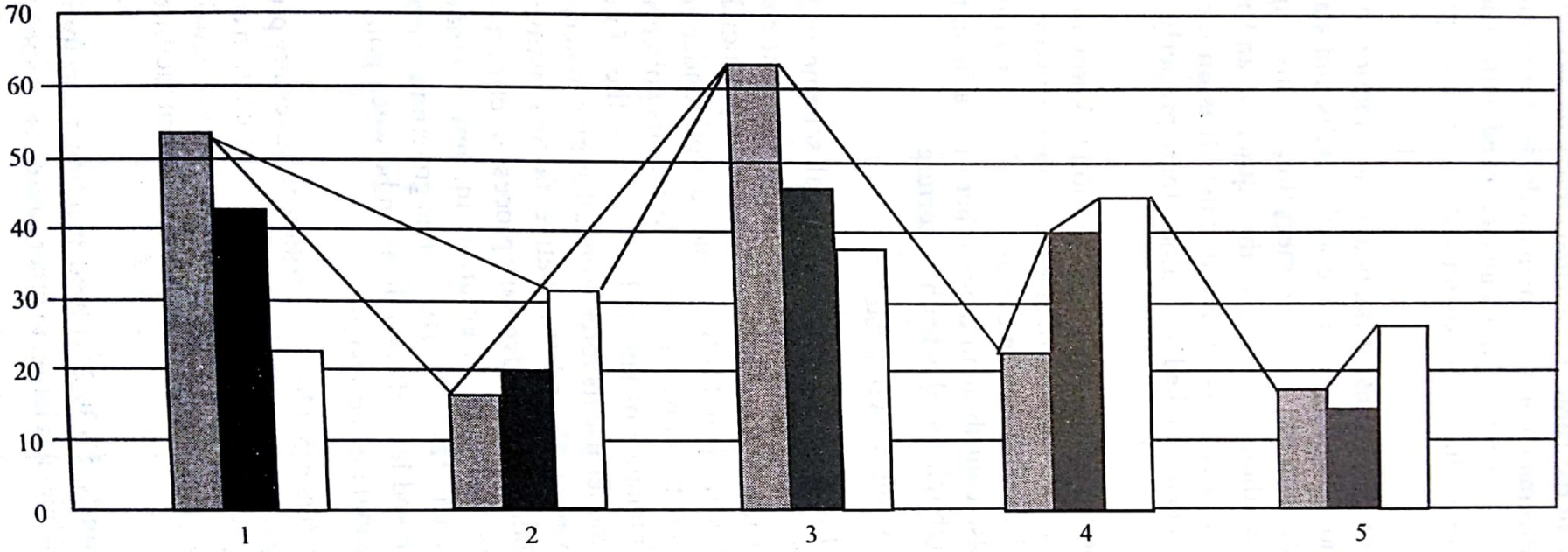
TABLE III A

Preference - wise response to organisational factors and torture in Police Custody

Prefer-ences	Lack of awareness and means to know the health of the accused	Conditioning within the organisation	Demand of quick results irrespective of the means	Show of professional competency by undue emphasis on statistics	Lack of acountability of the I.O.	Total	Not responded	Grand Total
I	53	17	64	23	18	175	25	200
	30.2%	9.7%	36.5%	13.1%	10.2%	87.5%	12.5%	100.0%
II	43	20	46	50	16	175	25	200
	24.5%	11.4%	26.2%	28.5%	9.1%	87.5%	12.5%	100.0%
III	23	32	38	55	27	175	25	200
	13.1%	18.2%	21.7%	31.4%	15.4%	87.5%	12.5%	100.0%

TABLE IIIB

Frequency of respondents (preference-wise) and organisational factors



1. Lack of awareness and means to know the health of accused
2. Conditioning within the organisation
3. Demand of quick results irrespective of the means
4. Show of professional competency by undue emphasis on statistics
5. Lack of accountability of the I.O.

Preference

1.
2.
3.

A gross sectional view of the Table reveals that among the organisation factors influencing the policeman to use inhuman methods of investigation demand of quick results irrespective of means coupled with show of professional competency by undue emphasis on statistics occupy place of prominence.

The hierarchy of police is such that it is always the superior officers, directly upto Ministry who are concerned more with results and statistics rather than the means to acquire the same. To meet this the investigating officer always feels that method of torture is the quickest and results oriented technique to reach to conclusion true or false. It is on the same basis that statistics also been crooked up rather than properly being maintained.

Police lack all such facilities and also the orientation to know in detail the health condition of accused at the time of arrest and apprehension. Thus the number of deaths which may take place due to lack of these facilities in the organizational setup also contribute to the number of deaths in police custody which the press highlights as the death by torture.

V. Administrative Factors

Police is in the State List as per the constitutional scheme in India. However, Delhi Police is working under the Union Government because Delhi was a Union Territory till 1992 and police has not been yet transferred to the state. Police in every state as in Delhi too has to work under certain administrative mechanism i.e. the Government always treats police as one of its main organs for maintenance of law and order. It is, therefore, the duty of the Government to modernise its force from all angles to keep pace with the social change. Among the administrative factors majority of respondents 63 (36%) attribute it to the adversary process of criminal trial, 45(25.7%) to deficient facilities of orientation in new methods of investigation, while 35(20%) and 32 (18.2%) relate it to government inaction in reforming of police force and lack of co-ordination between police and various other organs of criminal justice system.

Similarly in second preference, 53(30.2%) attribute to adversary process of criminal trial and an equal number relate it to lack of co-ordination among various organs of criminal justice system while opinion is almost equally 35 (19.5%) on factors like inaction for police reform and deficient facilities for orientation.

In third preference majority 53(30.2%) hold inaction for reforms in police as the primary cause while in relation to other causes the respondents are equally divided.

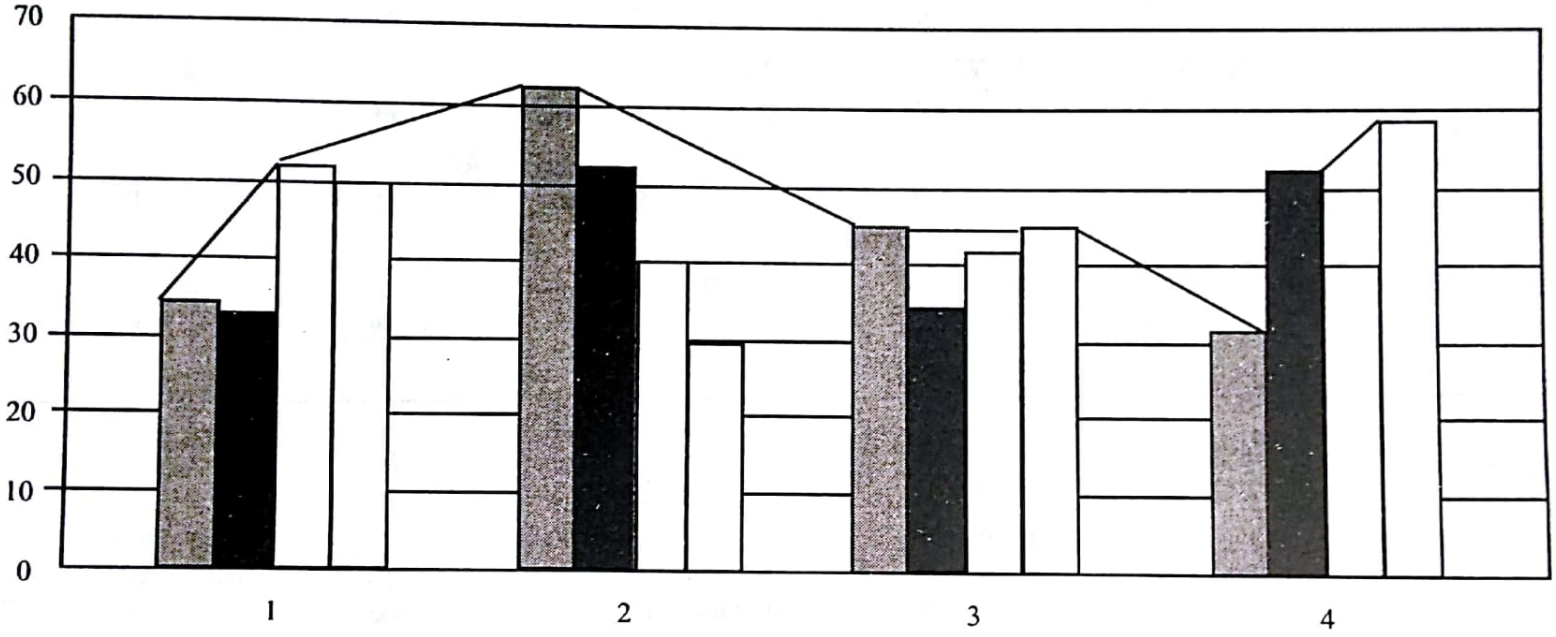
TABLE IV A

Preference - wise responses to Administrative factors and torture in Police Custody

Prefer-ences	Reforms of police force and governmental inaction	Adversary process of criminal trial	Deficient facilities for orientation in new methods of investi-gation	Lack of Co-ordination between police and various other organs of criminal justice system	Total	Not responded	Grand Total
I	35 20.0%	63 36.0%	45 25.7%	32 18.2%	175 87.5%	25 12.5%	200 100.0%
II	34 19.4%	53 30.2%	35 20.0%	53 30.2%	175 87.5%	25 12.5%	200 100.0%
III	53 30.2%	40 22.8%	42 24.0%	40 22.8%	175 87.5%	25 12.5%	200 100.0%
IV	50 28.5%	30 17.1%	36 20.5%	59 33.7%	175 87.5%	25 12.5%	200 100.0%

TABLE IVB

Frequency of respondents (preference-wise) and administrative factors



1. Reforms of Police force and Governmental inaction.
2. Adversary process of criminal trial.
3. Deficient facilities for orientation of new methods of investigations.
4. Lack of coordination between police and various other organs of criminal justice system.

Preference

1. ▓
2. ■
3. □
4. □

In fourth preference, 59(33.7%) attribute lack of co-ordination among various agencies of criminal justice system as the main reason, followed by inaction in reforming police force 50(28.5%), while 36(20.5%) and 30(17.1%) relate it to deficient facilities in orientation of new method of investigation and adversary process of criminal trial.

The overall view of the Table place lack of co-ordination among various agencies of criminal justice system and adversary process of criminal trial among primary gross factors with sluggishness of the Government to initiate police reforms and lack of orientation in new methods of investigation in the secondary Group of administrative causes. Therefore, police in absence of support from other agencies of criminal justice system has no alternative but to resort to short cuts including the use of barbwire and inhuman methods of investigation.

Further even after the investigation due to the adversary trial process having irksome formalities of evidence and procedure result more in the acquittal of the accused. The police feel demoralised due to long pending trial with little rate of conviction. Working under pressure even anxious for his self image as protector of society as well for his career prospects policeman gets further frustrated by the breakdown of judicial system. He gets alienated from the public and has no moral authority, therefore is bound to sink into brutality.

The inaction of the government to modernise or reforms the police force is further exhibited by the fact that no legislative reform has taken place either in the Criminal Procedure Code or Indian Police Act the two weapons which give discretionary power to police for investigation of an accused.

Further due to the faulty procedures of recruitment upto the level of police personnel which matter most to the public i.e. upto level of inspectors, mostly the recruitment rules are flouted to suit to the will of the political bosses/parties. The recruitment is done on caste or region basis. Due to number game in Parliament and legislatures preference is given to those who have strong voting lobby, thus competency, merit and other necessary qualification for the job are neglected. Even after this the institutes created for the purpose of equipping policemen with knowledge of new techniques of investigation are only ornamental or symbolic both at state and Central levels. The police training schools even if exist are deficient of the staff and the resource personnel who can make some contribution of making investigating officers aware about latest techniques of investigation. The recruited cop, therefore, has no option but to follow a traditional, dogmatic method of investigation which he imbibes while in the

company of his seniors or what we call as part of conditioning in the organisation.

VI. Conclusion

To conclude the following broad conclusions are drawn :

Multiple causes exists which are responsible for the use of torture in Police Station (Custody).

(*a*) Excessive work load leads to fatigue which causes stress therefore a policemen works under an anxiety syndrome.

(*b*) No alternative methods have been made available to police either because of governmental inaction or deficient orientation, therefore, he believes that third degree method (torture) is the efficacious method of investigation.

(*c*) To show his authority, policeman always feels intoxicated with power. He also use this power over-enthusiastically against the accused in most barbaric methods.

(*d*) From appointments to promotion the political interference works. This is so deep that policeman's routine work is subject to whims and wishes of political power.

(*e*) Criminalisation of politics is responsible for demoralising influence on police working—policeman with no moral authority has no alternative but to behave violently to keep up his self and organizational prestige.

(*f*) Increase in violence and rampant corruption all around too influence the mind of the policeman to find out his way and existence by use of his authority.

(*g*) Press (media) in India too lies to the tone of power groups, therefore is not objective with respect to police.

(*h*) Demand of quick results by superiors and undue emphasis on statistics without means results into short cut — barbaric/violent methods of investigation.

(*i*) Police as a force is not equipped with all relevant mechanism of testing an accused about his health at the time of arrest or apprehension.

(*j*) Lack of co-ordination among various organs of criminal justice system coupled with long pending disposal of cases resulting mostly in acquital leaves the police demoralised, dejected with no alternative but to sink in brutality.

(*k*) In-action by the government to modify the laws relating to powers and procedures of investigation too contribute to the continuity of this practice.

Keeping in mind the broad findings of the present research the following improvements have been suggested.

The torture in police stations takes place mostly when an accused or suspect is arrested, either for a cognizable or a non-cognizable crime. The main purpose of the use of torture is to make accused confess his guilt and help the police to build up a case for prosecution. The cop uses this force to dehumanise a human being rather to make him to subject to their will. This as is evident is not because of one single solid factor but multiple of factors operate which are held responsible for the use and continuity of this practice.

For, last two decades recommendations of National Police Commission have been gathering dust. The laudable recommendations which could have yielded better results with respect to police force in general and would have reduced the use of torture in particular have not been even discussed at the governmental level. Such an in-action or indecisiveness on the part of the government are bound to result into demoralising influence on the whole of police force in India. The police due to non-implication of these recommendations is asked to perform functions beyond its capacity and quite opposite to its normal work of assisting in the administration of criminal justice. The basic duty of the police therefore suffers and police always perform this under heavy odds with offended attitude under anxiety syndrome. To reduce this it is not too late to implement the recommendations in letter and spirit to provide working facilitation to price.

The undue political interference particularly to shield the criminal (criminalisation of politics) creates a demoralising effect on the whole working of police. Policeman in such crimino-political symbiosis also feels himself free (not accountable) to commit any violation including the torture on accused. His non-accountability is further existing because of a long hierarcal police system. It is therefore suggested that a policeman guilty to torture should not alone be held liable but his superior officer too should vicariously be held liable for such acts of violence.

Investigating officer due to non-availability of the alternative technique of investigation (which may be scientific and human) feels that the old barbaric method are efficacious therefore resorts to them. For this purpose it is suggested that a proper veritable support should be made mandatory by other agencies (forensic lab and other institution) which may help the police to use the scientific methods to avoid barbaric ones.

Inservice orientation should not be only merely as a lip service provided by existing institute but it should be provided on a regular basis and to the extent of constabalory. Rather it should be made mandatory for any further confirmation and promotion. The existing institutes should be equipped fully to provide latest knowledge to police personnel of all ranks.

Necessary legislative changes be made to give proper meaning to provisions of Criminal Procedure Code and Police Act dealing with investigation under the changing human rights jurisprudence.

Sensitising of police with human rights issues (primary being that dignity of person is supreme and should be respected) be made part of curriculum of police training college and the institutions imparting training.

Adversary process of criminal trial which suited to the Britishers be reviewed and "Speedy Trial" as envisaged by Supreme Court in number of decisions be taken care of. Time should be stipulated for trial as it is for investigation. Little of adjournment and long delay due to non-availability of witnesses be minimised to yield results. So the resonance between police performance and public expectations takes place.

Political appointments be minimised and a standardised psychological testing of personality be made part of the appointment procedure. So the elements with positive aptitude towards fellow human beings get precedence over others.

Press as an important organ of society should play an objective and a non-partisan role to give a moral boosting to police when it performs well and criticise healthy and not with an aim of wider circulation for profit motive only.

JUDICIAL SYSTEM AND REFORMS†

*Justice Arun Madan**

I. INTRODUCTION

The judicial system cannot survive onslaught of rust and dust, in view of the transitional nature of society in the absence of progressive attitude and needs appropriate reforms. The reforms are aimed at parting with obsolete and outdated laws with a view to introduce reformative laws which take into account the feelings and sentiments of the people at large since their welfare cannot be overlooked or ignored. It is in this context that we have to appreciate the status of judiciary, scope of its functions and judicial review.

The growing needs of the society always call for review and updating of laws to keep pace with advancement and change. The effective judicial reforms not only relate to amendments in procedural and substantive laws but also include reformative and corrective endeavours aimed at strengthening and systematizing the law and order mechanism operating in the country.

II. STATUS OF JUDICIARY

The scope of judicial review in its true sense determines the status of our judiciary as essential organ of the State. In the persent day democratic system, one can better understand the structure of state as being conglomerate of three major organs viz. Legislature, Executive and Judiciary. Our constitutional set up is based on giving independent status to the judiciary according to the doctrine of seperation of powers. The interrelationship of the judiciary with each of the other two organs viz. Legislature and Executive is very significant. It is well known concept that in order to have strong and independent judiciary, we equally need to have strong and independent bar. The judiciary can be strong and independent only if the bar also plays a positive role in strengthening judicial system by exercising its role in a very objective manner so as to harmonise relations

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† Address at the Seminar on Judicial Reforms organized by Rajasthan Bar Federation, Ajmer on 20th February, 2000.

* Judge, Rajasthan High Court.

between the two. Primarily no institution can survive without strong and independent judiciary.

The Constitutional Bench of the Apex Court while recognising independence of the Judiciary in *Indira Nehru Gandhi* v. *Raj Narain*[1] observed :

> In federal system which distributes powers between three coordinate branches of Government, though not rigidly, disputes regarding the limits of constitutional power have to be resolved by courts and therefore as observed by Paton, distinction between judicial and other powers may be vital to the maintenance of the Constitution itself.
>
> No Constitution can survive without a conscious adherence to its fine checks and balances. Just as Courts ought not to enter into problems entwined in the 'political thicket', Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which has in it the precept, innate in the prudence of self preservation that discretion is better part of valorous. Courts have by and large, come to check their valorous propensities.

In *Minerva Mills* v. *Union of India*[2] the Constitutional Bench of the Apex Court held sections 4 and 55 of the Constitution of India (42nd Amendment) Act, 1976 as void and thereby struck down the same for the reason that it was beyond amending power of the Parliament.

Section 55 of the 42nd Amendment Act introduced two new clauses in Article 368, namely, clauses (4) and (5). Clause (5) was to confer upon the Parliament a vast and undefined power to amend the Constitution even so as to distort it out of recognition. The Apex Court held that the amendment under 42nd Amendment Act if introduced would have damaged basic and essential structure of the Constitution, itself , by total exclusion of the challenge to any law on the ground that it is inconsistent with or takes away or abridges any of the rights under Article 14 or 19 of the Constitution. The Apex Court also held that the very object of the legislation is to give effect to the policy of the state towards securing for all directive principles of the State as enshrined in parts III and IV of the Constitution. The Apex Court then held that the amendments under sections 4 and 55 of the 42nd Amendment Act were beyond the amending power of the Parliament and were void in as much as these remove all limitations on the power of the

1. AIR 1975 SC 2299.
2. AIR 1980 SC 1789.

Parliament to amend the Constitution. The Apex Court was dealing with the constitutional amendments which had been brought into operation and which permitted violation of certain freedoms through laws passed for certain purposes. Following the dictum of law laid down in *Keshavanand Bharati* v. *State of Kerala*[3] the Apex Court held that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. In other words, Parliament cannot by having resort to Article 368 expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. It is well known that the donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one. Since clause (5) of Article 368 transgresses the limitations on the amending power, it was held to be unconstitutional with a view to maintain a balance of powers among three pillars of the State. It is the function of the Judges nay their duty to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled.

This is significant contribution to uphold independence of the judiciary and also to maintain balance of power between three wings of the State. It is not open to the Parliament to bring forth any amendment by way of introduction of new legislation under the garb of its amending power so as to nullify the basic structure of the Constitution. Viewed from this prospective, judicial reforms would not simply encompass amendments in procedural and substantive laws but would also include reformative and corrective endeavours to strengthen judicial system. Thus, an exercise for review of the Constitution of India under the garb of reforms, should be in strict conformity and adherence to the basic structure theory as propounded in *Keshavand Bharati's* case.[4]

In *S.P. Sampath Kumar* v. *Union of India*[5] the Constitutional Bench of Apex Court observed thus —

> It is also a basic principle of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance

3. AIR 1973 SC 1461.
4. *Ibid.*
5. AIR 1987 SC 386.

with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the Rule of Law.

In *C.Ravichandran Iyer* v. *Justice A.M. Bhattacharjee*[6] the Apex Court observed that independence of judiciary is an essential attribute of rule of law which is a basic feature of the Constitution and so the judiciary must be free from not only executive pressure but also from other pressures.It is the sentinel on the *qui vive* to protect the fundamental rights and to poise even scales of justice between the citizens and the State or the States inter-se. Rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law. Relying on the decision in *S. P. Gupta* v. *Union of India*[7], the Apex Court observed that it is therefore absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the Constitution with details. The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is wider concept which takes within its sweep independence from any other pressure and prejudices.

The Apex Court then observed that independence of judiciary is most essential when liberty of citizen is in danger. It then becomes the duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived), undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own .

III. Delays in Disposal of Cases and Remedial Measures

During last 50 years of our independence, litigation has increased manifold not only on account of population growth but also in view of new laws, legal awareness, industrial and commercial growth besides urbanization but proportionately there is not increase in the strength of judges and judicial infrastructure. No scientific study is undertaken to assess growing need being experienced as regards strength of Judges at all ladders of the Judiciary. In its 20th report, the Law Commission found that India had 10.5 judges per million of population, the corresponding figure in England was

6. 1995(5) SCC 457.
7. 1981 (Supp) SCC 87.

50.9, Australia 57.7, Canada 75.2 and the USA 107. The Law Commission in 1987 had recommended 50 judges per million of population instead of only 10.5. The recommendation has remained buried in the Report with no follow up action. The inadequate strength of judges is a major cause for the delay in disposal of cases.

One of the causes for the delay in disposal of cases is request for adjournments. The adjournments are very often granted at the drop of hat. The only remedy is to avoid uncalled for adjournments and this malady can only be resolved if the Bar and the Bench make sincere efforts together. Experience shows that it is always the helpless litigant who has to pay the price and to suffer for uncalled for adjournment at the behest of the Bar. Apart from that, strike-call also adds to the problem, which should be strictly avoided. The Members of the Bar are not trade unionists and they should avoid participation in strikes since they not only reflect on the system badly but also cause undue hindrances in the effectiveness of the justice delivery system.

IV. Procedural Delays

Yet another cause for delay is procedural mechanism of legislation such as provided in the Indian Evidence Act, Indian Penal Code, Criminal Procedure Code and Civil Procedure Code. Appropriate legislation by way of procedural reform is the immediate need. Both the Houses of Parliament upon the recommendations of the Law Commission have made significant changes by approving amendments proposed in the Code of Civil Procedure, 1908. The Parliament has passed the Code of Civil Procedure (Amendment) Act, 1999, which aims at amending the Code of Civil Procedure, 1908 and the Limitation Act, 1963 and the Court Fees Act, 1870. Of course it would come into force on such date as the Central Government by notification in official Gazettee notify which is still awaited.

V. Role of Investigating Agencies

Proper administration of justice is not in the hands of the judiciary alone. Proper implementation of laws and maintenance of justice depends upon the character of the personnel of the police, prisons department, political and social leaders and lawyers. In a degenerated society, even thousands of laws cannot ensure proper social justice. Earlier, by punishing the criminals properly and in time, law and order in the society was maintained. As a majority of officials in various departments, leaders of various political parties, religions and castes were conscious of maintaining justice in the society, laws were successful. In those days, these leaders did not try to protect criminals belonging to their party, religion and caste. The interest in maintaining justice, paved the way for early disposal of cases, conviction of

criminals, prevention of crime and reformation of offenders. Today, when people in various walks of life are sheltering criminals on the basis of caste, religion and political affinity, there is growing apprehension that justice may not only be delayed but even denied.

During his address on the Golden Jubilee Celebrations of the Supreme Court, Prime Minister Shri Atal Behari Vajpayee spoke thus :

> There is an urgent need to curb the strong appetite of our departments and the lawyers representing them for casual litigation and for wasting government money. They routinely file cases or defend cases they know are indefensible and do so only because they do not want to take responsibility.

It is trite law that for delay in examining witnesses and deciding cases certainly results in defeat of Dharma that is "miscarriage of justice". In our system, such a situation has become a rule rather than an exception and this delay can be attributed to ineffective investigation by the police and lack of motivation among public prosecutors who are burdened with a large number of cases. Even in some cases the investigating officer is reported to have submitted the chargesheet without completing investigations. This weakens the cases which ultimately results in acquittal of the accused. Only about 15 Public prosecutors and 45 Assistant Public Prosecutors are handling nearly 78,000 (66,720 as on 31/12/1998) criminal cases pending in the lower courts situated in Judgeship of Jaipur City itself excluding Jaipur District Judgeship.

It is brought to the notice of the Judges that in case the role of investigating agency is tainted, the matter should be referred to some impartial agency like C.B.I. which too is blamed for taking long time and undue delay in investigation. Very often real culprits go unpunished on account of either evidence not forthcoming or the prosecution witnesses being threatened by the accused, with the result that the Judges express helplessness in the matter with no option except to order large scale acquittals. The sensational case is of "Priyadarshan Mattoo' rape cum murder case which is a glaring example of tainted investigation resulting in acquittal of accused by Additional Sessions Judge, New Delhi who in his judgment of 449 pages said, *"Accused is a criminal but I cannot convict him for lack of evidence"*.The Trial Judge also said, *"the manner in which the CBI investigated puts question mark on its credibility as a premier investigating agency"*. However, the onus was on the State to negate probability of defence which the Trial Judge observed, the State failed to discharge. There was no medical evidence adduced by the investigating agency to suggest that she was raped. Notwithstanding the autopsy report of the deceased regarding the injuries on her person, the

accused was let off because of procedural lacunas created by investigating agency. That being so such cases result in people's losing faith in justice delivery system which requires judicial reforms in view of trained role being played by the investigating agencies, which should be held accountable for their lapses.

Though there is specific provision under section 309 CrPC that adjournment should be granted sparingly that too on valid grounds when it is necessary but it is followed more in the breach than in observance. In order to overcome difficulties and uncalled for delay in the trials, the proceedings should be conducted expeditiously as soon as the charge is framed. The Courts as a matter of course or routine should not interfere in each matter unless there are sparing and justifiable reasons which would necessitate the same. The under-trials remain in detention without trial being expedited resulting in violation of their right to speedy trial. Once the examination of witnesses has begun, the same should be continued on day to day basis until all the witnesses in attendance have been examined and the trial reaches its logical conclusion and the adjournments should be only subject to justifiable reasons to be recorded.

VI. Criminalisation During Elections

Most serious problem which is being faced today by democratic polity in our country is holding of free and fair elections due to increasing criminalisation of politics. Time and again, serious apprehensions have been expressed from different quarters about this obnoxious development of Indian politics. Though free elections, being the representative of collective will of the people, are the backbone of Indian democracy, yet electoral malpractice have the capacity to subvert the whole electoral process. Hence there is dire need to reform the system to purge it from further deterioration. There is no need to highlight increase of criminal elements and their role in elections. According to the Election Commission, almost forty members facing criminal charges were members of the Eleventh Lok Sabha and almost 700 members of similar background were in the state legislatures.

Conceptually, it is the function of the Sovereign to represent national interests but, in democracy this function is performed by Parliament, which mainly consists of persons belonging to different political parties. In view of the attraction of enormous political power, the political parties tacitly support or expressly do not object to the use of unfair means and corrupt practices by their candidates. The result of this development is increasing criminalisation of politics against which a deep concern is being shown or expressed in the society. Needless to say the real life of the Constitution under which all legal and political institution function depends upon free and

fair elections. It has rightly been said that "display of money and muscle power spreads corruption which is detrimental to the electoral process". Booth capturing deserves to be checked effectively but very few cases have been decided by the courts. The use of money or muscle power and the totally unacceptable practices of intimidation of voters and booth capturing offend, the very foundation of our socio-political order. Experience shows that since no effective action has yet been taken to check the corruption, criminality and casteism. The problem has become more serious and aggravated with every ensuing election. Despite the fact that there is anti-defection law yet floor crossing is very often indulged by the legislators to serve their vested interest at the cost of the voters which very often goes scot free since no action is taken to prevent such candidates from participating in electoral process. The number of election offences have gone up in recent years and elections have been criminalised because of entry of criminals and casteism. It is truism that States like Bihar, Uttar Pradesh and Andhra Pradesh have become notorious for electoral malpractices like rigging and booth capturing. The Apex Court has also expressed its serious concern for electoral reforms in catena of decisions like *Sasanagouda* v. *S.B. Amarkhed*[8] by observing thus—

> It is common knowledge that in the recent past, there have been various complaints regarding booth capturing. The tendency to overawe the weaker section of the society and to physically take over the polling booths meant for them is on the increase. Booth capturing wholly negates the election process and subverts the democratic set up which is the basic feature of our Constitution. During the post independent era, ten parliamentary elections have entrenched democratic polity in this country which cannot be permitted to be eroded by showing laxity in the matter of booth capturing".

Likewise in *Ram Singh* v. *Col. Ram Singh*[9], the Apex Court observed, "The election process in our country has become an extremely complex and complicated system and indeed a very difficult and delicate affair."

The Apex Court expressed its anguish by observing that there have been various complaints regarding booth capturing which wholly negates the election process and subverts the democratic set up. Such a problem can possibly be combated only if some political remedies are invoked. Criminals and suspects should not be given tickets by political parties. Electoral reforms must receive the top priority of any Government for the survival of the Constitution and its institutions in our country.

8. AIR 1992 SC 1163.
9. AIR 1986 SC 3.

VII. Appointment and Transfer of Judges

With regard to appointment and transfer of Judges, Dr. Anand, Chief Justice of India, in his address on Golden Jubilee Celebrations of the Supreme Court of India recently on 28th January, 2000 said that the proposed constitution of National Judicial Commission is a lofty idea but it is too presumptuous to say that those who are outside judiciary and almost strangers to judicial fraternity would be in a better position to participate in the selection of the Judges. In Special Reference No. 1 of 1998 decided by the Constitutional Bench on 28th October, 1998,[10] Dr. Anand felt that there was no need for National Judicial Commission. The Apex Court observed that in such matters, merit should be the predominant consideration though inter-seniority amongst Judges in their High Court and their combined seniority on all India basis should be given due weight but cogent or good reasons should be recorded far recommending person of outstanding merit regardless of his lower seniority. Expressions "strong cogent reasons" and "legitimate expectation" used in *Second Judges* case[11] were also explained besides scope of judicial review of the appointment or recommended appointment was also stated and according to it, recommendations made by Chief Justice of India without complying with the norms and requirements of consultation process, were not binding on Government of India. The majority view in the *Second Judges* case is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy and the opinion of the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other judges who are traditionally associated with this function".

This is indeed a commendable effort to ensure that outside interference muchless any pressure from any quarter should be strictly avoided and the independence of the judiciary is maintained. This proposition being an integral part of judicial reforms with a view to improve over all functioning of judicial system in the country that too within the framework of our Constitution without distorting its basic structure as propounded in *Keshavanand Bharati's* case.

VIII. Role of Legal Education

Even though the Constitution provides that every citizen should cultivate a scientific temper, the fact is that no effort is made by the law makers to educate the masses about the need for it. We attained freedom after a great

10. 1998 (7) SCC 739.
11. 1993(4) SCC 441.

struggle, but can India be said to be free when millions of her people are groping in the darkness of ignorance? The basic infrastructure of legal education in Rajasthan being imparted by the Universities deserves to be given utmost priority for the upliftment and in-order to maintain good academic standard of the Bar, the State must ensure adequate funds for such facilities. With proper coordination between Bar Council of Rajasthan with State Government and Bar Council of India as well of the Universities imparting legal education in the State, it can ameliorate cause of legal education so that better talented persons are produced in making judicial system more meaningful and effective.

IX. Public Interest Litigation

Role of public interest litigation is also of great significance towards judicial reforms. Proceedings initiated by way of PIL by public spirited citizens are intended to vindicate and effectuate interest of public at large by prevention of violation and rights constitutional or statutory for the benefit of sizeable segments of the society which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and quite often not even aware of those rights. The technique of PIL serves to provide an effective remedy to enforce these group rights and interests, as rightly said in *Sheela Barse* v. *Union of India*.[12]

In *Bandhua Mukti Morcha* v. *Union of India*[13] the Apex Court observed thus :

> It is quite obvious, therefore, that in a public interest litigation the petitioner and the State are not supposed to be pitted against each other, there is no question of one party claiming or asking for relief against the other and the Court deciding between them. Public interest litigation is a co-operative litigation in which the petitioner, the State or public authority and the Court are to be co-operative with one another in ensuring that the constitutional obligation towards those who cannot resort to the Courts to protect their constitutional or legal rights is fulfilled. In such a situation the concept of cause of action evolved in the background of private law and adversary procedure is out of place. The only question that can arise is whether the prayers in the petition, if granted, will ensure such constitutional or legal rights.

Public interest litigation should be used very sparingly in specially deserving cases and should be strictly confined to promoting public interest

12. AIR 1988 SC 2211.
13. AIR 1984 SC 802.

which mandates that violation of legal or constitutional rights involving large number of persons, poor, downtrodden ignorant, socially or economically disadvantaged citizen should not go unredressed. The Court should not hesitate in taking cognizance of PIL matters when there are complaints from any segment of the society which is shocking to the judicial conscience. We must remember that "the PIL is *pro bono publico*" and should not smack of any ulterior motive and no person has right to achieve any ulterior purpose through such litigation.

In *S.P. Gupta* v. *Union of India*[14], the Apex Court has cautioned citizens by observing that the Courts must be careful that the members of the public who approach the Court are acting bonafide and not in personal garb of private profit or political motivation or other oblique consideration and must not allow its process to be abused. Similar view has been echoed in the case of *Kazi Landup Dorji* v. *Central Bureau of Investigation*.[15] Thus, the rule of law requires to observe certain safeguards which are very vital in the context of PIL with a view to ensure that genuine grievances do not go unredressed while no individual should be permitted to make PIL as a private tool to vindicate his own vested interests.

X. Constitutional Reforms

The proper functioning of democracy to which this country is committed depends on the rule of law which forms the basis of the institutions and depends upon the position accorded to the Supreme Court and the High Courts in the constitutional structure and their relations with other organs of Government. It is well said that a nation that does not know how to respect the rule of law and the judiciary as its final interpreter is a nation that is not fit for the democratic way of life. As was said by Viscount Sankey, "Amid the cross currents and shifting of sands of public life, the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice".[16]

Recently there has been talk in higher echelons of the Government regarding setting up a panel to review the Constitution. The decision to set up a panel under the Chairmanship of Mr. Justice M.N. Venkatachaliah has been taken by the Government. His Excellency the President of India Shri K.R. Narayanan has expressed as to review of the Constitution in his speech at the function in the central hall of Parliament on January 27, 2000, to commemorate the Golden Jubilee of the republic that "the Constitution has not failed us, we failed the Constitution".

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14. AIR 1982 SC 149.
15. 1994 Supp (2) SCC 116.
16. Fourteenth Report Vol. II. Law Commission of India at 671.

Apprehension has been expressed by certain segments of the society that the pronouncements made by the Government are full of ambivalence and, therefore, rouse a lot of suspicion. It is more so in case of proposal to set up a commitee for the experts to review the entire Constitution. Shri K.R. Narayanan, the President of India, has made distinction between "amending Constitution" and subjecting it to comprehensive review. In order to allay the doubts and fears in the minds of critics, the Prime Minister in his speech on January 27, 2000, gave an assurance that the basic structure of the Constitution would not be altered, while thrust of the President of India was that the structure of parliamentary democracy has stood the test of time because it accepted the primacy of collective accountability to Parliament over stability, whereas in a presidential system, the stress is on stability with accountability or responsibility taking a backseat.

XI. Conclusions

Be that as it may, if any step is envisaged to transform system of parliamentary democracy to presidential system, we should not forget historical experience of other countries across the continent particularly Africa, Latin America and the Asia where installation of the presidential system had led to some form of authoritarian or dictatorial rule, as has been rightly said by Shri Madhu Dandavate.[17]

Recently, a Commission has been set up headed by Mr. Justice M.N. Venkatachalliah, former Chief Justice of India and Chairman of Human Rights Commission. The Commission shall examine in the light of the exeprience of the past 50 years, as to how far the existing provisions of the Constitution are capable of responding to the needs of efficient, smooth and effective system of goverance and socio-economic development of modern India and to recommend changes, if any, that are required to be made in the Constitution within the framework of parliamentary democracy without interfering with the basic structrue or basic features of the Constitution.

Eminent jurist Shri Nani A. Palkhivala, in his treatise, "We, the Nation — the Lost Decades", has expressed very significantly that in the past 50 years, under the garb of constitutional reforms, the Constitution has been defaced and defiled. This fact should not be overlooked in the proposed exercise by the panel on Constitution review. Doubtless, the law is imperfect, and it would be imperfect even if it were made by a committee of archangels. The Court is no longer looked upon as a cathedral but as a casino.

17. The Times of India, February 11, 2000.

LEGAL STATUS OF PRECAUTIONARY PRINCIPLE IN ENVIRONMENTAL JURISPRUDENCE

*Gurdip Singh**

Mankind faces overwhelming environmental problems. These are large scale, long term and strike directly at the most intimate links of mankind with the biosphere which is a thin shell of life- about five miles thick- covering the planet like skin of an apple. The tragedy is that we are ourselves responsible for the environmental catastrophe. Mankind is performing deadly experiment by spewing noxious gases like carbon monoxide, carbon dioxide, sulfur oxides, nitrogen oxides, chlorine, chloroform, chloroflourocarbons, methane etc. in the environmental test tube which has resulted in globally pervasive environmental problems like acid rain, global warming, depletion of ozone layer, deforestation, loss of biodiversity and marine pollution. The problem of environmental pollution is assuming alarming proportions and if legal brakes are not applied, the life form on the planet might struggle for survival.

The understanding of the causes and remedies of environmental problems involves scientific and technical specialization. Unfortunately, scientific theories are uncertain and differ widely in coming to grips with the environmental problems.

I. Assimilative Capacity Principle

Assimilative capacity principle underlies earlier legal measures to protect the environment. In 1972 U.N. Conference on Human Environment was held at Stockholm which resulted in adoption of Stockholm Declaration containing a number of principles. Principle 6 of the Stockholm Declaration contains assimilative capacity principle which assumes that science could provide policy makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumes that relevant technical expertise would be available when environmental harm is predicted and there would be sufficient time to act in order to avoid such harm.

The assimilative capacity principle is based on the belief that scientific theories are certain and adequate to provide the remedies for ecological

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restoration whenever environmental pollution occurs. The principle is built on the foundation of scientific certainties and adequacies.

Assimilative capacity principle suffered setback when the inadequacies and uncertainties of science became visible in environmental context. It has been revealed that inadequacies of science result from identification of adverse effects of a hazard and then working backwards to find causes.[1] Secondly, clinical tests are performed, particularly where toxins are involved, on animals and not humans, that is to say, are based on animals studies or short term cell testing.[2] Thirdly, conclusions based on epidemiological studies are flawed by the scientist's inability to control or accurately assess past exposure of the subjects.[3] Moreover, these studies do not permit the scientist to isolate the effects of the substance of concern. The latency period of many carcinogens and other toxins exacerbates problems of later interpretation. The timing between exposure and observable effect creates intolerable delay before regulation occurs.

Uncertainty, resulting from inadequate data, ignorance and indeterminacy are an inherent part of science.[4] Uncertainty becomes a problem when scientific knowledge is institutionalized in policy making or used as a basis for decision-making by agencies and courts. Scientists may refine, modify or discard variables or models when more information is available. However, agencies and courts must make choices based on existing scientific knowledge. In addition, agency decision making evidence is generally presented in a scientific form that cannot easily be tested and therefore inadequacies in the record due to uncertainty and insufficient knowledge may not bo properly considered.[5]

II. Precautionary Principle

The uncertainty of scientific proof and its changing frontiers from time to time has led to great changes in environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. A basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier the concept was based on the 'assimilative capacity' rule as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment of 1972. The

1. Alyson C. Flournay, *Scientific Uncertainty in Protective Environmental Decision Making*, 15 Harvard Environmental Law Review, 1991, 327 at 333-335.
2. *Ibid.*
3. *Ibid.*
4. Brian Wynne, *Uncertainty and Environmental Learning*, 2 Global Environmental Change, 1992 at 111.
5. Charmian Barto, 22 Harvard Environmental Law Review, 1998 at 509.

emphasis shifted to precautionary principle in the 11th principle of the World Charter for Nature adopted on 28 October 1982 by U.N. General Assembly by a majority of 111 votes with 18 abstentions and one negative vote cast by United States. The developing countries overwhelmingly endorsed the Charter. The former pre-1989 Soviet block found the Charter a costless and convenient way to demonstrate the fraternity with the isolation of United States in the General Assembly.

The World Charter for Nature proclaims that activities which are likely to cause irreversible damage to nature shall be avoided.[6] The Charter also comes to grips with the problem of global environmental change by imposing a requirement on States and ultimately their nationals that activities which are likely to pose significant risks to nature shall be preceded by an exhaustive examination. In case where the potential adverse effects of the activities are not fully understood, the activities shall not proceed.[7] In case the activities that may disturb the nature are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects.[8]

The World Charter is not a binding treaty. However, it exerts considerable moral force on accepting States and Member States of the United Nations. Despite the fact that the Charter is not a binding treaty, a large majority of the Member States of the United Nations have supported the Charter. The Charter imposes "soft law" obligations on the States which means that the principles set forth in the present Charter shall be reflected in the law and practice of each state, as well as at the international level.[9]

A. Conceptualisation

Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible environmental damage, lack of scientific certainty should not be used a reason for postponing measures to prevent environmental degradation. The implication of this duty is that the developers must assume from the fact of development activity that harm to environment may occur and that they should take necessary action to prevent that harm. This principle is known as precautionary principle and is recognized in major international documents. It is adopted by United Nations Environment

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6. WORLD CHARTER FOR NATURE, 1982, Article 11(a).
7. *Id.*, Article 11(b).
8. *Id.*, Article 11(c).
9. *Id.*, Articles 14 to 24.

Programme and various international conferences on prevention of pollution of the seas, e.g., the Nordic Council's International Conference on Pollution of the Seas, 1989.[10] Article 7 of the Bergen Ministerial Declaration on Sustainable Development in the ECE region held in May 1990 also affirms the precautionary principle.[11] The principle also appears in the Draft Convention for the Conservation and Wise Use of Forests prepared in 1991 by the Centre of International Environmental Law in the following form:

> The precautionary principle means the principle of establishing a duty to take such measure that anticipate, prevent and attack the causes of environmental degradation where there is sufficient evidence to identify a threat of serious or irreversible harm to the environment if there is not yet scientific proof that the environment is being harmed.

The main purpose of the precautionary principle is to ensure that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage.[12] The words "substance" and "activity" implies substances and activities introduced as a result of human intervention. They allow the principle to be used in relation to all aspects of environmental degradation, and to extend it to the area of sustainability. As a matter of fact, the environmental protection policies must be based on precautionary principle in order to achieve sustainable development.[13]

The Caring for the Earth document emphasizes that precautionary principle be made the basis of decisions on development and environment.[14]

The principle has been given utmost importance in the United Nations Conference on Environment and Development held at Rio in 1992. Although there was scientific uncertainty on various environmental issues, e.g., causes and impact of global warming, framework convention on climate change was concluded. It was unanimously agreed that scientific uncertainty would not be allowed to become an excuse for deferring environmental protection measures. Principle 15 of the Rio Declaration contains precautionary principle which provides as follows :

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10. Cameron and Abouchar, *The Precautionary Principle : A Fundamental Principle of Law and Policy for the Protection of Global Environment*, 14 BOSTEN COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW, 1991 at 1.
11. *Id.* at 18.
12. Gurdip Singh, ENVIRONMENTAL LAW - INTERNATIONAL AND NATIONAL PERSPECTIVES (1985) at 212.
13. *Id.* at 213.
14. CARING FOR THE EARTH (IUCN, UNEP and WWF), 1990 at 16.

> " In order to protect the environment, the precautionary approach shall be widely applied by States accordingly to their capabilities. Where there are threats of serious or irreversible damage, lack of Scientific Certainty shall not be used as reason for postponing cost- effecting measures to prevent environmental degradation."

Inadequacies of science is the real basis that has led to the emergence of precautionary principle. The principle is based on the theory that it is better to err on the side of caution and prevent environmental harm which may indeed become irreversible. While referring to the causes of the emergence of the precautionary principle, Chairman Barto observed :

> " there is nothing to prevent decision makers from assessing the record and concluding that there is inadequate information on which to reach a determination. If it is not possible to make a decision with some confidence, then it makes sense to err on side of caution and prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research."[15]

The precautionary principle forms basis of the adoption of all the instruments at the Rio Conference including the U.N. Convention on Biodiversity which entails legally binding obligations for the States.

B. International Custom

The principle has acquired the status of customary international law after meeting both the essential requirements for the existence of international custom namely, uniform practice of States and *opino juris sive necessitatis*, i.e., the belief of the States that such practice is binding on them. The legal status of the principle as customary norm of international law is not disputed in any quarter.

C. Basis of Precautionary Principle

The origin of precautionary principle lies in the horrifying consequences of environmental pollution. The monster of environmental pollution is spreading its wings so dangerously that the survival of life form on the pianet earth is threatened. The tragedy is that man himself is responsible for expanding the wings of the polluting monster. So pressing is the need for environmental protection and improvement that right to pollution free and healthy environment has emerged as a human right in human rights jurisprudence. The human rights jurisprudence affirms right to decent

15. Charmian Barto, *supra* n. 5 at 547.

environment as an integral part of right to life which is recognized as a basic human right in the Universal Declaration of Human Rights of 1948 as well as International Covenant on Civil and Political Rights of 1966. The International Covenant on Civil and Political Rights loudly proclaims that human right to life is part of international custom which prohibits arbitrary deprivation of right to life. The prohibition against arbitrary deprivation of life is non - derogatory even during the existence of emergency. Thus, human right to decent environment has non-derogatory character and constitutes peremptory norm of International law.

The pivotal position and *jus cogens* character of the right to healthy and pollution free environment in the hierarchy of human rights constitute the genesis for the evolution of the precautionary principle which underlies the adoption of environmental protection measures. The threat of serious and irreversible environmental damage constitutes negation and reversal of human right to decent environment of the present as well as future generations. The mandate of precautionary principle is that environmental protection measures should not be postponed on the ground of conflicting scientific theories and uncertainties in cases involving serious threat of reversal and negation of human right to environment. The *jus cogens* character of the human right to environment constitutes the fundamental basis for the emergence of precautionary principle which underlies international environmental jurisprudence. The position of human right to decent environment is further strengthened in the human rights jurisprudence in view of the fact that human right to decent environment forms part of the third generation human rights which have emerged according to the changing needs of the mankind.

The human right to pollution free environment has triggered the movement for the recognition of right to environment as fundamental right in the Constitution of India. The forty second amendment of the Constitution of India resulted in the introduction of Article 48A as a directive principle of the state policy and Article 51 (g) as a fundamental duty of the citizens. Article 48A proclaims that state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

The directive principle to protect and improve the environment is not merely a policy prescription for the States. It possesses legal status of being complementary to fundamental rights and therefore, imposes an obligation on the Government, including courts, to protect and improve the environment. The right to healthy environment is not expressly recognized as a fundamental right in the Constitution of India. The Indian judiciary jumped out of passive shell, embraced activism, and recognized right to environment

as a fundamental right being an integral and inseparable part of right to life guaranteed in Article 21 of the Constitution. The right to healthy environment constitutes fundamental right and is a constitutional pointer to the states as well as citizens to protect and improve the environment. Thus, environment occupies pivotal constitutional position despite the fact that constitution does not expressly proclaim it as fundamental right.

The pivotal constitutional status of the environment forms the basis for the application of precautionary principle in the adoption of environmental protection measures in India.

III. Sustainable Development

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

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

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

The principle of sustainable development received impetus with the adoption of Stockholm Declaration in 1972, World Conservation Strategy prepared in 1980 by the World Conservation Union (IUNC) with the advice and assistance from the United Nations Environment Program (UNEP) and the Worldwide Fund, the World Charter of Nature of 1982, Report of the World Commission on Environment and Development (Brundtland Report), *Our Common Future*, of 1987, the document *Caring For Earth : A Strategy for Sustainable Future* developed by the second world conservation project comprised of the representatives of the IUCN, UNEP and Worldwide Fund for Nature. The concept of sustainable development is the foundation stone of the Montreal Protocol for the Protection of Ozone Layer of 1987 and the instruments adopted at the Earth Summit held at Rio in 1992.

The Brundtland Report defines sustainable development as development that meets the needs of present generation without compromising the ability of the future generations to meet their own needs.[16] The report emphasizes that sustainable development means an integration of economics and ecology in decision making at all levels. The document *Caring for the Earth* defines sustainability as a characteristic or state that can be maintained indefinitely whereas development is defined as the increasing capacity to meet human needs and improve the quality of human life.[17] This means that sustainable development would imply improving the quality of human life within the carrying capacity of supporting ecosystem.[18]

Development and ecology are overlapping circles and the terrain of sustainable development is found where they overlap. Development and environment are not antithesis but synthesis of each other. Both are complimentary, inseparable and represent two phases of the same coin. An intrinsic link between environment and development renders sustainability to both.

Precautionary principle underlies sustainable development inasmuch as environmental protection measures are based on the precautionary principle. Therefore, developmental activity must be stopped and prevented if it poses threat of serious and irreversible environmental damage notwithstanding the prevailing scientific uncertainties and conflicting scientific theories. The lack of conclusive scientific proof should not be a

16. World Commission on Environment and Development, OUR COMMON FUTURE, 1987 at 92-93.
17. *Supra* n. 14.
18. Gurdip Singh, *Legal Aspects of Sustainable Development*, 1 NATIONAL CAPITAL LAW JOURNAL, 1996 at 93.

ground for postponing and deferring the imposition of restrictions and regulations on the developmental activity. Sustainable development demands regulation and control of development on the basis of precautionary principle which triggers environmental restraints on development. Precautionary principle forms the foundation of environmental constraints which are built in developmental process. Thus, precautionary principle is an important component of sustainable development because it is linked with the environmental content of sustainable development. The scope of the environmental content of sustainable development is ascertained and determined with reference to precautionary principle which imposes precautionary duties to regulate, control and restraint development in a manner that there is no threat of serious and irreversible environmental damage.

IV. Environmental Impact Assessment (EIA)

Environmental Impact Assessment is a technique to ensure that the likely effects of developmental activity on the environment will be taken into consideration before the developmental activity is authorized to proceed. The technique of Environmental Impact Assessment requires the developer to give to the deciding agency a statement of environmental effects of the development activity to be considered in the decision making process. Environmental Impact Assessment gives a chance to adopt or modify a scheme to mitigate adverse environmental consequences, and for taking the environmental dimension into account in project decisions.

European Community law requires that certain major projects are subject to a process in which the likely environmental effects must be considered before permission is granted for them.[19] As a result, environmental factors are considered as an integral part of the decision making process, rather than as objections to be thought about after a tentative decision has been made. Accordingly, developers have to consider the environmental impact of their projects as part of the process of planning them. The process of Environmental Impact Assessment effectively has three stages[20] :

1. The developer must submit an Environmental Impact Statement to the competent authority. This statement should identify the potential environmental effects (i.e., direct and indirect impacts on the human beings, flora and fauna, soil, water, air, climate and

19. European Community Directive 85/337, Simmon Ball and Stuart Bell, Environmental Law (1991) at 206.
20. Simmon Ball *et al.*, *id.* at 207.

landscape; the interaction between these factors; and the effects on material assets and the cultural heritage) and the steps that are envisaged to avoid, reduce or remedy these effects. It may also include further information, including the alternatives that have been considered.

2. The competent authority must than consult with concerned public bodies, environmental organizations and other institutions concerned with the protection and improvement of the environment. There must also be an opportunity for the public to express opinion. The developer's Environmental Impact Statement must be made publicly available and copies must be sent to consultees.

3. The competent authority must prepare an environmental assessment of the proposal before deciding whether it may go ahead. The Environmental Impact Assessment prepared by the competent authority should take into account the views of the public and consultees.

The following issues arise : whether EIA should be mandatory for all developmental activities ; whether EIA should be mandatory only for major developmental activities involving threat of serious and irreversible environmental damage ; whether competent authorities should be given wide discretion to determine whether developmental activity is likely to have significant adverse environmental effects.

The EC Directive makes Environmental Impact Assessment mandatory for major developmental activities contained in Annex I which are oil refineries; large thermal power stations ; nuclear power stations and nuclear reactors; installations for the storage or disposal of radioactive waste; iron and steel works; installations extracting or processing asbestos; integrated chemical installations; motorways, express roads, airports, and long distant railways, trading ports and inland waterways; and waste disposal installations for the incineration, chemical treatment or landfill of toxic and dangerous wastes.[21] The Directive further provides that other projects require Environmental Impact Assessment where these are likely to have significant effects on the environment by virtue of their nature, size or location. A broad range of projects is covered by this requirement, including most industrial and waste treatment processes, extractive operations, agricultural and forestry developments, and infrastructure projects.[22]

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21. *Ibid.*
22. *Ibid.*

The technique of Environmental Impact Assessment finds origin in the precautionary principle which requires refusal of consent or approval of the developmental activity by the competent authority if such project poses threat of serious and irreversible environmental damage. To determine the serious and irreversible nature of the environmental effects of the development activity, Environmental Impact Assessment is necessary. The precautionary principle mandates that Environmental Impact Assessment should be made obligatory for developmental activities which are likely to have significant adverse effect on the environment. In case Environmental Impact Assessment reveals that the developmental activity poses threat of serious and irreversible environmental damage, the competent authority must withhold the consent for approval or permit for such activity.

The precautionary principle dictates that Environmental Impact Assessment should be carried out not only at the time of commencement of the developmental project but even during the operation of the project. Environmental Impact Assessment involves continuing assessment and evaluation of the environmental effects of the development projects as long as the project is in operation and is not confined to pre-project evaluation of possible environmental effects. Environmental Impact Assessment is a continual process and is focussed at continuing monitoring of the environmental consequences of the developmental activity because it is not possible to anticipate all the environmental consequences of the developmental activity at the time of its commencement. The precautionary principle insists at continuing features of Environmental Impact Assessment as long as developmental activity continues. The continual environmental assessment is the mandate of precautionary principle.

V. Environmental Audit

Environmental audit means self-assessment of the environmental performance of the developer. It is a concept which enables developers to produce environmental strategies after reviewing their environmental performance, i.e. whether there has been compliance with legal and fiscal environmental regulations, conformity to developers environmental policies, what reductions in wastes have been brought about, and what efficiency has been achieved in the use of energy and raw materials.[23] The precautionary principle is applicable as part of the audit system.

Environmental audit is a continual process and involves reviewing both the organization and management in relation to environmental performance, following a systematic examination of operations in an environmental

23. David Hughes, Environmental Law (1992) at 22.

context, considering emissions, effects on local communities, landscapes and ecosystems, and resulting in reports on areas for improved performance.[24] Like Environmental Impact Assessment, continuity is basic feature of environmental audit which is based on principle of caution and embodies the obligation of continuing watchfulness and anticipation.

The concept of environmental audit has two levels, namely, self-assessment of the environmental effects of the activities and external verification of the audit by an independent body. The continual nature of the concept requires that developers must draw up annual environmental statement which shall be audited by independent auditors. The concerned environmental authorities and the public must have an access to the reports of the environmental auditors. To implement precautionary principle which strengthens the edges of environmental jurisprudence, environmental audit must be made mandatory at the international as well as at national levels.

VI. Response of Indian Judiciary

A. Status of Precautionary Principle in India

The uncertainties of scientific proof and its changing frontiers from time to time has led to great changes in environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. In *Vellore Citizens Welfare Forum* v. *Union of India*,[25] the Supreme Court of India referred to these changes, to the precautionary principle and the new concept of burden of proof in environmental matters. Justice Kuldip Singh referred to the environmental principles of the international environmental law and stated that precautionary principle, the polluter pays principle and the special concept of onus of proof have now merged and govern the law in our country as is clear from Articles 47, 48A and 51A(g) of the Constitution and that, in fact, in various environmental statutes, such as Water Act, 1974, the Environment (Protection) Act, 1986 and other statutes, these concepts are already implied. In view of the constitutional and statutory provisions, the Supreme Court held that the precautionary principle and polluter pays principle are part of environmental law in India. The Supreme Court further held that even otherwise precautionary principle and polluter pays principle are part of the customary international law and, therefore, part of Indian domestic law.

In *Vellore* Case, the Supreme Court not only treated precautionary principle and polluter pays principle as part of the Indian environmental law but also directed the Central Government to establish authority under

24. *Ibid.*
25. (1996) 5 SCC 647.

section 3 (3) of Environment (Protection) Act, 1986. The authority established by the Central Government under section 3(3) of the Environment (Protection) Act, 1986 shall implement precautionary principle and polluter pays principle. Justice Kuldip Singh criticized the inaction on the part of the Government of India in the appointment of an authority under section 3(3) of the Environment (Protection) Act and observed that the Central Government should constitute an authority headed by a retired judge of the High Court and other members preferably with expertise in the field of pollution control and environment protection.[26]

The Government of India has issued certain notifications pursuant to the observation of the Supreme Court in *Vellore* Case. In 1996, Government of India issued a notification for the establishment of authority for the State of Tamil Nadu under section 3(3) of the 1986 Act which shall consist of a retired High Court Judge and other technical members.[27] A similar notification was issued in 1997 for Environmental Impact Assessment for the NCT.[28] The said notification issued under section 3(3) of the 1986 Act deals with the shrimp industry and includes a retired High Court Judge and technical members.

In *A.P. Pollution Control Board* v. *M.V. Nayudu*[29] the Supreme Court affirmed that the precautionary principle is part of Indian environmental law. The case involves the grant of consent by A.P. Pollution Control Board for setting up an industry by the respondent company for the manufacture of hydrogenated castor oil. The categorization of industries into red, green and orange has been made and the respondent industry was included in the red category. The company applied to the A.P Pollution Control Board seeking clearance to set up the unit under section 25 of the Water Act. The Board rejected the application for consent on the ground that the unit was polluting unit and would result in the discharge of solid waste containing nickel, a heavy metal and also hazardous waste under Hazardous Waste (Management and Handling) Rules, 1989. The respondent company appealed under section 28 of the Water Act to the appellate authority. The appellate authority decided that the respondent industry was not a polluting industry and directed A.P Pollution Control Board to give its consent for the establishment of the respondent industry on such conditions as the Board may deem fit. In a writ petition filed in the High Court, the division bench of the High Court directed A.P Pollution

26. *Id.* at 647.
27. Notification S.O. 671 (E) dated 30 September 1996.
28. Notification No. 88 E dated 6 February 1997.
29. AIR 1999 SC 512.

Control Board to grant consent subject to such conditions as might be imposed by the Board. It is against the said judgement of the High Court that A.P Pollution Control Board filed various appeals in the Supreme Court. The Supreme Court discussed the evolution of precautionary principle and explained the meaning of precautionary principle in detail.

The Supreme Court expressed approval of the *Vellore* judgment and treated precautionary principle as part of Indian environmental law.

The judgment of the Supreme Court in *Vellore* case and *A P Pollution Control Board* case have significant impact on the specialized environmental legislations in India . The judgments are a pointer for Pollution Control Board to grant consent for setting up an industrial unit on the basis of precautionary principle. The precautionary principle underlies the provisions of environmental legislations which relate to grant of consent by the Pollution Control Board to the setting up of industrial units.

B. Burden of Proof

The inadequacies of science have led to emergence of precautionary principle and the precautionary principle has led to the special principle of burden of proof in environmental cases. The special burden of proof places onus of proof on the actor or developer/industrialist to show that his action is environmentally benign. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the *status quo* by maintaining a less polluted state should not carry the burden of proof and the party who wants to alter it must carry this burden.[30]

In the *Vellore* case and *A.P Pollution Control* case, the Supreme Court observed that the new concept which places burden of proof on the developer or industrialist who is proposing to alter the *status quo*, has become a part of environmental law in India. The court directed the environmental authorities to recognize the shift in burden of proof in environmental cases created by precautionary principle.

The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution etc., it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.

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30. James M. Olson, *Shifting the Burden of Proof*, 20 ENVIRONMENTAL LAW, 1990, 891 at 898.

C. Combination of Judicial and Scientific Needs

The application of precautionary principle in environmental cases involves combination of judicial and scientific needs. In the absence of scientific and technological inputs, the judiciary is environmentally myopic.

(a) Environmental Courts

The need for combination of scientific and judicial inputs has crystallized the necessity for the establishment of environmental courts. The officers drawn from the Executive or the judges alone are not suitable for resolving the complicated disputes concerning environment. In 1986, Justice Bhagwati projected the need for the establishment of specialized environmental courts in *M.C. Mehta* v. *Union of India*.[31] The Supreme Court noticed that in past few years there is an increasing trend in the number of cases based on environmental pollution and ecological destruction coming up before the courts. Many such cases concerning the material basis of livelihood of millions of poor people are reaching the Supreme Court by way of public interest litigation. In most of these cases, there is need for scientific expertise as an essential input to inform judicial decision making. These cases require expertise at a higher level of scientific and technical sophistication. The Court felt the need for such expertise in these cases and it had to appoint several expert committees to inform the court as to what measures were required to be adopted by the management of the Shriram Foods and Fertilizers to safeguard against the hazard or possibility of leak, explosion, pollution of air and water etc. The Court had great difficulty in finding out independent experts who would be able to advise the Court on these issues. Since there is at present no independent and competent machinery to generate, gather and make available the necessary scientific and technical information , the Court had to make an effort on its own to identify experts who would provide reliable scientific and technical input necessary for the decision of the case and this was obviously a difficult and by its very nature, unsatisfactory exercise. It is, therefore, absolutely essential that there should be an independent center with professionally competent and public spirited experts to provide the needed scientific and technological inputs. The Court, therefore, urged the Government of India to set up an Ecological Science Research Group consisting of independent, professionally competent experts in different branches of science and technology, who would act as an information bank for the court and generate new information according to the particular requirements of the case. The Court also suggested the Government of India that since cases

31. AIR 1987 SC 965 at 982.

involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evaluation of scientific and technical data, it might be desirable to set Environmental Courts on a regional basis with one professional judge and two experts drawn from the Ecological Science Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of the appeal to the Supreme Court from the decision of the environmental court. Thus, the Supreme Court not only contemplated combination of a judge and technical experts but also an appeal to the Supreme Court from the environmental court.

The Supreme Court again expressed the need for the establishment of environmental courts consisting of judicial and scientific experts in *A.P Pollution Control Board* v. *M. V Nayudu*[32] and suggested amendments in environmental statutes.

(b) Environmental Statutes — Need for Amendments

The combination of judicial and scientific needs require the amendments in the environmental statutes. The Supreme Court urged the Government of India to bring about appropriate amendments in the environmental statutes to ensure that in all environmental courts, tribunals and appellate authorities, there is always a judge of the rank of a High Court judge - sitting or retired - and scientist or group of scientists so as to help a proper and fair adjudication of disputes relating to environment and pollution.[33] The Supreme Court felt an immediate need that in all states and union territories, the appellate authorities under Water (Prevention and Control of Pollution) Act, 1974 and section 31 of Air (Prevention and Control of Pollution) Act, 1981 or other rules, there is always a judge of High Court, sitting or retired, and a scientist or group of scientists of high ranking and experience, to help in the adjudication of disputes relating to environment and pollution.[34] The Supreme Court pointed out the need of amending notifications under these Acts as well as notification under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989[35]. The Supreme Court requested the Central and State Government to take appropriate action urgently.[36]

The National Environmental Appellate Authority Act, 1997 comes very close to the ideals set by the Supreme Court. The Act provides for the

32. AIR 1999 SC 812 at 822-23.
33. *Ibid.*
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*

establishment of Appellate Authority consisting of a sitting or retired Supreme Court Judge or a sitting or retired Chief Justice of High Court and a vice-chairman who has been an administrator of high rank with expertise in technical aspects of problems relating to environment and technical members not exceeding three who have professional knowledge or practical experience in the areas pertaining to conservation, environmental management, land or planning and development. Appeals to the appellate authority are to be preferred by persons aggrieved by an order granting environmental clearance in the areas in which any industries, operations or processes etc. are to be carried subject to safeguards. With a view to ensure that there is neither danger to environment nor to ecology and at the same time ensuring sustainable development, the Supreme Court expressed the view that the Supreme Court, being the apex court, and the High Courts should refer scientific and technical aspect for investigation and opinion to expert bodies such as the Appellate Authority under the National Environmental Appellate Authority Act, 1997[37]. The said Authority, being combination of judicial and technical inputs, possesses expertise to give adequate help to the Supreme Court and High Courts to arrive at decisions in environmental matters. Accordingly, the Supreme Court in *A.P Pollution Control Board* v. *M.V Nayudu* referred the issue of determination of the hazardous nature of the respondent industry to the Appellate Authority which would help the Supreme Court to decide the matter of environmental clearance to the respondent industry.[38]

VII. Conclusion

The shift from assimilative capacity principle to precautionary principle has considerably sharpened the edges of environmental jurisprudence. The precautionary principle occupies such a central and pivotal position in the environmental jurisprudence that it underlies the international conventions, treaties and protocols adopted to protect the environment. Despite uncertainties and conflicting scientific theories concerning causes of the depletion of ozone layer, international community of sovereign States adopted Montreal Protocol to prevent the depletion of ozone layer which aims at phasing out of ozone depletion substances like Chlorofluoro carbons and halons. Despite scientific uncertainties concerning causes and effects of global warming, Climate Change Convention was adopted at the U.N. Conference on Environment and Development in 1992. Despite uncertainties concerning conservation of biodiversity, U.N. Convention on Biodiversity was adopted at the U.N. Conference on Environment and Development.

37. *Id.* at 825.
38. *Ibid.*

The issue of biosafety has always posed problems due to scientific inadequacies and uncertainties. The Conference of the Parties to the Convention on Biological Diversity adopted a supplementary agreement to the Convention known as the Cartagena Protocol on Biosafety on 29 January 2000. The Protocol seeks to protect the biological diversity from the potential risk posed by living modified organisms resulting from modern biotechnology. It establishes a procedure for ensuring that countries are provided with the information necessary to make informed decisions before agreeing to the import of such organisms into their territory. The Biosafety Protocol is breakthrough in that it enshrines the " precautionary principle" as a principle of international environmental law. The Protocol establishes a Biosafety Clearing - House to facilitate the exchange of information on living modified organisms and to assist countries in the implementation of the Protocol.

The precautionary principle has so consistently been affirmed in the international conferences and the legal instruments adopted therein that it has acquired the character of customary international law. The Supreme Court of India has demonstrated exemplary judicial activism in treating the principle not only as part of international custom but domestic law in India as well.

The precautionary principle forms the basis of fundamental principles of international environmental law, namely, Environmental Impact Assessment, Environmental Audit and Sustainable Development. However, Environmental legislations in India do not contain adequate provisions to give expression to the obligations to carry out environmental impact assessment and environmental audit. The environmental statutes in India need appropriate amendments to operationalise and implement basic and fundamental concepts of international environmental jurisprudence.

EXTRATERRITORIAL APPLICATION OF GATT ARTICLE XX(G): EVALUATING THE GATT/WTO DECISIONS

*Anupam Goyal**

The conclusion of the Uruguay Round of trade negotiations and coming into existence of the World Trade Organization (WTO) intensified the debate on trade versus environment. WTO in its fold comprises GATT 1947 (now GATT 1994) with certain modifications. The myth that GATT has no provisions relating to the environment has been slow to die.[1] While it is true that the GATT does not mention the word "environment," the history of the life and health exceptions in trade agreements demonstrates that trade-related environment measures (TREMs) have been in use for more than a century. For example, the Commercial Convention between Egypt and Great Britain of 1889 provided an exception for "prohibition occasioned by the necessity of protecting the safety of persons or of cattle, or of plants useful to agriculture".[2]

Some governments argue that the GATT provisions, in Article XX are flexible enough to allow for the use of trade provisions within Multilateral Environmental Agreement (MEA).[3] The history of Article XX exceptions demonstrates that it was designed to encompass environmental measures.[4] The language of GATT Articles XX(a), (b) and (g) appears broad enough to cover most, if not all, trade-related environmental measures.[5] The Appellate Body in *Shrimp/Turtle* case considered that Article XX(g), "exhaustible natural resources" was crafted more than 50 years ago.[6] It

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1. Kyle E. McSlarrow, *International Trade and Environment : Building a Framework for Conflict Resolution,* 21 ENVIRONMENTAL LAW REPORTS, 1991, 10,589 at 10,595.
2. COMMERCIAL CONVENTION, 1889, Egypt - U.K., Art. II, 172 Consol. T.S. 290-92.
3. TRADE AND ENVIRONMENT : NEWS FROM THE GATT, GATT Doc. TE 004, Nov. 26, 1993 at 3.
4. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX* (hereinafter Charnovitz 1991), 25 JOURNAL OF WORLD TRADE, Oct. 1991 at 55.
5. Ernst-Ulrich Petersmann, *International Trade law and International Environmental law : Prevention and Settlement of International Disputes in GATT*, 27 JOURNAL OF WORLD TRADE, February 1993 at 72.
6. *United States - Import Restriction of Certain Shrimp and Shrimp Products*, WTO Doc, WT/DS58/AB/R (12 Oct. 1998) [hereinafter *Shrimp/Turtle Appellate Decision*]; 38 INTERNATIONAL LEGAL MATERIALS, 1999 at para 129.

said that a treaty interpreter should read these provisions in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.[7]

In this regard the controversy is prevailing over the issue of extraterritorial application of measures covered under Article XX. The issue became of concern among environmentalists, after *Tuna/Dolphin* I, where the GATT Panel invalidated extraterritorial application of Article XX(g).[8] Specifically, in the present paper discussion is targeted over the extraterritorial application of a measure by a state on conservation of "exhaustible natural resources" lying outside the jurisdiction of the state imposing measures, when measures are taken in pursuance of some internationally agreed environmental agreements.

The study begins with discussion on issues of extraterritoriality, and notes that *Tuna/Dolphin* I Panel held extraterritoriality of measures inapplicable. Then the feasibility of extraterritorial application of measures in face of concept of sovereignty was examined. The next part discusses the rejection of extraterritorial application of Article XX(g) by the *Tuna/Dolphin* I panel and notes the fallacy of the decision. Subsequently the article notes that *Tuna/Dolphin* II admitted Article XX(g) to have extraterritorial application but rendered it infructuous by applying 'undermining test." Here it is noted that undermining test was held interpretively wrong by the *Shrimp/Turtle Appellate Decision.*

Then the paper takes note of the *Reformulated Gasoline* and *Shrimp/Turtle* Appellate decisions, though these decisions do not determine the question of extraterritorial application of Article XX(g), but hold that United States taking of measures against imported gasoline to conserve clean air at home and measures targeted at conserving turtles lying outside the jurisdiction of the US justified. These decisions testify, by necessary implication, the extraterritorial application of TREMs in certain cases. Lastly, the discussion observes in conclusion, the advantages of extraterritorial application of environmental measures as restraints on trade.

I. EXTRATERRITORIALITY[9]

The basis for almost every externally-directed environmental trade

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7. *Ibid.*
8. *United States — Restrictions on Imports of Tuna*, GATT Doc. DS21/R, B.I.S.D. (39th Supp.) 155 (Sept. 3, 1991) (unadopted) [hereinafter Tuna/Dolphin]; 30 INTERNATIONAL LEGAL MATERIALS, 1991 at 1594.
9. Extraterritoriality means outside one's territory; Extrajurisdictionality means outside one's jurisdiction. The meanings of the two are different technically. However the usage of each term in the discussion here, refers the both meanings - the meaning carried by the Article XX(e) - "relating to the products of prison labour".

measure is the assertion that practices of another country or its citizens are causing some kind of harm to the environmental interests of the complaining countries. Terms such as "transborder" or "transboundary" are often employed to describe the idea that an activity of one country has adverse effects on other countries, but the range of impacts covered by these terms is quite broad. The range varies from events with a physical impact on other countries to events that take place entirely within the borders of the target country.

The cases that most clearly entitle an affected state to act are those in which some harmful physicals substance is transmitted across borders into the complaining country and causes traceable damage. The example usually cited is the so-called *Trail Smelter* case involving transboundary emission of toxic sulfur dioxide fumes from a lead and zinc smelter.[10] These are the easy cases. Once the scientific facts are established, the "wrong" in such cases is almost universally acknowledged. Legal liability can be established, and remedies of retorsion and retaliation, including proportional trade retaliation, are taken for granted — so much so that cases involving this sort of direct impact do not occupy very much space in the current trade-and-environment debate.[11]

Now the question of territoriality arises in determining whether the trade measures for environmental purposes, extends to the conservation of exhaustible natural resources when these are lying within the jurisdiction of the state itself or these may be directed for conservation or protection of the thing existing outside or within the jurisdiction of the other states.

The issue of extraterritoriality first arose in *Tuna/Dolphin I* case.[12] In this case Mexico brought an action against the United States for violation of its GATT obligations as a result of the application of the United States' Marine Mammal Protection Act of 1972 ("MMPA"). The MMPA prohibited the importation of tuna or tuna products into the United States that had been harvested by purse-seine nets in the Eastern Tropical Pacific Ocean ("ETP").[13] The MMPA defines the ETP as the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west latitude, and the coasts of North, Central and South America.[14]

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10. *United States* v. *Canada* (*Trail Smelter* Arbitration), 3 UNITED NATIONS REPORTS OF INTERNATIONAL ARBITRAL AWARDS, 1941 at 1938.
11. Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, 2 FAIR TRADE AND HARMONIZATION, 1996 at 112.
12. *Tuna/Dolphin I*, *supra* n. 8.
13. *Id.*, para 2.1.
14. *Id.*, para 2.3.

The basis for this prohibition was that the schools of tuna in the ETP often swim below herds of dolphins. This means that the use of purse-seine nets[15] to catch tuna necessarily resulted in the incidental killing and injury to dolphins.

In 1990, following protracted litigation, the United States determined that the Mexican tuna fleet had exceeded the statutory limits on dolphin taking and imposed an embargo on imports of Mexican tuna.[16] The Mexican government challenged the embargo.

In *Tuna/Dolphin I* the Panel was doubtful of Article XX to have extraterritorial effects. The Panel recognized that the working of Article XX(b)'s health and safety exception and Article XX(g)'s resource conservation exception were not expressly limited to the protection of jurisdiction of the contracting parties.[17] In light of this ambiguity, and the practice of past panels to interpret the exceptions in Article XX narrowly, the panel ruled that neither Article XX(b) nor (g) permitted the use of measures that extended beyond the jurisdiction of the party taking the action.[18]

The Panel considered the drafting history of Article XX(b) and noted that Article 32 of the New York Draft of the Charter of the International Trade Organization contained an exception based on the same wordings as the present Article XX(b) but with the provision that "corresponding domestic safeguards under similar conditions [must] exist in the importing country."[19] From the deletion of this proviso in the final draft of the exception, the panel concluded that "the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country."[20]

It is submitted that the Panel has failed to address the thesis of environmentalists that "Mexican" dolphins are part of ecosystem that transcends all jurisdictions.[21] In defending its decision, the Panel warned that extraterritoriality would undermine the multilateral trading system.[22]

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15. *Id.*, para 2.1.
16. *Id.*, para 2.7.
17. *Id.*, para 5.25.
18. *Id.*, para 5.26.
19.. *Ibid.*
20. *Ibid.*
21. "In reality all dolphins are stateless". Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVIRONMENTAL LAW REPORTS, 1993 at 497.
22. *Tuna Dolphin I, supra* n. 8, para 5.27.

II. Sovereignty Considerations

The obsession against extraterritoriality arises from the concept of sovereignty. The principle of the sovereign equality of states is the cornerstone of international law. From this doctrine flows a sovereign state's exclusive jurisdiction over its territory, resources and the people who live there.[23] Also flowing from this doctrine is the duty of non-intervention in matters that fall under the 'exclusive jurisdiction of other states'.[24]

From the perspective of encouraging unfettered economic development, it is tempting to view the principle of sovereignty as established a state's absolute right to determine the domestic level of environmental protection or degradation it deems appropriate within its territory. Such an interpretation would certainly be in accord with the antecedents of the sovereignty doctrine. But conflicts related to production externalities, with spillover effect beyond national borders, may arise when distinct sovereignties have different interests in an environmental problem.[25]

Therefore, some authors have noted that such an 'absolutist' view of the sovereignty doctrine is inconsistent with an international legal system 'based on the principle of reciprocal rights and obligations'.[26] Although this point goes beyond the *Tuna/Dolphin I* Panel's terms of reference, it should be noted that the sovereign rights of states over resources within their jurisdiction is not absolute.[27] According to the Stockholm Declaration on the Human Environment, nations have a "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."[28] The tension between sovereign rights and international responsibilities underlies

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23. Ian Brownlie, Principles of Public International Law (1990) at 287.
24. *Id.*, at 287-289.
25. OECD, Annex : OECD Conceptual Framework for PPM Measures in OECD, Trade and Environment : Process and Production Methods, OECD Paris, 1994, 149-62 at 156.
26. "For if sovereignty means absolute power, and if states are sovereign in that sense, they cannot at the same time be subject to law" — Brierly, The Law of Nations (1963) at 7-16.
27. Under Law of the Sea Convention of 1982, "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." 21 International Legal Materials, 1982, 1261 at 1308.
28. *Stockholm Declaration*, Principle 21. Moreover, Recommendation 103(a) of the Stockholm Declaration states that "no country should solve or disregard its environmental problems at the expense of other countries." 11 International Legal Materials, 1972 at 1462.

many of the difficult environmental problems the world faces. Dolphins may roam in and out of national territory and thus be a jurisdictional concern as well as an extraterritorial one.

Perhaps nowhere are the pitfalls of an absolutist view more apparent than with respect to environmental issues. First, the accepted notion of 'global environmental interdependence' is incompatible with traditional notions of sovereignty.[29] Tension exists foremost because environmental degradation does not respect the territorial rights implicit in the doctrine of sovereignty. Pollution migrates and other forms of environmental degradation also frequently have transborder or even global implications. Environmentally-related violations of sovereignty occur daily, and the practice is usually to tolerate these violations, if they are kept within reasonable limits and the cumulative risks are not too great. Thus, in environmental matters territorial sovereignty is not inviolate.[30]

Second, gone is the belief that a sovereign (source) state is free to do as it pleases within its own territory, jurisdiction or control. Just as 'no serious scholar still supports the contention that internal human rights are "essentially within the domestic jurisdiction of any state" and hence insulated from international law',[31] permanent sovereignty over natural resources is also qualified,[32] constrained by 'treaties and rules of customary international law concerning conservation and environment protection' that serve to limit a sovereign's use of its own natural resources. These limitations are evident in Principle 2 of the Rio Declaration,[33] and many of the more prominent

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29. There is difficulty of reconciling global environmental interdependence and traditional or historical views of the sovereignty doctrine. It is worth noting that from the perspective of global environmental interdependence all states are, to some degree, both source and suffering states. This only goes to show that all states bear some responsibility for the planet's environmental problems, and are also victims of these problems. — Bragdon, *National Sovereignty and Global Environmental Responsibility : Can the Tension Be Reconciled for the Conservation of Biological Diversity?*, 33 HARVARD INTERNATIONAL LAW JOURNAL, 1992 at 381-382.
30. Tomushat, "*International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law : The work of the International Law Commission,*" INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (1991) at 40.
31. Reisman, *Sovereign and Human Rights in Contemporary International Law*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW, 1991, 866 at 869.
32. General Assembly Resolution, recognizes the right of people and nations 'to their natural wealth and resources,' but conditions this right on its exercise 'in the interest of their national development and of the well-being of the people of the State concerned'. 2 INTERNATIONAL LEGAL MATERIALS, 1963 at 223.
33. The balance between a state's right to use its resources and the environmental implications associated with this right are reflected in Principle of the RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT OF JUNE 14, 1992:

environmental conventions.[34] This is not to say that states do not enjoy a right to development, but only to say that, as one would expect, there are also constraints on how this right is exercised.[35]

Therefore, territoriality provides an insufficient basis for the protection of certain regions, zones, or areas of global concern. Viewed in isolation, the sovereignty doctrine provides an inadequate foundation from which to address the environmental interns of suffering states. A number of scholars have strongly objected to the notion of interest balancing, arguing that this approach would delegate "extraordinary discretion' to international trade tribunals, and would open the door "to unacceptable abuses."[36] Instead, Robert Hudec and Thomas Schoenbaum have advocated that trade measures that are specifically authorized by Multilateral Environmental Agreements (MEAs) should be permitted if agreement addresses a "serious" environmental problem of "potentially global scope," and the trade measure is reasonably related to the purpose of the MEA.[37]

Professor Lowenfield had observed:

> [i]n a situation involving more than one country, if country A wishes to regulate and country B does not, it seems ... equally fair to criticize B for attempting to impose its will beyond its borders as it is to criticize A for attempting to exercise its jurisdiction extraterritorially.[38]

Similarly, it seems equally fair to restrain states that cause global environmental harm as it is to restrain states that seek to use extraterritorial

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State have, in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

34. MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER, Sept. 16, 1987, 26 INTERNATIONAL LEGAL MATERIALS, 1987 at 1550, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, (CITES), Mar. 3, 1973, 12 INTERNATIONAL LEGAL MATERIALS, 1973 at 1086.
35. "The right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations". Principle 3 of Rio Declaration, *supra* n. 33.
36. Thomas J. Schoenbaum, *International Trade and Protection of the Environment : The Continuing Search for Reconciliation,* 91 AMERICAN JOURNAL OF INTERNATIONAL LAW, 1997 at 291.
37. *Id.* at 283-284; Hudec, *supra* n. 11 at 125-145.
38. Andreas F. Lwenfield, *Book Review*, 78 HARVARD LAW REVIEW, 1965, 1699 at 1703-4.

trade measures, to ensure that their own markets do not contribute to global environmental harm.

III. Article XX(g)

Article XX(g) provides that measures may be taken when they are relating to the conservation of exhaustible natural resources and they are made effective with restrictions on *domestic* production or consumption. It means that when similar restrictions are imposed domestically then the measures targeted at conservation of exhaustible natural resources may be taken.

Exceptions in Article XX of the GATT provides—

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or as a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures
>
> (b) necessary to protect human, animal or plant life or health,
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with the restrictions on domestic production or consumption.

IV. Tuna Dolphin I and Extraterritorial Application of Article XX(g)

The *Tuna/Dolphin I* Panel concluded that the natural resources and living things protected under these provisions were only those within the territorial jurisdiction of the country concerned.[39] The Panel observed that any measures taken under Article XX (g) to control the production or consumption of the exhaustible natural resource in question can only be effective if the production and consumption thereof takes place under the country's own jurisdiction.[40] The same reasons for which the *Tuna/Dolphin I* panel rejected the extrajurisdictional application of Article XX (b) also apply to Article XX (g).[41]

The Panel noted that a country could effectively control the production or consumption of exhaustible natural resources only to the extent that the

39. *Tuna Dolphin I, supra* n. 8, paras, 5.26, 5.31.
40. *Id.*, para 5.31.
41. *Id.*, paras 5.32, 5.27.

production or consumption is under its jurisdiction. Therefore, Article XX(g) was limited to take trade measures on production or consumption within one state's jurisdiction.[42]

The Panel further observed that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, it would jeopardize the rights of other states under the General Agreement.[43]

A. Rejection of Article XX(g)'s Extrajurisdictionality Seems Incorrect

Article XX(g) provides that measures may be taken when they are relating to the conservation of exhaustible natural resources if they are made effective with restrictions on *domestic* production or consumption. It means that when similar restrictions are imposed domestically then the measures targeted at conservation of exhaustible natural resources may be taken.

The question arises that besides domestic production or consumption, what is the area where the measures can be imposed?

The reply should be, the place beyond the domestic limit of the state concerned i.e. extraterritorial. The provision does not by any imagination confined to one states national or vessel. In other words the natural inference, arising from the use of phrase ". . . if such measures are made effective in *conjunction with the restrictions on domestic production or consumption* is to have extrajurisdictional effect".

There is nothing in the language of Article XX which suggests that measures to conserve exhaustible natural resources be limited to domestic jurisdiction. To the contrary, Article XX(e) permits to impose GATT-inconsistent trade restrictions on a country that produces products with prison labor an unambiguous exercise of extrajurisdictional regulation.[44]

Steve Charnovitz notes that nothing in GATT or its legislative history suggests that the drafters intended a more limited jurisdictional reach for Article XX(b).[45]

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42. *Id.*, para 5.31.
43. *Id.*, para 5.32.
44. Article XX(e) of the GENERAL AGREEMENT OF TARIFF AND TRADE, Oct 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].
45. Steve Charnovitz, *Green Roots, Bad Pruning : GATT Rules and Their Application to Environmental Trade Measures,* 7 TUL. ENVTL. L.J., 1994, 299 at 339-41. (arguing that the authors of the GATT intended Article XX to have international application).

Secondly, the *Tuan/Dolphin I* Panel reasoned for nonapplication of measures (extraterritorially) under Article XX(g) that the measures could effectively control the production or consumption of exhaustible natural resources only to the extent that the production or consumption is under its jurisdiction.[46] In other words it laid down "effective" test in determining the extraterritorial application of measures. This test has specifically been rejected by the *Reformulated Gasoline Appellate Decision*. The Appellate Body found that Article XX(g) did not impose an "effects test" in part because of the plain meaning of the words in Article XX(g), as well as due to the practical difficulties of determining causation.[47]

The definitive ineterpretation of this phrase was given by the Appellate Body in the *Reformulated Gasoline* case:

> [T]he basic international law rule of treaty interpretation ... that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here .... [T]he ordinary or natural meaning of "made effective" when used in connection with a measure a governmental act or regulation—may be seen or refer to such measure being "operative", as "in force", or as having "come into force".

B. Contradictory Approach of the Tuna/Dolphin I Panel

The *Tuna/Dolphin I* Panel examining, if any extrajurisdictionality meant Article XX(b), negatived by observing that:

> In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b) read: "For the purpose of protecting human, animal or plant life or health if corresponding *domestic* safeguards under similar conditions exist in the importing country". This added proviso reflected concerns regarding the abuse of sanitary regulations by importing countries. Later, Commission A of the Second Session of Preparatory Committee in Geneva agreed to drop this proviso as unnecessary.[48] Thus, the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary

46. *Tuna Dolphin I*, *supra* n. 8, para 5.31.
47. *United States - Standard for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/9 (May 20, 1996), 35 INTERNATIONAL LEGAL MATERIALS, 1996 at 625. [hereinafter *Reformulated Gasoline Appellate Decision*].
48. *Tuna Dolphin I*, *supra* n. 8, para 5.26.

measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.[49]

The reason for rejecting extrajurisdictionality as noted by the Panel was drop of the phrase: *"For the purpose of protecting human animal or plant life or health if corresponding domestic safeguards under similar conditions exist in the importing country"*. But the existence of the phrase in Article XX(g), — *"... if such measures are made effective in conjunction with the restrictions on domestic production or consumption" is to have extrajurisdictional effect"* — which is almost identical in meaning and intent to the former phrase, was *ignored* by the panel in determining Article XX(g) to have extrajurisdictional application.

It is submitted that the panel erred in its ruling rejecting the extrajurisidictionality in perhaps Article XX(g). It signifies that panel lacked the objectivity in its decision, either due to its apathy towards environmental consideration or consideration that environmental issues being subservient to free trade principle. It was a major drawback because the objectivity is the mainstay to the task of rule of interpretation.

The lack of objectivity flowing from over consideration of free trade can be elicited from the panel's justification for denying extrajurisdictionality to Article XX(g) was the consideration — *"that if the extrajurisdictional interpretation of Article XX(g) ... were accepted each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement"*[50] — an unwarranted interpretation by the panel.[51]

A treaty interpreter must begin with and focus upon, the text of the particular provision to be interpreted.[52] Article XX(g), is clear and unambiguous in its meaning and natural inference. Putting of an extraneous condition regarding Article XX(g) to the effect that extrajurisidictional interpretation would jeopardize the rights under the General Agreement is liable to be rejected, and violative of treaty rule of interpretation when the concerned provisions is not ambiguous.

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49. *Ibid.*
50. *Id.*, para 5.32.
51. *Shrimp/Turtle Appellate Decision, infra* 53, paras 116, 121.
52. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose — D.J. Harris, CASES AND MATERIAL ON INTERNATIONAL LAW (London : Sweet and Maxwell, 1998) at 813.

In recent *Shrimp/Turtle Appellate decision*,[53] the Appellate Body rectified similar interpretive mistake done by the *Shrimp/Turtle* Panel decision.[54] The *Shrimp/Turtle* Panel found:

> ... [W]e are of the opinion that the *chapeau* [of] *Article XX*, interpreted within its context and in the light of the object and purpose of GATT and of the *WTO Agreement, only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system*, thus also abusing the exceptions contained in Article XX.[55]

The Appellate Body in the appeal *rejected* such condition added by the Shrimp/Turtle Panel to the chapeau of the Article XX—that the chapeau be interpreted, so as not to undermine the WTO multilateral trading system.[56] This condition is almost identical to *Tuna/Dolphin I* panel's justification in denying extrajurisdictionality into Article XX(g).[57]

The Appellate Body held "fundamental rule not to undermining, the multilateral trading system at the part of the Contracting parties is neither an obligation, *nor is it an interpretative rule* which can be employed in the appraisal of a given measure under the chapeau of Article XX."[58]

The Appellate body noted that an interpretation holding a measure requiring from exporting countries, compliance with certain policies, prescribed by the importing country renders a measure *apriori* incapable of justification under Article XX shall eventuate the specific exceptions of Article XX inutile, a result *abhorrent* to the principle of interpretation we are bound to apply."[59]

V. TUNA/DOLPHIN II AND EXTRATERRITORIAL APPLICATION OF ARTICLE XX(G)

A little shift form previous stand of no-extraterritoriality for TREMs was perceived in *Tuna/Dolphin II* case. In 1992, the European Union

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53. *United States - Import Restriction of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, Oct. 12, 1998 [hereinafter *Shrimp/Turtle Appellate Decision*], 38 INTERNATIONAL LEGAL MATERIALS, 1998.
54. *United States - Import Restriction of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R, May 15, 1998, *modified* by Appellate Body Report, WT/DS58/AB/R, Oct. 12, 1998. [hereinafter *Shrimp/Turtle Appellate Decision*].
55. *Id.*, para 7.44.
56. *Shrimp/Turtle Appellate Decision, supra* n. 53, para 116,
57. *Tuna Dolphin I, supra* n. 8, para 5.33.
58. *Shrimp/Turtle Appellate Decision, supra* n. 53, para 116.
59. *Id.*, para 121.

brought a second challenge to the MMPA, this time based on a provision of the statute providing for a secondary embargo on imports of tuna from states that had themselves imported tuna from a state subject to the primary import ban.[60] The provision was intended to prevent states from circumventing the MMPA's primary embargo provision by engaging in "tuna laundering" — i.e. selling their tuna to an intermediary state, which would then re-export the tuna to the United States.

Tuna/Dolphin II Panel observed, first, that the text of Article XX(g) does not spell out any limitation on the location of the exhaustible natural resources to be conserved.[61] The Panel rejected the notion that GATT established a *per se* rule against extraterritorial measures.[62] The panel eschewed the *Tuna/Dolphin I* panel's tortured reading of the text and drafting history of Articles XX(b) and XX(g), and noted that several of the other Article XX exceptions — such as the exception permitting restriction of trade "relating to the products of prison labor" - expressly permit trade measures directed at persons and actions located outside the importing state's territorial jurisdiction.[63]

Giving instance of Article XX(e) the Panel observed that measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement with respect to things locate, or actions occurring, outside the territorial jurisdiction of the party taking the measure.[64] The Panel further observed that, under general international law, states are not ... barred ...from regulating the conduct of vessels having their nationality, or any persons on these vessels, with respect to persons, animals, plants and natural resources outside their territory.[65] The Panel recalling its reasoning under Article XX(g), noted, that the text of Article XX(b) does not spell out any limitation on the location of the living things to be protected.[66] The Panel further recalled its observation that elsewhere in the General Agreement measures according different treatment to products of different origins could in principle be taken with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure.[67]

60. *United States —Restriction on Imports of Tuna*, GATT Doc. DS29/R at para 5.5, (June 1994) (unadopted) [hereinafter *Tuna/Dolphin II*], 33 INTERNATIONAL LEGAL MATERIALS, 1994.
61. *Id.*, para 5.15.
62. *Id.*, para 5.16.
63. *Ibid.*
64. *Ibid.*
65. *Id.*, para 5.17.
66. *Id.*, para 5.31.
67. *Id.*, para 5.32.

One scholar[68] observed citing *Tuna/Dolphin II* case[69], that the Panel ruled that government can enforce an Article XX(g) restriction extraterritorially only against their own nationals and vessels.[70] But such observation is not correct. *Tuna/Dolphin II* panel nowhere put the condition for extraterritoriality to be against one's own nationals and vessels. It was an additional observation of the Panel that states could pursue jurisdiction over its nationals and vessels beyond its territory.[71] Relevant provision of para 5.20 reads:

> ... the Panel could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision. The Panel consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels fell with the range of policies covered by Article XX(g).[72]

Panel's observation in para. 5.20 as cited[73] by the scholar, neither explicitly nor implicitly restricts for Article XX to have extraterritorial application as noted by the Panel in para. 5.15 and 5.16,[74] if it were the intention of the Panel that extraterritoriality be limited to in respect of one's nationals and vessels, the panel would not have instanced extraterritoriality applicable in Article XX exceptions — such as the exception permitting restriction of trade "relating to the products of prison labor", because it could not be directed against one states' own nationals.

However, the *Tuna/Dolphin II* Panel, put some other *condition* for the use of extraterritorial measures that extraterritorial trade measures are allowed, provided they do not force other States to change their policies within their jurisdiction.[75] The Panel examined whether under Article XX(g) (b) the measures could include measures taken as to force other countries to change their policies with respect to persons or things within their own jurisdictions, and requiring such changes in order to be effective.[76] For imposing the condition the Panel reasoned that the text of Article XX does

68. Schoenbaum, *supra* n. 36 at 279.
69. *Tuna/Dolphin II, supra* n. 60, para 5.20.
70. *Supra* n. 68.
71. *Supra* n. 65.
72. *Supra* n. 69.
73. *Ibid.*
74. *Supra* n. 61, 63 and 64.
75. *Tuna/Dolphin II, supra* n. 60, paras 5.26 and 5.38.
76. *Id.*, paras 5.25, 5.38.

not provide a clear answer to this question.[77]

It further proceeded to examine the text of Article XX(g) in the light of the object and purpose of the General Agreement and found that if however Article XX were interpreted to permit contacting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties[78] — the similar effort done by the previous *Tuna/Dolphin I* Panel and recent *Shrimp/Turtle* Panel and reached the same interpretively wrong conclusion.[79] In its approach to interpret Article XX(b) and (g) in the light of the objectives and purposes of the General Agreement, the Panel committed mistake relating to the rules of interpretation—similar to that by *Tuna/Dolphin I, Shrimp/Turtle* panels.[80] Such interpretation has been expressly rejected by the *Shrimp/Turtle* Appellate Body.[81]

If the condition imposed by the *Tuna/Dolphin II* Panel were assumed right it would have rendered the extraterritoriality of a measure infructuous. The condition for extraterritorial measures not to force other states to change their policies within their jurisdiction has been struck down[82] by the *Shrimp/Turtle Appellate Decision.*

Previous to the *Shrimp/Turtle Appellate Decision,* in *Reformulated Gasoline* Appellate Decision, the Appellate Body taking different note from the aforesaid view of the *Tuna/Dolphin II*, observed, "the phrase relating to the conservation of exhaustible natural resources' may *not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interest it embodies."*[83]

If the interpretation[84] of *Tuna/Dolphin II* were accepted, Article XX should be no more called "exceptions". Exception means that if some

77. *Ibid.*
78. *Tuna/Dolphin II, supra* n. 60, paras 5.26 and 5.38.
79. *Supra* n. 50, 55 and 58.
80. *Ibid.*
81. *Supra* n. 58, 59.
82. *Supra* n. 58.
83. *Reformulated Gasoline Appellate Decision, supra* n. 47 at 622.
84. *Supra* n. 78.

measure is covered under Article XX, the inconsistency of the measure with the *General Agreement* has not to be heeded to. The phrase in the chapeau of Article XX — "nothing in this *Agreement shall . . .* ", itself indicates that when a measure is evaluated under Article XX, no reference to the General Agreement be made, as unwarrantedly done by the *Tuna/ Dolphin II* Panel.

In fact the chapeau to Article XX is competent enough to check any misuse or abuse of a measure in question.[85] Therefore, if the interpretive mistake by *Tuna/Dolphin II* Panel is assumed rectified, the extraterritoriality of measures should not have any hurdle when damage to global commons is at stake.

VI. Reformulated Gasoline and Extraterritorial Application of Article XX(g)

The WTO Appellate Body in *Reformulated Gasoline* case adopted more balancing approach in allowing extraterritoriality to the TREMs. The Appellate Body adopted interpretation of Article XX that would permit measures aimed at conserving global resources, so long as the importing state has a sufficient "nexus" with the protected resource, and the measure is both "even-handed" in its treatment of domestic and imported goods, and "reasonable" in light of the competing trade and environmental interests.[86]

In *Reformulated Gasoline* case, the Venezuela and Brazilian governments challenged a United States regulation concerning the maximum levels of gasoline emissions permissible in domestic and imported gasoline.[87] The regulation was promulgated pursuant to a 1990 Clean Air Act amendment requiring the United States Environmental Protection Agency (EPA) to promulgate regulations aimed at:

(1) achieving a fifteen percent reduction in the emissions of certain air-polluting substances in specific high-pollution areas, and

(2) ensuring that emissions from conventional gasoline sold in other areas remained at or below 1990 baseline levels.[88]

Pursuant to this mandate, EPA issued a regulation (known as the "Gasoline Rule") setting forth detailed criteria for establishment of the 1990

85. *Reformulated Gasoline Appellate Decision, supra* n. 47 at 626.
86. *Id.* at 623, 624, 625.
87. *United States - Standard for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (Jan. 29, 1996), 35 International Legal Materials at 274, paras 1.1-1.2 modified by Appellate Body Report, WT/DS2/9, May 20, 1996 [hereinafter *Reformulated Gasoline Panel*].
88. *Id.*, paras 2.2-2.4.

baseline emission levels.[89] Under these Rules, most domestic refiners were required to establish *individualized* baselines based on emissions data reflecting the actual quality of the gasoline that they themselves had produced in 1990.[90] However, the Rules did not permit foreign refiners to establish individualized baselines for their gasoline.[91] Instead, imported gasoline was required to comply with a baseline reflecting *average* emissions levels for *all* gasoline sold in the United States in 1990.[92]

The Panel established to hear the dispute concluded that a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning of Article XX(g).[93] However, the Panel Report also concluded that "less favorable baseline establishments methods" were *not* primarily aimed at the conservation of exhaustible natural resources and thus fell outside the justifying scope of Article XX(g).[94]

The Appellate Body, in its finding concluded, "that the baseline establishment rules of the Gasoline Rule fall within the terms of Article XX(g)"[95] and that the "Panel erred in law in its conclusion that the baseline establishment rules contained in part 80 of Title of the Code of Federal Regulations did not fall within the terms of Article XX(g) of the *General Agreement*".[96]

Here, the Appellate Body articulated a new three-pronged test for Article XX(g). Under the first prong of the test, the importing state must show that the challenged measure, "taken as a whole," has a "substantial relationship" to natural resource conservation.[97] Under the second prong, the importing state must show that its measure was "made effective in conjunction with" restrictions on domestic gasoline — i.e., that the measure is "even handed" in its treatment of domestic and imported products.[98]

Finally, the importing state must satisfy the additional "burden" imposed by the Article XX *chapeau*, which states that exceptions may not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail," or a "disguised

89. *Id.*, para 2.6.
90. *Id.*, para 6.2.
91. *Id.*, para 6.3.
92 *Ibid.*
93. *Reformulated Gasoline Appellate Decision, supra* n. 47 at 618.
94. *Ibid.*
95. *Id.* at 626.
96. *Id.* at 633.
97. *Id.* at 617-23.
98. *Id.* at 623-26.

restriction" on international trade.[99]

The Appellate Body found that the Gasoline Rule satisfied the first two prongs of this test. The rule had a "substantial" relation to the conservation of clean air, since it provided means for monitoring compliance with statutory emissions requirements.[100] Accordingly, the rule could not be regarded "as merely incidentally or inadvertently aimed" at improving the quality of US air.[101] Moreover, the rule satisfied the requirement of "evenhandedness," since it imposed "corresponding" - though not necessarily identical — restrictions on domestic production.[102]

However, the Appellate Body also found that the Gasoline Rule could not be deemed reasonable under the Article XX *chapeau*. The record indicated that the United States' violation of Article III "must have foreseen, and was not merely inadvertent or unavoidable."[103] The Appellate Body based this conclusion on two factors. First, the United States had failed "to explore adequately" less discriminatory alternatives for addressing its concerns about the reliability of foreign emission date.[104] Although governments had, "in many contexts," resolved similar concerns by means of "cooperative arrangements" with foreign producers and foreign governments, the United States had failed to show that 'it had "pursued the possibility" of entering into such arrangements, at least "not to the point where it encountered governments that were unwilling to cooperate."[105]

The United States' decision to permit domestic refiners to establish individualized baselines was based on its concern about the physical and financial costs and burdens that an average baseline would impose on domestic refiners of "dirty" gasoline, and a desire to give these refiners time to restructure their operations and adjust to the new emissions requirements.[106] However, there was "nothing in the record" to indicate that the United States took such factors into consideration with respect to foreign refiners.[107]

Therefore, one can hold that if the measure applied by the US were reasonable in terms of *chapeau*, they would have been allowed i.e., *extraterritorially* applicable.

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99. *Id.* at 626-32.
100. *Id.* at 623.
101. *Ibid.*
102. *Id.* at 625.
103. *Id.* at 632.
104. *Ibid.*
105. *Id.* at 631.
106. *Id.* at 632.
107. *Ibid.*

VII. Shrimp/Turtle and Extraterritorial Application of Article XX(g)

The Appellate Body in *Shrimp/Turtle* case observed that TREMs provided by the Convention on International Trade in Endangered Species, 1973 (CITES) having extraterritorial applications are justified.[108] Beginning in 1987, the United States issued a series of regulations requiring US shrimp trawl vessels to use approved "turtle excluder devices" (TEDs) in all areas where there was a risk of interaction with the protected sea turtle species.[109] In 1989, the United States enacted section 609 of the Endangered Species Act, which called on the Secretary of State to initiate international negotiations for the purpose of entering into treaties to protect the endangered sea turtles.[110] In addition, section 609 imposed a ban on shrimp imports from states that failed to establish sea turtle protection program "comparable" to that of the United States.[111]

The US import ban took effect in May 1991.[112] However, the State Department issued guidelines providing that the ban applied only to fourteen countries in the Caribbean/Western Atlantic region, and granting these countries a three-year period in which to phase-in measures to avoid the ban.[113] In December 1995, the Court of International Trade issued a decision ruling that the guidelines were based on an improper reading of section 609, and directed the State Department to impose the ban worldwide within the next four months.[114] The State Department complied with this ruling in April 1996.[115] Four countries that were subjected to the new ban, but had previously been exempted from the ban under the old guidelines, filed a WTO complaint asserting that the ban was an unlawful "quantitative restriction" on international trade.[116] The *Shrimp/Turtle* Panel did not adopt the *Tuna/Dolphin I* Panel's rule against extraterritorial measures. Instead, the Panel invoked a rule similar to the *Tuna/Dolphin II* rule against coercing states to change their policies. Specifically, the Panel found that the embargo constituted "unjustifiable discrimination," because it conditioned access to the US market on the adoption of specific policies by foreign governments.[117]

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108. *Shrimp/Turtle Appellate Decision, supra* n. 53, paras 132, 133.
109. *Supra* n. 54.
110. *Id.*, para 2.7.
111. *Ibid.*
112. *Id.*, para. 2.8.
113. *Ibid.*
114. *Id.*, para 2.10.
115. *Id.*, para 2.11.
116. *Id.*, para 7.11.
117. *Id.*, paras 7.25, 7.26, 7.49. 7.62.

In its October 1998 ruling,[118] the Appellate Body confirmed that Article XX(g) could be invoked to justify measures aimed at protecting resources outside the importing state's territorial jurisdiction — provided that the importing state has a sufficient "nexus" with the protected resource. The United States had such a nexus with the protected sea turtle species, because the turtles were acknowledged to be "threatened with extinction", were highly migratory, and occurred in waters over which the United States exercised jurisdiction.[119]

The Appellate Body noted that all of the participants in the appeal were parties to CITES.[120] It observed that all the seven recognized species of sea turtles were listed in Appendix I to CITES.[121] Thus the exhaustibility of sea turtle is incontrovertible, as the list in Appendix I includes "all species *threatened with extinction* which are or may be affected by trade."[122]

The Appellate Body further considered, citing the Panel report based on documented statements from the experts confirming the migratory nature of sea turtles, that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas.[123] Without passing upon the question of jurisdictional limitation of Article XX(g) the Appellate Body noted in the case before it that there was a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).[124]

This finding indicates that a WTO Member may rely on Article XX(g) to justify a trade-restrictive measure aimed at protecting environmental resources in the "global commons" so long as there is at least *some* jurisdictional relationship between those resources and that WTO Member.[125]

Since at least two GATT Panels that addressed the issue expressed serious doubt about the possibility of such justification, the Appellate Body's opinion on this point may give notable comfort to advocates of trade restrictions aimed at global environmental protection.[126]

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118. *Shrimp/Turtle Appellate Decision, supra* n. 47.
119. *Id.*, paras 132-133.
120. *Id.*, para 135.
121. *Id.*, para 132.
122. *Ibid.*
123. *Id.*, para 133.
124. *Ibid.*
125. Nancy L. Parkins, *Introductory Note*, 38 INTERNATIONAL LEGAL MATERIALS, 1999.
126. *Ibid.*

VIII. Conclusion

Article XX exceptions are intended to preserve each state's right to use trade measures to pursue legitimate regulatory objectives, including the protection of exhaustible natural resources and human, plant and animal life.

The principle of "sustainable development" — now expressly incorporated in the new WTO Preamble - recognizes that all states have a shared interest in the global environment, and a mutual obligation to avoid causing environmental harm outside their national boundaries. Ironically, this principle is designed to address a prisoner's dilemma similar to the "false" dilemma addressed by trade rules themselves. As Edith Weiss has argued, states share the global environment not only with each other, but also with future generations.[127] However, no individual state has an incentive to conserve the world's limited environmental resources, because no individual state can prevent other states from stepping in to take its place. Similarly, although all states share a common interest in cleaner air, states are better off if they "free ride" on another state's pollution control efforts. As a result, the dominant strategy for each state is to over-exploit the world's limited environmental resources, to the common detriment of all.[128]

Trade measures can *directly* protect scarce global resources, by ensuring that the importing state's own market does not directly contribute to over-exploitation of scarce global resources. For example, a ban on tuna harvested by methods that are harmful to dolphins can reduce the demand for such tuna, driving the price downward and reducing the incentive for continued use of these methods.

However, direct measures may not always be sufficient to deter over-exploitation of scarce global resources. In those cases, trade measures can protect scarce resources *indirectly*, by overcoming the collective action problems that lead to over-exploitation of such resources in the first place. This principle is illustrated by the WTO agreements themselves. In order to reduce the incentive for foreign countries to "free ride" on the trade liberalization efforts of other countries, GATT and WTO rules conditioned access to the agreements on the negotiations of "reciprocal" trade commitments by each member state. Similarly, environmental groups seek to overcome incentives to "free ride" on the environmental efforts of other states by conditioning the benefits of GATT rules on compliance with certain minimum environmental standards.

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127. Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 American Journal of International Law, 1990 at 198.
128. Garret Hardin, *The Tragedy of the Commons*, 162 Science 1968 at 1243.

Opponents of environmental trade measures have argued that states can overcome the "tragedy of the commons" and the problem of free riding by using economic incentives such as increased foreign assistance or technology transfer — rather than restrictions on international trade.[129] However, as Prof. Chang has shown, economic "carrots" are often far less effective than trade "sticks".[130] A rule requiring the use of "carrots" gives each count the incentive to wait for others to delay negotiations and increase their environmentally harmful behavior, in order to hold out for more and bigger "carrots". The use of trade measures avoids these perverse incentives. As Prof. Chang points out: "With sticks, a country that signals and inclination to harm the environment can bring greater penalties upon itself; with carrots, the same signal can yield greater rewards."[131]

129. GATT, *Trade and Environment*, 1 INTERNATIONAL TRADE, 1992 at 90-91.
130. Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J., 1995 at 2131.
131. *Id.* at 2159.

CITES OBLIGATIONS: IS WILDLIFE (PROTECTION) ACT, 1972 CAPABLE TO DEAL WITH IT?

*Ravi Sharma Aryal**

Much before the reported hunting of endangered species for a dinner attended by Andhra Pradesh bigwigs, wildlife trading has been a flourishing illegal business in India. After narcotics and underground arms running, poaching in India has become the third most lucrative business proposition.

Hunters frequently enters densely populated Indian forests and gun down endangered species whose skin, bones, tusks and sometimes even gums fetch megabucks in the international markets. It has been estimated that trade in wildlife and its derivatives brings in more than US $20 billion annually. India, is the transit point as well as a source for wildlife trading. Because of the country's lax laws and sometimes customs officials ignorance of the finished products, these traders usually go scot free.[1]

On its part, the Indian Government has banned hunting and trading in animal body parts, but there is rampant poaching not just by illegal traders but now it has become a kind of a macabre sport for the wealthy. Armed with sophisticated ammunition, flashlights and powerful binoculars, they make killing look so easy. This trade has of late also started posing a serious threat to the global biodiversity and the food chain, apart from constant threat of extinction of rare animal species especially in India.

Tigers, an endangered species worldwide, are poached for their hide and bones, rhinos for their horns, elephants for their ivory tusks, deer for their musks and butterflies and corrals for decorative purposes. In fact no animal is safe from the smoking guns of the poachers. That's because one kill could translate into a fortune for game hunters as hides, skins and bones are sold at exhorbitant prices in international markets. Since wildlife is found in big numbers in India, it makes the country a focal point of trade.

Trade in fur has been flourishing between India and Nepal and a few years ago fur items were openly displayed in the Kathmandu markets and

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1. *Dead Animals Walking*, NEWS TIMES, Hyderabad, November 29, 1998.

bought mainly by Europeans. Fur is converted into products like pelts, coats, jackets, hats, gloves and short and long coats. Small items like wallets, belts and walking sticks are also made out of fur. Fur and skin of wild cat is another product which is in great demand in the international market. There are at least twenty such species, whose skins are sold for millions of dollars and of these, eighteen are facing extinction.

The natural diversity is more threatened now than since the extinction of the dinosaurs, 65 million years ago. The trend is steadily downward, as more habitats are converted to human uses. While we are still uncertain about how many species now exist, some experts calculate that if the present trends continue, upto 25% of the world's species could become extinct or be reduced to tiny remnants by the middle of the next century. Many more species are losing a considerable part of their genetic variation.[2]

I. The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) Obligations

International trade in species is a huge business. High exploitation level and volume of international trade in wild animals and plants in addition to the increasing loss of suitable habitats may reduce population to such an extent that their survival becomes at risk.

The first demand for control on the international wildlife trade was made as early as 1911 when Paul Sarasin, a Swiss conservationist, called for restrictions on the import and export of bird feathers because of the effect of the vogue for plumed hats on bird population.[3] In 1960, these problems were first internationally discussed at the Seventh General Assembly of the International Union for Conservation of Nature and Natural Resources (IUCN). The Assembly urged governments to restrict the import of animals in accordance with the export regulations of the countries of origin.[4] The IUCN passed a resolution in 1963 calling for an international convention on regulations of export, transit and import of rare or threatened wildlife species or their skins and trophies.[5] The first draft appeared in 1964. In 1969, a list of species to be controlled was presented to the General Assembly. In 1972, the United Nations Stockholm Conference on the Human Environment adopted recommendation 99.3, in response to which 88 countries discussed a draft convention at a plenipotentiary conference held in Washington D.C. in February-March 1973. CITES was originally signed by 21 countries on 3 March, 1973, which came into force after the tenth ratification on 1 July,

2. IUCN/UNEP/WWF, *Caring for the Earth: A Strategy for Survival,* 1993 at 20.
3. Simon Lyster, International Wildlife Law (1989) at 239.
4. Willem Wijnstekers, The Evolution of Cites (1995) at 11.
5. *Ibid.*

1975.[6] From the said date the world has seen many changes in the field of wildlife conservation.

The CITES Treaty was concluded in the face of a dramatic, and largely uncontrolled, increase in the volume of international wildlife trade in the past two decades. CITES regulates commerce in more than 26,000 species of animals and plants through its system of Appendices that bans trade in endangered species and monitors illegal trade in other less endangered but potentially threatened species. The CITES framework regulates international trade in wild animals and plants through a permit system.[7] The CITES deals specifically with only one of the various causes threatening wild species. It regulates completely and effectively international trade, a phenomenon which had been already tackled by previous treaties in a fragmentary way. The CITES does not protect the species directly, nor does it contain provisions on habitat preservation. Indirectly the species turn out to be protected because the strict regulation of their international trade makes the collecting, capturing or killing less profitable.[8]

The basic principles of CITES are quite straight forward. It regulates international trade in wild animals and plants which are listed in the three Appendices to the Convention.

The CITES also regulates the trade occurring between parties and non-parties. The CITES provides for a system of exchange of export-import permits. These documents have to meet precise conditions and certify that the trade of specimens belonging to a given species is not detrimental to its survival.[9]

CITES is perhaps the most successful of all international treaties concerned with the conservation of wildlife. Its success is explained primarily by its fundamental principles, which most States have proved willing to accept, and by the way in which it operates, which ensures that on the whole it is better enforced than many other treaties.[10]

II. The Fundamental Principles of CITES

The fundamental principles of CITES is to ensure international co-operation essential for the protection of certain species of wild fauna and

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6. *Ibid.*
7. William C. Burns, *Asian Compliance with CITES: Problems and Prospects*, 29 Indian Journal of International Law 1989 at 62-63.
8. Maria Clara Maffei, *Evolving Trends in International Protection of Species*, 36 German Yearbook of International Law, 1993 at 146.
9. *Supra* n. 8 at 146-47.
10. *Supra* n. 3 at 240.

flora against over exploitation through international trade. It establishes not only joint responsibility in the control of trade by both importing and exporting States, but also a forum and a mechanism for governments and governmental agencies to work together to identify, address, and resolve wildlife trade problems. The Convention is a protectionist treaty in the sense that it prohibits, with a few exceptions, international commercial trade in species threatened with extinction. Secondly, it is a trading treaty because it allows a controlled international trade in species whose survival is not yet threatened, but may become so. Third, it provides a mechanism whereby a party which has domestic legislations regarding the export of species not in Appendix I or II can seek the support of other parties in enforcing its own domestic legislations.

Article 1 (a) of CITES defines 'species' which includes any species, sub-species or a geographically separate population.[11] This allows different populations of the same species to be considered independently for listing purpose. Similarly, Article 1(b) of CITES defines specimens. The specimen may be living or dead and includes any "readily recognisable" part of derivative thereof.[12] This implies that international trade in products such as ivory, skin, horns etc. which form the bulk of wildlife trade, is covered by the Convention. Article 2 of CITES stipulates the fundamental principles of the Convention and creates three Appendices to the Convention which are enumerated below.

(i) Appendix I

Appendix I of CITES includes all species threatened with extinction which are or may be effected by trade. Non-commercial trade in specimens of such species is to be subject to strict regulation and is only to be authorized in exceptional circumstances. The export, import or re-export[13] of specimens of such species correspondingly requires either an export permit, import permit or re-export certificate which may only be granted if the conditions pursuant to Article 3 of the Convention are met:

(*a*) A Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;

(*b*) A Management Authority of the State of export must be satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;

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11. Article 1(a) of CITES.
12. Article 1 (b), *id.*
13. Under Article 1 of the CITES "re-export" means export of any specimen that has previously been imported.

(*c*) A Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel.[14]

Where there is a grant of an export permit, the State of export must be satisfied that an import permit has already been granted by the country of import. For a re-export permit to be granted, different conditions apply and include the Management Authority of the State of re-export being satisfied that the specimen was imported into the State in accordance with the Convention.[15] A certificate must be granted for the introduction from the sea of any species included under Appendix I, once a number of different conditions are met.

The import permit can be granted only if:

(*i*) the importation will not be for purposes detrimental to the species survival;

(*ii*) the importation will not be primarily commercial; and

(*iii*) if live wildlife is involved, the specimen be assured of a suitable home.

The export permit can be issued only if:

(*i*) the wildlife was obtained legally;

(*ii*) the wildlife will not be harmed during shipping; and

(*iii*) an import permit has already been granted.

Initially, Appendix I contained about 450 species of majority being well known endangered animals as the tiger, cheetah, the humpback whale and pergrine falcon. Since then the number of species has become more than double and now includes a much greater variety of wildlife specially endangered plants.

(ii) Appendix II

Appendix II of CITES, as defined under Article 2 covers all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilisation incompatible with their survival. The export, import or re-export of specimens of such species correspondingly requires an export, import or re-export permit. These may only be issued if certain conditions are met as specified under Article 4. Trade in Appendix II species is only permitted if the exporting country issues an export permit, while for Appendix

14. Articles 3 (2) and (3) of CITES.
15. Article 3 (4), *id.*

I species where more stringent controls apply, an import permit is also required.

Any species whose international trade is unsustainable, thus can be listed in this Appendix according to the new criteria adopted in Conference of Parties 9 in 1994.

Article 2(2)(a) regulates international trade in species which are not sufficiently endangered for them to be included in Appendix I but which may become endangered unless their trade is controlled. Species in this category include heavily traded species whose populations are still relatively secure and those which are not yet in trade but could be vulnerable if traders suddenly switch from one target species to another. Article 2(2)(b) controls trade in species which are similar in appearance of species mentioned in Article 2(2)(a) and therefore be confused with them. A genera is to be listed wholly if some species of the genera are threatened and identification of the individual species within the genus is difficult.

The reasons for listing different species in Appendix II may alter but all species are treated equally once they are in Appendix II and trade in both categories is regulated in a similar way. CITES permits commercial trade in Appendix II species only if the country of origin has issued an export permit or a re-export certificate. The exporting country may not issue an export permit unless the proper government agency has certified that the export will not be detrimental to the species survival. Import permits are not required. Appendix II is much larger than Appendix I and contains tens of thousands of species varying from the African elephant to the entire order Cactaceae. More than 2300 animal species and over 24,000 plants are now listed in Appendix II.

For removal or downgrading of species from Appendix I or II and from Appendix I to II, CITES does not specify about the kind of information needed. However at the Berne Conference it was decided that any proposed decrease in protection for a species should be treated cautiously and that it was preferable to err on the side of protection than over-exploitation and very strict conditions were then laid down for deleting or transferring a species from (to) Appendices.

Though the *Berne Criteria* provided guidance on the types of information to be gathered on biological and trade status when trying to determine whether a species should be listed or not, it did not provide any definition of the crucial terms 'threatened and extinction' and 'affected by trade' .

The listing of species has never been very consistent and it is often not clear why particular species or populations are included in a particular

Appendix. In 1994, new criteria was set out, which is intended to make the process of listing species in the Appendices more consistent and objective.

(iii) Appendix III

Appendix III of CITES includes all species listed by individual parties as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other Parties in the control of trade. Under Article 5, the export of a specimen of any species listed in Appendix III from the State which has listed it requires an export permit. An export permit may only be granted where a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the fauna and flora protection laws of the State, and that any living specimen will be prepared and shipped as to minimize the risk of injury. The import of such a specimen from any other State requires the presentation of a certificate of origin, to prove that the specimen does not originate from the country which has listed the specimen concerned.[16]

Article 2(4) sets out that it is the responsibility of Parties to the Convention not to allow trade in specimens of species included in Appendices I, II or III except in accordance with the provisions of the Convention. As a result of this, Parties are obliged to prohibit trade in CITES specimens if the provisions of the Convention have not been complied with. This provision is considered to be one of the linchpins of the Convention.[17] It is important to identify it as a non-self executing provision of the Convention, meaning thereby that it cannot be implemented until specific domestic legislation has been adopted. This is in contrast to self-executing provisions, which are directly applicable to a party without the need for implementing domestic legislation. Unless expressly provided for by domestic legislation, the obligations of the Convention cannot be enforced against private persons in the courts and penalties cannot be applied for non-compliance.[18] This is important as without effective domestic compliance mechanisms the enforcement of CITES is unattainable.

III. Problems in Wildlife (Protection) Act, 1972

The Wildlife (Protection) Act, 1972 of India bans trade in most endangered species and their derivatives. But the problem lies in implementation of Wildlife (Protection) Act, 1972. Provisions of the Customs Act, 1962 provides for the compliance of the CITES requirement. Unfortunately, the ban on wildlife exploitation does not coincide with an equally rigorous enforcement

16. *Ibid.*
17. Cyrille de Kelmn, *Guidelines for Legislation to Implement CITES*, IUCN Enviornment Policy and Law IUCN, Gland, Switzerland, 1993 at 7.
18. *Id.* at 6.

effort and intelligence gathering on illegal trade thereby making legal provisions nugatory. The reason for growing wildlife trade is the absence of national-level authority for proper implementation of CITES, having enforcement or legal powers. It relies on the forest, customs and police departments to control illicit wildlife trade.

By an amendment in the Exim Policy in the very same fiscal year the Government signed the Biodiversity Convention, the Government allowed previously banned items to be freely exported. It comes directly into conflict with the Wildlife (Protection) Act as amended in 1991. The items which can now be freely exported include the highly endangered Kuth (item 3 of Schedule VI of the Wildlife (Protection Act), 1972) and brown sea weeds.

Some of the problems are as follows:

1. CITES allows captive breeding under its provision under Article 7(4)(5) of the Convention. Therefore, there is a provision under the Indian law to provide a certificate of breeding in captivity or artificial propagation from monitoring trade specially in plant and butterflies. Trade, however, thrives because of false certificates.

2. The Wildlife (Protection) Amendment Act of 1991 empowered under section 11 the Chief Wildlife Warden to permit hunting of wild animal specified in Schedule I when such animal has become a danger to human life or is disabled or diseased beyond recovery. In respect of hunting of wild animals specified in Schedules II, III and IV, the Chief Wildlife Warden or other competent officer may issue permit of hunting such animals under certain circumstances.

3. The Amendment Act of 1991 has also provided for the conservation of plant species on the same level and extent as for the wildlife species but a member of the schedule tribe is exempted from the said rule which make easy illegal trade of wild plants for the trader and is one of the big loopholes in the protection of endangered flora in India.

4. In Wildlife (Protection) Act, 1972 there is little provision on the trade in wild flora and marine/riverine fauna, which could not protect the respective endangered species.

5. The Wildlife (Protection) Act, 1972 and the Amendment Act of 1991 contain soft penal provisions for the wildlife offenders who on conviction are punishable with imprisonment.

6. At present, there is no law to prevent the sale of animal articles or trophies and recently "classified" advertisement offering sale of "two

licensed tiger skins" has raised a larger question of ethics and morality over and above pure commercial consideration.

7. The Wildlife (Protection) Act, 1972 is not creating a deterrence it was meant to produce. This was because law was being treated like a redundant organ and lay dormant, disused, discarded and neglected. Whenever a trader was caught, the court case dragged on for years and sometime decades. Literally 10000 cases languished in lower courts. In a few cases some NGO picked up the cudgels and sought to bring the offenders to book successfully.

8. Decisions on cases brought to the court take for too long to be delivered, and offenders are often let off on technicalities. More importantly, wildlife traders receive bail within a day or two of the seizures, leaving them active in the trade till the final hearing which generally come after a decade or later.

9. Despite some provisions in the Wildlife (Protection) Act, 1972, which strictly prohibits hunting and any trade in wildlife or wildlife parts or articles, conviction is rare. The now famous Salman Khan black buck shooting case (where despite intense media attention the accused was let off the hook) amply demonstrates this fact.

10. Clearly, forest staff face formidable difficulties in enforcing wildlife protection law. Not the least among them is the interpretation of complicated legal provisions. The language in the Wildlife (Protection) Act, 1972 is difficult and incomprehensible to the layman. The application of criminal law in wildlife cases is daunting for forest staff given the archaic legal language and widespread apprehension among front line staff about court procedures.

11. Most protected areas and some reserves have an unfortunate history of park-people conflict in India.

12. Inspite of the Act, what has jeopardised the very existence of the Gir lion is the unabated shooting, reduction of its natural habitat due to rapid development of agriculture, water pollution by the locals, drastic reduction in the wild population which constituted the natural prey of the lion and the spreading of infectious diseases through domestic cattles.

13. National Conservation Strategy, 1992 makes many promises in regard to conservation of natural resources especially of wildlife, but perhaps lacks conviction and betrays inaction when the question of implementation comes.

IV. Some Suggestions

To mitigate the aforesaid problems, some measures are suggested below:

1. A separate CITES Implementation legislation should be brought covering CITES obligations.
2. A Central CITES Enforcement Cell should be set up as a statutory body for the enforcement of CITES provisions.
3. Establishment of Special Wildlife Court and if necessary Mobile Wildlife Court, too may be considered.
4. A provision need to be added in the Wildlife (Protection) Act, 1972 to respect the concept of "right to life" of wild species.
5. Implementation of citizen education programme to enhance appreciation of wildlife and to emphasize the importance of preserving wildlife species is required.
6. Organizing, on regular basis the CITES implementation training for the enforcement staff may be helpful.
7. Establishment of Central data bank to figure out the wildlife trade activities is needed.
8. Establishment of Central CITES legal cells to cover wildlife cases, including legal training to the field personnel is also required.
9. Establishment of Rehabilitation Centre or Orphan Centre to protect orphan wildlife may be useful.
10. Framing a comprehensive and coherent CITES Implementation Action Plan may be helpful.
11. Establishment of a Wildlife Forensic Science Lab is needed.

In conclusion, we have to persuade the consumers of wildlife products that their consumption will lead to the extinction of certain species. They must give up the practice or find alternatives. Wildlife (Protection) Act, 1972 needs to be thoroughly amended to meet the obligations under CITES. Finally, we have to revamp enforcement strategies, too.

COMBATING CORRUPTION IN INDIA†

*Justice Arun Madan**

In order to appreciate the subject matter in its true perspective, it would be appropriate at the threshold to analyse as to what the word, "corruption" means. Corruption affects morality and increases feelings of distrust and cynicism thereby producing a state of social disorganisation. As per Stroud's Judicial dictionary, "corruption" means moral obliquity or moral perversity, whereas Dr. P. Ramanath Aiyar says that corruption is something against law, something forbidden by law, it is an act or intent to gain advantage not consistent with official duty and the rights of others. Corruption has a significant meaning in respect of elections. It means something different from and additional to bribery, personation, treating and undue influences. In fact it is an evil having direct bearing on the fabric of the society in the context of socio-economic problems which requires immediate attention.

I. Legislative Measures

Corruption has been considered as grave menace to the healthy administration of the Government. Therefore, it is inevitable to frame meaningful legislation with a view to arm the State machinery to adopt remedial measures to combat the evil of corruption.

The Prevention of Corruption Act, 1947 was enacted by the Parliament with an avowed object of making more effective provisions for the prevention of bribery and corruption by public servant, which are offences punishable under Chapter IX of the Indian Penal Code 1860 (IPC).

The legislation of 1947 (old Act) was, however, repealed by the Prevention of Corruption Act, 1988 (new Act). The new Act provides for appointment of Special Judges to take immediate cognizance of the offence of corruption. The Special Judges have been clothed with the powers and functions which are exercisable by a District Judge under criminal law. The procedure of summary trials has been envisaged. Where Special Judge tries an offence specified in sub-section (1) of section 3 of the new Act allegedly committed by the public servant in relation to the contravention of any special order

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* Judge, High Court of Rajasthan.

referred to in sub-section (1) of section 12A of the Essential Commodities Act, 1955 or of an order referred to in clause (a) of sub-section (2) of that section, the Special Judge has been armed with all necessary powers to try such offences in a summary manner and the provisions of sections 262 to 265 of the Criminal Procedure Code, 1973 shall be applied to such trials. Right of an appeal has been refused to a convicted person where sentence of imprisonment does not exceed one month and the fine does not exceed rupees two thousand while an appeal shall lie in excess of aforesaid limit against the order of the Special Judge. This indeed is a commendable effort of the legislature to ensure speedy trials of corruption cases.

II. Inbuilt Delays in Criminal Justice System in India

Our criminal justice delivery system is undoubtedly suffering from maladies of delay—delay being occasioned in adopting procedures contemplated in the Acts, which require obtaining of prior sanction for launching prosecution against the public servant before the Court notwithstanding flawless cases having been made out against him on the basis of investigations done by the specialised agencies, like Investigation Bureau (IB), Central Bureau of Investigation (CBI), Ombudsman like Lokayukta or Chief Vigilance Commissioner. In the changing environment of criminal justice delivery system, these uncalled for procedures result in delays in launching prosecution which can be avoided for ensuring speedy trial of corruption cases. The dycotheme of procedural requirements such as to obtain prior sanction of prosecution against public servant, as envisaged in Chapter V of the New Act, particularly section 19, can be done away with by special amendment in the enactment. The Courts are barred to take cognizance of the matter unless a complaint has been filed by a particular person or prosecution has been launched after obtaining requisite sanction. To obtain prior sanction by the prosecuting agency in absence of which prosecution can not be launched, the cases result not only in delay but also accede benefit to the accused of tampering with vital evidence which the prosecution may bring forth during trial.

A constitutional bench of the Apex Court in *P.V. Narsimharao* v. *State*[1] renownly known as "JMM bribery case" per majority view has ruled that since the Member of Parliament is required to perform public functions, he is a public servant for the purposes of the new Act. The Court then observed that until the new Act is suitably amended to name the competent authority to accord sanction for prosecution against a Member of Parliament, the prosecuting agency shall obtain permission of the Presiding Officer of the Legislative body concerned for launching prosecution. The Court has

1. AIR 1998 SC 2120.

thus recognised the requirement of obtaining prior sanction for prosecution as condition precedent to launch prosecution of public servant.

Though much emphasis has been laid by the Apex Court on the right of an accused to speedy trial to the extent that it has become an integral part of right to life and liberty under the Constitution but the very trial, itself, suffers from procedural malady of obtaining prior sanction in the absence of which not only the entire trial comes to a stand still but also frustrates the outcome of the efforts of the investigating agency. Hence, the formal requirement of obtaining sanction before prosecution against a public servant makes the investigating agency entirely dependable upon the authority concerned empowered to issue such sanction. Even such a requirement puts a bar on powers of the Court to take cognizance of such serious matters. Moreover, sometimes it seems to be a mere formality rather than an additional right of the accused to get the prosecution delayed by tampering with the evidence at his own whims by adopting illusory and dilatory tactics, which adds a further step to enlarge corruption.

III. Futility of Prior Sanction

Once the Act empowers the Court to take cognizance on the basis of material evidence collected during investigation, there is no reason for curtailing such power by contemplating procedural requirement of obtaining prior sanction to launch prosecution against the accused. The law relating to sanction deserves to be suitably amended in the light of observations made by the Apex Court from time to time[2] so that a real culprit does not go unpunished or scot free for want of prosecution.

The object of the new and old Acts is clearly to widen the scope of definition of expression "public servant". The Apex Court in JMM bribery case[3] observed :

> A Member of Parliament has to be treated as a public servant for the purpose of the 1988 Act even though there is no authority who can grant sanction for his prosecution under section 19(1) of the 1988 Act.

There is no justifiable reason why prior sanction should be obtained in case of public servants in view of over all deterioration in bureaucratic functioning, while in case of common citizens, no such sanction is necessary.

In *Habibulla Khan* v. *State of Orissa*[4] Division Bench of the Apex court gave a laudable decision under the 1988 Act where question for

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2. See *infra*.
3. *Supra* n. 1.
4. AIR 1995 SC 1123.

consideration was as to whether sanction is required for launching a criminal prosecution against the appellants who were Ministers in the State Cabinet of Orissa Government. The Apex Court held that admittedly the appellants were being prosecuted for the misconduct allegedly committed by them during their tenure as the Members of the Council of Ministers and not in their capacity as the MLAs, hence provisions of section 19 of the Act are inapplicable to the facts of the case as held in *R.S. Nayak* v. *A.R. Antulay*.[5] In *S.A. Venkataraman* v. *The State*[6] the Apex Court observed:

> In construing the provisions of a statute it is essential for a Court, in the first instance, to give effect to the natural meaning of the words used therein, if those words are clear enough. It is only in the case of any ambiguity that a Court is entitled to ascertain the intention of the legislature. Where a general power to take cognizance of an offence is vested in a Court, any prohibition to the exercise of that power, by any provision of law, must be confined to the terms of the prohibition. The words in section 6(1) of the Act are clear enough and must be given effect to. The more important words in clause (c) of section 6 (1) are "of the authority competent to remove him from his office". A public servant who has ceased to be a public servant is not a person removable from any office by competent authority. The conclusion is inevitable that at the time a Court is asked to take cognizance, not only that the offence must have been committed by a public servant but the person accused must still be a public servant removable from his office by a competent authority before the provisions of section 6 can apply.

Likewise in *Veeraswami* v. *Union of India*[7], while construing provisions of section 6 of old Act, the Apex Court held that no sanction under section 6 of that Act was necessary for prosecution of the appellant in that case since he had retired from service on attaining the age of superannuation and was not a public servant on the date of filing the charge sheet. Though the contention that the concerned Chief Minister who continued to be an MLA was a public servant and hence prior sanction was necessary before launching prosecution against him was accepted in *R.S. Nayak* v. *A.R. Antulay's*,[8] case, but was negatived by the Apex Court in *Habibullah's* case.[9] In

5. AIR 1984 SC 684.
6. AIR 1958 SC 107.
7. 1991(3) SCC 655.
8. *Supra* n. 5.
9. *Supra* n. 4.

Habibullah's case, the Supreme Court observed that upon a true construction of section 6 of the Act, it was implicit therein that sanction of the competent authority alone would be necessary which was competent to remove a public servant from the office when he was alleged to have misused or abused his office for corrupt motive and for which a prosecution was intended to be launched against him.

To ensure transparency and accountability in state actions and also speedy trials of corruption cases, it is suggested that section 19 of the Act be suitably amended so as to do away with the malady of delay resulting out of the procedural requirement of obtaining prior sanction which appears to be a technical formality and unnecessary requirement before the prosecution is launched against holder of public office. In this manner, the delinquent gets an opportunity not only to tamper with the evidence but also to prolong the trial which in fact violates his right of speedy trial itself.

THE MALADY OF GOVERNANCE IN OUR COUNTRY

*Harish Chander**

The Government of India has appointed a Constitutional Review Committee under the Chairmanship of the learned former Chief Justice of India, Justice Venkatachaliah. Justice Venkatachaliah made it clear to the Government on the day he was offered Chairmanship that he would accept the Chairmanship if the basic structure of the Indian Constitution would not be changed as has been held by the 13 Judge Bench of the Supreme Court in *Keshvanananda* v. *State of Kerala*.[1] The highest bench of 13 Judges of the Supreme Court in their Majority judgment identifying the basic structure of the Constitution of India held that even the 2/3 majority of the Parliament could not amend the basic structure of the Constitution of India.

In fact we do not necessarily need even a written Constitution for the proper governance of an independent politically sovereign society. The best example of it is the U.K. where they never had a written Constitution and they developed the Parliamentary form of Government through the conventions which they do very rigorously follow. For instance, once a Speaker is appointed, the convention is " once a Speaker always a Speaker", and then he becomes an independent person and does not belong to any political party. We claim that we follow the British parliamentary system. But this writer humbly submits that right from the time our Constitution was promulgated we never tried to follow this most important convention of the parliamentary system of government which lowered the standard of our parliamentary functions day by day and the speakers are influenced by the party to which they belong.

I. THE MALADY OF GOVERNANCE

It is true that we by and large have the parliamentary system in our country but we do not follow the kind of conventions and behaviour which is expected from the Parliament. Most of the time of the Parliament is wasted in unnecessary personal disputes between the various political parties just to gain power and defeat policies of the Government in power even though the

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1. AIR 1973 SC 1461.

same party in power wanted to follow the same policies. For instance, when Narsimha Rao was the Prime Minister it was the Congress party which started the New Economic Policy in the year 1991. However, Sonia Gandhi as the President of the Congress Party is putting hurdles before the present Government when the Government wants to introduce the second generation economic reforms. Thus it is clear that the party in Opposition wants simply to oppose the Government and that amounts to wastage of the time of the Parliament. The Parliament's time is very invaluable and the wastage of time means that the Parliament is not able to perform important legislative function. For example, with the introduction of the new economic policy, we need to review the whole field of industrial relations, if we really want to induce the foreign investors to invest in India. The policy of the politicians is whenever there is bad governance and corruption in society, they initiate the debate that we should have the Presidential form of Government. Our Constitution was framed under the learned Chairmanship of Dr. B.R. Ambedkar. Even he cautioned in the Constituent Assembly that we may have the best of the Constitution but ultimately it would depend on the highest functionaries as to how do they perform. Even the best of the Constitution can be nullified if those who are the important functionaries under the Constitution act arbitrarily. What we need is not the change in the Constitution but the change in the morality to govern under the Constitution. Our Constitution withstood all kinds of storms and political instability and has proved the faith of the people in democracy and is geared to the philosophy of socialism, secularism and democracy. To talk of Presidential form of Government means bringing in authoritarian rule which is not accountable to the people. If we think of the Presidential form of Government the result could be as it happened in Pakistan many a times. The merit of the parliamentary form of government lies in the fact that the Government is accountable to the Parliament and ultimately to the people at the time of elections.

Dr. L.M. Singhvi, a learned Advocate, is of the view that after the existence of our Constitution for 50 years the time has come that there should be review of the Constitution. The views of Dr. L.M. Singhvi are not sound on the ground that already 90 amendments have been made in our Constitution. Now that Constitutional Review Committee has been established it will have to work seriously and rigorously because we have observed whenever any amendment has been made to the Indian Constitution most of the times these were made only to satisfy the political ambitions and not with a justifiable necessity or for the betterment of the people. The long cherished necessity of the need of free and compulsory education for children up to the primary education level should be guaranteed under the Constitution and

to this effect the writer believes the Constitutional Review Committee should take care of this urgent need of the society particularly for the poorer sections of the society in India.

II. Functioning of the Constitution

It is true that our Constitution is one of the best Constitution framed in the world which provides Parliamentary form of Government and is supposed to function primarily on the lines of British parliamentary form. In this system of the Constitution Prime Minister is first among equals amongst other Ministers in the Cabinet. There is supposed to be collective responsibility of Cabinet and whatever decisions they take, it is the Cabinet as a whole which is responsible through the Parliament and the ultimate sovereignty lies with the people .

In India, theoretically, we have basically the Parliamentary form of Government. Being a Republic where President is the Chief executive of the Government and, therefore some nominal features of the Presidential form of Government are present where as in the U.K. the King is the Monarch whose office as a Crown continues and the successor of the Monarch or the Crown is appointed on the basis of the rule of primogeniture which means that the eldest son of the Monarch when he dies becomes the Monarch and in case there is no son then the eldest daughter of the Monarch inherits as the Queen. Inspite of the fact that there is monarchy in the U.K. the Monarch is basically a rubber stamp as he or she is supposed to act only on the advise of the Cabinet as tendered to the King or Queen.

We started with this assumption that our system is a parallel kind of system as it is followed in British parliamentary form of Government. Under Article 74 (1) of the Constitution of India, the President shall act and exercise function according to the advice of Council of Ministers, provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration. Article 74 (1) is not in tune with parliamentary form of Government and precisely for this reason the Presidents have a number of times interfered with the advice tendered by the Council of Ministers which is not a healthy sign as it was supposed that, which can be seen from debates from the Constituent Assembly, our President would function in same fashion as the King or Queen of the U.K.

Moreover, though on paper, our Constitution is well documented and appears, to be democratic in nature, however, as our Constitution retained the same bureaucracy in the form of IPS or IAS services as in the Government of India Act, 1935. Therefore, the functioning of bureaucrats has been just as if they are functioning during the colonial period. This writer

is firmly of the view that unless our bureaucracy functions for the welfare of the people, the country would remain democratic on paper and will be functioning in colonial manner.

After independence, we have observed that there has been remorseless increase in the cost of the Government which has been accelerated by increasing and constant expansion of the bureaucracy. After independence, Congress has ruled upto the year 1977, intensified bureaucracy and made enormous investments in public sector on grounds of socialism. Unproductive jobs were created in order to gain power by bureaucracy, enormous new projects were started particularly in areas of irrigation and power which were ultimately scrapped and proved to be wasted expenditure of the Government. A huge investment in public sector was made and rough estimates of Rs 2,80,000 crores investment were made in public sector and there were very meager return of around 1.5%, infact on these investment minimum of 6.6% return should be there. So in the public sector, we got highest administered price of iron, steel, coal and electricity etc and whenever a public sector undertaking wouldn't show profit and underwent losses, the Government went on giving money to the public undertakings to compensate their loss which affected the masses in the form of accelerated taxation. Such planning on the part of Government to invest in public undertakings in the name of socialism is one of the single most important factor which has given rise to rising prices, rise in taxes and slow rate of economic growth in India.

III. New Trends of Globalisation & Free Market Economy

Now in the age of globalisation, when the world is very small, and the trend is free market economy in the world, India cannot afford to live in isolation and has to compete economically so that it can survive in the present world. That is why it became essential to introduce a competitive and viable economy in the year 1991 for which credit goes to Dr Manmohan Singh. Even now the Government is thinking to introduce second generation economic reforms but the biggest problem in India is that working class has lost its work-ethics. This is partially because of the observance by the working class that the bureaucrats and the politicians have become corrupt so they have lost interest in work. Morever, trade unions are very strong in this country that is why policy of disinvestment in public sector and the opening of the economy to the world has not been satisfactory. If we really want foreign direct investment (FDI), the business is to run on profit lines because nobody would like to invest unless he sees that there would be profit in investment and the investment is safe also.

Above all, even the management of industries whether in public or private sector undertakings in India are not run on modern scientific lines. During the Prime Ministership of V.P. Singh, he wanted to encourage that the labour would have a say in management and wanted to give managerial role to labour in the form of worker's participation in management. In the year 1990, a bill was introduced in the Parliament called as Worker's Participation in Management Bill, 1990. However, even after 10 years it has not been passed by Parliament and politicians are busy with some other things rather than thinking of proper management of the country.

IV. Conclusions and Suggestions

The reasons of the malady are that we Indians have the habit of blaming others even for the bad governance on our own part. The highest functionaries under the Constitution of India blame either others or they believe that our Constitution has some defects and so there should be changes made so that the governance of our country can become effective and smooth. This writer is of the view that it is only an excuse and the highest functionaries of our county want to hide bad governance and the malady of corruption in our society which has taken deep roots in the whole society. This has been made possible by the criminalization of politics and nexus between bureaucratic corrupt functionaries, criminals and the politicians. In order to improve the system of governance, we as the citizens of India particularly the important functionary under our Constitution have to firmly resolve that they will discharge their duties with the consensus efforts to do justice, with the object of welfare of the people without fear and favour of any person.

Once the Constitutional Review Committee has been established, it has to perform very delicate and important functions in order to give efficient, smooth and effective governance. The review will have to be concerned itself with salient issues like area of governance, primarily federalism reforms and attainment of the political stability of the country. This has become more important particularly after the J and K Legislative Assembly has passed the resolution for autonomy of the Jammu and Kashmir State. Even Sarkaria Commission concerning Center and State relations had recommended more devolution of powers to the State. Thus one of the primary functions of the review committee should be to recommend proper devolution of the powers to the States keeping in mind the interest of the country and the political stability.

The review committee should also concern itself seriously for the issues in the arena of rights and justice of the people for economic rationalism with a view to bring about the role of bureaucracy or the civil servants for the welfare of the democratic society as compared to a colonial society.

In the era of new economic reforms and globalization, we have also got to think seriously about the role of the public sector undertakings, rationalization of the work force, the role of modern technology with particular emphasis on globalization and also at the same time to provide for the social responsibilities of industrial undertakings. This has become more important because if the present economic refoms do not take care of the vulnerable and destitute sections of the society, it will lead to imbalance and inequality in economic terms among the rich and the poor sections of the society.

In the era of free market economy and globalization, the management whether in the public sector or private sector has to become more responsible and sufficiently trained where the modern information technology will be guiding factor for the growth and development of industries. Even the role of unions should not remain as used to be in the so called socialist society in India. The unions will also have to perform well with the morally based work ethics so that the productive forces in industrial sector in India can compete with rest of the world.

INDIAN CONSTITUTION AT CROSS ROADS : THE ROLE OF REVIEW COMMITTEE

*Shyamlha Pappu**

The Constitution Review Commission, in its first meeting has identified eight core areas for scrutiny. Among the identified areas, the Commission proposes to examine enlargement of Fundamental Rights in Part III by specific incorporation of the freedom of the media, right to compulsory elementary education, right to privacy and right to information.[1]

I. JUDICIAL APPROACH TOWARDS IDENTIFIED CORE AREA

In respect of the above four items with great respect it is submitted that there is little to be done in these areas since the Supreme Court has already pronounced upon each one of them and they have become the law of the land. Any enlargement of Fundamental Rights may not be called for at this juncture. In *Sakal Papers* v. *U.O.I.*[2] the court has said :

> The right to freedom of speech and expression carries with it the right to publish and circulate ideas, opinions and views with complete freedom and by resorting to any available means of publication subject to such restrictions as could be legitimately imposed under clause (2) of Article 19. Our Constitution does not expressly provide for the freedom of the press but this freedom is included in the "freedom of speech and expression" guaranteed by clause (1) (a) of Article 19.

Daily Newspaper (Price & Page) Act 1956 and the Daily Newspaper (Price & Page) Order, 1960 sought to control the pricing of Daily papers and the number of pages published. The Constitution Bench of the Supreme Court, headed by Chief Justice B.P. Sinha struck down the Act and the order as infringing Article 19(1) (a) of the Constitution.

Regarding right to compulsory elementary education in *Mohini Jain* v. *State of Karnataka*,[3] the Court said, speaking through Justice Kuldip Singh who headed the bench:

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* Senior Advocate.

1. Newspapers report of the first meeting of the Review Committee dated 23.3.2000.
2. AIR 1962 SC 305.
3. AIR 1992 SC 185.

> Right to life is a compendious expression for all those rights which the courts must enforce because they are basic to the full range of conduct which the individual is free to pursue. The right to life under Article 21 and the dignity of the individual cannot be assured until it is accompanied by the right to education. The State government is under an obligation to make endeavor to provide educational facilities at all levels to its citizens.

Article 41 of the Directive Principles of State Policy clearly enunciates the policy of the state to ensure education to all.

Right to privacy has been declared to be an integral part of right to movement enshrined in Article 19(1) (d) and the right to life enshrined in Article 21 of the Constitution. In *Kharak Singh* v. *State of U.P.*,[4] the Apex Court declared :

> The freedom of movement must be a movement in a free country i.e. in a country where a citizen can do whatsoever he wants, meet people of his own choice without any apprehension subject of course to the law of social control.

Right to privacy has been further reiterated and affirmed in *Govind* v. *State of M.P.*[5] and *State of Maharashtra* v. *Madhukar.*[6]

Likewise the citizens rights to information has been amplified and enlarged in *S.P. Gupta and others* v. *President of India and others*.[7] A bench of seven judges headed by Justice Bhagwati has held:

> The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception justified only when the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspects of public interest.

Emphasizing the importance of the right to information the seven judge bench held that communications and correspondence exchanged between the Union Law Minister and the Chief Justice of India in regard to High

4. AIR 1963 SC 1295.
5. AIR 1975 SC 1378, para 24.
6. AIR 1991 SC 207, para 8.
7. AIR 1982 SC 149, para 66.

Court judges was not privileged and the public had the right to know about their deliberations. Consequently, the entire exchange of correspondence between the high dignitaries was made public in court. Much water has flown since the days of *Sodhi Sukhdev Singh* v. *U.O.I.*[8] when such notings would have been held to be beyond the ken of public scrutiny.

The law being well settled in regard to the above four items, the Review Committee may engage its attention to more important aspects which have become the subject of focus during the last several years. The other core items identified by the Review Committee (again from the newspaper reports)[9] are the strengthening of institutions of parliamentary democracy including the examination of the "persisting menace of unprincipled defections", working of Article 356, appointment and removal of governors, decentralization and devolution of powers, effective implementation of Directive Principles of State Policy, fiscal and monetary policies and the size of the Government and its expenditure.

Of these, questions of governmental policy, its governance, size and expenditure would be matters of routine administrative concern and would not in any manner pertain to the role of the Review Committee. The functioning of Article 356 has been discussed at length in *S.R. Bommai's* case[10] and what the Review Committee does will be a mere reiteration of the existing law. A bench of nine judges headed by S. Ratnavel Pandian has laid down that Article 356 is justiciable. The majority consisting of Pandian J. (para 2), Sawant and Kuldip Singh, JJ. (para 153) and Jeevan Reddy and Aggarwal, JJ. (para 435) has however laid down the extent of judicial review permissible of the proclamation under Article 356. It is limited to examine whether there was any material at all, whether it is relevant and that it is not tainted by malafide, perverse or irrational exercise of power. All of the judges nevertheless agree that the exercise of power under Article 356 is subject to judicial review.

Defection law undoubtedly calls for a change and any person who has come to Parliament/Assembly on the vote of people as a member of one party defecting to another party should suffer disqualification for election from panchayat to President for a period of six years. A defection is morally wrong and detracts from the moral stature of a parliamentarian.

This again will be a matter of reform in the electoral law. Similarly the implementation of directive principles, appointment and removal of governments are all in the realms of proper implementation of what is already available in the Constitution.

8. AIR 1961 SC 493.
9. *Supra* n. 1.
10. 1994 (3) SCC 1.

II. Stable Government

The real function of the Review Committee is to study and report on how to give stability to the Government so that the elected Parliament is able to complete its full term in office. It is common knowledge that the people of India are anxiously looking for stability and they do not want general elections at short durations. Why is it that the parliamentary form of Government which has been a success in Britain, Australia, Canada and Newzealand is unable to survive in India? We have had seven governments in ten years. Why is it again that we are unable to have a government won on majority vote? An analysis of the elections to the Lok Sabha from 1952 shows that at no time our Lok Sabha was represented by a majority vote.

The nation has been ruled during the entire period of 50 years since the inception of the Republic by a Government which has secured a minority of the votes cast. Such an aberration does not occur if there is a two party system where one or the other party necessarily wins the majority vote.

Our effort should therefore be to see that the parliamentary system works effectively and efficiently. If parliamentary democracy has to succeed there has necessarily to be a two party system — the majority and the minority. The majority is the ruling party and the minority is the opposition. If there are multi parties unable to secure even 20% of the votes polled then parliamentary democracy will function as we have seen in the last decade— governments changing frequently, fall of the Government on flimsy grounds and parties unable to fulfill their avowed goals and manifestoes because of pulls and pressures of their coalition partners. The need of the hour, therefore, is to de-recognize the smaller parties which fail to secure less than 20% of the votes. Even in Britain, if the two major parties Conservatives and Labour split into two each all tangles which plague the Indian Parliament will be re-enacted in Britain also. Sir Ivor Jennings[11] has said "If major parties break up, the whole balance of the constitution alters and then possibly the Queen's prerogative becomes important".

Such a de-recognition would not be challengeable, because the right to form associations/parties would not be curtailed in any manner and the matter of recognition of parties would be governed by the electoral law of the country. The number of parties will be reduced to 2 if the party getting the lowest number of votes would be de-recognized in every successive general election. No one can complain against this since this would be a measure to strengthen parliamentary democracy which has been declared to be a basic structure of the Constitution by the Supreme Court.

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11. Cabinet Government 3rd ed. at 427-28.

III. Making Constitution Workable by Review

The Chairman of the Review Commission appears to have clarified that the task of the Review Committee is only to review the working of the Constitution and not to re-write it. With respect, it is pointed out that every amendment of the Constitution is a re-writing of a particular article, every interpretation given by the Supreme Court is a re-writing through the judicial process. The Constitution, therefore, has been re-written seventy nine times as on date. The Review Committee has been appointed not merely to review the working of the Constitution but to suggest comprehensive amendments which will make the Constitution workable in the best interests of the country.

There is no magic in the words "Parliamentary Democracy" and "Presidential form of Government". Our Government is Presidential in so far as we have a President and there is a Federal structure headed by the Central Executive Government. There are many other presidential features which are not being enumerated for want of space and time. The parliamentary structure is equally important in our Constitution in so far as we have a Parliament headed by the Prime Minister and a Council of Ministers to advise the President. Therefore, even if the Review Committee is of the view that the two party system is not feasible in our country and that the head of the Government namely the Prime Minister is to be elected directly for a fixed term, it will not in any manner jeopardize the parliamentary system because only the method of election will change. The basic fundamental concept of the Constitution that the elected leader should head the Government which is the essence of a representative Government will not change.

IV. Clarification as to Question of Origin of the Candidates

The Review Committee should also consider the question whether persons of foreign origin ought to occupy high positions of public importance such as being President, Vice-President, Prime Minister, Judges of the High Courts and Supreme Court, heads of public sector undertakings and other important positions. Article 102(1)(d) of our present Constitution[12] clearly enunciates that persons owing allegiance or having connection with any foreign power

12. Article 102 (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament -

... ...

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign state, or is under any acknowledgement of allegiance or adherence to a foreign State.

or country are debarred from becoming members of Parliament under our Constitution.

The Review Committee should take the lead from Article 102(1)(d) of the Constitution and suggest an amendment to enlarge the scope of the debarment as indicated above and not leave this question as being contentous or controversial. The salutory principle underlying this principle is that a person of foreign affinity is liable to have divided loyalties particularly if there is a conflict between India and their country of origin.

V. Equality Clause

The Supreme Court has held that the equality clause is a basic feature of the Constitution[13] and therefore it would stand to reason that the Review Committee concerns itself with the elimination of discrimination of all forms. The existence of Article 370 of the Constitution is the most manifest form of discrimination which enables the government of J&K to deprive the inhabitants of other states from owning property in their State, even though all of them are Indian citizens. The inhabitants of J & K are free to purchase property and settle anywhere in India whereas other inhabitants of other states do not enjoy this privilege. This anomaly is the result of the fact that all Indian laws are not applicable to J & K and as per Article 370 they can be made applicable only with the consent of State Government.

Similarly, great injustice is caused to men and women alike because personal laws vary according to the religion they belong to. Discrimination on grounds of religion is a taboo under the Constitution — it is a total violation of Articles 14 and 15 of the Constitution. The Supreme Court has alluded to this fact and urged the State to enact a Common Civil Code applicable to all the citizens in a like manner.[14] The Review Committee should take serious note of this anamolous situation and do away with the glaring discrimination and there by strengthen the basic framework of the Constitution.

13. *Keshvananda* v. *State of Kerala*, AIR 1973 SC 1461.
14. *Sarla Mudgal* v. *Union of India*, AIR 1995 SC 1531.

AMENDMENTS IN PROCEDURAL LAW — A CRITICAL APPRAISAL

*Amarjit Singh Chandhiok**

Procedure is often described as the hand maiden of justice, but, in reality this seems to be a half truth. Many a times procedural law becomes much more important than the substantive law which defines rights and duties. The statement that substantive law resides in the interstices of procedure reflects this reality. The Law Commission observed :

> The efficacy of substantive laws to a large extent depends upon the quality of the procedural laws. Unless the procedure is simple, expeditious and inexpensive, the substantive laws, however good, are bound to fail in their purpose and object.[1]

The Code of Civil Procedure is a product of well thought-out efforts and experimentation extending over more than half a century; the earlier codes being of 1859, 1877 and 1882. The Code has stood the test of time. It has, on the whole, worked satisfactorily and smoothly and has evoked the admiration of many distinguished jurists. In the controversies raging now over the amendments brought out in the Civil Procedure Code by Amendments Act of 1999, the main contention of the supporters of the amendments is that they are meant to remove delays in dispensing justice and to clear arrears in the courts. But no one has come forward to state how exactly the amendments are going to help advance the cause of justice or bring down the backlog of cases.

The law is meant to promote and render justice and it must take into consideration the social conditions, capability of people and their economic status. In India, almost half of the population is illiterate. They lack legal awareness. Availability of legal expertise is also inadequate and they hardly have means to get justice.

Right to judicial review is a fundamental right and is the basic structure of our Constitution. Curtailment or denial of judicial review is against the object of our Constitution and the establishment of courts. One cannot

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1. Twenty Seventh Report, Law Commission of India.

reduce the arrears in courts merely by dismissing cases. Bringing in amendments to do their 'dismissal' can never help the cause of justice. It will only lead to miscarriage thereof. When a person comes to court, he comes with a grievance which he expects the court to understand and appreciate. The amendments now made in the Code of Civil Procedure will only serve to scuttle the course of justice and to make it appear that there are no arrears. If arrears are the only criterion and not justice, then one may conclude that there is no need for courts. Courts are the only panacea for the ills which have crept into the whole system. If this bastion is also attacked and powers are taken away, then it will be a case of denial of justice.

Examination of a few of the Amendments

Let us examine some of the amendments which have been brought in and drastically affect the common man and also the amendments which curtail the powers of the courts.

Section 100A of the amended Code of Civil Procedure is one of the most draconian sections; it states that there will be no further appeal against the order of a single judge in respect of any writ, direction or order issued or made under Article 226 or 227 of the Constitution of India. A decision or order will also include an interlocutory order. In many cases, applications are made for an injunction or a stay. If a single judge either refuses or allows the application, the affected party will have no right of appeal. How can a common person afford the luxury of going to the Supreme Court against every order of a single judge? This will make litigation expensive.

The Supreme Court is already overworked. After many years, it has been able to reduce some of its arrears. If it has to be burdened further by appeals against the orders of the single judge, even in interlocutory matters, the arrears are bound to increase. This also affects the common man and he may be compelled to accept an adverse order passed by the single Judge unless he or she can afford to go to the Supreme Court. Moreover, introduction of section 100A of Code of Civil Procedure is contrary to the explanation of section 141 of the Code of Civil Procedure which excludes proceedings under Article 226 of the Constitution.

Amendment to section 102 prevents any second appeal from being filed when the amount of the value of the subject matter of the suit does not exceed Rs. 25,000. Both logic and rationale is missing in this amendment. Second Appeals themselves are not automatically admitted, they are admitted only if they involve substantial questions of law. The subject matter of the original suit may be below Rs. 25,000, yet it may involve substantial questions of law which require determination. Therefore, it is not the amount of money

that matters; it is the legal question that requires consideration which is important. Moreover, the amendments go directly against the poorer sections of the society, for, those who are filing suit less than Rs. 25,000 would normally belong to economically weaker sections of the society.

Prior to amendments, section 115 of the Code of Civil Procedure provided that High Court will interfere if there is failure of justice or any irretrievable injustice likely to be caused. This provision has now been eliminated. Further, a proviso states that the High Court will not vary or reverse any order, or any order deciding an issue in the course of suit or any other proceedings except where the order, if it has been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Notwithstanding, therefore, that even interlocutory orders may cost a person irretrievable injustice, he will have no recourse to the revisional jurisdiction of the High Court.

On the point being made about delay in the disposal of civil proceedings, one finds it often stated that the defendant should not be allowed to protract the proceedings by repeatedly asking for time to file his/her/its written statement.

It is indeed unfortunate that the framers of the amendments should be taken in by these mischievous contentions. If one takes the Limitation Act, 1963, one finds in the Schedule as many as 113 articles providing different periods for a plaintiff to institute proceedings at his/her or its choice. According to these articles, a plaintiff has one year term for instituting 14 types of civil suits[2], a two year term for 3 types of civil suits[3] and a three year term for 88 types of suits[4], not to mention about a few other cases where limitation extends to 12 years and in 2 cases even to 30 years.

When a defendant gets summons from a court, more time would have elapsed. Should he have not enough time to recollect the facts which may have even escaped his memory, visualise a situation which had happened a long time earlier and collect his documents before meeting his legal adviser? Any system which will give a plaintiff such a long time to decide whether he is going to take his opponent before court and deny even adequate time to a defendant to prepare his defence cannot justify itself. One cannot always take the view that a plaintiff's case alone is true and a defendant's is false. Granted the need for avoidance of delay in a court of law, one should not approach the problem with blinkered eyes. It is significant for me to refer in

2. THE LIMITATION ACT, 1963, Articles 72 to 81, 98 to 100.
3. *Ibid*, Articles 82 to 84.
4. *Ibid*, Articles 1 to 71, 84 to 95, 101-105.

this context another draconian section, viz. Section 148 as now amended. It makes inroads into the powers of the courts. It is stated that if any time, limit is fixed under the Code, the courts can only enlarge it by a period which does not exceed 30 days. Where is the need to put such a fetter on the right of the courts and to curtail its rights. The task must be and is well left with the courts and the parties to find a solution. How many actions are not thrown out by the courts as being unsubstantiated and how many defences are not overthrown for same reasons?

By amendment made in 1976 a proviso was added to Order 17 Rule 1(2) to the following effect: "The fact that the pleader of a party is engaged in another court shall not be ground for adjournment".

Under Order 5, Rule 9, it is permissible to serve summons by fax or email. It is not known how many people possess fax or e-mail facilities in our country where millions of people live below the poverty line. If the summons is not served as contemplated under this provision, the plaint shall be rejected under the provision of Order 7, Rule 11 (f). This is a draconian law, which will once again make a mockery of the system of justice.

Order 6 Rule 5 has been omitted. This provision has allowed further and better statements of particulars in any matter stated in any pleadings, upon such terms as may be just. This amendment would mean that no further or better particulars can be filed. There may be particulars that the party may come to know subsequently, and preventing him or her from filing any such particulars will defeat the cause of justice.

Order 6, Rule 17 has been omitted. This had provided for amendment of pleadings. The Supreme Court had repeatedly stated that this is a beneficial provision and it had even allowed amendments at the appellate stage. There may be amendments that may be necessitated due to change of circumstances or due to change of law or the discovery of certain facts subsequently. By shutting out amendments of pleadings, a grave injustice has been done to the common person.

Order 7, Rule 14 states that when a document is not filed with the plaint, it shall not be allowed to be received in evidence on behalf of the plaintiff at the hearing of the suit. This will obviously result in injustice.

Order 14, Rule 5 has been omitted. It dealt with the powers of the court to amend and strike out issues. One wonder what is the purpose that is sought to be achieved by deleting this clause. Certain issues may become meaningless and certain issues may have to be changed owing to change of circumstances. This once again deals a blow to the cause of justice. In fact, this amendment tends to impede the administration of justice by curtailment of powers of the courts.

Order 18 provides for evidence of witnesses of examination-in-chief being given by means of an affidavit. Sub-Rule 2 of Rule 4 provides that the recording of evidence, cross examination, re-examination and so on, shall be done orally by a commissioner to be appointed by the court from among a panel of commissioners prepared for the purpose. The provision, however, provides that in the interest of justice and for reasons to be recorded in writing, the court may direct that the evidence of any witness may be recorded in the court in the presence of and under the personal direction and superintendence of a judge. This strikes at the very root of the system of justice. The judge has not only to record the evidence but also has to observe the demeanour of the witness and rejects and/or disallows irrelevant questions. The commissioner has merely to record the evidence but he or she cannot mention anything about the demeanour of the witness or even disallow any question. Even the court finds it difficult to record evidence under certain circumstances and if the commissioner has to be appointed, it will only lead to applications being filed to set aside the evidence recorded on various grounds. Allegations will be made against the commissioner and objections will be filed. This will lead to an increase of arrears.

Rule 17A of Order 18 had provided that the court would permit the party to produce evidence at the later stage if the party satisfies the court that after the exercise of due diligence, any evidence was not within his or her knowledge or could not be produced by him or her at the time when the party is recording the evidence. This beneficial provision has also been removed and again it is not clear how it helps the cause of justice.

Order 39, Sub-Rule 2 relates to injunctions. It now states that the courts shall while granting a temporary injunction, direct the plaintiff to give security or otherwise as the court thinks fit. It is not known how this protects the common person's right. In the case of a poor person, it will be impossible for him or her to provide any security. If the injunction is granted and it has been obtained by the party by misleading the court, the court can always order exemplary costs.

The public is being conveyed an impression that a great service has been done to the procedural system by these amendments with an intent to bring down arrears and speedy trials. Actually, what has been done is against the course of justice. This would require national debate.

INDIAN JUDICIARY TOWARDS 21ST CENTURY

*Pawan Chaudhary 'Manmauji'**

"True administration of justice is the finest pillar of good Government."

— George Washington

Indian Constitution is the best humanist and political document that India has. It is the product of a few best legal brains, eminent diplomats, true patriots and experienced politicians of India. It is a growing document and its provisions can never remain static. The court's endeavour should be to interpret its phraseology broadly so that it may be able to meet the requirements of an everchanging society. It may be permissible to give an enlarged or expanded meaning to the phraseology used by the Constitution-makers to mould the provisions to serve the needs of the society. It may even be permissible in certain extreme situations to stretch the meaning and, if necessary, to break it or, in the guise of interpretation, to replace the provisions or to re-write them.

I. JUDICIARY

The judiciary is one of the three basic organs of the State — the other two being the legislature and the executive. It has a vital role in the functioning of the State, particularly in a democracy based on rule of law. Since times immemorial, law and judiciary have played a vital role in Indian polity. The Constitution accords a place of pride to the judiciary by conferring the power of judicial review of legislative and administrative action and entrusting it with the task of enforcement of the fundamental rights guaranteed under the Constitution.

In a democratic polity, the supreme power of the State is shared among the three principal organs *i.e.* constitutional functionaries, namely the legislature, the executive and the judiciary. Each of the functionaries is independent and supreme within its allotted sphere and none is superior to the other. Justice has to be administered through the courts and such administration would relate to social, economic and political aspects of justice

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as stipulated in the Preamble of the Constitution. The judiciary, therefore, becomes the most prominent and outstanding wing of the constitutional system for fulfilling the mandate of the Constitution. The judiciary has to take up a positive and creative function in securing socio-economic justice to the people.

The constitutional task assigned to the judiciary is in no way less than that of other functionaries i.e. legislature and executive. Indeed, it is the role of the judiciary in carrying out the constitutional message, and it is its responsibility to keep a vigilant watch over the functioning of democracy in accordance with the dictates, directives and imperative commands of the Constitution by checking excessive authority of other constitutional functionaries beyond the ken of the Constitution. In that sense, the judiciary has to act as a sentinel on the *qui vive*.

The Constitution has generally provided for a single integrated system of courts to administer both union and state laws. At the apex of the entire judicial system exists Supreme Court of India with a High Court of each state or group of states, and under High Courts, there is a hierarchy of subordinate courts. There is generally separation of judiciary from executive. Panchayat courts also function in some states under various names like *Nyaya Panchayat*, *Panchayat Adalat, Gram Kachheri*, etc. to decide civil and criminal disputes of petty and local nature. Different state laws provide for different kinds of jurisdiction courts.

Each state is divided into judicial districts presided over by a District and Sessions Judge. The District and Sessions Court is the principal civil court of original jurisdiction. All offences including those punishable with death are tried in such a court. Below District and Session Courts, there are courts of civil jurisdiction, known in different states as munsifs, sub-judges, civil judges, and the like. Similarly, criminal judiciary comprises of chief judicial magistrate and judicial magistrates of first and second class.

II. Judicial Independence

The concept of justice is based on the judicial independence. Unless the judges are independent and impartial, people will have no faith in the administration of justice. In the context of Indian judiciary, the independence means and is confined to post-appointment i.e. in service — independence only. It does not include pre-appointment or post-retirement independence.

Thus, Judicial independence implies only partial independence, not full independence, 'practical' independence not ideal independence, created, crippled or legal independence, not complete or natural independence, make-believe or assured independence, not real independence, in true sense.

1. Establishment of Courts

The Constitution provides that the Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may with the approval of the President from time to time, appoint. Since the commencement of the Constitution, the Supreme Court sits in Delhi only.

As regard High Courts' seats, the Constitution is silent. But, mostly they sit in the capitals of their States, with a bench(s) at other place. Every District in every State has a District and Sessions Court headed by District and Sessions Judge.

The Supreme Court and High Courts are Courts of record. They have all the powers of a court of record, including the power to punish for contempt of the Supreme Court and respective High Court, as the case may be.

2. Composition

The Supreme Court and every High Court consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint. Similarly, in the subordinate judiciary, every District Court in every State consists of a District & Sessions Judge and such other Additional District & Sessions Judges, and subordinate judges as the Governor of the concerned State may from time to time deem it necessary to appoint. Since the year 1986, the Supreme Court consists of 25 judges, besides Chief Justice of India. Initially, in 1950, the Court consisted of seven judges, which number was raised to ten in 1956, 13 in 1960 and 17 in 1981. Excepting three advocates, only judges of High Court have been appointed as judges of the Supreme Court.

Every High Court has sanctioned judges strength. It has been increased from time to time. As on 20th June, 1998 the total sanctioned judges' strength of various High Courts was 581. As on 1.5.1997, in 18 High Courts, there were as many as 503 judges, including Chief Justices. Among these judges the representation of Bar judges (directly recruited from the Bar) and Service judges (promoted from service) was thus : Chief Justices 18, Bar judges 16, Services judges 2; Bar judges 313 (62.33%), Service judges 190 (37.67%); senior most (two) puine judges - Bar judges 32, Service judges 4. Of the 190 service judges in various High Courts, direct recruits to Higher Judicial Service and promotees from civil judges numbered 66 and 124, respectively.

When office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the

other judge of the court as the President may appoint for the purpose.[1] Also, there are provisions for appointment of retired judges, and attendance of retired judges at sittings of the Supreme Court.[2]

3. *Appointment of Judges*

The Constitution does not lay down qualifications or procedure for appointment of Chief Justice of India or Chief Justice of High Court, but it does lay down qualifications for appointment of a judge of the Supreme Court and High Court. Thus for Supreme Court, he should be a citizen of India and should have experience of (*a*) five years as a judge of a High Court or of two or more such courts in succession; or (*b*) should have practiced as an advocate for ten years in a High Court or in two or more such courts in succession; or (*c*) he is in the opinion of the President, a distinguished jurist. For High Court, he should be a citizen of India and should have experience of holding judicial office in territory of India for at least ten years, practising law as an advocate of High Court. For Higher Judicial Service, the eligibility criteria is Indian citizenship and seven years's standing at Bar. For subordinate judiciary, the eligibility criteria is Indian citizenship and three year's standing at Bar.

An advocate of High Court has been defined under the Advocates Act, 1969. According to it, an 'advocate of High Court' is a person enrolled with the Bar Council of India as an advocate of a High Court itself or in courts subordinate to it or both, irrespective of type, place or standing of practice. Appointment as judge of Supreme Court or High Court is made by the President on the recommendation of the Chief Justice of India and advice of the Union Cabinet. Appointment as member of subordinate judiciary is made by the head of the respective State Government on the recomendation of the High Court or State Public Service Commission.

In the case of appointment of a judge other then the Chief Justice, the Chief Justice of India is always consulted.

4. *Jurisdiction*

Jurisdiction of the Supreme Court the High Courts are described in the Constitution, and those of subordinate judiciary in the Code of Civil Procedure and Code of Criminal Procedure in general and in specific statute in particular. Indian Supreme Court has widest possible jurisdiction of not less than seven kinds, each having seasky scope. These may broadly be classified thus : (1) Original jurisdiction, (2) Exclusive jurisdiction, (3) Appellate jurisdiction —

1. Article 126 of the CONSTITUTION OF INDIA.
2. Articles 127 and 128 of the CONSTITUTION OF INDIA.

(*a*) Civil (*b*) Criminal (*c*) Certificate jurisdiction, (4) Special Leave jurisdiction, (5) Writ jurisdiction, (6) Transfer of case jurisdiction, (7) Review jurisdiction and (8) Advisory jurisdiction. Besides, the Supreme Court has created or carved for itself and High Courts one more jurisdiction in the name of public interest or public welfare. It is named as public interest jurisdiction. It may be utilized by (1) public spirited persons and (2) Supreme Court or High Court at its own i.e. *suo moto*. Public spirited persons may be any member of the public or professional. The jurisdiction of every High Court has pattern almost similar to that of the Supreme Court, except in one respect i.e. it is confined to the concerned state.

5. Transfer of Judges

The President may transfer a judge from one High Court to any other High Court. Before doing so, his consultation with the Chief Justice of India is necessary. High Court has power to transfer any member of subordinate judiciary within the state.

A joint conference of Chief Justices and Chief Ministers endorsed the policy of having one-third of the judges from outside in each court in December, 1993.

Transfer is effected on two grounds — administrative ground and as a matter of policy. As on 1.5.1997, transferee judges in various High Courts totalled 127, on administrative grounds - 39 (Bar judges 32, and Service judges 7) and as a matter of policy 88 (Bar judges 40, and Service judges 48).

6. Resignation/Retirement/Removal

A judge of the Supreme Court, (as also Chief Justice of India) may resign from his office. He may do so by writing under his hand addressing to the President. So is the case with a judge of High Court, including Chief Justice, and any member of subordinary judiciary in any State.

Different ages have been fixed in the Constitution for the retirement of judges of the Supreme Court and High Courts. Thus, in case of a Supreme Court judge the retirement age is 65 whereas in case of a High Court judge, it is 62 years.

A judge of the Supreme Court or High Court cannot be removed from his office except by (1) an order of the President, passed (2) after an address by each House of the Parliament, (3) supported by a majority of the total membership of that House and (4) by a majority of not less than two-third of the members of that House present and (5) voting has been presented to the president in the same session for such removal on the ground of

proved misbehaviour or incapacity. Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a judge. Since establishment of the Supreme Court and High Courts, not even a single judge has been 'impeached'. Only one unsuccessful attempt has been made in the case of a judge of the Supreme Court.

7. Post Retirement/Resignation

No person who has held office as a judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India. Similarly, no person who has held office as a permanent judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts. Thus, the restriction is applicable to judges who have retired, resigned or even removed. However, different persons after holding office as a judge of the Supreme Court or High Court have engaged themselves in different occupations in conformity with the restrictions imposted on them.

8. Code of Conduct

All the judges of the Supreme Court and High Courts have unanimously decided on May 7, 1997 to evolve mechanism to ensure proper conduct by the higher judiciary. The then Union Minister of Law and Justice, Mr. Ram Jethmalani had stressed the need to 'legalise' the code of conduct. However, there seems to be strong opposition to the legalisation since.

III. Law and Justice

Are 'law and justice' two words have the same meaning - two bodies and one soul? Or, are these two world with two meanings - two bodies with two souls? Or, they are only one word with only one meaning? Answers to these questions may vary from person to person, time to time and context to context.

In India, law and justice are usually understood to be two words with one meaning, one coin with two sides. Indian Constitution is what the judges say it is. In it if 'law' is used little less than five hundred and fifty times, (538 times to be exact) in more than one forms and contexts, mainly 'law' (450 times) and 'law' (50 times), 'justice' is used rarely, hardly eight times, including one in the Preamble 'justice, social, economic and political'. 'Justice' has been used six times, and 'civil and criminal justice' two times. Even in the provisions pertaining to union judiciary and state judiciary, the use of 'law' is preferred as against 'justice'.

The Union Ministry of Law, Justice and Company Affairs (Department of Legal Affairs, Legislative Department and Department of Justice) has been assigned a role in assisting the process of orderly change directed towards realisation of the objectives set out in the Constitution. For the purpose, it has various Departments, namely : (1) Department of Legal Affairs, (2) Legislative Department and (3) Department of Justice. The Department of Legal Affairs advises the Government on legal issues, examines legislative proposals, conducts the government litigation work, regulates the legal profession, organises legal aid to the poor etc. The Legislative Department mainly deals with the work of drafting government bills and subordinate legislation sponsored by the various Central Ministers. The duties of the Department of Justice include the administration of justice and the processing of appointment of Judges to the Supreme Court and High Courts. Thus, the Union Government does draw a line of distinction between 'law' and 'Justice', but it is very thin and dim. It is motivated by convenience only.

Initially, the Departments of Legal Affairs and Justice were administrated by the Ministry of Law and Justice. Subsequently, another department — Company Affairs — was added under the Ministry of Law and Justice. Accordingly, its name was changed as Ministry of Law, Justice and Company Affairs. Justice Department was transferred to Home Ministry without making any change in the name of Ministry of Law and Justice or Law, Justice and Company Affairs by making the Home Secretary as ex-officio Secretary of the Department of Justice. In 1996, the Department of Company Affairs was transferred to Ministry of Finance. Thus, there are three Departments of Legal Affairs, Justice and Company Affairs under three different Ministries of 'Law and Justice', 'Home Affairs' and 'Finance and Company Affairs'.

Placement of words too seems to make to difference for the Union Government. In its yearly publication 'India — 1994' 'Justice and Law' has been preferred as against 'Law and Justice', while naming the concerned ministry, 'Law and Justice' has been preferred as against 'Justice and Law'. Similarly, in the list of Chief Justices of India, there is no mention of 'Justice' before the names of Chief Justices of India, including the Chief Justice of India in chair. Mohammad Hidayatullah does provide an exception. Before his name 'Justice' is used, even after he ceased to be Chief Justice of India and became Vice President of India (1979-1984) as also while he was President of India (20 July, 1969 to 21 August, 1969 Acting).

Hon'ble members of the Union Judiciary, particularly State Judiciary, it appears, are very serious about the usage of 'Justice' with their names, some of them even after retirement, some until (and, may be, a few even

after) death. Unlike the usage of ranks by defence personnel, in service and after retirement, for which there are written rules, there are neither rules nor norms guiding the usage of justice during service or post-retirement period. Consequently, 'Justice' has been and is still under use in more than one form — (in service) — Hon'ble Mr. Justice', 'Hon'ble Ms. Justice', 'Hon'ble Mrs. Justice', 'Hon'ble Mr. Chief Justice', 'Hon'ble Dr. Justice'; (after retirement) — 'Hon'ble Mr. Justice', 'Justice', 'Mr. Justice'. After retirement, some judges have preferred to affix 'Retd.' 'Former' or 'Ex.' In Telephone Directory (1994) of the capital of the country, before the names of three former Chief Justices of India, 'Justice' has been added in different forms - 'Justice', 'Mr. Justice' and 'Chief Justice'.

'Shah' of Justice, J.C. Shah, former Chief Justice of India, was an exception; he had totally discarded the use of 'Justice' with his name immediately after his retirement as Chief Justice of India. Not only he himself discarded 'Justice' from his name, he disallowed and discouraged others also to use it with his name. So mush so, he instructed the telephone department in Bombay not to use 'Justice' with his name in the telephone directory. His contention in support of his thinking could well be found in his own short and simple answer : "I was Justice, now I am no more. When I have ceased to hold the chair of Justice, I have no right to make use of it."

In the judicial pronouncements too, there are instances of 'Justice' winning over law, or former getting sacrificed at the alter of the latter and vice versa although their number may not be more than very many. Likewise, in judicial appointments, as against 'Justice' 'Law' seems to be main guide, if not only guide. There appears to be a big chasm between the 'best' choice of the Bench from the Bar and the 'best' choice of the Bar and Society at large. Lately, average 'best' choice by the concerned constitutional authorities from the Bar for appointment as judge of High Court or trial court is whispered to be 'worst' choice by the Bar and the society at large in general, and quite a few in particular. Service of 'self ' alias 'individual' rather the 'system' or society alias 'institution' or India seems to be primary requisite qualification for the high judicial appointments.

Broadly speaking, there are only two types of law — man made law and nature-tailored-embroidered law. The former is known as law and the latter justice. There is sea-sky difference between the two. Law is the earth and justice is the sky; law is private secret and justice is open secret; law is truth contained in books and justice is truth scattered in open. Law is concerned with man made legislations, rules sub rules, books, reports, judicial and executive decisions, justice is related to the rule of nature; law is road or footpath and justice is goal; law may be dependent on nature but the nature is not dependant on law; law is slave chained by so many visible and

invisible considerations but the nature is absolutely independent and impartial; law is man's bicycle, bullock cart, bus, motor car or rail but justice is nature's aeroplane, helicopter or rocket.

The parameter of law is distinct from justice. Our society has learnt to remain within the parameter of law. In a way, the daily adherence to law is being done since time immemorial but to follow justice has always remained a casualty. A man remains in the parameter of law but sees injustice and tolerates injustice. He does not become impatient even on the death of justice whereas he should have become intolerant at the very sight of injustice.

Law is a negative side. The positive side is justice which demands a will power. Only justice should be done and injustice should not be manifested. Till we are not determined to this tenet, there is no justice, no balance and no religion in the society. Only law is there, only organisation is there to bind us.

In any democracy a question should be echoed within each citizen, but this question should emerge from the polity of that society as well. The question to be asked can be addressed plainly as to what is the difference between law and justice? Law should be a crutch to achieve individual and social justice. The justification of a government rests on bestowing justice to individual as well as to whole society.

In policy who perceive that law and justice are interlinked and those who believe that ends and means should co-exist have become rare. The people will smell the fragrance of 19th century's liberation thoughts when one speaks of law and justice. Now-a-days the burden of law is increasing but the justice is decreasing proportionately. Nineteenth century's maxim that Justice delayed is justice denied if extended today it will become clear that the governments and politicians are against it.

Media is replete with the views of bureaucrates, politicians and legal pundits that they are worried about the delay in justice in the courts. This anxiety is not for justice but for quick decisions. The question that why justice is not administered fast has not been addressed to. It was rephrased that why decisions are being delayed. The early decision no doubt solves some problems.

According to late Sachidanand Vatsayan 'Agegy', today, the Government and judicial concern is devoid of law and justice. Law has merged with establishment. Law and justice was the twin of nineteenth century's liberal relations. Law and order is twentieth century's ruling concern. Today's lawyer forgets in interpretting the niceties of law that in legislating it was thought that individual and society will get justice from it. It is not sufficient

that order will be maintained or work will be eased. Individualised society may not be based on justice.

Now only 'Mr. Justice' is brought before the courts again and again. If justice itself is the accused then how can one hope for justice? Our people should be taught that we have not got free society by winning freedom. For free society we need the bed-rock of social justice. We have to change the rotten social system. And this change, the polity will not initiate. The people's will power has to be ignited failing which the justice will be a pipe-dream.

RELIGIOUS PRACTICES *VIS-A-VIS* NOISE POLLUTION

CHURCH OF GOD (FULL GOSPEL) IN INDIA v. *K.K. R. MAJESTIC COLONY WELFARE ASSOCIATION AND OTHER*[1] — A Comment

*Gitanjali Nain Gill**

Church of God (Full Gospel) in India v. *K.K. R. Majestic Colony Welfare Association* (*Church case*) is a laudable reflection of apex court's sensitivity towards growing environmental awareness and widening of the horizons of knowledge to potential environmental hazards.

The controversial question in the *Church case* revolves around the right of a community or sect of that community to add to noise pollution on ground of religion. K.K. R. Majestic Welfare Association (Welfare Association) made a complaint to the Tamilnadu Pollution Control Board and Superintendent of Police stating therein that prayers in the Church of God (Full Gospel), located at K.K.R. Nagar were recited by using loudspeakers, drums and other sound producing instruments which caused noise pollution thereby disturbing and causing nuisance to normal day life of residents of said colony. The High Court directed the Church to bring down the noise level by keeping their speakers at a lower level, while pointing out that there was nothing of malice and malicious wish to cause any hindrance to free practice of religious faith of Church on basis of Madras City Police Act, 1888, Madras Towns Nuisance Act 1989 and Noise Pollution (Regulation and Control) Rules 2000 framed by the Central Government under the provisions of Environment (Protection) Act 1986 read with Rule 5 of the Environment (Protection) Rules, 1986. Aggrieved by the order an appeal was filed by the Church in the apex court. The Supreme Court affirmed the order passed by High Court.

The Church case raises some issues of seminal importance, *viz.* problem of noise pollution, adequate legal safeguards, the rights of religious communities *vis-a-vis* noise pollution, measures to control this menace. An effort is made in this paper to discuss these issues.

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1. 2000 (6) SCALE 163.

I. Noise Pollution — A Menace

It is not possible to give a precise definition of sound or noise. Sound of different frequencies and intensities could be termed as noise under certain perceptional conditions. In electronic and information theory, noise means random unfrictionable and undesirable signals or changes in signals that mask desired information content. In acoustics noise is defined as any undesired sound.[2] The Encyclopaedia America[3] defines noise as an unwanted sound. What is pleasant to some ears may be extremely unpleasant to others depending upon a number of psychological factors. The sweetest music, if it disturbs a person, who is trying to concentrate or to sleep is noise to him, just as the sound of pneumatic riveting hammer is noise to everyone. In other words, any sound may be noise if circumstances cause it to be disturbing.

Paradoxically all living beings including human beings cannot think of life without sound. But on the other hand they complain that it is a cause of psychological stress or physiological damage to them. Excessive noise or sound contribute to interference to the human environment by their own actions. Though noise does not adversely affect or damage the environment physically or chemically as in the case of air and water pollution, but it certainly is a pollutant when exceeds permitted levels of intensity. Thus, noise pollution is the condition where the noise has the characteristics to injure public health or which unreasonably interferes comfortable enjoyment of life and property.

The sources of noise pollution may be divided into two categories, namely industrial and non-industrial. The industrial source includes noise from machines, modern equipments, small factories and industrial establishments. The non-industrial includes loudspeakers, automobiles, aircrafts, trains, construction works, generator sets, social and religious celebrations, speeches etc.

Noise being one of the main pollutants of the environment carries its adverse effect on human health by way of causing various hazards depending upon its frequency, intensity and duration.[4] It may cause permanent[5] or temporary hearing loss,[6] speech interference,[7]

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2. 16 Encyclopaedia Britannica (1968) at 556-58.
3. 20 Encyclopaedia Britannica (1969) at 400.
4. N.S. Kamboj, Control of Noise Pollution (1999).
5. World Health Organisation, Environment Health Criteria 12 Noise (1980) 1 at 13.
6. *Ibid.*
7. S.R. Khirsagar, *Noise as an Occupational Hazard and Public Nuisance*, 53 Journal of the Institute of Engineering (1980) at 61.

cardiovascular problems and blood pressure,[8] annoyance,[9] loss of efficiency,[10] sleeping disturbances[11] and miscellaneous symptoms like decreased electrical resistance in skin, reduction of gastric activity and digestive system upsets.[12]

The adverse consequences of noise pollution have been felt on animals also.[13] The laboratory exposure of animals to short loud sounds can cause diverse effects, such as a temporary rise in breathing and heartrates, a rise of blood pressure or lessened flow of gastric juice; but these responses quickly subside when the noise ceases.[14]

The measure of noise is known as the decibel. Noise researchers have shown that continous noise level in excess of 90 decibels (one decible is the threshold of hearing, 30 decibels comes near whispering range and 60 decibels denotes the level of normal talk) can cause loss of hearing and irreversible changes in nervous system. The World Health Organization has fixed 45 decibles as the safe noise level for a city, though the four metropolitan cities of Mumbai, New Delhi, Calcutta and Chennai have usually registered more than 90 decibels. Mumbai has been rated as the third noisest city in the world, followed by New Delhi and if control measures are not taken to reduce the sound level, the result would be alarmingly disastrous.[15]

II. Legal Provision — Adequacy: A Debateable Issue

Till date, there is no specific legislation dealing with noise pollution. However, there are some scattered provisions contained in different enactments which make a reference or touch upon this pertinent issue.

Constitution

The Indian Constitution mandates the State in parens-patriaetic fashion to secure public health for its citizen as well as protect and improve the environment. Article 39 (e) of the Constitution provides: The State shall, in particular, direct its policy towards securing—

8. World Health Organization, *Noise*, Health Hazards of Human Environment (1980) 257 at 260-261.
9. *Supra* n. 5 at 16.
10. Donald Stewart, *Some Occupational Effects of Noise*, 75 Journal of Laryngology and Octology (1990) at 479.
11. *Supra* n. 8 at 261.
12. *Supra* n. 7 at 61.
13. *Supra* n. 4 at 20.
14. *Supra* n. 7 at 61.
15. World Health Organization, Environment Health Criteria (1996).

> That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Article 47 enjoins upon the State to raise the level of nutrition and the standard of living and improve public health.

Article 48-A provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

Article 51-A(g) provides to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

The judicial interpretation has further strengthened these constitutional mandates by interpreting appropriate environment under one's right to life within Article 21 of the Constitution. In *L.K. Koolwal* v. *State of Rajasthan*,[16] the court rightly observed:

> Maintenance of health, preservation of the sanitation and environment fall within the purview of Article 21 as it adversely affects the life of the citizen and amounts to slow poisoning and reducing the life of citizen because of hazards created if not checked.

The Air (Prevention and Control of Pollution) Act, 1981

Prior to 1987, the Air Act 1981 did not have any provision relating to noise pollution. However, the 1987 amendment has recognised noise as an air pollutant. Section 2(a) defines air pollutant as—

> Any solid, liquid or gaseous substance (including noise) present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.

Further, both the Central and State Pollution Control Boards in exercise of their power and functions under sections 16 and 17 of the Act not only include noise within their plans and programmes meant for abatement of air pollution but also lay down the noise standards, alongwith the standards of other air pollutants regarding industrial plants and automobiles.

16. AIR 1988 Raj 2.

The Environment (Protection) Act, 1986

Being a legislation of general nature for environmental protection, the Act empowers the Central Government under section 3 of the Act to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment and controlling and abating environmental pollution.

Keeping in view the objective of maintaining the ambient air quality standard in respect of noise, the Central Government in exercise of its powers conferred by clause (*ii*) of sub-section (2) of section 3, sub-section (1) and clause (b) of sub-section (2) of section 6 and section 25 of the Environment (Protection) Act, 1986 read with Rule 5 of the Environment (Protection) Rules, 1986 framed the Noise Pollution (Regulation) Rules, 2000. These rules relate to maintaining of ambient air quality standards in respect of noise in different areas/zones, responsibility as to enforcement of noise pollution control measures, restrictions on the use of loudspeakers/public address systems, consequences of any violation in silence zones/areas, authorities to whom complaints may be made for violation of the rules and the power to prohibit the continuance of noise pollution. They are as under :

Rule 3 — Ambient Air Quality Standards in respect of Noise

Area Code	Category of Area/Zone	Limits in dB(A) Leq. Day Time	Night Time
(A)	Industrial Area	75	70
(B)	Commercial Area	65	55
(C)	Residential Area	55	45
(D)	Silence Zone	50	40

Note :

(1) Day time shall mean from 6.00 am to 10.00 pm.

(2) Night time shall mean from 10.00 pm to 6.00 am.

(3) Silence zone is defined as an area comprising not less than 100 metres around hospitals, educational institutions and courts. The silence zones are zones which are declared as such by the competent authority.

(4) Mixed categories of areas may be declared as one of the four above-mentioned categories by the competent authority.

Other relevant rules for controlling noise pollution are:

Rule 4: Responsibility as to enforcement of noise pollution control measures—

(1) The noise levels in any area/zone shall not exceed the ambient air quality standards in respect of noise as specified in the Schedule.

(2) The authority shall be responsible for the enforcement of noise pollution control measures and the due compliance of the ambient air quality standards in respect of noise.

Rule 5: Restrictions on the use of loudspeakers/public address system—

(1) A loud speaker or a pubiic address system shall not be used except after obtaining written permission from the authority.

(2) A loud speaker or a public address system shall not be used at night (between 10.00 p.m. to 6.00 a.m.) except auditoria, conference rooms, community halls and banquet halls.

Rule 6: Consequences of any violation in silence zone/area—

Whoever, in any place covered under the silence zone/area commits any of the following offence, he shall be liable for penalty under the provisions of the Act—

(*i*) whoever, plays any music or uses any sound amplifiers.

(*ii*) whoever, beats a drum or tom-tom or blows a horn either musical or pressure, or trumpet or beats or sounds any instrument, or

(*iii*) whoever, exhibits any mimetic, musical or other performances of a nature to attract crowds.

Rule 7: Complaints to be made to the authority—

(1) A person may, if the noise level exceeds the ambient noise standards by 10dB(A) or more given in the corresponding columns against any area/zone, make a complaint to the authority.

(2) The authority shall act on the complaint and take action against the violator in accordance with the provisions of these rules and any other law in force.

Rule 8: Power to prohibit etc. continuance of music sound or noise—

(1) If the authority is satisfied from the report of an officer incharge of a police station or other information received by him that it is necessory to do so in order to prevent annoyance, disturbance, discomfort or injury or risk of annoyance, disturbance, discomfort or injury to the public or to any person who dwell or occupy property on the vicinity, he may by a written order issue such directions as he may consider necessary to any person for preventing, prohibiting, controlling or regulating:

(*a*) the incidence or continuance in or upon any premises of—

(*i*) any vocal or instrumental music.

(*ii*) sounds caused by playing, beating clashing, blowing or use in any manner whatsoever of any instrument including loudspeakers, public address systems, appliance or apparatus or contrivance which is capable of producing or re-producing sound, or

(*b*) the carrying on in or upon, any premises of any trade, avocation or operation or process resulting in or attended with noise.

(2) The authority empowered under sub-rule (1) may either on its own motion, or on the application of any person aggrieved by an order made under sub-rule (1), either rescind, modify or alter any such order:

provided that before any such application is disposed of, the said authority shall afford to the applicant an opportunity of appearing before it either in person or by a person representing him and showing cause against the order and shall, if it rejects any such application either wholly or in part, record its reasons for such rejection.

Criminal Law

Noise pollution is a type of public nuisance which is covered under section 268 of the Indian Penal Code. The section reads as:

> A person is guilty of public nuisance, who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwells or occupy property in the vicinity or which must necessary cause injury, obstruction, danger or annoyance to persons who may have occasion to use public right.

A much better, independent, speedy and summary remedy against public nuisance is provided in sections 133 to 144 of the Code of Criminal

Procedure of 1973. It empowers the Magistrate to pass a conditional order for the removal of public nuisance within a fixed period of time on information received from a police report or any other source including a complaint made by a citizen.[17]

Transportation Law

The various modes of modern transport are a great source of noise pollution and each day it is aggravating the problem.

The Aircrafts Act, 1934—Although the Act does not have any specific provision relating to noise pollution, but under section 8(A) of the Act and the Indian Aircraft (Public Health) Rules 1946, the Government can make rules to control noise pollution for safeguarding public health.

The Motor Vehicle Act, 1988 — The Act covers the problem of noise pollution caused by motor vehicles. Section 110 (h) empowers tile Central Government to enact rules for the reduction of noise emitted by vehicles. The State Governments, in exercise of their powers under section 111 (b), (c) and (g) can make rules for regulating the audible signals, appliances likely to cause annoyance, radios, tape-recorders, audio-visual etc. Further, section 190(2) provides that any person who drives or cause or allows to be driven, in any public place a motor vehicle, which violates the standards prescribed in relation to the road safety, control of noise and air pollution, shall be punishable for first offence with a fine of one thousand rupees and for any second or subsequent offence with a fine of two thousand rupees.

The railways, being a great source of noise pollution does not have any provisions in the Railways Act of 1989, dealing with this problem.

Factories Act, 1948

Although the word 'noise' has not been used specifically in the Factories Act, 1948 but the word 'nuisance' in section 11 of the Act may embrace noise in its ambit. There is an indirect reference of protection from noise pollution by making it obligatory on the part of the occupier to keep factory clean and free from any drain, privy or other nuisance.

The above mentioned statutory provisions are only touching upon certain aspects of noise pollution. They are only passing references. There is a need that a comprehensive and strict legislation for effective control of noise pollution be enacted by Parliament. However, the Noise

17. Armin Rosencranz, Shyam Divan, Martha L. Noble, ENVIRONMENTAL LAW AND POLICY IN INDIA (1986).

Pollution (Regulation and Control) Rules, 2000 which have come into effect from 14th February 2000 is a laudatory step which was long overdue for dealing with problem of noise pollution. But it is too early to comment on their effectiveness - time will only tell.

III. Religious Practices *Vis-A-Vis* Noise Pollution — A Judicial Review

The Constitution of India guarantees the right to freedom of religion under Articles 25 and 26 to its citizens. Both the Articles should be read together. The right guaranteed by Article 25 is an individual right as distinguished from the right of an organised body like the religious denomination or any section thereof dealt by Article 26. Both these articles protect matters of religious doctrine or belief as well as acts done in pursuance of religion — rituals, observance, ceremonies and modes of worship. But these articles are subject to the limitations of public order, morality and health.[18]

The right to propagate one's religion can become meaningful and effective through the right of speech and expression as envisaged under Article 19(1) of the Constitution. However, Article 19(1) (a) is subject to reasonable restriction in the interest of sovereignty and integrity of India, security of state, friendly relation with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Infact the freedom of speech and expression under Article 19(1)(a) and that of religion under Articles 25 and 26 of the Constitution are inseperable as one cannot be enjoyed without the exercise of another.[19] Although no religion prescribes or preaches that prayers are required to be performed through loudspeakers, voice amplifiers or drum beating, but practically speaking propogation of religious ideas is done through these means. At this point, the real controversy lies—whether use of loudspeakers, voice amplifiers, beating of drums which create the problem of noise pollution should be allowed to continue within the enjoyment of right to freedom of speech and expression and that of religion?

Not many, but in some cases the judiciary has tried to answer this question.

Om Birangana Religious Society v. *The State of West Bengal and others*[20] is an authoritative precedent in this regard. The petitioners, a

18. V.N. Shukla. Constitution of India (1992).
19. *Supra* n. 4 at 71.
20. CWN 1995-96, vol. 100 at 617.

religious organisation moved a writ petition before the court for seeking its direction to the District Magistrate and Circle Inspector of Police that they should not interfere with the rights of the petitioners to use microphone and loudspeakers while performing puja, religious songs and other religious activities.

The court posed certain questions for consideration-whether the public are captive audience or listener when permission is given for using loudspeakers in public and the person who is otherwise unwilling to bear the sound and/or the music or the communication made by the loudspeakers, but he is compelled to tolerate all these things against his will and health? Does it concern simply a law and order situation? Does it not generate sound pollution? Does it not affect the other known rights of a citizen like right to speak with others, read, sleep, rest, think? Does he not become a captive audience to listen when the citizen is ill and when such a sound may create adverse effect on his physical and mental condition? Keeping in view the aforesaid considerations and answering in affirmative the court held that:

> It cannot be said that the religious teacher or spiritual leaders who had laid down these tenets, had any way disired the use of microphones as a means of performance of religion. Undoubtedly, one can practice, profess and propogate religion, as guaranteed under Article 25(1) of the Constitution but that is not an absolute right. The provision of Article 25 is subject to the provision of Article 19(1)(a) of the Constitution. On true and proper construction of the provision of Article 25(1) read with Article 19(1)(a), it cannot be said that a citizen should be coerced to hear any thing which he does not like or which he does not require or which cause noise problems.

The Court cited two cases in support of its decision — *Masud Alam* v. *Commission of Police*[21] and *State of Bombay* v. *Narash Appa Mali*.[22] In both these cases it was held that if religious practice runs counter to public order or health or a policy of social welfare upon which the state has embarked then the religious practice must give way before the good of the people of the state as a whole.

Similarly in *Appa Rao, M.S.* v. *Government of Tamil Nadu and another*,[23] the Division Bench of Madras High Court directed the

21. CWN 1954-55, vol. 59 at 293.
22. AIR 1952 Bom 84.
23. 1995 ILW, vol. 115 at 319.

Government to ensure that use of amplifiers and loudspeakers in performing religious ceremonies must be permitted to the extent that they do not cause noise pollution and have adverse effect on the health of people.

Recently, the Orissa High Court on *Bijayananda Patra* v. *District Magistrate, Cuttack*[24] observed that right to use loudspeaker betokening a religious festivity or practice is subject to public order and health only to the extent it does not cause noise pollution.

The Supreme Court deserves appreciation for its judgment in the present *Church case* where it has once again proved that it is the protector, defender and guardian of people whenever it decides questions of prioritisation of hurnan needs and values systems. For the judiciary, the right to life comprehends right to safe environment, including safe air quality including noise. The court rightly opined that the level of noise is only permissible to the extent that it is not a source of noise pollution and perpetual nuisance to the normal day life resident. In an organized society, rights are related with duties towards others including neighbours. Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice amplifiers or beating of drums. In a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during day-time or other persons cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours. Similarly, old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensible to noise. Their rights are also required to be honoured. Further, it may cause interruption of sleep, affect communication, loss of efficiency, deafness, high blood pressure, depression, annoyance, mental stress etc. The extent of damage depends upon the duration and intensity of noise.[25]

An overview of these decisions reflects judicial policy of curbing the menace of noise pollution caused by religious practices in the name of 'public order and health'. One thing that can conceivably cover a ban on

24. AIR 2000 Orissa 70.
25. *Supra* n. 1, para 2.

noise by loudspeakers for religious practices can of course, be 'decency or morality' as used under Article 19(2) of the Constitution. According to Oxford American dictionary (1998), the word 'decency' means the requirement of correct behaviour, whereas 'morality' means right moral conduct. Both these words are covered under one generic head.

The law is well settled with respect to 'decency or morality' as a ground on which freedom of speech and expression may be reasonably restricted. Decency connotes the same as lack of obscenity. Obscenity becomes a subject of constitutional interest since it illustrates well the clash between the right of the individual to freely express his opinions and the duty of the State to safeguard the morals. Thus, the right to freedom of speech cannot be permitted to corrupt the community and therefore, writings or other objects, if obscene, may be suppressed and punished because such action would be to public decency and morality.[26]

The decency or morality as reasonable restrictions for use of loudspeakers to add to noise pollution on ground of religion must be relooked in light with environmental jurisprudence. Today, society's interaction with nature is so extensive that environmental question has assumed all proportions affecting all humanity. Environmental degradation and pollution has seriously threatened the human existence. A need is felt to discard moribund approach and examine the issues by addressing to the social realities and demands of time. Pragmatism must have overriding effect over theoretical, emotional considerations. Legislative, administrative and judicial strategies of harmonising of environmental values with social, religious, developmental values are a must and are to be formulated in the crucible of prevalent socio-economic conditions in the country.[27] As the word 'decency' means the requirements of correct behaviour, a new environmental dimension may be given by submitting that the correct behaviour demands that one must act in such a manner that it does not annoy or interferes with the quality of life of a class of persons who come within its neighbourhood. The moment there is an unreasonable interference with a general right of public, it becomes a case of NUISANCE. It is both a tort and a crime under modern environmental law. Similarly the word 'morality' connotes right moral conduct. The moral conduct essentially is concerned with accepted rules and standards of human behaviour. In an organized society, rights are related with duties towards others including neighbours. Enjoyment of

26. *Supra* n. 18 at 89.
27. P. Leelakrishnan, ENVIRONMENTAL LAW IN INDIA (1999).

one's rights must be consistent with the enjoyment of rights also by others. So from environmental point of view, enjoyment of right is permissible only to the extent that it coexists in harmony with the others. The moment it hurts, annoys or interferes with the rights of the others, it becomes NUISANCE.

Thus, 'decency or morality' should be redefined, re-evaluated in an environmentalistic spirit and manner, which could give a legal justification and provide solution to solving the problem of noise pollution *vis-a-vis* propogating religious practices.

IV. Conclusion And Suggestions

The *Church case* is a judgement of providence and prudence where the Supreme Court has shown its anxiety for combating environmental assaults caused by human activities. The noise polluting activities i.e. use of loudspeakers, amplifiers, beating of drums in the name of religion, religious faith and practices are so much that they are threatening as slow agents of death.

In order to curb noise pollution, some immediate measures are needed to be taken, some of them being as follows:

(1) the prescribed standards regarding noise by Government of India may be enforced strictly in letter and spirit;

(2) a separate self contained legislation dealing with all aspects of noise pollution may be enacted;

(3) separate courts regarding noise pollution may be established;

(4) the case should be decided within a prescribed time limit;

(5) all District Magistrates and Sub-Divisional Magistrates should be empowered to issue prohibitory order under section 144 of Code of Criminal Procedure, 1973 limiting the hours of loudspeaker in religious places and for other social gatherings and functions;

(6) the press and media should play a constructive role to highlight the disastrous effects of noise pollution and its remedy;

(7) the judiciary must have a progressive, interpretive, positive 'green bench' approach keeping in view the Indian socio-economic aspects in mind and in the era of present day industrial and global economic unification;

In a fast developing country like India, judiciary along with legislative and administrative authorities will surely be a guarantee to protect and improve the environment.

ENVIRONMENTAL AUDIT : MANAGEMENT SOLUTIONS FOR EFFECTIVE LEGAL COMPLIANCE

*Arunima Dhar**

I. INTRODUCTION

The era of blind industrialisation set an unfortunate trend of indiscriminate growth, of putting environmental concerns on the back-burner and developing at all costs. In this mindless race for rapid urban and industrial development, environmental quality has come to be subordinated to development and industrial production related goals. The results are too apparent to ignore. Man, today has come to a full circle, where he can no longer afford to take the environment around him and the "abundant" resources for granted. Scarcity of natural resources to cater for a burgeoning population is compounded by the problem of air and water pollution, contamination of land and soil, all of which have corroded the fragile ecological balance of the environment, reaching an 'environmental crisis' of sorts, which, has predictably arisen due to environmental deterioration caused by several forms of pollution, depletion of natural resources because of the rapid rate of their exploitation and the increasing dependance on energy consuming and ecologically damaging technologies, the loss of habitats due to industrial and urban expansion, reduction and loss of ecological populations due to excessive use of toxic herbicides, pesticides and the loss of several species of plants due to monoculture and removal of habitats through forest clearance has now become a matter of global concern.[1]

There are two main anthropogenic sources of pollution : (*a*) Urban and (*b*) Industrial. Urban sources of pollution include untreated sewage, automobile exhaust fumes among other things. Industrial sources contribute a host of pollutants such as sulphur di-oxide, nitrogen oxide emissions, waste water with concentrations of heavy metals like lead, arsenic, mercury etc. also leading to groundwater pollution which is especially possible if the factory is located upon an aquifer, as was observed in the

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1. I.A. Khan, ENVIRONMENTAL LAW (2000) at 9-10.

Bichchdi case.[2] In addition to this, industries may also contribute to land contamination if the hazardous wastes generated by the manufacturing process is illegally dumped. They also contribute to noise pollution and have proven to be a potential threat of accidents or man made hazards, particularly when located close to residential areas or sensitive environments of ecological importance (like sanctuaries, national parks, wetlands etc.).

The United Nations Conference on the Human Environment (UNCHE) held at Stockholm in 1972 drew the world's attention towards urgent global environmental problems which needed immediate redressal. Problems like acid rain, global warming, ozone depletion, besides the problems relating to disposal of hazardous wastes demonstrated the absolute importance of making industries accountable for the pollution they caused and for the threat of man made catastrophies they posed . Global conventions like the UNCHE alongwith United Nations Framework Convention for Climate Change, Vienna convention on the protection of the Ozone layer, 1985, Basel Convention on Transboundary Movement of Hazardous Wastes, 1989, United Nations Convention on the Law of the Sea, apart from developing soft law mechanisms on very pertinent issues also created widespread awareness regarding the impact of pollution, especially industrial pollution, on the environment and on man. As a result of this environmental costs' of production are being looked into very seriously and, becoming 'environmentally friendly' has almost become synonymous with the image of a socially responsible company.

A need, therefore, arises for a system that is designed, implemented and works to control the company's significant environmental aspects and achieve regulatory compliance.[3] This is effectively and very successfully done by an Environmental Management System which enables the achievement and systematic control of the level of environmental performance that it (the company) sets itself.[4] An Environmental Audit ensures that the Environmental Management System (EMS) is being implemented in the desired manner as also, checks the extent to which an organisation is complying with existing environmental laws and company policies. An Environmental Audit and a sound Environment Management System (EMS) is further necessitated by several factors like pressure groups, banks and insurance companies which require a guarantee against pollution related closures, competitors

2. *Indian Council for Enviro-legal Action* v. *UOI*, AIR 1996 SC 1446.
3. DNV and EQMS, COURSE MATERIAL FOR EARA, UK, APPROVED LEAD AUDITORS' COURSE, (2000) at 2-3.
4. *Ibid.*

who may be gaining greater market acceptability globally by adhering to more stringent environmental standards and a proactive media which is often unsparing in its attitude towards polluting industries.

II. Environmental Management Systems: Concepts and Constituents

The primary thrust of a wholistic EMS is its concentration on continual improvement of Environmental Quality, and the fact that it is voluntary, which implies that a company can decide its own targets and parameters of improvement keeping in mind, that the mandatory legislative norms have been complied with and that it is a continuous, planned process and not an ad-hoc one.

The International Standard specifies the requirement of an Environmental Management System. It has been written to be applicable to all types and sizes of organisations and to accomodate diverse geographical, cultural and social conditions. The success of the system depends on commitment from all levels and functions, especially from the top management. A system of this kind enables an organisation to establish and assess the effectiveness of procedures to set an environmental policy, and objectives, achieve conformance with them and demonstrate such conformance to others. The overall aim is to support environmental protection and prevention of pollution in balance with socio-economic needs. The International Standard takes into account legislative requirements and information about specific and significant environmental impacts. It applies to those environmental aspects which the organisation can control and over which it can be expected to have an influence. The essential constituents of a sound Environmental Management System are discussed briefly hereunder.

Firstly, a clear and concise Environmental policy which establishes an overall sense of direction and sets the principles of action for an organisation. It is essential for the policy to be implemented, documented and communicated to the employees and the public. The policy ought to be appropriate to the nature, scale and the environmental impacts of the company and should particularly address the identified significant aspects that the company seeks to address through an effective Environmental Management System. The policy also represents a commitment to comply with relevant environmental legislation and other requirements to which the organization subscribes. The environmental policy sets the overall environmental responsibility and performance required of the organisation, against which all of its subsequent actions will be judged.

Secondly, the organisation shall establish and maintain (*i*) procedure(s) to identify the environmental aspects especially those that have significant impact on the environment and which the company seeks to address; (*ii*) documented environmental objectives and targets at each relevant function and level within the organisation; (*iii*) programme(s) for achieving its objectives and targets, which shall include the delegation of responsibility and the time frame within which it has to be carried out; (*iv*) a procedure to identify and have access to legal and other requirements to which the organisation subscribes.

Thirdly, training needs are to be identified and comprehensive environmental awareness training needs to be provided to all employees in addition to job specific training pertaining to the relevant environmental impacts of his job/function. Apart from this, the organisation shall ensure the prevalence of a strong internal communication system between various levels and functions of the organisation and a comprehensive procedure for receiving, documenting and responding to relevant communication from external interested parties. Besides, efforts should be made to formulate a comprehensive Environmental Management Programme that ensures proper implementation of the formulated strategies for continual improvement.

Fourthly, information regarding core elements of the management system should be documented. Apart from this, the organisation shall establish and maintain procedures for the identification, maintenance and disposal of environmental records. These records shall include training needs and the results of audits and reviews.

Fifthly, and very importantly, the organisation shall establish and maintain procedures to identify potential for and respond to accidents and emergency situations and for preventing and mitigating the environmental impacts that may be associated with them. Also, there ought to be provisions for the reviews and revision of these procedures on a regular basis especially after an accident and the same should be periodically practiced by way of mock drills.

Sixthly, continual monitoring is a very vital requirement for the effective implementation of the Environmental Management System and not only should there be documented procedures to monitor and measure the key characteristics of its operations and activities that can have a significant impact on the environment but, it should also be ensured that monitoring equipment is caliberated and maintained alongwith records of the process. There should ideally be a frequently monitored procedure for evaluating compliance with environmental legislation and regulations.

Lastly, it is imperative for the organisation to establish and maintain programme(s) and procedure(s) to carry out periodic Environmental Management System Audits to ensure proper implementation of the system, to observe the conformance of the system to the standard and to legal norms. In order to be comprehensive, the audit procedures shall cover scope of the audit, frequency and methodologies, as well as the responsibilities and requirements for conducting audits and reporting results. And subsequently, the organisation's top management shall at regular intervals review the environmental management system to determine its relevance, adequacy and effectiveness.

The Environmental Management System most importantly should have an inherent capability to achieve regulatory compliance and strive towards continual improvement of environmental performance of the organisation.

III. Legal Mechanism

Much of the national environmental law in India and elsewhere is derived from provisions of international conventions which manifest themselves once a country becomes a party to the convention. When the signatory in question ratifies the convention, the item becomes a part of national law through the country producing its own statute to implement the obligatory provisions of the international legislation.

Environmental laws in India are at their infancy and leave much to be desired in terms of statutory stringency towards polluters. The few laws that do lay down mandatory standards lack effective implementation. In this part an effort has been made to briefly outline Indian laws that are relevant for the purpose of prevention of Industrial Pollution. They are, needless to say, mandatory in nature and non-compliance with the standards and norms laid down by these acts would incur upon the company, fines, punishment and even closure of the factory in certain cases. Legal compliance therefore, is the backbone of any system of environmental management and it is absolutely essential for industries to adhere to the standards prescribed under these acts.

The first act in India to address the problem of pollution exclusively was Water (Prevention and Control of Pollution) Act, 1974 (Amended upto 1988). The Act seeks to address the problem of water pollution and is particularly pertinent to industries given fact that only 300,000 factories using and contaminating water in their manufacturing processes adequately treat water prior to its release into a natural water body.

Industrial waste water contains toxic substances like lead, arsenic, mercury, cynide, oil, offensive colour and odour, acids and alkalies that

affects fish and aquatic life, inorganic substances like carbonate, chloride and nitrogen that renders water unfit for use and organic substances that deplete oxygen content and increase the Biological Oxygen Demand (BOD) content.

The Water Act aims at prevention of water pollution and maintaining and restoring the wholesomeness of water. The Act and Rules define the formation of State and Central Pollution Control Boards, their constitution, authorities, responsibilities and obligations.

The Act and Rules also provide the permission for industries to establish their factories. Further, there are renewable permissions for operations, these permits are called consents. The consents normally are given to the industry for specific periods and are to be renewed prior to the lapse of the consent. In *MC Mehta* v. *Union of India*[5], the Supreme Court held that whenever applications to establish new industries are made, such applications shall be refused unless adequate provisions has been made for the treatment of trade effluents flowing out of the factories. Immediate action should be taken against existing industries if they are found responsible for pollution of water.

The Water Act, 1974 empowers the petitioner to move the court to enforce statutory provisions of the Act. It also gives any official of the State Pollution Control Board, empowered by it, the power to obtain information and collect and test samples according to the procedure specified in section 21[6]. The powers of the PCBs (Pollution Control Boards) include ordering closures, prohibition of an operation or process. It can also include stoppage of electricity and water supply to the industry. In the Ganga Pollution case, *MC Mehta* v. *Union of India*,[7] the Supreme Court held that the financial capacity of the tanneries should be considered irrelevant while requiring them to establish primary effluent treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary effluent treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large. Failure to comply with the directions given under section 20(2) (Information regarding constitution, installation or operation of any establishment or any disposal system etc.) within the time specified in the direction would on conviction, be punishable with imprisonment for three months or with fine upto

5. AIR 1988 SC1115 at 1127.
6. Water (Prevention and Control of Pollution) Act, 1974.
7. AIR 1988 SC 1037 at 1045-46.

Rs. 10,000 or with both. While the failure continues, a fine of Rs.5000 for each day of continuance is also leviable.

The Water Act prescribes minimal national standards as well as standards for the small scale industry which are different. These standards are covered in a more comprehensive manner under the Environment (Protection) Act, 1986. Standards can be relaxed in cases where the water will be treated subsequently in a Terminal Treatment plant. The Water (Prevention and Control of Pollution) Cess Act, 1977 is mainly to levy and collect a cess on water consumed to augment resources for PCBs. The benefits which result from the prevention of water pollution are many. Abatement of pollution also aids in cutting costs, for example, the recovery of valuable commercial ingredients during the treatment of industrial waste water, which yields by-products which to some extent assist in offsetting the cost of treatment.

The Air (Prevention and Control of Pollution) Act, 1981 is similar to the Water Act and provides for the prevention, control and abatement of air pollution. Under the act the Central and State Boards constituted under the Water Act have now been given additional responsibilities of combating air pollution. The State Government has to declare certain areas as 'Air Pollution Control' Areas.[8] In these areas there are restrictions on the operation of certain industries. The levels of pollution are to be determined by the PCBs. Industries operating in the Air Pollution Control Areas must have a consent to establish and a consent to operate prior to commencing operations for emissions. As in the Water Act, emission standards, that are specified in this Act and Rules[9] are to be viewed together with the Environment Protection Act, 1986 which could have more exact and demanding requirements.

The Air (Prevention and Control of Pollution) Rules, 1982 and 1983, elucidate the National Ambient Air Quality standards which have different permissible levels of air pollution for Industrial, Residential and Sensitive areas and the standards are with regard to certain pollutants only like Sulphur dioxide, Oxides of Nitrogen, Suspended Particulate Matter (SPM), Respirable Particulate matter (less than 10 micron) Lead and Carbon Monoxide. The National Ambient Air Quality standards also specify the frequency and information on how it is applied.

The Environment (Protection) Act, 1986 is an umbrella legislation which provides for the protection and improvement of the environment.

8. Air (Prevention and Control of Pollution) Act, 1981, section 19.
9. Air (Prevention and Control of Pollution) Rules, 1982 & 1983.

requiring consent under Section 25 of the Water Act or Section 2 of the Air Act or both, or an authorisation under the Hazardous Wastes (Management and Handling) Rules, 1989 would be required to submit an environmental audit report in Form V for the financial year ending on 31st March every year to the concerned SPCB. Apart from rule discussed above there are other important notifications under the 1986 Act like (*i*) the ban on benzidine dyes and chemicals (*ii*) declaration of Coastal Regulation Zone (*iii*) Environmental Impact Assessment and (*iv*) Environmental clearance of projects.

Under the Hazardous Wastes (Management and Handling) Rules 1989 industries generating hazardous wastes and having facilities for collection, reception, transport, storage and disposal will have to get authorisation from the State Pollution Control Board. This applies in case of any operation as well for the collection, treatment, storage, transport and disposal of hazardous wastes. Hazardous wastes must be clearly labelled and appropriately packed before transportation to the site. The state government is responsible for identifying hazardous waste disposal sites. An impact Assessment must be done before the site is so declared. The philosophy behind it is the idea propagated during the Basel Convention i.e. "Cradle to grave" monitoring, and keeping the same spirit alive is the provision of prohibition for import of waste for dumping. In addition to this, accidents at sites are to be reported to the State Pollution Control Board and that State Government is required to maintain an inventory of hazardous wastes and where they are stored. These rules have also specified 684[13] chemicals with threshold quantities, it also requires Material Safety Data sheets.

Manufacture, Storage and Import of Hazardous Chemical Rules 1989 also specify the quantity of certain hazardous chemicals which need to be handled and stored in an appropriate manner. Safeguards are required to be evolved, such as an on-site as well as an offsite emergency plan. A list of 184 chemicals has been released as maximum polluting industries. Apart from this, a safety report is to be submitted and the likely people to be affected are to be informed of the hazards and methods of safety.

To meet such contingencies, a new indigenous rule of absolute liability has been formulated which is a distinct contrast to the *Rylands* v. *Fletcher*[14] rule. In *M.C. Mehta* v. *Union of India*,[15] the Supreme Court held:

13. Hazardous Wastes (Management and Handling) Rules, 1989 as amended in 2000.
14. *Rylands* v *Fletcher*, (1886) LR and HR.
15. AIR 1987 SC 1086 at 1099.

(W)here an enterprise is engaged in a hazardously or inherently dangerous activities and harm results to any one on account of an accident in the operation of such hazardous and inherently dangerous activity - the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the operations which operates vis-a-vis the tortious principle of strict liability in *Rylands* v. *Fletcher*."

It was also held that the measure of compensation must be co-related to the magnitude and capacity of the enterprise so that the compensation has a deterrant effect.

The growth of hazardous industries, processes and operations in India has been accompanied by the growing risks of accidents, not only to the workmen employed in such undertakings but also to the members of the public in the vicinity. For the purpose of providing immediate relief to the persons affected by the occurrence of the accident while handling any hazardous substance and for matters connected therewith or incidental thereto, the Public Liability Insurance Act, 1991 was enacted.

This Act provides for mandatory Public Liability Insurance for installations handling hazardous substances to provide minimum relief to the victims. Such an insurance apart from safeguarding the interests of the victims of the accidents also provide cover and enable the industry to discharge its liability to settle large claims arising out of major accidents. The mandatory public liability insurance has been based on the principle of no fault liability' as it is limited to only relief on a limited scale.[16]

To say that compliance of standards that lie at the heart of any environment management system, is the key to effective and efficient environmental, rather wholistic management, would be an understatement. However, to keep a check on the implementation of the environmental management system and legal compliance there exists a series of planned inspections called Environmental Audit.

IV. Environmental Audit

A full environmental audit comprises of a complete examination of all aspects of a company's interaction with the Government. It is designed to examine performance in terms of (*i*) management (*ii*) compliance with policies and regulation (*iii*) the information is then subsequently disclosed to the public. The methodology of environmental audit can generally be

16. G.S. Karkaria, Environmental Law (1999) at 22-23.

categoriesed into three broad audit stages. The first stage is the stage of document review when the auditor reviews the environmental policy, the objectives and targets, the aspects impacts register. The auditor also reads through the list of relevant legislation that is applicable. This stage of audit is generally done off site.

The second stage of audit is carried on, onsite, where the auditor checks whether the environmental management system is based on the identification and evaluation of environmental aspects, and in case of an external auditor, a thorough inspection is carried out as regards the internal audit of the company, the auditor may even ask for an internal audit report.

The third stage also conducted on site and is used for deciphering whether the procedures are being followed. This can be inferred by interaction with the employees or carrying out a mock drill. The auditor may also request for samples for analysis or he may check to see the condition of the effluent treatment plant and observe the outfall to get the true picture. The auditor then comes to a conclusion regarding whether or not the Environmental Management System is capable of delivering performance improvement and regulatory compliance.

As has been mentioned earlier, environmental audit may be conducted internally[17] or alternatively by an external auditor who would conduct the audit for certification of the company as being ISO 14001 compliant. The ISO 14001 certificate is a prominent external communication that speaks volumes regarding the work culture, ethics, social responsibility and management systems, and besides the existence of a properly implemented, sound environmental management system would also ensure timely compliance with all required legislative norms pertaining to them, which is always a state that most industries would strive to reach. The certification also shows commitment on part of the company towards a better environment and a work culture that is capable of achieving the same.

There are various modes of certification besides the ISO 14001, like Eco Management and Audit scheme also known as EMAS, which is adopted by the European Commission. It is extremely stringent with its requisite, standardised provisions and on completion of the audit, the auditor is required to file in an environmental statement. The other certificate standard is BS 7750 or British Standard 7750 which follows

17. Now made mandatory by Rule 14 of the Environment (Protection) Rules, 1986, inserted with effect from March 13, 1992.

EMAS and prefers public disclosure of environmental performance information (Policy and Objectives). BS 7750 however, is not so widely used now and it seems to be a trifle redundant. Environmental audit therefore, is a multifaceted option that companies may choose to ensure a streamlined management system and proper legal compliance.

V. Environmental Impact Assessment

This is necessary to ensure that new developments take into account environmental consideration at the planning stage. The results of EIA are embodied in the Environmental Impact Statement (EIS) which is now, often required by law and which should contain the following information. Firstly, a description of the development proposed the site, design, size and scale of development, and the data necessary to identify and assess the main effects that the development is likely to have on the environment.

Secondly, a description of the likely significant direct and indirect effects of the development by reference to its possible impacts on human beings, flora, fauna, soil water, air climate, landscape, cultural heritage, employment, transport, education resources, housing etc. and where significant adverse effects are identified and a description of the measures envisaged in order to avoid, reduce or remedy these. And finally, a summary in non-technical language for public consumption.

Environmental impact assessment is not an easy task. Prior to taking up the work, a set of guidelines and some set of directions for the analysis of the development work should be available. Usually, an environment impact assessment should be made either before or during the project planning and designing stages and thereby have a futuristic view of the impacts. Efforts should be made to integrate environmentally sound and efficient technologies at the planning stage itself so that environmental preparedness is inbuilt in the system. The other important considerations are those of the legal parameters regarding the location in question, human settlements around the industry, whether the host environment is of a 'sensitive' category that would magnify any environmental impact of the company's activities manifold. Furthermore, if adverse environmental impacts are not taken into consideration, at their infancy stage of implementation and planning, the long term costs of remedial measures due to such omission could be greater than short term benefits of the projects.

The basic thrust of Environmental Impact Assessment is foreseeability and thorough follow ups. Infact, it was because of poor environmental impact assessment, sheer lack of forseeability and apparent carelessness that the Bhopal gas leakage in 1985 happened.

Since prevention is indeed better than care, a thorough environmental impact assessment will be the first step in the direction of identifying the significant aspects of a company's activities and prioritising the same to derive sound environmental management system. With a thorough Environmental Impact Assessment, the company holds a better chance to plan and implement environmentally impeccable systems in the prescribed manner.

Thirdly, an environmental impact assessment, given its inbuilt resistance, may address environmental needs problems and the working of an Environment Management System in a better manner thereby ensuring complete compliance with the legal norms and a wholistic and positive attitude.

VI. Conclusions

In the face of rapid deterioration of the global environment, the need of the hour is a practical balanced approach to addressing industrial pollution related problems. It is imperative also to consider the following summarised deductions while attempting to induce greater accountability among industries.

Firstly, there could be incentives for utilisation of environmentally clean technologies, recycling and reuse of waste and conservation of natural resources.

Secondly, operationalisation of the 'polluter pays principle', by levying an effluent tax and fiscal incentives for small scale industries for pollution control and reduction of wastes.

Thirdly, location of industries ought to be as per the environmental guidelines for setting of industries, but even then preference ought to be given to compatible industries where wastes from one may be used as raw material for the other, thereby, reducing the net pollution.

Fourthly, and very importantly, introduction of Environmental Audits and reports thereof to focus on environment related topics, and preparation of onsite and offsite emergency plans. Environmental Impact Assessment should be insisted upon from the planning stage.

Fifthly, dissemination of awareness among employees, local community and children with specific references to pollution control and waste management.

Finally, collective efforts of installation and operation of common effluent treatment facilities in industrial estates and in areas with industrial clusters.[18]

18. M.C. Mehta, rev., Water and Air Pollution and Environmental (Protection) Laws (4th Edition).

Careful implementation of environmental management system and a sound process of periodic Environmental Audit can actually assist industries in cutting production costs by reduction in power consumption, recycling reusable wastes as raw material, streamlining preventive measures through a process of monitoring and an effective existing emergency preparedness plan lesser the possibility of any impending accidents, spillage and wastage. In other words achieving legal compliance and continual improvement is not impossible. It requires cooperation, dedication and commitment at all levels especially at the level of the top management.

It is possible that the solution to most major pollution related problems of the industries could be an effective Environment Management System and frequent Environmental Audits. Much of the damage to the environment may be irreversible, yet its never to late to make a beginning. Environmental Management System and Environmental Audit may just be the twin solutions that the industry was looking for, as a practical answer to all its environmental dilemmas.

IS REASONING BY ANALOGY CENTRAL TO LEGAL REASONING?

*Jayna Kothari**

The use of past decisions to assist the resolution of present problems is an unexceptional feature of the reasoning techniques employed in both legal and non-legal contexts. And in law, the use of prior decisions to assist in the resolution of present disputes, has in general reached a considerable degree of refinement. The object of the present paper is not only to reach a conclusion as to whether or not reasoning by analogy is a central component of legal reasoning, but also to examine what analogical reasoning really involves.

Legal reasoning in this context would mean reasoning undertaken by judges and lawyers in the process of adjudication. With that as our premise, although analogical reasoning is very important to the practice of decision-making in Anglo-American courts, this method of reasoning cannot be clearly separated from other forms of reasoning like using principles or policies in decision-making.

I. Reasoning by Analogy

The doctrine of using analogy is definitely the cornerstone of adjudication in Anglo-American legal systems, and whether this method of reasoning is a valid one or not, and whether it should be used or not, the fact remains that it is atleast the most familiar form of legal reasoning. Decisions in difficult and unregulated[1] cases are almost always made by judges and lawyers referring to past relevant decisions which are either analogous or disanalogous to the case to be decided.

According to the common law doctrine, a previous decision is to be treated as an authority, if it is analogous to a present dispute before a court or if it was decided by a court which, has the status to make decisions which will be deemed to be authoritative, and if the decision has not been abrogated by a statute or a court which has the power to overrule prior decisions. So a court relies on analogy whenever it draws

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1. Unregulated cases according to Joseph Raz are those cases where there is a gap in the law applying to the case.

on similarities or dissimilarities between the present case and previous cases, which are not binding principles applying to the present case. Argument by analogy is not a method of discovering which rules are legally binding because of the doctrine of precedent. That discovery requires nothing more than an interpretation of the precedent to establish its *ratio*. Analogical argument is a form of justification of *new* rules laid down by the courts in the exercise of their law-making discretion[2]. As such it succeeds when it helps to establish that the rule adopted by the court is the best it can adopt. Therefore, what is important in deciding whether a certain case is analogous to a certain precedent and thus hold the precedent as applicable, is that it is similar in ways that are relevant for the rule or principle in question to be upheld. If it is still similar but not in any relevant way, then it cannot be said to be analogous. But of course, how is one to judge which similarities are relevant and which are not? It is difficult, but the test of relevance for similarities is the underlying justification of the rule which forms the basis of the analogy.

Example : Let us suppose that case X has characteristics a, b, c, d, e & f, and the court lays down that a, b & c = Rule Y.

Case Z (which is at hand) has characteristics a, b, d, e, f & g.

The court may, relying on the relevant similarities a and b, extend Rule Y by dropping a condition to yield a, b = Rule Y, or create another rule with the same result a, b, d = Rule Y which will co-exist with the old rule. Such a change in the law is justified by the same *purpose or value* which justifies the original rule on which the analogy is based (namely a, b, c = Rule Y).

II. Analogical Arguments and Reasoning by Legal Principles

The central theme of this paper is that although incredibly important, reasoning by analogy is not what legal reasoning solely consists of. Analogy or disanalogy of the facts of the case at hand with precedents ultimately serves to justify the operation of the rule and the policy or principle at play behind the rule. Decisions in cases not covered by mandatory rules must be shown to be supported by some general legal principle or some relevant analogy or other 'persuasive' legal source.[3]

Often, even in arriving at a decision whether the particular facts of a case are analogous or not, requires weighing of different principles to

2. Raz, The Authority of Law (1979) at 202.
3. Neil MacCormick, Legal Reasoning and Legal Theory (1978) at 178.

decide which value deserves to be promoted by the rule. Analogies must be evaluated, and in the process they inevitably become embedded in a wider web of legal reasoning which must include non-analogical, normative elements.[4] Thus, it is difficult to draw a clear line of distinction between argument from legal principle and argument from analogy. Analogies only make sense if there are reasons of principle underlying them.

By its very nature the justification of a rule is more abstract and more general than the rule it justifies. Therefore, just as it justifies one rule, it could justify another. If one rule is justified as a way of achieving a certain purpose, or of protecting a certain value, so might other rules be if they promote the same purpose or protect the same value in different ways or under different circumstances. The following example[5] illustrates the point clearly:

In *Adams* v. *New Jersey Steamboat Co.*[6], valuables were stolen from a passenger's rented steamboat cabin. The issue in that case was whether the steamboat owner was strictly liable to the passenger for the loss (if having been decided that neither the steamboat nor the passenger was negligent). There were two different precedents directly on point: one held that an innkeeper was strictly liable for the theft of boarders' valuables, while another held that a railroad company was not strictly liable to passengers for the theft of their valuables from open-berth sleeping-car trains. So the legal issue put to Judge O'Brien was: Was the steamboat sufficiently like an inn, on the one hand, or sufficiently like a train on the other to receive the same legal treatment?

The Court held that the steamboat owner was strictly liable to its passengers for any loss. The Judge's reasoning in likening a steamboat to an inn emerged from the principle upon which innkeepers were charged by the common law as insurers of the money or personal effects of their guests, which originated in public policy. It was deemed to be a sound and necessary rule that this class of persons be subjected to a high degree of responsibility in cases where an extraordinary confidence was necessarily reposed in them, and where great temptation to fraud, and danger of plunder existed by reason of the peculiar relations of the parties.

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4. Jefferson White, *Analogical Reasoning*, in Dennis Patterson, ed., 'A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY' (1996).
5. This example is borrowed from Scott Brewer, *Exemplary Reasoning. Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARVARD LAW REVIEW, 923 at 1004. The analysis however is original.
6. 151 N.Y. (1896).

What this example tries to reveal is that often behind reasoning by analogy, the court has to weigh arguments of principle in order to decide which analogy to prefer. In the above mentioned case, there was an equally applicable precedent of a railroad company not being strictly liable to its passengers, but the Court came to the conclusion that the steamboat was analogous to the inn rather than a rail road company on the basis of the purpose it thought necessary to uphold. So whether a steamboat counts as an inn under the rule of strict liability, and therefore, whether a steamboat company should be likened to an inn-owner depends on whether we think the rule is meant to charge innkeepers as insurers under public policy or some other railway related purpose. Therefore, as we can see, arguments by analogy are important, yet it is no less clear that the analogy used in the above case did not make the decision given obligatory. The existence of the analogy did not compel Judge O'Brien to reach the conclusion he reached; rather it was crucial in showing that the conclusion otherwise desirable was permissible in law. The analogy provided legal support for, but not legal compulsion of, the decision given.[7]

Keeping the above arguments in mind, there is no sensible way of comparing or distinguishing situations to the end of rule-governance apart from purposive judgments. An analogical comparison is not inherently in the facts; it is a way of grouping facts that helps us advance certain interests. It is rather that we cannot marry rule to circumstance effectively unless we are willing to bring both the definition of appropriate circumstance and the definition or relevant rule-applying endeavour by the particular rule to be applied[8] *e.g.* : the steamboat counting as an inn.

One of the most important objections to this form of reasoning is that analogical arguments are inconclusive because there are many incompatible analogies which can be drawn and the courts choose which ones to draw on independent grounds. This is a valid point, but its significance is misunderstood if it is supposed that it shows that analogical reasoning is a mere window dressing. The point is valid to the extent that the law already contains pragmatic conflicts. Suppose rules A1 and A2 promote conflicting social goals, the court will have to choose whether to introduce a new rule B1 promoting the same rule as A1 or B2 which promotes the same goal as A2. That choice will not be based on analogy. But the fact that whichever rule the court adopts is analogical to some

7. *Supra* n. 6 at 181.
8. Unger Roberto, WHAT SHOULD LEGAL ANALYSIS BECOME? (London, 1996) at 60.

existing rule is still relevant in showing that the court is not introducing a new pragmatic conflict but is supporting one side in an existing dispute.[9]

Analogical reasoning is thus not only useful for applying law, but also for making new law. Argument by analogy, used in law-making, involves interpreting the purpose and rationale of existing legal rules; these are equally essential for a correct interpretation and application of the law. Analogy is used in law-making to show harmony of purpose between existing laws and a new one.[10] It is also used in interpretation through the assumption that the law-maker wished to preserve harmony of objectives and his/her Acts should be interpreted as designed to pursue goals compatible with those of related rules.

III Sunstein's Analysis of Analogical Reasoning[11]

Legal theorist Cass Sunstein regards analogy as a form of bottom-up reasoning by which decisions can be made by focusing on the particulars of the case. He then proceeds to emphasize the use of his famous 'incompletely theorizing agreements' in analogical reasoning, but this is not a very coherent argument. On the one hand he claims that principles are developed with constant references to particular cases, and on the other hand he refers to them as incompletely theorized agreements because the judgments are unaccompanied by a full apparatus to explain their basis. He maintains that lawyers typically lack the tools for large-scale theorizing and thus, analogical reasoning is ideal because it calls for a low or intermediate level of principles rather than general abstract principles.

In my view his basic premise of analogical reasoning is inverted, because he sees legal principles evolving out of analogies, and not analogies arising because of the principles. Analogy without any base of theory or purpose would be blind. Such arguments cannot be those of logic alone. What is more mystifying is his categorization of low-level and high-level principles and thus, favouring incompletely theorized agreements. I do not think that such a distinction is possible, for to decide whether a particular rule (which is not binding) may be applied to the case at hand it is necessary to go into the matter of what the purpose of the rule is, and whether it is worth upholding. If this is what he refers to as high-level principles, then we cannot escape them for they remain the very foundation of legal reasoning and must be applied in the use of analogy too.

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9. *Supra* n. 1 at 208.
10. *Ibid.*
11. Cass Sunstein, *On Analogical Reasoning*, 106 Harvard Law Review at 741.

IV. Conclusion

Analogies only make sense if there are arguments of principle underlying them. Therefore, we cannot hold that reasoning by analogy is by far central to legal reasoning, for it involves valuing of legal principles and justification of rules, which are independent methods of legal reasoning. For ultimately, analogical arguments are useful primarily in instances when there is no applicable rule or statute to the case at hand, or binding precedents, that the court has to look for analogies — although it is not uncommon for argument from analogy in the application and interpretation of statutes too. However, a good amount of legal reasoning still takes place through rule application and weighing of principles. We can, therefore, hold that there are myriad ways of legal reasoning, and analogical reasoning — a very important method, is after all one of those myriad ways.

To conclude in the words of Unger, "A developed practice of analogical judgment is one resembling a more self-conscious and bounded version of many of our ordinary methods of moral and political judgment : bounded by the starting point in legal materials, and made self conscious by the determination to articulate the aims of an endeavour that is both collective and coercive".[12]

12. *Supra* n. 7 at 59.

BOOK REVIEWS

Justice Kuldip Singh — VISION & MISSION BY PAWAN CHAUDHARY. Vidhi Seva, E-31, Mansarover Garden, New Delhi-110015 (INDIA), 1997 Pp. x +134, Price Rs. 250/-.

Constitutional law is fundamental law of the country. Though our Constitution is a detailed Constitution but it does not mean that what is written in the Constitution and in various Articles and Schedules requires no explanation or interpretation. Our Constitution is, therefore, subject to the final interpretation given by the Supreme Court of India and accordingly what is finally decided by the Supreme Court becomes the law of the land. Our Constitution has received progressive interpretation at various stages during the last 50 years. It is basically dependent on the vision of Hon'ble Judges which has made our Constitution progressive and dynamic. The book under review[1] is written by a veteran writer and is in fact a biographical account of Justice Kuldip Singh's contribution in the growth of the dynamic constitutional interpretation during his tenure as the Judge of the Supreme Court of India.

The author has very rightly stated that Justice Kuldip Singh pronounced judgements and orders on wide range of subjects falling under different headings, namely: Criminal Law, Service and Labour law, Environment Law, Practice and Procedure, Forests, Municipalities, Land and Tenancy, Excise and Income Tax etc. Each of them affords a great deal of attraction for separate study. Yet, he is better known for his pronouncements on constitutional provisions, particularly public law cases (e.g. cases of Taj Mahal, Mirza Ghalib, government accommodation, petrol pumps, shops allotment) and more particularly on right to life contained in Article 21 of the Constitution with the vision and mission for the betterment of life of the citizens of India.[2]

The author has divided the book into five chapters. In chapter two he has highlighted the contribution of Justice Kuldip Singh on Article 14 of the Constitution of India *i.e.*, equality before law and has incorporated the contribution of Justice Kuldip Singh through many cases decided by him like the *Bank of Baroda's case,*[3] wherein the learned Judge held that the burden of showing that a classification is arbitrary is basically on

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1. Hereinafter referred to as JUSTICE KULDIP SINGH.
2. *Id.* at iv.
3. AIR 1989 SC 2105.

the person who impeaches the law. If any state of facts can reasonably be conceived as sustaining the constitutionality, the existence of that state of facts, as at the time of the enactment of the law, must also be assumed. The allegations on which violation of Article 14 is based must be specific, clear and unambiguous and must contain sufficient particulars.

The author has also discussed *Sudhir Kumar Jaiswal's case.*[4] He also discusses *Uday Pratap Singh's case,*[5] where the learned Judge held that it is now well settled that by an executive order the statutory rules cannot be whittled down nor can any retrospective effect be given to such executive order so as to destroy any right which became crystalised.

Fundamental Freedoms as provided under Article 19 of the Constitution are also discussed. In *Sodan Singh's case,*[6] wherein Justice Kuldip Singh describing about right to business under Article 19 (1)(g) held that there is no justification to deny the citizens of their right to earn livelihood by using the public streets for the purpose of trade and business.

On Article 21 the author has further shown the constitutional vision of Justice Kuldip Singh because there is no freedom more important to a person than that of his life and personal liberty and Article 21 of Constitution of India guarantees to every person the protection of his life and personal liberty.[7] The author has highlighted the decision of Justice Kuldip Singh in *Tehri Bandh Virodhi Samiti's case,*[8] where the petitioners alleged that in preparing the plan of the Tehri Dam Project the safety aspect had not been taken into consideration. That the dam, if allowed to be constructed, will pose a serious threat to the life, ecology and the environment of the entire northern India region. The Court held that the Union of India had considered the safety aspect of dam and the question of design of the dam, the seismic potential of site where the dam was proposed to be constructed and the various steps which had been taken for ensuring the safety of the dam were highly intricate questions relating to science and engineering. This Court did not possess the requisite expertise to render any final opinion on the rival contentions of the experts. The author has also discussed at length the *Kumari's case*[9] wherein in the city of Madras there was ten feet deep sewerage

4. AIR 1994 SC 2750.
5. 1994 Supp. (2) SCC 495.
6. 1989 2 SCR 1038.
7. K. Suba Rao, CONFLICTS IN INDIA POLITY at 2.
8. AIR (1990) Supp. 2 SCR 607.
9. JT 1882 (2) SC 16.

tank which was not covered with lid and was left open. Kumari's six years old son fell into it and died. The petitioner filed a writ petition which was dismissed by the High Court. However, the Supreme Court through Justice Kuldip Singh reversed the judgement of the High Court and directed the state of Tamil Nadu to pay to the appellant a sum of Rs 50,000/- with interest @12% per annum from January 1, 1990 till the date of payment within the six weeks from the date of the judgement.

Article 25 of the Indian Constitution guarantees every person a freedom of conscience and the right to freely profess, practice and propagate religion. The right in every case is subject to public order, health and morality. And state can make laws regulating or restricting any economic, financial, political or secular activity which may be associated with the religious practice. As also providing for social welfare and social reform even though they might interfere with religious practices.[10] The author has discussed at length the contribution of Justice Kuldip Singh in *Sarla Mudgal's case,*[11] wherein it has been pointed out very eloquently by Justice Kuldip Singh that marriage is the very foundation of civilised society. After the relations are formed, the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilisation can exist.[12] In this case Supreme Court through Justice Kuldip Singh gave the progressive interpretation by stating that second marriage of Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provision of section 494, IPC and the apostate husband would be guilty of the offence under action 494.[13]

On the role of judiciary under the Constitution particularly the Supreme Court of India and the pivotal role of the Chief Justice of India has been discussed by the author at length through the *Kumar Padma Prasad's case,*[14] wherein the court has pointed out that Independence of judiciary is the basic structure of the Constitution. To achieve this objective there has to be separation of judiciary from the executive, and legislature.[15]

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10. JUSTICE KULDIP SINGH at 72.
11. (1995) 3 SCC 635.
12. JUSTICE KULDIP SINGH at 75.
13. *Id.* at 74.
14. (1992) 2 SCR.
15. *Id.* at 85.

The author has also very lucidly pointed out the contribution of Justice Kuldip Singh in *S.C. Advocates On Record Association Judges Case-II*,[16] wherein Justice Kuldip Singh has very rightly pointed out the duties and responsibilities of the office of Chief Justice of India which are much more onerous than that of a Judge of Supreme Court. The responsibility of toning-up judiciary in the country rests on the shoulders of the Chief Justice of India. As he is supposed to make appointments of the Judges of the High Court and in the Supreme Court. He has also to select the Chief Justices of the High Courts. He is responsible for the transfer of Chief Justices and Judges of the High Courts. As the head of the judiciary, the Chief Justice of India would lay down the principles and practices to be followed in the administration of justice all over the country.[17] In the above case Justice Kuldip Singh also provided the right vision wherein he opined that there is no distinction between the 'Constitutional law' and an established 'Constitutional convention' and both are binding in the field of their operation. Once it is established to the satisfaction of the court that a particular convention exists and is operating then the convention becomes a part of the Constitutional law of the land and can be enforced in like manner.[18]

On the jurisdiction of the Supreme Court the author has discussed the *Case of Asif Harmeed's*,[19] wherein through Justice Kuldip Singh the Supreme Court has held that even though there is not specific provision of separation of powers under the Constitution of India, yet the executive, the legislature and the judiciary are supreme to the extent of function provided under the law and therefore, in above said case the direction of High Court to the legislature for constituting "Statutory Independent Body" is solely for the legislature to consider as to when and in respect of what subject matter the laws are to be enacted. And, therefore, no direction in this regard can be issued to the legislature by the courts.[20]

The author has also discussed the *Case of National Federation of Blind's*,[21] wherein the Government had appointed a commission to identify the jobs in the Government which could be given to handicapped people. The commission submitted the report to the Government and identified about 416 categories of Group A and Group B posts, which are suitable for the handicapped. However, for the last seven years the Government

16. AIR 1994 SC 264.
17. JUSTICE KULDIP SINGH at 94.
18. *Id.* at 95.
19. (1989) 3 SCR 19.
20. JUSTICE KULDIP SINGH at 106-7.
21. AIR 1993 SC 1916.

had not taken any action and one Mr. S.K Rungta who himself was visually handicapped argued the case as a counsel of the petitioner before the court. It was held that the question of giving preference to the handicapped in the matter of recruitment to the identified posts is a matter for the Government of India. The court also held that the claim of visually handicapped for writing the civil services examination in Braille script or with the help of scribe was legally justified demand.[22]

The reviewer feels that the author has very eloquently written a biographical account of Justice Kuldip Singh who had a missionary vision and gave the progressive interpretation of the Constitution of India. The reviewer feels that more and more jurists should write such contributions of prominent judges of Supreme Court of India which would go a long way for the healthy and learned judicial decisions by the Supreme Court of India.

The book is published by Vidhi Sewa which is perhaps the publication by the author himself and is a useful contribution towards legal literature. It is recommending that the book should be used by scholars of constitutional law, researchers, students of law and should be kept in law libraries.

Harish Chander*

22. JUSTICE KULDIP SINGH at 133-34.

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LAW RELATING TO COMPUTERS, INTERNET AND E-COMMERCE. Edited By Nandan Kamath. Delhi : Universal Law Publishing Co. Pvt. Ltd., 2000. Pp XXIV + 516, Rs. 395/-.

These days Computers play an important role in the functioning of the society. More so in business one cannot operate efficiently without the use of computers. Through Internet the world has become so small that you can find any information relating to everything at your desk. Now a days business is gradually becoming operational through e-commerce. However, conventional laws relating to contract, crime or trade or business have become subject to intricate cases of bugging, hijacking and tricky manipulations on the computer services. Municipal laws are not sufficient to tackle the legal problems regarding computer related crimes. This reviewer is of the firm view that we need concerted efforts to bring about International rules and regulation to control the menace of cyber practices in the world. So far nothing has been done in this regard and this is very imperative because of the cyber revolution which has come. There is an urgent need to have relevant Cyber Laws which should be in tune with the functioning of computer and the international implications of the transactions on the computer which has become very complicated today.

The book under review[1] is the edited version of the various articles written by learned authors from the National Law School of India University, Bangalore. It contains seventeen research papers on various aspects of cyber laws. Some of the important articles are 'Sweeping Cobwebs Off The Law.... The Law, Lawyers And Cyberspace', 'Jurisdiction And The Internet,' 'Understanding Digital Signatures', Protecting Software Copyrights in The Age Of The Internet,', 'Cyberspace And The Law Of Trademarks', Crime On The Internet: A Challenge', Pornography On The Inernet & The Indian Penal Law', Censoring Cyberspace : In Search Of An International Regulatory Norm', and "Letterless" Letters of Credit.

The paper written by Rahul Rao 'Sweeping Cobwebs Off' The Law... The Law Lawyers And Cyberspace', the learned author has very cogently pointed out that the information provided by the web pages would be quiet unremarkable in respect of commercial enterprise, but what is interesting here is that lawyers are prohibited from advertising by

1. Hereinafter referred to as LAW RELATING TO COMPUTERS.

Rule 36 of the Bar Council of India Rules, framed under Section 49(1) of the Advocates Act, 1961. As with many other professions such as medicine and architecture, the chief objective of the ban on advertising has been to preserve the dignity of the legal profession.

This has been recognised in *Government Pleader* v. *S.A. Pleader*,[2] where it was held that advertising was unprofessional conduct on the part of a professional man.

Mr. Rao has pointed out that the application of Information Technology promoted the revolt called Zapatista revolt of January 1994. In Harry Cleaver documents he calls it the 'electronic fabric of struggle,[3] We have seen that E-Commerce has grown to become buzzword in corporate circles. The lure of conducting global operations through a web site has become irresistible for business people internationally. A page on the World Wide Web can reach web surfers in any country or a state in the world and thus led to issues and disputes as to where lies the jurisdiction of the court in case a dispute arises between the parties who have entered into the contract. The whole trouble with Internet jurisdiction is the presence of multiple parties in various parts of the world who have only a virtual nexus with each other.[4] For example sending an e-mail to an individual whose location is known to the sender is similar to sending regular mail addressed to an individual at a known location. Hence one could reasonably argue that there is little reason not to exercise jurisdiction over the sender in the location to which the e-mail was sent. In *Resuscitation Technologies Inc.* v. *Continental Health Care Corp*[5], the New York defendant had extensive communication with the Indiana plaintiff, the court held that the level of activity directed to Indiana was substantial and therefore, Indiana had the personal jurisdiction over the defendant.

In the book under review it has been pointed out that in the area of jurisdiction lessons have to be drawn from the cases. For instance there may be certain jurisdiction where one may not like to do business at all. More so if users are required to be of certain age or if business is banned or regulated in certain areas, for example gambling, then it may be necessary to identify all such persons before they can be permitted to engage in transactions and to prohibit transactions with certain users and in certain jurisdictions.[6]

It is difficult to provide evidence in disputes on the Internet as legal rules assume the existence of original and signed a paper records. The

2. AIR 1929 Bom 335.
3. LAW RELATING TO COMPUTERS at 15.
4. *Id.* at 22.
5. 1997 WL 148567 (SD Ind 1997).
6. LAW RELATING TO COMPUTERS at 46.

law of evidence traditionally relies on paper records, although of course oral testimony and other kinds of physical objects have always been part of our court rooms for evidence. On the Internet the situation of prosecution may be more complex. A hacker logging in to a computer on the way to his victim will often login under a different identity this is called as 'spoofing'. The hacker is able to do this by having previously obtained actual passwords, or having created a new identity by fooling the computer into thinking he is the system's operator.[7]

Bhakta Batsal Patnaik in his paper 'Crime On The Internet-A Challenge' pointed out that ordinarily, the law keeps pace with the technological changes in the society. However, technological advancement like the Internet clearly threatened to leave the law behind. To a technical specialist, Internet is a global network of computers based on TCP/IP and other high speed communications protocols with thousands of nodes and millions of users. He said that in 1980's a digitisation and cheap and widely available personal computers have made copying easy, perfect and fast — regardless of how many generations of copies have been made, how the inforrnation is stored, or how many people are copying it.

In his paper titled 'Pornography On The Internet & The Indian Penal Law', Dev Saif Gangjee observed that the technology serves to facilitate commercial activity and pornographers have never shied away from it. A huge amount of pornographic material can be reproduced more quickly and cheaply on new media like hard disks, floopy disks, CD-ROMs. Not only still pictures and images, full motion video clips with sound and complete movies are also available. He points out in fact the latest trend seems to be towards interactive 'live sex' where people perform on and according to requests by subscribers to the services. The U.S.A, Australia and Canada have made attempts to identify the pornography problem and bring about suitable legislation to curb the menace of pornography on the minds and morality of people. In India the law relating to pornography are provided under Sections 292 to 294 of the Indian Penal Code which in fact is a British legacy.[8] The I.P.C. has borrowed the word obscenity from the English statute and its foundations are basically on Lord Cockburn's famous test in the Hacklin case.[9]

In India this problem has been tackled by the Information Technology Act, 1999. The author suggests that by multilayered governance system using mixture of National and International legislature and self-imposed

7. *Id.* at 60.
8. *Id.* at 264.
9. 1868 LR 3 QB 360 at 371.

regulations by ISPs and users, hotlines and special organisations to report pornographic content, a more comprehensive approach can be taken to tackle the problem and that is how the balance between the freedom of the individual and the greatest good for society can be maintained.[10]

In a paper written by Dipen Sabharwal titled 'Censoring Cyberspace — In Search Of An International Regulatory Norm', the author has pointed out that global based communications cut across territorial borders, creating a new realm of human activity and throwing up a multitude of questions regarding the need for and manner of regulating this virtual world. There are two streams of arguments to regulate the Internet or Cyber Laws. One is that municipal or a particular country's laws can regulate the problem relating to Internet misuse. Secondly, whatever municipal laws you make they are bound to fail. In this context it is essential to have International Regulatory Authority with proper rules and regulations to curb the illegal use of the Internet. As there are inherent limitations for the national enforcement of laws the imperative solution lies in the International Regulatory Norms. The book further deals with some important and learned papers written by various authors like 'Cryptography, Privacy And National Security Concerns'; Regulating Electronic Money : Tackling The Challenge To National Monetary Sovereignty' and 'An Introduction To The Indian Tax Structure And The Challenges Posed By Internet Commerce' In the last mentioned paper written by Chetan Nagendra it has been very eloquently pointed out that with the use of Internet technology the problem of tax evasions are bound to happen and accordingly the tax structure has to be changed in order to curb the menace of Cyber misuse.

The book on the whole is a very learned presentation on Cyber Laws by various authors. This has been published in a very attractive jacket by Universal Law Publishing Co. Pvt. Ltd. The book is impeccably published with flawless printing and the Universal Book Company deserves to be congratulated for having published such a book which is so essential in the present times. Being a book on important subject like cyber laws which is written by a number of learned authors, this book is very useful for lawyers, computer experts, scholars, students and researchers who are interested in law relating to computers. It is a must for all law libraries.

Harish Chander*

10. *Id.* at 271.

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LEGAL THEORY. By W. Friedmann. Delhi : University Law Publishing Co. Pvt. Ltd., First Indian Reprint, 1999. Pp. XX +607, Rs. 395/-, ISBN 81-7534-144-7.

W. Friedmenn's book on Legal Theory which was first published in the year 1944 has achieved the distinction of legal classicus for the students, teachers and practitioners of law throughout the world. No law library in the world can afford to go without this book on the subject of Jurisprudence. The reasons are obvious. The book is divided into three parts and each part is divided into sections which is further divided into 35 chapters. These 35 chapters deal with almost every aspect of jurisprudence and philosophy of law in a simple, lucid and coherent style. Chapters 1 to 6 deal with esoterics of law dwelling on the contribution of Greek and Roman philosophers with an apprisal of a relationship between various concepts developed by various thinkers c/f Kelsen, Ross, Hart, Fuller (ch. 3) as law, justice, ethics, morality, science and legal theory pervading all inquiry into the methods of science with the conclusion that both the methods have widened and diverged into complex phenomenon (ch. 4) with the result that the profession of a lawyer and the values in law have been fattened by various social and political upheavals such as fascism, communism and dictatorships which *albeit* have to keep pace with legal idealism and sociological underpinnings diagnosing the social crisis and the principle antinomies in legal systems.

Part 2 from chapters 7 to 14 is exclusively devoted to the subject of natural law and the search for absolute values as the history of natural law for the last 3000 years has been a search by philosophers for an ideal higher justice than positive law was offering. Natural law although has fulfilled recurring theme for transformation of various legal systems—Romans, German, English and American yet the underpinnings of the principle of natural law have eluded thinkers throughout its history. Accordingly, the author makes a critical analysis of Greek, Roman and middle ages with references to natural law (chapters 7 to 9) and discusses the natural law theory of St. Thomas Aquinas in detail followed by the natural law theory of Grotius, Pufendrof and Vattel which laid down the first fundamentals of international law (ch.10). The natural law theories of Hobbes, Locke, Rousseau (ch.11) have been discussed with the conclusion that natural law essentially was a search for absolute values. The twilight of the natural law ideology found expression in the theories

of Hume (ch.12) which is followed by the natural law theories in anglo - american legal systems. The author refers to the justification how natural law exercised great formative influence upon English law and its impact on the American jurisprudence. The author discusses various cases decided by the Supreme Court of the United States of America in exploring the due process of the American Constitution and concludes that the natural law has influenced the US law in various ways. The revival of natural law in the beginning of the 20th Century with reference to Stammler and others has been discussed (ch.14). Chapters 15 to 17 deal with philosophical idealism and the problem of justice with specific emphasis on Kant, Fichte and Hegel who differ in their systems yet share some fundamental ideas. The German transcendental idealism of Kant, Fichte and Hegel essentially try to discover through and enquire the parameters of human mind which essentially is endowed with reason and thus is subject-matter of critical inquiry. The Neo-Kantian philosophy of scientific legal idealism which takes shape in the philosophy of Stammler, Del Vecchio and other Neo-Kantian has essentially laid emphasis on the idea of freedom of man as the absolute concept (ch. 16). The modern value philosophers of relativism, phenomenology, existentialism and contemporary legal philosophy (ch. 17) laid stress on sociological and economic push towards the progress of human being as well as to derive a nexus between legal objects, legal values and antinomies. The impact of social development on legal theory which is characterised by historical evolution is a guide to legal thought which found expression in Savigny Dahn, Maine and Kohlers' theories of Philosophical historicism developing a different legal philosophy from the evolution of history (ch. 18) followed by an analysis of the impact of biology and sociology on legal thought (ch. 19).

The author has discussed positivism, its meaning and the various theories connected with it as propounded by Austin, Kelson, Hart (chs. 22 to 24) and how the various philosophers have developed various theories of positivism. However, on balance the notion of positivism has been upset by the contemporary philosophers who emphasised progress, prosperity and liberty with commitment to social justice. The American realist movement coupled with Scandinavian have been depicted (ch.25) as a phenomenon that law making is a serious business and a subject to the influence of personality, prejudice and other non-logical factors. The American legal history markedly, demonstrates how political sympathy, economic theories and personal qualities of judges have settled matters of gravest problems for millions of people and hundred sufferers.

Law in the pursuit of interest and the Bentham's utilitarianism (chs. 26, 27) followed by Mill, Ihring, Geny and Roscopound dovetails on periodical movement from the abstract to the concrete, from the ideatistic to the middlistic, from the *apriori* to the imperical with the emphasis that freedom of judges towards the written law had been used successfully for achieving the constitutional goals of one or the other thinking.

The legal theories of modern political movements, socialist and communist legal values of modern democracy in reference to the rights of an individual to freedom of contract, liberty and association, property, enterprise and person, the government of the people and the role of the law and functions of the lawyer in developing countries (chs. 29 to 31) has been discussed in contemporary context with the phenomenological and existentialistic approaches. The author has laid special emphasis that the role of lawyer in the developing country is very vital as he is the defender of all the freedom of individual which are constantly threatened by the political powers in developing society. Legal theory, public policy and legal evolution which to some lawyers are metaphysical and speculations but to some are essential ingredients for law and legislation (chs. 32 to 34) have been dwelt with a special emphasis on judicial law making in federal constitution, statutory interpretations, precedent and developmental legal reforms. Finally legal theory and international society concludes the book (ch. 35).

The book explains the legal theory in most comprehensive manner and it is apparent that the contents discussed in various chapters of the book are very important for the lawyers, legislators and the students of law who have to be continuously, consciously or unconsciously be guided by the principles of legal theory so that there is a clarification of legal values and postulates for making the law and the legal system functional and pragmatic.

The Universal Law Publishing Co. should be congratulated for publishing this Indian edition which would make the book easily available to all the concerned in India.

A.K. Koul*

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HINDU LAW. By B.M. Gandhi. Lucknow : Eastern Book Company, First Edition, 1999. Pp XLVIII + 406, Rs. 160/-.

During 1955-1956, some areas of Hindu law were codified in the four Acts, viz., Hindu Marriage Act, 1955, Hindu Adoption and Maintenance Act, 1956, Hindu Minority and Guardianship Act, 1956 and Hindu Succession Act, 1956. Other areas of Hindu law like joint Hindu family, law of partition, impartible estates, religious and charitable endowments, etc., are still uncodified. The book under review presents both the codified and the uncodified Hindu law in a simple and lucid language. The book has twenty one chapters, of which the first fifteen chapters relate to uncodified law and chapter sixteen to twenty relate to the codified law. Last chapter, twenty first, is an epilogue or an addenda to the book giving vent to the conflict of opinions about constitutionality of the enacted laws. In this chapter the author has said that owing to a great deal of discrimination based on sex and religion, scattered in various provisions of the four Acts of Hindu law, there are two groups of jurists, one arguing that these provisions are not in breach of the Constitution, while the other stressing that they are in open breach of the Constitution, leaving aside the ideal of secularism.

The author has listed out certain baffling questions to which systematic scientific, logical and uniform answers are hard to find[1]. He has also traced the religion based discrimination under the modern Hindu law; sex-based discrimination under Hindu law and the religion based discrimination under the secular laws on marriage and succession and has ultimately led the readers to the need of enacting the Uniform Civil Code.

The joint Hindu family is one of the important areas of Hindu law. In chapter III the expressions "Joint Hindu Family" and "Joint Family Property" are loosely dealt with. The author has used the expression "joint property" to describe the "joint family property" or the coparcenary property.[2] It may be noted that the two expressions i.e. the joint property and the joint family property are not exactly synonymous. In the joint family property the coparceners acquire an interest by birth, whereas no such right can be claimed with respect to the joint property of the

1. The book under review at 386-87.
2. *Id.* at 46, 47, 49, 51.

coparceners which some of them might have acquired jointly without the aid of the nucleus of the joint family property. At some places the expression "grandfather" instead of "father's father' is used.[3]

Some of the printing mistakes may be noted— names for manes[4] S.M. Bhattacharjee for A.M. Bhattacharjee[5], Redasubhaya for Pedasubhaya[6], however. Act for However act[7] on page 56, in foot note 36 after sections 4 and 5 the expression 'Indian Partnership Act, 1932' is missing. The rule of *Dampudat* is a branch of the Hindu law of debts, according to which the amount of interest recoverable at any one time cannot exceed the principal amount. While explaining this rule of Hindu law, the author has given two illustrations. In the first illustration,[8] there is discrepancy with respect to the amount and the name of the parties.

The following details may be added in the next edition of the book (1) important case law on (a) section 9 of Hindu Marriage Act, 1955 relating to the restitution of conjugal rights involving working women; (b) section 14 of the Hindu Succession Act, 1956 relating to women's property; (2) State Amendments with respect to Section 6 of Hindu Succession Act, 1956 making daughters coparceners, viz, Hindu Succession (Andhra Pradesh Amendment) Act (Act No 13 of 1986); Hindu Succession (Tamil Nadu Amendment) Act (Act No. 1 of 1990); Hindu Succession (Maharashtra Amendment) Act (Act No. 11 of 1994); Hindu Succession (Karnataka Amendment) Act (Act No. 23 of 1994).

A detailed subject index has been provided to facilitate the readers in locating the points of his interest. Important case-law upto 1997 has been incorporated. All in all, it is a book that will prove to be a valuable addition to the literature on the subject.

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3. *Id.* at 53.
4. *Id.* at 24.
5. *Id.* at 29.
6. *Id.* at 113.
7. *Id.* at 46, second last line.
8. *Id.* at 143.

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AN INTRODUCTION TO THE GUIDING PRINCIPLES IN THE DECISIONS ON PATENT LAW. Compiled and Edited by K.V. Swaminathan, Delhi : Bahri Brothers, 2000, Pp. XXII + 376, Rs. 495/-.

In the recent years, Intellectual Property Rights (IPRs) has emerged as a major issue in international economic relations and bilateral commercial negotiations. It has also become a subject of discussion and debate in various circles within the country. Its importance in technology development is well recognised as major industrial organisation take investment decisions keeping in view the protection available to inventions. The Uruguay Round of Multilateral Trade Negotiations, the signing of the Final Act on General Agreement on Tariffs and Trade (GATT) and introduction of the issues of effective protection of IPRs, effective enforcement of such rights and other related issues and establishment of World Trade Organisation (WTO) provided momentum to the trend towards strengthening of the intellectual property protection regime.

IPRs refers to creation of human intellect. It is the legal expression of privileges granted by the State for the use of creation. Intellectual property is inherently intangible. It relates to items of knowledge and to information which can eventually be incorporated or embodied in limitless number of tangible things or goods all over the world. The Property is indeed in the knowledge and information embodied in them or associated with their products.

A patent is legally enforceable right granted by the Government to inventor for a limited period to make, use and sell the product or the process of his invention to the exclusion of others. In fact, it is a form of reward given by a State to inventors in return for the disclosure of his invention by virtue of which the patent holder enjoys a monopoly right for a limited time. For the patent to be granted, the invention must be new, non-obvious and useful. A sound and strong patent system encourages investment in research and development in order to bring about new and useful inventions and also protects inventors from their inventions being copied or pirated by others. Since inventions and the rights have potential use in the global market beyond geographical limits of a State, international conventions have came into being, setting rules and guidelines in the exploitation of patents.

The Uruguay Round of multilateral trade negotiations resulted in the Agreement on the Trade Related Aspects of Intellectual Property Rights

(TRIPs). This recognises the IPRs as private rights and set certain minimum standards to be adopted by the Parties for protection of such rights. It also recognises the special technological needs of the least developed countries and set some time-frame in which other countries will make necessary changes in their own laws to comply with the required degree of protection. India and other developing countries were given a transition period of 5 years (w.e.f. 1.1.95) under Articles 65 to apply the provisions of the TRIPs Agreement. Countries that do not provide product patents in certain areas can delay the implementation of the provisions on product patents for another five years. However, they have to provide exclusive marketing rights (EMRs) for products which obtain patents after 1.1.95.

There are seven areas of IPRs covered by the TRIPs Agreement. These are : Copyrights, Trade Secrets, Industrial Designs, Integrated Circuits, Geographical Indications and Patents. Except in case of Patents, in all the six other areas India's policies, law and regulations, administrative and judicial systems were in line with those prevailing in the rest of the world. It was only in case of Patents, that there was a sharp divergence between the Indian Patent law and the new IPRs.

In India the patent system, in one form or the other, was in vogue since 1856. The Indian Patents and Design Act of 1911 conferred on the inventor monopolistic rights for products as well as processes. It was later felt undesirable to grant patents in respect of items / substances which are of basic necessity to life, i.e., food, drugs and medicines and chemicals. The Indian Patents Act 1970, emphasised on optimum balance between the monopolistic rights of the inventors and public interest.

India is a party to the TRIPs Agreement and has agreed to amend its law to provide for product patent and all other stipulations in the Agreement including the interim arrangement for grant of EMRs. To comply with the said obligations, the Indian Patents Act, 1970 was drastically amended by the Patents (Amendment) Act, 1999. Most significant aspect of the amendment is that inventors can now obtain product patents for pharmaceuticals unlike in the past when it was limited to process patents only. India has retained the option for a ten year transition period for granting these patents. In the interim period it would, however, grant EMRs as pipeline protection mechanism for such products.

Hence, considerable interest has been aroused in India in the field of IPRs in the recent years. It is in this context that the book under review is very timely and invaluable. The book is a compilation of large number of typical decided cases on patent law from different parts of the world.

It contains 101 selected cases from 15 countries. Most of these decisions (92) were pronounced in the last five years and will be of practical interest in the new regime of protection of intellectual property.

The author has very carefully grouped these 101 cases into 11 major groups. These groups are Patentability, Novelty, Obviousness, Disclosure, Aspects Relating Grant, Special Issues, Jurisdiction, Infringement, Relief, Revocation and Procedures. The first four groups have dealt with the basic requirements to obtain a patent. The section on Special Issues has identified very important aspect such as Broad Patents, Doctrine of Equivalents, Compulsory Licenses, Parallel Imports and Exhaustion as well as Supplementary Protection. The next three groups deal with the type of legal disputes and remedies that follow in a patent dispute resolution. The section on Infringement has dealt with a wide range of situations in which the decisions on infringement disputes are presented. The chapter on Relief has specifically highlighted the need for a minimum relief in the form of an injuction as well as the punitive part relating to awarding damages. The Revocation of Patent in which the rights granted by patents are withdrawn has also been treated in a very clear-cut manner. This grouping of the cases into distinct subject areas makes the presentation reference friendly and provide continuity from chapter to chapter.

Each case is reported in a standard format having a clear indication of the issues involved, the factual background and the court decision supplemented by the observations highlighting the basic general principles involved in each case. The author attempted to deduce certain guiding principles which would be useful in a variety of new cases that will come up for adjudication.

The groupwise classification of decisions is preceded by an Overview which presents analysis of court rulings pertaining to each specific group and the propositions that emerge out of the analysis. Such an analysis would afford a glimpse of important decisions and facilitates reader's perception of the issue involved in each group of cases before actually turning over to the relevant group for an elaborate study.

The book also contains two annexures. The first annexure presents three cases from India and Canada decided by the Appellate Body of WTO to illustrate that their decisions have a mandatory effect on the change to be made in the national law to ensure compliance with the TRIPs Agreement. The second annexure deals with the important recent developments on "Patenting of Biotechnology" and "Examining the Patenting to Business Method Practices". They present the emerging

and evolving criteria for patentability on newer developments arising from advances in science and technology. The book ends with a Subject Index.

The author deserves to be congratulated for his taking pains in compiling such an invaluable book on an important subject which has gained significance throughout the world. As TRIPs Agreement would perhaps constitutes a broad basis on which many legal systems in different countries of the world would have adapted, the compilation will prove very useful to the teachers and the students of IPRs in the country. The book is worth keeping in all the libraries.

The book has been priced at a very reasonable price of Rs. 495/-. It is highly praiseworthy on the part of the publisher, Bahri Brothers, who have beautifully published the book on a topical issue.

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