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NATIONAL INSTITUTIONS AND PROTECTION OF HUMAN RIGHTS: ROLE OF NHRC IN THE DEVELOPMENT OF LAW

*Gurjeet Singh**

I. INTRODUCTION

Most human rights activists would probably agree that task of protection of human rights and civil liberties of people essentially falls within the ambit and amplitude of National Human Rights Institutions that have been established in many countries of the world. This is notwithstanding the fact that the United Nations and some of its subsidiary bodies have been actively engaged in promotion and protection of human rights at the international level. As a matter of fact, the concept of 'National Human Rights Institution' was first discussed by the Economic and Social Council (ECOSOC) in the year 1946, two years before the UN General Assembly proclaimed the Universal Declaration of Human Rights as a "common standard of achievement for all peoples and all nations." At its Second Session in 1946, the ECOSOC invited Member States "to consider the desirability of establishing information groups or local human rights committees in furthering the work of the Commission on Human Rights. It was nearly fourteen years later the matter was raised again, in a resolution that recognized the important role that national institutions could play in promotion and protection of human rights and that invited governments to encourage the formation and continuation of such bodies as well as to communicate all relevant information on the subject to the Secretary General of the United Nations."[1] However, as standard-setting in the field of human rights gained momentum during the 1960s and 1970s, discussions on national institutions became increasingly focused on the ways in which such bodies could assist in the effective implementation of these international standards. Therefore, throughout the 1980s, the United Nations continued to take an active interest in this topic and a series of reports prepared by the Secretary General was presented to the General Assembly. It was during this time that

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* Vice-Chancellor, Rajiv Gandhi National University of Law, Patiala, Punjab.

1 NATIONAL HUMAN RIGHTS INSTITUTION: A HANDBOOK ON THE ESTABLISHMENT AND STRENGTHENING OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, Professional Training Series No.4 (New York and Geneva: Centre for Human Rights, United Nations 1995) at 3.

a considerable number of national institutions were established many with the support of the United Nation Centre for Human Rights[2].

It may be appropriate to mention here that UN has laid down a number of guidelines in regard to the establishment and functioning of National Human Rights Institutions and it is essentially on the lines of these guidelines that a number of Human Rights Commision have been set up in different parts of the world. These institutions have "a very unique role in translating international human rights standards into reality, and giving them a local flavour and acceptability without diluting their essential universal characteristics."[3] It was in line with the various international guidelines on the subject that the Government of India enacted the Protection of Human Rights Act, 1993 and thereby established the National Human Rights Commission (NHRC) with the sole aim of "better protection of human rights and for matters connected therewith or incidental thereto."[4]

Sections 12(d) and (f) of the Protection of Human Rights Act, 1993 respectively enjoin upon the National Human Rights Commission the duty to "review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation" and to "study treaties and other international instruments on human rights and make recommendations for their effective implementation." It is in line with this mandate that the NHRC, ever since its establishment, has been playing its role in the context of reviews of laws, implementation of treaties, and other international instruments of human rights. As the discussion in the following paragraphs would indicate, it has been impressing upon the Government of India as well as upon various State Governments for taking appropriate measures in this regard. The views expressed by the NHRC have been highlighted in its Annual Reports as well as monthly newsletters and other publications.

In accordance with its mandate under the Protection of Human Rights Act, 1993, the NHRC has been making sincere endeavors as far as review of some of the existing laws, implementation of treaties and various international instruments relating to human rights are concerned. In the following paragraphs, an attempt has been made to discuss some of the initiatives taken by the NHRC in this regard.

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2 *Id.* at 4.

3 Mohapatra, Arun Ray, NATIONAL HUMAN RIGHTS COMMISSION OF INDIA: FORMATION, FUNCTIONING AND FUTURE PROSPECTS (New Delhi: Radha Publications, 2001) at 44.

4 Preamble to the Protection of Human Rights Act, 1993.

II. Review of Laws

A. The Child Marriage Restraint Act, 1929

The problem of the widespread prevalence of child marriage in certain parts of the country has been a major concern of the NHRC over a number of years. It has been interacting with the National Commission for Women and the Department of Women and Child Development to evolve suitable measures to combat this problem. As the Draft Marriage Bill jointly prepared by the National Commission for Women and the Department of Women and Child Development did not find favour with the government, the NHRC decided to work on an amendment to the Child Marriage (Restraint) Act. 1929.[5] The NHRC took the view that this Act should be recast so as to provide for higher penalty for the violation of the provisions of the act and also to make the offences cognizable and non-bailable. Further, it was of the view that a provision should be made in the amended Act to take action against organizers/associations who organize child marriages on a mass scale.[6] The NHRC recommended that it was necessary, first of all, to provide for registration of all marriages – whether religious or civil. Further, just as there were registers of births and deaths, there should be registers of marriages where any marriage in any form performed within the area must be registered. This would provide an authentic record of the marriage. Since marriage affects the status and legal rights not just of the parties to the marriage but also others including their children, it was essential that an authentic record of marriages should be maintained by the State. The NHRC stressed that, if at the time of marriage, one party or both parties to the marriage are minors, the marriage needs to be made voidable at the instance of the party who was a minor at the time of the marriage. For this, it should be possible to file a petition at any time, but before completion of two years of attaining majority. Further, in order to safeguard a minor girl's position, an amendment proposed by the NHRC suggested that the husband or his guardian (if he was a minor at the time of marriage) shall pay maintenance to the minor girl until her remarriage. All gifts and dowry received at the time of marriage were also required to be returned. Marriages through force or fraud would be void. A child marriage in contravention of an injunction order of the court would also be void. In the proposed amendments, punishment for contravention of any provision of the Act would have to be

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5 NHRC Annual Report (1999-2000) at 43. Also see: *Full Commission Meeting Discusses Amendments to Child Marriage Restraint Act,* 2(10) Human Rights Newsletter (October 1995) at 1.

6 NHRC Annual Report (2001-2002) at 50.

made more stringent (upto two years of imprisonment instead of three months and increased fine which may extend to one lakh rupees). Organizers of mass marriages where child marriages were performed could also be punished. The Commission was of the view that there should also be provision for Child Marriage Prevention Officers and their duties.[7]

B. The Armed Forces (Special Powers) Act, 1958

The NHRC first received a representation against the Armed Forces (Special Powers) Act, 1958 when it visited Nagaland in April 1995. It subsequently learnt that there were proceedings pending before the Supreme Court questioning the constitutional validity of the Act in various writ petitions. Thereafter, the NHRC also took into consideration the concerns expressed by a number of other public and civil liberties groups in regard to the provisions of the Act. The representations received against the Act, in essence, asserted that its powers were too vast and sweeping and did pose a grave threat to the fundamental rights and liberties of the citizenry of the areas covered by the Act. It was argued, for instance, that the powers under Section 3 to declare any area to be "disturbed area" were too wide, unguided and unanalyzed. It was further argued that Sections 4 and 5 were so arbitrary and excessive as to empower the armed forces even to take away the life of a citizen by firing upon him on the mere ground, inter alia, that he was, acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons", or "carrying things capable of being used as weapons". According to the NHRC, this power could even be exercised by a non-commissioned officer if he was of the opinion that it was necessary to do so for the maintenance of public order.[8]

The views of the NHRC were, thereafter, placed before the Supreme Court with the permission of the latter, and the position was taken, *inter alia* that the 1958 Act lacked temporal and spatial limitations and that it bestowed draconian powers that could be exercised by non-commissioned officers on the basis of their subjective satisfaction. Accordingly, the Supreme Court, by its order of 27 November, 1997, held that a declaration under Section 3 of the 1958 Act designating any area as disturbed (thereby giving special powers to non-commissioned officers and other officers above this rank) has to be for a limited duration and that there should be a periodic review of the declaration before the expiry of six months.

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[7] *Id.* at 50-51.

[8] See, NHRC ANNUAL REPORT (1996-1997) at 32-33.

The Apex Court further ordered that: (i) while exercising powers under section 4(a) of the Act, the officer in the armed forces shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order; (ii) A person arrested and taken in custody should be handed over to the officer in-charge of the nearest police station, with least possible delay, so that he can be produced before the nearest Magistrate within 24 hours of such arrest excluding the time taken for the journey from the place of arrest to the court of the Magistrate: (iii) The provision of the Criminal Procedure Code, 1973 governing search and seizure have to be followed during the course of such operations conducted in exercise of the powers conferred under the Act; and (iv) While exercising the powers conferred under clauses (a) to (d) of section 4, the officers of the armed forces should strictly follow the instructions contained in the list of "Dos's and Donts' issued by the authorities which are binding and any disregard of these instructions would entail suitable action under the Army Act.[9]

C. The Narcotic Drugs and Psychotropic Substances Act, 1985

Upon receipt of numerous petitions alleging prolonged and unreasonable detention under the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985, the NHRC undertook an in depth study of the provisions of that Act. The NHRC's interest in the subject was heightened by its visits to jails where, not infrequently, those held under the Act clamoured for the attention and intervention of the NHRC. An exchange of views was, accordingly, initiated by the NHRC with the Ministry of Finance with the purpose of expediting trials. The Ministry of Finance, in turn, framed a set of proposals for amending the Act to achieve this end and to introduce a system of better graded punishment. As the NHRC was of the view that there was an inadequacy of courts to deal with the NDPS cases, it made specific proposals suggesting that the number of such courts be increased in certain States/Union Territories. The NHRC's recommendations contributed to a positive effect. Thus whereas in April 1995, there were 48 courts dealing with NDPS cases, by 31 March, 1996, the number of such courts had increased to 95. The NHRC has nevertheless recommended that more courts need to be designated to deal exclusively with NDPS cases.[10]

D. The Terrorist and Disruptive Activities (Prevention) Act, 1987

Ever since its inception, the NHRC had been pressing the Government of India to repeal the Terrorist and Disruptive Activities (Prevention) Act,

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9 See NHRC ANNUAL REPORT (1997-1998) at 21-22.

10 See NHRC ANNUAL REPORT (1993-1994) at 23.

1987.[11] According to the NHRC, this was a matter of highest importance to the Commission since it touched on "three most sensitive areas: the Constitution, India's treaty obligations, and the determination of the nation to preserve and protect human rights despite the lethal impact of terrorism which, often fuelled and supported from beyond the borders of this country, is the mortal enemy of civil society and all the rights that the Indian polity holds sacred."[12]

Seized with the matter, the NHRC started inviting to its periodic meetings the competent senior officials of the Central and State governments to ascertain the ways in which the 1987 Act was being applied, the consequences to the individuals and groups affected by it and, indeed, to the country as a whole. Reinforced by it visits to various States following wide-ranging discussions regarding the TADA, the NHRC's Chairperson announced publicly in June 1994 in Srinagar, that it had learned enough to have serious doubts about the worth and terms of the Act and that it was contemplating seeking a review of the judgment of the Supreme Court where in the latter had upheld the vires of the Act.

The NHRC, thereafter, pursued a threefold strategy: it continued to monitor closely the manner in which the Act was being implemented, it prepared a dossier for possible recourse to the Supreme Court and, as the data mounted concerning the extension of the life of the Statute, it prepared a direct approach to all Members of the Parliament seeking an end to this law. The exercise of the third option result in a letter[13] from the Chairperson to all Parliamentarians dated 20 February, 1995, recommending not to renew TADA when its life expired on 23 May 1995, on the grounds that it was "incompatible with our cultural traditions, legal history and treaty obligations."[14] The letter concluded with the observation that Parliament had "entrusted the Commission with the charge of maintaining human rights" and that "the Commission is finding it difficult to do so unless this draconian law is removed from the Statute Book.[15]

The NHRC's efforts contributed substantially to the nation-wide debate on this issue and that, as a result of its persistence and the remarkable efforts

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11 See *Full Commission Meeting Discusses TADA*, 1(1) HUMAN RIGHTS NEWSLETTER (October 1994) at 3.

12 See NHRC ANNUAL REPORT (1996-1997) at 32-33.

13 For detailed contents of this letter see NHRC ANNUAL REPORT (1994-95) at 53-57.

14 *Id.* at 9.

15 Also see *Appeal to End TADA–NHRC Writes to MPs*, 2(3) HUMAN RIGHTS NEWSLETTER (March 1995) at 1.

of many distinguished citizens and groups, "a hightened and firmer sense of what is acceptable, and what is not, in terms of law and practice has begun to emerge and assert itself in our polity."[16] It was thus a source of satisfaction to the NHRC, and to a vast array of human rights activists in the country that the TADA was not revived when its life expired on 23 May, 1995. However, thousands of under-trials remained in jails in various States and the Union Territory of Chandigarh under the provisions of TADA, and that their situation was in danger of being forgotten. The NHRC, therefore, started gathering data in regard to all such persons, who numbered 6060 on 30 June, 1995. The Commission acted thereafter in three ways: First, it urged that the Review Committees set-up in individual States indeed meet regularly, as has been directed by the Supreme Court. Second it interacted with those States where the periods of detention were the longest and the number of detainees were the largest, urging an increase in the number of trial courts. Third, the NHRC submitted the information at its disposal to the Supreme Court in connection with a case seeking the provision of certain relieves to under-trials charged under the TADA. The Supreme Court rendered a notable decision on this matter on 26th February, 1996, laying down detailed directives on how to deal with questions of bail in regard to the TADA cases. In consequence, the situation of under-trials held under TADA substantially improved.[17]

E. The Protection of Human Rights Act, 1993

On the basis of experience in the first few months of its functioning, the NHRC made certain recommendations in its Annual Reports thereby proposing amendments to the Protection of Human Rights Act, 1993 in order to remove what it considered to be ambiguities and impediments concerning its competence and autonomy. In the light of further experience, however, the NHRC itself realized that more in-depth, comprehensive and independent examination of the 1993 Act was required. The NHRC accordingly requested Mr. Justice A.M. Ahmadi, former Chief Justice of India to head a high-level Advisory Committee consisting of human rights activists and legal experts to study the Act and suggest amendments. A number of issues were proposed by the NHRC for consideration by the Ahmadi Committee.[18] The Committee invited comments and suggestions on the 1993 Act from the Chief Justices

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[16] *Id.* at 10.

[17] NHRC ANNUAL REPORT (1995-1996) at 23.

[18] For further details, see NHRC ANNUAL REPORT (1998-1999) at 25-27. Also see *Justice Ahmadi Heads an Advisory Committee to go into Human Rights Act*, 5 (6) HUMAN RIGHTS NEWSLETTER (June 1998) at 1.

of various High Courts, Chairpersons of State Human Rights Commissions, Chiefs of the Army, Navy, and Air Force, Heads of Parliamentary Committees, Non-governmental Organisations and members of the public. The Committee finalized its recommendations and presented these to the NHRC in the form of a Draft Amendment Bill on 18 October, 1999.[19]

The recommendations of the Ahmadi Committee were considered by the NHRC and a report of the Commission on these recommendations was sent to the Government in March 2000.[20] However, the NHRC has expressed its deep regret that despite repeated contacts with the Government, both at the highest political level and at the working level, the needed amendments have not been made in the 1993 Act.[21]

F. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995

The NHRC has been strongly urging that a higher level of attention be given to the full and proper implementation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 by the Central as well as the State Governments. On learning that the Government of India was proposing to amend the Act in order to make it more powerful instrument for promoting equality and protecting the rights of disabled persons, the NHRC analyzed it clause by clause. After consulting the experts in the field, the Commission forwarded its suggestions, by way of amendments to the existing legislation, to the Government for its views. These suggestions covered, *inter alia,* the definition of disability and a disability NGO, the composition of Central and State Coordination Committees, reservation in jobs for persons with mental retardation, better access to facilities for persons with sensory disability and provisions relating to non-discrimination, care and protection etc.[22]

G. The Freedom of Information Bill, 2000

The right to information is of great importance to good governance, the empowerment of people and, indeed, to the proper realization of a range of other rights. Because of this, the NHRC undertook an in-depth examination

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19 For a list of recommendations of the Ahmadi Committee see NHRC ANNUAL REPORT (1999-2000) at 44-45.

20 For the full text of the recommendations made by the NHRC for amendments to the Protection of Human Rights Act, 1993 with the reasons thereof, see Annexure XII to the NHRC ANNUAL REPORT (1999-2000) at 183-205.

21 See NHRC ANNUAL REPORT (2000-2001) at 45.

22 For further details, see NHRC ANNUAL REPORT (2000-2001) at 50-51.

of the Freedom of Information Bill, 2000 for close scrutiny. The Commission took the view that the title of the Bill should be changed from the 'Freedom of Information Bill' to 'The Right to Information Bill' in order to make the proposed Bill conform to Articles 19(1)(a) and 19(2) of the Constitution. The Commission stated that the Bill provides a system for access to a right which already exists. The NHRC stated that the Bill should be examined in the light of Article 19(1) (a) which guarantees to every citizen the right to freedom of speech and expression as a fundamental right and, in particular, that Section 8 of the Bill should be re-examined to ensure that the provisions are within the ambit of permissible restrictions under Article 19(2). According to the Commission's opinion, it has been judicially recognized that the right to freedom of speech and expression in Article 19(1)(a) includes the right to acquire information. The state is not merely under an obligation not only to respect but also to ensure conditions in which the right of acquiring information, which is part of freedom of speech and expression, can be meaningfully and effectively enjoyed. The NHRC thus stated that the aims and objectives of any law on the subject have to be regulated and operationalised the right to information and facilitate the enjoyment of this right by citizens.[23]

H. The Prevention of Terrorism Ordinance 2001

The Law Commission of India had submitted the Draft Prevention of Terrorism Bill, 2000 to the Government of India together with 173rd Report. The NHRC considered it essential to examine the aforesaid Draft Bill. In pronouncing its views on the Draft Bill, the NHRC observed that it was "an essential function of the Commission to formulate its opinion on the desirability and need for enacting such a stringent law and to give public expression to it for consideration by the Parliament and all those involved in the making of laws so that due weight is given to the Commission's opinion in the performance of this exercise."[24]

The NHRC accordingly expressed its firm opinion about the aforesaid Bill by categorically stating that there was "no need to enact the new law (Prevention of Terrorism Bill, 2000.).[25] According to the NHRC, the Draft Bill set out the kind of actions, that were proposed to be dealt with under

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[23] See NHRC ANNUAL REPORT (2001-2002) at 55-56. Also see *NHRC's Opinion on Salient Features of Freedom of Information Bill, 2000,* 9(2) HUMAN RIGHTS NEWSLETTER (February 2002) at 1.

[24] NHRC ANNUAL REPORT (2000-2001) at 40.

[25] *Id.* at 41.

the Bill. These actions, the NHRC rightly pointed out, were substantially taken care of under the existing laws.[26] According to the NHRC, between these legal measures, all the 'terrorist acts' contemplated under the new Bill appeared to have been covered and that, if necessary, the Indian Penal Code or any provisions of any other Act could be amended to cover any specific action, which at present might not be covered. The NHRC, therefore, expressed its opinion by saying that the "punishments provided under these Acts could also be increased where necessary. But there was no need to have a separate new Bill for the purpose of creating new offenses."[27]

The NHRC also considered the avowed justification for the new law: namely, (i) that it was difficult to secure convictions under the criminal justice system: and (ii) that trials were delayed and hence there was need for special courts.[28] On this point, the NHRC, however, observed that "if there were a large number of acquittals today, it was not for lack of any laws but for lack of proper utilization of these laws, lack of proper investigation and prosecution, and lack of adequate number of courts to try the offences." According to the Commission, and rightly so, unless these root problems were redressed, "adopting draconian laws would only lead to their grave misuse, as had been the case with the previous TADA law."[29] The Commission also pointed out that the "Bill would hinder, rather than enhance, the effective implementation of treaties and other international instruments on human rights and would not be in consonance with many provisions of the International Covenant on Civil and Political Rights (ICCPR) to which India is a party."[30] The Commission rightly observed that "one such area where a suitable law needs to be enacted related to the financing of

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[26] These are: The Indian Penal Code, 1860; The Explosives Act, 1884; The Explosive Substances Act, 1908; The Armed Forces (Special Powers) Act, 1958; The Arms Act, 1959; The Unlawful Activities (Prevention) Act, 1967; and The Suppression of Unlawful Activities Against the Safety of Civil Aviation Act, 1982. In addition to these, there are at present at least following four Preventive Detention Acts enacted by the Union of India: The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; The National Security Act, 1980; The Prevention of Black Marketeering and Maintenance of Supplies Act, 1980; and the Prevention of Narcotic Drugs and Psychotropic Substances Act, 1988. Further, there are a number of Preventive Detention Act enacted by various States.

[27] NHRC ANNUAL REPORT (2000-2001) at 41. For details, see Text of *NHRC Opinion on Prevention of Terrorism Ordinance 2001*, 8 (12) HUMAN RIGHTS NEWSLETTER (December 2001) at 1-3.

[28] *Id.* at 42.

[29] *Ibid.*

[30] *Id.* at 42-43.

terrorism."[31] It suggested that Government should frame appropriate legislation in this connection in the light of the International Convention on this subject.

According to the NHRC, "the proposed Bill, if enacted, would have the ill effects of providing unintentionally a strong weapon capable of gross misuse and violation of human rights, which must be avoided particularly in view of the experience of the misuse in the recent past of TADA and earlier of MISA of the emergency days."[32] The NHRC therefore, recommended that a new law based on the Draft Prevention of Terrorism Bill, 2000 be not enacted. It asserted that "such a course is consistent with our country's determination to combat and triumph over terrorism in a manner also consistent with the promotion and protection of human rights."[33]

According to the NHRC, undoubtedly, national security is of paramount importance and that without protecting the safety and security of the nation, individual rights could not be protected. However, the worth of a nation is the worth of the individuals constituting it. Article 21, which guarantees a life with dignity, is non-derogable. Both national integrity as well as individual dignity are core values in the Constitution, the relevant international instruments and treaties, and respect the principles of necessity and proportionality. The National Human Rights Commission, therefore, reiterated its earlier view in respect of the Ordinance also.[34]

Subsequent to the promulgation of the Prevention of Terrorism Ordinance, 2001, an effort was made to replace it by a Prevention of Terrorism Bill, 2001. That Bill, however, could not be introduced and considered by the Lok Sabha during its winter session before Parliament was adjourned *sine die* on 19 December 2001. The Prevention of Terrorism (Second) Ordinance, 2001 was therefore, promulgated on 30 December 2001. Thereafter, on 26 March, 2002, the Prevention of Terrorism (Second) Ordinance 2001 was enacted into a law following a Joint Session of Parliament.

The NHRC finally observed that it respects and honours the constitutional process leading to the adoption of this Act, even if it has made known its opposition to the contents of the Act. The NHRC retains, however, the responsibility under its own statute to ensure that the Act is not implemented in a manner that is violative of the Constitution and the treaty

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[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*

[34] NHRC ANNUAL REPORT (2001-2002) at 49.

obligations of the country. The Commission will, therefore, monitor the use of this Act carefully.[35]

III. Implementation of Treaties

As mentioned earlier, under section 12(f) of the Protection of Human Rights Act, 1993, the NHRC has a statutory responsibility to study treaties and other international instruments on human rights and to make recommendation for their effective implementation. It is in this context that the role of the NHRC has been discussed below.

This is a matter of common observance that India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights both of 1966. The country is also a party to the Conventions on the Elimination of Racial Discrimination of 1965, on the "Suppression and Punishment of the Crime of Apartheid of 1973, on the Elimination of All forms of Discrimination Against Women on 1979; and the Rights of the Child of 1989. It may be appropriate to mention here that ever since its establishment, the NHRC has been consistently mindful of the commitments of the country under treaties to which it was a party, as also of the more general principles of conduct relating to human rights which had been elaborated in international forums with the full participation of India.[36]

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35 *Ibid.*

36 See NHRC Annual report (1995-1996) at 26. It may be appropriate to mention here that India is a party to sixteen international treaties drawn up under the auspices of the United Nations. These are: (i) International Covenant on Economic, Social and Cultural Rights (1966); (ii) International Covenant on Civil and Political Rights (1966); (iii) International Convention on the Elimination of All Forms of Racial Discrimination (1965); (iv) International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); (v) International Convention Against Apartheid in Sports; (vi) Convention on the Prevention and Punishment of the Crime of Genocide (1948); (vii) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968); (viii) Convention on the Rights of the Child (1989); (ix) Convention on the Elimination of All Forms of Discrimination Against Women (1979); (x) Convention on the Political Rights of Women; (xi) Convention on the Nationality of Married Women; (xii) Slavery Convention of 1926; (xiii) 1953 Protocol Amending the 1926 Convention; (xiv) Slavery Convention of 1926; (xv) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); and (xvi) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Other (1949).

A. UN Convention (1951) and Protocol (1967) Relating to the Status of Refugees

Form the very beginning of its establishment, the NHRC has been emphasizing on the need for a national law, fully in consonance with the United Nations Convention Relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967). In October 1997, the NHRC initiated a dialogue with the Ministry of External Affairs requesting them to examine afresh the possibility of India becoming party to the 1951 Convention and 1967 Protocol.[37] Due to the efforts of the NHRC, the process had been initiated. However, according to the NHRC, as the process was likely to take time, it hoped that "the action now initiated by the Central Government will be completed within a time-frame that is clear and reasonable, so that this important matter, touching upon the human rights of an extremely vulnerable group of person, is expeditiously acted upon in a manner that is consistent with the dictates of our Constitution, the decision of our Supreme court and the international instruments on this subject."[38]

B. Protocols to the Geneva Convention 1977

As India has not so far acceded to the 1977 Protocols to the Geneva Conventions of 1949, the NHRC has been urging the ministry of External Affairs to examine the issue expeditiously and to offer its comments to the Commission at the earliest.[39]

C. Convention Against Torture 1984

Ever since its establishment, the NHRC has believed that the country must act deliberately to end custodial violence of all forms and signify to itself and to the world that it will not tolerate countenance brutality in custody. That is why it has continued to act with determination to end the ongoing custodial violence, including death, rape and inhuman torture that have scarred the record of law and order apparatus of our country and diminished its standing in the eyes of the people. It was to this end that the NHRC had urged the Prime Minister as early as in December1994 that India should become party to the 1984 Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment.[40] This

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37 NHRC ANNUAL REPORT (1997-1998) at 24.

38 NHRC ANNUAL REPORT (2001-2002) at 54.

39 *Id.*at 52.

40 NHRC ANNUAL REPORT (1995-1996) at 14. Also see *Government Urged to Accede to UN Convention Against Torture*, 2(1) HUMAN RIGHTS NEWSLETTER (January 1995) at 1; and *Government Urged to Accede to UN Convention Against Torture*, 4 (1) HUMAN RIGHTS NEWSLETTER (January 1997) at 2.

was done in view of the numerous complaints that the NHRC had been receiving alleging brutality in custody.

According to the NHRC, and rightly so, "a permissive approach to the use of third degree methods in investigation led to serious violations of the rights of the citizens of India and that it was wrong to believe that such practices were necessary for the successful investigation of cases."[41] However, quite surprisingly, the NHRC was informed by the Central Government that the issue of accession to the Convention was placed before the Chief Ministers Conference in May 1995 but that the majority of Chief Ministers were either not in favour of India becoming a party to the Convention or had not indicated their views in this matter. Accordingly, the NHRC followed up this matter with the Chief Ministers directly advising them that, in this age, it would be strange indeed if their States were viewed as continuing to countenance torture.[42] Their attention was drawn to the views of the Supreme Court of India that "nothing is more cowardly and unconscionable than a person in custody being beaten up, and nothing inflicts a deeper wound on our constitutional rights.[43]

Pursuant to the communications from the NHRC, the then Prime Minister convened a high level meeting on 4 April, 1997 to discuss India's accession to the said Convention. In a comprehensive paper presented at the meeting, the then Chairperson of the NHRC urged that India should accede to the 1984 Convention and signal to the country and to the world its commitment against brutality in custody on three accounts. First, the Constitution, the laws and the rulings of the Supreme Court of India have already set standards of conduct and accountability that are no less demanding than those that might stem from treaty obligations. Secondly, India is bound to honour its obligations under the International Covenant on Civil and Political Rights, to which it became a party on 10 April 1979. Under Article 7 of that Covenant, torture is categorically forbidden and the provisions of that article are non-derogable. Third, the right against torture has been judicially recognized by the Supreme Court as a fundamental right, placing that right and the corresponding obligation it placed on the States and its agencies as a fundamental entrenched right.[44]

The apprehension that acceding to the Convention would open the country to 'interference from outside' was strongly refuted by means of an

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41 *Ibid.*

42 *Ibid.*

43 *Kishore Singh* v. *State of Rajasthan*, AIR 1982 SC 625.

44 NHRC ANNUAL REPORT (1997-1998) at 12-13.

analysis of the provisions of the Convention, particularly its Articles 21, 22, and 28. It was further argued that "the Indian Constitution and its laws already required the country to act in ways consistent with Convention Against Torture and, given its pluralistic complexion. India's efforts to promote human rights had been impressive."[45] The paper concluded:

> Our country is already required by the Constitution, our laws and the Supreme Court to act in ways consistent with the Convention Against Torture. To accede to the latter would thus be to signify to the world that we indeed intend to conduct ourselves in the manner that we have ourselves, determined to be in keeping with our most cherished values. Such a move would also signify that, as a nation, we intend to be in the forefront of the world-side human rights movement and not, timorously, in the rear. India's efforts to promote and protect human rights in a country whose demographic, linguistic and pluralistic complexion present the most acute problems, incomparable anywhere else in the world for its sheer staggering size, has been impressive. This great country does not need to crouch behind the high wall of national sovereignty on the great issue of Human Rights.[46]

As a result of the strenuous efforts of the NHRC, the Government of India, announced on 26 June 1997, that it would ratify this Convention.[47] It was stated that India's accession to the Convention Against Torture was "part of India's determination to uphold the greatest values of Indian civilization and our policy to work with other members of the international community to promote and protect human rights."[48] The Permanent Representative of India to the United Nations signed the Convention Against Torture on 14 October 1997. It was described as "a happy consummation of a process set in motion"[49] by the National Human Rights Commission. The NHRC continued to press the Government of India to ratify the Convention Against Torture.[50] It was heartening for the Commission to note that in its Memorandum of Action Taken on the Annual Reports of the NHRC, the Government had stated that the Ministry of External Affairs had initiated action in the matter and has emphasized to the authorities concerned the need

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45 *Id.* at 13.

46 NHRC ANNUAL REPORT (1996-1997) at 18.

47 See *Government of India Decides to Sign UN Convention Against Torture*, 4(7) HUMAN RIGHTS NEWSLETTER, (July 1997) at 1.

48 NHRC ANNUAL REPORT (1997-1998) at 12.

49 *Id.* at 13.

50 For details, see *Government Urged to Ratify UN Convention Against Torture*. 7(7) HUMAN RIGHTS NEWSLETTER (July 2000) at 3- 4.

for effecting changes in domestic legislation in order to bring its provisions in conformity with the UN Convention Against Torture.[51]

D. Protocols to the Convention on the Rights of the Child, 2000

The NHRC has recommended that Optional Protocols 1 and 2 to the Convention on the Rights of the Child, dealing respectively with the sale of children, child prostitution and child pornography and the involvement of children in armed conflicts, be examined by the Government of India. Specifically the Department of Women and Child Development and the Ministry of External Affairs were requested to take the appropriate action. The Memorandum on Action Taken, however, indicates no further developments in regard to this matter, though the Optional Protocol 2 concerning children in armed conflict, came into force on 12 February 2002. The NHRC, therefore, considered it necessary to reiterate its recommendation that both the Optional Protocols be adopted by the Government of India and appropriate action taken in this regard.[52]

IV. Conclusion and Suggestions

From the above discussion, one can easily understand and appreciate the role played by the National Human Rights Commission in the field of human rights. On every issue of consequence, ranging from terrorism to the treatment of prisoners in custody, from civil liberties in all of their variety to the right to development, from the rights of women to the rights of the child, the NHRC has, as a matter of instinct and of practice, weighted the implications of the Constitution and of the nation's international undertakings, in formulating its views and making known its recommendations.[53] For instance, the NHRC had considered TADA to be incompatible with India's "cultural traditions, legal history and treaty obligations."[54] It was thus a source of satisfaction to the NHRC, and to a vast array of human rights activists in this country, that TADA was not revived when its life expired on 23 May 1995. In summing up, one can easily argue that the National Human Rights Commission had indeed done a commendable job in the context of review of Acts, implementation of treaties and signing and ratification of various international instruments.

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[51] NHRC Annual Report (2001-2002) at 53.
[52] *Id.* at 52.
[53] NHRC Annual Report (1995-1996) at 26.
[54] NHRC Annual Report (1994-1995) at 23.

ROLE OF EQUITY IN SUSTAINABLE DEVELOPMENT: A CONCEPTUAL ENQUIRY

*Gurdip Singh**

Equity is the foundation of sustainable development. It rests on commitment of future generations to equity. This ethical and philosophical commitment constrains the inclination to take advantage of our temporary control over the earth's resources in order to use them for our own benefit without careful regard for what we leave for our children or for their descendents. Concerns about equity are central in the legal tradition. Law and philosophy provide a basis for analyzing the normative relationship among generations and the instruments for transforming normative values into rights and obligations. International environmental jurisprudence has witnessed stiff controversy among States on the conceptual issues relating to sustainable development. What are various forms of equity which form basis of sustainable development? What are planetary rights and duties? Are planetary rights and duties codified? Sustainable development is structured on two forms of equity, namely, intergenerational equity and intra-generational equity.

Intergenerational equity implies intergenerational fairness and mandates that the present generation should not look at the earth and its resources as mere investment opportunity but as a trust passed on to them by the ancestors, to be enjoyed and passed on to the future generations for their use. Each generation holds the earth and its resources as a steward or in trust for future generation. Earth and the resources constitute a planetary trust.

The theory of intergenerational equity stipulates that we, the human species, hold the natural environment of our planet in common with all members of our species: past generations, present generation, and the future generations. As members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it. Thus, the present generation being trustee, has the right to benefit from the use of the natural resources which constitute trust property.

The present generation also has the corresponding duty to maintain the quality of the natural system. All generations are inherently linked to other generations – past and future, in using the common patrimony of the earth.

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

The theory of intergenerational equity stipulates that all generations have an equal place in relation to the natural system. There is no basis for preferring the present generation over future generations in their use of the planet. Each generation should use the natural system to improve the human condition. Improvements should be conserved for the future generations. Thus, the anchor of a legal framework is the notion of equality as the norm, connecting sequential generations in their use and care of the environment. The intergenerational equity views the human community as a partnership among all generations – a partnership not only between those who are living but also between those who are dead, and those who are yet to be born. The purpose of human society is to realize and protect the welfare and well-being of every generation in relation to the planet. This requires sustaining the life support systems of the planet as well as the ecological processes and the environmental conditions, necessary for a healthy and decent human environment. In this partnership, no generation knows beforehand when it will be the living generation, how many members it will have, or even how many generations there will ultimately be. Each generation wants to inherit the earth in at least as good condition as it has been in for any previous generation and to have good access to it as previous generations have had. This requires each generation to pass the planet on in no worse condition than that in which it received it and to provide equitable access to its resources and benefits. Thus, each generation is both a trustee, for the planet with an obligation to take care for it, and a beneficiary with rights to use it.

I. International Law and Intergenerational Equity

The theory of intergenerational equity has a deep basis in international law. The United Nations Charter, the preamble to the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 and many other human rights documents reveal a fundamental belief in the dignity and equality of rights of all members of human society. The grant of licence to the present generation to exploit the natural and cultural resources at the expense of the well-being of future generations, would contradict the purposes of the United Nations Charter and the international human rights documents.

Since the World War II, States have begun to express concern in international legal instrument for the welfare of future generations and to set forth principles and obligations intended to protect and enhance the welfare of both present and future generations. Even the Untied Nations Charter, drafted in the aftermath of World War II, affirms the universal concern for the welfare of future generations in the opening words of its preamble:

> We, the peoples of the United Nations determined to save succeeding generations from the scourge of war...[1].

The Universal Declaration of Human Rights also states in its preamble:

> ...whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...[2].

The term 'human family' has temporal element and includes dead, living and the unborn persons. In the same vein, the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights of 1966 recognizes:

> ...the inherent dignity and the equal and inalienable rights of all members of human family constitute foundation of freedom, justice and peace in the world ...[3].

Concern for justice to future generations regarding the natural environment emerged in the preparatory meetings of the UN Conference on Human Environment, 1972. The preamble to the Stockholm Declaration on the Human Environment expressly refers to the objective of protecting the well-being of future generations and reaffirms the commitment of the States to defend and improve the environment for present and future generations[4]. The World Charter for Nature 1982, while not a binding agreement, explicitly refers to the requirement to protect species and ecosystems for future generations.

The concept of 'sustainable development' in the Brundtland Report of 1987 is based on intergenerational equity. According to the Report, 'sustainable development' is the development which meets the needs of the present generation without compromising with the ability of the future generations to meet their own needs. The reference to the 'ability of the future generations' implies intergenerational equity. The present generation holds the earth and its resources in trust, to be passed on to the future generations in the same quality as these were inherited by the present generation from the past generation.

The Earth Summit held at Rio de Janeiro, Brazil from 3-14 June 1992

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1 Preamble, United Nations Charter, 26 June 1945.

2 Preamble, Universal Declaration of Human Rights, 10 December 1948.

3 Preamble, International Covenant on Civil and Political Rights, 1966; Preamble, International Covenant on Economic, Social and Cultural Rights, 1966.

4 Preamble, UN Conference on Human Environment, Stockholm 1972.

representative's decision to do so, this inability does not affect the existence of the right or the obligation associated with it. Thus, the issue of representation of the future generations in decision-making process assumes enormous importance. What mode should be adopted to give representation to the future generation? Should an ombudsman for future generations or commissioners for future generations be appointed? If yes, at what levels – international, regional, national or local? The Brundtland Report recommended the countries to appoint an ombudsman for future generations at the national level.[6]

Future generations need to be effectively represented in decision making today, but they are not. This requires an understanding of the fundamental entitlement correctly. Future generations have an equal right with the present generation to use and benefit from the natural environment. International community of sovereign States faces the undaunting task of elaboration and codification of the intergenerational rights and obligations to correctly determine the generational entitlements.

The codification of intergenerational rights and obligations encourages co-operation between countries and amongst communities to fulfill the obligations of future generations. Codification reduces ambiguities about the behaviour that is expected of parties. It also leads to the creation of international institutions to manage or to coordinate measures for managing particular natural or cultural resources or activities affecting these resources. Such institutions facilitate the development of new norms.

IV. Intragenerational Equity

Intragenerational equity signifies equity within the countries and between the countries. It underlies intergenerational equity and is a condition precedent to achieve intergenerational equity. Intragenerational equity is a ladder to achieve intergenerational equity. The problem of intragenerational equity must be approached in the light of different economic, environmental, cultural and political circumstances prevailing within the countries and between the countries. The inequality between people as a result of greed and the misdistribution of power is major obstacle in achieving sustainability. Unsustainable behaviour by the poor people is almost always due to factors such as loss of land, growing indebtedness, or loss of access to markets that leave them unable to support themselves properly. When wealthier people appropriate resources for themselves at costs far below their value for production, poor people who lose by such appropriations are powerless to

[6] The World Commission on Environment and Development, Our Common Future (1987 Brundtland Report) at 332.

hold the wealthy accountable. Having no resource, they place greater stress on their environment by moving deeper into the forest, occupying marginal land unsuitable for agriculture or herding or adopting some other way of staying alive.

The Brundtland Report also recognizes the inequalities between countries and stresses that several problems arise from inequalities and access to resources. The Report maintains that inequitable land ownership structures can lead to overexploitation of resources in the smallest holdings with harmful effects on both environment and development. Accordingly, Brundtland Report asserts that the future cannot be common in the sense of being equal, fair and just when the economic and ecological situation of lower and higher income countries are compared. Undoubtedly, the inability of the mankind to promote the common interest in sustainable development is often a product of the relative neglect of economic and social justice within and amongst nations. Thus, the Brundtland Report emphasizes that the reduction of poverty is a precondition for environmentally sound development in lower income countries.

Intragenerational equity requires that the developed countries should provide environmentally friendly technology and the funds to the developing countries to build their capacities to protect the environment. The developing countries are entitled to the funds as well as technology on the basis of intergenerational equity which is essential component of sustainable development. Accordingly, international treaties and conventions concerning protection of the environment effectuate intragenerational equity by providing for transfer of technology and the funds by the developed countries to the developing countries. International funding mechanisms to build the capacities of the developing countries to protect the environment aim at the fulfillment of the entitlements of the developing countries based on intragenerational equity. Intragenerational equity mandates recourse to capacity building measures.

The developed and the developing countries have common but differentiated responsibilities to protect the environment. The responsibilities are differentiated due to the difference in the economies. The concept of intragenerational equity is based on the realization that we have two planets, two worlds, two humanities and two economies. The responsibilities of the States to protect the environment are proportionate to their respective economies.

The Rio Declaration of 1992 proclaims that poverty is the main culprit for environmental degradation and aims at complying with the mandate of

heritage of mankind. The challenge for the North and South is the implementation and institutionalization of common concern of mankind. The industrialized countries owe responsibility to help the developing countries in building capacities to protect and improve environment which is common concern of mankind. The task of building capacities in the developing countries requires transfer of technology and funds by developed countries to developing countries. Equity has dominating role to play in building environmental capacities. The mandate is loud and clear. Build environmental capacities with the bricks and mortar of equity.

LEGAL PROFESSION TOWARDS A NEW VISION OF PROFESSIONALISM

*Suman Gupta**

I. INTRODUCTION

The Law is the bedrock of a nation. Law is the supreme regulator. Whether nationally or internationally, it is the glue that holds together the constituent parts of society. Law is the invisible substance, which sustains social well-being, moral consensus, mutuality of interest and trust.

The world is going through a period of dynamic change, presenting new problems to nations and to the international community. Societies are now more complex. People are better educated, more demanding and much more conscious of their rights. The position of women has changed radically. Attitudes about homosexuality, marriage and illegitimacy have altered. The rigid divisions between classes have broken down. The police and security agencies have technology, which raise questions of privacy. Law has a central role to play in this new landscape. The legal systems must learn to adapt or they will lose the confidence of the people. The three basic principles, which should underlie any legal system, are equality before the law, fairness and respect for human rights. In addition a good legal system must have committed and knowledgeable legal profession to enforce these three principles.

The legal profession is wounded and suffering. This has been catalogued in numerous books, studies and personal anecdotes[1] . The ailment of the legal profession is complex. It has occurred because of many decades of neglect. Various commendable attempts are being made to address this malaise by the profession and law schools. But the problems gripping the legal profession are wide and deep and will take time to heal. It will take decades of attention to rebuild and restore what has been lost. But the important thing is that it can be done.

The legal profession sometimes behaves as it is waiting for a knight in shining armor to rescue it from the evils. But the practice of law is not a fairytale, and there is no knight in shining armor coming to the rescue. One

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

1 . Robert Kurson, *Who's Killing the Great Lawyers of Harvard*, ESQUIRE, August 2000 at 82.

of our great weaknesses has been extraordinary willingness to see greener grass in other systems. It is frequently wrong. This is not because the ways of the Americans or Europeans are less good but because they are not always right for us. Taking bits of other systems and trying to stitch them on to ours is more a folly. The mistake is a failure to see that law is cultural and consent is essential to effective legal systems. If the legal profession is going to save itself, we are the people who must do it. It is we who must take up the long and difficult quest that will lead us to probe the darkness of this landscape in the hope of shedding some light on how we got there, where we are. We have the capacity. We have the people. We have the ideal. We lack only the effort and desire, and even that is present but come to life in pieces. We have to work consciously and collectively, and not let the things to take natural course, we have already seen where it will lead us.

II. Role of Legal Education

Legal education is one of the most important issues, which affects the whole society. The proper system of legal education is essential for the rule of law and justice delivery system. It plays a pivotal role in making the democratic system of the country more vibrant and effective. Legal education has the advantage of enhancing a person's analytical and presentation skills, which are useful in almost any occupation. Foundations of good lawyers can only be strong if the legal education system is strong. A quality of judgment is as good as the arguments made before the judge and the arguments are as good as the legal training a lawyer got when he was a student of law.

The concept of legal education is comprehensive and may include four aspects:

1. Legal education to students at grass-root level.
2. Clinical legal education & Practical training to students to equip them with appropriate training and expertise to make them efficient professionals.
3. Legal education (appropriate legal training) to judicial officers to enable them to discharge their function of administration of justice in the right perspective.
4. Higher legal education for equipping research scholars with the development of law.

However, the present system of legal education has contributed to the decline of legal craftsmanship. Enough emphasis is not placed on the judicial process or practical training. The resulting loss of legal craftsmanship has

proved very expensive. In order to rebuild the profession, the legal academy must find ways to recontextualize its educational process. This does not mean abandoning the teaching of rigorous legal analysis. Rather, it requires undertaking something more difficult: continuing to teach rigorous legal analysis as well as other lawyerly skills. Law faculties will require a reorientation on this purpose of legal education[2].

There are other impediments as well, for example, the inaccessibility of faculty to students has long been a major problem in legal education. There are two very strong reasons for it. One is the high faculty/student ratio in law schools. These high ratios were once justified as well as suited because the dominant methods of law school teaching were the lectures and the socratic method. A second counterforce to accessibility of faculty is the attitude of many faculty members that they have little in common with students. Socratic dialogue and lecture method, beside from justifying high faculty/student ratios, separate students and teachers physically as well emotionally. This system places the professor at the front of the classroom, on a different physical level from students. Until these faculty/student ratios change students cannot expect much time for meaningful contact with faculty members. It will also be impossible to make the clinical or other process programs more effective and successful.

There is a growing movement among law professors to investigate new methods of teaching that involve more participation of students in teaching and learning process. But the resistance to such a movement is strong. Innovation and introduction of other methods are often resisted. The legal academy has traditionally viewed the Socratic method as superior to all other forms of teaching, and the lecture method used as a technique when it is necessary to save time and cover material faster. Making structural and substantive changes in faculty/student contacts and opening teaching methods to allow more student participation will take time, as it requires fundamental attitude shift among law faculties. The good news is that some of this shift has begun to occur as law schools have developed clinical programs, mediation programs, inter-disciplinary training, and many other innovative approaches to teach legal ethics and law & literature. These all can be placed under the head, what we now call, the Legal Training – learning to think like a lawyer.

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[2] The most innovative work in new methods of law school teaching occurs at the annual conferences hosted by Gonzaga Law School's Institute for Law School Teaching. Information on the conferences can be found at http://www.law.gongaza, edu/ilst/ILST.htm.

The most dramatic and widespread reform in legal education has come through the clinical programs, now in place at most of law schools. Clinical education began a method of teaching law through hand-on experience and by providing legal services to the poor[3]. The cornerstone of this new approach – which served real clients rather than teaching through simulation – was the reality of practice. Clinics provide a different approach to legal education from the formal classroom experience. Unlike the traditional classroom, the focus in clinical education is no longer upon students and their mastery of the material. The focus is upon the needs of the client, it is the client's story, which must be listened to, understood, researched, analyzed, and advocated. Students are required to work together in teams and attend a clinical class as a group. In the class they cooperate to address problems of the real-life cases that they are handling. Student's performance is measured by how well he works for, and with someone else. The clinical education is a very natural and highly effective method of bringing students face-to-face with real legal issues in a close-to-real life context.

Two more effective ways for reforming legal education are the Seminar – called oral histories of lawyers and judges, and a Mentoring Program where students are matched with lawyers and judges in an intense yearlong mentoring experience[4].

In the Seminar, students will select a judge or lawyer as a subject, to interview, research his life, and then go "into the field" i.e. homes, courts, and law offices of their subjects and record their life stories. Student will bring these stories back to the seminar in the form of oral presentations and seminar papers, which will reflect on the professional life and how that life informed his/her own life story. In the Mentoring Program, students will be matched with a lawyer or judge as their mentor. They will attend a law-school sponsored weekend workshop with their mentors, and spend the remainder of the academic year meeting and visiting with their mentors at work.

In both the seminar and mentoring experience, students will be exposed to professional work through examples of real people. These contact programs present an opportunity for deep learning reflection upon one's life and purpose. They also provide opportunity for practical advice on practicing

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3 Robert McCrate, *Educating a Changing profession: From Clinic to Continuum*. 64 TENNESSEE LAW REVIEW, 1997 at 1099.

4 A detailed description of these programs appears in Walter H. Bennett Jr., *The University of North Carolina Intergenerational Legal Ethics Project: Expanding the Contexts for Teaching Professional Ethics and Values*, 58 LAW AND CONTEMPORARY PROBLEMS, 1995 at 173.

law, professionalism, and ethical responsibility. Its effect upon students will be to reassure and inspire them and open their eyes to the legal profession.

Some of these effects can also be achieved through a course on *Law and Literature*[5]. This course will take a hard look at images of lawyers and other professionals in various literary sources as Herman Melville's *Billy Budd*, Leo Tolstoy's *The Death of Ivan Ilyich*, and Kazuo Ishiguro's *Remains of the Day*[6]. Because of emphasis upon narratives, as teaching tools for law schools, this course will represent another step toward bringing more context into the curriculum.

Thus, we can imagine that a scene of a classroom of a law school can be like this. The students are sitting in a circle along with the professor and five guests: two lawyers, a judge, and two ordinary persons. These guests are related to complex legal action that has been decided. The class has already studied the concerned law case. Students have researched the law in concerned case, interviewed these participants and others involved in the case and have made oral and written reports to the class on their findings. The class has examined the conditions that lead to the filing of the complaint; the economic and policy decisions that lead to those conditions; the actions of the lawyers in investigating the case, their actions in attempting to negotiate, prepare for trial and to litigate; the action of judge during the entire court process; the results of the trial and the positions of the parties after the trial.

The class is now collected to hear in person from these participants about their role in case, and its effect upon them. The students will ask questions specifically about the context of the legal action and the conditions leading to it; whether the race or gender affected the parties; not only the legal results but also the emotional costs of the case. The class will ask questions about the purpose and effect of legal action in terms of public policy, and look for the principles of justice and fairness in the case and determine how well those principles were honored. The class will examine particularly the lawyers' and judges' roles – not only in this case but in the greater contexts of the justice system and the political structure; their professional behaviour.

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5 The resurgence of law and literature courses in law schools owes a great debt to Professor James Boyd White, whose pioneering book, THE LEGAL IMAGINATION (Boston: Little, Brown and Company, 1973) has served as inspiration and text to introduce narrative techniques into law school classrooms.

6 An excellent bibliography for law and literature courses appears in Elizabeth Villiers Gemmettee, *Law and Literature: Joining the Class Action*, 29 VALPARAISO LAW REVIEW, 1995 at 665.

The class will examine the human dimension – the effect on the participants in terms of emotional costs, and the effects on the participant's families and personal lives. At the end of course, they will have a relatively complete story of an important legal case and people in it. They will exercise their new found skills of legal reasoning and analysis and write a comprehensive, analytical paper that critiques the quality of the legal work and the outcome of the case in terms of overall social purpose. Each student will also write three short papers: one from the standpoint of the average citizen which critiques the lawyer's roles and the ideals of justice as they manifest in the case; one from the lawyers' standpoints defending their actions on the same basis; and one fictional account of themselves as a lawyer or judge that how they would have dealt with the case.

III. The Role of Bar

In regard to professionalism, the Bars and law schools resemble those two cricket fielders who let the ball drop between them because each assume the other player will catch it. Law schools were not established to teach professionalism. Professional behaviour was assumed as part of one's upbringing and code of honor as a gentleman. Bars assumed the same thing, however this assumption proved to be no longer true. Yet neither the Bars nor law schools accepted the responsibility of educating law students and young lawyers about the tenets of professionalism. Law schools grudgingly began to teach courses on professional ethics but held the attitude that teaching professionalism was the job of profession and that the profession was "*out there*" and not really present in the law school. The bar looked to law schools to teach the rules of professional ethics and consoled itself that 'law school courses on professional ethics' were sufficient to insure professionalism among law school graduates.

A part role of the lawyer should be the obligation to teach other lawyers. This obligation is commitment of being a member of a profession. It implicitly assumes that we have a professional heritage that must be preserved. Without a professional commitment to teaching and serving as mentors to other lawyers, this professional heritage cannot be nurtured, and passed on. So the first step for the bar and bar leaders must be to devote energy and provide resources to programs that promote this kind of professional teaching.

Bar council of India is acting in a bureaucratic manner by thrusting upon the law schools, the curriculum that cannot be implemented in law and spirit. Autonomy of law faculties should be maintained, as they are the laboratories in which the lawmen are being trained. Nothing should be

imposed from above as it blunts the intellectual growth. The teaching of law is not restricted to the production of lawyers and judges but it has much wider role to serve the society in disseminating knowledge for making people aware of their rights, duties and privileges. The law students may not join the profession but may play an equally important role in making aware the general public the notions of justice and human rights in the society. There are many other fields that a law graduate can join.

Law teachers should decide in fixing the curriculum, laying down standard of education and infrastructural faculties to be provided in the law schools. Faculty knows better what is to be taught and what are their problems. They have the tools. They have the better understanding. The laws are multiplying. There is an enormous increase in the legislations. There is need to introduce papers to study such legislations and for that reason it is better that it must be left to the faculty that which Act should be combined with which paper. The Bar and the Bench also have an important role to play in making the law schools academically sound and socially relevant, so the advice of eminent judges and lawyers is necessary.

The Legal education committee should consist of 10 law teachers, two judges of the Supreme Court, two judges from High Courts, four eminent advocates, one representative each of UGC, MCI, AICTE, Ministry of Education, Ministry of Industry, Law, Finance and Science and Technology to make recommendations in the development of legal education.

Lapse on the part of the BCI has also resulted in over production of lawyers with no skills. BCI should take abundant care and should insist for stricter compliance of standard requirements. Unless the requirements of appropriate building, library, faculty etc., are met it should not give permission to open a new college. BCI should make yearly evaluation and cancel the affiliation if they found any failure to comply with the requirements.

There cannot be uniform curriculum and uniform policy to project all law schools in same category in whole of the country. Various law schools in the country may cater to various kinds of students. There should be flexibility in syllabus so that students can combine for a particular field. One institution may not be able to take all specialties so that there must be five or six institutions in the country with different specializations.

We have elitist kind of institutions which may compete with international standards, on the other hand we have law schools which are in developing stage and law schools which are absolutely under developed. Some law schools should be declared as autonomous institutions to built

themselves in such a way that the product, which they produce, must be able to compete with the best in the international legal market. They should be developed as role models for other law schools. In all the internationally famed law schools, their autonomy and structure is designed in such a manner that they get complete autonomy in designing curriculum, engaging faculty and making inter-disciplinary studies.

IV. Cooperation Between the Bar and Law Schools

Law schools and the Bar must see themselves as part of the same professional community with interdependent duties to promote and pass on the tenets of professionalism. Law schools must understand their critical role and responsibility of producing young professionals and not merely persons highly educated in the skills of legal reasoning and advocacy. Law school curricula must be changed to support that professional commitment. Law teachers should believe in and support commitment to the profession. For this, it is necessary that law professors must think themselves as members of the legal profession as well as the academic profession. It will mean establishing through practice a close relationship with bar. Every professor should be required to maintain membership of the Bar Council of India and of the State Bar Association in which his law school is located. He should be invited to participate in the work of bar associations – such as membership on disciplinary boards and ethics committees, bar admission committees, professionalism committees, and committees to study problems of the profession and practicing lawyers. This work will bring legal academicians together with real lawyers. It will tell them about the profession, which they are teaching the students to enter.

A change in the attitude of legal academia toward the law practice and lawyers is equally important. Currently many law professors see themselves above the rough and tumble life of practice and superior to lawyers.

The Bar should also accept responsibility for the professional education of law students and young lawyers. There must be an interaction between the lawyers and law teachers to bring quality in teaching as well as practice of law. This will require cooperation between the bar and legal academy, which is often, not present. Improving these relations is the job for law school deans, heads of law schools and Bar leaders. Law professors should be invited to serve on various bar committees and should be given carrier incentives for it. They should be encouraged to find ways to bring lawyers and judges into classrooms. Bars should seek ways to assist law schools in promoting professionalism among students from the first day they enter into a law school.

V. The Role of the UGC

The quality of teacher, the quality of teaching and the quality of lawyer and judge is ultimately a matter of resources. You cannot expect the quality of Harvard, Columbia, Michigan or London school by providing bare minimum infrastructure and peanut salaries, perks and facilities. The role of UGC should be to make proper grants to the law schools and to audit it that they are properly utilized.

Legal education is an inter-disciplinary study. In order to become a good lawyer one must have the knowledge of sociology, economics, political science, psychology etc. No judge, no lawyer can claim to be well equipped by merely learning the lessons in law. He has to be versatile genius, equipped with knowledge stretching to the field of science and technology, economics etc. One who ceases to grow begins to perish.

communities" and "encourage the equitable sharing of the benefits arising from the use of such knowledge, innovations and practices" [Article 8(j)].[3]

These two articles specifically emphasize the need for protection of biodiversity and the recognition of traditional knowledge. If they are effectively applied and implemented, they can have major consequences for the access to genetic resources. Many developing countries have welcomed the concept of benefit- sharing, which is of substantial signification for local communities and the preservation of traditional knowledge. Indeed, more than 50 countries have already enacted some legilsation on CBD at the national level.[4]

B. Benefit- sharing Mechanisms

The Convention also recognizes "the sovereign rights of States over their natural resources", and that "the authority to determine access to genetic resources rests with the national governments and is subject to national legislation" (Article 15). The sovereignty of states over their genetic resources is a vital issue in the equitable benefit sharing mechanisms. The Convention further says that parties "shall endeavor to create conditions to facilitate access to genetic resources" (Art 15.2) and access, where granted, shall be on mutually agreed terms and subject to Prior Informed Consent (PIC) of the Contracting Party (Art 15.5).[5] The latter provision indicates that parties have to be aware and agree with the terms under which resources are accessed and /or taken away.

The Convention finally asserts, in Article 16 that "The Contracting Parties, recognizing that patents and other Intellectual Property Rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives."[6]

Articles 15 and 16 are now subject of negotiations, as they involve rights and duties that should be enforced. However, laws regulating

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[3] L. Glowka, et. al., *A Guide to the Convention on Biological Diversity*, Environmental Policy and Law Paper No. 30, IUCN Environment Law Centre, Bonn – Germany, 1994 at 48-49.

[4] Manuel Ruiz, *Intellectual Property Rights and Biodiversity: Procesess and Synergies*, Background paper for workshop on TRIPs and CBD Global Biodiversity Porum, Cancun – Mexico, Sep 5-7, 2003 at 7.

[5] *Supra* n. 3 at 76-83.

[6] *Supra* n. 3 at 85-86.

intellectual property do have other priorities that may be hindered by such articles, as I will elaborate here in the next secotion below.

III. Convention on Biological Diversity and its Implication with IPRs

As a result of common concern about the genetic resources, a number of international treaties and intergovernmental institutions deal with the issue of conservation of biodiversity; intellectual property rights, and/or with both. Even though opinions are divided on the need for diversity, the importance of biological resources for human being and the decline of their availability made a common concern. According to Cooper,[7] the worldwide dependence on other countries' resources is the main reason why international cooperation in the field of genetic resources is important. There are three main treaties dealing with CBD and IPRs viz. the International Undertaking on Plant Genetic Resources (IUPGR) of the FAO, the Convention on Biological Diversity (CBD) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement). The aim and purposes of each of these treaties is different. However, for the purpose of this paper, I will look more closely at the debates and conflicts around CBD and TRIPs Agreement only.

IPRs are currently defined as "rights given to persons over the creation of their minds" (TRIPs-WTO, text of the Agreement). The scope of the exclusive rights created by IPR defines who can use the information contained in genetic resources, and so influences the distribution of the benefits flowing from this use.[8] In these ways, and others, IPR will affect who shares in the benefits arising from genetic resources, with implications for the conservation and use of biological diversity.

The CBD on the other hand has two provisions relating to IPRs. First, its Article 16.5 states that Contracting Parties shall cooperate to ensure that IPRs are "supportive of and do not run counter to its (the CBD's) objectives". However, this is "subject to national legislation and international law". Second, Article 22 states that the CBD's provisions will not affect rights and obligations of countries to other "existing international agreements,

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7 D. Cooper, *The International Undertaking on Plant Genetic Resources* 11(1) RECIEL, 2002.

8 The scope of intellectual property rights refers to a number of factors such as the subject, duration, category of activities that IPRs extend to, as well as the availability of exceptions to private rights such as compulsory licensing, and other exceptions for research and non-commercial uses.

except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity".[9] By reading both these articles in conjunction and in the spirit of the CBD, it seems there is a basis for countering the runaway march of the IPRs regimes.

Dutfield[10] in an extensive review argues that the relevance of international IPR regime to the CBD is beyond doubt. The questions which he feels are unresolved include:

(i) increased availability of IPR protection will automatically lead to greater levels of innovation in society. He argued that innovation and creativity flourish in many parts of the world without any IPR laws.[11]

(ii) though, evidence suggests that most technologies supportive of biodiversity conservation are in the public domain but, with respect to those which are not, it is uncertain whether IPR restrict or support their transfer to developing countries but it is widely accepted that the application of traditional knowledge and technologies can add value to genetic resources.

He further opined that, while patents are clearly unsuitable mechanisms to protect the rights of traditional knowledge holders, the use of other intellectual property rights may in some circumstances be feasible.

Moreover, the relationship between the CBD and IPRs has already been considered by the CBD Conference of the Parties (COP) in a number of decisions. The COP called for cooperation with the WTO on IPR-related issues and stressed "the need to ensure consistency in implementing the Convention on Biological Diversity and the World Trade Organisation agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights" (decision IV/15).[12] It has also invited the WTO to take into account relevant provisions of the Convention and their interrelationship with the TRIPS Agreement. While related to a number of aspects of biodiversity conservation, IPR are proving particularly relevant to provisions of the CBD that govern the following inter-related areas:

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9 A. Kothari and R. Anuradha, *Biodiversity, Intellectual Property Rights, and the GATT Agreement: How to Address the Conflicts?* BIOPOLICY, Paper 4, PY 97004, 1997, Online Journal, http//www.bdt.org.br/bioline/py.

10 Graham Dutfield, INTELLECTUAL PROPERTY RIGHTS, TRADE AND BIODIVERSITY: SEEDS AND PLANT VARIETIES, (IUCN and London: Earthscan Publications Ltd., 2000) at 125-27.

11 The knowledge, innovations and practices of indigenous peoples and local communities, for example, are rarely if ever protected by intellectual property rights

A. Traditional Knowledge (TK)

Traditional knowledge (TK) is main issue related to the CBD's provisions on access and benefit sharing. The indigenous and local communities through years of practise, scrutiny and usage have developed a knowledge base system extending across generations regarding the use and properties of various biological resources. This knowledge, for example, the long-term use of medicinal plants – provides an important source of information for the sustainable management of biological diversity, and for the development of new, socially beneficial products.[13]

The CBD calls on Parties to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity" in Article 8(j).[14] A diversity of views has been expressed about the relationship between traditional knowledge and IPR. Some authors argue that IPR can provide an incentive for continued investment in the preservation of these practices.[15] Other commentators argue that traditional knowledge generally falls outside the parameters of protection offered by current IPR regimes, and that these regimes may enable the knowledge of indigenous and local communities to be misused by others. In my opinion, these views are not mutually exclusive, and there are examples where both are true.

Indeed, there are growing numbers of instances in which IPRs have been used to gain control over traditional knowledge, without provision for benefit sharing. Some recent examples include the case of an Indian Turmeric (Curcuma Longa) and Amazon Basin Ayahuasca. These two cases are good examples of the controversy on how IPRs control the TK without sharing the benefits with the indigenous community and resulting in the "biopiracy".[16]

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12 The CBD website at: www.biodiv.org

13 R.V. Anuradha, *Law Relating to Bio-diversity Challenges for the Lawyer*, 1 INDIAN JOURNAL OF ENVIRONMENTAL LAW, National Law School of India University and CEERA, 2000 at 31-42.

14 *Supra* n. 3, Article 8(j) at 47-49.

15 Anil K. Gupta, *How Can Asian Countries Protect Traditional Knowledge, Farmers Rights and Access to Genetic Resources through the Implementation or Review of the WTO TRIPS Agreement*, paper presented at the Joint ICTSD/ CEE/HBF Regional Dialogue for Governments and Civil Society, organised by ICSTD at Thailand, March 29-30, 2001.

16 A. Kothari and R. Anuradha, *Biodiversity and Intellectual Property Rights: Can the Two Co-exist?* 2(2) JOURNAL OF INTERNATIONAL WILDLIFE LAW AND POLICY, 1999.

B. Conservation of Biological Diversity

The main objective of the CBD is to encourage the conservation and sustainable use of the components of biological diversity. This objective encompasses many of the issues raised above, and requires consideration of additional, often indirect, impacts of IPRs on the conservation and sustainable use of biodiversity.

Among its many obligations relating to conservation and sustainable use, the CBD requires Parties to integrate considerations relating to conservation and sustainable use into national decision-making (Article 10).[17] Further, Parties are responsible for identifying processes and categories of activities that have or are likely to have significant adverse impacts on biological diversity and monitoring their effects (Article 7(c))[18] . The granting of IPRs could, arguably, be such a category of activity.

The CBD also includes a number of obligations relating to the conservation of *in situ* biological diversity. For example, it requires Parties to "control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts" (Article 8(g)).[19] Implementation of these obligations will be particularly important in relation to the conservation of genetic resources, where IPRs can play a crucial role.

A major concern about IPR in the hands of private owners and companies is that the latter used this IPR for commercial purposes, the first reason for genetic erosion, threatening biodiversity, which in turn threatens food security which is the most concern for the developing countries[20] in the current WTO debate.

All the above mentioned factors contribute to the thought that strong IPR regime is detrimental to developing countries and emphasize the need for an alternative way for developing countries to protect their resources.

C. Access to and Benefit Sharing of Genetic Resources

Due to the economic benefit associated with the genetic resources, there is a large scope for the framing of regulations for controlling access to such resources in the interest of the national and local communities. However,

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[17] *Ibid.*

[18] *Supra* n. 3 at 36.

[19] *Id.* at 45.

[20] The food security is also important in the light of recently conlcuded WTO Ministerial Meeting where strong coalition of developing countries raised that this is the most important concern for them.

before laying any access regime, the major constraint needs to be tackled with is the 'ownership right' on these resources. The problem is further complexed by the fact that discourse on the subject limits itself often to the modern definitions of ownerhsip, which do not necessarily encompass the more traditional forms of ownership acquisition. For example, traditional knowledge in India has been preserved through *smriti and shruti,* that is, through the word of the teacher, which is heard and remembered, not documented, nor converted into a statutory ownerhsip right in favour of the teacher or his disciple. Although this form of ownerhsip right is enshrined in the common law principles,[21] and recognized through jurisprudence in India, and at times even converted into a statute for a more predictable ownership rights regime, it is not necessarily recognized outside the jurisdiction of India.

But CBD does not clarify who has the ownership rights on the resources in the first place: the country, the community concerned, the individual or some association on behalf of the individuals. The 'rights' issue, therefore, is perhaps left for resolution at the national level. The focus of implementation of the will of the international community as laid down in CBD is at the national level and hence recognition of such national level regimes at the international level is a mandatory for conservation of biological resources and associated traditional knowledge.

As in the case of access, for benefit sharing also, CBD gives solutions that need national level implementation (Art 15 (1)).[22] In fact, CBD perhaps assumes that the exploitation of the right of the holder, irrespective of the way it is determined, will be ensured through a process of fair and equitable benefit sharing.[23] There is an implicit recognition that outsiders misappropriate resources and associated traditional knowledge, and therefore a benefit sharing mechanism would reverse the wrong. But determination of value of the resource/knowledge, and the profit earned by the outsider that should accrue to the holder is no mean task. In some of the agreements that have been concluded between developing country right holders and developed country corporations, royalties promised range from 0.1% to 3-4%.

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[21] A. Kaushik, *Multi-stakholder Dialogue on Trade, Intellectual Property and Biological Resources in Asia*, paper presented at the workshop conducted by Bangladesh Environmental Lawyers Association (BELA), Bangladesh, April 19-20, 2002 at 3.

[22] *Supra* n. 3 at 76.

[23] *Ibid.*

V. WTO Framework on TRIPS and CBD

The World Trade Organisation (WTO) in its Doha Declaration in 2001, singled out the relationship between the CBD and traditional knowledge to the Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) as requiring clarification (para 19).[26] As part of the Declaration, the ministers agreed to include in its review of the TRIPs Agreement, an examination of the relationship between TRIPs Agreement and the CBD as well as the protection of traditional knowledge and folklore.

The TRIPs Agreement lays down the international framework for the protection of intellectual property rights, including patents and trade secrets (the most relevant to benefit sharing of genetic resources). As a general rule, the TRIPs Agreement protects intellectual property rights holders by requiring WTO Members to provide national treatment and MFN treatment to the nationals of other WTO Members with respect to the protection of intellectual property.

Article 27 of the TRIPs Agreement effectively allows Contracting Parties to allow the patenting of life forms i.e. plants, animals, and biological processes – by the simple expedient of not expressly excluding such life forms from patentability. Micro-organisms and non-biological and microbiological processes may be patented as well. Because of these provisions, many see the TRIPs Agreement as threat to the protection of traditional knowledge of local and impoverished communities.

However, the outcome of the review, undertaken by the TRIPs Council at the WTO, is still inconclusive and it is difficult to anticipate the outcomes of this review. What is clear is that if this is not done right, decisions made in the WTO process could seriously undermine whatever progress has been made in the CBD. Decisions being made in these negotiating forums have enormous impact especially on developing countries and their local and poor communities.

Moreover, in the recent past, many local communities reject the patenting of life forms. The concept of ownership over knowledge of living products and life processes is culturally strange to many such communities and particularly to indigenous peoples. While there are people who advocate that traditional knowledge can be protected through the present system, many disagree for both ideological as well as practical reasons. Solutions have been

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[26] See paragraph 19 of the Doha Ministerial Declaration, the full text of which can be found in http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

proposed on how to deal with this difficult challenge like collective community rights[27] but many argue that without the review of TRIPs Agreement, it is difficult to foresee a satisfactory solution.

It is also pertinent to mention here that the TRIPs Agreement's source of authority arises from its Understanding on the Settlement of Disputes (DSU) which establishes a binding dispute settlement mechanism[28]. If a Member fails to abide by a decision of the DSU, the complaining Member may be authorised to retaliate and impose trade sanctions on the other party. Although it is among the most powerful international dispute settlement systems, it has been criticised for inadequate mechanisms for gaining access to non-trade expertise, and sometimes inappropriate decisions regarding the competing goals of trade liberalisation and environmental protection. Where the subject matter of the WTO agreements and other international agreements interrelate, the existence of the dispute settlement mechanism is one factor that lends practical and political strength to the WTO agreements. It is thus important in designing recommendations to resolve tensions between the CBD and the TRIPS Agreement, to consider this factor.[29]

VI. Inconsistency Between the Agreements

As mentioned above, there are various international treaties and different inter-governmental institutions that regulate the access to genetic resources and Intellectual Property Rights, on different levels and for different purposes. Different texts of agreements have various intentions and protect different peoples and interests. Simultaneous implementation is therefore sometimes difficult. Specifically, in case of the CBD and TRIPs Agreement, a certain number of problems arise. On the face of it, it seems unlikely that there should be significant conflicts between them as they both deal with different topics.

A. Equitable Benefit-sharing

The TRIPs Agreement does not mention any provision recognizing the principle of benefit-sharing, a central thought in the CBD, or any regulation

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[27] G. S. Nijar, *TRIPs and Biodiversity, The Threat and Responses: A Third World View*, Third World Network, Paper No. 2, Malaysia, 1996.

[28] RIS, World Trade and Development Report 2003 (RIS, New Delhi, 2003).

[29] It is relevant to mentioned here that Article 22(1) of the CBD provides "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity".

between the patent holder and the holder of the genetic material.[30] The absence of such mechanism from international conventions has raised concerns amongst the developing countries. Though, developing countries have not much space for negotiations, the issue here is that they would like to see some form of compensation for the use of the resources originating from their territories.

The CBD asserts that mechanisms of benefit-sharing should be implemented, meaning thereby that countries must ensure that benefits arising from the use of biological resources are shared with the communities and peoples from whom they have been taken. The promise of benefit sharing should not be a sufficient ground on which access can be accorded. It is also important that clear provisions should be made on how to share the benefit.

Criticism on this concept is that such contracts consider material as a commodity rather than knowledge, and overlook the intrinsic value for local communities. Besides, contracts between the private sector and communities or institutions are seldom equitable: the percentage of royalties the communities should get does not reflect in any means the benefits for the company.[31]

Another argument is that the rush for Indigenous-held knowledge and resources has turned into a race for patents, and not for the substance the patent is protecting. So, what seemed to be a fairness contract in CBD is now being criticized by the defenders of community rights and public interest: accepting the mechanism of benefit sharing in fact means that the idea of a resource as a commodity is accepted. In doing so, it justifies bioprospecting, which in turn those same defenders reject.

Hence, the absence of sharing mechanism in IP regulating laws and the simultaneous explicit mentioning of the same principle in CBD shows on the one hand a conflict between two agreements. But on the other hand, given the criticism on benefit sharing, it shows that the principles of the CBD may not conflict that much in starting point with the ones of TRIPs as is commonly advocated.

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30 Gaia Foundation and GRAIN, *TRIPs versus CBD, Conflicts Between the WTO Regime of Intellectual Property Rights and Sustainable Biodiversity Management*, 1 GLOBAL TRADE AND BIODIVERSITY IN CONFLICT (London/Barcelona 1998).

31 Gaia Foundation and GRAIN, *Biodiversity for Sale, Dismantling the Hype about Benefit Sharing*, GLOBAL TRADE AND BIODIVERSITY IN CONFLICT (London/Barcelona, 2000) at 4.

In view of the above, one can argue that whereas the benefit-sharing mechanism seemed like a fairer deal than open access, the practical outcome does not seem to be satisfactory in many cases. It is nevertheless one way in between the agreements to achieve a better deal than unlimited access. It requires though that resources be considered a marketable commodity, which is in turn rejected by many.

B. Private and Collective Rights

By stating in the preamble that "intellectual property rights are private rights", TRIPs Agreement also negates collective rights. Regarding implementation of TRIPs, this is a major shortcoming and uneasy situation for the developing countries. Indeed, many communities share their resources, knowledge and cultures among themselves. The individual appropriation of knowledge like in industrialised countries is less common in developing countries. The negation of collective rights in TRIPs Agrement shows how inappropriate the Agreement is for countries other than the developed and industrialized ones. The negation of collective rights is seen as a big issue for developing countries. Whereas they are obliged to protect their biological and genetic resources through patents or the *sui generis* system, they are unable to protect them in a way that ulfils cultural traditions, such as community rights.[32]

C. Sovereignty over Genetic Resources

There is also debate on the TRIPs Agreement about the principle mentioned in the CBD, stating that countries have sovereignty over their genetic resources. According to Article 3 of the CBD Convention, States have "the sovereign right to exploit their resources pursuant to their own environmental policies".

The TRIPs Agreement, by making biological resources subject to private Intellectual Property Rights with the intention of promoting free trade, wishes to facilitate the access to these resources, and overlooks the sovereignty principle.

The concept of sovereign rights over resources, replacing the concept of common heritage, allows countries to regulate the access to them, making their national laws prevailing, including provisions concerning the restriction to exploit their resources. It is questionable though, if sovereignty of states over their resources is beneficial to the resources and the communities. No need to say that when it comes to financial benefits that can be made out of

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[32] *Supra* n. 30.

the exploitation of resources. States too are interested in commerce. In this context, one should think that resources in the hands of dishonest officials are not that protected, especially when it becomes a sought after commercially interesting item. If the state authorities decide to allow access in exchange for financial support, then the purpose of the CBD can be endangered.

D. Prior Informed Consent/Mutually Agreed Terms

The CBD also states that access to genetic resources should be subject to "Prior Informed Consent" (PIC), meaning that authorization of the right holder should be sought after and obtained in order to access the resource and/ or the knowledge.

The simultaneous occurrence of sovereignty over genetic resources and the allowance to access them can be combined in Prior Informed Consent, that means that communities should know and agree on the removal of resources from their natural territory. To make such provision effective, it should be possible to nullify any new invention, whether patented or not, for which the resource was used without PIC. Terms under which consent can be denied/permitted should also need to be defined.[33] TRIPs Agreement on the contrary pursues free access and does not mention any such notion.

E. Approval and Denial of Access

On the approval and denial of access, provisions should include the conditions under which access is permitted or denied. Article 8 of the TRIPs Agreement states that: "Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interests in sectors of vital importance to their socio economic and technological development, provided that such measures are consistent with provisions of this Agreement".[34] So, it should be possible to deny access on the ground that the latter does endanger among others socio- economic development. Besides, the CBD states that access is permitted for the purpose of "environmentally sound uses" only. It is thus possible to determine what one considers environmentally unsound use in the *sui generis* provision, which in turn allows denying access if such is the case. The terms under which access can be permitted or denied should be defined in such provisions. In this context, one could argue of mentioning the end purpose of the use of the resources.

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[33] J. Mugabe, et. al., MANAGING ACCESS TO GENETIC RESOURCES : TOWARDS STRATEGIES FOR BENEFIT SHARING (Nairobi: Centre for Technology Studies, 1996).

[34] WTO TRIPs Agreement, *supra* n. 26.

Thus, the list of conflicts about benefit sharing viz. collective versus individual rights, sovereignty principles and others clearly show contrasts between the laws regulating access to biodiversity and Traditional knowledge on the one hand and Intellectual Property on the other hand. However, it is not adequate to consider that TRIPs plus regime will hurt the cause of CBD. As we have seen, in some cases oppositions are not that obvious; even more, some concepts such as considering genetic resources as a commodity do not seem very different among the different agreements. Indeed, we need to bear in mind that intentions in both CBD and TRIPs have different directions, but many not opposite. Hence, in working towards a better position for the purpose of the conservation of biodiversity and the protection of traditional knowledge, developing countries should be aware of the contents of the different agreements and at the same time be critical of what the underlying thought is of such agreements.

Though, to achieve this lots of advocacy work is needed to changes and recognition of the developing countries' interests. Protests against such far-reaching treaties are growing, also. The issue here is that because of TRIPs restrictions, there is very few opportunity to carry out the provisions of the CBD. Countries do not face sanctions if they do not live up to CBD commitments, while they face huge trade sanctions if they are found to violate TRIPs. There is thus inequity in the weight of TRIPs and CBD, making it more difficult to use CBD provisions such as benefit-sharing and sovereignty over resources to be implemented and carried out.

VII. The Role of IPRs from Developing Countries Perspective

In the current scenario, the negotiating power of developing countries over their biological and genetic resources is weak. On the other hand, developed countries try to patent the biological and genetic resources and at the same time restrain imitation of technology when their technology is transported abroad. So, the costs of among others lost markets seem to be a strong motivation to argue that IPRs are needed in order to protect the developed countries and their transnational corporations. The same arguments can be used to show that IPRs could even be beneficial to developing countries. So it seems, according to those arguments that two parties could win by increasing protection of intellectual property. Evidences given by a number of scholars both in favor and against this argument are discussed in the subsequent paragraphs.

As patents regulate access to protected technology, the use of that technology by consumers or other technology-users will be subject to royalty payment and any other conditions imposed by the patent holder. Besides,

local initiatives to develop new technologies, building on already existing ones will be more difficult and expensive.[35] This may in turn slow down the process of new initiatives in the development of technologies. Especially small local initiatives will be turned down because of the costly access.

The absence of strong IPRs and the subsequent possible threat of copied technology is a reason for not investing in a certain country, according to some. Owners of technology choose then not to enter the unprotected market, and also not to export their goods to countries with weak protection. Hence, the profitability of firms diminishes, and in turn disables the attraction of new technologies by developing countries. The argument is that if the latter had stronger protection, then exports would rise, thereby increasing trade flows, and also enabling inflows of technologies.

On the other hand, technology itself and the products in which it processed will become more expensive: patented technology means that with every use of the technology or the product, royalties should be paid, making it more expensive for technology-consuming countries. Higher royalty payments are a deep concern for developing countries often lacking sufficient resources, and might even exacerbate already negative terms of trade and balance of payments positions. According to Correa, the financial resources spent on royalty payments could have benefited local investments in R&D.[36]

Besides, owners of technology are in the position that they can refuse to transfer their technology, thereby discouraging and blocking further industrial initiatives. According to studies of the United Nations, industrialized countries tend to sell more and more embodied knowledge, instead of transferring directly the technology to countries through foreign investment or licensing agreements. In turn, this could lead to more exports from developed to developing countries, meaning less opportunities for developing countries to access technology, while worsening financial problems.[37]

The strengthening of IPRs may also result in the restriction of imitative practices, which may slow down significantly the process of catching up with technology. The argument thus stating that developed countries are better

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[35] K. E. Maskus, COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES: INTERESTS IN UNILATERAL INITIATIVES AND A WTO AGREEMENT (WTO, Geneva, 1999).

[36] C. M. Correa, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES, THE TRIPS AGREEMENT AND POLICY OPTIONS, THIRD WORLD NETWORK, (Penang, Malaysia, 2000).

[37] *Ibid.*

off with stronger IPR is therefore trivial, as technology becomes more expensive, harder to copy and increasingly embodied. According to Carlos Correa, the strengthening of IPRs may even have a reverse effect on the access to technology for developing countries.[38] This barrier may in turn even block or slow the process of industrial development. Moreover, according to Nagesh Kumar significant amount of technological learning took place under weak IPRs regime in these developing countries.[39]

Hence, it can be easily argued that by no means it is clear that strengthening of IPRs will increase innovative activity even in the industrialised countries especially for solving the problems faced by developing countries with regards to ABS regime.

VIII: The Bonn Guidelines – A Right Step Ahead

The COP of the CBD adopted *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* in 2002[40]. All genetic resources covered by the CBD and benefits arising from the commercial and other utilization of such resources are covered, including traditional knowledge, innovations, and practices that are associated with genetic resources such as indigenous medicinal and local farming practices. Human genetic resources are explicitly excluded.

The fundamental of these guidelines is to contribute to the sustainable use of genetic resources and to provide a transparent framework to facilitate access and ensure benefit sharing at national level. For developing countries, the important of these guidelines is that this redressal towards the aim for legal regime for access and benefit sharing. The guidelines also clarfiy and complement many of the existing obligations under the CBD, viz. (i) prior informed consent, (ii) mutually agreed terms, (iii) relation to traditional knowledge, and (iv) role of intellectual property.

Though, the guidelines are clear in many respect and a right step ahead towards a framework guidelines for ABS regime at the national level, still it has not defined the important terms like what is genetic resource? At the same time it misses the opportunity to address what benefit sharing actually meaning? Whether it is limited only to the royalty payments or profits or would it include the other broad areas like scientific collaborations and

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[38] *Ibid.*

[39] RIS, World Trade Development Report 2003, Research and Information System for the Non-aligned and Other Developing Countries, New Delhi, India.

[40] CBD, Conference of the Parties, Decision VI/24 A (2002) information available at http//www.biodiv.org.

technology transfer as well. The policy makers idea regarding not to define these specific terms is still unclear. Whether they want this definitions and terms to be resolved at the national level can be argued. However, these point is crucial for the aspect of the benefit sharing mechanism especially from the developing countries who are seeking benefits arising from their biodiversity and genetic resources.

IX. Conclusion

How far do IPRs help or restrict on the access and benefit sharing is still unknown. Intellectural proerpty rights may be a help or a hinderance. The law on patents and trade secrets could be useful arrangements in the service of developing countries seeking to enhance their scientific and technological capacities. However, many of these countries still facing the problem that their option for developing appropriate IPR laws have become much more limited and not in place. But, it can be argued that we cannot afford to wait for conclusive proof one way or another before making decisions on the design of appropriate ABS regime with strong IPRs at national level especially for the developing countries. It is vital to consider whether and how the IPRs may be applied in the ABS context to minimise the risk without (a) being construed as an illegal barrier to trade or (b) foreclosing opportunities for developing countries to use IPR law to get the equitable benefits from the use of their genetic resources.

TRANS-BOUNDARY MOVEMENT OF HAZARDOUS WASTES AND INDIAN EXPERIENCE

*P.S .Nerwal**

I. BACKGROUND

The movement of hazardous wastes for disposal in the developing countries created a problem that evolved with the advent of industrialization and increasing globalization. Established stringent domestic environmental laws have forced the world's leading industrialized countries which produce hazardous waste in West to ship the same primarily to developing countries. In the developed world an informed public often oppose the generation and disposal of domestic hazardous waste unlike in the developing world where the ill-informed public is unable to strongly oppose these movements. Developed countries are encouraged to dispatch wastes to underdeveloped nations where, the costs are low, as it makes more economic sense. On the other hand developing countries need such wastes for development purposes, for example, for producing steel. But disposal of such wastes not only damages environment but also is a security threat as in some cases even explosives and armaments have been shipped, may be intentionally or inadvertently, as waste. Problem thus is complex as a complete ban on movement of hazardous wastes may result in an adverse impact on trade, commerce and industry of the developing countries as well.

Disposal costs in the developing world are considerably cheaper and, thus, the decision to export the hazardous wastes is considered logical. However, the problem of management of hazardous wastes raises environmental and health issues needing an economical solution in a planned and transparent manner. Export of hazardous wastes takes place in the name of re-cycling, which is termed as dumping in developing countries. In India the problem is more acute, as the workers handling such products being un-educated do not observe safety standards. The hazardous activity of breaking down the old ships is a case in point. This activity has relocated from the Northern to Southern World and to Asia, which lack environmental and workers safety regulatory infrastructure, particularly in the Asian nations.

* Indian Railway Traffic Service Officer, presently working as Chief General Manager, Northern Region, Center for Railway Information Systems, New Delhi. 110001.

China and India are the most popular destinations for live ships for breaking. The export of hazardous ships for scrap is, however, a clear case of toxic waste trade in recyclable steel. Shipment of hazardous wastes has caused several accidents resulting in loss of life and property. It is still economical to allow wastes to be disposed of safely outside the national boundaries of developed countries. After Sept. 11 disaster several thousand tonnes of metal scrap, possibly contaminated with asbestos, PVCs, cadmium, mercury and dioxins, has been exported to India and other parts of Asia. China, Malaysia and South Korea have also received shipments. Eventually, such scrap landed in Asian countries dirtying the Asian ports and threatening the Asian workers.[1]

Several cases of illegal shipments of hazardous wastes have resulted in hue and cry across the world. Existing legal framework has failed to control the movement of such wastes across the national borders causing pollution related problems, particularly, in developing countries which lack well developed handling and disposal arrangements. More so, the victims of ill affects of such shipments are deprived of any compensatory mechanism. The issue has drawn attention across the world for fixing proper accountability in respect of polluting industries handling hazardous wastes and their ill affects. Indian judiciary has taken several important decisions thereby creating a great amount of awareness in the country. It would not be an exaggeration to say that the development of environmental laws in India has taken place mainly due to the awareness generated and concerns expressed by Indian Supreme Court. It has prescribed absolute liability standards in accordance with the "Polluter Pays principle"[2] and laid down guidelines for the industries to follow in the form of "Precautionary principles"[3]. A proper legal regime of determining the nature and extent of compensation payable to the victims of pollution as a result of handling, transportation and disposal of hazardous wastes, is thus, necessary.

Due to lack of awareness not many precautions were taken in India for internal movements. Earlier, accidental deaths occurred due to hazardous wastes shipped from Australia through Hong Kong and Singapore in respect of dry cell batteries and gas lighters stuffed in ISO containers catching fire. In case of WTC scrap shipments the U.S. Govt. was under obligation to

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1 Nityanand Jayaraman and Kenny Bruno, *Trading in Disaster- World Trade Center Scrap lands in India*, SPECIAL TO CORPWATCH, February 6, 2002. see www.corpwatch.org/pid.jsp?articleid=1608.

2 *Shriram Gas Leak* case, *M.C.Mehta* v. *Union of India*, AIR 1987 SC 1086, 1099.

3 Precautionary approach set forth in Principle 15 of the Rio Declaration on Environment and Development, 1992.

indicate the true nature of the consignments of their shipments and to compensate if the same were found containing poisonous contaminants. As per the Basel Convention[4], the Indian Govt. is supposed to prevent the import of material if it is found to be hazardous. But U.S. refused to sign the Basel Convention and, therefore, not bound by the treaty. An action plan[5] was supposed to be devised for environmentally sound management for hazardous products. Govt. of India has passed legislation[6] and made Rules and Regulations under the same as a signatory to the Basel Convention[7] which lay an obligation for provision of complete information on the exporter, importer, source of generation, type of waste and its constituents, method of disposal, safety data sheet etc., which are required to be furnished by both the exporter and importer. However, the movement of hazardous wastes still takes place unabated. Problem of management of hazardous wastes and other wastes is likely to be compounded by the fact that in Delhi alone 31 registered industries are likely to produce 50000 tones of wastes annually.[8]

II. Regional Agreements Preceding Basel Convention

A. OECD Decisions

Before the Basel Convention was adopted, OECD took two separate decisions, viz., the "Movement decision"[9] for regulating transport from OECD countries and the "Exports decision"[10] between the members and non-members. The "movement decision" contains only one binding provision, viz., "Countries shall control the trans- frontier movements of hazardous wastes and ...shall ensure that the competent authorities of the countries concerned are provided with adequate and timely information concerning such movements." OECD decisions were binding on the signatories but not the recommendations. As the Decision also sets forth a recommendation asking the member nations to manage the wastes in such a way so as to

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4 Article 4, Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, 1989.

5 Agenda 21, Chapter 19, Environmentally Sound Management of Toxic Chemicals, including Prevention of Illegal International Traffic in Toxic and Dangerous Products.

6 The Environment Protection Act, 1986.

7 Hazardous Wastes (Management and Handling) Rules, 1989 as amended in 2000 and 2003.

8 Times of India, New Delhi, October 08, 2005.

9 OECD Decision and Recommendation on Trans-frontier Movements of Hazardous Wastes, 1984.

10 OECD Decision and Recommendation on Exports of Hazardous Wastes from the OECD Area, 1986.

protect the man and environment it did not bind the members and could not control the movements of toxic waste materials. The "exports decision" intended to regulate the movement of wastes from OECD member countries to non-members and contained stricter standards: to monitor the export of hazardous wastes it set up authorities with the power to prohibit such export; to use no less strict standards on control of exports on members than to non-members; to prohibit any export to importing country if the intended disposal facility is not adequate. However, Exports Decision also made a non-binding recommendation that the exporting country prohibit the export of the hazardous wastes if an objection is made by any country of transit and no appropriate alternative route can be found by the exporter. Thus, both these decisions suffered from the lack of specific requirements of notification and of a liability regime for waste dumping. The 'prior consent requirement' was considered to have resulted in blockade of the export. However, a provision for the liability of an exporter to pay would have provided an incentive to the exporting country to monitor and control the waste exports.

B. European Community Directives

The European Community faced a very controversial situation due to export of hazardous wastes to Africa. But the events leading to adoption of the EC hazardous exports directives occurred in Europe only. One of the incidents was referred to as "Saga of the Saveso Drums", which began in 1976[11] . As a result, the EC countries realized that the proper monitoring and regulation machinery could have avoided this waste scandal. It then passed a resolution, in 1984, regulating the trans-boundary transport of hazardous waste. The directives later modified in 1986[12] required that the exporter should not only receive the consent from the importing country but also demonstrate the intended disposal capability to handle the waste safely. These directives also suffered from the weakness as the Member States could implement the same only after the enactment of domestic laws and it also

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[11] The incident began in 1976 with the explosion of a fertilizer factory in Saveso in Italy, releasing a cloud of dioxin. In 1982 the Italian government ordered the Swiss company, the owner of the factory, to move the dioxin waste out of the country. The company a West German firm who hired a French sub-contractor and drums carrying the waste were transported to France and disappeared. As a result of frantic search for ten months the waste barrels were found in an abandoned slaughterhouse in France.

[12] Directives on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste, 1984 amended as Directives on the Supervision and Control within the European Community of the Trans-frontier Shipment of Hazardous Waste, 1986.

did not apportion liability for any proper disposal and accidents in transportation. Moreover, the directives did not allow EC members to ban all imports of hazardous wastes. The lack of liability regime, in particular, did not provide enough incentive for countries to control their waste exports.

C. Organization of African Unity and Central American Countries Regulations

The developed countries were interested only in finding a way to monitor and control toxic waste exports. But the African countries were very agitated over the waste dumping incidents. Strong international reactions were noticed to the dumping of toxic material incidents like Seveso Drums, Khian Sea[13] ,Koko[14], and Somalia[15] cases. After the Koko incident the Nigerian government declared the import of hazardous waste a capital crime. Subsequently, the Organization of the African Unity (the OAU) through its Council of Ministers passed a resolution in 1988 calling for a ban on dumping and declared that dumping of toxic waste in Africa was a crime against Africa and African people. It condemned such dumping by multi-national Corporations and urged members to stop arranging for waste dumping. The resolution, however, was only a non-binding political statement and did not distinguish between waste imports and local waste disposal and thereby multi-national Corporations located in one of the OAU countries could not dispose all the wastes it generated, even locally. Fearing that the Central American nations may become a dumping ground, they created the Central American Commission for the Environment and Development for

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[13] This was a very notorious case in which the ship Khian Sea carrying twenty-eight million pounds of toxic incinerator ash left Philadelphia in 1986. It informed Haiti that the ship was carrying 'fertilizer ash' and dumped 3000 tones of hazardous waste at Gonaives beach before the Haitian government could rescind the permission. The ship appeared in Singapore after wandering in the ocean for 18 months with the changed name of 'Pelicano'. During this period it changed its name twice and its country of registration many times. During an investigation by US federal grand jury it informed that it disposed of the ash legally. However, they were finally indicted for perjury when it was revealed that the ash has been illegally dumped in the Indian Ocean.

[14] On discovering in 1988 that an Italian company was dumping waste in the port city of Koko, the Nigerian government asked Italy to take back the waste. But when the Italian ships went to take back the waste they were denied permission to dock at many European ports and the ships returned empty after several months.

[15] Due to a confused political situation in war-torn and famine-stricken Somalia, in 1992 the Italian and Swiss companies took advantage and entered into an $80 million contract for dumping waste in Somalia.

developing guidelines and legislation. Ultimately it banned the hazardous waste imports.

D. Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes

These guidelines[16] were finalized in 1985 but adopted in 1987 by the United Nations Environment Program (UNEP). For ensuring safe disposal facilities for the transported wastes the guidelines required a prior notification of and consent by the importing and transit nations. The Governing Council of the UNEP set up a working group to incorporate these guidelines into international law by means of a convention through negotiations which could not be completed due to differences over the consent requirement and the definition of the hazardous wastes. However, the guidelines resulted into culmination of the Basel convention due to hue and cry raised on account of above mentioned incidents.

III. Basel Convention and Basel Ban

The Basel Convention[17] made several suggestions towards containing the problem and clearly brought the issues to the attention of the Basel committee outlining a process in which States must "Not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing into specific imports"[18]. It also required the States to ensure that proper measures should be taken, so that, "Generation of Hazardous wastes and other wastes is reduced to minimum" and that, "Movement of hazardous and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes"[19]. An agreement based upon "prior informed consent[20]" for trans-boundary movement of hazardous wastes was drawn declaring the wastes to be illegal if undertaken without prior written notice. Such movements would be considered illegal even if the exporting country had prior knowledge that the waste would not be managed in an environmentally sound manner. Since several countries including the U.S. have not ratified the Convention so far, the Basel Convention did not adequately deal with the problem of export of hazardous material as it was a document without any enforcement

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16 Cairo Guidelines and Principles for the Environmentally Sound Management and Disposal of Hazardous Wastes.

17 Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, 1989.

18 Article 4, *id.*

19 *Ibid.*

20 Article 9 Basel Convention.

mechanism. The Convention was aimed at minimizing the generation and trans-boundary movement of hazardous wastes and other wastes by treatment and disposal at the source of generation consistent with their environmentally sound management. The generation should be reduced to the minimum in terms of quantity and potential hazards[21].

Some of the key elements of the regulatory system of the Convention were 'prior informed consent' 'the prohibition to export to a country not Party to the Convention' and 'the legal provisions for duty to re-import and the responsibility of States involved in the trans-boundary movements.'[22] The concept of 'prior informed consent' puts obligations on the State of export, the generator or exporter to notify the other party in writing about the proposed trans-boundary movement and obtain a written consent for the movement with or without conditions. The exporting state shall not permit export without written confirmation not only of the importing but also of the transit state or states. All trans-boundary movements shall be covered by 'insurance, bond or other guarantee as may be required by the state of import or any other state of transit which is Party'. Such a permission can, however, be denied within a period of 60 days failing which the movement can take place[23]. The state of export is also obliged to notify the state or states which are non parties[24]. The exporting State is obliged to take back the wastes in question if the movement has taken place in violation of the terms of the contract on which the consent was given and the 'alternative arrangements cannot be made for their disposal in an environmentally sound manner'. This has to be done within 90 days of the information given by the importing state to the exporting state or the Secretariat of the Convention. No hindrance can be created either by the exporting state or the state(s) of transit in such movement[25].

Any movement without notification or consent or with consent obtained with falsification, misrepresentation or fraud or such movement resulting in dumping, contravenes the Convention or the general principles of international law 'shall be deemed to be illegal traffic'. The exporting state, in such case(s), shall be liable to take back or otherwise dispose of such wastes within 30 days of information received. If no responsibility can be fixed the wastes are to be disposed of in an environmentally sound manner

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21 Para 1.2, Manual of Implementation of the Basel Convention, 1989.
22 Para 1.3, *id.*
23 Article 6, Basel Convention.
24 Article 7, *id.*
25 Article 8, *id.*

and all the state shall make national legislation for dealing with such traffic[26]. The Basel Convention calls for countries to become self- sufficient in hazardous waste management as an incentive for minimizing waste production. Thus, regardless of what kind of promises Indian ship- breakers might give for improving conditions there, the ban on the export of ships that have not been pre-cleaned of toxic substances will still be in effect. As per the Indian guidelines all the ships must be controlled under the Hazardous Waste Rules which include the obligations placed on India under the Basel convention. The Basel BAN was adopted as an amendment to the Basel Convention in 1995 to prevent precisely the type of activity from which the ships meant for scrap in other countries than OECD countries are shipped. By prohibiting the export of toxic wastes from the richest to the poor Countries, the global community tried to counter the brute economic imperative that allows the export of hazards to avoid the costs of proper and responsible treatment and prevention at home.

The subsequent meetings of the Conference of parties held in Piriapolis, Uruguay in December, 1992 and in Geneva, Switzerland in March, 1994 produced a more concise document in the form of Basel Action Network, i.e. BAN which called for the minimum prohibition of "All trans-boundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD States." It also decided to phase out by 31st Dec. 1997 "All trans-boundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD States."[27] This document was considered a non-ambiguous and complete vision for the future of the hazardous waste trade. However, gradually the Basel BAN became a subject of discussion in every forum and it could not become a document of consensus as only a few countries ratified the BAN. The meeting in Geneva divided the world into two groups i.e. the Developed and Developing World and specifically prohibited the trans-boundary movement from any country in the OECD, European Community (EC) and Liechtenstein to any other country.

Trade and environment are major components of the problem of trans-boundary disposal of hazardous wastes. There has been a heavy emphasis on the movement aspect and the trade aspect has been overlooked and the same has formed the basis for the developed world's opposition to the BAN.

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[26] Article 9, *id.*

[27] Article 4A, *id.*, inserted vide Decision III/1 (Amendment to the Basel Convention).

[28] Basel Protocol on Liability and Compensation for Damage Resulting from Trans-boundary Movement of Hazardous Wastes and Their Disposal, 1999.

The BAN seems to ignore the fact that the trade of recyclable and hazardous wastes is very lucrative and the demand of such material is inelastic. As a result, ways and means are being found circumventing thereby any legal responsibility for the shipments and ultimately defeating the very purpose of the convention. For example, Australia shipped lead, for re-cycling, through Hong Kong and Singapore, which were not included in the Annexure. Some of the countries indulge in the trade of supply of recyclable waste to those who are not a party to the convention. WTO has emphasized the free flow of goods across boundaries. The international trade law, therefore, prohibits the BAN imposed by the Basel processes. The Basel BAN has, therefore, been treated discriminatory as it creates a clash between the free trade and the environment.

IV. Protocol on Liability and Compensation, 1999

In 1999, a "Liability Protocol"[28] was defined to provide the States with an avenue to voice complaints and seek arbitration. States parties to the Convention are under an obligation to 'develop international and legal instruments regarding liability and compensation for the victims of pollution and other environmental damage[29]'. Basel Convention did not provide for an enforcement mechanism. Instead of providing rules on liability and compensation the Convention left the matter to be addressed by the parties to the convention through a protocol at a future date[30]. The 'Protocol' was expected to address this issue. It was in the form of legislative guidelines in accordance with principles laid down in the Rio Declaration and promise made by the Basel Convention[31]. The Protocol was aimed at providing adequate and prompt compensation for the damage caused due to movement of hazardous wastes even to a third party or for environmental damage. Compensation could be for the loss of life or injury to life or property in the form of reinstatement or the cost of preventive measures for possible environmental damage[32]. The protocol is applicable to the damage caused due to an incident on account of movement or disposal of such wastes and also includes the illegal traffic[33] and when the incident occurred in the national jurisdiction of either of the parties to the Convention be it exporter or importer. Liability starts after loading on a means of transport and extends up to the time it is taken over by the disposer. However either of the

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29 Principle 13, Rio Declaration, 1992.

30 Article 12, Basel Convention, 1989.

31 *Supra* notes 29, 30.

32 Article 1, Protocol, *supra* n. 28.

33 Article 3, *id.*

contracting parties can exclude liability for an incident occurring in its national jurisdiction by notifying the parties and the secretariat of the Convention. If one of the contracting parties is a party to the Convention the liability will start only after the wastes are loaded or possession is taken over, as the case may be. A transit state is also liable under bilateral or multilateral agreements even if it is not a party to the convention and in case of re-import the liability will last till the wastes reach the original exporting party. No liability arose before the Protocol came into force and the same is applicable only to the wastes which have been notified. Protocol is also not applicable to the movements which take place under bilateral agreements not covered by the Convention.

The Protocol has divided the liability into 'Strict Liability' and 'Fault based Liability'. In case of 'Strict Liability' the exporter or the importer who notifies the goods is liable till such time the possession is taken by the disposer after which the disposer is liable. The person who re-imports shall be liable till such time the possession is taken over by the exporter or the alternate possessor[34]. Liability is excluded in case of a force majeure clause including an incident on account of a war or armed conflict or civil war or natural calamity of an exceptional nature or an act of public authority or an act of state or an incident on account of fault of a third party or the party suffering the damage. A claimant can file a claim against any one or all the parties to a contract, if there are more than one parties involved.

In case of 'Fault based Liability[35]' a party guilty for non-compliance or non implementation of the provisions of the Convention is liable for the damage caused by an incident on account of the movement of the wastes. Such a party is liable for any intentional wrong or negligence or omission or any reckless act. Domestic laws would, however, not be affected by this provision. All parties to the contract are under a duty to take due care to prevent the damage and a party which has taken reasonable steps to prevent such damage, as per its domestic law, shall not be liable[36]. Liability will, thus, also be determined on account of contributory negligence of the person who suffers the damage[37]. In case of goods mixed with wastes the liability will arise only in respect of wastes covered by the Protocol[38]. The claims arising out of the damages due to the incidents covered by the Protocol can

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34 Article 4, *id.*
35 Article 5, *id.*
36 Article 8, *id.*
37 Article 9, *id.*
38 Article 7, *id.*

be filed within 5 years of the date on which the party came to know or perceived to have known but not later than a period of ten years from the date of incident[39].

With a view to establish a comprehensive liability regime, the protocol tried to fix responsibility on the generator of waste or the exporter in the event of an accident. However, it left many escape routes for the defaulting parties. The main flaw in the protocol remained in the provision relating to the applicability to the parties as it was applicable only when the damage occurred within the national jurisdiction of either of the contracting parties if either or both the parties are signatories to the convention and is not applicable to contracting parties if they are not parties to the convention[40]. If only the importing party is a signatory the Protocol will apply only after the possession of the wastes has been taken by the importer. If the exporter is a party the same will apply only before the disposer takes the possession.

The Basel Convention imposes a duty on the exporting state to take back the wastes legally exported[41] but does not lay down as to who should bear the cost. Once the importing state has given the consent it appears illogical for it not to bear the cost. By this analogy no state will allow import till such time it has developed the requisite disposal facilities. Similarly in case of illegal traffic the exporting state may plead that it is not practicable to take back the wastes and wants to dispose of the same on the spot. If the importing state does not term the import as illegal it may have to bear the clean-up and shipping back costs. It would, perhaps, be logical if the exporting state is made responsible till the wastes are finally disposed of.

V. UN Conference on Human Environment, 1992 (Earth Summit) and Agenda 21

Brundtland Report (1987), also known as "Our Common Future"[42], alerted the world to the urgency of making progress towards economic development that could be sustained without depleting natural resources or harming the environment. It defined Sustainable Development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" and thus introduced the concept of 'inter-generational equity'. And also "development which improves people's quality of life, within the carrying capacity of the earth's

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39 Article 13, *id.*

40 Article 3, *id.*

41 Article 8, Basel Convention, 1987.

42 *Our Common Future*, World Commission on Environment and Development, 1987 headed by former Prime Minister of Norway, Ms G.H.Brundtland

life support system."[43] While reviewing the progress of the action on the report in 1999, Ms Brundtland said that 'the spread of chemicals, such as dioxins and PCB's, impairs the intellectual development of children, reducing their level of IQ'. 'Business will have an important role and responsibility in helping to curb the use of non-renewable fuels; in promoting a reduction of generation of wastes and in reducing trans-boundary pollution, and helping to minimize environmental change' and 'we need public private interaction'[44].

Stockholm Declaration[45] called upon the States to halt 'the discharge of toxic substances or of other substances' in excess of the quantity and concentration to avoid 'serious or irreversible damage' upon ecosystems[46]. States should take 'all possible steps to prevent pollution of the seas by substances that are likely to create hazards to human health, to harm living resources and marine life'[47] Rio Declaration[48], affirming the Stockholm principles, emphasized the need of sustainable development of which environmental protection was an integral part of the development process.[49] They share 'common but differentiated responsibilities' 'in view of the different contributions to global environmental degradation.'[50] It emphasized the need for cooperation 'to strengthen capacity building for sustainable development by improving scientific understanding through scientific and technological knowledge.'[51] It declared that 'environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on an international consensus'[52]. 'States should effectively cooperate to discharge or prevent the relocation and transfer to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health'[53].

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43 2nd World Conservation Strategy, UNEP see www.earthsummit2002.org

44 See http://www.provincia.fe.it/agenda21/document/brundtland_report.htm

45 UN Conference on Human Environment, 1972 held at Stockholm, also known as Stockholm Declaration.

46 Principle 6, Stockholm Declaration.

47 Principle 7, *id.*

48 UN Conference on Environment and Development, 1992 also known as the Rio Declaration and the Earth Summit.

49 Principle 4, Rio declaration, 1992.

50 Principle 7, *id.*

51 Principle 9, *id.*

52 Principle 12, *id.*

53 Principle 14, *id.*

Agenda 21[54] called upon the states to minimize the 'wood waste'[55] 'use economic incentives to reduce polluting the seas' and 'control and reduce toxic-waste discharges' besides 'stopping ocean dumping and incineration of hazardous wastes at sea'[56]. It gave due importance to hazardous waste management by seeking international support on restraining the trade in hazardous wastes. It required the industry to adopt cleaner production methods and phase out the processes that produce high risks because of hazardous waste management and the producers should be held responsible for environmentally sound management of the hazardous wastes they generate. Apart from asking the states to launch public awareness programs for the hazardous waste management it wanted them to ban the export of hazardous wastes to countries that are not equipped to deal with those wastes. Industry should treat, recycle, reuse and dispose of wastes at or close to the site where they are created[57].' For furthering the concept of sustainable development it cautioned the states that 'In the face of threats of environmental damage, lack of full scientific understanding should not be an excuse for postponing actions which are justified in their own right' and thus gave a thrust to the 'precautionary principle'[58]. For this purpose 'economic assistance would move from the developed to the developing countries principally in the form of technology[59]'.

VI. Aftermath Of The Basel Convention, 1987

African States did not sign the convention because they wanted a complete ban on hazardous wastes and passed a resolution at Bamako, the capital of Bali, which became the Bamako Convention[60] aimed at imposing a complete ban on imports into OAU from anywhere else. It also regulated movement of wastes within the OAU. In a way the convention adopted the

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54 Agenda 21, a special product of the Earth Summit was a vast work program for the 21st century, approved by consensus among the world leaders in Rio. This historic document is 700 pages long and embraces all areas of sustainable development. It strives to reconcile the twin requirements of a high quality environment and a healthy economy for all peoples of the world, while identifying key areas of responsibility as well as offering preliminary cost estimates for success.

55 Agenda 21: Chapter 11, Section two: Conservation and management of Resources.

56 Agenda 21: Chapter 18, Section two: Conservation and management of Resources.

57 Agenda 21: Chapter 20, Section two: Conservation and management of Resources.

58 Agenda 21: Chapter 37, Section Four: Means of implementation.

59 Agenda 21: Chapter 34, Section four: Means of Implementation.

60 Bamako Convention on the Ban of Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa, 1991.

principle of Basel Convention for movements within OAU and stricter standards for imports into African countries. In 1992, OECD[61] adopted a system of grading the wastes into green, amber and red. Green goods do not have the characteristics of the goods covered by Basel Convention and can have free movement. Other category of wastes is strictly controlled and requires permission from the importing country and the recycling facilities should be as per the domestic laws of that country. But even the so-called green also included lead and thallium waste and scrap. Even EC members, except France, did not ratify the Convention and developed their own measures for control of movement of hazardous wastes. Lome' convention[62] decided to 'prohibit all direct or indirect export of hazardous wastes into ACP States while at the same time these States shall prohibit the direct or indirect import into their territory of such waste from the Community or from any other country'. Thus most of the African States got what they did not get from the Basel Convention which only regulated and not banned the movement of hazardous wastes.

Global community banned all exports of hazardous wastes from the rich countries of the OECD to non-OECD countries. This has been transcribed into the European law and into the laws of each EU member states. Asbestos and PCBs are clearly listed as some of the hazardous wastes which are forbidden from export and a ship destined to be scrapped would be considered as a 'substance or object intended for disposal' under the law. "Under the Basel convention and EU law, there is simply no way that a ship laden with asbestos, PCBs, contaminated oils etc. that is headed for scrap yards can be considered anything other than a hazardous waste", said Jim Packet of BAN who has been following the Basel Convention and EU law on the subject since 1989. "Yes, India is poor, yes we need jobs", said Ravi Agarwal of the Basel Action Network in India. "But we find it disgusting that we are offered the world's worst hazards, the world's worst jobs, all to better the North's environment and health at the expense of our own"[63]. This report speaks volumes about the concern about shipments in violation of the Basel Convention and its ineffectiveness in controlling such movement of hazardous wastes.

"For most of the country, governments have concentrated on developing a set of international trade rules that allow for the free flow of goods

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61 OECD Decisions of 1992.

62 Article 39, Fourth Lome' Convention, 1989 signed by 69 African, Caribbean & Pacific countries.

63 See www.ban.org/ban_news/ferries.html

(including hazardous wastes). Even while world trade bodies such as UNCTAD and WTO are busy lobbying for changes to government trade policy and practice e.g. through the reduction of tariffs, removal of quotas, or seeking exceptions to hazardous waste trade bans, they have consistently ignored market failures- such as those that allow concentration of extremely hazardous activities and wastes in places that are least able to handle them safely."[64] It is argued that 'the Basel convention was never necessary as the Basel Ban promotes discriminatory rules among members which allow wealthy countries to trade the waste with each other but not with the developing countries.'[65] Indeed the Basel Ban proponents forget that the poor countries do not need 'green' mandates to encourage recycling and it would slow down development in poor countries. In fact it is necessary to promote labor and environment standards. The ban will have adverse effect on people and the environment and would prolong poverty of those who desperately need development. It was suggested that the Basel Ban be dumped. This view is taken perhaps due to the tendency of some of the rich countries to dump their wastes in developing countries which is supported by others as 'The public generally sees toxic wastes exports as wrong, not a legitimate activity. This perception is due in part, to reports indicating a pattern in which a rich country dumps its hazardous wastes in third world countries, often in an unsafe manner and without properly informing the local community, accounts of such misdeeds abound.'[66]

However, the Basel Convention should be considered as a meeting ground for drastically opposite views on supporting a total ban and the other wanting a free movement of hazardous wastes. The Basel Convention rather than completely putting a ban has tried to regulate the movement of such wastes. The Basel convention tried to adopt a safer path as some of the agreements imposed a complete and the others tried to regulate the movement. It also tried to fill the gaps left by the earlier agreements. For example, the 'movement's decision' and the 'exports decision' of the OECD did not have specific consent and notification requirements and a liability regime for waste dumping. The requirement of prior consent and notification may probably have resulted in complete stoppage of movement by the importing party but a liability regime would have encouraged both the exporter and the importer to better monitor movement of wastes. Even the

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64 See http://archive.greenpeace.org/toxics/toxfreeasia/unctad.html

65 Prasanna Srinivasan, *Let the Trade Continue*, WALL STREET JOURNAL ASIA, December16, 2002; see www.libertyindia.org/publication/baselconvention/htm

66 Hao-nhien Q. Vu, *The Law of Treaties and Export of Hazardous Wastes*, 12 UCLA JOURNAL OF ENVIRONMENTAL LAW & POLICY at 389.

EC directives did not provide for a liability regime and the same were enforceable at will of the States when they make domestic laws. Besides, the OAU directives imposed a ban on dumping without a binding force of the agreement. The Basel Convention was a compromise at regulation rather than ban on export of hazardous wastes giving proper definition to 'hazardous waste' making provisions for 'prior consent requirement' and taking back by the exporter of the illegal traffic. That is another matter that due to certain weaknesses in the consent requirement and 'liability regime' and lack of enforcement mechanism it was not successful in regulating the movement of wastes and in controlling illegal shipments. But despite some shortcomings of the Convention it should be considered a step in the right direction for developing international law.

'The movement of wastes across frontiers raises political and social problems.'[67] The international Conventions try to tackle a problem by developing guidelines and regulations but it fails to solve the same as the developing countries do not ratify the same. As a result, the developing countries are not able to enforce the provisions of the convention against such countries which do not ratify the convention. Similarly, in absence of a strong Liability Protocol the contracting parties are not compelled to abide by the Conventions. Developed countries use their muscle power by not providing proper funding to the international agencies. UNEP being underfunded is not able to develop a proper legal framework to deal with the problems of environment. The Basel Convention and the Liability Protocol are steps in this direction and international community can make use of the same for regulating the movement of wastes.

The definition of the 'hazardous wastes' was considered difficult as the same depended on different levels of concentration, quantity and their association with other substances. The exporter or importer or the disposer could try to avoid liability by pleading ignorance about the composition of a particular substance to be termed as hazardous waste. Moreover, the procedures for the management are unduly cumbersome. Then the 'special wastes' is also to be defined specially which has its own special problems needing solutions[68]'. Generally, the waste is considered hazardous if it is harmful to health and environment. The Convention has indicated wastes in two lists, one based on the processes from which the end products are made

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67 T.R.Subramanya, *Legal Control of Trans-boundary Movement of Hazardous Substances: North South Issues and a Model for Reform*, 34 INDIAN JOURNAL OF INTERNATIONAL LAW, 1994 at 40.

68 John D Leeson, ENVIRONMENTAL LAW (1995), Chapter 16 at 434.

and the other based on the disposal processes. But the lists can't be exhaustive. One country may add more wastes to a list and the other may, in view of environmental protection, discourage the same in view of industrial development. An importing country may also do some interpolation for jealously discouraging the imports. However, the Convention being the environmental protection strategy should be read in the right perspective.

'The hazardous wastes pose actual and potential danger to human health and the environment.'[69] It is definitely a challenge. Since the Stockholm, Rio and Agenda 21 the international community has a mandate and is trying to solve the problem of environmental degradation. The States can solve the problem through domestic legislation but not across the boundaries. Industrialized countries including USA and UK which produce most of the hazardous waste, encounter heavy cost of waste disposal and stringent domestic legislation, dump the same in the developing countries. With the Basel convention the developing countries may become dumping ground for waste, it being less costly in terms of labor and environmental standards. Developing countries are more prone to health and environmental hazards as the Convention does not prohibit movement of wastes between non-parties to the Convention. But after the Liability Protocol the contracting parties are under an obligation to abide by the provisions of the Convention as it is an incentive for them to follow the regulations.

'As estimated in 1990, 400 million metric tons of hazardous waste was generated world wide and over 90% of the same was generated in OECD countries. As disposal is costlier in industrialized countries the same gets dumped in the developing countries which lack the capacity to deal with the same. This practice of such exports is termed as environmental injustice or environmental racism on a global scale. Problem of transport of hazardous goods to developing countries is primarily economic[70]'. The export of hazardous wastes to the disadvantaged countries puts a burden of industrialization on them without having received any of its advantages. The concept of intergenerational responsibility and inter-generational justice was emphasized by the Brundtland Report[71] as a step towards sustainable

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69 Bharat Desai, *Regulating Trans-boundary Movement of Hazardous Wastes*, 37 INDIAN JOURNAL OF INTERNATIONAL LAW, 1997 at 43.

70 Dr.Zada Lipman of Macquarie University, Australia, *Trade in Hazardous Waste: Environmental Justice Versus Economic Growth*, see www.arbld.unimelb.edu.au/envjust/papers/allpapers/lipman/home.htm

71 OUR COMMON FUTURE, the Brundtland Report, 1987, the Report of the UN Commission on Environment and Development.

development. Agenda 21 also emphasized the concept of sustainable development. The Basel Convention is a step towards ensuring environmental justice to developing countries and the regulations are expected to be an incentive to minimize waste and a check on the developed countries to export waste to developing countries. Even the developing countries will be encouraged to adopt cleaner technologies in waste disposal. 'Environmental measures addressing Trans-boundary or global environmental problems, should, as far as possible, be based on an international consensus[72]'. In order to further discourage the developed countries to dump wastes there is a need to impose anti-dumping duties. However, the States have started opposing any effort to dump wastes but have not been very successful in imposing duties as the same are considered hampering trade.

'The trans-boundary movements of hazardous wastes from industrialized countries to developing countries constitute transfer of pollution. Several instruments have been adopted with the avowed objective of protecting the environment and human health from the dangers posed by the increased generation and complexity of hazardous wastes. Several environmental NGO's claimed that India has become the prime target for international hazardous waste traders and demanded a complete ban on any import of hazardous wastes'[73] Environmentalists propagate the idea of a complete ban on imports of hazardous wastes into India. But the trade and industry term this as hindrance in industrial development as the wastes are a raw material and also because the reprocessing and recycling provides employment and provide certain low cost products extracted from the wastes. For this purpose stringent enforcement of domestic labor laws and the provision for re-export of imported material which does not conform to the domestic laws for regulation of hazardous wastes is needed. Hazardous Wastes generate many harmful gases and other substances on disposal through burning which creates air pollution. For this 'no emission standards existed' even in USA 'and directly applied to the sources of air comprising of hot gas and dust cloud on account of burning of bodies combined with asbestos, fiberglass and concrete dusts as this was a new type of air pollution

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[72] Abdul Haseeb Ansari, *Free Trade Law and Environmental Law: Congruity or Conflict*, 41 INDIAN JOURNAL OF INTERNATIONAL LAW, 2001 at 1.

[73] Shikhar Ranjan, *Legal Control of the Trans-boundary Movements of Hazardous Wastes into India –An Evaluation*, 41 INDIAN JOURNAL OF INTERNATIONAL LAW, 2001 at 45.

source.'[74] India should develop such standards and apply the same to the instances of air pollution caused due to disposal of hazardous wastes.

'Developing a comprehensive and effective global regulatory framework for trans-national waste trade is complex and difficult task in view of the conflicting interests of the industrialized and developing countries[75].' The Basel Convention did not completely prohibit or ban the movement of the hazardous wastes and only tried to regulate the same on the basis of prior informed consent. It is not an easy task to arrive at a consensus among the States particularly when the economic issues are concerned. Since the movement of the wastes also affects the economic activities it was not possible to ask the states to agree to a complete ban on their movement. Hence many aspects of the law on these wastes have been left to the discretion of the states party to the Convention. The Basel Convention was thus an achievement in itself keeping in view of the global state of affairs and it is on the states to devise some mechanism to regulate the movement of these wastes which is acceptable to the parties. Regional conventions like the Bamako Convention[76] and the Lome' Convention[77] that address the problem more effectively than the Basel Convention can render a useful guidance in developing the law on this subject. Since most of the matters have been left to the discretion of the parties the Basel convention can only serve a purpose of guiding the state in developing the domestic legislation taking into account the decisions of the OECD to prohibit the export of hazardous wastes from OECD to non OECD countries.

The Convention and the decisions although are significant in developing international law but it requires a strong political will of the parties to turn this into a reality. It was hoped that the 1999 liability Protocol[78] will strengthen the Basel regime. The Protocol tried to fill the gap for regulating the liability of the contracting parties and but it did not provide for the

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74 Marjorie J Clarke, a Department of Sanitation Specialist in her statement before the US Senate Environment Committee hearing on the Air Quality surrounding the World Trade Center, Feb. 2002; see www.everest.hunter.cuny.edu/mclarke/resume.htm, www.corpwatch.org

75 B.C.Nirmal, *Regulating Trans-boundary Movements of Hazardous Wastes'* in S. Bhat & Akhtar Majeed (ed.) *Environment Management and Federalism, Indian Experience* (Uppal Publishing House, New Delhi) Chapter 9, 135-179 at 163.

76 *Supra* n. 60.

77 Lome Convention, 1989 signed by 69 African, Caribbean and Pacific (ACP) States.

78 Basel Protocol on Liability and Compensation for Damage resulting from Trans-boundary Movements of Hazardous Wastes and their Disposal, 1999.

responsibility for disposal of hazardous wastes. It depends upon the states to pay adequate attention to the creation of disposal facilities and agree upon a common framework for a properly defined liability regime for the same. A comprehensive global Convention is needed on the regulation of land based disposal also as has been done in case of disposal of the same on the sea and air. The 1996 Marine Protocol[79] for prevention of dumping of radio-active materials and other hazardous materials is a step in the right direction. Similarly, there is an urgent need to develop a legally binding instrument on the radio-active wastes, which at present are beyond the scope of the Basel Convention, and are governed by a non-binding IAEA Code of Conduct on Radio-active wastes. The Lome' and Bamako Conventions and EC directives[80] can provide the required guidelines for developing such an instrument. An effective legal mechanism for dealing with state liability for trans-boundary nuclear pollution is also urgently needed which can regulate the liability of the states in a Chernobyl like situation.

VII. Indian Law on Hazardous Wastes and the Judicial Response

The dumping of hazardous wastes and other wastes has posed a grave situation in India causing serious ecological problems. There is no scarcity of laws in India but the necessary willingness to implement the same is lacking. The Environment Act[81] is an umbrella law on environment under which rules have been framed for handling and management of hazardous wastes. Indian judiciary has developed a comprehensive environmental jurisprudence for regulating the entry of hazardous wastes and other wastes into the country. Despite existence of laws and regulations for hazardous wastes, instances of imports of hazardous wastes into the country have occurred. This was mainly due to indifference of the government agencies, resistance of the people for fear of losing jobs and illegal activities of unscrupulous operators which has encouraged the industrialized countries to dump wastes in India. It is, therefore, incumbent upon the government agencies, particularly the Pollution Control Boards to enforce the laws more forcefully, of course, also taking into account the genuine concerns of the Indian industry. A complete ban may perhaps not be feasible in the interest of the industry and the international trade.

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79 The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.

80 Lome and Bamako Conventions and EC directives 92/3.

81 Environment (Protection) Act, 1986.

'Hazardous substances pervade modern industrialized societies. Indian industry generates, uses and discards toxic substances.[82]' Hazardous wastes including the Toxic substances are regulated in India by the provisions of the Environment Act which has defined 'hazardous substance' in section 2(e). The Hazardous Wastes (Management and Handling) Rules, 1989(subsequently amended in 2000 and 2003)[83] have been framed under the Act. Radioactive Wastes which were not covered by the definition of 'Hazardous Wastes' under the Convention have been covered earlier in India by the Atomic Energy Act, 1962. The Merchant Shipping Act, 1958 already governed the discharge from the ships. Pollution created by the waste water and exhaust gases was covered by Water Act, 1974 and Air Act, 1981 respectively. A person generating hazardous wastes and the operator of a facility are responsible for proper handling, storage and disposal of wastes. No person, without proper authorization, may collect, receive, treat, transport, store, or dispose of hazardous wastes. Hospital waste is governed by the Bio-Medical Waste (Management and handling) Act, 1998.

Indian government issued Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 applicable to the industries that use or store specified hazardous chemicals. Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996, to supplement the Hazardous Chemicals, 1989, were made to strengthen the administrative response to hazardous substance accidents. Provisions relating to certain aspects of storage, transportation and regulation of hazardous substances are contained in Motor Vehicles Act, 1989; the Insecticides Act, 1968; the Atomic Energy Act, 1962; the Inflammable Substances Act, 1952; and the Explosive Substances Act, 1908. The Factories Act, 1948 has been amended in 1987 to include a section on hazardous industrial activities for plant safety. The 2000 amendment to the Hazardous Wastes Rules, 1989 was to restrict the export and import of hazardous wastes for recycling and reuse.

'More than 30000 tons of steel scrap, possibly contaminated with asbestos has been exported to India.[84]' This referred to shipments of WTC scrap into India. Though the risks from the scrap were probably not of the order of the health threats at Ground zero, the US nevertheless have the obligation to ensure that toxic contamination from the World Trade Center

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[82] Shyam Divan and Armin Rosencranz, ENVIRONMENT LAW AND POLICY IN INDIA: CASES, MATERIALS AND STATUTES, (Oxford University Press, 2001) at 514.

[83] Hazardous Wastes (Management and Handling) Rules, 1989 subsequently amended in 2000 and 2003.

[84] *Supra* n. 1.

is not exported to other nations. Contamination of steel scrap is a common concern in the steel industry. Under the Basel Convention it falls on the Indian Govt. to prevent import of wastes if they are found hazardous because US refuses to sign the Convention and is not bound by the treaty. Despite an order of the Indian Supreme Court, US consignments of hazardous wastes continue to come routinely through the unscrupulous importers. This reflected the record of implementation of the rules and regulations on environment in India which has not been very satisfactory. The Indian regulatory agencies, notably the Port and customs authorities and the Ministry of Environment and Forests, have not been very proactive on matters such as management of hazardous wastes which affect human health and environment. Following many instances of unregulated import of hazardous wastes into India for dumping and disposal an interim prohibition was imposed by the Indian Supreme Court in 1997[85] on the imports to India and a committee was appointed to examine matters relating to hazardous wastes thoroughly. The committee found containers holding wastes at Delhi and Bombay. Customs authorities were later allowed to release these goods as per recommendations of the committee only.

In *Shriram Gas Leak* case[86] the Supreme Court articulated a new standard of absolute liability in 1984. In *Bichhuri* case[87] the 'polluter pays principle' has been held to be a sound principle and 'absolute liability standard' has been applied on the polluting industries. Parliament enacted the PLIA[88] and recognized the principle of 'no fault liability'. In case of an accident due to hazardous substance/s the owner of the substance is liable to compensate as per the Schedule to the Act. This 'no fault liability' regime received further endorsement in the setting up of National Environmental Tribunals.[89] Since PLIA was a social welfare statute even the electricity has been held to be hazardous substance for the purposes of the statute. However, the apex court indicated that 'We can not have a policy of not having any chemical or other hazardous industries merely because they pose hazard or risk to the community. If such a policy were adopted, it would mean the end of all progress and development. Such industries, even if hazardous, have to be set up since they are essential for economical development and

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85 *Research Foundation for Science and Natural Resources Policy v Union of India.* 1997 (5) SCALE 495 and 1999 (1) SCC 223, 224, 345 and 495.

86 *M.C. Mehta v Union of India*, AIR 1987 SC 1086, 1099.

87 *Indian Council for Enviro-Legal Action v Union of India (Bichhuri Case)*, AIR 1996 SC 1446.

88 Public Liability Insurance Act, 1991, (PLIA).

89 National Environment Tribunal Act, 1995.

advancement of the people. We can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a manner which would pose least risk of danger to the community and maximizing safety requirement in such industries.'[90]

Indian judiciary has been particularly active in the area of environmental justice and has gone to the extent of suggesting that environmental courts should be set up for dealing with environment cases. Absolute liability standard laid down by the Supreme Court was, however, diluted in the *Bhopal Gas* case [91] and laid down that the quantum of damages payable should be on the basis of the monetary capacity of the delinquent. It was stated that 'it is premature to say whether this yardstick has been, or will be, accepted in this country, not to speak of international acceptance which may be necessary should occasion arise for executing a decree based on such a yardstick in another country.'[92]

The Supreme Court has applied the same to domestic polluters as well and the 'Precautionary Principle' and 'EIA regulations' have been adopted in environmental laws. However, the apex court recognized the distinction between the principle of 'absolute liability' applicable only to hazardous industries, and the wider 'polluter pays principle' which applies whenever an industry pollutes the air, water or land, irrespective whether it is hazardous unit or not. The apex court in the *Vellore* case[93] appears to have mixed up these two principles and rolled them into one. It appears that in India a polluter is no longer entitled to the defenses that are available to him under the law of torts. This appears to be the outcome of adoption of the 'no fault rule'.

VIII. Conclusion and Suggestions

UN Conference on Human Environment, 1972[94] only called for a halt to the discharge of toxic substances and did not significantly deal with the issue of wastes. The World Charter for Nature, 1982[95] also didn't deal with the matter but emphasized the need to take special precautions to prevent the discharge of radio-active or toxic wastes. Cairo guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes called upon the states to develop policies for the environmentally sound

[90] *Supra* n. 86.
[91] *M.C. Mehta v Union of India*, AIR 1987 SC 965.
[92] *Supra* n. 87.
[93] *Vellore Citizens' Welfare Forum v Union of India*, AIR 1996 SC 2715.
[94] *Supra* n. 45.
[95] Principle 12, World Charter on Nature by the United Nations in 1982.

management of hazardous wastes from their generation to final disposal. Basel Convention developed the 'prior informed consent' principle but is silent on the effect of subsequent withdrawal of consent by the importing state. It, however, laid down that any such movement with consent, obtained from the state of import through falsification, misrepresentation or fraud is an illegal traffic: The movement is to take place with the prior consent of the transit state as well which should be given within 60 days failing which the movement can take place by informing the other parties of the decision of export through the state of transit. But it may create a situation where a state of transit decides to take action against the movement taking place without its consent. Although the Convention insists on an environmentally sound management of hazardous wastes and other wastes, it does not lay down any clear cut criteria for its determination. Cairo guidelines contained certain parameters to be followed which the Convention did not prescribe. However, it called for the parties to develop appropriate technical guidelines for environmentally sound management of hazardous wastes.Stockholm and Rio Declarations emphasized the need for development of liability and compensation rules at national levels. But the Convention instead of providing rules on liability and compensation left the matter to be addressed by the parties to the Convention through a Protocol. The Basel Protocol on Liability and Compensation, 1989 tried to fill the gap left by the Basel convention in this regard. But the Protocol also was not applicable to the damage caused by the movement of wastes before the commencement of the Protocol but covers even the 'illegal traffic'. Even after the Protocol comes into force any damage that will result from an incident occurring during trans-boundary movement pursuant to bilateral, multilateral or regional or other arrangements will be outside the purview of the protocol. The person in control of such wastes for the purpose of taking preventive measures is only obliged to act reasonably and in accordance with any domestic law regarding preventive measures and is not subject to any liability under the Protocol. The area of international law relating to reparation for environmental damage is under-developed. Apart from requirement of huge finances for making such reparation there is problem of determining of how to assess the measures for environmental damages. Regulatory framework of the Convention is very weak as the Secretariat has very little powers for monitoring trans-boundary movement and prevention of illegal traffic unlike Bamako Convention who's Secretariat can verify the allegations and submit a report to the parties. The Convention has left enough room to the parties to circumvent some of the provisions on one pretext or the other. For example, the prohibition of export to a non-party can easily be evaded by means of bilateral and multilateral agreements by even the non-contracting

parties. African and other countries have not signed the convention and are not bound by the Convention. Rather, the Bamako and Lome' regional conventions have imposed the ban on the movement of these wastes. Radio-active wastes have been excluded from the scope of Basel Convention as the same were covered by other conventions. Even Rio Declaration and the Agenda 21 are a 'soft law,' as these do not create binding obligations and represent an authentic statement of international norms applicable to 'sustainable development'. Indian law on environment in general and on hazardous wastes is in conformity with the Basel Convention and suffers from the similar weaknesses.

Since the implementation of laws in India has been very tardy it may be worthwhile to consider induction of technology in the procedures for imports and exports. Fully developed ports like Singapore do not permit any ship or any other means of transport to enter unless it's documentation is electronically compatible which ensures better scrutiny of documents and compliance of laws and regulations. Similarly, no container can enter the US territory unless it has passed through the strict security check mechanism where the Shipping lines owning ships and containers have been asked by the security agencies to ensure strict compliance of security regulations. Though the maritime industry is well regulated yet adoption of the security centric steps, including online container tracking, would ensure proper shipment documentation to avoid illegal movement of hazardous wastes across national boundaries.

Somalia incident highlighted the untenable argument that the international law was applicable to the states and not the individuals. Strict security procedures laid down by the US government and their compliance, particularly after the WTC disaster, also takes care of the issue that the international conventions are applicable to the States and not to the individuals as the ship-owners, the exporters and the importers are directly held responsible for any violations of the international laws in general and domestic laws in particular. Somalia like situation was, though an exception rather than the rule should not be allowed to happen and not only the States but also the individuals and the institutions should be held accountable. It is, however, surprising that no efforts were made by the international community to modify the provisions of the Basel Convention to avoid the incidents like Somalia. Procedure laid down by the Rotterdam Convention,[96] adopted in consonance with the Basel Convention, for prior consent requirement can be effective only if there is a proper enforcement mechanism

[96] Rotterdam Convention on the Prior Informed Consent Procedure for Certain

in place for which the strengthening of the Convention Secretariat is necessary which is possible only if the powerful States like USA ratify the Convention and provide the requisite financial and political backup.

Hazardous Chemicals and Pesticides in International Trade, 1998. The Convention is intended to protect human health and the environment by prohibiting international trade in certain hazardous chemicals unless the importing State first gives its informed consent, and by facilitating information exchange to promote the safe handling and use of such chemicals.

DISTRIBUTION OF LEGISLATIVE POWERS BETWEEN UNION AND STATES – PROBLEMS AND ISSUES

*Mahavir Singh**

I. INTRODUCTION

> There is no dichotomy between a strong Union and strong States. Both are needed. The relationship between the Union and the State is a relationship between the whole body and its parts. For the body being healthy it is necessary that its parts are strong. It is felt that the real source of many of our problems is the tendency of centralisation of powers and misuse of authority. [1]

The above observation of National Commission to Review the Working of the Constitution (National Commission) in fact depicts the true nature of the Constitution of India which has broadly incorporated the essential features of the Government of India Act, 1935 and, in addition, has taken inspiration from some of the old and modern Constitutions of the world.

The Constitution of India envisages India to be a Union of States. It incorporates a detailed scheme of distribution of legislative powers between the Union and the states. The distribution of powers is not, however, watertight. Not only there are situations of overlapping jurisdiction in the conferment of power, there can also be conflict in the exercise of those powers. The Parliament's legislative powers extend to the whole of India and no legislation enacted by Parliament can suffer from the vice of unconstitutionality on the ground of extra-territorial operation.[2] The power of state legislatures to legislate remains confined to the territory of the state concerned. A state law may be unconstitutional on the ground of its application beyond the territory of the state concerned unless the same was saved by application of the theory of nexus.[3]

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

1 REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION (2002) at 152.

2 Article 245(2), Constitution of India.

3 *State of Bombay* v. *R.M.D.C.*, AIR 1957 SC 699; *Tata Iron & Steel Company* v. *State of Bihar*, AIR 1958 SC 452; *State of Bihar* v. *Charusila Dasi*, AIR 1959 SC 1002.

II. Constitutional Scheme for Distribution of Power

The scheme of distribution of powers contained in the Constitution is based broadly on the Government of India Act, 1935. All the subjects have been specified in the form of entries in three Lists in the Seventh Schedule of the Constitution. The first one, known as the Union List (List I), contains 97 Entries. The subjects included in this List include those which are of strategic and national importance to the country and on which uniformity in law is required for the whole country. These subjects have been assigned exclusively to Parliament under article 246(1). The power of Parliament to enact legislations on the subjects included in this List is not only exclusive but also overriding the powers of the state legislatures in case of conflict and inconsistency with any subject included in the other two Lists. The state legislatures have been assigned legislative powers in respect of 66 Entries specified in the State List (List II). The subjects included in State List are of local significance and that is the reason why they have been assigned to the states for legislation. There are 47 Entries in Concurrent List (List III) on which both Parliament and the legislatures of states have concurrent powers to legislate. In case of inconsistency between the law made by Parliament and law made by the legislature of a state enacted under List III, the law made by Parliament prevails over the law made by the state legislature except when the law made by the state legislature had been reserved for consideration of the President and has received his assent.[4] The National Commission in its report recommended the insertion of a new entry in the Concurrent List with the heading "Management of Disasters and Emergencies, National or Man Made".[5] Likewise the Estimates Committee of Parliament had recommended that "Water" should be transferred from the State List to the Concurrent List of the Seventh Schedule. These recommendations have not been implemented as yet.

The state legislatures are empowered to exercise their powers subject to Parliament's power given under the Union List. This would be clear by a reading of clauses (2) and (3) of article 246 of the Constitution. The consequence of these provisions would be that if there arises a situation of conflict between a legislation enacted by Parliament in exercise of powers in the Union List and a legislation enacted by a state legislature in exercise of its power in the State List or Concurrent List and the conflict cannot be resolved by applying the principles of harmonious construction and doctrine of pith and substance, the law enacted by Parliament would be valid and the state law to the extent of conflict would be void.

4 Article 254(2), Constitution of India.

5 *Supra* n. 1 at 155.

The Parliament has also the entire legislative power for the Union Territories[6] as well as residuary power in respect of subjects not included in the State List or the Concurrent List.[7] Besides this, the Parliament can legislate on any subject enumerated in the State List under many situations.[8]

Since the commencement of the Constitution, some legislative entries have been transferred from the State List to the Concurrent List thereby increasing the powers of Parliament to legislate in those subjects. The Constitution (Forty-second Amendment) Act, 1976 transferred many subjects from the State List to Concurrent List. These are: (1) Administration of justice, constitution and organization of all courts except the Supreme Court and the High Courts (entry11A); (2) Education (entry 25); (3) Weights and measures except establishment of standards (entry 33A); (4) Forests (entry 17A); and (5) Protection of wild animals and birds (entry 17B).[9]

The tilt in favour of legislative powers of Parliament does not end here. A bill passed by state legislature can be reserved by the Governor of State concerned for consideration of the President under Article 201. There are many constitutional provisions which require that a Bill in respect of a particular subject shall not be introduced before the state legislature unless prior assent of the President had been obtained.[10] The Constitution neither prescribes any clear principle to indicate the kinds of Bills which can be reserved for President's consideration nor lays down any time frame within which the President should consider the Bill proposed to be introduced before state legislature or which has already been passed by the state legislature.[11]

These constitutional provisions relating to distribution of legislative powers have given rise to conflicts between the Centre and the States and have brought about bitterness in the Centre-State relationship. Despite the establishment of the Inter-State Council[12] on May 28, 1990, no serious efforts have ever been made to make it more effective in order to have harmonious legislative relationship between the Centre and States.

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6 Article 246(4), Constitution of India.

7 Article 248, *id.*

8 Articles 247, 249, 250, 252, 253 and 356, *id.*

9 See R.C. Bhardwaj, ed., CONSTITUTION AMENDMENT IN INDIA (New Delhi: Lok Sabha Secretariat, 1995).

10 See, e.g. Articles 31C, 304(b),Constitution of India.

11 *Hoechst* v. *State of Bihar*, AIR 1983 SC 1019; *Bharat Seva Ashram* v. *State of Gujarat*, AIR 1987 SC 494; *Puthiyadeth Jayamathy Avva* v. *K.J. Naga Kumar*, AIR 2001 Ker 38.

12 Article 263, Constitution of India.

The Constituent Assembly did not start its work with respect to distribution of legislative powers in a clean slate. It had formulated the blue prints of Cabinet Mission's plan and the provisions of the Government of India Act, 1935. The problem before the Constituent Assembly was that it had to please three masters to formulate the scheme of distribution of legislative powers: (1) the Federation, (2) the Provinces and (3) the Indian states. Over and above this, the Assembly had experience of partition of India into two parts: India and Pakistan. Considering the importance of the subject and to pacify all the three masters referred above, the Assembly started its work. The Constituent Assembly constituted a Union Powers Committee and a Union Constitution Committee. These Committees recommended a clear-cut demarcation of legislative powers between centre and states with a strong centre. It was on the basis of the experiences of the world federal constitutions, recommendations of the Committees, blue prints and the foundation mentioned above that present scheme of distribution of legislative power was adopted.

A federal structure pre-supposes that: (1) The Constitution of country would be written and its amending process would be very rigid to the extent that without the consent of the federating units, the Constitution would not be amendable; (2) That there will be distribution of all kinds of powers - legislative, executive and judicial - between the federal Government and the federating units, the residuary legislative power will be vested in the federating units; (3) That the federal units have agreed to surrender part of their power in favour of federal Government; and (4) that there will be independent judiciary to adjudicate disputes between the federal Government and federal units.[13]

The Constituent Assembly addressed itself to the immensely complex task of devising a Union with a strong Centre. This task was beset with many difficulties. They had to bring into the Union not only the British Indian Provinces, but also the Princely States and the remote inaccessible Tribal Areas. They were conscious that several areas and regions of this sub-continent had, for a very long time, been following their own sub-cultures, administrative systems, traditions, customs and ways of life. It was, therefore, readily accepted that "there are many matters in which authority must lie solely with the units". Further, that "it would be a retrograde step both politically and administratively" to frame a Constitution with a Unitary State as the basis.

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[13] *State of West Bengal* v. *Union of India*, AIR 1963 SC 1241.

In fashioning the form of Parliamentary government, the Assembly drew largely on the British model. In devising the pattern of Union-State Relations they were influenced, in varying degrees, by the principles underlying the Constitutions of Canada and Australia, which had Parliamentary system, and the United States, which had Presidential system. They made use of the Government of India Act, 1935, after making significant changes in it. Nevertheless, the Constitution as finally passed, was *sui generis*. There were substantial differences in both legal provisions and conventions between India and these countries. The geographical, historical, political, economic and sociological conditions and compulsions in India were basically different.

The Constitution as it emerged from the Constituent Assembly in 1949, has important federal features but it cannot be called 'federal' in the classical sense. It cannot be called 'unitary' either. It envisages a diversified political system of a special type. According to Dr. B.R. Ambedkar, Chairman of Drafting Committee of the Constituent Assembly, it is unitary in extraordinary situations, such as, war (or emergency) and federal in normal times. Some authorities have classified it as a "quasi-federal" Constitution. However, these labels hardly matter as both levels of Government derive their respective powers from a written Constitution, which is supreme, and there is a Supreme Court to interpret the Constitution.

Article 1 describes India as a 'Union of States'. These States are specified in the First Schedule to the Constitution. Articles 2, 3 and 4 enable Parliament by law to admit a new State, increase, diminish the area of any State or alter the boundaries or name of any State. A special aspect of the Indian Union is that the Union is indestructible but not so the States; their identity can be altered or obliterated. This is a departure from a federal feature which obtains in a classical federation like the U.S.A. The Constituent Assembly rejected a motion in the concluding stages to designate India as a 'Federation of States'. Dr. Ambedkar, Chairman of the Drafting Committee, while introducing the Draft Constitution explained the position thus:

> [T]hat though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation, and that the federation not being the result of an agreement, no State has the right to secede from it. The federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a

> single people living under a single imperium derived from a single source. The Americans had to wage a civil war to establish that the States have no right of secession and that their federation was indestructible. The drafting Committee thought that it was better to make it clear at the outset rather than to leave it to speculation.[14]

Another distinctive aspect of the Indian Constitution is that it provides for a single citizenship for the whole of India. There is no dual citizenship, one of the Union and the other of the States. In this respect, the Indian Union basically differs from the American federation which recognizes a dual citizenship and consequent diversity in the rights of the citizens of different States. This important difference between the two countries is due to their different historical backgrounds. Whereas the American Federation was the result of an agreement between pre-existing independent States, in India the position was significantly different. Before the formation of the Indian Union, its units did not have the status of sovereign independent States.

The Union legislature or Parliament has two Houses, the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). Unlike in most federations, representation in both is on the basis of population, through indirect election in the former and direct election in the latter. The Council of States has been given some special functions regarding matters effecting States, while the House of the People has been given some special role regarding financial matters. States have been given some flexibility about having bicameral or unicameral legislatures.

The Constitution contains detailed provisions regarding the distribution of taxing powers between the Union and the States. The fields of taxation have been enumerated either in the Union List or in the State List. There is no subject of taxation in the Concurrent List. The Constitution recognizes that the financial resources of the States may not be adequate for discharging their onerous responsibilities. It, therefore, envisages certain tax revenues raised by the Union to be shared with the States. It provides not only for their distribution between the Union and the States but also *inter se* among the States on the recommendations of the Finance Commission.[15]

It is noteworthy that though the Constitution creates a dual polity based on divided governmental powers, this division is not watertight. It is flexible. The large concurrent sphere let alone, several entries in the State List have an interface with the Union List. Such entries are either subject to certain entries in the Union List or Concurrent List, or a law made by Parliament.

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[14] CONSTITUENT ASSEMBLY DEBATES, Volume VII at 43.

[15] Articles 268 – 281, Constitution of India.

Introducing the draft Constitution, Dr. Ambedkar pointed out that when diversity created by division of authority in a dual polity goes beyond a certain point it is capable of producing chaos. In this context, he emphasized:

> "The Draft Constitution has sought to forge means and methods whereby India will have Federation and at the same time will have uniformity in all basic matters which are essential to maintain the unity of the country. The means adopted by the Draft Committee are three:
>
> (1) a single judiciary;
>
> (2) uniformity in fundamental laws, civil and criminal; and
>
> (3) common All-India Civil Service to man important posts."[16]

There are other special features also which highlight the predominance of the Union. Where, with respect to a matter, there is irreconcilable conflict or overlapping as between the three Lists of the Seventh Schedule, the legislative power of the States must yield to that of the Union [Non-obstante clauses in Articles 246(2) and (3)]. A law made by a State legislature, repugnant to a law made by Parliament or an existing law applicable in that State, in regard to any matter enumerated in the Concurrent List, shall be void to the extent of repugnancy [Article 254 (1)]. However, if such a State law having been reserved for the consideration of the President and receives his assent, it shall remain operative [clause (2) of Article 254]. Nevertheless, Parliament may amend or repeal such State law notwithstanding the President's assent.

III. Response of Judiciary

The above discussion of legislative relations between the Centre and the States clearly reveals that there is a conscious constitutional tilt in favour of the Centre in the legislative sphere. However, the courts have upheld state legislation on matters in the Concurrent List until the Parliament exercised its supervening power. As regards state legislation with respect to certain entries in the State List which overlap the entries in the Union List, there arises the question of determining inter-relationship among them. The courts have evolved several principles of interpretation to harmonize the exercise of State and Union authority. The principle followed in such cases has been to establish harmony among the various seemingly conflicting

16 Constituent Assembly Debates, Volume VII at 36-37.

entries, by restricting the ambit of broader entry in favour of the narrower entry, so that the latter is not wiped away by the former.[17] This interpretative principle has helped the States, as the Centre's powers are more generally worded.[18]

Another norm is the doctrine of 'pith and substance' which is a judicial innovation aimed at avoiding conflicts between the Centre and the States and giving due scope for the full exercise of legislative jurisdiction within the spheres allotted to them under the Constitution. The courts examine the true nature and character of a particular legislation and if it substantially falls within the powers conferred on the legislature, which has enacted it, it is not declared invalid, even if it incidentally trenches on matters assigned to another Legislature.[19] Since the principle of 'pith and substance' of almost all legislations may be characterised in various ways, the rule gives an element of flexibility to the whole scheme of distribution of legislative powers. The courts have been characterizing state legislation so as to permit it to stand whenever possible. Thus, they have enabled the states to exercise their legislative powers to the full extent.[20]

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17 The best illustration of the rule of reconciliation of entries and avoidance of conflict is found in the pre-Constitutional case of *In re C.P. Motor Spirit Act*, AIR 1939 FC I. In this case, a provincial tax on retail sales of petrol and lubricants was challenged by the Centre on the basis that it was a duty of excise and not sales tax. The Federal Court did not accept the contention and held the tax valid. By itself, the Central power could have been interpreted broadly, but there was the question of harmonizing the two entries. Hence, the general power of the Centre was interpreted restrictively, so as to give effect to the narrower power of the provinces. Similarly in the post-Constitution period for the application of this principle to uphold State legislation, see *Calcutta Gas Co. (Prop) Ltd.* v. *State of W.B.*, AIR 1962 SC 1044.

18 *State of Bombay* v. *Balsara*, AIR, 1951 SC 318; *Tikaramji* v. *State of UP*, AIR 1956 SC 676.

19 See *A.S. Krishna* v. *Madras State*, AIR 1957 SC 297, 303.

20 The instances of Court's tendency to uphold state legislation may be found in *State of Rajasthan* v. *G. Chawla*, AIR 1959 SC 544; *K. Kunhikoman* v. *State of Kerala*, AIR 1962 SC 723; *Ram Narain Medhi* v. *State of Bombay*, AIR 1959 SC 459; *Raghubar Sarup* v. *State of U.P.*, AIR 1959 SC 909; *Ratanaprova Devi* v. *State of Orissa*, AIR 1964 SC 1195; *Harak Chande* v. *Union of India*, AIR 1970 SC 1553. Important cases under the Government of India Act, 1935 are: *Prafulla Kumar* v. *Bank of Commerce, Khulna*, 74 IA 23; *Subramanyam* v. *Mutuswami*, AIR 1941 FC 47.

However, the courts have been reluctant to allow states to usurp the power of central legislature. In *State of West Bengal* v. *Union of India*,[21] the State of West Bengal questioned the power of the Union to acquire land rights in and over land vested in the State. The West Bengal Government had challenged the competence of the Parliament to enact Section 47 of the Coal Bearing Areas (Acquisition and Development) Act, 1957, which sought to acquire for the Central Government coal bearing lands and rights over them vested in the state. The state contended, *inter alia*, that the Constitution being federal one, the states share sovereignty with the Union. Hence, the Parliament does not have legislative competence to pass a law depriving the states of property vested in them as sovereign entities. The Court by majority rejected the contention and concluded that the present Constitution did not conform to any traditional model of federation. Provinces are not sovereign and sovereignty is vested in the people of India. Further, the Court referred to the absence of dual citizenship and absence of independent Constitutions of the states and the unusual power of Parliament to alter the boundaries of the states and even to extinguish the existence of a state. In view of these special features of the Constitution giving large powers to the Parliament, it was held that the Parliament was competent to acquire property owned by a state, by a legislation.[22]

Thus the Court decided the case on the basis of the legislative competence of Parliament to acquire property under entry 42, List III. The Court, therefore, rejected the concept of state sovereignty and instead concluded that the states under the Indian Constitution enjoyed merely a subordinate role.[23]

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[21] AIR 1963 SC 1241.

[22] The Court also examined the working of the federal Constitution of the United States, Canada and Australia and found that in the United States and Canada, the power to acquire property of States to effectuate federal purposes is inherent in the concept of federal government in a federation. In Australia alone, the Constitution has a specific provision empowering the Commonwealth to acquire State property on payment of compensation. *Id.* at 1258-59.

[23] *Id.* at 1265-66. Subba Rao, J. gave a dissenting judgment questioning some of the reasoning of the majority opinion. He conceded that the federal concept in India has a strong bias towards the Centre to prevent the separatist tendencies in a country so vast and varied as India is. Nevertheless, it is a federation. Sovereign powers are divided between the Centre and the States within the sphere allotted to them.

The net effect of the majority judgment in this case represents a functional approach to the division of powers in a federation. The decision is based on the realistic appraisal of the overall scheme of the division of legislative powers under the Constitution.

The judgment in *Union of India* v. *H.S. Dhillon*[24] is of major significance in so far as it seeks to give an expansive interpretation to the Union's residuary powers. This case involved a central law, the Wealth Tax Act, which was applied to agricultural property. The Finance Act, 1969 was upheld by the Supreme Court under the Centre's residuary powers. The subject-matter of the legislation was found not to fall under entry 86 of the Union List. The Court by majority held that the subject-matter of the impugned law did not fall under any entry and so the Centre could justifiably legislate under its residuary powers. Even if a part of the Act fall within entry 86 of the Union List, the residuary clause could still be invoked to justify the rest of the legislation. The main question in this case was whether residuary power could be invoked to make law on a topic partly included in an entry and partly excluded from the scope of an entry. In earlier cases,[25] the residuary power had been invoked to make law on a topic when the subject-matter of legislation did not fall within any of the lists. The principle formulation was that the test to determine the scope of residuary powers was to examine whether the subject-matter fall under List II or III or not. If the subject-matter of legislation did not fall under List II or III, then Parliament would have the requisite power. To reach this conclusion, Article 248 was invoked according to which Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent or State List. The minority view, on the other hand, taking a restrictive view of the residuary power, ruled that once a topic or field of legislation is enumerated in any entry in any List, then residuary power could not be invoked. But the minority view has a serious flaw that it could give rise to a vacuum in the Constitution, as there could be matters on which neither the Centre nor the States could legislate. Imposition of wealth tax on agricultural property would have been one such matter if the minority view were to be accepted. Thus, after the majority ruling in the *Dhillon* case, any danger that any vacuum may arise in the area of legislation has receded.

The Bombay High Court in one case had held that the entries in the legislative lists were to be construed according to the pith and substance. Bombay Money-Lenders Act, 1946 was enacted under entry 30 of State List

[24] AIR 1972 SC 1061.

[25] *Jaora Sugar Mills* v. *State of M.P.*, AIR 1966 SC 416; *Second G.T.D Mangalore* v. *D.H. Nazareth*, (1970)1 SCC 749.

which was related to 'Money-lending and money-lenders; relief of agricultural indebtedness." It was held that it did not fall within entry 46 of the Union List.[26] The Supreme Court in another case had observed:[27]

> Entries in the legislative lists, it may be recalled, are not sources of the legislative power, but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression with respect to Article 246 brings in the doctrine of pith and substance in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised, the test is whether the legislation looked at as a whole is substantially with respect to the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic.

On the whole, it may be concluded that scheme of allocation of legislative powers as interpreted by the judiciary has well stood the test of the time and has fulfilled so far, and is capable of fulfilling in future, the contemporary needs of the country. Adjustments in the sphere of Centre-State legislative relation is a constant problem in a federal system. In U.S.A., the needed adjustments have been achieved through the judicial process. In Canada and Australia, necessary adjustments to some extent have been made both by constitutional amendment and judicial process. But still the position in these federations is not regarded as very much satisfactory as the Centre feels lack of necessary power in the economic sphere. In the Indian federation such difficulty may not arise. The courts have played a creative role in the area as is evidenced by the cases mentioned above, although the entries in the lists being very elaborate do not provide much scope for judicial interpretation. However, the courts decided in favour of the existing legislation and the principles of interpretation are flexible enough to enable them to reach such a result. But whenever there has been a serious conflict on a matter between the Centre and the States, the courts have by and large upheld the Centre's power.[28]

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[26] *Bhanushankar* v. *Kamal Tara Builders*, AIR 1990 Bom 140, 141 (DB).

[27] *Ujagar Prints* v. *Union of India*, AIR 1989 SC 516, para. 23.

[28] See *State of West Bengal* v. *Union of India*, AIR 1963 SC 1241; *State of Karnataka* v. *Union of India*, AIR 1978 SC 68.

IV. Distribution of Legislative power under Articles 245 to 256: Salient Features

The distribution of legislative power between Centre and States provided under Articles 245 to 256 of the Constitution of India brings out the broad features:

(1) The power of Parliament to legislate for the whole of the country is not only broad but also override the powers of state legislatures in many respects. This is clear from reading of the provisions of Articles 252 to 254 and Article 356.

(2) The Parliament's power to legislate in respect of any matter enumerated in the Union List of VII Schedule is subject only to judicial review and there is no other kind of limitation in the Constitution.

(3) The state legislatures have no doubt been given "exclusive" power to legislate in respect of any matter enumerated in State List of VII Schedule but the power in fact can be exercised by the Parliament in special situations e.g. under Article 257 the Parliament can legislate on any subject for establishment of additional courts for the better administration of laws made by Parliament or of any existing law; under Article 249 the Parliament can legislate on any matter in the State List in national interest if so resolved by Council of States by 2/3 majority; under Article 250 Parliament can legislate on any matter in State List during the operation of proclamation of emergency declared under Article 352; the Parliament can legislate on the request of state legislatures under Article 252; under Article 253 the Parliament can legislate on any matter for giving effect to international agreements and finally the Parliament can legislate on any matter in the State List under Article 356 if the President so declare. In view of the above, it is clear that the power of state legislature to legislate on matter in the State List is not exclusive.

(4) The residuary power of legislation, which normally vests in the federal units in case of a federal constitution, has in fact been vested in the Parliament under Article 248 of the Constitution of India. The power of legislation in matters mentioned in Concurrent List of the VII Schedule is no doubt vested both in Parliament as well as state legislature, but here again the Parliament power is superior as compared to power of the state legislature. This is clear from the provisions of Article 254 which envisages cases of repugnancy.

(5) While interpreting the provisions of Article 254, alongwith various entries in the three lists of VII Schedule, the Supreme Court has propounded and applied various doctrines such as, rule of harmonious construction,[29] rule of pith and substance,[30] rule of colourable legislation[31] and plenary power of legislation.

There have been occasions, when Parliament transferred some entries of the State List and incorporated them in Concurrent List. This action requires constitutional amendment under Article 368 of Constitution which envisages not only a special majority for passing a constitutional amendment Bill in each house of Parliament but also requires ratification by not less than half of the State Legislatures.

(6) The Constitution of India contains many provisions such as Article 3, 304 (b) which require Presidential assents for initiating any legislative action by the State Legislature. There is general provision under Article 201 which empowers the Governor of the State to reserve any bill passed by the State Legislature for the consideration of the President of India. Experience shows that the Governors of the States have been exercising this power without any guidelines. Moreover, the bills reserved for the consideration of the President are not cleared expeditiously thereby creating a lot of problems for the States.

In *Jamalpur Gram Panchayat* v. *Malwinder Singh,*[32] the Supreme Court held that if the assent of the President were sought to the law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it. The court held that if the assent is sought and given, in general terms so as to be effective for all purposes, different considerations might arise. In the case before the Supreme Court the assent was given by the President for giving protection to the legislation under Article 31 (as it then stood) and Article 31A and the court held that such asset would not operate for the purposes of Article 254 (2) of the Constitution. However, the court upheld the law passed by the state legislature on the ground that it fell under entry 18 of the State List and not entry 41 of the Concurrent List.

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29 See *R.S. Rekhchand Mohota Spg. & Wvg. Mills Ltd.* v. *State of Maharashtra,* AIR 1997 SC 2591.

30 *State of Bombay* v. *Narottamdas,* AIR 1951 SC 69, 96; *Atiabari Tea Co.* v. *State of Assam,* AIR 1961 SC 232; *Kannan D.H.P. Co.* v. *State of Kerala,* AIR 1972 SC 2301. See also *Sita Ram* v. *Rajasthan,* AIR 1974 SC 1373.

31 See *R.M.D. Chamarbaugwala* v. *State of Mysore,* AIR 1962 SC 594; *State of Haryana* v. *Sant Lal* (1993) 4 SCC 380.

32 AIR 1985 SC 1394.

It is desirable that a suitable amendment should be made in the Constitution so that the assent given by the President should avail for all purposes of relevant articles of the Constitution. It would be inappropriate to drag the assent of President into such arguments. From the time the Bill is introduced till the assent of President is given, the whole procedure and proceedings are legislative in character. It is a collective action of the President, the House of the People, and the Council of States. It is not permissible to enquire as to how the mind of each member of the House and the President worked during the entire proceedings beginning with the introduction of the Bill and concluding with the according of the assent by the President. The procedures are certainly internal matters which are beyond the jurisdiction of the court to inquire into. The court is entitled to go into the questions as to whether the enactment is either ultra virus or unconstitutional. The assent of the President is not justiciable.[33] Even if noting sent to the President by the concerned Ministry does not reflect all the articles in the Constitution, which referred to the effect of the assent of the President i.e. Articles 31A, 31C, 254, it cannot be presumed that the President was not aware of or did not bear in mind, the relevant articles dealing with the effect of the assent of the President. However, when a Bill is sent for the President's assent, it would be appropriate to draw the attention of the President to all the articles of the Constitution, which refer to the need for the assent of the President to avoid any doubts in court proceedings.

A suitable article should be inserted in the Constitution to the effect that an assent given by the President to an Act should not be permitted to be argued as to whether it was given for one purpose or another. When the President gives his assent to the Bill, it shall be deemed to have been given for all purposes of the Constitution.

During the last five decades the scheme of distribution of legislative powers came for judicial interpretation and discussion. The Indian judiciary has not created any inroad in the working of the Indian federalism rather filled the vagueness and corrected the infirmities. The case laws in this area in general points towards strong center, thus toeing the wavelength of the Constituent Assembly and the existing provisions of the Constitution. During the regime of Congress the seven amendments to the Constitution dealing with scheme of distribution of legislative powers were made bringing the following directions: (1) More power in the concurrent jurisdiction; (2) curtailment of the state subject; and (3) minor addition to the power of Parliament. On the whole it shows a co-operative approach. In such an

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[33] *Hoechst Pharmaceuticals Ltd* v. *State of Bihar*, AIR 1983 SC 1019, 1048.

important matter and for the healthy growth of center-state relations the need of the hour is to have a detailed discussion, clause by clause, word by word of any proposal dealing with the distribution of the legislative power. It would be better that a Joint Committee of both houses of Parliament be constituted to make recommendations in this area.

V. Fresh Look at Federal Structure

In last three decades, states have been demanding a fresh look at the Indian federal structure including the legislative relationship of the center-state. The central government and the state governments made five attempts through commission, committees, memorandum and conclave. It is interesting to note that the central commission suggested *status quo* except that the working of federalism be put in true spirit. On the other hand, the state's commission, memorandum and conclave opted for an overall change in the legislative relation giving more autonomy to the state. Nearly after two decades of the first central commission, the Congress party in the power at the center constituted a commission under the chairmanship of a retired Supreme Court Judge, Justice Sarkaria, who had a long judicial experience in balancing the centre-state relations. This commission made detailed preparation to examine the existing constitutional provisions and its working and also involved cross-sections of constitutional authorities and people at large. The commission also examined the available literature, recommendations and reports of the previous commissions, committees and memorandum on the subject.

There were four main questions raised by this Commission and the last one dealt with response or reaction on the need of any change or reform in the field of legislative relations between the centre and states. The supplementary questionnaire added two more questions about Articles 249 and 253.

All the state governments were unanimous, and rightly so, that Article 245 needs no change. This article has not curtailed their territorial jurisdiction and the courts while employing the doctrine of territorial nexus have not in spirit reduced any arc of jurisdiction.

In the general subject-wise jurisdiction of legislative powers, nearly twenty state governments have responded to the questionnaire. The broad outcome was that the states having Congress party in power and other states numbering nearly fifteen also toed the line of Congress advocated for a *status quo* in the subject. Out of the fifteen state governments, only nine made recommendations for minor changes in the Seventh Schedule. On the other hand, state governments of Andhra Pradesh, Karnataka, Tamil Nadu, Tripura

and West Bengal opted to tilt the balance in favour of the state autonomy. One interesting point in these responses may be seen that wherever there was a change in the ruling party at the state, the state government submitted modified response. It is submitted that the commission should not have allowed modification to the response already submitted as the political parties have also been given a say in the matter.

Coming to concurrent power of legislation there were seven states - Tamil Nadu, Karnataka, Punjab, Maharashtra, Kerala, Andhra Pradesh and Assam – with only one dissent Himachal Pradesh, which advocated for prior concurrence of the state legislature before Parliament exercises the concurrent jurisdiction given in Article 246 (2) read with List III.

Regarding the exceptional power of the Parliament to pass law, on the state subject(s), the state governments were not very vocal except on Article 249 where there was no unanimity in the state governments. There were three different opinions: The state governments of Karnataka, Punjab, Tamil Nadu and West Bengal opined for deletion of Article 249; The state governments of Haryana, Himachal Pradesh and Maharashtra advocated maintaining *status quo*; whereas Andhra Pradesh, Assam, Bihar, Gujarat, Kerala, Sikkim, Tripura and Uttar Pradesh governments recommended for a periodic review of the Parliamentary intervention in the state's exclusive field. The government of Tamil Nadu was one of the states, which took the stand that Parliament should not be given any exceptional power to encroach on the exclusive power of the state legislature. In this philosophy it is recommended to delete even Articles 250 and 253.

There were in all six state governments which gave their positive response on residuary power of legislation. Whereas, rest of the 14 state governments did not send their point, meaning thereby that they were interested in the *status quo* position. These recommendations had three shades of opinions. Firstly, the residuary power of the Parliament be given to the state legislature. Secondly, the residuary power be put in concurrent jurisdiction. And lastly, the *status quo* be maintained with some restrictions on its functioning. None of the federal constitutions of the world have put the residuary power either in the concurrent jurisdiction or restrictions have been woven on its exercise.

Even those constitutions which confer such power on the state, because of their historical reasons or as a compromising formula to form a federation or confederation, the judiciary in those constitutions has carved out areas for the federal interferences even in the residuary power of the state legislature. It is suggested that a *status quo* be maintained so far as Article

248 is concerned with a minor change that this Article may find one addition that subjects not mentioned in List I will also be treated as residuary subject. This will clear the conflicting judgments and divergent opinions expressed by the individual judges.

Coming to the responses of the overall setting of the Seventh Schedule, fourteen state governments responded to the questionnaire of the commission. One group advocated for abolition of List III and the subjects of this list be transferred to the List II. Second group of state governments demanded for taking out certain subjects from List I to List II and the others recommended for shifting of certain items from Concurrent List to the State List.

It is suggested that the Seventh Schedule does not require any drastic change. However, with the changing time and circumstances a subject which may be of local importance may become a subject of common or national importance and vice-versa. Such changes could be made without affecting the existing structure.

Regarding the concurrent jurisdiction, there were only two regional parties – Tamil Arasu Kazhagam and the action committee of North East Regional Conference which asked for abolition of the Concurrent List; whereas, seven other parties were of the opinion that there should be consultation of state legislature before Parliament makes any enactment in the Concurrent List. It is submitted that the suggestions given by the political parties cannot be given a base in the Constitution as it is antithesis to a common jurisdiction or a cooperative approach or a *cooperative federalism*. Therefore, it is suggested that the concurrent jurisdiction be not abolished.

The exceptional powers of Parliament to encroach on the state subjects have not been digested by regional political parties for the simple reason that they viewed them as carving out areas from the state autonomy. But in letter and spirit this is not the position. The working of exceptional provisions from Articles 249 to 253 hardly indicate any ill growth in the development of federalism in India. The provisions of Article 249 came under severe criticism by the political parties which included the CPI (M) and its Madhya Pradesh and Kerala state units, CPI and its West Bengal unit, Kerala unit of Janta Party, Lok Dal, DMK, Kerala unit of Muslim League, Socialist Party of India, Revolutionary Socialist Party and its Kerala unit – Democratic Socialist Party, Asom Jatiyavadi Dal and JMM. They were of the opinion that Article 249 be deleted from the Constitution of India. On the other hand, the Indian National Congress (I) advocated deletion of Articles 252 and 253. The Kerala unit of CPI further demanded for repeal of Article 250.

Coming to the residuary power, apart from the parties which have advocated for the abolition of Concurrent List, there were some more parties, which included Indian National Congress (Socialist) – Kerala Unit, the Kerala Congress (Mani Group), Malayalee Desheeya Munnani, Namadhi Kazham and Siromani Akali Dal, which advocated that Parliament's residuary power be transferred to the state legislature.

Various commissions have brought out the recommendation to restructure the subjects in the Concurrent List. This will give a clear picture of the major subjects and will avoid any vagueness, leaving minimum scope for confrontation and interpretation. Further, this recommendation, if adopted, will not attract the plea of violation of basic structure, as it will simply put the scattered subjects in order. Committees, Memorandum and commissions have brought out an interesting solution for the healthy growth of federalism by suggesting that subjects and matters like 'public interest' or 'national interest' be reviewed from time to time with the help of a co-operative approach based on cooperative federalism. The subject which the constituent assembly though in 1949 to be local or state, national or common importance may not remain same with the changing time and circumstances, and therefore, review in this area must be undertaken from time to time.

The exceptional power of Parliament attracted a mixed approach of the commission. So far as the provisions of Articles 247 and 250 were concerned, various commissions rightly advocated for the *status quo*. However, the report kept silence on the provision of Article 253. It is submitted that the silence may be taken to have voted in favour of no change in the present position. In case of Article 249, the commission's stand that the Article not to be repealed, be supported.

However, the commission while advocating for 'consensus' in the House, has demanded for setting up a special committee to go through any proposed exercise by Parliament under Article 249. It is suggested that more representation in the Council of States be brought in through the additional requirement of resolution to be passed by the majority of the total membership of the house.

In the common subject jurisdiction under Article 252 the commission has come out with two improvements : Firstly, the state legislature could participate in the amendment of the parliamentary law under Article 252 for its application to the concerned state with the approval of the President. Secondly, the enactment under this Article should not take a perpetual base.

In case a central legislation does not suit a state, it should be allowed to opt out of the implementation of the parliamentary law. The Water Act,

1974 is still in operation after nearly 25 years. It is suggested that a Joint Committee of both the Houses of Parliament must review the continuation of such law after every twenty-five years. Once a state legislature prefers to go out it should not be permitted to join the application of the parliamentary law.

Sarkaria Commission had done hard work in categorizing the subjects of the Concurrent List and also of the Union List. The subjects of List III have been put under certain groups. While grouping the subjects, the Report took into consideration two parameters. One, the inter-state character and two, the national importance. Any subject which did not come under either of the above two parameters was placed in the State List. It may be pointed out that the concurrent jurisdiction will play an important role in the existing changed political scenario in the country which Sarkaria had not experienced.

In the area of requirement of consultation with the state, the commission advocated that no such special provision be incorporated in the Constitution. It, however, opined that a convention be developed in this regard. It is suggested that a mandatory convention is not justified. In its place, it is suggested that when on the concurrent subject more than one-third of total number of states demand that there should be consultation then Parliament may allow this process.

The commission had advocated for a major change in the scheme of the residuary legislative powers. They, according to commission, be transferred to the Concurrent List. It is submitted that this view point will allow the state legislature either to carve out subject(s) from the existing lists in the name of the residue or embark upon totally new subjects. It is suggested that Article 248 be allowed to operate in its present form with the modification that if a subject does not find place in any of the Lists of the Seventh Schedule, the Parliament shall have the residuary legislative power over the subject. It may be pointed out that none of the federal Constitutions of the world has either such a provision or the existing provision have been interpreted to bring the aforesaid provision.

In the State List, the commissions could not make any recommendation except with respect to only two entries. This shows that the commission did not want to distort the existing autonomy of the state legislature under Article 246 (3) read with List II. No subject can be static. It may become a subject of national or common importance in course of time.

It becomes necessary that the competitive exercise of power which is the dominant characteristic of federal governments in federations, has to be checked and the other characteristics like rigidities, technicalities,

conservatism, excessive legalism and over centralisation, have to be minimised to the suitable extent if the interests of the public are to be promoted to the maximum extent.[34] It is for curing these ills of federalism that the reality has moved far away from what is called 'classical federalism' and has given birth to a new phase of federalism, that is, cooperative federalism. It is a system by which state and national governments supplements each other and jointly or collaboratively perform a variety of functions. Furthermore, cooperative federalism depends not so much on an institutional system and devices but on the congruence of the national norms and the trends in the pattern of economic, political, social and cultural life of the nation.[35] The so called cooperative federalism does not replace the legal framework of federalism. Rather, it supplements, corrects federalism and checks over centralisation in the federalism by providing a just system of resolution of Centre-State and inter-State conflicts through an adequate institutional system for consultation, co-ordination, interchange and integration. It emphasizes the interdependence and sharing of functions between the Centre and the States. It also focuses on the mutual leverage that each level is able to exert on the other.

Thus it may be asserted that 'dual federalism' was wrong because it encouraged a false competition between national and state governments and left too many problems in a no-man's land in between. Cooperative federalism is an improvement, because it presumes that there will always be room for some government to act, and it encourages the two levels to act jointly on occasion. Theoretically, it tends to assume that the responsibilities of national and state governments are to coordinate, but in practice, the national government needs to be superior. It is so because the cooperation of the national government with the states should always be on the basis of national standards rather than adjusting its scales to state-local standards which in many cases would be below those of the national government.[36]

VI. Conclusions

The Indian Constitution aims at cooperative federalism, which seems to be a panacea for the grievances of the States. The Centre's powers should not be diminished further. But it is essential to make more effective all the

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34 See Chandra Pal, State Autonomy in Indian Federation (1984).

35 L.M. Singhvi, *Cooperative Federalism: A Case for the Establishment of an Inter-State Council*, Journal of Constitutional and Parliamentary Studies, Special Number 1969 at 212.

36 *Supra* n. 34.

constitutional, extra-constitutional and statutory institutions devised so far for solving the Centre-State problems.

The solution to the problem of the Centre-State tensions lies in cooperative federalism and that calls for a continual consultation between the Centre and States. The Constitution of India lays down the foundations of cooperative federalism in India not by the device of a meticulous balance or an approximate equivalence between the Union and the States, but by emphasizing the dominance of the Centre occasionally and somewhat as the Karta in a Hindu joint family. It assumes that equality of States inter se or equality between the Centre on the one hand and the States on the other is not a necessary pre-condition for cooperative federalism.

The Indian Constitution also accepts that the principle of operation of the Federal and State Governments in watertight departments is undesirable, if not impossible, and it includes a large number of provisions[37] for interaction between the Central and State Governments and further provides for other means of securing flexibility.

The Constitution has empowered the President to establish an Inter-State Council[38] to effect co-ordination between the Centre and the States and between the States *inter se*. The Constitution is silent on its composition but it specifically lays down the duties that may be assigned to this institution. The duties are to enquire into disputes arising between States, to investigate and discuss subjects of common interest to the Union and the States or to the State themselves and to recommend a better coordination of policy and action with respect to matters so investigated. Although Inter-State Council has been created on May 28, 1990, it could not work effectively to resolve the problems of the Centre and States. It is therefore suggested that the Council should hold meetings, preferably before the start of every parliamentary session. It should have secretariat competent enough to prepare notes and papers on matters coming up in the meetings. The Council cannot but have an advisory status under our system of governance but a convention should be evolved to accept its recommendations. Among the prerequisites of its success are the confidence in it and the attitudes of give and take from all sides for immediate solution of emerging issues and problems between the Centre and States.

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[37] Articles 131, 249, 250, 253, 256, 257, 258, 258A, 262, 275, 286, 293, 301,303, 312, 356 etc., Constitution of India.

[38] Article 263, *id.*

HUMAN RIGHTS EDUCATION WITH SPECIAL REFERENCE TO CHILDREN

*Geeta Sekhon**

> All adults stand accused...the society responsible for the welfare of children has been put on trial. There is something apocalyptic about this startling accusation; it is mysterious and terrible like the voice of the Last Judgment: What have you done to the children that I entrusted to you.[1]

I. INTRODUCTION

There are more than 375 million children in India, the largest number for any country in the world. India has made some significant commitments towards ensuring the basic rights of children. There has been progress in overall indicators: infant mortality rates are down, child survival is up, literacy rates have improved and school dropout rates have fallen. With State support to the social sector being systematically reduced, more than 360 million people, about 36 per cent of the population (1999-2000 statistics) are living below the poverty line, though the government's latest estimates put this figure at 26 per cent. It is estimated that women and children account for 73 per cent of those below the poverty line.[2]

According to the census of 2001, India has the largest child population in the world. Children in the age group 0–8 years number 398.3 million and thereby comprise 40% of the total population.[3] Out of these, children in the age group of 0–6 years comprise 158 million.[4]

National Policy for Children, Government of India Resolution of 22 August 1974 proclaimed that, "Nation's children are supremely important asset. Their nurture and solicitude are our responsibility. Childrens' programmes should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunity for

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

1 Maria Montessori, THE SECRET OF CHILDHOOD (New York: FIDES Publishers, INC., 1966) at 13.

2 www.infochangeindia.org.

3 www.wcd.nic.in.

4 www.censusindia.net.

development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequalities and ensuring social justice."[5]

II. International Standards with Reference to Children

The first standard – setting United Nations instrument exclusively devoted to the rights of children was the 1959 Declaration of the Rights of the Child. Affirming that mankind owes to the child the best it has to give and that the principle of the "best interests of the child" should guide the actions of those responsible for them, this Declaration offered a moral framework for the rights of the child. The United Nations chose to commemorate the twentieth anniversary of the adoption of this Declaration by proclaiming the year 1979 as the International Year of the Child.[6]

In 1978 the Government of Poland submitted a draft Convention on the rights of the child to the Commission on Human Rights. The Commission on Human Rights, which had been assigned the task of drafting the text of the Convention, completed its work in 1989 and the General Assembly adopted the Convention on the Rights of the Child the same year. It derives from the Convention that the child is the subject of law and that all Human Rights – civil, cultural, economic, political and social - necessary to his or her survival, development, protection and participation are interdependent and indivisible. All countries except two, the United States of America and Somalia, have ratified the Convention. The Government of India ratified the Convention on November 12, 1992. Subsequently, the Vienna Convention of 1993 provided that nations must focus on 'special care and assistance for children and need to create an environment in society conducive to healthy growth and development so that they are able to live securely and realize their full potential in life'.

III. Constitutional Provisions with Reference to Children

The Constitution of India was adopted on November 26, 1949 and came into force on January 26, 1950. Part III and Part IV which deal with Fundamental Rights and Directive Principles of State Policy respectively, contain some special provisions with respect to children. Article 14 confers

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5 K.P.S. Mahalwar and Shahbuddin Ansari, *Rights of Child and Judicial Activism – A Critical Appraisal* in Jawahar Kaul (ed.), Human Rights : Issues and Perspectives (1995).

6 Zarina Y. Farooqui, *Rights of a Child under the United Nations Aegis* in Vijay Chitnis, C. M. Madan and M. H. Hirani (eds.), Human Rights and the Law – National and Global Perspectives (Snow White Publications, 1997).

the fundamental right to "equality before the law" and the "equal protection of laws" within the territory of India. Article 15 specifically prohibits discrimination by the State on grounds of religion, race, caste, sex or place of birth. However, under Article 15 (3) the State can make any special provision for women and children. Under Article 24 no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Part IV of the Constitution which outlines the Directive Principles of State Policy has been made unenforceable by any court by Article 37, but the principles laid therein are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Thus, the objective of the Directive Principles of State Policy is to embody the concept of a welfare State. In several decisions emanating from the Supreme Court it has been held that these Directives supplement Fundamental Rights in achieving a welfare state and the latter should be adjusted in their ambit so as to give effect to the former.[7]

Article 39 which falls within Part IV calls upon the State to direct its policy towards securing (among other things): -

(e) that the health and strength of workers, men and women, and the *tender age of children are not abused* and that the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that *children are given opportunities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against moral and material abandonment.*

Under Article 45 the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they completed the age of fourteen years. This Directive has been held to be a fundamental right forming part of the Right to Life under Article 21 of the Constitution.[8] Parliament has enacted the 86th Constitutional Amendment in 2002 and made *right to education a fundamental right.*[9]

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7 Narendra Kumar, CONSTITUTIONAL LAW OF INDIA (Delhi: Pioneer Publications, 2003).

8 *Unni Krishnan* v. *State of Andhra Pradesh*, AIR 1993 SC 2178.

9 The 86th Constitutional Amendment reads as follows: -
ARTICLE 21 A-
The State shall provide free and compulsory education to all children of the age of 6-14 years, in such manner as the State may, by law, determine.

IV. Judicial Approach to Rights of Children

The judiciary in India has been the forerunner in protecting and promoting human rights by expanding the domain of public interest litigation encouragingly and with positive results. The teeming masses ignored by the legislature and turned away by the executive, look up with a sigh of hope to the men in robes, asking for justice. Homicide of human rights anywhere is a matter of concern for everyone everywhere.[10] Some path-breaking judgments, which have been delivered by an activist judiciary, especially in issues relating to rights of children are quoted to demonstrate the apathy of the legislature and the executive. Enforcement is the Achilles' heel of radical law. These judgments also bring home the harsh fact that at the implementation level, welfare legislations in favour of children meet with their Waterloo.

In *People's Union for Civil Liberties* v. *Union of India*,[11] more popularly known as the *Asiad Workers* case, the Supreme Court held that the prohibition contained in Article 24 could be plainly and indubitably enforced against every one, whether State or private individuals. It is the obligation of the State to ensure that private contractors who had employed children in construction work should not contravene the prohibition. The Court held "construction work" as a hazardous employment where children below 14 years should not be employed.

In *Sheela Barse* v. *Union of India*,[12] the Supreme Court impressed upon the State Government to set up necessary remand houses and observation homes where children accused of an offence could be lodged pending investigation and trial. In *Sheela Barse* v. *Secretary, Children Aid Society*,[13] the Supreme Court commented upon setting up dedicated juvenile courts and specialist juvenile court officials and the provision of proper care and protection of children in observation homes.

In *Gaurav Jain* v. *Union of India*,[14] by way of public interest litigation the petitioner asked for the improvement of the plight of prostitutes and their

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Part IV A of the Constitution, which deals with Fundamental Duties has also been amended by addition of clause (k).

Article 51A. Fundamental duties – It shall be the duty of every citizen of India,-

(k) Who is a parent or guardian to provide opportunities for education to all children or, as the case may be, ward between the age of 6-14 years.

10 Krishna Iyer, Human Rights and Inhuman Wrongs.

11 AIR 1982 SC 1473.

12 AIR 1986 SC 1773.

13 AIR 1987 SC 656.

14 AIR 1990 SC 292.

children. The court issued directions for the constitution of a committee to examine the problem and for the segregation of the children of prostitutes from their mothers living in prostitute homes and to allow them to mingle with others and become a part of society. In *Vishal Jeet* v. *Union of India*,[15] the Supreme Court issued directions on a PIL to the State Governments and Union Territories for eradicating the evil of child prostitution and for evolving programmes for the care, protection, treatment, development and rehabilitation of the young fallen victims.

The *M.C. Mehta* v. *State of Tamil Nadu*,[16] was a PIL filed against employment of children in the notorious Sivakasi match industries. The Supreme Court pronounced upon the constitutional perspective of abolition of child labour and issued extensive guidelines to the Government of India with respect to education, health, nutrition, etc. of the child labourers. The *Bandhua Mukti Morcha* v. *Union of India*,[17] was a PIL, which related to the employment of children in the carpet industry in the State of Uttar Pradesh. The Supreme Court reiterated the directions given under *M. C. Mehta's* case.

The *Sakshi* v. *Union of India*,[18] was a PIL, which brought into limelight the problem of child sexual abuse in India. The Supreme Court directed the government/ Law Commission to conduct a study and submit a report on the means of curbing child sexual abuse. In *Sakshi* v. *Union of India*,[19] the Supreme Court issued fresh guidelines on child abuse trials and recording of evidence in a bid to spare victims from undergoing further trauma.

However, sometimes the judiciary takes a retrograde step and undermines the whole issue of the rights of children and their violation. Justice Lentin in an article "Judging the Judiciary – Continuing Search for Ideal"[20] quoted a Mumbai High Court judgment that reduced the sentence of a father who raped his minor daughter on the ground that he was a poor widower who fell to temptation but was otherwise a good father.

V. Children under Difficult Conditions

There are children who are particularly disadvantaged because of their social, economic, physical or mental condition. These children are placed under the category of children under special or difficult circumstances. The

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15 AIR 1990 SC 1412.
16 (1991) 1 SCC.283.
17 AIR 1997 SC 699.
18 (1999) 6 SCC 591.
19 Times of India, September 19, 2004.
20 Times of India, New Delhi, July 15, 1994.

website of Department of Women and Child Development, Ministry of Human Resources and Development, Government of India, lists the following problem areas with respect to the rights of children.[21]

(i) Children in Labour - India has the largest number of working children in the world. Estimates on the magnitude of child labour vary from approximately 11.28 million (Census of India, 1991) to 23.2 million estimated by the International Labour Organization. The government admits that about 2 million children are employed in hazardous industries, occupations and processes. Other unofficial sources estimate 100 million working children in the country.

(ii) Children in Bondage – The number of bonded labourers in India is 5 million. A large number of these would have begun their lives as child labourers. As children they are literally sold to the contractors or landlords; on gaining adulthood they are unable to break away from this state of bondage and after some time replace their labour with that of their children and this cycle of debt, poverty and bondage goes on.

(iii) Children on Streets – This is the most vulnerable group. India has the dubious distinction of having the largest population of street children. Street children suffer from destitution, neglect, abuse and exploitation. It is estimated that in urban areas alone there are 11 million children on the streets. Of them 420,000 street children live in the six metropolitan cities of the country.

(iv) Children who are Juvenile Delinquents

(v) Children in need of Adoption - There are no comprehensive statistics available on the number of abandoned babies in India. Due to government apathy in the matter and resultant malpractices in adoption matters, the Supreme Court issued comprehensive guidelines on adoptions by foreigners.[22]

(vi) Children in Prostitution - Estimates by NGOs puts the figure of child prostitutes at 12.15% of the total number of prostitutes. Out of these 40% are inducted into the profession before 18 years. In India child prostitution also thrives through religion sanctioned practices and beliefs, such as the 'devdasi' and 'jogin'.

(vii) Children of Prostitutes

(viii) Children of Prisoners

[21] www.wcd.nic.in.

[22] *Laxmikant Pandey* v. *Union of India*, AIR 1984 SC 469.

(ix) Refugee Children

(x) Slum and Migrant Children

(xi) Children who are Physically or Mentally Challenged

(xii) Crimes against Children – Child rape and sexual abuse of children constitute the maximum number of incidences of the total statistics available. Children up to 16 years constituted 19 % of the victims.[23]

The Government of India has enacted some specific legislations dealing with children.[24]

(1) Child Marriage Restraint Act, 1929

(2) The Children (Pledging) Labour Act, 1933

(3) The Employment of Children Act, 1938

(4) Child Labour (Prohibition and Regulation) Act, 1986 – there are many more laws which, pertain to labour reforms and welfare in which some provisions have been made with special reference to children.

(5) Maintenance, custody and guardianship and adoption provisions under various personal laws.

(6) Penal law and evidence, crimes against children under the Indian Penal Code, 1860

(7) The Immoral Traffic (Prevention) Act, 1956

(8) The Juvenile Justice (Care and Protection) Act, 2000

(9) The National Commission for Protection of Rights of Children Act, 2005.

The rights of the child, approved by the United Nations and reflected in the Constitution and other statutory provisions, are phony prescriptions, as harsh facts of life reveal.[25] The reasons for violation of rights of the children are obvious. Among all the groups in society, children are the most *vulnerable.* It is correctly said *'children do not vote'* and therefore, are never taken into consideration by the governments and the policy makers. Their age makes them *dependant* and hence they are always in need of protection. *Poverty, illiteracy, war, armed conflicts and persecution* are some of the other factors because of which rights of children get trampled upon.

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[23] Categories of crimes against children and their state–wise break up is given in the website of the Department of Women and Child Development.

[24] Asha Bajpai; *Children and Young Persons*, HALSBURY'S LAWS OF INDIA (Butterworths, 1999).

[25] *Supra* n. 10.

More than any other moral language available at this time in history the language of Human Rights is able to expose the 'immorality and barbarism of modern face of power....We cannot take rights seriously without taking suffering seriously'.[26]

VI. Human Rights Education (HRE) in Schools

What is human rights education? A simple answer to this question can be that, *HRE is all learning that develops the knowledge, skills and values of human rights*. It includes recognition of ones own biases, accept differences, take responsibility for defending the rights of the others and mediation and conflict resolution. Why teach about human rights at all? Why should young people learn about these mattes in school? The answers to these questions are all around us. To borrow a phrase from the UNESCO Constitution "it is in the minds of human beings that flagrant breach of human rights and prejudices have their beginning and it is in the minds of men that regard for human rights need be created."[27]

HRE is a way of clearing and preparing ground for reclaiming and securing our aim to be human. It is to learn about justice and empowering people in the process. It is a social and human development strategy that enables men, women and children to become agents of social change. It can produce the blend of ethical thinking and action needed to cultivate public policies based on human rights and it opens the possibility of creating a human rights culture for the 21st century.[28]

The first International Conference on the Teaching of Human Rights, Vienna, September 1978, and the Pune Declaration on Education for Human Rights in Asia and Pacific, 1999 have stressed upon the significance and importance of human rights education. Further the General Assembly of the United Nations proclaimed in December 1994 that the period spanning from 01 January 1995 to 31 December 2005 would be the UN Decade for Human Rights Education. The General Assembly defined human rights education as *Training, Dissemination and Information* efforts aimed at the building of a universal culture of human rights through imparting of knowledge and skills and moulding of attitudes. World Conference on HR (ECOSOC) called upon the States and institutions to include Human Rights, Humanitarian Laws,

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[26] J. Palok Basu, Law Relating to Protection of Human Rights under Indian Constitution and Allied Laws (Modern Law Publication, 2003).

[27] Nomita Aggarwal, *Mainstreaming of Human Rights Education – Challenges and Prospects*, paper presented in the South Asian Law Schools Forum for Human Rights Conference in Kathmandu, Nepal in June 2004.

[28] www.pdhre.org.

Democracy and Rule of Law as subjects in the curricula of all learning institutions in formal and non-formal settings. The Committee on Economic, Social and Cultural Rights during its day of general discussion on human rights education and public information activities relating to International Convention on Economic Social and Cultural Rights (ICESCR) stated that *Human Rights Education is itself a human right.*

In India, the University Grants Commission appointed the Justice Sikri Committee in 1980, which chalked out a "Blueprint for the Promotion of Human Rights Education". The emphasis was on the attitude formation and value inculcation especially at the impressionable age of school going children. It was noted that HRE should not remain confined to a few topics in the curriculum but should be reflected in the hidden curriculum as well. However, the focus of HRE in India has remained limited; the social relevance edge did not get the projection it deserved.[29]

The recommendations of the following Commissions, Committees and Policies reflect the importance of HRE in schools directly or indirectly; namely, the Kothari Education Committee (1964 –1966), National Policy on Education (1986), National Curriculum for Elementary and Secondary Education (1998) and the National Curriculum Framework for School Education (2000).

National Human Rights Commission (NHRC) is sensitizing National Council for Education, Research and Training (NCERT) and its other State counterparts (SCERT) to design text - books and other study materials in such a way that human rights teaching are included in the curriculum of studies at various stages in the school. NCERT has already published a Source Book on Human Rights materials to guide teachers for teaching subjects in schools, which was later translated into Hindi and Urdu.[30]

Presently, the subject of human rights is taught at the school level as a part of world history. The subject is taught in the classrooms without any practical exposure. Such stereotypical teaching without any practical and social relevance will not achieve the desired purpose of human rights education. Therefore, what urgently needs to be done is to make human rights education an independent subject of study. However, the teaching methodology should not be the same as that followed for all other subjects. The subject of human rights requires a special and different treatment.[31]

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29 *Supra* n. 27.

30 Bhaskar Chakravarty, *Human Rights Education – UN and India*, National Seminar on HRE, Law and Society, organized by NALSAR University of Law, Hyderabad.

31 *Supra* n. 27.

The aims of HRE for school students are[32]:

(i) *to encouraging their ability in making judgments and criticizing the state of world affairs, their country and their society;*

(ii) *to awaken and strengthen their readiness to stand up for human rights and to resist disregard and violation;*

(iii) *to stand – up for human rights of others;*

(iv) *to use realization of human rights as the most important measure in judging political situation in their own and other countries; and*

(v) *to inculcate in them tolerance and respect the differences in others.*

A. Teaching Methodology

The challenge before teachers of human rights is how to approach the issue of human rights before school students. The insights offered by the comprehensive website of UNESCO on human rights education are all encompassing. The following points give students an opportunity to actually experience the importance and significance of human rights[33]:

(i) Perceiving – which includes observation, description and research.

(ii) Understanding – which includes interpretation and systemic analysis.

(iii) Action – which includes among others, feedback, staging events, role-playing and playing games, which set examples.

Developing a culture of human rights through HRE has strong moral imperatives and other crucial benefits. HRE is vital in giving young people i.e. children a sense of belonging to them and to the society; it helps them understand that they count like everyone else. These children are the future citizens who will be lawyers, judges, administrators, legislators, law-enforcement officials, doctors, engineers, teachers, etc. Educating them Human Rights is one of the most reliable investments a society can make for its future.

This education presupposes field experiences, action oriented ways of teaching and learning and an innovative teaching methodology. In schools HRE should aim at conduct transformation and make respect for human rights of others a way of life. The focus should be inculcating an attitude of self-esteem, respect of ideas and beliefs of other people and of fostering an attitude of tolerance and removal of prejudices. Students at the school level should not be burdened with detailed texts of human rights literature.[34]

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[32] UNESCO education server - www.dadalos.org.

[33] *Ibid.*

[34] Gurjeet Singh, *Role of Human Rights Education*, National Seminar on HRE, Law and Society, organized by NALSAR University of Law, Hyderabad.

B. Role of Teachers

HRE has to be the catalyst in bringing about social and attitudinal change. It has to be an important weapon to eradicate social evils. The role of teachers cannot be segregated from the social context. *HRE cannot be merely an intellectual exercise.* Imparting of knowledge in the classrooms is not enough and it should cover all modalities, formal, non-formal and informal which could sensitize a person, his/her conscience and develop attitude of imbibing respect for human rights of others. It requires building linkages between what occurs in society and what is transmitted in classes to students. The teaching of Human Rights often places the dilemma of 'Claim v. Reality' before the teachers. Therefore, a teacher/educator of human rights must attempt that the lessons on human rights must endeavour the following:[35]

(i) to discover the relationship of human rights to the student's own life;

(ii) to establish links to personal values;

(iii) to use encounters with other people to understand the true value of human rights;

(iv) to discover the role of current political situation and history in understanding and implementing human rights; and

(v) to question the reporting in newspapers and media.

Some innovative teaching methods and activities, which may be taken up in schools in teaching human rights are discussed hereinafter.

(i) Questions on human rights and approaches should be aimed at creating lessons that are action-oriented. For example, the teachers should involve the students in discussions and debates on questions, such as, what is hidden behind the term 'human dignity'; what does tolerance mean; are women second-class citizens; are there any human rights organizations in our town/city; etc.?[36]

(ii) Extensive use of audio – visual materials should be made.

(iii) Young students should be encouraged to narrate during classroom instructions what they feel about specific human rights abuses, for example, child labour, female infanticide, etc.

(iv) The imagination of students should be ignited by asking them to narrate their feelings on various topics, such as, "if you are a domestic servant, what would you feel?"

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[35] *Supra* n. 32.

[36] *Ibid.*

(v) Students should be involved in social service schemes designed by the school.

(vi) Human rights activists and NGOs working in the field of human rights should be invited to address the students to inform them of the concerns of human rights abuses of the society in which they live.[37]

(vii) Events such as skits, drama, 'nautanki', musical events, dance, poetry, painting competition, slogan competition, collage making competition on a topic of human rights concern, essay writing competition, debate and discussion on a current issue of human rights violation may be organized in the school to make human rights education a fun experience for the students. During theatrical activities they should be involved in role – playing to understand the psyche of the victim and the violator.[38]

(viii) The project – work done by students when the above said activities are organized should be displayed for the benefit of the entire school. For example, poster display, wall – newspapers display, and presentations should be exhibited.

(ix) Students should be provided with a "*conceptual language*" by means of which they will be able to communicate ideas, feelings, emotions and actions. Students should be encouraged to communicate with other schools via e-mail or personal visits and build a network of young human rights activists.[39]

(x) Specific tasks may be delegated to senior students such as simplifying the language of the Convention on the Rights of the Child and then make cards for distribution. They may be asked to choose the five most important rights from their perspective and then write an essay or an article on the first most important right.[40]

(xi) Students should be sent in the field along with NGOs and should be given specific tasks such as questioning people and institutions and the results should be collated and displayed in the school.

(xii) The morning school prayer and school assembly should be utilized to raise human rights violations reported in the newspapers of the day.[41]

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37 *Supra* n. 27.
38 *Ibid.*
39 *Supra* n. 32.
40 *Ibid.*
41 *Supra* n. 27.

(xiii) A newsletter of the Asian Human Rights Commission reported the innovative way of creating awareness on human rights in a school in Taiwan. A fair was organized outside the President's official building to learn about human rights in a fun way. All the activities such as the food stalls, games stalls and music were organized with a human rights theme. Children were issued passports and every stall that they visited earned them a stamp on their passports. At the end of the day, they were encouraged to narrate their experiences and what they learnt throughout the day.[42]

(xiv) Observance of Human Rights Day on 10th December is a good method of creating awareness among school children. The same is already being done in CBSE schools, Kendriya Vidyalaya Sangathana and the National Open School.

Giving pupils the chance actually to experience human rights in lessons is of key importance. It is also essential to emphasize that the idea of human rights isn't merely an abstract one that only touches them in an indirect way, but an incredibly important and current problem that concerns everyone. Indeed, the challenge is to make clear that human rights represent a call for everyone to accept responsibility for their observance.

C. *Suggested Curriculum for HRE in Schools*

At the primary level, significance and importance of human rights and duties should be taught and at the secondary level, knowledge of international and national organs and their functioning should be imparted. At the higher level, students should be acquainted with the different aspects of human rights along with inter – disciplinary approach, for example, in a science class the impact of human organ trade and human genome research on human rights should be discussed.[43]

(i) Suggested Curriculum at the Primary Level

(a) The meaning and concept of human rights;
(b) The importance, significance and relevance of human rights; and
(c) Human rights and present social context.

(ii) Suggested Curriculum at the Secondary Level

(a) The Universal Declaration of Human Rights;
(b) the working of United Nations, Human Rights Commissions at UN;

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42 www.acr.hrschool.org.
43 *Supra* n. 27.

(c) the working of the National Human Rights Commission;
(d) practical usefulness of HRE and its present and future relevance/ prospects; and
(e) case studies on human rights issues.

(iii) Suggested Curriculum at the Higher Level

(a) The historical evolution and development of the concept of human rights;
(b) relevant provisions of the Constitution of India with special reference to human rights;
(c) the Convention on the Rights of the Child;
(d) inter–disciplinary aspect and relevance of human rights;
(e) reasons/causes for violation of human rights in society;
(f) submission of a project on a human rights issue based on the field–work experience for limited hours with any Human Rights Non–Governmental Organization (NGO).

VII. Conclusion

"I am the child
All the world awaits for my coming.
All the earth watches with interest to see what I shall become.
Civilization hangs in the balance
FOR WHAT I AM THE WORLD OF TOMORROW WILL BE.
I am the child
You hold in your hands my destiny.
You determine, largely whether I shall succeed or fail
Give me I pray you, the things that make for happiness
Train me, I beg you, that I may be a blessing of the World."[44]

[44] Quoted in *M. C. Mehta* v. *State of Tamil Nadu and Others*, AIR 1997 SC 699.

SUSTAINING LIFE AND HUMAN WELL-BEING ON EARTH THROUGH CONVENTION ON BIOLOGICAL DIVERSITY

Piyush K. Sharma[*]

I. INTRODUCTION

Life arose on this planet about 3.7 billion years ago. Each species here today is the product of hundreds of millions of years of evolutionary process. Life is wonderful because it is diverse and complex. Life exists in many forms: plant range from grass to giant trees and animals from tiny worms and insects to elephants and whales; life is found everywhere, from the depths of oceans to the tops of mountains and from arid deserts to tropical rainforests. From a purely utilitarian view, life is represented in forms that can be both benign (e.g. periwinkle, which yields a life-saving drug) and malignant (e.g. curare, a deadly poison). It is this wide range that makes up biodiversity or biological diversity, which is defined as "the variability among living organisms from all sources, including, *inter alia,* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems".[1]

This variation occurs at several levels—those of genes, species, and ecosystems. Species diversity refers to the variety of species within a region; genetic diversity refers to the variation of genes within species. The complexes of species, interacting together and with the physical environment they inhabit, create the diversity of ecosystems found around the planet.[2] Genes, species, and ecosystems are all components of biological diversity. These components, which constitute the totality of biological resources of the Earth, or of a given region, are of fundamental importance to human beings from the ecological and economic as well as aesthetic points of view.[3]

The interdependence and co-existence of various life forms maintain the balance of nature. The rich biodiversity of any habitat is a gift to man by

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* Research Scholar, Faculty of Law, University of Delhi, Delhi.

1 Article 2, U.N. Convention on Biological Diversity.

2 Donna G. Craig Nicholas A. Robinson Koh Kheng-Lian, CAPACITY BUILDING FOR ENVIRONMENT LAW IN THE ASIA AND PACIFIC REGION, Vol.-II. (Asia Development Bank, 2002) at 607.

3 See http://www.biodiv.org/doc/publications/guide.asp?id= web visited on 21st February, 2005.

Mother Nature and is based on optimal sustainable use of its life-support system. Each species is of potential value to humans. So are healthy ecosystems. The global collection of genes, species, habitats and ecosystems is a resource that provides for human needs now, and is essential for human survival in the future. Each species is unique and has a right to exist. Each species is worthy of respect regardless of its worth to human beings. This was recognised in the 'World Charter for Nature', adopted by the United Nations in 1982. Each species and ecosystem adds to the richness and beauty of the Earth. Once a species becomes extinct, it is gone forever. A natural system once destroyed is impossible to recreate. The value people attribute to the aesthetic function of nature is partly reflected in the number of people who visit areas of natural beauty.

Regulatory mechanisms for the conservation of biological resources and the uninterrupted provision of the services they render to human beings are not new; rules concerning the taking of animals and the collection of plants are as old as the human communities using them; those rules, however, evolved in parallel to the knowledge and understanding of the complexity of relationships and processes which exist within nature. Thus, nationally, the evolution has been toward creating regulatory mechanisms that approach their specific aims (e.g., the use of a particular population of plants or animals) in the context of ecological unit management. The rationale for internationally agreed regulatory mechanisms has also evolved, originally only based on the need to cooperate bilaterally, regionally or globally whenever unilateral measures are not sufficient to achieve the conservation of specific populations or ecosystems either because: the species or ecosystems concerned are outside any area under national jurisdiction; or they are distributed across national boundaries (shared resources); or they are threatened by factors that originate in other states (transboundary threats).[4]

It is based on this rationale that a number of early treaties on terrestrial and aquatic resources uses have been concluded; only exceptionally did this rationale justify action at global level, for regulating such activities as fishing on the high seas or international trade in endangered species.[5] It is only relatively late that the need for concerted global action has been recognized, first in two specific instances: for one ecosystem, particularly as a habitat type e.g. the Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, held at Ramsar, 1971,[6] and for sites with exceptional

4 *Supra* n. 2.

5 *Ibid.*

6 11 INTERNATIONAL LEGAL MATERIALS, 1972 at 963. The convention entered into force on 21st December, 1975. India acceded the Convention on 1st October, 1981.

global values e.g. the Convention for the Protection of the World Cultural and Natural Heritage concluded at the general conference of the UNESCO, Paris in 1972.[7] These two texts marked an essential step in the evolution of international biodiversity law, as they recognized a common interest of the international community as a whole in the unilateral, but concerted, conservation of specific components of biological diversity, dispersed throughout the world.

The way was paved for the recognition that biological diversity as a whole is a common concern of humanity, and that inspite of - or, more logically, because of - the sovereign rights of states over its constituent components, they have a duty to cooperate in achieving the conservation of biological diversity, as well as an individual responsibility to conserve and use sustainably the biodiversity components on which they exercise such rights. This was done with the adoption of the 1992 Convention on Biological Diversity.[8] The Biodiversity Convention covers a vast and complex area of concern and makes a landmark beginning in international efforts to protect and conserve the astounding biological diversity of the world. The Convention can be hailed as a landmark from several points of view. It is the first time that biodiversity, as such, is comprehensively addressed, and the first time that genetic diversity is specifically covered in a binding global treaty. It is also the first time that the conservation of biodiversity is recognized as the common concern of humankind. By including issues of access and use of genetic resources, as well as technology transfer and biosafety, the Convention demonstrates a will to address all aspects of biodiversity. By creating a mechanism to provide funds to developing countries to help them implement the Convention, the need for new and additional resources to flow from North to South is also addressed.

The Convention is of particular interest to developing countries like India, where the greatest biodiversity is to be found as it provides a legal framework by which they could benefit from the exploitation of their biological resources. Conservation of biological diversity is essentially vital to the future of mankind because it can maintain sound and healthy environment, and meet the needs of present and future generations too. An attempt has been made in this paper to highlight the nature and value and of biodiversity components

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7 11 INTERNATIONAL LEGAL MATERIALS, 1972 at 1358. The convention entered into force on 17th December 1975. India signed the Convention on 16th November 1972.

8 31 INTERNATIONAL LEGAL MATERIALS, 1992 at 818. The Convention entered into force on 29 December 1993. India signed the Convention on 5th June 1992 and ratified on 18th February 1994.

for sustaining life on this planet and need for the protection, conservation and sustainable use of biological resources and also the legislative efforts made by the Biodiversity Convention to preserve this biological wealth for humankind.

II. The Nature and Value of Biodiversity Components

While extinction of some species and evolution of new ones are a part of the natural process of evolution, these two processes occurred at a roughly equal rate over most of the history of life on Earth. But the rate of extinction has outstripped the rate of speciation (the evolution of new species) at an alarming rate. This rapid loss of biodiversity has become a major cause of concern. But if biodiversity is being lost, so what? Why should we worry? It is a definite cause of concern because biodiversity, in all its form, is important for the health of our planet and of human society.

Earth's plants, animals and microorganisms—interacting with one another and with the physical environment in ecosystems—form the foundation of sustainable development[9]. Biotic resources from this wealth of life support human livelihoods and aspirations and make it possible to adapt to changing needs and environments. The steady erosion of the diversity of genes, species, and ecosystems taking place today will undermine progress toward a sustainable society. Indeed, the continuing loss of biodiversity is a telling measure of the imbalance between human needs and wants and nature's capacity.

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

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[9] 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; see Gurdip Singh, *Legal Aspects of Sustainable Development*, I NATIONAL CAPITAL LAW JOURNAL, 1996 at 93.

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.[10] This is an improvement on the previously existing notion of 'sustainable use', which had a restricted meaning in that it focused on adoption of standards governing the rate of use or exploitation of specific natural resources rather than on their preservation for future generations. To be sustainable, development must possess both economic and ecological sustainability. The concept of sustainable development indicates the way in which development planning should be approached.

The human race had 850 million members when it entered the industrial age, sharing earth with life forms nearly as diverse as the planet has ever possessed. Today, with population nearly six times as large and resource consumption proportionately far greater, both the limits of nature and the price of overstepping them are becoming clear. A turning point is upon us. We can continue to deteriorate the environment to meet immediate needs, at the cost of long-term benefits, or we can conserve life's precious diversity and use it in a sustainable manner. We can deliver to the next generations a world rich in possibilities or one impoverished of life; undoubtedly social and economic development will succeed only if we do the first.

Species evolve to fill particular niches (role in an ecosystem) or habitats. Many species depend on each other in intricate ways for survival. Specific life forms present in a particular habitat help in providing conditions for other life forms to live in that environment. Destroying one species can lead to further extinctions or changes. The primary indirect value of biodiversity lies in the services provided by the ecosystem and *taxa* (distinct group of organisms) by maintaining an intricate network of life forms. From both wild and domesticated components of biodiversity, humanity derives all of its food and many medicines and industrial products. Economic benefits from wild species alone make up an estimated 4.5 percent of the Gross Domestic in United States—worth Rs. 87 billion annually in the late 1970s.[11] Fisheries, largely based on wild species, contributed about 100 million tons of food in 1989. Indeed, wild species are dietary mainstays in much of the world. Timber, ornamental plants, oils, gums, and many fibers also come from the wild. The

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[10] Gurdip Singh, ENVIRONMENTAL LAW: INTERNATIONAL AND NATIONAL PERSPECTIVES (2005) at 210.

[11] *Supra* n. 2 at 610.

current economic value of domesticated species is even greater. Agriculture accounts for 32 percent of GDP in low-income developing countries and 12 percent in middle-income countries.[12] Trade in agricultural products amounted to Rs. 3 trillion in 1989.[13]

The value of variety of species is particularly apparent in agriculture. For generations, people have raised a wide range of crops and livestock to stabilize and enhance productivity. The wisdom of these techniques—including their contributions to watershed protection, soil fertility maintenance, and receptivity to integrated pest management strategies—is being reaffirmed today as farmers around the world turn to alternative low-input production systems. The genetic diversity found within individual crops is also of tremendous value. Genetic diversity provides an edge in the constant evolutionary battle between crops and livestock and the pests and diseases that prey on them. In age-old systems, several genetically distinct varieties of crops are planted together as a hedge against crop failure. Breeders and farmers also draw on the genetic diversity of crops and livestock to increase yields and to respond to changing environmental conditions. The opportunities provided by genetic engineering—which allows the transfer of genes among species—will further increase the opportunities genetic diversity provides for enhancing agricultural productivity.[14]

The components of biodiversity are also important to human health. Once, nearly all medicines came from plants and animals, and even today they remain vital. Traditional medicine forms the basis of primary health care for about 80 percent of people in developing countries, more than 3.4 billion people in all.[15] About 20,000 species of plants are used for medicinal purposes

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[12] *Id.* See also Tacconi L., *Biodiversity and Ecological Economics: Participation, Values and Resource Management*, EARTHSCAN (2001) at 14.

[13] *Global Biodiversity Strategy: Guidelines to Save, Study and Use Earth's Biotic Wealth Sustainably and Equitably* in WRI/IUCN/UNEP, 1992 at 1–5.

[14] A wild relative of rice collected in India provided a "resistance gene" that now protects high-yielding rice varieties in South and Southeast Asia from their nemesis, the brown plant-hopper. Plant breeding is to thank for half of the gains in agricultural yields in the United States from 1930 to 1980: an estimated $1 billion annually has been added to the value of US agricultural output by the widened genetic base. A wild tomato, found only in the Galápagos Islands, can grow in seawater and possesses jointless fruitstalks—a trait that has been bred into domesticated tomatoes to make them easy to harvest mechanically; see Glowka L. and Balakrishna P. (eds.), *Access to Genetic Resources and Benefit-Sharing* in IUCN-REGIONAL BIODIVERSITY PROGRAM, Asia (2001) at 11-16.

[15] See, http://www.biodiv.org/doc/publications/guide.asp?id=changing, visited on 27th March, 2005.

in these countries. More than 5,100 species are used in Chinese traditional medicine alone, and people in northwestern Amazonia have tapped some 2,000 species. Traditional medicine is now encouraged by the World Health Organization, and in many countries—including industrialized countries—its use is expanding rapidly. Nearly 2,500 plant species in India have been used for medicinal purposes and the demand for drug plant material has tripled in the last decade.[16]

Traditional indigenous system of medicine in India has relied heavily on the rich biodiversity of the region. Three traditional systems of medicine are widely prevalent in the country - *Ayurveda, Siddha and Unani*. The *Ayurvedic* system subscribes to the view that there is no plant on the Earth which is not a medicine. The story goes that Brahma ordered the sage Jivaka to find a tree or a herb which had no medicinal property. Jivaka wandered for eleven long years in search of such a plant but could not find one. When he returned and informed Brahma of his failure, much to his surprise Brahma recognized him as a great physician! *Ayurveda* has given to the world the drug reserpine used as a tranquilizer and for the treatment of hypertension, anxiety and schizophrenia. Reserpine is extracted from the forest shrub *Rauvolfia serpentine*. As for modern pharmaceuticals, one-fourth of all prescriptions dispensed in India contain active ingredients extracted from plants, and over 3,000 antibiotics—including penicillin and tetracycline—are derived from microorganisms. Cyclosporine, developed from a soil fungus, revolutionized heart and kidney transplant surgery by suppressing the immune reaction. Aspirin from the plant *Filipendula ulmaria* and quinine from the bark of *Cinchona* tree and many other drugs that are now synthesized were first discovered in the wild. In addition, plants contain complex chemical structure which may be impossible to synthesize in a laboratory and which might provide important clues for new medicines. Compounds extracted from plants, microbes, and animals were involved in developing all of the 20 best-selling drugs in United States, drugs whose combined sales approached Rs. 6 billion in 1988.[17]

Biodiversity in India, particularly, is important for its religious, spiritual and other cultural uses. Many plants and animals have ritualistic significance. Among auspicious flowers offered in temples are *Hibiscus* offered to the goddess *Kali* and *Datura* flowers to Siva. In some parts of India such as Gujarat, *Sami* (*Prosopis spicigera*) is used in sacrificial fires. Various plant and animal species are considered sacred on account of their association with

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16 *Ibid.*

17 See http://www.biodiversity.nl/opinion08.htm, visited on 29th March, 2005.

different deities. Some animal species are termed *vahanas* or vehicles of deities and are hence venerated. Important among these are the bull for *Siva*, the rat for *Ganesha* and the lion for *Durga*. Entire ecosystems have also been utilized for cultural and spiritual purposes. Sacred value was attached to patches of forest believed to be the abode of gods and ancestors, and utilized only for prayer and related rituals. A network of such sacred groves is still in evidence in some parts of India.

III. Biodiversity Under Threat

Although extinction is a natural process, there is much evidence that human beings have become a major force in the premature extinction of species. As the human population and resource consumption increase over the next coming years and we take over more and more of the planet's surface and more of the earth's net primary productivity, we may cause the extinction of up to a quarter of the earth's current species.[18] If this happens it will constitute a sixth mass extinction, caused by us.[19]

For thousands of years we have been developing a vast array of domesticated plants and animals important for food. But this treasure house is shrinking as modern commercial agriculture focuses on relatively few crop varieties. And, about 30% of breeds of the main farm animal species are currently at high risk of extinction. When most people think of the dangers besetting the natural world, they think of the threat to other creatures. Declines in the numbers of such charismatic animals as pandas, tigers, elephants, whales, and various species of birds, have drawn world attention to the problem of species at risk. Species have been disappearing at 50-100 times the natural rate, and this is predicted to rise dramatically.[20] Based on current trends, an estimated 34,000 plant and 5,200 animal species - including one in eight of the world's bird species - face extinction.[21] Forests are home too much of the known terrestrial biodiversity, but about 45 per cent of the Earth's original forests are gone, cleared mostly during the past century.[22] Despite some regrowth, the world's total forests are still shrinking rapidly, particularly in the tropics. Up to 10 per cent of coral reefs - among the richest ecosystems - have been destroyed, and one third of the remainder face collapse over the

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18 G. Tyler Miller, Living in the Environment: Principles, Connection and Solution (2002) at 113.

19 *Ibid.*

20 See Web site: http://www.terin.org/biodiv/threats.htm; visited on 22nd April, 2005.

21 *Supra* n. 17.

22 See http://www.biodiv.org/gbo/default.asp, visited on 21st May, 2005.

next 10 to 20 years.[23] Coastal mangroves, a vital nursery habitat for countless species, are also vulnerable, with half already gone.

Further, global atmospheric changes, such as ozone depletion and climate change, only add to the stress. A thinner ozone layer lets more ultraviolet radiation reach the Earth's surface where it damages living tissue. Global warming is already changing habitats and the distribution of species. Scientists warn that even a one-degree increase in the average global temperature, if it comes rapidly, will push many species over the brink. Our food production systems could also be seriously disrupted. The loss of biodiversity often reduces the productivity of ecosystems, thereby shrinking nature's basket of goods and services, from which we constantly draw. It destabilizes ecosystems, and weakens their ability to deal with natural disasters such as floods, droughts, and hurricanes, and with human-caused stresses, such as pollution and climate change. Already, we are spending huge sums in response to flood and storm damage exacerbated by deforestation; such damage is expected to increase due to global warming.

The biodiversity loss also hurts us in other ways. Our cultural identity is deeply rooted in our biological environment. Plants and animals are symbols of our world, preserved in flags, sculptures, and other images that define us and our societies. We draw inspiration just from looking at nature's beauty and power. While loss of species has always occurred as a natural phenomenon, the pace of extinction has accelerated dramatically as a result of human activity. Ecosystems are being fragmented or eliminated, and innumerable species are in decline or already extinct. We are creating the greatest extinction crisis since the natural disaster that wiped out the dinosaurs 65 million years ago. These extinctions are irreversible and, given our dependence on food crops, medicines and other biological resources, pose a threat to our own well-being. It is reckless if not downright dangerous to keep chipping away at our life support system. It is unethical to drive other forms of life to extinction, and thereby deprive present and future generations of options for their survival and development.

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[23] *Ibid.* In the United States, the destruction of estuarine ecosystems between 1954 and 1978 cost over $200 million annually in revenues lost from commercial and sport fisheries alone. Expensive engineering was needed to defend against storms as substitutes for the natural defenses provided by coastal wetlands; see, Oviedo G., Larsen P.B. and Maffi L., INDIGENOUS AND TRADITIONAL PEOPLES OF THE WORLD AND ECOREGION CONSERVATION, (WWF International, 2000) at 11-14.

IV. International Legal Regime

Under the impetus of the Man and Biosphere Conference (UNESCO, 1968), and the Stockholm Conference on the Human Environment, the value of species and ecosystems— and generally the natural environment—became increasingly recognized. The need for cooperation and concerted unilateral action was formally recognized in soft law instruments, starting with the Stockholm Declaration (1972), and followed by the World Charter for Nature (1982) and the Rio Declaration (1992). The negotiation of binding international instruments on specific issues accompanied this process. Four major global conventions were adopted in the period 1972-1992. They are: (i) Convention on Wetlands of International Importance, Ramsar, 1971; (ii) Convention for the Protection of the World Cultural and Natural Heritage, Paris, 1972; (iii) Convention on International Trade in Endangered Species, Washington, 1973; (iv) Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 1979.

In 1987, the World Commission on Environment and Development (the Brundtland Commission) concluded that economic development must become less ecologically destructive.[24] In its landmark report, 'Our Common Future', it said that: "Humanity has the ability to make development sustainable-to ensure that it meets needs of the present without compromising the ability of future generations to meet their own needs".[25] It also called for "a new era of environmentally sound economic development".[26]

A. Convention on Biological Diversity

The Convention on Biological Diversity was adopted in Nairobi on May 22, 1992. Later, on June 5, 1992, at the UN Conference on Environment and Development in Rio de Janeiro, a record number of over 150 States signed it. Approximately 18 months later, on December 29, 1993, the Convention entered into force. The treaty is a landmark in the environment and development field, as it takes for the first time a comprehensive rather than a sectoral approach to conservation of the Earth's biodiversity and sustainable use of biological resources. It recognizes the vital point made in the World Conservation Strategy (1980), Caring for the Earth (1991), the Global Biodiversity Strategy (1992) and many other international documents that both biodiversity and biological resources should be conserved for reasons of ethics, economic benefit and indeed human survival. It implicitly accepts the

[24] World Commission on Environment and Development, Our Common Future (1987) at 92-93.
[25] *Ibid.*
[26] *Ibid.*

telling point that the environmental impact which future generations may most regret about present time is the loss of biodiversity, in part because most of it—for example loss of species—cannot be reversed.

The fact that biological diversity is unevenly distributed around the globe is also recognized in the Convention. The North, biologically poorer, has depleted its biodiversity reserves over time, but such reserves are still found in the biologically sound South. If biodiversity is to be conserved, this imposes a heavier burden on the South, at a time when the use of biological resources is of paramount importance for developing countries in achieving development. The Convention recognizes that this burden, in turn, can only be alleviated by additional contributions (not only financial) from the industrialized North and through increased partnership between both developed and developing countries. The Convention on Biological Diversity affirms that conservation of biodiversity is a common concern of humankind and reaffirms that nations have sovereign rights over their own biological resources.[27] The treaty states as major objectives the conservation of biological diversity and sustainable use of its components; fair and equitable sharing of the benefits arising out from the use of genetic resources; and appropriate transfer of relevant technologies. The agreement covers all ecosystems, species, and genetic resources. It links traditional conservation efforts to the economic goal of using biological resources sustainably. It sets principles for the fair and equitable sharing of the benefits arising from the use of genetic resources, notably those destined for commercial use.[28] It also covers the rapidly expanding field of biotechnology, addressing technology development and transfer, benefit-sharing and biosafety.[29]

The Convention reminds decision-makers that natural resources are not infinite and sets out a new philosophy for the 21st century, that of sustainable use. While past conservation efforts were aimed at protecting particular species and habitats, the Convention recognizes that ecosystems, species and genes must be used for the benefit of human beings. However, this should be done in a way and at a rate that does not lead to the long-term decline of biological diversity. The Convention also offers decision-makers guidance based on the precautionary principle[30] that where there is a threat of significant reduction

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27 Article 3, Convention on Biological Diversity.

28 Article 15, *id.*

29 Article 19, *id.*

30 Principal 15 of Rio Declaration contains Precautionary Principal as follows: "In order to protect the environment, the precautionary approach shall be ideally applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measure to prevent environmental degradation.

or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.

The Convention as an international treaty, identifies a common problem, sets overall goals and policies and general obligations, and organizes technical and financial cooperation.[31] However, the responsibility for achieving its goals rests largely with the countries themselves. Private companies, landowners, fishermen, and farmers take most of the actions that affect biodiversity. Governments need to provide the critical role of leadership, particularly by setting rules that guide the use of natural resources, and by protecting biodiversity where they have direct control over the land and water. Under the Convention, governments undertake to conserve and sustainably use biodiversity. They are required to develop national biodiversity strategies and action plans, and to integrate these into broader national plans for environment and development. This is particularly important for such sectors as forestry, agriculture, fisheries, energy, transportation and urban planning. The conservation of each country's biological diversity can be achieved in various ways. "In-situ" conservation - the primary means of conservation - focuses on conserving genes, species, and ecosystems in their natural surroundings, for example by establishing protected areas, rehabilitating degraded ecosystems, and adopting legislation to protect threatened species.[32] "Ex-situ" conservation uses zoos, botanical gardens and gene banks to conserve species.[33] Promoting the sustainable use of biodiversity will be of growing importance for maintaining biodiversity in the years and decades to come. Under the Convention, the "ecosystem approach to the conservation and sustainable use of biodiversity" is being used as a framework for action, in which all the goods and services provided by the biodiversity in ecosystems are considered. The Convention is promoting activities to ensure that everyone benefits from such goods and services in an equitable way.

Other treaty commitments include: identifying and monitoring the important components of biological diversity that need to be conserved and used sustainably; respecting, preserving and maintaining traditional knowledge of the sustainable use of biological diversity with the involvement of indigenous peoples and local communities; preventing the introduction of, controlling and eradicating alien species that could threaten ecosystems, habitats or species; controlling the risks posed by organisms modified by biotechnology; promoting public participation, particularly when it comes to

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[31] Article 20, U.N. Convention on Biological Diversity.

[32] Article 8, *id.*

[33] Article 9, *id.*

assessing the environmental impacts of development projects that threaten biodiversity; educating people and raising awareness about the importance of bio diversity and the need to conserve it; reporting on how each country is meeting its biodiversity goals. Importantly, the Convention is legally binding; countries that join it are obliged to implement its provisions.

B. The Biosafety Protocol

The Biosafety Protocol is an agreement which is designed to regulate international trade, handling and uses of any Living Modified Organisms (LMOs) 'that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health'.[34] LMOs — often known as genetically modified organisms (GMOs) — form the basis of a range of products and agricultural commodities. Common LMOs include agricultural crops that have been genetically modified for greater productivity or for resistance to pests or diseases. Processed products containing dead modified organisms or non-living modified organisms components include certain vaccines, drugs, food additives and many processed, canned, and preserved foods.[35] They can also include corn and soybean derivatives used in many foods and nonfoods, cornstarch used for cardboard and adhesives, fuel ethanol for gasoline, vitamins, and yeast-based foods such as beer and bread.[36]

Biotechnology is being promoted as a better way to grow crops and produce medicines, but it has raised concerns about potential side effects on human health and the environment, including risks to biodiversity.[37] In some countries, genetically altered agricultural products have been sold without much debate, while in others, there have been vocal protests against their use, particularly when they are sold without being identified as genetically modified.[38] Further, Article 19(3) of the Convention requires consideration

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[34] Article 1, Cartagena Protocol on Biosafety.

[35] See http://www.biodiv.org /biosafety/faqs.asp, visited on 29th March, 2005.

[36] *Ibid.*

[37] In recent years, advances in biotechnology techniques have enabled us to cross the species barrier by transferring genes from one species to another. We now have transgenic plants, such as tomatoes and strawberries that have been modified using a gene from a cold water fish to protect the plants from frost. Some varieties of potato and corn have received genes from a bacterium that enables them to produce their own insecticide, thus reducing the need to spray chemical insecticides. Other plants have been modified to tolerate herbicides sprayed to kill weeds, see Spinney L., BIOTECHNOLOGY IN CROPS: ISSUES FOR THE DEVELOPING WORLD, a Report compiled for Oxfam Great Britain (May 1998).

[38] See www.Oxfam.org.uk/policy/papers/gmfoods/gmfoods.htm, visited on 4th April, 2005.

to be given to a protocol on the safe transfer, handling and use of any LMO resulting from biotechnology that may have an adverse effect on the conservation and sustainable use of biodiversity.

In response to these concerns, governments negotiated a subsidiary agreement to the Convention on Biodiversity to address the potential risks posed by cross-border trade and accidental releases of LMOs. Adopted in January 2000, the Cartagena Protocol on Biosafety allows governments to signal whether or not they are willing to accept imports of agricultural commodities that include LMOs by communicating their decision to the world community via a Biosafety Clearing House, a mechanism set up to facilitate the exchange of information on and experience with LMOs.[39] In addition, commodities that may contain LMOs are to be clearly labeled as such when being exported.[40] Under the protocol stricter Advanced Informed Agreement (AIA) procedures will apply to seeds, live fish, and other LMOs that are to be intentionally introduced into the environment.[41] In these cases, the exporter must provide detailed information to each importing country in advance of the first shipment, and the importer must then authorize the shipment. The aim is to ensure that recipient countries have both the opportunity and the capacity to assess risks involving the products of modern biotechnology. The Protocol will enter into force after 50 governments have ratified it.[42] This is the first Protocol under the Convention on Biological Diversity. Other protocols may be introduced as implementation efforts proceed.

IV. IMPLEMENTATION PROCESS

The main thrust of implementation is at the national level. Each Party has much to do, considering the spectrum of actions Parties have to undertake and the wide range of policies they have to review. The success of national action, seen from a global perspective, will depend on the will of both the developed and developing country parties to meet their obligations.[43] The level of implementation and enforcement will be the ultimate test of whether the compromise achieved during the Convention negotiation was a true success

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[39] Article 20, Cartagena Protocol on Biosafety, see also Burhenne Guilmin F., *The Biosafety Protocol is Adopted in Montreal* in ENVIRONMENTAL POLICY AND LAW, 2000 at 4.

[40] Article 18, *id.*

[41] Articles 7-10, *id.*

[42] Article 37, *id.*

[43] Glowka L., Burhenne-Guilmin F. and Synge H., in collaboration with McNeely J. and Guendling L., A GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY, IUCN (1994) at 2.

or an illusion.[44] At the international level, the machinery provided for in the Convention to steer and assist its implementation has to be set in motion.

The Convention has created a global forum-actually a series of meetings- where governments, non-governmental organizations, academicians, the private sector, and other interested groups or individuals share ideas and compare strategies. The Convention's ultimate authority is the Conference of the Parties (COP), consisting of all governments (and regional economic integration organizations) that have ratified the treaty.[45] This governing body reviews progress under the Convention, identifies new priorities, and sets work plans for members. The COP can also make amendments to the Convention, create expert advisory bodies, review progress reports by member nations, and collaborate with other international organizations and agreements.[46] The COP can rely on expertise and support from several other bodies that are established by the Convention:[47]

(a) The Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA). The SBSTTA is a committee composed of experts from member governments competent in relevant fields. It plays a key role in making recommendations to the COP on scientific and technical issues.

(b) The Clearing House Mechanism. This Internet-based network promotes technical and scientific cooperation and the exchange of information.

(c) The Secretariat. Based in Montreal, it is linked to United Nations Environment Programme. Its main functions are to organize meetings, draft documents, assist member governments in the implementation of the programme of work, coordinate with other international organizations, and collect and disseminate information. In addition, the COP establishes ad-hoc committees or mechanisms as it sees fit. For example, it created a Working Group on Biosafety that met from 1996 to 1999 and a Working Group on the knowledge of indigenous and local communities.

The COP has launched a number of thematic programmes covering the biodiversity of inland waters, forests, marine and coastal areas, drylands, and agricultural lands. Cross-cutting issues are also addressed on matters such as the control of alien invasive species, strengthening the capacity of member countries in taxonomy, and the development of indicators of biodiversity loss.

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[44] *Ibid.*

[45] Article 23, U.N. Convention on Biological Diversity.

[46] *Ibid.*

[47] *Ibid.*

The Convention's members regularly share ideas on best practices and policies for the conservation and sustainable use of biodiversity with an ecosystem approach. They look at how to deal with biodiversity concerns during development planning, how to promote transboundary cooperation, and how to involve indigenous peoples and local communities in ecosystem management. In both the interim and operational phase, it is important to draw from available expertise, as well as to build on existing activities. A number of international governmental and nongovermental organizations have worked on biodiversity issues for decades and it is essential to harness their knowledge and expertise in support of the implementation process. UNEP, FAO, UNESCO, and IUCN have much to contribute, as have the World Resources Institute (WRI) and other international organizations with a sectoral focus.[48] Initiatives such as the 'Global Biodiversity Strategy' will enable Parties to make implementation decisions with the best background information to hand. Of equal importance is to link these implementation efforts to existing programs, including those which are emerging from the implementation of Agenda 21, such as the UNDP-sponsored Capacity 21. These initiatives should not simply exist parallel to the implementation of the Convention, but should play an integral part in the process and vice versa.

In the same vein, the relationship between the Convention on Biological Diversity and other conventions in the field should be reconsidered and links established to enable effective cooperation and coordination. The original reason for promoting a convention on biological diversity—to fill in the gaps of the existing fragmentary regime while building upon the existing conventions—should not be lost from sight at this stage. There are a considerable number of global and regional instruments directly relevant to biodiversity and both their achievements and potential must be taken into account and integrated to the maximum extent possible in the process of implementation. The problems inherent in trying to effectively link existing treaties in a particular field are difficult. Imaginative steps are required if the overall goal of the Convention, which is to lead to a truly comprehensive and integrated regime, is to be realized.

When the Convention was adopted, developing countries emphasized that their ability to take national actions to achieve global biodiversity benefits would depend on financial and technical assistance. Thus, bilateral and multilateral support for capacity building and for investing in projects and programmes is essential for enabling developing countries to meet the Convention's objectives. Convention-related activities by developing countries

[48] *Supra* n. 43.

are eligible for support from the financial mechanism of the Convention i.e. the Global Environment Facility (GEF). GEF projects, supported by the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the World Bank, help forge international cooperation and finance actions to address four critical threats to the global environment: biodiversity loss, climate change, depletion of the ozone layer and degradation of international waters. By the end of 2000, the GEF had contributed nearly $ 1 billion for biodiversity projects in more than 120 countries.[49]

Finally, at both the national and international level, nongovermental organizations have an important role to play in the implementation of Convention. This was specifically recognized in preambular paragraph 14 which stresses "the importance of ... the nongovermental sector for the conservation of biological diversity and the sustainable use of its components." The growth of NGO interest for the Convention, in both developed and developing countries, bodes well for the convention's implementation, and it is to be hoped that Parties will take full advantage of the knowledge, skills and commitment of NGOs in their country, as well as regionally and globally, to help them implement the Convention.

V. India's Commitment

The Biological Diversity Act has been passed by the Indian Parliament in 2002 to preserve biological wealth of the country. The Act was formulated after India became signatory to the Convention on Biological Diversity. The draft legislation was developed through an intensive consultation process involving all stakeholders such as the Central Government, State Governments, institutions of local self-government, scientific and technical institutions, experts, non-governmental organizations, industry, etc.[50] The Act responds to a number of new, emerging concerns: firstly, the result of new developments in technology, in particular, biotechnology and information technology, and, secondly, the ongoing degradation of the environment, inevitably accompanied by an erosion of biological diversity.

Like the CBD, the Biological Diversity Act, 2002 aims to achieve three things: conservation of biodiversity, sustainable use of biological resources, and equitable sharing of benefits arising from such use. To achieve these, the Act contains several important clauses which provide, *inter alia*: (i) prohibits

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[49] See http://www.bnhs.org/bio/documents/biodiversity.pdf, visited on 21st February, 2005.

[50] Anon., Publication of the Biological Diversity Act, 2002 No. 18 of 2003 (Ministry of Law and Justice, Govt. of India, New Delhi, 2003).

transfer of Indian genetic material outside the country, without specific approval of the Indian Government through a due process; (ii) stipulates that anyone wanting to take a patent or other intellectual property right (IPR) over such material, or over related knowledge, will have to seek permission in advance; (iii) provides for the levying of appropriate fees and royalties on such transfers and IPRs; (iv) regulates access to such material by Indian nationals also, to ensure that there is some control over over-exploitation (e.g. of medicinal plants), and that there is some sharing of benefits to all concerned parties; however, it provides some relaxation in the case of research; (v) provides for measures to conserve and sustainably use biological resources, including habitat and species protection, conservation in gene banks, environmental impact assessments of all projects which could harm biodiversity, and so on; (vi) empowers local communities to have a say in the use of resources and knowledge within their jurisdiction, and to enter into negotiations with parties who want to use these resources and knowledge; (vii) provides for the development of an appropriate legislation or administrative steps, including registration, to protect indigenous and community knowledge; (viii) empowers governments to declare Biodiversity Heritage Sites, as areas for special measures for conservation and sustainable use of biological resources, as also notify threatened species to control their collection and use; (ix) stipulates that risks associated with biotechnology (including the use of genetically modified organisms), will be regulated or controlled through appropriate means.

The Ministry of Environment and Forests has notified the Biological Diversity Rules in April, 2004 as part of implementation process of the Biological Diversity Act, 2004. This law essentially provides for a system to regulate access, use and benefit sharing vis-à-vis biological resources. Following this, as envisaged in the Act, a National Biodiversity Authority has been set up in Chennai. The process of setting up of State Biodiversity Boards is already underway in many states governments.

VI. Conclusions

It is the combination of life forms and their interactions with each other and with the rest of the environment that has made Earth a uniquely habitable place for human beings. Biodiversity provides a large number of goods and services that sustain our lives. By consuming ever more of nature's resources, we have gained more abundant food and better shelter, sanitation, and health care, but these gains are often accompanied by increasing environmental degradation that may be followed by declines in local economies and the societies they supported. Economic development is essential to meeting human

needs and to eliminating the poverty that affects so many people around the world. The sustainable use of nature is essential for the long-term success of development strategies. A major challenge for the 21st century will be making the conservation and sustainable use of biodiversity a compelling basis for development policies, business decisions, and consumer desires.[51]

The Convention on Biological Diversity and its underlying concepts can be difficult to communicate to politicians and to the general public.[52] Nearly a decade after the Convention first acknowledged the lack of information and knowledge regarding biological diversity; it remains an issue that few people understand. There is little public discussion of how to make sustainable use of biodiversity part of economic development. The greatest crunch in sustainable development decisions is the short-versus the long-term time frame. Sadly, it often still pays to exploit the environment now by harvesting as much as possible and as fast as possible because economic rules do little to protect long-term interests. Truly, sustainable development requires countries to redefine their policies on land use, food, water, energy, employment, development, conservation, economics, and trade. Biodiversity protection and sustainable use requires the participation of ministries responsible for such areas as agriculture, forestry, fisheries, energy, tourism, trade and finance. The challenge facing governments, businesses, and citizens is to forge transition strategies leading to long-term sustainable development. It means negotiating trade-offs even as people are clamoring for more land and businesses are pressing for concessions to expand their harvests. The longer we wait the fewer options we will have.

In addition, many endangered species survive in zoos and botanical gardens, and key ecosystems are preserved through the adoption of protective measures. However, these are stopgap actions. The long-term viability of species and ecosystems depends on their being free to evolve in natural conditions. This means how to use biological resources in a way that minimizes their depletion. The challenge is to find economic policies that motivate conservation and sustainable use by creating financial incentives for those who would otherwise over-use or damage the resource. Can we save the world's ecosystems, and with them the species we value and the other millions of species, some of which may produce the foods and medicines of tomorrow? The answer will lie in our ability to bring our demands into line with nature's ability to produce what we need and to safely absorb what we throw away.

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[51] See http://www.biodiv.org/doc/publications/guide.asp?id, visited on 4th April, 2005.
[52] *Ibid.*

DESIRABILITY OF THE INSTITUTION OF OMBUDSMAN IN A MODERN DEMOCRATIC SET UP

*Sarbjit Kaur**

Any good system of administration, in the ultimate analysis, has to be responsible and responsive to the people. But history bears witness to the fact that more often, the impersonal bureaucratic system advertently or inadvertently tries to overwhelm the 'little man'. With the proliferation of administrative agencies affecting the life of a citizen in every conceivable aspect, the chances of administrative faults violating the rights of a person, property and liberty have tremendously increased. This has led to the never-ending search for an efficacious mechanism that can protect a person from administrative faults. The search has produced the idea of 'Ombudsman', which in terms of utility means a 'watchdog of the administration' or 'the protector of a little man'. This institution was first developed in Sweden in 1809 and soon became a cherished importable commodity the world over. It is a unique institution, which leads to an 'open government' by providing a democratic control mechanism over the powers of the State. Its main catch is its apparent effectiveness despite minimal coercive capabilities. It has its own role to play by bringing 'renaissance' and 'humanism' in the working of modern governments which have tended to develop an attitude to look to the paper rather than the person behind it.[1]

I. Meaning, Object and Main Characteristics of the Ombudsman

Ombudsman is Scandinavian word. It is taken to mean officer or commissioner. In its special sense, it is taken to mean a commissioner who has the duty of investigating and reporting to Parliament on citizens' complaints against the government. An Ombudsman acquires no legal powers except power of inquiry. In particular, he is in no sense a Court of Appeal and he cannot alter or reverse any government decision. His effectiveness derives entirely from his power to focus public and parliamentary attention upon citizens' grievances.[2]

In simple words, the Ombudsman is an Officer of Parliament whose main function is to investigate the complaints and allegations against the

* Lecturer, Law Centre-I, Faculty of Law, University of Delhi, Delhi-110007.

1 I.P. Massey, Administrative Law (6th ed., 2005) at 458.

2 Wade, Administrative Law (7th ed., 1994) at 81.

administration. The main object of the Ombudsman is to control the administration and thus give protection to the citizens against injustice brought about by faulty administration. The Ombudsman is closely concerned with the correct functioning of the administrative machine. His function is to locate 'mal-administration' or faults in the administration. He does not upset an administrative decision in the absence of an element of mal-administration even though he takes a different view of a decision on merits from what the administration has taken.[3]

In the words of Prof. S.K. Agarwala[4] the term 'Ombudsman' refers only to institutions which have three basic and unique characteristics:

(a) The Ombudsman is an independent and non-partisan officer of the legislature who supervises the administration;

(b) He deals with specific complaints from the public against administrative injustice and mal-administration. The Ombudsman may proceed on his own information in the similar circumstances.

(c) He has the power to investigate, criticise and report back to the legislature, but not to reverse administrative action.

No court fees are payable for filing a complaint with the Ombudsman; no lawyer need be engaged because the Ombudsman himself is the complainants' lawyer. A probe by him into administrative functioning does not involve much publicity; he works silently and discreetly and the administration gets a chance of rectifying its mistakes.

II. Need and Importance of the Ombudsman

In modern times, two tendencies have become manifest in all democratic countries. One, the administration enjoys a vast reservoir of powers to order and affect the daily lives of the people over a wide canvas. Two, a feeling has arisen in the public mind that vesting of such vast powers in the administration has generated possibilities and opportunities of abuse or misuse of power by administrative functionaries resulting in mal-administration and corruption. In the flush of power, the administration very often exhibits a tendency to disregard individual rights and interests in the name of public good. As Wheare[5] observes "It is not eccentric to conclude that if there is more administration, there will be more mal-administration." The greater the power given to the executive, the greater the need to

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3 Jain & Jain, Principles of Administrative Law (4th ed., Reprint 1993) at 918.

4 S.K. Agarwal, The Proposed Indian Ombudsman (1971) at XVI.

5 Wheare, Maladministration and Its Remedies (1973) at 3.

safeguard the citizen against its arbitrary or unfair exercise. Therefore, an urgent problem of the day is to evolve an adequate and effective mechanism to contain these dangers by controlling the administration in exercising its powers, safeguarding individual rights, and creating procedures for redressal of individual grievances against the administration.

In the common-law world, the courts have traditionally exercised control over administrative action. However, judicial control of administrative action is not perfect. While exercising power of judicial review over administrative actions, the courts play only a peripheral role. The courts do not provide for a review in depth of the entire administrative field. By and large judicial review at present does not comprehend the merits of administrative decisions. The courts do not substitute their discretion for that of the official on whom the power is conferred by law.[6]

Besides, the efficacy of judicial review of administrative action is also diluted by several other significant restrictive factors, *e.g.* a number of aspects of administrative functioning fall outside the judicial purview; the legislature does not often lay down articulately the norms and guidelines for exercising the vast powers which are conferred on the administration; failure of the legislature to lay down procedures which the administration must follow while exercising its powers *etc.* The courts may compel the exercise of power by an administrative authority if it is mandatory for it to act, but not when the power is merely enabling or permissive, howsoever harmful its non-exercise may be to an individual. The courts have set before themselves the limited task of overseeing that the administration functions according to law. The courts can therefore quash administrative action on such grounds as *ultra vires, mala fides*, exercise of power for an improper purpose, or on irrelevant or extraneous considerations, or after failing to take into account relevant considerations or when there is a patent error of law. But even in the available limited area of judicial review, it is not always easy to get the relief sought and have the administrative action quashed.[7] The burden of establishing the case lies on the person who alleges the abuse of power. To prove *mala fides*, improper purpose, *etc.*, is not an easy task specially in cases where the government claims privileges to withhold the documents.

Moreover, the administration is not obligated to give reasons for its decisions unless it is obviously required under the statute or the nature of the case is such which warrants the application of natural justice. Although

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6 *Supra* n. 3 at 912-13.

7 *Ibid.*

is recent years judicial trend is developing to insist on giving reasons.[8] Yet it is not possible in every kind of administrative functions. The result of the present situation in actual practice is that out of a large number of cases which are filed in the court against the administration, it is only in a very few cases that the courts are able to give relief and a large number of public grievance against the administration thus go unnoticed.[9] The judicial control of administration is helpful to the extent it is available, but the point to note is that judicial review does not go far enough and does not cover many facets of the working of the administration. Further, judicial proceedings are dilatory, formal, time-consuming, costly and lawyers have to be engaged to prosecute individual grievances and this makes it beyond the resources of common men to seek judicial redress of the grievances against the administration.

Besides the judicial control, the system of in-built control in the administration to set right its lapses and faults, is not satisfactory and adequate. There is generally an official bias towards maintaining and supporting original decisions of the lower echelons of administration and higher or superior authority hardly looks into the complaints of the citizens seriously. This leaves the grievances unattended and unremedied.

Then there is legislature whose traditional function in a democracy is to oversee the administration. But nowadays instead of the legislature controlling the executive, in practice, it is the executive which largely controls the legislature. The legislature is always faced with paucity of time and pressure at work. It is a busy body and is usually engaged in discussing policy matters and proposals for legislation and taxation. A number of Bills always remain pending before the legislature for enactment. The legislative procedures are such that there is not much room for ventilating individual grievances on the floor of the House. The legislature has no mechanism at its disposal to probe into administrative faults and lapses in individual cases. Raising of a matter in the legislature soon acquires political overtones, receives a lot of publicity, and may even become a matter of confidence in the government, and consequently, redressal of individual grievances through the legislature becomes a far cry.[10]

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[8] See *Government Branch Press* v. *D.B. Belliappa*, AIR 1979 SC 429; *Waryam Das* v. *Madhya Pradesh*, AIR 1972 SC 2086; *Uttar Pradesh* v. *Lalai Singh*, AIR 1977 SC 202; *Raja Mallaiah* v. *Anil Kishore*, AIR 1980 SC 1502.

[9] *Supra* n. 3 at 915.

[10] *Id.* at 916.

From the above discussion, it becomes clear that the traditional organs in a democracy do not provide an adequate and effective control mechanism over the administration. It has, therefore, been felt that some independent institution outside administrative hierarchy, should be established to detect and check administrative lapses and faults and to ventilate the grievances of people so that the rights of the individuals are not unduly transgressed and appropriate relief is provided to them. In these circumstances, the quest for an effective control-mechanism over the administration led to the establishment of the institution of Ombudsman. The institution has been adopted in a number of countries with the basic idea to control effectively the activities of, and prevent abuses by, public officials after it came to be realised that the existing procedures and mechanism for the purpose were hardly adequate and efficacious.

The Ombudsman is in a very strong position to redress individual grievances arising out of bad administration. A major difficulty in the present dispensation for getting relief against the administration through the courts is the difficulty of obtaining sufficient evidence of the impropriety committed by it. The important point of the Ombudsman is that he has access to departmental files. On a complaint being made to him against the administration, the Ombudsman satisfies himself by looking into the relevant papers whether there was any fault or lapse on the part of administration. The complainant is not required to lead any evidence, or to prove his case, before the Ombudsman. It is for the Ombudsman to find out whether the complaint is justified or unjustified.[11]

The Ombudsman has a 'frontier' with the law; in some aspects an 'overlap'; but his criteria for judging mal-administration or injustice are not co-extensive with those of law courts. The Ombudsman can thus deal with many facets of administrative action with which the courts may not concern themselves, *e.g.* the Ombudsman can give relief to the individual for delay in administrative action, or when the complainant has not received any answer to his communication from a department, or when he complains of departmental bias in making a decision and so on.[12] The proceedings of the Ombudsman are not formalised or routinised and do not take long to be completed. The essence of the Ombudsman's technique is to receive the complaint informally, to enter the government department, to speak to the officials and read the files and to find out exactly who did what and why.

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[11] *Id.* at 917.
[12] *Id.* at 918.

No formal procedure is involved at any stage. Therefore, the action taken by him is fast and inexpensive.

The role of the Ombudsman is not only curative but also preventive. He not only gives relief to the aggrieved party in certain situations, but also induces more care in the administration while taking decisions, and, thus, many potential grievances are eliminated and rights of the people are protected and preserved from infringement. The Ombudsman also helps in gradually improving administrative procedures by making recommendations for modifying these procedures.[13] The Ombudsman thus can help in developing by his observations and suggestions a body of principles of administrative due process. His functioning leads to setting and maintaining standards of good administration for government departments which he does from case to case. Wade[14] has rightly observed that the consciousness of the Ombudsman's vigilance has a healthy effect on the whole administration making it more sensitive to public opinion and to the demands of fairness.

III. Origin and Development of The Ombudsman

The institution of Ombudsman first came into operation in the Scandinavian countries. Sweden was the first country to adopt this institution as early as in 1809; Finland adopted it in 1919; Denmark in 1953; and Norway in 1963. Amongst the common law countries, with a parliamentary form of government, New Zealand was the first country to opt for the Ombudsman system in 1962; next was England which established the system in 1966. In Australia, it has been established at the Centre as well as the States in 1976.

Sweden

In Sweden, the office of Ombudsman was established in 1809. Ombudsman is appointed by the *Riskdag*, the Swedish Parliament, for a four-year-term at a time. A person is selected for this high office mainly for reasons of the high integrity, character and good established reputation. His main duty is to act as an authorised agency of *Riskdag* for maintaining a constant vigil over, and scrutiny for the discharge of administrative and judicial functions by the government and other authorities. He cannot quash or review the administrative decision but can make investigation and recommendations to Parliament, not only against public officials but also against Ministers on complaints made by aggrieved citizens. The function of the Ombudsman is not only to supervise the administration of the laws

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13 *Ibid.*

14 *Supra* n. 2 at 75.

as a representative of the Parliament and to report to the Parliament but also to institute proceeding (in the manner a public prosecutor does) against those officials who have acted contrary to law or with partiality or negligence[15]. He also audits administrative procedure and problems becoming apparent in the course of investigation of complaints of the individuals.

DENMARK

Under the Danish law passed in 1954 the provision was made for the *Folketingets* Commissioner with the looks of an Ombudsman in Sweden. After every general election the *Folketingets*, the Danish Parliament appoints a person with legal qualifications and known for good reputation from among persons who are non-members as the *Folketingets* Commissioner. He holds office at the *pleasure* of the *Folketing*, and occupies his office so long as he enjoys the confidence of that body. The functions of the office of *Folketingets* Commissioner include[16] :

(i) supervision of the civil and military government, and administration;

(ii) keeping a watch over unlawful, arbitrary or unreasonable decisions of the public authorities and abuse, or misuse of powers vested in them; and

(iii) gathering information relating to acts of negligence and mistakes of the civil servants and all other persons including Ministers, but not judges in performance of their official duties.

NEW ZEALAND

In New Zealand, the Ombudsman has been established in 1962 by the Parliamentary Commissioner (Ombudsman) Act, 1962. The Act of 1962 has been replaced by the Ombudsman Act, 1975. By the Act of 1975, the jurisdiction of the Ombudsman has been extended and the provision has been made for the appointment of more than one Ombudsman. The provision has been made for designating one of them as the Chief Ombudsman for allocation of works among them and also for co-ordination among them. In New Zealand, the Ombudsman is appointed by the Governor-General on the recommendation of the House of Representatives. He holds the office for a term of 5 years. He can be reappointed. He can be removed from his office by the Governor-General upon the address from the House of Representatives on the ground of disability, misconduct, neglect of duty, *etc.*

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15 U.P.D. Kesari, ADMINISTRATIVE LAW (15th ed., 2005) at 258.

16 M.C.Jain Kagzi, THE INDIAN ADMINISTRATIVE LAW (6th ed., 2002) at 204.

ENGLAND

In England great interest regarding the establishment of the office of Ombudsman was aroused by the Scandinavian Ombudsman. The "Justice" a British wing of the International Commission of Jurists recommended that it be set up in England. Thus the office of Parliamentary Commissioner was created by the Parliamentary Commissioners Act, 1967. The Parliamentary Commissioner is a permanent appointee with the security of service of a High Court Judge. He is appointed by the Crown on the advice of the Prime Minister. His salary is charged on the Consolidated Fund and he holds office during good behaviour, subject to retiring age of sixty-five. He can only be removed on addresses from both Houses of Parliament. He has power to appoint his own staff subject to the Treasury's approval. Astonishingly, there is no professional lawyer in his staff.

The jurisdiction of the Commissioner extends to the department given in the Second Schedule of the Act. The Third Schedule lays down the departments which are excluded from his jurisdiction. Prominently external relations, crime investigation, judicial proceedings, prerogative of mercy, governmental, contractual and commercial transactions, award of honours, granting of royal charters, national health service, local government, police and personnel matters in armed forces and the civil services are excluded from his jurisdiction.

The jurisdiction of investigation extends to the cases of "injustice in consequence of mal-administration".[17] However, the terms 'injustice' and 'mal-administration' have been deliberately left undefined to make the boundaries of jurisdiction flexible. Nevertheless, 'injustice' includes cases of hardship and a sense of grievance, besides legally redressible damage. Maladministration covers a multitude of administrative faults of commission and omission, corruption, bias, unfair discrimination, harshness, misleading a member of the public as to his rights, failing to notify him properly of his rights or to explain the reasons for a decision, general highhandedness, using power for a wrong purpose, failing to consider relevant material, taking irrelevant material into account, losing or failing to reply to correspondence, delaying unreasonably before making a tax refund or presenting a tax demand or dealing with an application for a grant or licence and so on.[18] The Commissioner is prohibited from investigating an action in respect of which the person has a remedy in a court or tribunal by way of appeal, reference

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17 Section 4, 5(i) and Schedule II of the Parliamentary Commissioners Act, 1967.

18 S.A. de Smith, CONSTITUTIONAL AND ADMINISTRATIVE LAW (3rd ed.) at 618.

or review, unless he is of the opinion that such remedy would not be adequate.

The Commissioner, cannot entertain a complaint directly from a citizen, it must come through a member of the House of Commons. However, in actual practice the Parliamentary Commissioner has been receiving complaints directly from the members of the public too and he has been giving them a certain amount of study.[19] The Commissioner's jurisdiction is confined to faults in the administration as distinguished from question of policy and he has no power to implement his finding. His only function is to report to Parliament and it is for Parliament to decide what action should be taken on his report.

It is interesting to note that even if the Commissioner finds maladministration causing injustice, he cannot order the department to halt or delay or speed up action, to change a decision, to pay money, or to do anything else. He can submit his report after investigation. But this does not mean that complainants do not get their injustices remedied. In the first place, the Commissioner will expect the department to find a remedy for the complaint. Where the department expresses inability to find the remedy, he will ask them to think again, or if he thinks that the proposed remedy is inadequate, he will say so. Secondly, the Commissioner's report of his investigation goes to the principal officer of the department – the senior civil servant. It is his responsibility to see that his department is properly run. He will be concerned about the existence of mal-administration in his department and should ordinarily welcome an opportunity to put things right. Thirdly, the Commissioner reports to Parliament which will hold the Minister responsible for what he does and what his department does.[20] All these measures put pressure on the departments to accept the recommendations of the Ombudsman.

AUSTRALIA

In Australia, two tier Ombudsman system has been adopted. There is Ombudsman system at the Centre and each State has separate Ombudsman. The Commonwealth Ombudsman system has been established in Australia by Ombudsman Act, 1976 which has been amended several times. The Ombudsman system in Australia consists of a Commonwealth Ombudsman, three Deputy Commonwealth Ombudsmen and a Defence Force Ombudsman. The Ombudsman holds office for seven years. He is eligible

19 *Supra* n.15 at 261.

20 Foulkes, INTRODUCTION TO ADMINISTRATIVE LAW (4th ed.) at 291.

for being reappointed. He retires at the age of 65 years. He is appointed by the Governor-General. He can be removed from his office on an address by the two Houses of Parliament requesting his removal on the ground of physical or mental incapacity or misbehaviour. He has been empowered to investigate complaints against the actions of several major government departments. He can investigate on complaint made by a person or *suo motu* with a matter of administration taken by the department. Taking of action includes failure or refusal to take action. It is to be noted that he can investigate into an action taken by a delegate of a Minister but cannot investigate into an action taken by a Minister. The provision has been made for resolving the doubt about the power or jurisdiction of the Ombudsman by the court. The Ombudsman and the department concerned can refer it to the Federal Court for determination[21].

THE UNITED STATES OF AMERICA

In the United States of America the reception of the idea of an Ombudsman has encountered strong constitutional and other practical difficulties. Because of the established constitutional position originally founded on the doctrine of separation of powers, the idea of accountability of the administration to Congress is opposed to the known constitutional jurisprudence of the country. Since, 1963 in every session of the Congress a Bill has been introduced to establish an institution akin to the Ombudsman, but it never did become an Act. However, the congressional investigations and grievance cells established in various departments like the police review Boards, discharge the work of the Ombudsman.[22]

IV. LOKPAL: THE PROPOSED OMBUDSMAN IN INDIA

In India the desirability of the establishment of the Ombudsman-type institutions has repeatedly been stressed[23], although the Central and State Governments have not been very receptive of the idea of their adoption.

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21 Paras Diwan, ADMINISTRATIVE LAW (3rd ed., 2004) at 274-75.

22 Gellhorn, WHEN AMERICAN COMPLAIN (1966).

23 M.P. Jain, LOKPAL – OMBUDSMAN IN INDIA (1969); Jagannadham and Makhija, CITIZEN, ADMINISTRATIVE AND LOKPAL (1969); S.K. Agarwala, THE PROPOSED INDIAN OMBUDSMAN (1971); S.P. Sathe, *Lokpal and Lokayukta: The Indian Ombudsman*, 38 JOURNAL OF UNIVERSITY OF BOMBAY (1969) at 265; Donald C. Rawat, *The Proposed Ombudsman System for India*, 5 JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES (1971) at 284; R.L. Narsimhan, *The Indian Ombudsman Proposal – A Critique*, LAW AND COMMONWEALTH (1971) at 27.

The proposals have been frequently made in this respect at various levels. The Administrative Reforms Commission was appointed on January 5, 1966 by the President of India to consider the problems of citizens' grievances. The Commission surveyed the existing remedial methods for redressal of the citizens' grievances and allegations in connection with administrative corruption, mal-administration, delinquencies, lapses, failures, improprieties, and lack of desired standards of administrative probity, propriety and efficiency. The Commission[24] noted the widely prevalent corruption in the administration and administrative ineffficiency and unresponsiveness to the public. It treated the problem at two levels: (i) lapses and improprieties committed by the Ministers and their immediate subordinates, that is, Secretaries to the government and his aides; and (ii) the delinquencies committed by the lower administrative authorities and public servants. It classed the Ministers and the Secretaries together as they were functionally inter-dependent and confidents of one another. A Minister would bear the political responsibility; and his Departmental Secretary would carry the administrative responsibilities. Accordingly, the Commission recommended the appointment of two Ombudsmen, namely, *Lokpal* and *Lokayukta*, the *Lokpal* was recommended to be appointed by the President on the advice of the Prime Minister. The latter was intended to select a person for the appointment in consultation with the Chief Justice of India and the leader of Opposition in the Lok Sabha. The *Lokpal* would be easily accessible and demonstrably independent of the official pulls and pressures, and would be impartial. He would have jurisdiction and power to investigate the complaints against the Ministers and the Secretaries. The subject matter of a complaint could be an act done by, or with the approval of a Minister or a Secretary falling within the purview of the Union. An act would include failure to do an act. A complaint could raise the issue of matters of mal-administration, corrupt practice, favouritism, nepotism, personal benefits, abuse of political influence and official discretion, except certain specified categories of matters, *e.g.*, action in respect of contracts, services, *etc.* Unless a complainant was a person who did not suffer any injustice at all, or else the complaint was vexatious or otherwise not worth investigation, the *Lokpal* would inquire into it. He would communicate the substance of the complaint to the concerned Minister, or the Secretary, as might be the case; and would invite comments on it. He would ask for rectification of the faulty administrative action in the case. If no rectification was made, he could suggest appropriate remedial action. In the event of non-response, non-

[24] See Administrative Reforms Commission, INTERIM REPORT ON PROBLEM OF REDRESS OF CITIZENS' GRIEVANCES (1966).

cooperation and indifference to his advice he could report the matter to State Chief Minister. He could also mention it in a report submitted to the Parliament, or the appropriate State Legislature. The proceedings were intended to be conducted *in camera*. They would be informal, orderly and simple. The *Lokpal* would have power to call witnesses, inspect official records, papers and documents. He would communicate the findings to the complainant.

The *Lokayukta* would bear the looks of the *Lokpal*. He would work independently and effectively; and his office and investigation wings would function autonomously. He would investigate the complaints in respect of the official acts of the administrative authorities in general, and afford redress of individual grievances arising in the course of day-to-day administration. Besides the *Lokayukta* for the Union; each State could have a *Lokayukta*.

The recommendations of the Commission were widely commented upon. The proposal for the Ombudsman was largely welcomed and tentatively accepted by both, the Government of India and certain State Governments. A Draft Bill was appended to the Interim Report of the Administrative Reforms Commission. In 1968, a Bill[25] called the *Lokpal* and *Lokayukta* Bill was introduced in the Lok Sabha, under which the *Lokpal* and *Lokayukta* would jointly make one single two-tier system. The *Lokpal* was intended to have a five years term with a provision for a second term. He would not be a member of any House of Parliament, and would hold no other office of profit or trust; and would be totally ineligible for any post-retirement employment or appointment. He would draw salary and allowances equal to the Chief Justice of India. He would be irremovable, except on the ground of misconduct in the manner of a judge of the Supreme Court. The complaint against Ministers and Secretaries could be entertained at any time within five years of the alleged cause. He would have jurisdiction over matters falling within the purview of the Union agencies. He would communicate with the Minister or the other competent authority in the course of his work. The government would be required to make a reply intimating him of the action taken in any matter within three months. The *Lokpal* would be given free access to the official record for relevant evidence in connection with investigation in a Minister's conduct, except the proceedings of the Cabinet and the Cabinet Sub-Committees.

The *Lokayukta* would also be appointed by the government in consultation with the *Lokpal*; and would be afforded the service conditions available to a judge of the Supreme Court. In other respect he would imitate

[25] Bill No. 51 of 1968.

the position of the *Lokpal*. He would look into complaints against the public servants. He would hear complaints in respect of administrative failures and involuntary injustice likely to be caused by official misdemeanour or culpable practice. He would also entertain and investigate into allegations of graft and sharp practices of the errant public servants. He would be able to communicate with the competent authority with a copy to the concerned public servant. But before the Bill could be passed, the Lok Sabha was dissolved and therefore the Bill was lapsed. In 1971, another Bill[26] was introduced in the Lok Sabha. It provided for the appointment, by the President, of one *Lokpal* and one or more *Lokayuktas*. The *Lokpal* was to be appointed after consultation with the Chief Justice of India and the leader of opposition in the Lok Sabha. If there was no such leader, a person elected by the members of opposition in the Lok Sabha for this purpose was to be consulted.

The function of the *Lokpal* was to investigate any action which was taken by, or with the approval of a Minister (other than the Prime Minister) or a Secretary, or any other public servant belonging to that class which had been notified by the Central Government in consultation with the *Lokpal* for that purpose. Such an investigation could be undertaken if a person made a complaint involving 'grievance' or 'allegation'. A 'grievance' was defined as "a claim by a person that he had sustained injustice or undue hardship in consequence of mal-administration". The term 'allegation' was defined to include not only "corruption or lack of integrity" but also "abuse of public office to secure gain or to cause harm or hardship to another".[27] The time-limit for making a complaint involving an 'allegation' was five years from the date on which the action complained against was alleged to take place. In the case of 'grievance', the time was twelve months from the date on which the complainant came to know of the action complained against, but this period could be relaxed if the *Lokpal/Lokayukta* was satisfied that the complainant had sufficient cause for not making the complaint within the period of twelve months. It is to be noted that the primary idea of the Ombudsman in the Scandinavian and the common law countries (New Zealand, England and Australia) where the institution has been introduced is to oversee mal-administration, *e.g.* negligence, delay, inefficiency, bias, abuse of power (which may not amount to corruption), and to make the administration more humane and accountable. However, the 1971 Central Bill assigned to the Ombudsman the twin tasks of checking corruption (allegation) involving Ministers (other than the Prime Minister) and

[26] Bill No. 3 of 1971.

[27] Lok Sabha Secretariat, LOKPAL (1965) at 35.

government servants, and mal-administration by these functionaries. In view of prevailing situation in India, this would have been an extremely heavy burden on the functionary. It would have meant in practice that he would neglect one or the other function. Therefore, Jain and Jain[28] has advised that there should be two separate institutions for two functions – redressal of grievances and fighting corruption.

The *Lokpal/Lokayukta* could follow such procedure for conducting an investigation as he considered appropriate in the circumstances of the case. The identity of the complainant or that of the public servant concerned was not to be disclosed to the public at any stage of investigation. He could refuse to investigate any complaint if in his opinion it was frivolous or vexatious or was not made in good faith, or there was no sufficient grounds for investigating, or the complaint should avail of other remedies open to him. The reasons for not entertaining a complaint were to be communicated to the complainant.

The 1971 Bill lapsed on account of the dissolution of the Lok Sabha in February, 1977. The third *Lokpal* Bill in the series was introduced by the new government in 1977. The 1977 Bill[29] completely threw overboard the western idea of Ombudsman. The jurisdiction of the Central *Lokpal* was confined only to "public men" which term included Central Ministers (including Prime Minister), members of Parliament, members of legislative assemblies for the Union Territories and a few other categories of elected functionaries.[30] The government servants as such were beyond the purview of the *Lokpal*. However, the *Lokpal* could inquire into the conduct of any other person only to the extent necessary to inquire into any allegation of misconduct against a public man. Secondly, the proposed *Lokpal* was not to be concerned with the cases of mal-administration but only with the cases involving corruption. The task of the *Lokpal* was to be to inquire into allegations of misconduct against a public man. A public man would commit

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28 *Supra* n. 3 at 943.

29 Bill No. 88 of 1977; GAZETTE OF INDIA, Extraordinary, Part II, section 2 dated July 28, 1977.

30 The Bill as originally introduced in Parliament had included a State Chief Minister within the purview of the *Lokpal*. However, the Joint Committee of the Parliament recommended the deletion of this provision as the Chief Minister was primarily answerable to his Legislative Assembly. An amendment moved by the government on May 10, 1979 resorted the original position. See S.L. Verma, *Lokpal, Bureaucracy and the Common Man*, 24 INDIAN JOURNAL OF PUBLIC ADMINISTRATION, (1978) at 1030-58, 1245-58; Rajeev Dhawan, *A Comment on the Lokpal Bill*, 19 JOURNAL OF INDIAN LAW INSTITUTE (1977) at 257.

misconduct if he was actuated by corrupt motives in the discharge of his functions, or abused his position to cause harm to any body or used his position to secure any valuable or pecuniary advantage for himself or his relatives or associates or committed an act constituting corruption. In sum, the purpose of the *Lokpal* Bill, 1977 was to control political corruption.

Other provisions of the 1977 Bill were on the same lines as those of the 1971 Bill except with the following major differences. First, the *Lokpal* was to be appointed by the President after consultation with the Chief Justice of India, the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha. The last two functionaries could consult the leaders of the various parties and groups in their respective Houses before expressing their views on the appointment of the *Lokpal*. Secondly, the Bill provided for the appointment of special *Lokpal* or *Lakpals* by the President if he considered it necessary on a report from the *Lokpal* that it was necessary to do so for expeditious disposal of complaints under the Act. Thirdly, the 'competent authority' for the Prime Minister was the Speaker; for a Minister, the Prime Minister; and for members of the Parliament, the Chairman of the Rajya Sabha or the Speaker of the Lok Sabha as the case may be. Fourthly, no matter in respect of which a complaint could be made under the Act was to be referred for inquiry under the Commissions of Inquiry Act, 1952, except on the recommendation, or, with the concurrence of the *Lokpal*; and the *Lokpal* was not to inquire into any matter which had been referred for inquiry under the Commission of Inquiry Act, 1952 on his recommendation, or, with his prior concurrence. Fifthly, power was given to the *Lokpal* to try summarily certain offences, that is, the offence of giving false evidence before him and offences contained in sections 175, 178, 179 and 180 of the Indian Penal Code committed in his view or presence. A person convicted by the *Lokpal* could appeal to the High Court.

Maladministration which is the primary concern of the Ombudsman in other countries was thus proposed to be kept out of the purview of the Indian Ombudsman under the 1977 Central Bill. This was not proper as there is a great need for an institution, independent of the executive, to supplement the system of judicial control over administrative action in view of the limitation of judicial review so as to reduce the sense of grievance presently nursed by the people against the administration.[31]

The 1977 Bill was referred to the Joint Select Committee of the Houses of Parliament which presented its report to the Houses in July, 1978. But this Bill lapsed again with the dissolution of the Lok Sabha. So far, all

[31] *Supra* n. 3 at 944.

attempts to establish the Ombudsman system at Central level were proved futile. In the meantime various State Governments set up the office of *Lokayukta*.[32]

The Rajiv Gandhi Government introduced another Bill[33] in the Lok Sabha on August 26, 1985. If this Bill should have been passed it should have provided for a *Lokpal* appointed by the President from amongst a small class of elderly persons. The choice should have fallen on a person who was, or had been, or was qualified to be a judge of the Supreme Court. The *Lokpal* thus would be sitting Supreme Court or High Court Judge, a High Court Chief Justice, a retired judge of either court, a lawyer of ten years standing known to be the man who would matter, or an eminent jurist considered as suited to the appointed authorities. The persons eligible for appointment would really be limited in number, therefore, the choice in the matter of appointment of *Lokpal* would not be very wide.[34]

The choice would fall on a person who would be more suited than meritorious. The only safeguard against selection of a person for his acceptability to be men in the government was that the President would consult the Chief Justice of India before making the selection. He would appoint the *Lokpal* by warrant under his hand and seal. The appointment would be for five years; and the *Lokpal* would cease to hold office on completion of 65 years of age. He could be removed by the President on the ground of proved misbehaviour or incapacity after an antecedent inquiry made in the charges or allegations levelled against him by the Chief Justice of India, or by a Supreme Court Judge nominated by the Chief Justice. The *Lokpal* could resign his office. On ceasing to hold the office, he would be ineligible for any further appointment/employment. The *Lokpal* would inquire into any matter involved in, or arising from, or connected with any allegation made in a complaint against any public functionary who could be a Union Minister – a Minister of State, Deputy Minister or Parliamentary Secretary. The expression 'public functionary' would not include the Prime Minister. Unlike the earlier Bill of 1977 a complaint could not be made against any Secretary or other high official of the Union Government or head of any public corporation. A complaint would allege that a public functionary while holding any of the offices (Ministerial) committed any offense

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[32] Orissa (1970); Maharashtra (1971); Bihar (1973); Rajasthan (1973); Uttar Pradesh (1975); Madhya Pradesh (1981); Andhra Pradesh (1983); Himachal Pradesh (1983); Karnataka (1985); Assam (1986); Gujarat (1986).

[33] Bill No. 166-B of 1985.

[34] *Supra* n.16 at 213.

punishable under Chapter IX of the Indian Penal Code, or under the Prevention of Corruption Act, 1947. No complaint could be made after the expiry of five years from the date of commission of the offence mentioned therein. Never could a complaint be frivolous or vexatious. When received, the *Lokpal* would inquire into the complaint, provided there were sufficient grounds for inquiry into it. The *Lokpal* would send a copy of the complaint to the competent authority; and at such time as he would consider it appropriate, send the copy to the concerned public functionary. The *Lokpal* could have at his disposal services of an investigating agency of the Central Government. The *Lokpal* would conduct the inquiry *in camera*. He would afford the public functionary an opportunity to represent his case.

The Bill was referred to a Joint Committee of both the Houses of Parliament. In the committee several members criticised the Bill on the ground that the scope of the Bill was very restrictive. It did not provide for the redressal of grievances of citizens but only provided of a pre-trial enquiry into the cases of corruption.[35] The definitional category of "public functionaries" excluded Prime Minister, the members of Parliament, heads of public corporations, the State Chief Ministers and other high functionaries, *e.g.*, Secretaries of Ministers of the Government of India or heads of various governmental agencies such as Central Bureau of Investigation, Chairman of Railway Board *etc.* Another restrictive feature of the Bill was that it left out complaints of misconduct, grievances due to complaints of mal-administration, abuse of office/power, *etc.* The government felt that it would be desirable to re-examine the entire issues relating to the establishment of the *Lokpal*, his powers and jurisdiction. The government, therefore, withdrew the Bill with a view to bringing forward a more comprehensive legislation on the subject. However, this was not done during the tenure of the eighth Lok Sabha. The members of the opposition parties who were members of the select committee strongly protested against the withdrawal of the Bill because in their opinion the Bill with suitable modifications could be adopted. The dissenting members stated in their note that the *Lokpal's* jurisdiction should not be restricted to examination only of those complaints which involved corruption but should also cover complaints about abuse of power, gross misconduct, mal-administration causing harassment to citizens *etc.*[36] The opposition members also insisted that the Prime Minister should be brought within the purview of the *Lokpal*.

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[35] *Report of the Joint Committee on the Lokpal Bill, 1985*, GAZETTE OF INDIA. Extraordinary, Part II, section 2 at 7.

[36] Minute of Dissent, *id.* at 9; the dissenting members included P. Upendra, K.P. Unnikrishnan, L.K. Advani, S. Jaipal Reddy, V. Arunachalam.

The 1989 Bill[37] introduced by the National Front Government almost reproduced the 1985 Bill with minor modifications. The most significant provision of this Bill was the inclusion of the Prime Minister within its purview. The scope of the Bill was, however, restricted only to complaints against public functionaries which included persons "who hold or has held the office of the Prime Minister, Deputy Prime Minister, Minister, Minister of State or Deputy Minister of the Union."[38] The *Lokpal* would have no power to inquire into complaints of corruption against the senior government officers. The *Lokpal's* jurisdiction was limited to combat only the problem of corruption at the higher political level abandoning the original exalted objective mooted in the Report of the Administrative Reforms Commission[39] for providing an effective and impartial machinery to redress administrative wrongs and excesses and eradicate corruption at all levels. Corruption in government offices is often the result of collusion between the Ministers and officers. It would be desirable that in cases in which officers appear to be guilty of collusion with the public functionary against whom the *Lokpal* has started an inquiry, the *Lokpal* should be empowered to treat the concerned officers also as public functionaries rather than entrusting the case to the vigilance commission.[40]

For the first time the 1989 Bill provided that the *Lokpal* would consist of a Chairman and two members to be appointed by the President in consultation with the Chief Justice of India. The first Bill of 1967 provided for consultation with the leader of opposition in the appointment of *Lokpal*. The provision was not included in 1989 Bill. It is submitted that since the legislation seeks to maintain political cleanliness, it would have been better to provide for consultation with the leader of opposition during the process of appointment. The purpose would be better served if the *Lokpal* were appointed by the consensus between the ruling party and the opposition.

Only persons who were or had been judges of the Supreme Court were eligible to be appointed as Chairman and members of the *Lokpal*. The tenure of the members of the *Lokpal* would be five years. Members were made ineligible to hold any office of profit under the Government of India after ceasing to be members of the *Lokpal*. Members of the *Lokpal* could not be removed except by the procedure of removal as prescribed in the Act, which was similar to that provided by the Constitution for the removal of judges of the High Courts and the Supreme Court. It is submitted that eligibility

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37 Bill No. 98 of 1989, GAZETTE OF INDIA, Extraordinary, Part II, section 2.

38 Clause 2(g), The Lokpal Bill, 1989.

39 *Supra* n. 24.

40 Balbir Singh, *The Lokpal Bill, 1989*, 12 DELHI LAW REVIEW (1990) 95 at 98.

qualifications for membership of the *Lokpal* has been too narrowly defined. As pointed out by S.P. Sathe,[41] there is no reason to believe that judges are always and no one other than a judge could be suitable for being the *Lokpal*. The Bill excludes jurists, administrators or retired High Court Judges from being eligible for appointment as *Lokpal*.

The jurisdiction of the *Lokpal* had been very narrowly defined as his jurisdiction was confined merely to charges that might conceivably be covered under the Prevention of Corruption Act, 1988 and not those which were covered under the Indian Penal Code. The *Lokpal* could also not inquire into any matter which had been referred for inquiry under Commission of Inquiry Act, 1952 on his recommendation or with his prior concurrence. The *Lokpal* was to deal only with cases of corruption by such people. It is quite clear that the Ombudsman aspect totally side-tracked in the Bill. The *Lokpal* was going to merely conduct pre-trial inquiry against persons holding ministerial posts who were alleged to be guilty under the Prevention of Corruption Act, 1988. A pre-trial inquiry conducted by the *Lokpal* would merely enable the government to put forward cases before a competent court under the Prevention of Corruption Act and since standards of evidence in a criminal case would bound to be much more demanding, it might happen quite often that the person held to be *prima facie* culpable by the *Lokpal* could be acquitted by the trial court under the Prevention of Corruption Act.

A complaint could be made by any person other than a public servant. There was no reason why a public servant was prevented from making a complaint. A complainant was required to deposit one thousand rupees with the complaint. The deposit could be forfeited if the complaint was dismissed on the ground of having been frivolous or vexatious or not having been made in good faith. The deposit could also be utilised for compensating the public functionary complained against. In any other case, the deposit could be refunded. If the provision of deposit was intended to deter irresponsible or frivolous or vexatious complaints, that intention might not be achieved because one thousand rupees is not a big sum as one could easily spend that much amount in order to cause harassment to a political adversary.[42] Moreover in order to discourage the mischief mongers the Bill empowered the *Lokpal* to punish for the offence of willfully and maliciously making a false complaint. The *Lokpal* had been given power to try certain offences such as giving false evidence *etc.* Whenever he rejects the complaint, he has to record reasons and communicate the same to the complainant and the competent authority. This is an essential requirement in the interest of justice

[41] S.P. Sathe, ADMINISTRATIVE LAW (5th ed., Reprint 1996) at 496.
[42] *Id.* at 498.

seen to be done. The *Lokpal* could award compensation or give reward to the complainant if the complaint had been substantiated either wholly or partly.

The *Lokpal* would have power to require any public servant or any person who in his opinion would be able to furnish information or produce documents relevant to the inquiry to be made by him to furnish such information or produce such documents. However, this power had been made subject to the freedom of government servant to withhold information as might prejudice the security, or defence or international relations with the government of any other country or with any international organisation or with the investigation or detection of crime or as might involve disclosure of proceedings of the Cabinet of the Union Government or of any committee of the Union Cabinet. For this purpose the certificate that any information was of the above description shall be considered as "binding and conclusive". It is submitted that this clause totally nullifies the effect of the earlier provision making the giving of information obligatory. Even if the *Lokpal* wishes to contest the opinion of the Secretary, it would have to do so by filing a writ petition in the High Court. The Bill, therefore, gives by one hand and takes away by another.

Although the *Lokpal* had been given power to determine the procedure of inquiry, it had no power to act *suo motu*. The *Lokpal* was given power to search and seize the relevant documents, the criminal prosecution would have to be launched in the court of special judge. The task of presenting the prosecution case would be on the public prosecutor appointed by the government. Such a prosecution might not command the confidence of the public and, therefore, it would be desirable if the *Lokpal* has its own prosecution machinery.

The proceedings or decisions of the *Lokpal* could not be challenged, reviewed, quashed or called in question in any court. Though *prima facie* an impression can be formed that the provision of protection ousts the jurisdiction of the courts but the attitude of the courts evident from a long series of cases leaves no doubt that the power of judicial review exercisable by the higher courts (Supreme Court and High Courts) is very wide and this power is a basic feature of the Constitution of India which cannot be abrogated. This power can, therefore be, exercisable by the court in appropriate cases notwithstanding the existence of such provision, particularly on the point of jurisdiction.[43]

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[43] *Supra* n. 40 at 103.

For all these reasons the Bill totally buries the concept of Ombudsman which Administrative Reforms Commission had spelt out in its report. Public grievances have been wholly kept out of its purview and there is over-emphasis on corruption alone. Unfortunately, the corrupt secretaries do not at all figure in the Bill. The *Lokpal* will not be of any use to the common man whose main grievance is against mal-administration, callousness and negligence. So far as corruption is concerned, the Prevention of Corruption Act could be suitably strengthened and even a special tribunal or court with appeal only to the Supreme Court on question of law could be provided for dealing with these cases. Ombudsman is not the remedy for that purpose.[44]

Once again in the monsoon session of the Parliament in 1993, the government made a promise to appoint a *Lokpal* to look into the charges of corruption against the government, but it could not be passed. By introducing the *Lokpal* Bill in 1996[45] in the Budget Session of the Parliament, the United Front Government can be said to have kept the promise it had made about cleansing public life and injecting an element of accountability at the highest level. However, because of the fall of the government, the Bill could not, once again, see the light of the day.

Another attempt for the establishment of *Lokpal* at the center was made on August 3, 1998 when a fresh *Lokpal* Bill was introduced in the Parliament. The Bill provided that the institution of *Lokpal* shall consist of a Chairperson who is or has been a Chief Justice or a judge of the Supreme Court or the Chief Justice of the High Courts.[46] The President of India shall appoint them after obtaining the recommendation of a committee consisting of (a) Vice-President of India, (b) Prime Minister, (c) Speaker of the Lok Sabha (d) Home Minister, (e) Leader of Opposition in Lok Sabha and Rajya Sabha. However, no sitting judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.[47] The person who was to be appointed as *Lokpal* must have severed his connection, if any with any political party, his membership in Parliament or the Legislature of State or any office of profit.[48] The Chairperson and member shall not be removed from his office except by an order of the President on the recommendations of a committee consisting of the Chief Justice of India and two other judges of the Supreme Court next to Chief

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[44] *Supra* n. 41 at 500.
[45] Bill No. 101 of 1996.
[46] Section 3, The Lokpal Bill, 1998.
[47] Section 4, *id.*
[48] Section 5, *id.*

Justice in seniority.[49] *Lokpal* shall have jurisdiction to inquire into any allegation made in the complaint. Limitation for filing a complaint shall be ten years from the date when alleged offence is committed. However, if bias is alleged against Chairman or any member, the President, on application, shall obtain the opinion of the Chief Justice of India and should decide accordingly.[50] Any person other than a public servant can made a direct complaint from a person in jail or other place of custody.[51] Every inquiry shall be conducted by the Chairman and the members sitting jointly. The inquiry shall be open to which public may have access except in exceptional circumstances and for reasons to be recorded in writing such inquiry may be conducted in camera.

The *Lokpal* shall complete inquiry within a period of six months, but where it would not be possible it shall record reasons in writing.[52] For the purpose of conducting inquiry, *Lokpal* shall have the powers of a civil court and proceedings before *Lokpal* shall be deemed to be judicial proceedings within the meaning of section 193 of the Indian Penal Code. The government or any public servant shall not be entitled to any privilege relating to the production of any document or oral evidence. For the proper conduct of inquiry, *Lokpal* shall have power, to summon and enforce attendance of any person and to examine him on oath, to enforce discovery and production of any document, to requisition any public record, to issue commissions for examination of witnesses and documents and to search and seize any documents.[53] After inquiry, if offence was proved, the *Lokpal* shall communicate its report and findings to the competent authority. Such competent authority shall be the Speaker in case of Prime Minister and member of Lok Sabha and Chairman of the Rajya Sabha in case of a member of Rajya Sabha. The competent authority shall communicate to the *Lokpal*, within a period of ninety days from the date of receipt of the report. *Lokpal* shall present annually to the President of India a consolidated report who shall cause the same to be placed before each House of Parliament as soon as possible but not later than ninety days from the date of receipt of the report. Every person who made a complaint which was found by the *Lokpal* to be false would be punished by it, after summary trial, with imprisonment which should not be less than one year but which may extend to three years and also a fine which may extend to fifty thousand rupees.[54] Out of this fine

[49] Section 7, *id.*
[50] Sections 10, 11, 13, *id.*
[51] Section 12, *id.*
[52] Section 14, *id.*
[53] Sections 15, 16, *id.*
[54] Section 22, *id.*

Lokpal may award compensation to the public functionary against whom false report was filed.[55] President of India may also confer additional functions on *Lokpal* and may require it to inquire into any allegations against any public functionary.[56] If the complaint is wholly or partially substantiated the *Lokpal* may make necessary orders to compensate the complainant having regard to the expenses incurred by complainant in respect of such complaint.[57] *Lokpal* and its officers shall be immune from prosecution or other legal proceedings in respect of any thing done in good faith and its proceedings or decisions shall not be called in questions in any court of law.[58] It may be mentioned that this provision shall not oust the jurisdiction of the High Courts and the Supreme Court. *Lokpal* shall have power to make rules for the purpose of carrying out its functions.[59]

The *Lokpal* Bill, 1998 again suffers from major deficiencies. The Bill seeks to place unreasonable restrictions on those who may have genuine complaints but do not have the necessary proof to substantiate the charges. The complainant must be absolutely sure of the facts and must have proof to substantiate the complaint. It is like asking the complainant to investigate the case, collect evidence and prepare a fool proof charge sheet. If the complaint made in good faith is not proved, the complainant may be required to pay a fine up to fifty thousand rupees and face a jail term up to three years. This provision would certainly deter even a genuine complaint.[60]

Furthermore, there is no specific provision that *Lokpal* should specify the action to be taken against public functionary in case charges were substantiated. Placing of the report before the Parliament for action would mean that the action would be lost in party policies. If the purpose of this institution is to check corruption in high places then it is equally necessary that there should be a binding provision for making obligatory for all public functionaries to file their property returns before the *Lokpal* after becoming a member of Lok Sabha or Rajya Sabha. They should also submit a copy of their annual income tax returns to the *Lokpal*.[61]

However, the 1998 Bill also could not see the light of the day because of controversy regarding the inclusion of Prime Minister within the jurisdiction of *Lokpal*.

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55 Section 23, *id.*
56 Section 24, *id.*
57 Section 25, *id.*
58 Section 26, *id.*
59 Section 29, *id.*
60 *Supra* n.1 at 465.
61 *Ibid.*

On August 14, 2001[62] the *Lokpal* Bill had again been introduced in the Lok Sabha. However, the Bill could not be enacted into an Act. The 2001 Bill lapsed after the dissolution of the thirteenth Lok Sabha in February,2004. Now in 2004 *Lokpal* Bill has again been introduced in the Parliament. The Bill is still lying pending in the Lok Sabha. Thus, attempts have been made to establish the institution of *Lokpal* in India but it has not been established so far. The Report of the Administrative Reform Commission is allowed to gather dust and the Bills introduced by the government for the purpose of making provision for appointment of the *Lokpal* are allowed to lapse. The Government of India never showed much enthusiasm for implementation of the recommendations of the Administrative Reforms Commission, because of the in-built bureaucratic resistance to any machinery for the citizens' grievance redressal on the Ombudsman pattern.

V. Difficulties in Adopting the Institution of Lokpal

There may be some constitutional difficulties in adopting the institution of *Lokpal*. According to P.K. Tripathi[63], the doctrine of collective responsibility of Ministers, which constitutes a basic principle of our parliamentary democracy may come in conflict with the institution of *Lokpal* in India. Investigation into the allegations against a Minister by the *Lokpal* and recommendation of an action against him would in some respect, undermine the doctrine of ministerial responsibility. If the actions of Minister himself are brought within the purview of the proposed institution, the institution of responsible government in a particular system will break down and the identity of the Constitution will be impaired. Similarly Justice P.B. Mukherji[64] has pointed out that the Ombudsman is contrary to the basic letter and spirit of the Indian Constitution. Unless one is prepared to throw the whole Indian Constitution lock stock and barrel over-board, an Ombudsman cannot fit into Indian Constitution.

With regard to the impact of the institution of Parliamentary Commissioner on the doctrine of ministerial responsibility, the Select Committee of House of Commons in England pointed out that by setting up the office of Parliamentary Commissioner, Parliament to some extent undermined the doctrine of ministerial responsibility, in that the power of the Commissioner to carry out an independent investigation and to publish what he finds is an encroachment on the Minister's responsibility. The

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62 Bill No. 73 of 2001.

63 P.K. Tripathi, *Lokpal - The Proposed Indian Ombudsman*, 9 Journal of Indian Law Institute (1967) at 135.

64 In Chamanlal Setalvad Memorial Lectures delivered at Bombay University in 1967 quoted in Paras Diwan, *supra* n. 21 at 280.

anonymity of civil servants too, might be infringed by the Commissioner's findings.

However, from the functioning of the institution of Parliamentary Commissioner in England it appears that it does not undermine the principle of ministerial responsibility. In fact the experience shows that his investigation so far from conflicting with ministerial responsibility, helped it to work better by enabling both Parliament and Ministers to correct faults in administration which would otherwise never have been brought into light.[65]

Therefore, the apprehension that the Ombudsman will impair ministerial responsibility has lost its substance. If a Minister can be made responsible to courts there should not be any unconstitutionality if he is made accountable to the Ombudsman, who is a creature of Parliament itself. For policy and efficiency of their departments, Ministers are responsible to Parliament but for administrative lawlessness they may be made accountable to the Ombudsman. Far from weakening ministerial responsibility, the Ombudsman will help that principle works better. On the basis of investigation, Parliament can reach the bottom of the problem and can hold a Minister responsible and accountable for it. Even in England it is being increasingly felt that direct complaints (now they are routed through a member of Parliament) to the Parliamentary Commissioner would fit in the constitutional structurisation because the Commissioner is necessarily an arm of Parliament.[66]

Ministers in any self-governing country like India belong to a majority party and so long as the popular vote prevails, a party in majority today may become the minority tomorrow. Hence Ministers who shape the policies of the government should be aware that official inequities if tolerated today may tomorrow oppress yesterday's rulers. Hence everyone, whether or not in momentary ascendancy, shares a long-range interest in nurturing even-handed, effective and honest law administration; the rulers and the ruled alike benefit from devices that correct governmental mistakes and help prevent their occurring again.[67] The existence of the Ombudsman will induce Ministers to a greater degree of accountability and responsibility.

Another source of uncertainty in India is that a single Ombudsman institution may not operate effectively in so large a country because complaints may be too large for a single institution of three persons to dispose of. It is submitted that the appointment of one *Lokpal* and a number of

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[65] *Supra* n. 2 at 83.

[66] *Supra* n.1 at 466.

[67] Prof. Gellhorn quoted by R.L. Narsimhan, *supra* n. 23.

Lokayuktas will take this factor into account. Further, being a federal country, the central administration is not concerned with the totality of governmental functions but only with a portion of these, the other portion being discharged by the States, and each State may have its own Ombudsman system.

It must be noted, however, that the institution of *Lokpal* is an innovation and it may take some years before its effectiveness can be accurately measured. Though the Ombudsman may take pressure off the courts and prevent legal principles being strained, yet he is not a panacea for all the evils of bureaucracy. His function is to improve administration; hence, his success depends on the existence of a reasonably well administered State. He cannot cope with a situation where the administration is riddled with patronage or corruption. It would be the greatest injustice to the institution of *Lokpal* if we regard him as the possessor of cure-all. Where corruption is rampant, and nepotism has infiltrated right from the ministerial level to the lower officials, it is highly doubtful whether a *Lokpal* can produce any appreciable improvement in administration. Unless and until we provide a basically sound and healthy society no good result should be expected from the proposed Ombudsman. The institution is nevertheless, well worth a trial.[68]

VI. Conclusion

It is too early to comment on the working of this institution because it is still in take-off stage. However, its desirability has been fully realised. The delay in formulating the *Lokpal* Bill is unfortunate. This institution is much needed in our country where corruption among public officials is widespread. A strict separation of the three arms of governance - the legislature, administration and judiciary - is absurd and impossible in a country such as ours. Thus, many times the administration intrudes into the domain of the legislature and the judiciary. Also, many major administrative decisions are taken for political reasons, for the benefit of a particular section of people so that it may bring political rewards. Here, the rule of law and equality before law are the things to be found in books only. Government servants have many special privileges and prerogatives while individuals have hardly any power to fight administrative injustice. All this underlines the need for a *Lokpal*.[69]

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[68] U.P.D. Kesari, *The Indian Lokpal – A Panacea of Administration Maladies*, Journal of National Academy of Administration at 281.

[69] Bhupal Sinha Chowdhury, *Big Brother to Keep a Watch*, The Telegraph, November 25, 2004: See http://www.telegraphindia.com.

The redressal of the grievances of the citizens is basic to the functioning of the democratic government. It will strengthen the hands of the government in administering the laws of the land without fear or favour, affection or ill will. It will enable it to go up in public faith and confidence without which progress would not be possible. The democratic government has an obligation to satisfy the citizens about its functions and provide them adequate means for the redressal of their grievances. There prevails a public feeling against prevalence of corruption and administrative inefficiency. Besides, there is need to dispel from the mind of the people false notions and prejudices against the quality and character of the administration.

In India, the existing machinery for the correction of administrative faults is highly inadequate. The public law review system of administrative action through writs and orders under Articles 32, 226, 227 and 136 is not only technical and expensive, but also involves delay because of congestion in courts which has reached staggering proportions. Private law review by injunction, declaration and suit for damages is also not an adequate remedy due to similar reasons. The vigilance exercised by government vigilance and anti-corruption cells is far from satisfactory because of red-tapism and political overtones by which the big fish always escape the net. Therefore, the institution of Ombudsman seems to be the only hope for a quick remedy for administrative inertia, corruption and indifference.

Many situations such as prolonged imprisonment of undertrial prisoners[70], torture of prison inmates[71], plight of women prisoners[72], or of women in protective homes[73], payment of sub-standard wage to workers, by contractors engaged by government[74] in which the Supreme Court has intervened on behalf of the victims were really such as could have been effectively dealt with by the Ombudsman.[75] The setting up of these offices would relieve the Supreme Court of such functions. However, the *Lokpal* and the Supreme Court might have to work complementary to each other. The Supreme Court has no resources for pursuing the implementation of its decisions and taking other follow up measures needed to take matters to their logical conclusion. The *Lokpal* could better deal with such matters.

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70 *Hussainara Khatoon* v. *Bihar*, AIR 1979 SC 1360 : (1980) 1 SCC 81.
71 *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675.
72 *Sheela Barse* v. *Maharashtra*, AIR 1983 SC 378 : (1983) 2 SCC 96.
73 *Dr. Upendra Baxi* v. *U.P.*, (1983) 2 SCC 308 : (1981) SCALE 1136.
74 *Peoples' Union for Democratic Rights* v. *India*, AIR 1982 SC 1473.
75 *Supra* n. 41 at 494.

In sum, there is a great need to supplement the existing mechanism to supervise administration in India, and the experiment of Ombudsman is worth a trial. It is bound to result in the improvement of administrative procedures affecting the individuals dealing with the administration. The establishment of Ombudsman in India is the demand of the time. However, there has been no success so far in giving shape to the institution of *Lokpal* at the Central level. Successive Bills, each contemplating a *Lokpal* less effective than the one envisaged in the previous Bill, have been introduced but all lapsed. It needs to be emphasised that the original concept of *Lokpal* has undergone a metamorphosis over the years. The genesis of this institution in the modern representative democracies can be traced to the Swedish Ombudsman established in 1809. The basic idea of the Ombudsman is a simple one. He is an official, independent of the administration with power to investigate the citizens' complaints of mal-administration.[76] The notion of mal-administration incorporates any complaint tainted with (a) nepotism, corruption or bias; (b) failure to observe a sound administrative basis; (c) negligence in carrying out a duty; (d) misuse of discretion; (e) incompetence; (f) loss of documents or papers; (g) tardiness and delay; (h) unjust segregation or discrimination; or (i) any similar matter.[77] The objective behind the appointment of Ombudsman was to institute new standards and evolve new and more congenial patterns of administrative behaviour. Of course, this did include doing away with corruption. But corruption was not the most important target. The administration and administrative behaviour as a whole needed to be scrutinised and reformed.

However, as discussed above the main target of the *Lokpal* in the Bills proposed for this purpose is to unearth cases of corruption. It is submitted that the main grievance of the common man is against mal-administration, callousness and negligence. Therefore, what we need is: a suitable grievance procedure for the individuals to invoke the complaints of mal-administration; creation of a mechanism which would reduce corruption in the administrative services and setting up of a mechanism which would take cognizance of complaints of favouritism and nepotism against the Central and State Ministers. To meet this end, it becomes necessary that the *Lokpal's* jurisdiction should not be restricted to the examination of only those complaints which involved corruption but should also cover complaints about abuse of power, gross misconduct, mal-administration causing harassment to citizens. In alternative, to deal efficiently with large number of complaints.

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[76] Peter Cane, AN INTRODUCTION TO ADMINISTRATIVE LAW (1987) at 261.

[77] D.C.M. Yardley, PRINCIPLES OF ADMINISTRATIVE LAW (1986) at 225.

it is suggested that there can be two separate institutions. One, for dealing with redressal of grievances and another, for fighting corruption.

Further, the functioning of the proposed institution of *Lokpal* may be greatly improved by securing for him a constitutional position like the Election Commission under Article 324 of the Constitution. In the absence of this provision, his powers may come in conflict with those of High Courts under Article 226. Though the jurisdiction of the High Courts has been restricted to jurisdictional defects only, the proceedings before the *Lokpal* may be hampered by invoking the jurisdiction of the High Court. Keeping in view the status of *Lokpal* as envisaged in the Bills, he must be insulated from the interference of courts.

The provision regarding inclusion of the Prime Minister within the purview of *Lokpal* can be considered significant because the Prime Minister, unlike the President, Vice-President and other constitutional functionaries enjoying special immunity by virtue of their role, is the highest executive of the land and, therefore, any scheme designed to end corruption at the top political level will be rendered virtually meaningless if he were to be placed beyond it. The proposal contained in the Bills also empowers the *Lokpal* to inquire into any act or conduct of any person other than a public functionary in so far as he considers it necessary for the purpose of his inquiry. The provision requiring the *Lokpal* to give reasons when he is rejecting the complaint is an essential requirement to give the feeling of justice to the complainant.

The *Lokpal*, when constituted, has to be given complete independence and autonomy in order to be able to perform his delicate task without any interference or influence from the individuals, agencies or even the government. It would need independent professional investigative and prosecuting machinery which should be free from government and ministerial backlash. There would be no point in having a *Lokpal* if no action is contemplated within a time frame that ensures justice against faults in the administration. Moreover, no privilege should be allowed to the government against the *Lokpal* in the matter of production of evidence.

If the *Lokpal* Bill is passed with the modifications suggested above, it will have a healthy effect on the whole administration making it more sensitive to public opinion and to the demands of fairness.

CHALLENGES FOR LAW IN REGULATING STEM CELL RESEARCH, THERAPEUTIC AND REPRODUCTIVE CLONING: A GLOBAL PERSPECTIVE

*L. Pushpakumar**

I. INTRODUCTION

The humankind stands now at an historic juncture.[1] Never before in the history has humanity been so unprepared for the new technological and economic opportunities, challenges and risks that lie on the horizon. Our way of life is likely to be more fundamentally transformed in the next several decades than in the previous one thousand years.[2] By the year 2025, Jeremy Rifkin observed in 1998, "we and our children may be living in a world utterly different from anything human beings have ever experienced in the past. In little more than a generation, our definition of life and the meaning of existence is likely to be radically altered. Long-held assumptions about nature, including our own human nature, are likely to be rethought. Many age-old practices regarding sexuality, reproduction, birth, and parenthood could be partially abandoned. Ideas about equality and democracy are also likely to be redefined."[3]

At present, we are facing the scenario contemplated by Jeremy Rifkin. With the advent of new tools in biotechnology, nanotechnology and advancements in biomedical research, many new developments such as cloning, stem cell research and gene therapy make possible many new cures for the humanity's innumerable diseases such as cancer, AIDS, Alzheimer's disease, Parkinson's disease etc. Biomedical research assures miracles to

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

1 Statement of Prof. Alexander Morgan Capron, Commissioner of National Bioethics Advisory Commission, USA, and Henry W. Bruce, University Professor of Law and Medicine, Co-Director, Pacific Center for Health Policy and Ethics, University of Southern California Law Center, testifying before the Subcommittee on Crime Committee on the Judiciary, United States House of Representatives, June 19, 2001, while speaking on his own behalf about the legal and ethical issues involved in Human Cloning.

2 Rifkin Jeremy, THE BIOTECH CENTURY: HARNESSING THE GENE AND REMAKING THE WORLD (1998) at 1.

3 *Ibid.*

medical industry, which could turn out to be boon as well as bane for the global humanity. The human kind is now under a compulsion to take decisive decisions as to the regulation and permissibility of technology in a variety of fields, particularly in the field of biomedical research.

Stem cell research, therapeutic and reproductive cloning have been seriously pursued by many countries. Countries like Belgium, China, India, Israel, Japan, Singapore, South Korea, South Africa, UK and USA are enormously investing in stem cell research. Yet most of the countries do not have effective regulatory framework to deal with stem cells research.

Law, as an instrument of regulating human behaviour, has a pivotal role to play in this historic moment. The DNA technology and genomic age posit a new set of challenges to the lawmakers and implementing agencies. Regulation of the hitherto unknown areas of activities unleashed by modern biomedical research would be a phenomenal task for the policy and lawmakers. Many social, political, economic, legal, ethical and philosophical considerations call for thorough analysis of permissibility of modern biomedical research. The potential risks involved in the process ought to be regulated by a well- framed regulation at the national and international level. What are the precautions to be taken while allowing such inherently dangerous and at the same time beneficial research? How to harness the benefits of technology for the promotion of global health? What are the ethical issues involved in such venture? What are the changing dimensions of IPR issues, genetic privacy, human rights and dignity of human beings? These are some of the major questions the humanity has to answer and the law has to respond while embarking upon not a frequently ventured arena. The paper attempts to track the recent trends in biomedical research with special reference to human stem cell research, therapeutic and reproductive cloning and their health care policy implications at the global level. The paper also proposes to account for the ethical considerations leveled against those research activities and the challenges for law in regulating biomedical research. The paper maintains that while human therapeutic cloning can be encouraged, human reproductive cloning shall not be allowed at any cost. The paper also calls for international convention on bioethics and human stem cell research so that global consensus can be achieved.

II. Modern Trends In Biomedical Research

A. Stem Cell Research

Stem cells are the master cells that are capable of developing into any tissue or organ in the body. Researchers believe that stem cells could be useful as regenerative tool to treat a wide variety of diseases such as

cardiovascular disease, diabetes, osteoporosis,[4] cancer, Alzheimer's disease,[5] Parkinson's disease,[6] birth defects, spinal cord injuries, severe burn injuries etc.

Stem cells are available in small numbers in living human body in most organs including the liver, blood, and brain. Stem cells have two crucial capabilities: (1) they divide repeatedly into stem cells of their own type; and (2) with appropriate stimuli they can develop or differentiate either into one particular tissue, or into a small number of tissues or, as in the case of pluripotent embryonic stem cells, into potentially all types of tissues. For years, pluripotent embryonic stem cells have been viewed as the holy grail for many scientists, particularly developmental biologists.[7] In 1998 the scientists discovered the process of purifying Embryonic stem cells (ESCs) and maintaining them in culture in the laboratory. ESCs are derived from embryos at the blastocyst[8] stage, which is approximately five to seven days after fertilization. At this state, within the blastocyst, there is a small fluid collection (cyst) in the embryo and at one pole of the cyst a specialized clump of cells known as the inner cell mass. It is from this inner cell mass that ESCs can be obtained. Researchers have now developed the ability to separate early, undifferentiated stem cells from the blastocyst stage that eventually develops into an embryo.

Until quite recently, it was thought that stem cells found in adult tissues and organs could differentiate only into the particular type of cells that make up the organ where the stem cell resides. However, over the past few years it has been repeatedly demonstrated that stem cells originating from one organ or tissue can develop into cell types of another tissue. This has been shown in both animals and humans. Nonetheless, there are reports that cast doubt on the notion that adult stem cells are as versatile as ESCs.[9] If adult stem cells are proved to be as flexible as ESCs, the scientists may utilize adult stem cells instead of ESCs and avoid much of the ethical problems associated with ESCs.[10]

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4 Osteoporosis occurs in bone due to decrease in mass and becoming porous which is susceptible to frequent fractures.

5 Alzheimer's disease causes due to irreversible damage to the brain and leads to memory loss and ultimately to death.

6 Parkinson's is a neurological disease resulting in death of brain cells associated with emotions and motor control.

7 See Abdullah S. Daar and Lorraine Sheremeta, *The Science of Stem Cells: Some Implications for Law and Policy*, 11 (1) HEALTH LAW REVIEW at 1.

8 Blastocyst is the early stage of mammalian embryo.

9 *Supra* n. 7 at 4.

10 *Id.* at 6.

B. Cloning

Cloning refers to "making an identical (or near identical) genetic copy".[11] The term cloning is used in three different contexts. It sometimes refers to the process of copying a fragment of DNA so that there are enough identical fragments for a scientist to study. For instance, criminologists use a method of DNA cloning called polymerase chain reaction (PCR) when they need to make many copies of a tiny bit of DNA found in blood, hair, skin, or semen at the scene of a crime. That is a widely accepted form of cloning used in labs around the world every day. Then there is reproductive cloning, a technology for creating an entirely new animal (the clone) from the genetic material of an existing animal (the donor). Dolly, the sheep, was created with reproductive cloning technology. The third category is therapeutic cloning – the cloning of human embryos to harvest stem cells for medical uses – is accomplished the same way as reproductive cloning. The difference is, instead of implanting the embryo in a woman, scientists destroy it so that researchers can extract its stem cells, which are master cells capable of morphing into different kinds of cells, such as those in the brain, muscles, or other organs, and which might be used for medical treatment.[12]

The subject of cloning became a matter of public debate and concern after the announcement of the cloning of the sheep Dolly in 1997. The public was concerned that human beings would be cloned for inappropriate purposes. In this context, we need to distinguish between "therapeutic cloning" and "reproductive cloning".[13]

Reproductive cloning, by nuclear transfer from a differentiated somatic cell[14], although conceptualized and developed in other species over decades of research, became a reality in mammals only in 1997. Somatic cell nuclear transplant (SCNT) involves the fusion of somatic cell with an enucleated egg, or the transfer of a nucleus of a somatic cell into an enucleated egg. The somatic cell and egg may be from different individuals or from the same individual.

Where SCNT is initiated without the intention of implanting the blastocyst in a uterus, it is termed as "therapeutic cloning". Although SCNT is the starting point for both reproductive cloning and therapeutic cloning, the important distinction lies with the fact that with "therapeutic cloning"

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[11] *Ibid.*

[12] Gina Smith, THE GENOMICS AGE: HOW DNA TECHNOLOGY IS TRANSFORMING THE WAY WE LIVE AND WHO WE ARE, (2005) at 158-60.

[13] *Supra* n. 7 at 6.

[14] Somatic cell is any body cell other than sex cells, i.e. the sperm or egg cells.

there is no intention of implanting the resultant blastocyst into a uterus of an animal or a human to create a living being.

Therapeutic cloning is simply used to create a blastocyst that provides a source from which ESCs can be extracted and cell lines created for research. One possible application of ESCs is to use them to make cells, tissues and/or organs that can be transplanted back into the same person who donated the somatic cell nucleus. This technology is important because it may provide a solution to the significant problem of shortage of organs for transplantation and of the rejection of transplanted organs and tissues by the recipient's immune system.

C. Human Cloning

The birth of Dolly by SCNT method hit the hornet's nest as the general public, policy makers, ethicists and even the scientists got worried about the possibility of application of this method to create human beings. If such an event happens, that would signify 'the first step on a slippery slope that would inevitably result in cloned children'.[15] Even the cloned animal Dolly was euthanized within a period of six years as it developed several complications including premature arthritis and cancer which was attributed to the cloning process.

Scientists feel that animals born through reproductive cloning using SCNT develop genetic abnormalities. This raises the likelihood that stem cells, and by implication, cells, tissues and organs derived from them, may be in some way defective and that the defects may not be apparent until quite late in the life of the transplanted cells, tissues or organs. However, the science is at a very early stage and this possibility is one further argument for continuing research in this area.[16]

While there are some who find it acceptable to clone human beings, the vast majority of commentators consider human reproductive cloning to be unethical. There is a near consensus among the countries that human cloning must be banned and in fact many countries brought out legislations to that effect. Strangely enough there are also supporting voices for human cloning. Dame Mary Warnock, the Chair of the Warnock Commission in the UK based on whose report the Human Fertilisation and Embryology Act, 1990 was passed in UK, has "called for the blanket ban on human cloning

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[15] Opinion of Krauthammer in the President's Council on Bioethics on April 25, 2005. See, Stephen S. Hall, *Human Cloning: President's Bioethics Council Delivers*, 297 SCIENCE, 19 July 2002 at 322-24.

[16] *Supra* n. 7 at 8..

to be lifted and has stated that she supports cloning of babies for infertile couples. She believes that in future there should be no major ethical obstacles to human reproductive cloning for medical reasons if it can be proven safe."[17]

If the slippery slope argument proves to be true, that could be the worst thing to happen in the human history and would write obituary to humanity. Recently the UN has adopted a declaration which bans human cloning. But unfortunately it fails to distinguish between "therapeutic cloning" and "reproductive cloning" and imposes a blanket ban on all forms of cloning. On this count alone, the declaration failed to achieve consensus among the community of states.

As human cloning is unethical and dangerous there should be no second opinion on banning it completely. At the same time, therapeutic cloning which is beneficial to mankind due to its potential utility in health sector must be allowed with adequate regulatory system.

A group of Korean researchers Hwang Woo-suk and his team claimed[18] that they have cloned the world's first human embryo and extracted stem cells from it. They reported that the first human embryonic stem cell line produced with somatic cell nuclear transfer (cloning). There are several doubts regarding this supposed breakthrough.[19]

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17 Templeton, *Cloning – One Step Closer*, THE SUNDAY HERALD, July 28, 2002.

18 W. S. Hwang, et. al., 308 SCIENCE, May 2005 at 1777.

19 The Seoul National University has commissioned tests on cell samples taken from scientist Hwang Woo-suk's laboratory amidst reports that earlier results have created stem cells individually tailored to patients. The investigation panel has asked three outside labs to conduct the DNA tests to determine whether Mr. Hwang was ever able to develop a colony of stem cells from a cloned embryo as he claimed in a May article in the journal *Science*. It was claimed that the panel found at least 9 out of 11 stem cell lines documented in the article were fabricated and the other 2 cell lines were under investigation. On the other hand, South Korea's Yonhap News Agency reported that some test results already received showed that some stem cells created after the paper was published did match patient's DNA. Scientists felt that the development of stem cells that match a patient's DNA is a huge leap toward treatments for incurable afflictions such as Alzheimer's disease and diabetes. The University authorities planned to commission more investigations to obtain an accurate and prudent analysis. In the meantime, Mr. Hwang apologized for the fabrication and stepped down as Professor at the University. He insisted, however, that his team has developed the technology to create patient–matched stem cells. See *University Orders More DNA Tests on Hwang's Stem Cell Research*, THE HINDU, December 28, 2005.

III. The Bioethics Debate

The benefits and perils of what some are calling "the ultimate technology frontier" are both exciting to behold and chilling to contemplate.[20] While the power and possibilities of biotechnology are comprehended by people, the ethical issues about the potential threats and possibilities of cloning in human beings are beginning to pour from all concerned quarters. The bioethics[21] debate has started to emerge as a powerful force against the stem cell research and cloning in the West, particularly in the US it has become very controversial. Ethical questions pertaining to DNA databases, gender selection, genetic testing, genetic counseling, preimplantation genetic diagnosis, are being seriously debated. Legitimacy of embryonic stem cell research, cloning, especially human cloning became very contentious unresolved issues. Utilization of human genome project and permissibility of genetic testing are nagging the policy makers and ethicists for lack of clear directions.

There are few areas of modern biomedical research that have aroused as much controversy as stem cells.[22] These new experimental medical strategies did not only raise positive expectations with respect to the treatment of serious diseases and conditions but also created a great deal of controversy and put pressure on policymaking. Whereas tissue engineering and

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20 *Supra* n. 2 at 2.

21 The term 'bioethics' has at least two different meanings, one broader than the other. The term was used for the first time by Van Rensselaer Potter in 1970 who advocated a comprehensive and global view of bioethics; on the other hand, André E. Hellegers used the term 'bioethics' for the first time in an institutional way for an academic field of learning and a movement regarding public policy and the human life sciences. Bioethics in this view is a new way of approaching and resolving moral conflicts generated by a new concept of medicine. This more restricted view has become dominant in much of the theory and practice of bioethics. In the present context "bioethics" refers to the systematic, pluralistic and interdisciplinary study and resolution of the ethical issues raised by medicine and the life and social sciences as applied to human beings and their relationship with the biosphere, including issues relating to the availability and accessibility of scientific and technological developments and their applications. See *Explanatory Memorandum on the Elaboration of the Preliminary Draft Declaration on Universal Norms on Bioethics*, First Intergovernmental Meeting of Experts Aimed at Finalizing a Draft Declaration on Universal Norms on Bioethics, UNESCO Headquarters, 4-6 April 2005.

22 Abdullah S. Daar and Lorraine Sheremeta, *The Science of Stem Cells: Some Implications for Law and Policy*, 11 (1) Health Law Review at 6.

23 Xenotransplantation is the process of transplantation of organs from one species to another, especially animals to humans.

bioartificial organs have remained relatively uncontested. xenotransplantation[23] and, in particular, therapeutic cloning and embryonic stem cell research have given rise to heated debates in Europe and in the United States. What some interpreted as a "medical revolution," others saw as an attempt to create "superhumans," as a revival of Nazi eugenics[24] in new clothes, or as a potential public health disaster.[25]

Embryonic stem cell research, cloning, and xenotransplantation are medical strategies that stir emotions, create camps of fervent supporters and dedicated opponents, and stimulate discussions about the meaning and direction of modern medicine. Currently, in most Western countries bioethicists, philosophers, lawyers, scientists, and other kinds of experts ponder about the acceptability, the limits, and the promises of these new research strategies, which focus on the recovery, manipulation, and utilization of cells from humans and animals for medical purposes. They discuss different methods, such as transplanting tissues or organs from genetically modified pigs to humans, removing embryonic stem cells from aborted fetuses in order to create and transplant neural precursor cells, and taking cells from a person for using them to clone a blastocyst and thus obtaining stem cells.[26]

The birth of Dolly was the starting point of debate. Within days of the announcement about cloning of sheep in 1997, President Clinton of the USA responded immediately to the emotions of public and imposed a ban on federal funding related to attempts to clone human beings. In addition, the President directed the National Bioethics Advisory Commission (NBAC) to report within 90 days on the ethical and legal issues that surround the potential cloning of human beings. The NBAC engaged itself in an intensive and open examination of the topic, hearing from experts in law, science. medicine, ethics, religion as well as from members of the general public and submitted its report, *Cloning Human Beings*, to the President. The Commission focused mainly on the reproductive human cloning and not on

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[24] The term eugenics used to refer the process of improvement of human species by selective breeding with the help of those individuals with desirable genetic characteristics. It was practiced during Nazi Germany to encourage the pseudoscientific 'master race' by eliminating unfit and feeble minded persons. This was highly disfavoured as it led to the sterilization of thousands of people and murder of people in the name of 'social undesirables'.

[25] Herbert Gottweis, *Stem Cell Policies in the United States and in Germany: Between Bioethics and Regulation*, 30 (4) POLICY STUDIES JOURNAL, 2002 at 444-69.

[26] *Supra* n. 22.

research (or therapeutic) cloning and found out that the potential ability to clone human beings through SCNT raises a host of complex scientific, religious, legal, and ethical issues, especially the medical risks to any child conceived in this manner. The Commission concluded that no one – whether federally or privately supported – should be permitted to create babies through cloning at that time and recommended a moratorium be imposed on such research. It was believed that a moratorium would give society a safeguard not only against extreme risks to any child created in this fashion but also against the possible harms that might accompany crossing the line to controlled, asexual "reproduction". A moratorium would also provide a period of time both for further knowledge to be accumulated about mammalian cloning and for serious and sustained reflection about the sort of world that human cloning could create and then, three to five years hence, Congress or the President of the US would decide whether the results of the scientific research and of the debate on the risks and potential benefits of human cloning had provided sufficiently strong reasons to lift the prohibition and permit human cloning under any circumstances. As the technology was still in infancy at that time, the Commission did not attempt to write a final word on the issue but instead provided a starting point for what they hoped would be the profound and sustained reflection their nation needed on the subject on human cloning.[27]

When the researchers succeeded in creating for the first time the human pluripotent stem cell lines from embryos remaining after infertility treatments and aborted fetuses in 1998,[28] the NBAC again engaged itself in analyzing its implications and came out with the report *Ethical Issues in Human Stem Cell Research* and suggested for appropriate changes in statutes and regulations to allow federal funding of research involving the derivation and use of human stem cells from aborted fetuses and from embryos that would

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[27] See the Statement of Prof. Alexander Morgan Capron, Commissioner of National Bioethics Advisory Commission, USA, and Henry W. Bruce Professor of Law. University Professor of Law and Medicine, Co-Director, Pacific Center for Health Policy and Ethics, University of Southern California Law Center, testifying before the Subcommittee on Crime Committee on the Judiciary, United States House of Representatives, June 19, 2001.

[28] Researchers at the University of Wisconsin and Johns Hopkins University announced in November 1998 that they had for the first time succeeded in creating human pluripotent stem cell lines from embryos remaining after infertility treatments and aborted fetuses. See J. A. Thomson, *et. al.*, *Embryonic Stem Cell Lines Derived from Human Blastocusts*, 282 SCIENCE, 1998 at 1145; M.J. Shamblott, *et. al.*, *Derivation of Pluripotent Stem Cells from Cultured Primkordial Germ Cells*, 95 PROC. NAT'L. ACAD. SCI., 1998 at 13726.

otherwise be discarded, subject to appropriate ethical standards and procedures that include public oversight and review. The commission also recommended that research involving the derivation or use of stem cells from human embryos made, using SCNT, should not be eligible for federal funding at that time. However, NBAC noted that there was significant reason to believe that use of stem cells from such embryos may have therapeutic potential, due to the utility of matched tissue for autologous cell replacement therapy, and stated that scientific progress and medical utility in this area of research should be monitored closely. NBAC did not address whether or not this research should occur in the private sector.[29]

NBAC had several courses of action under consideration on the question of cloning. One would have been no moratorium on any activities. The second would have been a moratorium on both reproductive as well as research cloning. The third, which was the one that the commission actually chose, was a temporary moratorium on reproductive cloning, but no moratorium on research cloning. In doing so, NBAC recognized that while important moral considerations were at stake, with respect to research and reproductive cloning, the nature of those moral considerations were different in kind. With respect to research cloning, the issues are those associated, in general, with the embryo research debate. With respect to reproductive cloning, however, the issues pertained to the safety of the fetus and mother and the potential impact of reproductive cloning on the resultant children and their institutions of parenting and child bearing. It was because of the difference between these types of considerations that a moratorium was considered appropriate in one case (reproductive cloning) but not the other (research cloning). At the time it considered stem cell research, the commission once again considered the question of research cloning. There it concluded that the case had not yet been made for a need for federal funding for that activity. It did not, however, propose a moratorium on privately funded activity in this area.[30]

Prof. Alexander Morgan Capron in his personal capacity opined that had a stronger justification been shown for using SCNT to create embryos for stem cell research he doubted NBAC would have opposed federal funding. The fact was the need for cloning human embryos was simply not established, given the rudimentary state of the science on such matters as

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[29] *Supra* n. 24.

[30] *Ibid.*

[31] *Ibid.*

mammalian cloning in general or controlling the differentiation and development of cells and organs from pluripotent stems cells. In addition, NBAC recognized the availability of human embryos remaining after fertility treatments to meet the needs of researchers.[31]

In July 2002, the President's Council on Bioethics delivered its recommendations to the President regarding the federal policy on human cloning. The deeply divided panel by a 10-7 margin recommended that the government should ban cloning for reproductive purposes and observe a 4 year moratorium cloning for biomedical research. However a minority of Council members expressed support in principle for research cloning.

A human embryo has a special status as a potential human being, but it does not have the same status as a living child or adult. It should not be seen as disrespecting the embryos, but rather as enabling them to serve a greater good by being used for research – which is an act of greater respect for these embryos.

There is a view that the creation of embryos through therapeutic cloning does offer an opportunity to derive stem cells which are immunologically compatible with the person being treated, thereby avoiding the problem of rejection. In February 2003, Singapore ES Cell International has paved the way for stem cell treatment that offers hope for diabetic patients, as its scientists have the means to develop insulin producing to respond effectively to such scientific advances and discoveries.

Different religions possess different stand points with regard to stem cell research. For example, in Singapore, the National Council of Churches of Singapore, the Catholic Medical Guild of Singapore, the Sikh Advisory Committee, and the Singapore Hospice Association have strong contentions that a human life begins from the moment of conception. Others such as the Majlis Ugama Islam Singapura held the view that a human life does not begin until some time after conception. The Buddhist Federation in Singapore supports research on the view that it is ethically irresponsible to deny the progress of scientific research that would benefit mankind.[32]

From 1998 to the present, advisory groups and government panels in at least 23 countries and 5 international political bodies have studied and commented on human embryonic stem cell research. During this time, 18 different committees in 12 countries have concluded that permitting the

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[32] Catherine Tay Swee Kian and Tien Sim Leng, *The Singapore Approach to Human Stem Cell Research, Therapeutic and Reproductive Cloning*, 19(3) BIOETHICS. 2005.

conduct of human SCNT research is an acceptable public policy. The groups espousing this view include the Nuffield Council on Bioethics in the United Kingdom, the National Consultative Committee on Ethics in France, Israel's Bioethics Advisory Committee, Singapore's Bioethics Advisory Committee, the Dutch Health Council, and the British House of Lords Select Committee on Stem Cell Research.[33]

While there is universal agreement not to permit human cloning, the opinion is divided regarding use of embryonic stem cells for therapeutic cloning. Equally controversial is the issue of sex determination of embryo. It is obviously justified if it is required for preventing birth of a genetically compromised child. The psychosocial, ethical and legal consequences of surrogate motherhood following in vitro fertilization (IVF) technology can no longer be kept under the carpet since there is already an increasing demand for the same. The emerging fields of behavioural genetics and the potentials for manipulating brain functions have already raised alarms about their possible misuse in absence of well-defined ethical guidelines. Attributing the client's criminal action to some genetic predisposition lawyers have begun to plead in the courts of law absence of responsibility or culpability of their client for the criminal offence committed.

In the UK the Royal Society preferred moratorium instead of an outright ban on reproductive cloning. According to Gardner, "The reason why the Royal Society advocated a global moratorium on human reproductive cloning rather than outright prohibition is that a full and open discussion of the issues that it raises might lead to recognition of circumstances in which its use was considered appropriate".[34]

While there exists a near global consensus about banning of human reproductive cloning amongst the vast majority of experts, commentators and States, as evidenced in the practices of individual States in their respective countries and their declared positions while voting for the United Nations Declaration on Human Cloning in the General Assembly in August 2005, still there are some who find it acceptable to clone human beings.[35]

Ethical considerations have strong force in the society and for that matter they cannot be overlooked. Ethics also happen to be the basis of law

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[33] Le Roy Walters, *Research Cloning, Ethics, and Public Policy*, 299 (5613) SCIENCE, 14 March 2003 at 1661.

[34] Gardner, Richard L., *Therapeutic Cloning and Reproductive Cloning – A Scientific Perspective*. (Oxford: Oxford University, 2002) at 6-7, quoted in *id.* at 207.

[35] See, *supra* n. 22.

making most of the times. Yet, at the same time the society cannot afford to stifle the development of science and technology in the name of assumed factors. An effective interdisciplinary approach must be adopted to seriously explore and examine the sociological, political, economic, ethical, philosophical and legal implications of cloning and stem cell research. The implications of intellectual property rights over patenting of genetic materials should also be resolved.

IV. Redefining Health Law And Policy

In the light of the recent developments in biomedical research, a new look at the health care law and policy is imperative. The purpose of science is (or ought to be) improvement of human life and alleviation of human sufferings. The human curiosity to unravel the secrets of nature with the help of emerging technology brings alongside it new kinds of problems and creates new provinces of jurisprudence.

Norman Daniels[36] has logically extended the theory of justice propounded by John Rawls[37] and has related it to justice in health care. Daniels has made the compelling argument that access to basic health care is a requirement of justice. A goal of public health and medicine is to keep people as close as possible to the ideal of normal functioning, under reasonable resource constraints. The question is how can this goal be accomplished on a global scale, and what sorts of public policies are needed to make progress toward that goal?[38] Only recently have bioethicists begun to explore inequalities in health and health care in the international sphere.[39] There is a strong nexus between global health care and emerging revolution in science and technology. According to Harvard University President Larry Summers, the most important issues facing mankind today are the health of people in the developing world, particularly people in Africa and the emerging revolution in the life sciences which for the first time, is providing us with a fundamental understanding of human nature.[40]

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36 N. Daniels, Just Health Care (Cambridge: Cambridge University Press, 1985).

37 J. Rawls, A Theory of Justice (Cambridge: The Belknap Press, 1971).

38 Ruth Macklin, *Bioethics and Public Policy in the Next Millennium: Presidential Address*, 15 (5/6) Bioethics, 2001at 373-81.

39 *Id.* at 374.

40 Summers L., *Remarks of President Lawrence H. Summers, School of Public Health Leadership Council Inaugural Meeting,* Cambridge, Massachusetts. October 21, 2003, quoted in Abdallah S. Daar, Puja Sahni and Peter A. Singer. *Genomics, Biotechnology and Global Health: The Work of the University of Toronto Joint Centre For Bioethics*, X (2) Acta Bioethica 2004 at 213-25.

The new and rapidly advancing field of genomics and related biotechnologies has the ability to either improve or worsen global health inequities. In general, developing countries are left behind in the development of new technologies and advances in genomic medicine.[41] This widening gap between modern science and technology and the accessibility of the same to the needy in the developing world to improve their health has to be reduced. Innovation in science and technology has significantly contributed to medical advances and has consequently had a large impact on public health. The benefits of this progress, however, have yet to be equally shared globally. Millions of people in developing countries continue to face health challenges that no longer burden the industrialized world. With pandemics such as HIV/AIDS plaguing countries in sub-Saharan Africa, life expectancies in this region is 40 years and falling – nearly half of those in developed countries. This immense disparity in global health equity is perhaps the greatest ethical challenge of our time.[42] Global health inequity is one of the most important ethical issues facing the world today.[43] It is evident in the large differences between life expectancy figures for industrialized and developing countries. Life expectancy in Canada is 80 years and rising; in sub-Saharan Africa, it is 40 years and falling. Inequities exist in the number of deaths due to preventable diseases – a figure much higher in the developing world than in the industrialized west. There is also a 10/90 gap: only 10% of public and private health research expenditure is devoted to the health issues affecting 90% of the global population.[44] Most genomics researches also focus on health issues affecting the wealthiest countries in the world. Scientists feel that genomics–related technologies have the potential to improve the health equity gap.[45] The World Health Organization, in its 2002 report on *Genomics and World Health*, also urges Member states to build genomics and bioinformatics capacity for research towards their own health priorities in order to address global health inequities.[46]

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41 See A. Daar, et. al., *ibid.*

42 Peter A Singer, et. al., *The Critical Role of Genomics in Global Health*, 2 GLOBAL FORUM UPDATE ON RESEARCH FOR HEALTH at 113-14.

43 *Supra* n. 29.

44 Global Forum for Health Research, *The 10/90 Report on Health Research 2003-2004*, quoted in *id.* at 214.

45 *Supra* n. 29 at 116.

46 GENOMICS AND WORLD HEALTH, Report of the Advisory Committee on Health Research, World Health Organization, Geneva 2002.

However, a view that extends beyond genomics and biotechnology is required in order to truly harness the potential of science and technology to improve global health. Other fields such as nanotechnology and regenerative medicine can also have a large impact on increasing global access to health care. Nanotechnology, for example, currently offers a cheap alternative to current diagnostic tests through the lab-on-a-chip, a microfluid device that can test for numerous diseases at a time. Regenerative medicine also has tremendous therapeutic potential: autologous bone marrow stem cells are currently being tested in patients for treatment of heart disease, a promising development in light of the dramatic increase in levels of cardiovascular disease in developing countries. The benefits of genomics and biotechnology are already being felt in developing countries.[47]

The moot question is how cost effective it would be for the people living in developing countries to access the modern treatments. How many people could afford to avail super specialty treatments given their pitiable economic status? What would be the role of national governments in such a scenario?

Some encouraging signs are visible at the global level. One of the efforts being the Millennium Development Goals (MDG) initiated under the auspices of the UN which aims at reducing global poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women by the year 2015.[48] Another ambitious project the University of Toronto Joint Centre on Bioethics (JCB)'s Canadian Program on Genomics and Global Health (CPGGH) involving 25 research and capacity enhancement projects aimed to reduce the genomics divide and improve global health equity.[49] Their *Top 10 Biotechnologies for Improving Health in Developing Countries* project identifies the ten most promising biotechnologies which could be used for improving health in developing countries.[50] Another major initiative is

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47 *Supra* n. 29 at 116.

48 See IMPLEMENTING THE MILLENNIUM DECLARATION: THE MILLENNIUM DEVELOPMENT GOALS AND THE UNITED NATION'S ROLE (United Nations Department of Public Information, October 2002).

49 See Canadian Program on Genomics and Global Health (CPGGH) 2004 at www.geneticsethics.net visited on December 23, 2005.

50 The top 10 biotechnologies include, Molecular Diagnostics, Recombinant Vaccines, Vaccine & Drug Delivery, Bioremediation, Sequencing Pathogen Genomes, Female-Controlled Protection Against Sexually Transmitted Infections. Bioinformatics, Enriched GM Crops, Recombinant Drugs, Combinatorial Chemistry. Full report available online University of Toronto Joint Centre for Bioethics. TOP 10 BIOTECHNOLOGIES FOR IMPROVING HEALTH IN DEVELOPING COUNTRIES (2002). http://www.utoronto.ca/jcb/home/news_genomics.htm visited on December 25, 2005.

from Bill and Melinda Gates Foundation (BMGF) under the title *Grand Challenges in Global Health* involving $200 million medical research grant. The University of Toronto Joint Centre for Bioethics (JCB) is providing methodological support for this programme.[51] A global genomics network is also mooted to harness and equitably distribute the benefits of genomics among the countries. Canada has proposed to set apart not less than 5% of their research and development to a knowledge-based approach to develop assistance for less fortunate countries. Similar kind of 5% commitment by European Union and the US (if they come forward) would result in an additional $9.3 billion and $14.1 billion devoted to developing country challenges, respectively.[52]

V. Differing National Legal Regimes

Countries adopt different approaches in allowing stem cell research and therapeutic cloning. However, human reproductive cloning is by and large disallowed by all countries. The World Stem Cell Map published by[53] the Columbia University Medical Center reveals the global status of stem cell research in different countries. Countries like United Kingdom, Belgium, Sweden, Israel, India, Singapore, China, Japan, South Korea, South Africa, follow permissive approach to stem cell research. Embryonic stem cell derivation techniques including somatic cell nuclear transfer (SCNT), also called research or therapeutic cloning is permitted. Australia, Brazil, Canada, France, Spain, The Netherlands, Taiwan adopt flexible approach in which derivations from fertility clinic donations only are permitted, excluding SCNT, and often under certain restrictions. Research is permitted only on remaining embryos no longer needed for reproduction. Countries with a restrictive policy include (among the most restrictive) Austria, Ireland, Norway, Poland, (among the less restrictive) Germany, Italy, and the United States. Restrictive policies range from outright prohibition of human embryo research to allowing research on imported embryonic stem cell lines only to permitting research on a limited number of previously established stem cell lines. A law in the Czech Republic regulating embryonic stem cell research is pending. Turkey is among several countries in which no specific regulations and guidelines have so far been defined by legal or governmental institutions for human embryonic stem cell research. The positions of some of the countries are discussed below.

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51 See, H. Varmus, et. al. *Public Health Enhanced: Grand Challenges in Global Health (Policy Forum)*, 302 (5644) Science, 17 October 2003, at 398 -99.

52 *Supra* n. 30.

53 Columbia University Medical Center, Stem Cell Reception Brochure, June 21, 2005.

A. USA

Stem cell research and human cloning have become extremely contentious issues in the US. President Clinton has instituted a ban on federal funding related to attempts to clone human beings in 1997.[54] On the basis of religious beliefs, the House of Representatives banned all forms of human cloning from 2001. Now federal funding is allowed for embryonic stem cell research only on cells already in existence. The National Bioethics Advisory Commission monitors all federally funded ES cell research. President Bush has banned embryonic stem cell research in any federal institution or any federally funded research program except for some already existing cell lines.

The Human Cloning Prohibition Act, 2003 prohibits human cloning.[55] It is also unlawful to import an embryo produced by human cloning or any product derived from such embryo. Nonetheless the Act does not restrict areas of scientific research in the use of nuclear transfer or other cloning techniques to produce molecules, DNA, cells other than human embryos, tissues, organs, plants, or animals other than humans.

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[54] Harold T. Shapiro, *Ethical and Policy Issues of Human Cloning (Policy Forum)*, 277 (5323) SCIENCE, 11 July 1997 at 195-96.

[55] Sec. 302. Prohibition on human cloning:

(a) In General - It shall be unlawful for any person or entity, public or private, in or affecting interstate commerce, knowingly-
  (1) to perform or attempt to perform human cloning;
  (2) to participate in an attempt to perform human cloning; or
  (3) to ship or receive for any purpose an embryo produced by human cloning or any product derived from such embryo.

(b) Importation - It shall be unlawful for any person or entity, public or private, knowingly to import for any purpose an embryo produced by human cloning or any product derived from such embryo.

(c) Penalties -
  (1) Criminal Penalty - Any person or entity that violates this section shall be fined under this title or imprisoned not more than 10 years, or both.
  (2) Civil Penalty - Any person or entity that violates any provision of this section shall be subject to, in the case of a violation that involves the derivation of a pecuniary gain, a civil penalty of not less than $1,000,000 and not more than an amount equal to the amount of the gross gain multiplied by 2, if that amount is greater than $1,000,000.

(d) Scientific Research - Nothing in this section restricts areas of scientific research not specifically prohibited by this section, including research in the use of nuclear transfer or other cloning techniques to produce molecules, DNA, cells other than human embryos, tissues, organs, plants, or animals other than humans.

As the Federal support is not forthcoming, the US National Science Academy has offered its own guidelines for stem cell research in May 2005. However, the State of California has given green signal to stem cell research. Approved by California voters on November 2, 2004 Proposition 71 provides constitutional right to a State to pursue stem cell research, including through Somatic Cell Nuclear Transfer or therapeutic cloning, and prohibits funding of human reproductive cloning research.

Only 12 of the 50 states currently ban human SCNT research, either specifically or through prohibiting all research on early human embryos. In the remaining 38 states, SCNT research involving human eggs and early embryos is not legally proscribed. California studied the question of human embryonic stem cell research with the aid of an interdisciplinary advisory committee. After a multiyear deliberative process, this large, diverse state enacted a law that supported human SCNT research. A federal ban would immediately preempt this new law. Bills that expressly permit human SCNT research have been introduced in the legislatures of 12 additional states. The states are Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Kentucky, Tennessee, Indiana, Missouri, and Washington.[56]

On December 20, 2005, the President of the USA has signed the Stem Cell Therapeutic and Research Act of 2005, which creates a new Federal program to collect and store cord blood, and expands the current bone marrow registry program to also include cord blood. The legislation requires that the Secretary of Health and Human Services contract with qualified cord blood stem cell banks to facilitate the collection and maintenance of human umbilical cord blood. Collected cord blood would be made available for transplantation or research and distributed via a program within the Health Resources and Services Administration. Additionally, the Act also establishes a searchable database of available cord blood as well as a scientific database tracing patient.

It is felt that the UK could benefit from the regulatory differences between the US and UK. It is predicted that as a consequence of the prevailing situations in the US, Britain will see an influx of scientists from the U.S. In 2001, for example, Professor Roger Pedersen, a pioneer in this area, took up a position at Cambridge University's Department of Surgery. Professor Pedersen's laboratory was only one of six to have isolated stem cells from human embryos. There are also reports that a number of U.S.

[56] R. Willing, USA TODAY, 25 Feb 2003 at 3A. See Le Roy Walters, *Research Cloning, Ethics, and Public Policy*, 299 (5613) SCIENCE, 14 March 2003 at 1661.

biotech companies are considering moving their research programs to the UK.[57]

B. United Kingdom

UK strongly supports stem cell research. The Human Fertilization and Embryology Act, 1990 permits experimentation on human embryos up to the 14 days post fertilization stage, and prohibits nuclear substitution of any cell whilst it forms part of an embryo.[58] The Act requires a license from the Human Fertilization and Embryology Authority for any creation, use, or storage of a human embryo outside the body.[59] Any one who wants to pursue SCNT requires a license from the Authority. All treatment clinics offering in vitro fertilization (IVF) or donor insemination, or storing eggs, sperm or embryos, conform to high medical and professional standards and are inspected regularly. The Authority is empowered to license and monitor all human embryo research and overseeing research in the field as well as considering the ethical implications of a number of key issues.

US regulation of stem cell research has had a direct effect on the UK science effort. In the opinion of Richard Gardner, Professor of Zoology at Oxford University, the UK government's recent decisions to allow therapeutic cloning will make reproductive cloning more likely, and will certainly do so in the sense of generating the know-how necessary for improving the efficiency of obtaining healthy cloned conceptuses. Moreover, since such technical advances are normally published in the open scientific literature, this information will be just as freely available in countries that do not have the relevant legislative controls as in those that do.[60]

With regard to the biomedical field, the European Commission has established the European Group on Ethics in Science and New Technologies, the support for research in bio-ethics and the introduction of ethical principles and evaluation for Community research support. With regard to therapeutic cloning – where the UK has the lead – and the UK government's adaptation

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57 Helen Lawton Smith, *Regulating Science and Technology: The Case of the UK Biotechnology Industry,* 27 (1) LAW & POLICY, January 2005, 189-212 at 207. However, Professors like Kay Davis, Head of the Oxford Centre for Gene Function, said that she would not do some work in China because of the less strict regulatory system, see Davis, Kay, *Creating Knowledge – New Initiatives in Oxford,* 2002, in seminar on Genetics Knowledge in Oxford – Networks and Opportunities? at Business School, Oxford, 30 October.

58 Section 3 (3)(d) Human Fertilization and Embryology Act, 1990.

59 Section 3(1), *id.*

60 *Supra* n. 34.

in January 2001 of the 1990 Human Fertilization and Embryology Act to allow therapeutic cloning research to be carried out on fourteen-day-old embryos left over from IVF treatment, has led to the European Parliament's establishing of the Temporary Committee on Human Genetics. This will provide guidance for the European Parliament on what regulation may be necessary.[61]

C. Singapore

In Singapore, there is no law to regulate research on human embryos. The Guidelines for Private Healthcare Institutions Providing Assisted Reproduction Services[62] provide for the use of human embryos below 14 days that were created through IVF techniques, but which are not used in assisted reproduction treatments, provided stringent regulatory stipulations are met.

The Regulation of Biomedical Research Bill was introduced in November 2003. The Bill seeks to regulate the conduct of biomedical research and ban certain types of research. However, Singapore decided to adopt a step-by-step approach to the regulation of human stem cell research and cloning. She started with the more pressing issue of human reproductive cloning by enacting the Human Cloning and other Prohibited Practices Act, 2004. Separate laws will subsequently be developed for human embryonic stem cell research and human tissue research. Section 5 of the Human Cloning and Other Prohibited Practices Act specifically prohibits the implantation of a human embryo clone in the body of a human or an animal. Further, it is not a defense to this criminal offence that the human embryo clone could not have survived. However, therapeutic cloning of human embryos for research is allowed under special circumstances. Section 7 bans the implantation of any human embryo in a woman created by any process other than fertilization of a human egg by a human sperm, for a period of more than 14 days. It is an offence for any person to develop any human embryo outside a woman body for more than 14 days. Section 9 forbids any person to remove any human embryo from a woman body to collect a viable human embryo. It is also an offence to place any prohibited embryo in the body of a woman. This Act also bans the importation and exportation of human embryo clones. It also prohibits the commercial trading in human eggs, human sperms and human embryos. The criminal penalties for contravening the provisions of Human Cloning and Other Prohibited

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[61] Helen, *supra* n. 57.

[62] Regulation 4, Private Hospitals and Medical Clinics Regulations.

Practices Act are a maximum fine of $100,000 or a maximum imprisonment of ten years or both.[63]

D. India

India is the 10th largest industrialized country in the world, with the 3rd largest pool of scientific and technical professionals. The country has a well-established pharmaceutical industry and has made forays into the biotechnology sector, with support from the government as well as industry innovation. It also continues to be the world leader in the Information Technology sector, which has spawned a burgeoning bioinformatics industry. At the same time majority of its population live in poverty and have poor access to modern medicine. Scientists view that the country's biotechnology industry has made huge strides over the last ten years and that genomics has the potential to alleviate India's health problems.[64]

The Indian biotechnology industry is ranked third in the world in terms of stem cell research, primarily because both the government and private industry have invested heavily in research institutes studying stem cells.[65] As India ventures into genomics and bioinformatics, it will be important to prioritize the country's health needs and strategic entry points. An estimated 4 million people are living with AIDS in India, over 2 million people are infected with malaria per year and over 420,000 Indians die annually from tuberculosis. On the other hand, chronic diseases like cancer, diabetes and heart disease are also prevalent in India and pose a rising health concern. Both these broad categories of disease present R&D opportunities for India. Moreover, India's biotechnology and pharmaceutical industries are also in a good position to prioritize and develop indigenous technologies. For example, the announcement by the US Department of Health in 2002 of 64 stem- cell lines that will be funded by the US federal government creates opportunities for stem cell research in India – Reliance Life Sciences has 7 of these cell lines.[66]

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[63] For a detailed analysis of Singapore scenario, see Catherine, *supra* n. 32.

[64] GENOMICS POLICY EXECUTIVE COURSE REPORT, An Indo - Canadian initiative by Indian Council of Medical Research and University of Toronto Joint Centre for Bioethics for Harnessing Genomics to Improve Health in India, January 20 - 23. 2003, Kumarakom , Kerala, India.

[65] Tara Acharya, et. al., *Harnessing Genomics to Improve Health in India – An Executive Course to Support Genomics Policy,* 2:1 HEALTH RESEARCH POLICY AND SYSTEMS 2004, May 2004

[66] *Ibid.*

In January 2002, the Department of Biotechnology (DBT) also articulated priority research areas for government funding in biotechnology. These areas include vaccines based on genomic research for cholera, malaria, AIDS, rabies and tuberculosis as well as biofertilizers, biopesticides, transgenic crops, and gene therapy for cancer treatment. A biotechnology vision document released in late 2001 outlines additional plans over the next 10 years and includes developing edible vaccines for specific diseases targets, testing and approving a series of GM crops, developing additional vaccines and diagnostic tools for major communicable diseases, as well identifying and protecting biodiversity "hot spots." There is considerable concern among NGOs and other stakeholders in India that the DBT's goals are too broad and difficult to realize. Draft National Biotechnology Development Strategy (2005) also emphasises harnessing the benefits of modern biomedical research particularly stem cell research.[67] Moreover, it is doubtful that these activities will help to meet the health needs of the economically weaker sections of society.

The regulation of biomedical research in the country is still in a nascent stage. The Indian Council of Medical Research issued a "Policy Statement on Ethical Considerations involved in Research on Human Subjects" in 1980. In September 1994, the Government of India notified the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act. The ICMR has over the years issued policy statements and guidelines primarily concerned with ethical aspects of research on human subjects. It has a standing Central Ethics Committee on Human Research (CECHR). Similarly the Medical Council of India has a committee on Medical Ethics which has issued a code for medical practice.

In 1998, the National Academy of Sciences, India, organized an International Bioethics Symposium on *Human Genome Research: Emerging Ethical, Legal, Social and Economic Issues*. As a follow-up of the recommendations of this symposium, the Department of Biotechnology, Government of India established a National Bioethics Committee. Following detailed deliberations, it has issued a document on "Ethical Policies on the Human Genome, Genetic Research and Services". This is an elaboration of the guidelines included in the ICMR document. A nominee of this committee is represented on the UNESCO Inter-governmental Bioethics Committee

[67] DRAFT NATIONAL BIOTECHNOLOGY DEVELOPMENT STRATEGY prepared by the Department of Biotechnology, Ministry of Science & Technology, Government of India, 2005

(IGBC). The Committee thus provided inputs to the UNESCO deliberations on human genetic data.[68]

Despite all these developments and prospects for stem cell research in India, the people at large, even those who are eventually connected with these activities, are almost ignorant of what is going on around them and there is no healthy debate or policy initiative in the country. India needs a clearly articulated genomics and biotechnology policy that will focus on biomedical research to meet domestic needs.

The Indian Council for Medical Research has come out with Guidelines for Stem Cells Research / Regulation in India in 2004. Still it is in a draft stage only. The Government of India has not yet taken any final action on this. As of now there is no policy or legal framework which regulates stem cell research in India.

VI. The Evolving International Order: Unesco's Efforts On Bioethics

Practice of medicine has since time immemorial been guided by ethical principles. The best known of these were enshrined in the Hippocratic Oath. However, long before that equally enlightening principles were pronounced by *Charak* and *Susruta*, the pioneers of the Ayurvedic system of medicine. These primarily referred to doctor-patient relationship.[69] Nevertheless, modern bioethics is founded on values enshrined in the Universal Declaration of Human Rights (1948). Other texts of different legal force establishing rules for the protection of persons in the wide field of biomedicine include the Nuremberg Code adopted by the United Nations General Assembly in 1947, the Declaration of Helsinki (1964) of the World Medical Association (WMA) , Declarations of Tokyo (1975), Venice (1983) and Hong Kong (1989) - and the International Ethical Guidelines for Biomedical Research Involving Human Subjects (1992) prepared and recently revised by the Council for International Organizations of Medical Sciences (CIOMS).

At the regional level, the American Convention on Human Rights (1978) and the African Charter on Human and Peoples' Rights (1981) also contain provisions relevant to bioethics. The only existing conventional instrument is the Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, which was drawn

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[68] See, P.N. Tandon, *Bioethics: An Emerging Discipline*, Indian J Med Res, January 2005 at 121.

[69] *Ibid.*

up within the framework of the Council of Europe, adopted in 1996 and in force since 1997. An additional Protocol is already in force and another is open for signature. The main purpose of the Convention is to "protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedom with regard to the applications of biology and medicine"[70]. The Convention also declares that "the interests and welfare of the human being shall prevail over the sole interest of society or science".[71] On the other hand, the Charter of Fundamental Rights of the fifteen countries of the European Union, adopted at the Nice Summit in 2000, includes other points of bioethical interest that are related not only to biology and medicine: the right to life (nobody can be condemned to capital punishment); the right to physical and mental integrity, to freedom and personal security; the refusal of torture and inhuman punishments or treatments, of slavery and forced labour, but also include "positive rights" connected with fundamental needs, such as health and education, and that demand action and implementation of public policies.

UNESCO has been a pioneering international body in the field of bioethics and has established two advisory bodies – the International Bioethics Committee (IBC) and the Inter-governmental Bioethics Committee (IGBC). IBC is the only global forum for in depth biological reflection by exposing the issues at stake which was established in 1993. IGBC was created in 1998 to examine the advice and recommendations of IBC.[72]

UNESCO has contributed to the formulation of basic principles in bioethics through three major instruments – the Universal Declaration on the Human Genome and Human Rights adopted by the General Conference of UNESCO on 11 November 1997, the International Declaration on Human Genetic Data adopted by the General Conference of UNESCO on 16 October 2003 and the Universal Declaration on Bioethics and Human Rights adopted by the General Conference of UNESCO on 19 October 2005.

The Universal Declaration on the Human Genome and Human Rights, 1997 was the first step in the direction incorporating the fundamental principles in bioethics. The Universal Declaration on the Human Genome and Human Rights is limited in its scope, as it applies only to the human

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[70] Article 1 of the Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 1996

[71] Article 2, *id.*

[72] For more details see http://portal.unesco.org visited on 23 December 2005.

genome. At the same time, it specifically mentions examples contrary to human dignity, such as the reproductive cloning of human beings[73] and germ-line interventions.[74] It also underlines the role of the International Bioethics Committee in identifying practices contrary to human dignity and sets forth distinct principles on ethical values that should be considered in the international instrument, such as prior, free and informed consent, no financial gain, confidentiality, non discrimination and solidarity.

The International Declaration on Human Genetic Data, 2003 was adopted to ensure the respect of human dignity. The Declaration aims[75] to ensure the respect of human dignity and protection of human rights and fundamental freedoms in the collection, processing, use and storage of human genetic data,[76] human proteomic data[77] and of the biological samples[78] from which they are derived, referred to hereinafter as "biological samples", in keeping with the requirements of equality, justice and solidarity, while giving due consideration to freedom of thought and expression, including freedom of research; to set out the principles which should guide States in the formulation of their legislation and their policies on these issues; and to form the basis for guidelines of good practices in these areas for the institutions and individuals concerned. Any collection, processing, use and storage of human genetic data, human proteomic data and biological samples shall be consistent with the international law of human rights. The provisions of this Declaration apply to the collection, processing, use and storage of human genetic data, human proteomic data and biological samples, except in the investigation, detection and prosecution of criminal offences and in parentage testing that are subject to domestic law that is consistent with the international law of human rights.

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73 Article 11 of the Universal Declaration on the Human Genome and Human Rights,1997.

74 Article 12, *id.*

75 Article 1, International Declaration on Human Genetic Data, 2003.

76 Human genetic data means the information about heritable characteristics of individuals obtained by analysis of nucleic acids or by other scientific analysis. See, Article 2(i), *id.*

77 Human proteomic data denotes the information pertaining to an individual's proteins including their expression, modification and interaction. See Article 2(ii), *id.*

78 Biological samples means any sample of biological material (for example blood. skin and bone cells or blood plasma) in which nucleic acids are prese. See Article 2(iv), *id.*

The Universal Declaration on Bioethics and Human Rights, 2005 recognizes that ethical issues raised by the rapid advances in science and technological applications should be examined with due respect to the dignity of the human person and universal respect for and observance of human rights and fundamental freedoms. The Declaration emphasizes that moral sensitivity and ethical reflection should be an integral part of the process of scientific and technical developments and that bioethics should play a predominant role in the choices that need to be made concerning issues arising from such developments. The Declaration aims to provide a universal framework of principles and procedures to guide states in the formulation of their legislation, policies or other instruments in the field of bioethics.[79] Article 3 of the Declaration protects human dignity, human rights and fundamental freedoms and puts the interests and welfare of the individual at the centre stage. Scientific research should be carried out with the prior, free, express and informed consent of the person concerned. The information should be adequately provided along with modalities for withdrawal of consent by the person concerned at any time and for any reason without any disadvantage or prejudice. Exceptions to this principle should be made only in accordance with ethical and legal standards adopted by States, consistent with the principles and provisions set out in the Declaration and international human rights law.[80] Privacy and confidentiality of personal information of persons are protected under the Declaration. The privacy of persons concerned and the confidentiality of their personal information should be respected to a greatest extent possible. Such information should not be used for purposes other than those for which it was consented to or collected. [81] Though the Universal Declaration of Bioethics and Human Rights 2005 is a significant declaration as far as bioethics is concerned, it is unfortunate that it does not even mention about stem cell research and cloning.

VII. UN Ban on Human Cloning

The Health Assembly first considered the subject of human cloning in 1997, affirming that "the use of cloning for the replication of human beings is ethically unacceptable and contrary to human integrity and morality".[82]

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[79] Article 2(a), Universal Declaration on Bioethics and Human Rights, 2005.

[80] Article 6.1, *id.*

[81] Article 9, *id.*

[82] Reproductive Cloning Of Human Beings: Status Of The Debate In The United Nations General Assembly, Report by the Secretariat, World Health Organization, Executive Board, EB115/INF.DOC./2 115th Session 16 December 2004.

The following year, the Fifty-first World Health Assembly reaffirmed that "cloning for the replication of human individuals is ethically unacceptable and contrary to human dignity and integrity". To date, some 35 countries have adopted laws forbidding human cloning. Some prohibit only cloning for reproductive purposes and allow the creation of cloned human embryos for research, whereas others prohibit the creation of cloned embryos for any purpose. International documents such as the Universal Declaration on the Human Genome and Human Rights, adopted by the UNESCO General Conference in 1997 and endorsed by the United Nations General Assembly the following year, and the World Medical Association's Resolution on Cloning, endorsed in 1997, have confronted the issue but lack binding legal force.[83]

The UN General Assembly recently adopted the United Nations Declaration on Human Cloning, 2005 calling on the Member States to adopt all measures necessary to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life. The Declaration also calls on the Member States to protect adequately human life in the application of life sciences; to prohibit the application of genetic engineering techniques that may be contrary to human dignity; to prevent the exploitation of women in the application of life sciences; and to adopt and implement national legislation in that connection.

The Assembly commenced the work on an international convention on human cloning four years ago, but failed to forge a consensus on the vexed issue of global importance. The Declaration was adopted by a vote of 84 in favour to 34 against, with 37 abstentions. This is because of the reason that most of the states are in favour of therapeutic cloning and the term "human life" contained in the text was ambiguous and confusing and could be interpreted as a call for a total ban on all forms of human cloning. However, there was a global consensus for reproductive human cloning.

VIII. Conclusions

The development of science signifies the maturity of human race in unlocking the secrets of nature and harnessing them for the benefit of humanity. The preceding discussion reveals that technology promises a significant leap forward for the humanity in its known history – to make, unmake, fine-tune, design differently or cure humans – in many new ways. Are we ready for this process? What kind of science and technology we could afford to permit? What amount of restraint is needed at this hour? The human

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[83] *Ibid.*

race as a whole has to decide now. Technology is good as long as it is within our control. For that matter regulation should not stifle the development of science and technology which would prove to be benevolent to the human race however small segment of people it could be. At the same time the mandate of science and technology must be to benefit the global health of human beings and not to complicate life.

Swift precautionary regulatory approach would solve the uncertainty over stem cell research. As of now there is no global vision and regulatory framework in the field of biotechnology and nanotechnology assisted biomedical research, particularly relating to cloning and stem cell research, barring a few UNESCO Declarations on Bioethics and Human Rights. The regulation of biomedical research is largely in the national domain. This would make the global governance of medical biotechnology uneven and complex as the harmful effects of biotechnology will not confine themselves within the limits of national boundaries alone rather they will affect the entire global environment and human health. Different strategies and legal measures adopted by different nations will pave the way for uneven standards and prevent uniformity of legal and policy measures in dealing with modern biomedical research. Global consensus has to be achieved to have a holistic approach to the biomedical research and a comprehensive legal framework has to be evolved covering all issues. The legal framework should endeavor to promote global health and prevent disparities and inequity in health care initiatives. It should also aim at minimizing its lethal implications and maximizing its benefits. The issue of liability for any potential harm to the persons utilizing advanced biomedical research and those used in such process has to be settled. In the final analysis, it is submitted that there should be an international convention on bioethics and human stem cell research so that a consensus can be reached internationally with minimum standards and safeguards to be placed at national levels.

TEACHING OF INTERNATIONAL LAW IN INDIA

*Anupam Jha**

I. INTRODUCTION

Teaching of international law in India until 1990s had not been given due attention and support by the State and international institutions. The situation has changed in the present era of definite and progressive development of international law. Going global is fashionable these days. Course offerings in international law and comparative law abound; students and faculty exchanges are proliferating; transnational recruitment of faculty and students is expanding; international student initiatives such as mooting, journals, and internships are multiplying rapidly; visitor's programs and transnational collaborative research projects are ubiquitous.

In such a scenario, teaching of international law in India has become a challenging as well as an exciting task. However, it is distressing to note that many new course offerings are confusing international law with global law, comparative law, transnational law and foreign law. Therefore, it is pertinent to distinguish international law from either global law or foreign law or transnational law or comparative law.

The term 'global law' is commonly used as a loose reference to a mix of foreign, comparative, international and transnational law[1]. 'Foreign law' typically refers to the internal law of States other than our own.[2] International law, in contrast, has traditionally been viewed as governing relations between States. But since the advent of non-state actors (e.g. international institutions, NGOs, terrorist groups) on the international scene, it has been more aptly described as any form of law that is supranational. 'Comparative law' is more difficult to define, as the amount of scholarly literature devoted to the issue testifies.[3] However, it will be sufficient to say that the domain of comparative

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* Lecturer, Law Center–II, University of Delhi, Delhi. This paper is a revised version of the paper presented at the seminar organized jointly by Indian Society of International Law, Delhi and Law Center –II, University of Delhi in April, 2005.

1 Catherine Valcke, *Global Law Teaching*, 54 JOURNAL OF LEGAL EDUCATION, 2004 at 160.

2 Foreign law is used in its most common understanding, as referring to geographical otherness only.

3 See generally A.T. Von Mehren, *An Academic Tradition for Comparative Law?* 19 AMERICAN JOURNAL OF COMPARATIVE LAW, 1971 at 624; G.

law does not differ from that of foreign law. Transnational law is still more nebulous. Most commonly, the term is used in a technical sense, to designate an amalgam of legal relations and instruments that, while involving private citizens directly, cross national boundaries[4]. Transnational contracting is a good example. Although the parties are private, not State actors, the contracts relate to more than one State. To this date, what is commonly referred to as 'transnational law' boils down to no more than international and internal state law applied to cross-border interactions involving private parties.

If the above distinction is kept into mind while teaching international law and devising new courses, it will be beneficial. That benefit will be manifested in the clear concept and vision of the teacher of the subject and its relevance to India. India is a developing country. International law has been initially moulded and developed by the developed western countries. Thus, contemporary international law needs to be analyzed and evaluated with a view to determine the interests of the developing and developed states. Such an analysis will be much more effective if Indian interests, policy and law and their compatibility with the international standards are given adequate focus.[5]

This paper is an endeavor to throw light on the teaching of international law in India in the contemporary times. Starting with the introduction in the first part, the second part deals with the rationale of teaching international law in India. The third part deals with the broad topics to be covered while teaching international law in India. Finally, the fourth part deals with the effectiveness of teaching international law in India.

Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARVARD INTERNATIONAL LAW JOURNAL, 1985 at 411; B. Markesinis, *Comparative Law – A Subject in Search of an Audience*, 53 MODERN LAW REVIEW, 1990 at 1; A. Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW, 2nd ed., (Athens, 1993); J. Gordley, *Is Comparative Law a Distinct Discipline*? 46 AMERICAN JOURNAL OF COMPARATIVE LAW, 1998 at 607; N.V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AMERICAN JOURNAL OF COMPARATIVE LAW, 1998 at 647; J.H.Merryman, *Comparative Law Scholarship*, 21 HASTINGS COMPARATIVE & INTERNATIONAL LAW REVIEW, 1998 at 771; M. Van Hoecke & M. Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INTERNATIONAL & COMPARATIVE LAW QUARTERLY, 1998 at 495.

4 William Twining, *Globalization and Legal Theory*, 49 CURRENT LEGAL PROBLEMS, 1996 at 1 and 9.

5 Gurdip Singh, INTERNATIONAL LAW (New Delhi, 2003) at vii.

II. Rationale of Teaching International Law in India

To teach international law in India, one will certainly look for the reasons to teach the subject. Our judiciary has recognized that nations must march with the international community and the municipal law must respect rules of international law[6]. It means that rules of international law must be known to the students of law and to the policy makers of India. When rules of international law are cited before the domestic courts, they are given respect and enforced under certain circumstances. It has been repeatedly affirmed by our apex court that it is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law[7]. Even with respect to those rules of municipal law, which can be given two interpretations, that interpretation will be adopted by the courts which lean in favor of international law. Only when the municipal law is inconsistent with the international law that municipal law is accorded primacy over international law. Therefore, it is extremely important for the students of law to be taught international law.

The next rationale behind teaching international law in India is to sensitize the students about the effects of international law on the individuals of any nationality. International law is more than ever aimed at individuals. It is not confined to regulating the relations between the States. Today, matters of social concern, such as health, education and economics apart from human rights fall within the ambit of international regulations[8]. Individual has been granted limited procedural capacity to enforce rights granted under international law. Individual may also be punished for violation of international law, such as under Optional Protocol to the Covenant on Civil and Political Rights, 1966; International Convention on the Elimination of All Forms of Racial Discrimination, 1966; Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965; UN Convention on the Law of the Sea, 1982; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971: Convention on the Prevention and Punishment of the Crime of Genocide,1948 and Rome Statute, 1998. The developments in international

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6 It was so held by Justice O. Chinnappa Reddy in *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey* (1984) 2 SCC 534.

7 For example, *Vellore Citizens' Welfare Forum* v. *Union of India* (1996) 5 SCC 647; *People's Union for Civil Liberties (PUCL)* v. *Union of India* (1997) 1 SCC 301.

8 *Peoples' Union for Civil Liberties (PUCL)* v. *Union of India* (1997) 1 SCC 301.

law show that individuals have rights and duties under international law. In fact, international law has fractured traditional link of the state with international law and by selecting individuals as members of international community for rights and duties, even against their respective national states[9].

The next significant rationale of teaching international law is to provide knowledge to students about the implementation mechanism of a rule of international law. Many jurists differ in their views about implementation. As the substantial portion of international law is the creation of developed western countries, jurists and the courts of those countries recognize the implementation of customary international law without implementing legislation. Some countries are trying to give a new shape to international law in the aftermath of 9/11. They also claim to have implemented international law. Such an approach needs to be assessed by the developing countries according to their needs, aspirations and interests. Problems in implementation shall certainly face problems in case of international environmental law and international trade law. India's record of implementing international law is better than the other Asian countries. Except some important areas like refugee law, criminal law and environmental law, India has several feathers in its cap when it comes to implement international law. To mention a few, our Parliament has enacted The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 to implement law of the Sea. It has come up with Geneva Conventions Act, 1960 to implement international humanitarian law. Recently, the Government has enacted the Patents (Amendment) Act, 2005 to implement GATT obligations. To implement international law, therefore, domestic legislation may be required but not always essential.

Finally, rationale to teach international law comes from contemporary challenges in international law. The problems for the UN Charter based World Order system posed by the conflicts within the Security Council need to be discussed today. New legal claims are advanced such as, a revised doctrine of humanitarian intervention; pre-emptive military strikes as an exercise in self-defence; and multilateralism versus unilateralism in the exercise of the peace and security powers under the UN Charter[10]. International terrorism has been a threat to India. A comprehensive and

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[9] *Supra* n. 5 at 85.

[10] Edward Mc Whinney, THE SEPTEMBER 11 TERRORIST ATTACKS AND THE INVASION OF IRAQ IN CONTEMPORARY INTERNATIONAL LAW (Boston, 2004) at 11.

insightful analysis of the pertinent domestic, bilateral, regional and international legal developments need to be carried out while teaching international law. There is a threat of nuclear and cyber terrorism now. The problems of detention of terrorists as unlawful combatants and their trial merit discussion and analysis. The recent difficulties faced by the Government of India in extraditing the fugitive offender Abu Salem from Portugal is an example of India's slow response to new challenges in the world order. The Extradition Act of India is of the year 1962 when the whole world had a different order and speed to take action. Now, the International Criminal Court has been established in the year 2002. Its relevance to India has to be understood and examined in greater detail. International criminal law recognizes around fifty acts as war crimes.[11] But, the India's Geneva Conventions Act, 1960 recognizes very few of them as war crimes. Should we re-examine our law or should we be threatened by expanding international criminal law? Can we say that domestic law is becoming so deeply enmeshed with the global environment that teaching it in isolation from this environment would be tantamount to distorting it?[12]

III. Broad Topics to be Covered

Teaching of international law in India should cover the basic topics. The UGC Model Curriculum for Law is a good example of such basic topics. It has given a good guideline to the universities to include those topics. However, implementing body is the concerned university. The concerned university knows the requirements of its students and the time constraints. Those universities, which follow semester system in law schools, find very tough to include all basic topics in one semester itself. Trimester system law schools[13] cannot include all basic topics at all in one semester. The University of Delhi covers the very basic topics of international law in one semester and then other issues of it in other two semesters. However, the other two are optional and the students are free to opt it or not, but the first part of international law is compulsory one.

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[11] See for example, Art. 8 of the Rome Statute of the International Criminal Court. 1998.

[12] See in this respect John Sexton's explanation that "few significant legal or social problems today... are purely domestic—whether one thinks of labor standards and NAFTA, criminal law, intellectual property and trade, or the impact of foreign creditors on United States monetary policy. It is virtually impossible to avoid the transnational implications of almost any subject," John E. Sexton, *The Global Law School Programme at New York University*, 46 Journal Of Legal Education. 1996 at 329-34.

[13] For example, National Law Institute University (NLIU), Bhopal follows trimester system.

At least there are fifteen topics that are important and should be taught at the law schools. But the general experience of the teachers of international law is that the students find the study of international law as not a rewarding one. The reasons are- the syllabus for lower judiciary places least emphasis on international law, law firms in India are primarily catering to the needs of domestic industry and mastery over domestic law is considered to be a *sine qua non*. Except those law students who aspire to become a civil servant and opt law as an optional subject, no other student seems to be attracted to the study of international law.

The first topic to be taught should be development, nature and current status of international law. The present day international law is said to have started its evolutionary journey four hundred years back. At the start of its journey and unto its half way, international law was not considered to be as 'law' proper. Now, the international jurisprudence has acquired the maturity to realize that an effective international legal system is indispensable to ensure peace, develop international co-operation and guarantee the sovereign rights of states. The process of international legislation (i.e. law-making treaties) has, therefore, geared itself to such an enormous extent that it has dominated the relatively slow process of international custom which has ever since the main source of international law.

In this connection, the sources of international law have become important to be discussed. Two kinds of sources- traditional and modern- need to be discussed. Traditional sources are mentioned in Article 38 of the Statute of the ICJ. However, modern sources, which include resolutions of General Assembly and Security Council, become relevant discussions. Such discussion will include ICJ decisions, *Advisory Opinion of ICJ on Namibia,*[14] *Advisory Opinion of ICJ in Western Sahara,*[15] *Texaco Overseas Petroleum et al.* v. *Libyan Arab Republic,* [16] and *Advisory Opinion of ICJ on Legality of the Threat/Use of N-Weapons.*[17]

The relationship between international law and municipal law comes thereafter. Apart from various theories on relationship, the practice of States like India, U.S.A., U.K., and Australia needs to be discussed. While discussing India's practice, its constitutional position, treaty-making power of the executive and implementing power of the executive and the legislature need to be discussed. In such discussion, judicial decisions can be the best illustrations.

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14 ICJ Rep., 1971.

15 Advisory Opinion, ICJ Rep., 1975.

16 (1978) 17 INTERNATIONAL LEGAL MATERIAL 1.

17 (1996) 35 INTERNATIONAL LEGAL MATERIAL 809.

Further, state responsibility is an important area worthy of being taught. After Herculean efforts by the international community and especially by the International Law Commission, a Draft Code on Responsibility of States for Internationally Wrongful Acts, 2001 was adopted. The Draft Code distinguishes between international responsibility and international obligations of states. It also deals with various forms of reparation. Therefore, the above distinction and forms of reparation need to be discussed threadbare. While discussing the aforesaid topic, certain decided cases, such as *Trail Smelter* (*US* v. *Canada*)[18]; *Corfu Channel*[19]; *Nottebohm*[20], *Barcelona Traction*[21] and *US Diplomatic and Consular Staff in Tehran*[22] need to be discussed.

The Law of Sea is another important area of international law teaching. India has taken important initiatives in the promotion of international law on the sea. The concepts of Territorial Sea, Contiguous Zone, Continental Shelf, Exclusive Economic Zone and High Seas need to be properly made understood to the students. The fact that India has been registered as a pioneer investor in 1987 makes it imperative that students should know the legal regime of various maritime zones as established by the U.N. Convention on the Law of the Sea, 1982 which came into force on 16th November 1994. India ratified it in 1995. Apart from the specific provision from the U.N. Convention, some landmark judgment such as, *Anglo- Norwegian Fisheries case*[23], *North Sea Continental Shelf case*[24], *Libya-Tunisia Continental Shelf case*[25], *Libya-Malta Continental Shelf case*[26] and *Qatar –Bahrain case*[27] are also to be discussed.

Other important areas of international law are international human rights law; international humanitarian law, international environmental law, international trade law, international refugee law, law of treaties, international terrorism, international criminal law, dispute settlement methods under international law are outlined, and air and space law. Here only ten very important broad areas of international law, which are quite useful from the student's perspective of utility and practice. It is submitted that contemporary areas should always be taught in international law.

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18 UN Rep., Int. Arb. Awards, 3, 1941.
19 ICJ Rep., 1949.
20 *Leichtenstein* v *Canada*, ICJ Rep., 1955.
21 *Belgium* v *Spain*, Second Phase, ICJ Rep., 1970.
22 *USA* v *Iran*, ICJ Rep., 1980.
23 ICJ Rep., 1951.
24 ICJ Rep., 1969.
25 ICJ Rep., 1982.
26 Reproduced in 25 INDIAN JOURNAL OF INTERNATIONAL LAW (1985) at 270.
27 Reproduced in 42 INDIAN JOURNAL OF INTERNATIONAL LAW (2002) at 371.

Those contemporary areas are rewarding in the sense that they offer job avenues. For that matter, law schools in India should go in for major revision of the course contents of their international syllabi. Such a revision should take into account the latest UGC Model Curriculum for Law, 184th Law Commission of India's Report on Reform of Legal Education and the guidelines of Bar Council of India.

IV. Enhancing Effectiveness in Teaching International Law

To enhance effectiveness in teaching international law, multi-pronged approach is required. It is not sufficient that we revise the course-contents in the curriculum and it shall become effective. The curriculum is only an instrument, after all is said and done, for the use of teachers and students.[28] It does not enhance the effectiveness of teaching methodology. It will also be not enough that we make study of international law compulsory for at least four semesters and the teaching will become effective. It will again not be enough that we make sixty-six percent attendance requirement mandatory for appearing in the examination and it will become effective. What is required, apart from the above initiatives, is to build an ambience, to build an atmosphere of learning, to build such an atmosphere of learning where students start to think international law. Unless international law will not become a way of thinking, a mode of reasoning, the receptivity and attentiveness of the students will remain low.

In so far as law becomes a way of thinking, a mode of reasoning rather than just a collection of rules, doctrines and institutions, the ultimate objective of legal education ought to be not so much the absorption of legal information as the development of the ability to think in law. So law schools should aim to render students capable of 'thinking like an international lawyer'. Not just thinking, but also to 'feel' it and 'behave' like a lawyer.

To make students think, feel and behave like an international lawyer, problem based teaching is the need of the hour. Pierre Legrand gave a swimming metaphor, which is surprisingly apt here: 'In order to learn how to swim, one had better jump in the water than read swimming treatises'.[29] Moot Court Competitions should be organized at least twice in each semester

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[28] Gitanjali N. Gill, V.K. Ahuja, Vijender Kumar, et. al., *Law Teaching and Legal Research Skills*, Background Paper presented at the Law Teaching and Legal Research Skills Training Program, 10-13 Feb. 2005, British Council, Delhi at 3.

[29] A translation of the French version of Pierre Legrand's swimming metaphor is given in Catherine Valcke, *Global Law Teaching*, 54 Journal Of Legal Education, 2004 at 172.

in every subject. Participation in those moot courts should be made compulsory for the students. The relevance of organizing moot courts by law schools has been repeatedly emphasized by Bar Council of India. Mooting is a specific form of simulation in which we ask the students to argue points of law before a simulated court.[30] The students need to be encouraged to take part in such moot courts on a regular basis. The Henry Dunant and Philip Jessup Moot Court Competitions organized by ISIL every year is a laudable effort and it gives students an exciting opportunity to develop their confidence at the international level. Such competitions should be increased in number.

Students should also learn Client counseling techniques. Those techniques are important skills to be acquired by the international law students. One such skill is negotiating skill. Negotiation is an art as well as science. As an art, it exhibits the imaginative and artistic ability of the negotiator in creating a worthwhile atmosphere where a good rapport is built between or amongst conflicting parties and the negotiator. As a science, it points to the logical, mechanical and procedural steps to be followed to attain an effective accomplishment of goals.[31] If the student knows the art and science of client counseling, he also knows handling pre-litigation matters. The students should command pre-litigation techniques. Client Counseling Competition is such a nice competition that students and the invitee judges are willing to say 'bye-bye' to moot court competition and 'hi' to client counseling competitions. India has not caught up with such developments. That needs to be done. That is how students will be having hands-on experience of the actual problems and disputes and its handling. That is how, Pierre Legrand's metaphor will be applicable.

Finally, teaching methods or techniques should also be improved a lot. The way that teachers organize situations to help students to learn can be called teaching techniques. When choosing and planning teaching technique, one should consider the type of learning involved, the ways that different people like to learn, and the context in which they are learning. There are different techniques/methods of teaching such as Lecture Method of teaching; Lecture with Discussion Method of teaching; Panel of Experts Method of teaching; Brainstorm Method of teaching; Videotapes/ Slides Method of teaching; Discussion Method of teaching; Small Group Discussion Method of teaching; Case Studies Method of teaching; Role Play Method of teaching;

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30 Le Brun, Lansdell and Clarke, NEW PERSPECTIVE FOR TEACHING LEGAL STUDIES (Hobart, 1989).

31 *Supra* n. 28 at 2.

Report-Back-Session Method of teaching; Worksheet/Surveys Method of teaching; Index Card Exercise Method of teaching; Guest Speaker Method of teaching; Values Clarification Exercise Method of teaching, etc.[32] Out of these different techniques, the teacher should adopt that technique which he thinks best to convey properly to the students.

V. Conclusion

Teaching international law in India is not easy as well as exciting. It is not easy because international law is very vast and complex. One needs to understand the basic preliminary concepts very clearly and thereafter to establish the rationale of teaching international law. It is not so exciting because there is a limited audience. However, the recent plans of the Government of India to open up the doors of legal practice to foreign firms has stirred the students to know more and more about international law. Legal Process Outsourcing is also considered to be the future career by the current generation of students. These new developments have given a spurt in the study of international law. The students also want to study the contemporary challenge posed by the conflicts within the Security Council and the resultant problems for the UN Charter based world order.

The UGC Model Curriculum for Law, Law Commission's latest report and Bar Council of India's recommendations take these developments into account. The Universities in India should implement the recommended curriculum in the right earnest and even should add some new areas, which are considered rewarding by the students. Ultimately, the teaching of international law should be planned in such a manner that an atmosphere of learning is created where students start to think about international law. By organizing moot courts on international law, imparting client-counseling techniques, adopting better teaching techniques, such an atmosphere may be created.

[32] *Id.* at 8.

STRENGTHENING THE JUDICIAL SYSTEM IN INDIA

*Ashutosh**

I. INTRODUCTION

The foundation of any democratic society is based on "rule of law". Our country is no different. The rule of law governs all aspects of our State and it is guaranteed by Part III and other provisions of the Constitution.[1] But where the citizens are largely illiterate and poor, and mediocrity is at a premium, population explosion is nobody's concern and the illiterate poor feel that extra hands in the family would be a small financial help, what happens to the rule of law? Our country is the best example of working democracy with these evils, at great strains trying to keep the system work at tremendous odds.[2]

Laws in India have elaborate provisions for safeguarding the rights of its citizens. However, these rights are not available to the accused belonging to poverty class and the same are being availed only by those belonging to elite class of the society, who have got the means to exploit those rights. Due to this reason, accused persons belonging to poverty class are not able to get justice in our judicial system and on the other hand the people of means are able to get out of the clutches of law and hold the key to unlock the door of the justice. Hence, because of this disparity in availability of the rights to different sections of the society, the weaker sections of the society are not able to avail the economic opportunities nor they are able to participate in the political processes and local decision making. They are exposed to ill treatment by institutions of State and the society. This has also made poor people more vulnerable to insecurity in life i.e. vulnerable to ill health, economic shocks, crop failure, policy-induced dislocations, natural disasters and violence. All these things have led to increasing of gap between poor class and rich class. However, if democracy uses its mighty weapon of rule of law, which is foundation of any democratic society, to restore equality before law and balance the economic structure, the problem of poverty, world's greatest challenge, can be met successfully.

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

1 *Director of Rationing* v. *Corporation of Calcutta,* AIR 1960 SC 1355: 1960 Cri LJ 1684.

2 R. Damodar, *Custodial Crimes and Procedural Safeguards,* Cri LJ (Journal) 1994 at 117.

II. Rule of Law

A. *Concept of Rule of Law*

"The major problem of human society", observed the Supreme Court of India, "is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license".[3] The perennial dilemma is to discover a measure of right balance appropriate to the ever shifting tangle of human affairs. "A large part of the effort of man over centuries has been expended in seeking a solution of this great problem." There are two aspects of Government: governing the governed and the Government controlling itself. The device adopted by all self-governing peoples devoted to the values of liberal democracy is the 'rule of law' as a moral, cultural and constitutional underpinning of this process. The predicament of many of the emergent democracies in the post –World War-II scenario indicates that the mere adoption of loftily worded constitutional documents without the spirit of liberty and constitutionalism, is mere rope of sand.[4]

Rule of law is a dynamic concept and must keep pace with the changes to suit the current needs of the society. Protection of human rights and implementation of the legal framework is essential to prevent resort to rebellion against tyranny and oppression. In the Act of Athens, 1955, the rule of law is described as springing "from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all."[5]

B. *Role of Legal Profession and Rule of Law*

The aforesaid description of rule of law by the International Commission of Jurists is universally accepted and is a general definition in conformity with the legal system in every democracy. The first prerequisite of justice is rule of law and the true role of the legal profession is to

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3 *Indira Gandhi* v. *Raj Narain*, AIR 1975 SC 2299 (para 318).

4 J.S.Verma, *50 years of Freedom under Rule of Law: Indian Experience*, in New Dimensions of Justice (Delhi: Universal Law Publishing Co. Pvt.Ltd., 2000) at 37.

5 J.S.Verma, *Convocation Address* delivered on 16th June, 1997 at Calcutta University in New Dimensions of Justice, (Delhi: Universal Law Publishing Co. Pvt.Ltd., 2000) at 175.

endeavour to equate law with justice to achieve the ideal form of administration of justice. Court of law is described as 'Temple of Justice.' The judges and lawyers who constitute the legal profession discharge the role of priests in the Temple of Justice to worship the idol of justice.[6]

C. Poor People and the Rule of Law

The rule of law means that a country's formal rules are made publicly known and enforced in a predictable way through transparent mechanisms. Two conditions are essential: (i) the rules apply equally to all citizens, and (ii) the state is subject to the rules. How State institutions comply with the rule of law greatly affects the daily lives of poor people, who are very vulnerable to abuses of their rights.[7]

The rule of law is upheld through many channels, the most formal being the legal and judicial system. The legal and judicial system constraints and channels Government action and maintains clear rules and procedures for upholding an individual's constitutional rights. This system is essential for guarding against abuse of power by the state or other actors, and it requires that the judiciary be independent of the executive and legislative branches. The rule of law protects life and personal security and guards against human rights abuses. Thus defined, the rule of law is tremendously important for all citizens – but especially for poor people, who have few private means of protecting their rights.[8]

D. Rule of Law and Role of Police

Although the rule of law benefits poor people in many ways, laws and statutes are not necessarily geared to protecting their interests. Legal systems, the product of power relations between different groups in society, typically focus on protecting the interests of those with political strength and representation. Making laws and their interpretation more sensitive to the needs of the disadvantaged requires building coalitions to this end. This is the goal, for example, of efforts to make laws more equitable in their treatment of women and minorities. Legal obstacles leave poor people vulnerable to exploitation by local bosses and the police, and arbitrary harassment, lawlessness, and violence are constants in their lives. For poor people, a crucial aspect of the rule of law is the ability to live without fear of lawlessness and harassment. An effective modern police force is needed

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6 *Id.* at 176.

7 World Bank, WORLD DEVELOPMENT REPORT 2000-2001 – ATTACKING POVERTY (New York: Oxford University Press,2001) at 102.

8 *Id.* at 103.

to maintain order by enforcing the law, dealing with potentially disorderly situations, and attending to citizens in distress. [9]

The police force is meant not only to apprehend the perpetrator of the crime and to prosecute him in the law court but also to take effective measures for prevention of crimes. An efficient police force is to emphasize on prevention of crimes to generate a general feeling of security and well being in the community. Criminalisation of society disturbs the even tempo of life in the community, even if the offenders are apprehended and punished. Greater orderliness is achieved by maintaining an even tempo in the life of the community by reducing lawlessness to the minimum. Such a result itself ensures preservation of human rights of the people since every infraction of law occasions infringement of human rights of the victim. 'Prevention is better than cure' in State administration as it is in medi-care. This is the primary role of the police force in the preservation and enforcement of Human Rights of the members of the community.[10]

The above, however, is the ideal State. It is the utopia. Pragmatism requires an efficient machinery for implementation of the rule of law. In a society ruled by law, public institutions and officials must act in accordance with law. In democratic societies, fundamental human rights and freedoms are more than paper aspirations. They form part of the laws. In dealing with situations created by breach of law, the offender has to be dealt with in accordance with law. There has to be derogation from the human rights and freedoms of the offender to some extent. However, derogations from human rights and freedoms even when necessary must be limited so as to avoid weakening the substance of the rights and freedoms themselves, it must be only to the extent necessary in a democratic society. The delicate balance between the conflicting interests of the individual offender and the community has to be maintained. Extent of restriction of individual rights must be tested on the anvil of larger interest of community.[11]

III. Making the Legal System More Responsive to Poor People

Even when the legal system is well run, poor people face constraints in using it. Poor people typically have little knowledge of their rights and may be deliberately misinformed. Contemporary legal systems are written and are conducted on the basis of written documents – making access

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9 *Ibid.*

10 J.S.Verma, *Human Rights and Policing* in New Dimensions of Justice (Delhi: Universal Law Publishing Co. Pvt.Ltd., 2000) at 187- 88.

11 *Ibid.*

inherently difficult for poor people, who usually have little formal education. Language, ethnic, caste, and gender barriers and other exclusionary practices add to these problems. The intrinsic complexity of legal system is exacerbated in many developing countries by the superimposition of the new laws and constitutional rights over colonial legislation and customary law. The resulting confusion makes it difficult to know one's rights, introduces arbitrariness in law enforcement, and enables the powerful to choose which legal system to apply. This reduces poor people's confidence in the legal system. It also gives enormous discretion to authorities, often making connections and bribes central to negotiating the legal system. Making the rules simpler and clearer is especially important in the areas of greatest concern to poor people, such as labour disputes, land titling, human rights abuses, and police violence.[12]

A. Access to Legal System

Although poor people need to access the legal system for registration and other administrative purposes, they use the judicial system much less frequently than the non-poor. Court systems are poorly funded and equipped, and mechanisms for enforcing judgements often weak. These add to the other problems poor people face in using the judicial system, such as financial costs. Waiving court fees for people with low incomes could provide some relief. To assist poor people, legal aid is provided but often more in principle than in practice. To be effective, such aid must be delivered promptly. In addition to Government-provided services, legal aid can be provided through alternative sources.[13]

B. Streamlining the Operation of the Judicial System

Streamlining the operation of the judicial system to reduce costs and delays will address some of the problems poor people face in the courts. Reforming court procedures helps – simplifying rules (while respecting due process), shortening proceedings, and allowing parties to represent themselves. Broader reforms, such as changing the structure of the courts, also help increase poor people's access to justice. Small claims courts and other informal proceedings can reduce the backlog and widen access. The teaching and practice of law can be amended to sensitise the legal profession to the needs of poor people and to the use of the law to further the public interest.[14]

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12 *Supra* n. 7 at 103-04.

13 *Ibid.*

14 *Ibid.*

C. Alternative Dispute Resolution Mechanisms

The population growth and increasing awareness of rights in the people are major factors contributing to the increase of the workload in courts. Arbitrariness in State action with activity of the welfare States extending beyond the traditional governmental functions, is yet another contributory factor. The inadequacy of existing infrastructure of the justice delivery system to cope with the growing need during recent years has further widened the gap. However, to maintain the quality of performance this gap has to be bridged in a phased manner. Some years back an ominous warning was sounded by a few concerned with the administration of justice that our system was on the verge of collapse being antiquated and inadequate to meet the new challenges faced by the modern judiciary.[15] Alternative dispute resolution is another area that can rescue the system from crumbling under its own weight. Whatever be the form of legal system, the mandatory mediation particularly judicial mediation and court ordered mediation is one of the most significant modes of alternative dispute resolution. It is proving to be an effective alternative to traditional judicial systems be it United States or Germany. Experience has shown that resolution through arbitration though widely availed is less effective as at every step the parties seek court action causing enormous delay. It has become counter productive. Delay always operates as incentive for breaching obligation.[16]

The requirement of the judicial mediation is to first narrow down the disagreements between the parties and then persuade them for settlement by way of pointing out the strength and weakness of the claims and counter claims as well putting up the proposals for settlement projecting success or failure of the disputes on merits. Dr. Don Peter, Director of the Institute for Dispute Resolution at the University of Florida has suggested implementing steps in this regard. Some of these are – (i) creating statutory or rule based authority for the referrals; (ii) creating necessary procedures regarding the mediations; (iii) creating a means to ensure minimal mediator competence, which often includes mandatory training or certification requirements, ethics codes and mechanism for their enforcement; (iv) securing adequate funding and determining who will coordinate the programme. The theory is that if you set the people down with authority they will make good use of the time and talk.[17]

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[15] J.S.Verma, *Remedies to Reduce the Laws' Delays*, in NEW DIMENSIONS OF JUSTICE (Delhi: Universal Law Publishing Co. Pvt.Ltd., 2000) at 102.

[16] J.D. Kapoor, J., *Strengthening Administration of Justice*, AIR (Journal) 2002 at 88.

[17] *Ibid.*

There is dire need for providing necessary services to the public at large in settlement of claims, resolution of conflicts and adjustment of family and business relationships. As in England, provision for issuing certificates by area committees on the basis of which lawyers may be provided for opinion, giving notices, writing letters, negotiating settlements and filing suits and contesting criminal actions may be included in the Legal Aid and Advice Act.[18]

Thus, alternative dispute resolution mechanisms hold considerable potential for reducing the delays and corruption that characterise much dispute settlement. These alternative mechanisms may provide more predictable outcomes than the formal system, because community mediators are typically more familiar with the details of cases than are judges. The risk of such mechanisms is that they can give undue power to conservative forces in a community (which might, for example, be biased against gender equity) and be subverted to serve the interest of local elites. To minimise these risks, alternative dispute resolution mechanisms need to be carefully regulated and supervised by more formal legal structures. They can also be introduced gradually – for example, through pilot programs sponsored and supervised by regular courts.[19] At this juncture it would not be out of context to mention five principles, as prescribed by Buddha, long ago, with prescient wisdom that must be observed by a wise ruler when resolving disputes amongst his subjects. This is how they have been recorded: firstly, examine the truthfulness of the facts presented; secondly, ascertain that they fall within his jurisdiction; thirdly, enter into the mind of parties to the dispute so that the judgment to be rendered be a just one; fourthly, pronounce the verdict with kindness, not harshness; and lastly, judge with sympathy.[20]

These five percepts prescribed for a wise ruler are applicable to a wise judge as well; they are indispensable to an arbitrator.[21]

D. Promoting Legal Service Organisations

Civil society organisations such as legal service organisations seek to help poor people gain access to the benefits and protection of the legal system inside and outside the court system. Protecting individuals against unlawful

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18 *Ibid.*

19 *Supra* n. 7 at 104.

20 Bukhyo Dendo Kyokai, TEACHING OF BUDDHISM (Tokyo: Buddhist Promotions Foundations).

21 F.S.Nariman, *Arbitration Law – Change in Law Must Get Reflection in Changing Attitudes to Arbitration and Arbitral Awards*, 8th Foundation Day Lecture delivered at the Indian Law Institute on Monday 22nd March, 1999.

discrimination at work and eviction from their homes, such organisations help people collect their entitlements, obtain basic services, and get court orders to protect women from domestic violence. They can also protect communities from being dispossessed. Legal service organisations can help poor people by taking legal action on behalf of a group of plaintiffs. Often, large numbers of poor people suffer from similar injuries, so seeking redress as a group provide poor people with otherwise inaccessible judicial protection. Public interest litigation is one such form, which in India has improved the delivery of some public services and reduced environmental contamination.[22]

The most effective legal service organisations work outside the judicial system, protecting rights without resorting to lawsuits – important, because the costs of lawsuits can sometimes outweigh any resulting gains. This goes far beyond the conventional idea of offering free legal representation to poor individuals and helping people or communities assert their rights through the courts. More generally, the work of legal service organisations helps create a culture of rights that changes the way people think about themselves relative to those who have power over their lives – spouses, landlords, employers, and government agencies. This encourages poor people to avail themselves of the protection that the formal legal system offers. These organisations also generate pressure for changing the way the rules are applied by judges, bureaucrats, and the police. Legal literacy and legal aid have the maximum benefit if they help create a process of self-empowerment and social empowerment that moves citizens to activate their rights and to redefine and reshape inequitable laws and practices. Legal service organisations help change the rules that affect poor people, whether in Constitutions, statutes, regulations, municipal ordinances, or myriad other codes.[23]

E. Role of Judicial Institutions

State institutions play an important role in how markets affect people's standards of living and help protect their rights. They can promote inclusive and integrated markets, and ensure stable growth and thus dramatically improve people's incomes and reduce poverty. It is about equal opportunity and empowerment for people, especially the poor. Without strong judicial institutions that enforce contracts, entrepreneurs find many business activities too risky. Without effective corporate governance institutions that check managers' behavior, firms waste the resource of stakeholders. And weak

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22 *Supra* n.7 at 104-05.

23 *Ibid.*

institutions hurt the poor especially. For example, estimates show that corruption can cost the poor three times as much as it does the wealthy.[24]

IV. Judicial Reform Efforts

When building effective judicial institutions, policymakers aim to establish courts that decide cases cheaply, quickly, and fairly, while maximizing access. These variables are independent of one another. However, the evidence indicates that tradeoffs among them exist only at the margin. For example, when judicial performance is very slow, improvements in speed can be made without compromising fairness.[25] Three key themes run through the successful initiatives to improve judicial efficiency.

A. Increased Accountability of Judges

The existence of power must be accompanied by accountability. The accountability of the Judges is to the people in whom the ultimate sovereignty vests. It is, therefore, imperative to retain public confidence, which is the real source of strength of the judiciary. Erosion of credibility in the public mind resulting from any internal danger is the greatest latent threat to the independence of judiciary.[26] When judges are accountable for their actions, judicial systems can become more efficient, with judges providing faster and fairer solutions to cases. The incentives judges face affect judicial performance. Institutional design, in turn, affects judges' incentives. One of the primary factors affecting incentives is information on judicial performance, which allows the performance of judges to be monitored. A frequently used alternative is the imposition of legislated time limits on the resolution of particular types of cases. While legislated time limits have been a popular response to slow trials, the results to date have not been very encouraging. For example, in the United States time limits originally set by the Supreme Court have proved unenforceable. This is partly because it is difficult to monitor judicial effort. There is no objective way to tell whether a case drags on because it has legitimate difficulties or because a judge fails to do his job. As another example, judges in Argentina and Bolivia are given mandatory time limits to conduct and decide cases, but these are rarely enforced.[27]

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24 World Bank, World Development Report 2002 – Building Institutions for Markets (New York: Oxford University Press, 2002) at III.

25 *Id.* at 124.

26 J.S.Verma, *Independence of Judiciary – Some Latent Dangers* in New Dimensions of Justice (Delhi: Universal Law Publishing Co. Pvt.Ltd., 2000) at 26.

27 *Supra* n. 24 at 125.

There is dire need for treating judicial management as a philosophy. Efficiency, competence, merit and fairness have always been the hallmarks for success of judicial institution. Efficient system always promotes fairness. Thus we need to develop a judicial management philosophy of merit-oriented selection of judges and adopt informed and sensitive management by delegating the operational tasks to professionally trained administrators. There is need to establish the Institution of Court Administrators on state level as well national level as it is existing in USA (it is in Denver) for monitoring, operating, analyzing the case flow, developing the research into paper flow studies, case processing strategies and goal rationalization and to evolve measures and formulae to reduce the backlogs besides imparting training to judges and judicial personnel in court craft.[28]

B. Working according to Individual or Master Calendar

Systems where each judge works on the basis of an individual calendar have had some success. In such systems a single judge follows a case from beginning to end. This is in contrast to the master calendar, where the court can assign different parts of a case to different judges. The master calendar has some advantages; a case can go on if a judge is sick or has a large workload and judges can specialise in the procedural tasks that fall in their area of expertise. But there are drawbacks as well. No judge is fully familiar with the case, indifferent judges can rule inconsistently in the same case, and – when a case takes a long time in a master-calendar jurisdiction – it is hard to know who is responsible. Some studies have found that the individual calendar is associated with reduced times to disposition, not only because the judge in charge is more familiar with her own cases, but also because judges feel more accountable.[29]

C. Generating Accurate Statistics

Generating accurate statistics reduces delay, since judges care about their reputation. The experience with delay reduction programs in the United States suggests that because problems on a case, such as excessive delay, can be uniquely traced to a judge, individual calendars make judges work harder and manage cases more effectively. More broadly, reputational effects are a crucial determinant of whether delay in courts is severe. Reputational concerns are however, difficult to measure. Reforms such as reporting judicial statistics are effective because they provide a basis on which to assess judges' efficiency and therefore affect their reputation.[30]

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[28] *Supra* n. 16.
[29] *Supra* n.24 at 125.
[30] *Ibid.*

D. Transparency

Apart from hard statistics, greater transparency in the conduct of judicial business, coupled with a judge's interest in his reputation and desire for prestige, improves judicial efficiency. This has been documented in several industrial countries. When judges have open trials, lawyers, litigants, the media, and the general public observe their conduct. A review of the impact of televising judicial proceedings in New York State found that such scrutiny raises the efficiency of judges by one-third while at the same time increasing the quality of their judgements.[31]

E. Role of Civil Society Groups

Civil society groups can play an important role in helping to increase accountability in the judiciary. For example, in 1994 Argentina's *Fundacion para la Modernizaction del Estado* and *Instituto para el Desarrollo de Empresarios en la Argentina* published a report on the need for greater transparency as part of a judicial reform proposal. Also in Argentina, Poder Ciudadano formed a commission with other civil society organisations to follow the work of the new Judiciary Council. This group requested public access to hearings of the council and issued report on its functioning. In the Philippines the Foundation of Judicial Excellence, the National Citizens Movements for Free Elections, and the Makati Business Club established the Court -Watch project in 1992. They sent two observers, usually law students, to court rooms over an extended period of time. The observers rated judges after each visit, based on direct observation and surveys of lawyers and prosecutors involved in the case. The ratings included the judge's familiarity with the law, as well as the conduct of the proceedings, on such measures as promptness, efficiency, and courtesy. Soon after the program began, the media noticed that judges' behaviour had changed and that the efficiency of the court had risen significantly[32].

F. Simplification and Structural Reform

Simplification of procedures and enforcement has been found to improve judicial efficiency. Three main types of simplification or structural reform are important: the creation of specialised courts, alternative dispute resolution mechanisms, and the simplification of legal procedures.[33]

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[31] *Ibid.*

[32] *Ibid.*

[33] *Id.* at 126.

G. Specialised Courts

The structure of adjudication can be changed by creating specialized courts. These courts may be specialised around the subject matter. Specialised courts also introduce simplified steps if they cut some of the general court procedures.[34]

H. Alternative Dispute Resolution

We have already discussed this aspect of the matter above. However, it would be useful to mention that the main criticism of alternative dispute resolution methods, voluntary or otherwise, is that such mechanisms generally work better when the courts are efficient. In other words, parties to a dispute have incentives to settle when they know what court judgements they will get; courts complement ADR systems. However this is clearly not the case in many developing countries, where ADR systems function as substitutes. But to function in this manner, they need to effectively represent the community for whom they adjudicate. The *Lok Adalats* in India, for example, are not very popular since they do not offer adequate compensation for victims, who face high costs in the courts to enforce their rights. These are more likely to be the poor people.[35]

I. Simplifying Procedural Law

Case studies also show that simplifying procedural law can increase judicial efficiency. A factor commonly associated with inefficiency in civil law countries is the predominance of written over oral procedures. A move towards oral procedures has produced positive results in some countries, for example, Italy, Paraguay, and Uruguay. Simplification of procedures tends to have a positive impact on efficiency because greater procedural complexity reduces transparency and accountability, increasing corrupt officials' ability to obtain bribes. Procedural simplification tends to decrease time and costs and increase litigant satisfaction. The overall impact of procedural simplification depends on how burdensome the procedures were previously. Reforms in clogged systems may bring about a large increase in filings in the short run but in the long run will be associated with improved service, greater litigant satisfaction, and improvements in access.[36]

Streamlining the system by which judicial procedure itself is determined can be beneficial. If every procedural change must go through the legislature,

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[34] *Ibid.*
[35] *Id.* at 127.
[36] *Id.* at 128.

experimentation and innovation become difficult. Powers of the legislature to determine the organisation and procedural rules of courts could be partially delegated to the judiciary or the legislature could partially delegate these powers to individual courts to encourage more flexibility, as has been done in the United Kingdom, where small claims judges have the ability to adopt any procedure they believe will be just and efficient. Many procedures have been adopted because they were believed to serve fairness, protect the accused, and improve access of the poor. But the judiciary itself needs checks and balances. Such authority is best devolved to judges when there are also measures established to enhance accountability. Another constraint on the ability of procedural reform to deliver greater judicial efficiency is the law itself. When the substantive rules are unclear and other institutions are weak, there may be a limit as to how much judicial efficiency can be improved through procedural reform. For instance, when most land is untitled, land tenure is insecure because no one is sure how courts will rule on a contested claim.[7]

3. Increased Resources

The lack of resources and staff has been cited as the main factor constraining efficiency in the judicial system. However, data from the United States and from Latin American and Caribbean countries show no correlation between the overall level of resources and times to disposition. Further, many efficiency-improving efforts include funding increases along with other initiatives, making it difficult to isolate the impact of increased resources relative to other factors. The evidence indicates that funding increases help alleviate temporary backlogs in systems that have made a serious effort to work better but are of little use when inefficiencies are large. Crash programs to reduce backlogs through large infusions of resources have shown great results in the short term, but without deeper change, these results cannot be sustained. Introducing computer systems or other mechanisms to the judiciary has helped reduce delays and corruption. Resource increases are needed to introduce computer-based systems. Much of the reduction in corruption as a result of such a reform is probably due to the increased accountability in mechanised systems. Computerised case inventories are more accurate and easier to handle than the paper-based procedures they replace, and more than one person can have access to them, which makes them harder to manipulate.[8]

Overall resource levels are often un-correlated with judicial efficiency, but in cases of extreme under-funding, an infusion of resources can be

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[7] *Ibid.*

[8] *Id.* at 128-29.

effective. Resources may also help judges improve management. A major inefficiency in many judicial systems is judges' responsibility for administrative work, such as signing pay cheques and ordering office supplies. Centralising administrative work in a single office, where the employees have administrative training, increased efficiency.[39]

K. Independence of the Judiciary

Good governance requires impartial and fair legal institutions. This means guaranteeing the independence of judicial decision-making against political interference. A judiciary independent from both government intervention and influence by the parties in a dispute provides the single greatest institutional support for the rule of law. If the law or the courts are perceived as partisan or arbitrary in their application, the effectiveness of the judicial system in providing social order will be reduced.[40]

Care has been taken in the Constitution to ensure independence of Judiciary. As a matter of fact it is also treated as a basic feature of the Constitution which cannot be touched. But the full import or meaning of the expression "independence of the judiciary" is often not realized. There are many facets to it. Independence of judiciary does not mean merely independence from outside influences but also from those within. Danger from within have much larger and greater potential for harm than dangers from outside. To protect Judges from dangers, which emanate from sources outside there are many others who help. So far as the dangers from within are concerned, Judges are the one primarily responsible for them and they are the ones primarily who can avoid them – at a time, when the need for independence of the Judiciary and its preservation is the greatest. It is necessary that Judges are fully alive to this danger.[41]

'Be you ever so high, the law is above you.' Judges have to remember that when they say this it is not meant only for others. It applies equally to them – with the added responsibility, which they have of implementing it on themselves. For everyone else, they do it. For them, it will have to be done. There cannot be any doubt because no one can claim to be above law. If Judges are wise and they do it themselves then there is no need for any outside agency to do it. If they don't do it, and if some outside agency does it and then judges would only have themselves to blame. That would be an erosion of the independence of the judiciary for which no one else can be

[39] *Ibid.*

[40] *Ibid.*

[41] J.S.Verma, *Constitutional Obligation of the Judiciary* in NEW DIMENSIONS OF JUSTICE (Delhi: Universal Law Publishing Co. Pvt.Ltd., 2000) at 10.

blamed. Just as everyone else is accountable, judges are also accountable. Accountable to the same law, accountable to the same standards, which they set up for others.[42]

L. Court Administration

Next comes the need for making the Judiciary a single over arching authority. Responsibility of court administration has to be exclusively that of the judiciary, that is, the practice of supply of administrative component and financial sanctions by the executive have to be stopped. Transfer of power is not a gift but a burden to be shouldered with. Ultimately the public blames the judiciary. No house can have two masters and be strong. Judicial administration has been operating with beggarly budget because it does not generate profit. It is high time that the Judiciary should alone be made a sole authority to take care of the administration of Justice.[43]

M. Control over Subordinate Courts

There is another important facet of independence of the judiciary provided under the Constitution, according to which the control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, person belonging to the judicial service of a state and holding any post inferior to the post of district judge is vested in the High Court.[44] It is not mere conferment of power on the High Courts, the provision has been enacted to ensure that the subordinate judiciary also is immune from executive influence. That is why the control over the subordinate judiciary is entrusted to the High Court and to no one else because the control remains within the Judiciary itself which is what ensures the maintenance of independence of the subordinate judiciary. Article 235 is really the power in the High Court to discipline the subordinate judiciary with care and affection as an elder would discipline with care and affection, younger members of his family. It is, therefore, a power to be discharged with great responsibility to ensure that the subordinate judiciary realizes its true potential and is able to discharge its function as the foundation of the judicial system because the maximum exposure of the people is to the judiciary at the grassroots level. This is necessary to retain public confidence in our judicial system.

N. Duration of Appointment

When judges have life long tenure, they are both less susceptible to direct political pressure and less likely to have been appointed by the

[42] *Ibid.*

[43] *Supra* n. 16.

[44] Article 235, Constitution of India.

politicians currently in office. Independence is particularly important when judges are adjudicating disputes between citizens and the state (for example, freedom of speech issues and contract disputes). Therefore, the study focuses on the tenure of two different sets of judges: those in the highest ordinary courts (the Supreme Courts), and those in administrative courts, which have jurisdiction over cases where the state or a government agency is a party to litigation. Countries in which judges are independent from the influence of the state also tend to be countries where the judiciary is free from interference by private parties. The tenure of judges matters in both cases. Peru is frequently rated as the country with the least judicial independence. Former President Fujimori kept more than half of judges on temporary appointments from 1992 to 2000.[45]

O. "Faceless" Judges

Intimidation by powerful private interests is as likely to result in arbitrary decisions, as is intervention by the State. In Colombia, for example, powerful drug lords threaten the lives of judges and their families. In the 1990s alone more than 60 judges were assassinated. One solution to the problem is the creation of "faceless" judges or juries, who decide on cases without the public knowing their true identity. This method has been successfully tried in Colombia. But even this solution may be inadequate. In a corrupt society the identity of faceless judges can be revealed. Another channel of influence is through bribes and corruption. In a number of countries judges' salaries are lower than those of other public servants and much lower than the salaries of private sector lawyers. This creates incentives to sell justice. While wages increases would not eliminate high-level corruption in the judiciary, they may eradicate small-scale bribery. Judges will have less need to supplement their income. To date, however there has been little systematic evidence on this issue.[46]

P. Reducing Laws' Delays

Another latent danger to guard against is the consequence of mounting arrears in the law courts. Unless corrective measures are taken expeditiously, the malady would progressively de-generate the justice delivery system and erode its credibility. The malady has already given rise to resort to extra-legal remedies by many, and frustration in others with a feeling that the promise of justice to all is a mirage on account of law's delays. Immediate action is required in this regard otherwise, there would be no rule of law and without rule of law, democracy cannot survive.

[45] *Supra* n.24 at 130.
[46] *Id.* at 131.

Some of the remedial measures which can be taken with the available infrastructure and require only the zeal to perform the duty with true devotions, are:

(i) full utilization of the court working hours;

(ii) avoid absenteeism except for an unavoidable good cause. Provision of vacation is for this reason;

(iii) curb frivolous litigation by proper check at entry and quick disposal. One has to remember, delay breeds frivolous litigation;

(iv) identify and eliminate artificial arrears; and

(v) encourage alternative dispute resolution mechanisms

Failure to adopt above measures may be construed as lack of devotion to duty. A standard higher than that applied to control the subordinate judiciary under the Constitution[47] is expected to be followed by the superior Judges.[48]

V. Conclusions

The goal of an ideal society can be achieved through a strong legal system, providing equal protection of laws to each section of the society irrespective of caste, religion, creed, sex and other factors affecting social status. Efficacy of the laws is the test with regard to an efficient and strong legal system. The acceptance of law by the society is the surest guarantee of its efficacy. In India, it is the ready acceptance by the society of the need for such laws and their faithful enforcement, which realises the promise, held out by the Preamble of the Constitution. Natural acceptance by the majority of this phenomenon is ingrained in the Indian ethos. This is the grandeur of the Indian Mosaic.

A stateman's vision and perception is needed in enacting laws. Short-term political gains must give way to long-term stability and progress of the nation. Judicial statesmanship must influence judicial interpretation of the laws to promote cohesion. The objective must be continuing cohesion by promoting fraternity among all the citizens. Equality is the core value to be observed and cherished. This is the real purpose of laws in a multi-cultural society. Laws in India seek to achieve this end.[49]

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47 Article 235, Constitution of India.

48 *Supra* n.26 at 34-35.

49 J.S.Verma, *The Law in a Multi-Cultural Society* in New Dimensions of Justice (Delhi: Universal Law Publishing Co. Pvt.Ltd., 2000) at 58.

GEOGRAPHICAL INDICATIONS AND TEXTILE SECTOR

*Niraj Kumar**
*Vandana Singh***

I. INTRODUCTION

Textile industry by their very nature is labour intensive and doesn't require high end technological inputs. This gave many developing countries cost advantage in the textile sector. This scenario led to lobbying by developed countries for protections which resulted in four successive Multi Fibre Agreement (MFA) between 1974-94 and many quantitative restriction in trade of textiles.

Under Uruguay round negotiations, textile and clothing were made subject of discussion. Integration of market was sought and it was agreed that in a ten-year period (1995 – 2004) integration will come about and it will take place in four stages – 16% of this category under MFA restriction were to be integrated in 1995, another 17% in 1998, followed by another 18% in 2002. At the end of 2004, the remaining 49% were to be integrated.

With the complete dismantling of MFA, a new era has descended in textile sector. This article tries to explore the benefits accrued after dismantling of MFA in conjunction with Geographical Indications of Goods (Registration and Protection) Act, 1999 (hereinafter referred as 'Act').

Indian textile industry in conjunction with protection provided under the Act can rule the roost in world textile market. The Act can give protection to traditional products like *Pashmina, Chanderi, Sambhalpur, Kancheevaram, Lucknavi Chicken, Jaipuri Bandhej* etc. India can make use of provisions under Article 24 of TRIPs agreement for negotiationg higher protection for textile products.

II. GEOGRAPHICAL INDICATIONS

A. What are Geographical Indications?

Geographical Indications (GIs) as the name suggests are indicative of geographical origin of the product. Theoretically, it is the geographical region

* Lecturer, Law Centre-II, Faculty of Law, University of Delhi, Delhi.
** Lecturer, University School of Law and Legal Studies, G.G.S. Indraprastha University, Delhi.

upon which this intellectual property rights (IPRs) are conferred but as it will appear in this discourse later, that it is for all practical purposes enjoyed by the inhabitants of that region. Marks indicating the geographical origin of goods are the earliest types of trademarks and were established to differentiate goods that possessed some unique quality reflecting environmental factors, or processing methods, or manufacturing skills. These marks have strong geographical motifs that include the depiction of local animals (panda beer), landmarks (Mt. Fuji sake), buildings (Pisa silk), heraldic signs (fleur de lys butter) or well-known personalities (Mozart chocolate).

B. Defining Geographical Indications

The inclusion of GIs within the TRIPs Agreement is a result of the EC's[1] negotiating success. This also draws attention to previous frustrated attempts at securing an international treaty on indications of geographical origin (IGOs) and the insufficiency of closely related IPRs, viz. 'indications of source' and 'appellations of origin'.

(i) Indication of Source

The term 'indications of source' is used in the Paris Convention[2] and the Madrid Agreement[3]. The Conventions does not defines 'indication of source' but broadly three elements comprise the notion: (a) there is a clear link between the indication and geographical origin (e.g. 'made in ...') rather than any other criterion of origin (e.g. 'made by ...'); (b) unlike other IGOs, there is no requirement for distinguishing qualities or attributes of the good; (c) the protected indication can be constituted by words or phrases that directly indicate geographical origin or phrases, symbols or iconic emblems associated with the area of geographical origin.

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1 The European Communities are a sub-entity of the EU. As opposed to the EU, the European Communities have comprehensive legal personality. The "European Communities" are made up of two Communities: the European Community (EC) and the European Atomic Energy Community (EURATOM) as founded by the Treaties of Rome of 1957.

2 Articles 1(2) and 10 bis, Paris Convention for the Protection of Industrial Property. 1883. The Paris Convention for the Protection of Industrial Property was adopted in 1883 and has been revised at Brussels in (1900), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967). The Convention was amended in 1979.

3 The Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods was adopted in 1891 and revised at Washington (1911), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967).

(ii) Appellation of Origin

The term 'appellations of origin' is found in the Paris Convention [article 1(2)] and defined in the Lisbon Agreement[4]. Following three elements comprise the notion: (a) appellations must be direct geographical names; (b) the appellation must serve as a designation of geographical origin of the product; (c) quality and characteristics revealed by the product must be essentially attributable to the designated area of geographical origin.

III. The TRIPs Agreement and Geographical Indications

The TRIPs Agreement is said to be the first multilateral agreement dealing with the term 'geographical indications'[5]. The TRIPs Agreement discusses the law related to geographical indications in a separate section. Section 3 of Part II of the TRIPs Agreement makes provisions for the protection of GIs. Like any other section of the TRIPS Agreement, it begins with a subject matter definition which also set out the conditions for protection (Article 22.1)[6]. To qualify for protection, an indication must (i) identify the good and its area of geographical origin, (ii) possess a given quality, reputation or other characteristics, which (iii) is essentially attributable to its area of geographical origin.[7]

Articles 22.2-22.4 establish the basic obligation for the protection of all GIs. Members must provide the "legal means for interested parties" to secure protection of their GIs. As the legal means are not specified, Members are free to determine the appropriate implementation mechanism[8].

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4 Article 2, Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958.

5 Daniel Gervais, The TRIPs Agreement – Drafting History and Analysis, (Second edition, Sweet and Maxwell).

6 The text of Article 22.1 reads as follows: "Geographical indications are, for the purpose of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characterstic of the good is essentially attributable to its geographical origin".

7 It should be noted, however, that WIPO has opted to use the term 'geographical indication' in its widest possible meaning to describe names and symbols regardless of whether they indicate that the qualities of a given product are due to its geographical origin (such as appellations of origin), or they merely indicate the place of origin of a product (such as indications of source).

8 All Andean countries have regional legislation regarding collective trademarks and certification trademarks. This was not notified expressively to the WTO but it is clearly regulated in Articles 180 to 189 of the Andean Decision 486. See http://www.comunidadandina.org/ingles/treaties/dec/D486e.htm.

Article 23 contains additional obligations for providing the 'legal means' for the protection of indications of wines and spirits. The additional protection offered to wines and spirits begins with Article 23.1 which borrows language from Article 3 of the Lisbon Agreement. Article 23.1 prohibits the use of GIs for wines and spirits "even where the true origin of the good is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like". Paralleling the provisions in Article 22, provisions exist for invalidation or refusal of trademarks that 'contain or consist' of GIs identifying wines or spirits (Article 23.2). The next provision in Article 23 relates specifically to homonymous indications where there is an obligation to "determine the practical conditions under which the homonymous indications in question will be differentiated from each other", while ensuring equitable treatment of producers and that consumers are not misled (Article 23.3). Finally, Article 23.4 obliges Members to enter into negotiations "concerning the establishment of a multilateral system of notification and registration" of GIs for wines to "facilitate" their protection.

It has also been noticed that the built-in agenda for further negotiations and review in this Section was the only possible outcome to overcome the deep conflicts that existed on GIs[9]. The first provision for further negotiations relates to a multilateral register for GIs of wines (Article 23.4)[10].

Article 24 discusses exceptions and sets forth commitments to a process of further international negotiations regarding protection of GIs. Article 24.1 makes explicit provisions for further negotiations aimed at "increasing the protection of individual geographical indications under Article 23" and cautions Members from using the exceptions listed in Articles 24.4-24.8 as either an excuse to avoid negotiations or conclude bilateral or multilateral agreements. A series of exceptions are included in Article 24 that aim at balancing interests of GI-holders with those of the wider public and other users of indications. Article 24.3 is not an exception, but a standstill clause that seeks to preserve TRIPs-plus standards of protection that may have existed in some Member countries at the time the WTO Agreement came

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9 http://www.ictsd.org/ipronline.

10 Para 17, *Doha Ministerial Declaration*, WTO document WT/MIN(01)/DEC/W/1: "With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines *and spirits* by the Fifth Session of the Ministerial Conference. [...]"

into force (1 January 1995). Article 24.4 is an exception related to GIs for wines and spirits that permits the "continued and similar use" of GIs for wines and spirits by those who have used that indication in a "*continuous* manner with regard to the *same or related* goods or services" in that territory for at least 10 years preceding 15 April 1994 or in good faith preceding that date. Article 24.5 is an exception relating to all GIs and aims to negotiate the relationship between trademarks and GIs, i.e. Articles 22.3 and 23.2. The exception states that a trademark acquired or registered in good faith either (a) before the date of application of the provisions of Section 3 or (b) before the GI in question has been protected in its country of origin should not prejudice the eligibility for or validity of registration of the trademark or the 'right to use' the trademark. Furthermore, Article 24.7 establishes a time limit (5 years) and a contingency ('bad faith') with respect to exercising the right to invalidate or refuse registration of trademarks that consist of or contain an indication. Article 24.6 is an exception that concerns generic GIs across all goods and includes a specific application of this principle for 'products of the vine' (thus, including those spirits made from vine). The first part of Article 24.6 allows exceptions from obligations in Section 3 where a term is customary in common language as a common name for certain goods and services (e.g. 'china' for porcelain). The second part of Article 24.6 exempts Members from protecting indications that are identical with the 'customary name' of a grape variety in the territory at the date of entry into force of the WTO Agreement (e.g. Cabernet Sauvignon). Article 24.8 recognises the right of a person to use his/her name or the name of their predecessor in business in the course of trade. This right is circumscribed by requiring the name not to "mislead the public". Article 24.9 is framed as a 'dependency' exception that exempts Members from protecting indications that are either not protected in their country of origin or those that cease to be protected in their country of origin or are in disuse[11].

IV. Protection of Geographical Indications

Not only there are deep terminological differences in the area of geographical indications but there are also significant divergences with regard to the modes of and the purpose of protection. The TRIPs Agreement has left broad room for manoeuvre to determine how geographical indications are to be protected at the national level[12].

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11 Dwijen Rangnekar, Protecting GI: What Developing Countries Need to do – Lesson From The EU Experience.

12 It is to be noted that the EC has recently concluded several bilateral agreements referring to the protection of GIs, in particular the agreements with South Africa, Mexico, Australia and Chile.

Knowledge about the different forms of protection available in different countries is useful as an input for the design and implementation of national laws, particularly for those countries that are adopting new rules on the matter[13]. Most importantly, such knowledge is crucial for the international enforcement of rights based on geographical indications. For example, the approaches for the defence and enforcement of a geographical indication from Trinidad and Tobago will considerably differ in Europe as compared to the United States. While in the former, geographical indications receive under certain conditions special protection, in the latter protection is conferred in a variety of ways, including unfair competition, federal (such as trademark law) and state statues and regulations. In particular, the US Trademark Act of 1946, as amended, provides for the protection of geographical indications as certification marks. Various alternatives have been developed in national and international law for the protection of geographical indications[14] these are inter alia:

(i) "absolute" protection against use by any non-authorized party of the indication whether the public may be misled or not, as established, for instance, by the French law of May 6, 1919 (which recognized "appellations of origin" and laid down the conditions for their protection), the EC Council Regulation No. 2081/92, the Lisbon Agreement, and Article 23 of the TRIPs Agreement (only for wines and spirits). This special title or *sui generis* protection is based on a public or administrative act (WIPO, 1998, p. 118-119);

(ii) protection against the use of an indication which is deceptive or misleads the public, as provided for by the Madrid Agreement and by Article 21.2 (a) and 21.3 of the TRIPs Agreement in the framework of trademark law;

(iii) protection against acts of unfair competition committed with the use of geographical indications, as provided under Article 10 bis of the Paris Convention;

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[13] The explanatory note appended to India's Geographical Indications of Goods (Registration and Protection) Act, 1999 is worth noting: For the purposes of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be.

[14] See the WTO Secretariat's review of IGOs for an overview of different mechanisms for implementing this obligation (IP/C/W/253). WIPO's symposiums on GIs also provide useful material on GI legislation in various countries.

(iv) protection against acts of "passing-off", as provided for in common-law countries,

(v) protection against the 'false' use of an indication, when it does not indicate the true origin of the product. This protection established, for instance, under Article 10(1) of the Paris Convention, does not extend to indications which may mislead the public but are not false (for example, where certain geographical areas in different countries have the same name but only one of those areas is known for particular products);

(vi) "passing-off" is misrepresenting one's business goods or services as another's, to the latter's injury. This approach has been followed, for instance, in United Kingdom;

(vii) protection as collective or certification mark, which may be registered by the government or by a private entity.

V. Economic Aspects of Geographical Indications

The inclusion of geographical indications, itself a new category of intellectual property rights, within the ambit of the TRIPs Agreement is well-appreciated as signifying the negotiating success of the European Union. While the TRIPs Agreement heralds a significant upgrading of the standards of protection for indications of geographical origin (IGOs) there remains the problem of a hierarchy in the levels of protection based on an arbitrary categorisation of goods. Interestingly, unlike any other IP-instrument in the TRIPs Agreement, demandeurs for stronger protection include many developing countries. The interest of developing countries is based on a presumption of strong commercial potential as IGO-goods tend to be from the rural, agricultural and handicraft sectors of the economy. In this respect, growth of niche markets segments like 'fair trade', 'organic', and 'authentic' and consumer interest in the source of products is supportive. However, it is the nature of multilateral trade negotiations at WTO that concessions in other areas will have to be made by demandeurs to secure their desired gains in the area of GIs. Balancing gains and concessions require an analysis of different policy outcomes. A first step in that direction, at least for demandeurs, is to understand the evidence and impact of GIs[15]

IGOs are the oldest category of trademarks, suggesting a shared heritage and a degree of commonality in the economic rationale for their protection.

[15] Geographical Indications: A Review of the Proposals at the TRIPs Council, June, 2002.

In the case of trademarks, economists draw attention to the informational asymmetries between the buyers and sellers of a good[16]. Despite the shared heritage and rationale for protection, there are differences between trademarks and IGOs. Trademarks belong to an enterprise and are not limited by any territorial link. In contrast, 'geography is at the heart' of IGOs and, in contrast, not limited to any particular enterprise, but enjoyed by all enterprises within the demarcated geographical area that meet the stipulated requirements for use of the indication. By virtue of not being 'owned' by a single firm, IGOs are more appropriately characterized as collective monopoly rights.

So much for the impact at macro-level, it is in the very nature of GI as an intellectual property to provide for redistributive justice. Unlike other IPRs, GI is a community right. So promotion of GI will help in fulfilling the obligations of state under Directive Principles of State Policy of our Constitution.

Negotiation under GIs are likely to be more fruitful than those under other obligations of TRIPs Agreement, because world vis-à-vis GI is not divided into North and South but division is between European Economic powers on one hand and US and its allies like Australia, Latin American Countries and New Zealand on the other. Where former is vying for extension of GI protection and later fighting against its extension. European countries have got their interest secured by incorporation of Article 23 of TRIPs Agreement. Now it is the turn of developing superpowers like India and China to unite and make use of Article 24 to get higher level protection for GIs in textile sector. As a public policy instrument, GIs have potentially positive implications towards the protection of indigenous knowledge and as a means for generating livelihood and income.

VI. Effect of Dismantling of MFA

For more than three decades the textile and clothing sector has been the subject of special attention in the World Trade Organisation (WTO) and its trade in goods oriented predecessor, the General Agreement on Tariffs and Trade (GATT). This is partly because the textile and clothing sector – one of the most widely distributed industries in the world and a key provider of employment – has long been recognized as an essential factor for economic and social development and one where market interventions were deemed to be necessary. But since labour costs are important differentiating

[16] This asymmetry exists because sellers have much better information with regard to the unobservable features of a product than the buyer.

components of this sector's competitiveness, a number of industrialized countries (who might otherwise have been unable to compete) sought to shield this sector from foreign competitions. This led to quantitative restrictions being introduced especially by Europe and the United States, on top of already high tariff-based restrictions.

Although quantitative restriction had been in place even before then, 1974 saw the inception of the Multifibre Agreement (MFA) which was a formalisation of quota restrictions in textile and clothing which had been in effect since 1962. While the MFA was not specifically time-bound, it signaled the beginning of a long-term shift in the dynamics in the global textile and clothing sector. It was renewed in 1977 and again in 1981, 1986 and 1991. The MFA also signified a major departure from GATT principles, and could thus be classified as derogation from GATT rules. However, as per Agreement on Textile and Clothing, the textile quotas were phased out and textile sector fully integrated into WTO from 1st January 2005. The liberalized trading regime would result in increased international trade in textiles thus providing greater export opportunities; and at the same time expose the domestic industry to import penetration in the domestic market. The industry will have to improve its efficiency and productivity to meet the emerging global competitions.

Together with selected agricultural products, textiles and apparel are subject to the most protective policies. Ministry of Textiles is responsible for policy formulation, regulation, development and export promotion in respect of textiles, including cotton, wool, silk, jute and other fibers[17] and handicrafts. The Ministry has taken a number of policy initiatives for the sector and more particularly since introduction of the economic reforms in mid-1991. The Uruguay Round was not only for continuation of these initiatives but for hastening their pace of implementation, since all the existing barriers to global trade in textiles were to be phased out by December 2004. The Ministry is taking various policy initiatives[18].

India's textile products, including handlooms and handicrafts, are exported to more than hundred countries. However, USA, EU Member States, Canada, UAE, Japan, Saudi Arabia, Republic of Korea, Bangladesh, Turkey etc are the major importers of our textile goods. The market size of

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[17] Excluding non-cellulose synthetic fibre and filament yarns.

[18] Examples of these policies are: National Textile Policy-2000 (NTxP-2000), New Foreign Trade Policy, Apparel Export Park Scheme, Scheme for Integrated Textile Parks, India Exposition Mart etc.

the textile industry is about US$ 37 billion. Textiles contribute 16% of india's export earnings. While export of textiles (including handicrafts, jute and coir) formed 24.6% of total exports from India in 2001-2002, this percentage has decreased to 16.24% during the year 2004-05. The main reason in the past has been the discriminatory quota regime governing international trade in textile and clothing. As the availability of quotas was less than their demand, quota restriction had immediate effect of limiting exports. But with the dismantling of quota system countries like India, Pakistan and China can expect gain in their textile exports. Without quotas, global demand especially from large European and US retailers is likely to gravitate. Consumers in general are also likely to be major beneficiaries, as the removal of market impediments should increase the competitiveness of the sector and drive down the price of textiles and finished garments.

Under these circumstances India can receive most significant gains from exports in textile. India's textile industry is versatile and having a large variety with unique characteristics. By giving status protection to Geographical Indication under the Act, the product will be protected from the false use and misrepresentation. It can boost the Indian economy if used properly. Recently, status of Geographical Indication is given to Chanderi Silk, Pochampally Ikat, Kanjeevaram sari but there are lots more textile and handicrafts, which need protection and which have capacity to contribute significantly in the economic development of the country. With the opening of trade under WTO regime, it is felt that handicraft sector may also use IP tools primarily as a marketing strategy and for protection of its important traditional heritage sector.

The new Foreign Trade Policy contains a number of positive features. The features, which are particularly beneficial to the textile industry, are as follows:

(i) Handicrafts and Handloom sectors, among others, have been identified as Special Focus Initiatives;

(ii) Duty free import of trimmings and embellishments for Handlooms and Handicrafts sectors increased from 3% to 5% of FOB value of exports;

(iii) Import of trimmings and embellishments and samples shall be exempt from CVD.

Attention has also been paid to Human Resource Development in the textile sector. Towards this end, particular mention deserves to be made of National Institute of Fashion Technology (NIFT), which is imparting training

to Fashion Designers and Fashion Technologists to cater to the human resource requirements of garment industry[19].

If a state's handicrafts are protected under the GI Act, the people of the state would have exclusive rights for manufacturing such products. It would prevent unauthorized use or copying of the products and would promote economic prosperity of the producers, besides giving greater recognition to the state artisans. The absence of such a right being given can lead to a situation wherein the commercial benefits that should have vested in a country are being "hijacked" by some other country.

The success of getting the Geographical Indication Registration for 'Pochampally Ikat' has motivated the Government of India and, more specifically the Union Textile Ministry to identify all handloom products, which can be registered under the system. The Andhra Pradesh Textiles Development Committee (APTDC) would also be given a commission for carrying out a countrywide survey to locate such goods. A national programme for preparing the textile industry for globalization in the WTO regime has been initiated by the Textile Committee.

Items for which GI registration was applied in 2005 (awaiting registration) include the famous Kanjeevaram Silk rumal (handkerchief) and famous Banarasi Silk Sarees from Uttar Pradesh. Kanjeevaram Silk Sarees, Mysore Silk Sarees, made-ups, ties and yarn have already got their registration.

Now it's high time that Government must take up protection to GIs at war footing. This will need support of civil society organizations also. We must have ready referencer of GIs rather than having piece-meal approach. Since it involves participation of traditional societies also, so it will be prudent in the scheme of things to have nurturant approach. The benefits that will accrue due to protection of GIs will far outweigh the costs involved.

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[19] A team of the National Institute of Fashion Technology (NIFT), Kolkata, with assistance from the Development Commissioner, Handloom and Handicrafts, Union Textiles ministry, is in the state of Arunachal Pradesh to identify and patent indigenous Arunachalee handicrafts under the intellectual property rights through geographical indication (GI).

PREVENTIVE DETENTION IN EMERGENCY AND ARTICLE 9 OF ICCPR: THE CASE OF INDIA

*K.Mahesh**

I. INTRODUCTION

After 11 September 2001 attack on the world trade tower, the new paradigm of "war against terrorism" has emerged. It has been recognized that terrorism is a special situation allegedly requiring special measures to deal with it. The ideological motivation and global network of terrorism makes prevention and detection difficult. In some extreme situations terrorism may even constitute a threat to the life of the nation, justifying derogation from States full human rights obligations[1]. In this scenario, the balancing of measures to deal with this threat with international human rights law becomes very important so that the measures do not become counterproductive by alienating the people most affected. The Security Council in its Resolution 1269 (1999) has expressed concern over the increase in acts of international terrorism endangering the lives and well being of individuals worldwide as well as the peace and security of all States. Following the 11 September 2001 attacks in America, Resolution 1373 was adopted on 28th September 2001 under Chapter VII of the UN Charter placing obligations on States to take measures against terrorism in the form of criminalizing the collection of funds for terrorist acts and freezing the assets of terrorists; refraining from providing any support to entities or individuals involved in terrorist acts; preventing terrorist acts through early warning and exchange of information with other States; criminalizing terrorists acts and prosecuting terrorist acts, etc. However, in combating terrorism, the need to protect human rights and fundamental freedoms is of paramount importance and General Assembly adopted a resolution to this effect on 18th December 2002(A/RES/57/219). According to this, the States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

A similar resolution was adopted by the Commission on Human Rights on 25th April, 2003, at the 59th session (E/CN.4/RES/2003/68). The report submitted by the policy-working group on the United Nations and Terrorism

* LL.B 3rd year Student, Law Centre-II, Faculty of Law, University of Delhi, Delhi.

1 Scheinin, Martin, *Human Rights and Counter Terrorism: International Monitoring System* at ICJ Seminar, Geneva October 2003.

(A/57/273-S/2002/875) states

> "the United Nations must ensure that the protection of human rights is conceived as an essential concern. *Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights* the fight against terrorism must be respectful of international human rights obligations."

International human rights law has tried to balance the State's legitimate right to protect its existence and the right of an individual to be protected from human rights abuses by recognizing these states of emergencies and providing for derogations under international supervision which establishes a legal regime regulating the respect of human rights in times of emergency.

Against this background, where the exigencies of general security outweigh the traditional theory of criminal law, Preventive Detention (PD) is often resorted to in almost all countries today and is considered a necessary evil. The question however is when it should be resorted to? And what safeguards should be there to prevent its abuse? Is preventive detention compatible with human right law? Is there a correlation between the right to derogation and corresponding right to resort to preventive detention? Or can it be resorted to at any time irrespective of situation? These issues will be examined in this paper with reference to Article 9 of the International Covenant on Civil and Political Rights, 1966 (ICCPR), in the Indian context where PD is incorporated and authorized by the India Constitution itself [2] even in peacetime[3]. The study will concentrate only on the National Security Act, 1980 (NSA) as it specifically deals with preventive detention on grounds of national security and public order and is applicable throughout India sans Jammu and Kashmir, which has its own Act, the J & K Public Safety Act,1978 on the same lines.

II. Concept of Emergency within Article 4 Of ICCPR

Under Article 4 of ICCPR, the States have a right to derogate from the provisions of the Covenant and/ or to limit the rights subject to the strict

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2 Article 22, Constitution of India.

3 Preventive detention is allowed in COFEPOSA (The Conservation of Foreign exchange and Prevention of Smuggling Activities Act, 1974), the Prevention of Black-marketing and Maintenance of Essential Commodities Act, 1980; The Smugglers and Foreign Exchange Manipulators Act, 1976; Assam Preventive Detention Act, 1980, The Bihar Control of Crimes Act,1981; Jammu and Kashmir Public Safety Act,1978; the Maharashtra Prevention of Communal, Anti–social and other Dangerous Activities Act, 1980; UP Control of Goondas Act,1970 etc.

conditions of proportionate response to a serious public emergency, consistent with other international obligations. It lists definite circumstances constituting *Public emergency threatening the life of the nation* to prevent the abuse of derogation provision by the States, which justify derogations. Article 4 of the ICCPR reads as follows:

> "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

The Human Rights Committee (HRC) in its general comment (GC) 29 on Article 4 stated that when proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional laws and other provisions of law that govern such proclamation and the exercise of emergency powers. If States Parties consider invoking Article 4 in situations other than armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. Derogations must be limited to the extent strictly required by the exigencies of the situation with respect to the duration, geographical coverage and material scope of the state of emergency.

Though HRC has not laid down any specific guidelines on what constitute a 'public emergency threatening the life of the nation', it has while considering the State reports commented on the proclamation of emergency in certain situations as unjustified e.g. in case of Argentina[4], the State was

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[4] GAOR,A/45/40,Report HRC, 49-50.

questioned on justification of declaration of emergency on mere probability of internal disturbances; UK[5] was asked about the territorial application of emergency measures with respect to Northern Ireland; in response to Bolivian authorities ground for proclamation due to serious political and social disturbances the HRC observed that protest movement or general strike did not fulfill the conditions for proclamation[6]; in case of Chile, the HRC stated that 'latent subversion' did not authorize derogation under Article 4 of the ICCPR[7]; in Cameroon, the high crime rate was held not to warrant the proclamation of emergency on its own[8]. The European Court of Human Rights (ECHR) dealt with this issue in Lawless case[9] and stated that

(i) the crisis or danger must be "exceptional" and "imminent";

(ii) it should affect the "whole population" (or of one section of the State community[10]);

(iii) it must constitute "a threat to the organized life of the community".

The Greek Case added a fourth point:

(iv) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

However, the court gave the States the margin of appreciation in taking into account any situation of emergency[11] subject to international supervision. Further, in *Cyprus* v *Turkey*[12] the Commission held that the formal and public act of derogation was essential for application of Art of the ECHR.

The Inter-American Court and Commission on Human Rights has not had to interpret these terms either but have made general statements in their advisory opinion on the conditions justifying suspension of rights and freedoms under the American Convention. In the Habeas Corpus in *Emergency Situation*[13] case, the court held that the "suspension of guarantees lacks all legitimacy whenever it is resorted to for the purposes of undermining the democratic system".

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6 GAOR, A/33/40, Report HRC, 32.
7 GAOR, A/44/40, Report HRC, 95.
8 GAOR, a/34/40, Report HRC, page 18.
9 GAOR, A/44/40, Report HRC, 103.
10 *Lawless Judgement*, Series A, No.3 of ECHR.
11 *Irish Case* ECHR, Series A, No.25).
12 *Ibid.*
13 ECHR Application Nos. 6780/74 and 6950/75.
Advisory Opinion OC-8/87, Series A, No.8, page 38.

III. Various Emergencies Like Situations In India

Since the early-1980s there has been a dramatic rise in violence engineered by organized groups fighting secessionist campaigns in different parts of India, notably in Punjab, Kashmir, and Assam and the other northeastern states. This has led to the enactment of special security laws, which have been seen by many to constitute a defacto emergency situation. These situations will now be analyzed to establish whether they meet the criteria of states of emergencies under international law.

A. Cross Border Terrorism in the State of Jammu and Kashmir

The conflict in Kashmir has its roots in the accumulated grievances and subsequent alienation of the post-independent generation of Kashmiris, which in subsequent years intensified into a strident secessionist campaign and led to widespread violence, including repeated clashes between such extremist groups as the Jammu and Kashmir Liberation Front (JKLF) and Indian security forces who have been deployed in increasing numbers since 1988-89 (India has always claimed that these are terrorists organizations being aided and abetted by outside forces, namely Pakistan to wrest the control of J & K from India). They are estimated to number about 150,000 and are in addition to some 17,000 members of the state police force. At present there are two main sources of armed opposition to the security forces: groups fighting for an independent Kashmir and those demanding the accession of Kashmir to Pakistan. Kashmir was brought under President's Rule[14] on 19th July 1990. This was preceded by a six-month-long period of "Governor's Rule". Democratically elected Government is working in Jammu and Kashmir at present.

By February 2003 the number of terrorist incidents in the state was 56,259 with 11,092 civilians killed; 3,537 security personnel killed; 16,236 terrorists killed and 2910 foreign militants killed[15]. Since 1989, the reimbursement of security related expenditure by Central Government to the State Government has been to the tune of Rs.2357.85 crore. Over 56246 families, majority being Kashmiri Pandits and Sikhs have been displaced and are living in camps in Jammu and Delhi.

At present the whole of Jammu division and six districts of Kashmir valley along with the 20km belt along the line of control are declared as a 'Disturbed Area' under the Armed Forces (J & K) Special Powers Act, 1990.

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[14] Under Article 356 of the Indian Constitution where the executive and legislative control shifts to central government due to State's inability to function in accordance with provisions of the Constitution.

Nine militant outfits have been proscribed under the POTA, 2002. The Jammu and Kashmir Public Safety Act, 1978 permits the detention without charge or trial for up to one year of any person deemed likely to act in a manner prejudicial to " the security of the state or the maintenance of public order".

Incident of hijacking of Indian Airlines flight 813 to Afghanistan, attack on Indian Parliament, occupation of Pakistani regulars in the Kargil areas are linked to this conflict.

B. Terrorism in Punjab

There has been a significant reduction in the terrorist-inspired violence in Punjab since early 1994. Except for sporadic and rare incidences the situation is under control and thus cannot be termed as 'emergency' situation now though the situation was within the definition in the late 1980's.

C. Insurgency in the North-Eastern Parts of India

The seven north-eastern states – Assam, Arunachal Pradesh, Manipur. Meghalaya, Mizoram, Nagaland and Tripura – contain substantial numbers of hill tribes who are ethnically, economically and socially distinct from the rest of the Indian population. They have, over the years, complained of neglect and exploitation by the Indian Government and some have organized themselves into armed insurgent groups demanding autonomy or independence. The population of Assam has also in recent years protested against the unchecked flow of illegal immigrants from neighbouring Bangladesh who, they believe, have taken away many of the local jobs. There has been a sharp increase in the level of political violence in the region as a whole since 1985 with increased deployment of central security forces to contain the situation.

At present 13 organizations have been declared 'Unlawful Associations' under the Unlawful Activities (Prevention) Act, 1967. In year 2002 the total number of terrorist related incidents have been 1319 in which 563 extremists were killed and 1070 arrested. Along with 454 civilians, 147 security forces personnel were also killed in the same year[16] .

The most serious militant affected States/areas viz, the whole of Manipur, Nagaland and Assam, Tirap and Changlang districts of Arunachal

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15 Government of India, INDIA ANNUAL REPORT 2002 – 2003, New Delhi.

16 *Ibid.*

Pradesh and a 20 km belt in the states having common border with Assam have been declared as 'disturbed areas' under the Armed Forces (Special Powers) Act. 1958 as amended in 1972. The Government of Tripura has also declared the area under 22 police stations and part of areas under 5 police stations as 'disturbed areas'[17] In addition NATIONAL SECURITY ACT, 1980 along with other legislations are also in force.

The threshold of insurgency has peaked many a time to an extent to a level of an armed conflict followed by the special operations launched by security forces to control the situation and thereafter a lull in the terrorist activities. In these periods the situation can be warranted as an emergency situation.

D. Left Wing Extremist Violence in A.P., Chattisgarh, M.P., Orissa and Bihar

Left wing violence is prevalent in 53 districts in 9 States with Andhra Pradesh, Chattisgarh, Bihar, Jharkhand and Orissa worst affected. During the year 2002 there were 1465 incidents of violence with 482 deaths. Following police action by the State Governments, 121 extremists were killed and 2523 extremists were arrested in the same year. Special Service Bureau (SSB) has been deployed in these areas and two organizations have been notified as terrorist organization under POTA 2002[18]. However, the situation has not reached the threshold of "emergency".

IV. CAUSES AND EFFECT OF NON-DEROGATION UNDER ARTICLE 4 OF THE ICCPR

India has always maintained that no emergency situation exists but acknowledges the terrorist violence requiring special measures to deal with it[19]. Though it has accepted that some areas have been declared 'disturbed' but 'emergency' has not been declared. It is difficult to say whether the difference is of nomenclature alone or the domestic definition of emergency is interfering with the international one. Further, incorporating strict security laws in the ordinary legislation has helped India deal with its security problems and at the same time obviated the need for formal declaration of emergency, thus eliminating the question of international supervision. Joan Fitzpatrick[20] while explaining internal security laws in countries, which were under the British Empire, has pointed out the provision of emergency powers

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17 *Ibid.*

18 *Ibid.*

19 CCPR/C/37/Add.13,Para 57 of India's SECOND PERIODIC REPORT under Article 40 of ICCPR and CCPR/C/76/Add.6, the THIRD PERIODIC REPORT, para 37.

20 Fitzpatrick J, HUMAN RIGHTS IN CRISIS, (Pennsylvania Press) at 16-17.

in the constitution. She has rightly stated that in the time of stress, these Governments have a choice between imposing formal emergencies under their constitutions and implementing emergency legislation, or simply invoking the provisions of their permanent national security laws. This seems to be the case of India viv-a-vis preventive detention under the NSA and now the POTA and Armed Forces (Special Powers) Act.

The principle effect of non-derogation is that India is being judged by the International standards applicable in a situation as if no emergency exists, calling for extra measures to deal with it. Higgins (as a member of HRC), on the special legislation resorted to deal with problems of terrorism stated that NSA and TADA could be justified only with reference to the exigencies of the situation within the meaning of Article 4 of the Covenant[21] The HRC in its concluding observations on India's third periodic report stated that it remained concerned at the continuing reliance on special powers under legislation such as the Armed Forces (Special Powers) Act, the Public Safety Act and the National Security Act in areas declared to be disturbed and at serious human rights violations, in particular with respect to Articles 6,7,9 and 14 of the Covenant, committed by security and armed forces acting under these laws as well as by paramilitary and insurgent groups[22]. The Committee regrets that some parts of India have remained subject to declaration as disturbed areas over many years – for example the Armed Forces (Special Powers) Act has been applied throughout Manipur since 1980 and in some areas of that State for much longer – and that, in these areas, the State party is in effect using emergency powers without resorting to Article 4, paragraph 3, of the Covenant[23].

V. Scope of Permitted Derogation Under Article 9 of ICCPR

During the situations of crisis, the States can limit their obligations under international law by way of limitation clauses prescribed within the instruments as well as by derogation. Even when circumstances exist in which a State may derogate from its obligations, it still remains subject to three major constraints[24]:

(i) no derogation is permitted in non-derogable rights,

(ii) no derogation inconsistent with other international obligations is permitted,

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[21] CCPR/C/SR. 1042 at Para 14.

[22] CCPR/C/79/Add.81,Para 18.

[23] *Id.* para 19.

[24] Hampson Francoise, Study On Human Rights Protection During Situations Of Armed Conflict, Internal Disturbances And Tension, at paras 21-25.

(iii) the State is not free to simply suspend the right but can modify the scope of its application proportional to its need.

Article 9 of the ICCPR relates to the right to liberty and security of a person containing the procedural guarantees where it has to be derogated or curtailed. Though not an absolute right and subject to derogation and restrictions. Para 1 gives substantive guarantee that arrest or detention will not be arbitrary or unlawful and paras 2-5 provide the procedural guarantees for the same. Article 9 reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

The HRC[25] in GC 8[26] states that Article 9 is applicable to all deprivations of liberty, whether in criminal cases or in other and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States Parties have in accordance with Article 2(3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his

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25 Human Rights Committee set up under the ICCPR.

26 General Comments though not binding are explanations as set out by the HRC.

liberty in violation of the Covenant. Adding further that, if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (Para.1), information of the reasons must be given (Para 2) and court control of the detention must be available (Para 4) as well as compensation in the case of a breach (Para.5). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3), as well as Article 14, must also be granted.

With regards to the requirement of legality and prohibition of arbitrariness HRC stated that

1. the arrest and detention must be specifically authorized by law;
2. law itself must not be arbitrary;
3. enforcement of this law must not be arbitrary[27].

In *Van Alphen v. The Netherlands,*[28] the HRC held that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. In *A v. Australia*[29], the HRC recalled that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Every decision to keep a person in detention should be open to review periodically so that a judicial body can assess the grounds justifying the detention and should not continue beyond the period for which the state can provide appropriate justification. In concluding comments on New Zealand[30], the imposition of punishment in respect of possible future offences was held to be inconsistent with Article 9 and 14 of the ICCPR.

On Article 9(2), the right to be informed of a criminal charge, the substance of the reasons for the arrest must be given[31] promptly[32] is applicable even in cases of administrative detention. With respect to Article 9(3), GC 8 states that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power and must not exceed a few days.

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27 Joseph, Schultz, Castan, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (OUP) at 211.

28 305/88.

29 560/93.

30 Undoc.CCPR/C/79/Add.47,para.14.

31 *Drescher Caldas* v. *Uruguay* (43/79), Para 13.2; *Grant* v. *Jamaica* (597/94).

32 *Kelly* v. *Jamaica* (253/87).

Article 9(4) entitled any person who has been arrested or detained for whatever reason to challenge the lawfulness of his/her detention in a court without delay[33]. In *Hammel* v. *Madagascar* (155/83), the incommunicado detention for three days making it impossible for the author to gain access to a court to challenge his detention was held to be a breach of Article 9(4) of the ICCPR. In *Berry v Jamaica*[34], the HRC held that it is virtually impossible for people to challenge their detention without legal representation.

In *Torres* v. *Finland*,[35] the HRC held violation of Article 9(4) in that, a detained person must be able to take proceeding before the court, in order that that court may decide without delay on the lawfulness of his detention as review of the detention was possible only after 7 days when the detention was confirmed by order of the minister.

In *Vuolanne* v. *Finland*[36], the HRC stated that most of the provisions of Article 9 apply to all deprivations of liberty and whenever a decision depriving a person of his liberty is taken by an administrative body or authority Article 9(4) obliges the State party concerned to make available to the person detained the rights of recourse to a court of law.

In *A* v. *Australia*,[37] the committee in the course of examining the issue of effectiveness of right to challenge detention stated that 'lawfulness' in Article 9(4) means 'lawfulness' under the Covenant, rather than 'lawfulness' in municipal law[38]. Mr.Bhagwati elucidating this point stated that

> The interpretation contended for by the State (narrow interpretation of lawfulness limited merely to compliance of the detention with domestic law) will make it possible for the State to pass a domestic law virtually negating the right under Article 9(4), and making nonsense of it broad interpretation on the word 'lawful' which would carry out the object and purpose of the Covenant 9(4) requires that the court be empowered to order release 'if detention is not lawful', that is, the detention is arbitrary or incompatible with the requirement of Article 9(1) or with other provisions of the Covenant' lawfulness' which calls for interpretation in Article 9(4), occurs in the Covenant and must therefore be interpreted in the context of the provisions of the Covenant and having regard to the object and purpose of the Covenant.

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33 Nowak Alfred, UN COVENANT ON CIVIL AND POLITICAL RIGHTS.

34 330/88.

35 291/88.

36 265/87.

37 560/93.

38 *Supra* n. 27 at 241, para 11.56.

In concluding comments on Ukraine[39], the HRC condemned the practice of 'administrative detention' of vagrants. The HRC also criticized laws in Peru[40] which authorized the 'preventive detention' of persons for up to fifteen days, with a possibility of extension by another fifteen days, in cases of suspected terrorism, espionage, and illicit drug trafficking.

Thus derogation should be proportionate to the exigencies of the situation, in no case arbitrary and without procedural safeguards under subsections 2-5.

VI. Preventive Detention

A. When can Preventive Detention be Resorted to?

One of the most serious defects in existing international standards governing states of emergency is the absence of precise and agreed limits on the derogability of the right of personal liberty. Secondly, international norms are equally ambiguous on the question whether preventive/ administrative detention is ever permissible in a non-emergency context[41]. The ICCPR is silent on the circumstances under which administrative detention would be tolerated or the mandatory safeguards to prevent abuse. The Human Rights Committee in GC 8 simply stated that "preventive detention....for the reasons of public security...must not be arbitrary, must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available as well as compensation in the case of a breach". Article 9 acknowledges the detention in cases other than criminal but does not specifically mentions preventive or administrative detention. Alfred Nowak[42] on Article 9 states that the basic right of personal liberty does not strive towards the ideal of a complete abolition of state measures that deprive liberty; rather, it merely represents a procedural guarantee obligating State's legislature to define precisely the cases in which deprivation of liberty is permissible and the procedure to be applied and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials. Although the right of liberty of person may be restricted in the case of a public emergency within the meaning of Article 4, it is not forfeitable pursuant to Article 5(1).

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39 UN doc. CCPR/C/79/Add.52, para.13 (1995).
40 UN doc. CCPR/C/79/Add.67, para 18.
41 *Supra* n. 20 at 38.
42 *Supra* n. 33.

Even the European Convention is silent on this issue. In *Brogan case*[43] the ECHR on administrative detention held that suspect be brought "promptly" before a judicial authority. However, it failed to address the question of justification of administrative detention in non-emergency context.

Special Rapporteur on States of Emergency in his report[44] to the sub-commission in 1989 stated that administrative detention was the only possibility of holding people for any length of time without a charge being made against them, but a state of emergency had to have been publicly proclaimed in such cases.

The ECHR while addressing the issue in *Ireland* v. *UK*[45] stated that a State struggling against a public emergency threatening the life of the nation would be rendered defenseless if it were required to accomplish all safeguards at once, and the interpretation of Article 15 must leave a place for progressive adaptations. However, the measure taken must not exceed the 'extent strictly required'.

Thus in situations of emergencies where the normal procedures of investigation and criminal prosecution are inadequate and the ability to secure criminal conviction due to general atmosphere of intimidation making it impossible to obtain sufficient evidence, preventive detention can be resorted to as a special measure subject to safeguards to prevent its abuse.

B. What Safeguards are Required for Preventive Detention?

No right can be abrogated to an extent that it becomes redundant. Therefore infringement of rights of an individual should be subjected to safeguards. Article 4 obliges the State Parties to provide careful justification not only for their decision to proclaim state of emergency but also for any specific measures based on such proclamation. Committee on prevention of torture has also stated a link between arbitrary detention and torture, therefore need for safeguards to prevent ill-treatment, the length of detention, discrimination in implementation have to be considered.

Due to the relationship of Article 9 with other non-derogable rights, the Siracusa Principles[46] (though not legally binding reflect the opinion of the world community) hold the rights in Articles 9 and 14 to be non-

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43 *Brogan* v. *United Kingdom*, 145 ECHR(1988).
44 U.N.Doc.E/CN.4/Sub.2/1989/SR.32.
45 *Supra* n.10.
46 UN DocE/CN.4/1985/4 (1985).

derogable. Principle 11 of the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment[47] has stated that an effective opportunity to be heard promptly by a judicial or other authority must be given to the detained person and he shall have the right to defend himself or to be assisted by counsel as prescribed by law. He shall receive prompt and full communication of any order of detention, together with the reasons therefore and a judicial or other authority shall be empowered to review as appropriate the continuance of detention.

C. Justification of Preventive Detention

Due to the transnational nature of the terrorist activities in India leading to difficulties in obtaining evidence, which can be held admissible in the court of law, preventive detention appears to be the only resort for the authorities to control terrorism.

Due to the problems of terrorism and insurgency, India is entitled to derogate with respect to situation in the Northeast and Kashmir. The transnational nature of terrorism and the ease with which they are able to infiltrate into India, the difficulties faced in procuring evidence, preventive detention has to be resorted to. The derogation required for the purposes of protection of life, property, prevention of public disorder, exercise of power of arrest and detention and exclusion may be with respect to:

1. adding ground to preventive detention;
2. increasing time requiring a judicial review of detention;
3. increasing time for investigation and thus pre-trial detention;
4. increasing the time before which a person has to be produced before a magistrate after arrest;
5. special measures to protect witnesses requiring in-camera proceedings etc.

D. Validity of Preventive Detention under NSA and J & K Special Powers Act

India has time and again resorted to preventive detention to deal with various internal disturbances and war situations. In fact, the laws on preventive detention are not limited to exceptional situations, but are applicable even in peacetime. However, the maximum criticism of this provision has been with respect to the National Security Act, 1980 which

[47] GA Resolution 43/173 of 1988, U.N.Doc.A/43/49 (1989).

allows for preventive detention for a period of 12 months in accordance with the measures mentioned in Article 22(3) to (7) of the Constitution, on grounds of National Security and Public Order.

The National courts, without any clear guidance from the Act on what constitute 'threat to national security and public order', have applied the test of 'subjective satisfaction' of the detaining authority, to govern its application. The review made by the Advisory Board of the procedure as prescribed by the Act is basically an executive review of executive decision-making. It affords no legal representation to the detainee, or opportunity of cross-examination is closed to public and its report is confidential. Further, the Board can only appreciate the grounds of detention and not rule on the need for such detention (justified or not). There is no provision for consideration of a detainee's case by the Advisory Board more than once. Yet periodic review is an indispensable protection to ensure that detention is 'strictly required' and fairly administered. The information on the grounds of detention can be withheld for up to 10 days and even then some information can be withheld on grounds of security reasons.

Right to liberty is not an absolute right, but any limitation imposed must be in conformity with the fundamental principle laid down in Article 5(1) of the Covenant i.e., any act aimed at destruction of any of the rights and freedoms recognized in the Covenant is prohibited[48] and conformity of any restriction to the provision of a covenant is not a domestic matter but a question of international law.

The HRC has also criticized this Act as not fulfilling the requirements of due process and principle of proportionality under Articles 9 and 14 of the ICCPR[49] holding five day period for informing detainees of the grounds for their detention and a three week period for bringing them before the Advisory Board were incompatible with Article 9(2) and (3) of the Covenant adding that Advisory Board could not be considered as a judge within the meaning of Article 9 of the Covenant. The seven-week period for deciding on the legality alone gave executive excessively broad discretionary powers and provided opportunity for arbitrariness. Further, pre-trial detention orders

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[48] 56/1979 HRC, Mr. Christian Tomuschat's individual opinion. Article 5 is a provision designed to cover instances where formally rules under the Covenant seem to legitimize actions which substantially run counter to its purposes and general spirit. Thus, Governments may never use the limitation clauses supplementing the protected rights and freedoms to such an extent that the very substance of those rights and freedoms would be annihilated".

[49] CCPR/C/SR.1606,Para 16, 31,41.

could not be appealed against and even where it was established that the order had been arbitrary, the victim could not claim compensation. The Committee further recommended that the requirements of Article 9, paragraph 2, of the Covenant be complied with in respect of all detainees. The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with Article 14, paragraph 1, of the Covenant[50].

India has maintained that pre-trial detention orders were not part of the judicial procedure and as such the rights set forth in the Covenant did not apply during that form of detention[51] and that India has a reservation under Article 9. However, in light of Article 5(1) and in the absence of any of the safeguards, the NSA falls short of its validity, at the international plane even in an emergency situation.

India has however, justified the act on grounds of its reservation to Article 9 of the ICCPR.

VII. Reservation to Article 9 of Iccpr

The permissibility of reservations in international treaty law essentially represents a compromise between the normative strength of a treaty and the maximization of ratification to a treaty[52]. If the reservations are contrary to object and purpose of the covenant, i.e., contrary to the provisions reflecting *jus cogens*, or provisions contrary to the charter of the UN, they cannot be held to be valid. Is it possible that if derogations are not permitted, reservations are not permitted either?

A. Text of India's Reservation to Article 9 ICCPR

While ratifying the ICCPR, India made the following *reservation* with respect to Article 9:

> "With reference to Article 9 of the ICCPR, the Government of the Republic of India takes the position that the provisions of the Article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India. Further, under the Indian legal system there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State."

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50 CCPR/C/79/Add.81, Para 24

51 CCPR/C/SR 1604, Para 55.

52 *Supra* n. 27.

According to clauses (3) to (7) of Article 22 of the Constitution of India the safeguards of detention namely, right to be informed of grounds of detention, to consult and to be defended by a legal practitioner, to be produced before a magistrate within 24 hours, of arrest are not applicable in preventive detention cases. Text of clauses 3-7 being:

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause(7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers being against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause(a) of clause (4);

(b) the maximum period for which any person may in any class or

classes of cases be detained under any law providing for preventive detention; and

(c) The procedure to be followed by an Advisory Board in an inquiry under sub-clause(a) of clause(4).

B. Effect of Reservation

While placing limits to a State's freedom to enter reservation, HRC giving reference to Article 19(3) of the Vienna Convention on the Law of Treaties in GC 24, stated that " A State may make a reservation provided it is not incompatible with the *object and purpose* of the treaty". Further in paragraph 8[53] it states that reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.

Considering the special nature of the human rights treaties however, HRC stated that the application of Vienna Convention with respect to inter-state reciprocity has no place in it. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant[54] and it is for the Committee to judge the validity of reservation. And finally, the normal consequences of an unacceptable reservation are not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation[55] (ECHR also in *Louzidou* v. *Turkey* held certain reservations invalid, finding them incompatible with ECHR)[56].

Due to the dynamic and evolving nature of the human rights, their interpretation cannot be static. This involves constant review of the reservations to human rights treaty to test them on the threshold of compatibility with the 'object and purposes' principle. Thus when a treaty establishes enforcement/monitoring body, this body can determine the scope of validity of the reservation. Though Human Rights Committee in GC 24 stated that the effect of invalid reservation is severable, it has been suggested that the three options available to the monitoring body are[57]:

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[53] US and France however, objected to addition of so many propositions as customary international law.

[54] UK (Observations on GC24 (1995) 3 IHHR 261 and France {Observations on General Comment 24(1997) 4IHRR 6} have disputed this contention of non-applicability of Vienna Convention.

[55] UK, France and US have objected to this assertion regarding the effect of any invalid reservation.

[56] *Supra* n. 20 at 618.

[57] Hampson Francoise, RESERVATIONS TO HUMAN RIGHTS TREATIES, E/CN.4/SuB.2/1999/28.

(i) Severance of invalid reservation or any invalid application of reservation, leaving the ratification, including any other reservation intact.

(ii) Body to ask State what it proposed to do about the reservation found to be invalid.

(iii) In case of general/sweeping reservation, it can question whether it is a valid reservation at all.

Thus a reservation does not stop the HRC from addressing the issue of preventive detention. In fact the HRC despite India's reservation to Article 9 has commented on the preventive detention as justifiably applicable only under Article 4 of the Covenant, it was disturbing that in India it was authorized under an Act with general application[58]. Stating further, with reference to GC 24 it said that it was not possible to make reservations incompatible with the object and purpose of the treaty. The reservations entered by the Government of India were precisely of that nature and should be withdrawn[59].

C. Validity of India's Reservation and Issue of Derogation

The HRC's General Comment 24 confirms that State Parties can enter reservation upon ratification which reduces their ICCPR obligations. However, incompatible 'reservations' are actually ineffective, and thus have no impact on the actual extent of the reserving State's ICCPR obligations[60]. The decision in *Kennedy* v. *Trinidad and Tobago* (845/99) has further elaborated this point. Para 20 of GC 24 on invalid reservations states that "such reservation will generally be severable. Covenant will be operative for reserving party without benefit of reservation"[61]. Supporting the non-applicability of Vienna Convention on Law of Treaties, the ECHR in *Belilos case*[62] stated "the silence of the depository and Contracting States does not deprive the Convention organs of the power to make their own assessment

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[58] CCPR/C/SR.1603, THIRD PERIODIC REVIEW, Para 31.

[59] *Id.*, para 34.

[60] *Supra* n. 37 at 620, para 25.36.

[61] US objected to it as being "completely at odds with established legal practice"(the Vienna convention on the Laws of Treaties) and the UK memorandum stated" severability would have to entail exercising both the reservation and the parts of the treaty to which it applies".

[62] Case 20/1986/118/167, judgement of 29/4/88, para 47.

(of the validity of the reservation)". Susan Mark[63] has rightly said that "Reservations ought only to be tolerated up to a point. Far reaching reservations may negate the value of adherence or even act counterproductively, encouraging the reserving State to rest on the supposed laurel that participation in the treaty itself confers"

Considering the case law of the regional treaties, the main point that emerges is the 'object and purpose' rule and core obligations from which derogations is not allowed. In *France and Others* v. *Turkey*[64], the ECHR held that Convention enshrined obligations essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves. American Court of Human Rights adopting a more conciliatory attitude towards reservations in an Advisory Opinion[65] on reservation made by Guatemala when ratifying the American Convention stated that "reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict aspects of a non derogable right without depriving the right as a whole of its basic purpose".

Over the years there has been widening of the non-derogable rights, especially with respect to Articles 2, 9 and 14 of the ICCPR[66]. In resolution 1992/35, the UN Commission on Human Rights[67] called upon the States-

> "To establish a procedure such as *habeas corpus* by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful all States to maintain the right to such a procedure at all times and under all circumstances, including during state of emergency'.

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63 J.P.Gardner, (ed.), *Three Regional Human Rights Treaties and Their Experience of Reservation* in HUMAN RIGHTS AS GENERAL NORMS AND A STATES RIGHT TO OPT OUT.

64 1986, 6 EHRR 24.

65 OC-3/83(1983) 23 (LM 320.

66 Svenson-McCarthy, *TheWidening Field of Non-derogability* in THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION.

The Human Rights Committee has also stated that it was satisfied that States Parties generally understood that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency[68] and that the remedies provided in Article 9, paragraphs 3 and 4, read in conjunction with Article 2 were *inherent to the Covenant as a whole.*

The Report of the Sub-Commission on Prevention of discrimination and protection of minorities on its Forty-Sixth Session 1994[69] reaffirmed that Articles 2(3), 9(4) and 14 "are inherent in the Covenant as a whole and should accordingly be considered to be non-derogable, particularly because they are necessary to protect other non-derogable rights".

Article 2 of the ICCPR places an obligation on the state to implement the Covenant in domestic legislation. The aim being to achieve improvement in protection of human rights. However, the reservation which protects the existing legislation, as entered by India with reference to Articles 9, restricts the impact of the Covenant.

In the concluding observations to India's third periodic report, the HRC summed up the preventive detention in the following words:

> "It is regretted that the use of special powers of detention remains widespread. While noting the State Party's reservation to Article 9 of the Covenant, the Committee considers that this reservation does not exclude the obligation to comply with the requirement to inform promptly the person concerned of the reasons for his or her arrest. Preventive detention is a restriction of liberty imposed as a response to the conduct of the individual concerned, and the decision as to continue detention must be considered as a determination falling within the meaning of Article 14, paragraph 1, of the Covenant, and proceedings to decide the continuation of detention must, therefore, comply with that provision. Therefore, the Committee recommends that the requirements of Article 9, paragraph 2, of the Covenant be complied with in respect of all detainees. The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with Article 14, paragraph 1. of the Covenant. Furthermore it is recommended, at the very least, that a central register of detainees under preventive detention laws be maintained and that the State Party accept the admission of the

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67 UN dec.E/1992/22 (E/CS.4/1992/84), p. 92.

68 GAOR, A/49/40(I), Report HRC, 4, para 23.

69 UN doc.E/CN.4/Sub.2/1994/56.

International Committee of the Red Cross to all types of detention facilities, particularly in areas of conflict[70]."

India's reservation far exceeds what can be allowed and has rightly been criticized by HRC in this regard. In view of the above the reservation is invalid and instead of resorting to it India should validly do so through derogation by placing the safeguards in its preventive detention regime.

The question India has failed to address is the National Justification v the International Justification of the Acts. Though a particular Act is justified under the national Constitution does not mean that it is internationally justified. Thus India's contention of relying on the reservation of Article 9 to justify its preventive detention regime is ineffective.

VIII. Conclusion

Gardiner Committee appointed by UK on Northern Ireland stated in paragraphs 148 and 149[71].

> "detention cannot remain as a long term policy. In the short term, it may be an effective means of containing violence, but the prolonged effects of the use of detention are ultimately inimical to community life, fan a widespread sense of grievance and injustice, and obstruct those elements in Northern Ireland society which could lead to reconciliation".

Few if any of the human rights recognized by ICCPR are absolute. Many of them are subject to derogation in time of public emergency. Many are subject to limitations in public interest at any time[72]. The basic right of personal liberty does not strive towards the ideal of a complete abolition of State measures that deprive liberty; rather, it merely represents a procedural guarantee. The restriction on liberty of person by an administrative act is permissible only when this takes place in enforcement of a law that provides for such interference with adequate clarity and regulates the procedure to be observed[73]. The law itself must not be arbitrary and the enforcement also must not be arbitrary. The cases of deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the

[70] A/52/40 vol.I (1997) 67 at para.439.
[71] *Supra* n.10 at para 74.
[72] Alexandrwe Charles Kiss, *Permissible limitations on Rights* in Louis Henkin. (ed.), The International Bill of Rights (Columbia University Press, 1981).
[73] *Supra* n. 33 at 171-74.

circumstances of the case"[74]. Preventive Detention is inherently unjustifiable on its own but the severity and scale of terrorism in the past decade has made it indispensable in providing human and national security.

When it is resorted to in the name of 'national security', the problem emerges when it is construed as the interest of a Government, regime or power group. It is at times like this that it becomes an instrument of abuse thus requiring certain safeguards. In India despite the Parliamentary system of governance, independent judicial system and separation of powers enshrined in the Constitution itself acts as a check against the arbitrary exercise of power by any of the wings of the government, it saw erosion of fundamental rights and independence of judiciary in the third emergency proclamation in 1975, promulgated on grounds of 'internal disturbances'. Thousands of people were detained under the preventive detention laws for months together and even the right to judicial review in the form of 'habeas corpus' was withdrawn. In the light of this recent history it is all the more important that the legislations giving special powers to the executive may not be internalized in the system but resorted to only when the exigencies of the situations so demand. They must hold well on the proportionality test with respect to area of application, time frame and severity established under Article 4 of the ICCPR.

However, the preventive detention as it exists under NSA reflects the derogation with respect to procedural safeguards in Article 9 against the principle of Article 5(1)[75] of the ICCPR. Complete withdrawal of judicial review will go against the very principle of Article 9 of the ICCPR. India's justification of these acts against the backdrop of its reservation is not acceptable on its own. However, what should be the threshold beyond which reservation should not be tolerated is peculiar to a particular situation at a particular time. A balance has to be struck between the legitimate interest of the State and the effect on the human rights of the individuals. One must not outweigh the other. A state thus cannot reserve the right to resort to preventive detention without any of the safeguards enshrined in the Covenant by resorting to reservations and as such the validity of such a reservation is open to review.

Thus preventive detention regime though not consistent with Article 9 on its own is justifiable only in case of emergency subject to safeguards to prevent its abuse. Any reservation has to be justified based on the 'object and purpose' criteria.

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[74] See *Van Alphen* v. *The Netherlands*, *supra* n. 28.

[75] Any act aimed at the destruction of any of the rights and freedoms recognized in the covenant is prohibited.

EVOLVING PRINCIPLE OF POLLUTER- PAYS IN ENVIRONMENTAL JURISPRUDENCE

Dinesh Kumar

I. INTRODUCTION

The emerging environmental crisis has necessitated the evolution and implementation of principles which transcends the national boundaries. The polluter pays is one such principle which is playing a significant role in strengthening of national and international environmental jurisprudence. This principle is a driving force behind the process of shaping environmental policy and confronting ecological crisis. It has gained recognition as guiding norm of environmental policy at international level especially in developed economies.[1] The Indian Supreme Court has also specifically addressed and applied this principle in a number of its decisions in last one decade.[2]

Polluter Pays Principle is one of the economic and administrative measures to restrain and contain the pollution problem. The basic idea underlying polluter pays principle is that those who cause damage or harm to man and environment should pay for it. This basic proposition appeals directly to our common sense of justice.

However putting this seemingly innocuous idea into practice demands answer to certain questions – how to apply this principle to various types of environmental harms; identifying polluters; how much the polluters should

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* LL.M., Faculty of Law, University of Delhi, Delhi.

1 Article 1.2.1, § 2, Flemish Act, 1995 contains general provisions concerning environmental policy: 'Environment policy shall seek to achieve a high level of protection.... It shall based on *inter alia* - the polluter pays principle'. Article 4 of Federal Act, 1999 concerning protection of marine environment in marine areas under Belgian jurisdiction defines the principle as implying that 'the cost of preventing, reducing and controlling pollution, as well as the cost of reparation of damages are to be borne by polluter'. Also see Article L 100-1 of the French Environmental Code.

2 *Indian Council for Enviro-legal Action* v. *Union of India*, AIR 1996 SC 1466; *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *M. C. Mehta* v. *Union of India*, AIR 1997 SC 714 (*Taj Trapezium* case); *S. Jagannath* v. *Union of India*, AIR 1997 SC 811; *M. C. Mehta* v. *Kamal Nath* (1997) 1 SCC 388; *M. C. Mehta* v. *Kamal Nath* (2000) 6 SCC 213; *M.C. Mehta* v. *Kamal Nath* (2002) 3 SCC 653; *Research Foundation for Science Technology and Resources Policy* v. *Union of India and Another*, 2005 (1) SCALE 87.

pay; and to whom they should pay. The answer to these questions is not free from complexity.

These complexities in finding precise meaning and scope of polluter pays can be broadly categorized as follows:

(i) Types of environmental harms – It is comparatively easy to make reparation when the victims of polluting activity are human beings or goods. But can one calculate harm caused to water and air? When the harm is exclusively to nature i.e. to flora and fauna, the application of polluter pays principle becomes difficult. There are no specific guidelines for making anyone liable for loss of a certain plant or animal species.

(ii) Who is polluter? – in cases of accumulated pollution there is no method to find out the polluter or how to fix responsibility. For example, the Yamuna River in Delhi is polluted from diverse sources such as domestic waste to industrial effluents. Also there is question of equity involved in dealing with such pollution. This becomes especially relevant when this principle is sought to be applied between developed and developing world. The developed countries are already enjoying the fruits of economic progress and now they want developing countries to accommodate environmental concerns in their quest for economic development. Also it may be noted that many of multinational corporation locate their polluting processes in developing countries in order to avoid more strict liability regimes of their own countries.

(iii) How much to pay? – Usually the capacity of an enterprise is limited. As such it may not always be easy to recover full environmental costs. There is a need to create funds for this purpose. Various techniques ranging from environmental taxation to insurance could be explored for this purpose.

(iv) Relationship with traditional liability principles – The traditional legal liability is based on fault[3]. But in case of polluter pays principle the strict liability works much better. In India the absolute liability principle has been upheld by Supreme Court for deciding the obligations of a polluter under polluter pays principle.

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[3] Liability based on fault can only be imposed if intention or knowledge on the part of polluter is proved. This liability has proved ineffective in controlling environmentally damaging activities.

II. Conceptualization Of Polluter Pays Principle

Liability is founded on the basis that polluters are responsible and accountable to others for their actions. In simple terms one can say that since you have polluted, pay for clean up. This means that the application of the principle is limited to specific circumstances usually involving identifiable damage to others or to property. This restrictive meaning to polluter pays principle can hardly be justified considering the immensity of environmental problems. In its wider sense the polluter pays principle demands complete reparation of environmental damage thereby serving not only curative function but preventive and anticipatory as well.

It has been difficult to agree on a precise and fixed meaning of this principle. However, there can be no denying of the fact that a broad understanding about validity of this principle at national and international level has emerged. This general acceptance of this principle at international and national level cannot be overlooked. This acceptance coupled with increasing utilization of this principle would certainly help in clarifying the meaning and scope of this principle.

The polluter pays principle first articulated in early 1970's, was an economic rule of cost allocation whose genesis lies in the theory of externalities[4]. It requires the polluter to take responsibility for the external costs arising from his pollution. Internalization is complete when the polluter takes responsibility for all the costs arising from pollution; it is incomplete when part of it is shifted to the community as a whole.[5]

Accordingly, the purpose of polluter pays principle is to force polluters to bear the real costs of their pollution, though such costs often are difficult to calculate precisely. In theory, measures based on polluter pays principle encourage producers of pollution to make cleaner products or to use cleaner technologies.

A. Organization For Economic Cooperation and Development

The polluter pays principle first adopted in 1972 by OECD (organization for economic cooperation and development), was prompted by

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4 Many economists claim that much environmental harm is caused by producers who "externalize" the costs of their activities. For example, factories that emit unfiltered exhaust into the atmosphere or discharge untreated chemicals into a river pay little to dispose of their waste. Instead, the cost of waste disposal in the form of pollution is borne by the entire community.

5 Nicolas de Sadeleer, Environmental Principles from Political Slogans to Legal Rules (Oxford University Press, 2002) at 21.

a desire to increase free market efficiency rather than to promote environmental protection. The OECD Council's Recommendations on Guiding Principle concerning International Aspects of Environmental Policies clearly state that the polluter should "bear expenses of carrying out (preventive & control) measures decided by public authorities to ensure that environment is in acceptable state"[6]. Thus the purpose of OECD policy and recommendation on the subject was to internalize the economic cost of pollution control, clean-up and protection measures and to assure that the Government did not distort international trade and investment by subsidizing these environmental costs.

OECD Council decided in a 1989 Recommendation on the Application of Polluter Pays Principle to Accidental Pollution that the principle would no longer be applicable to only sustained pollution. The cost of measures to prevent and combat acts of accidental pollution should be charged to all potential agents[7]. However, the accidental polluters were also expected to pay only the cost of reasonable measures taken by authorities.

OECD Council in a 1991 Recommendation on Uses of Economic Instruments in Environmental Policy admitted "a sustainable and economically efficient management of environmental resources requires internalization of the costs of pollution prevention and control measures as well as damage costs"[8]. It is satisfactory to note that under this recommendation, the polluter has been made liable to pay the cost of damage arising from the pollution apart from the cost of prevention and control measures. This is a progress in right direction as the scope of polluter pays principle is getting expended.

B. European Community

One of the general principles approved by the European Council in 1973 when adopting the first Environmental Action Programme was that of the "polluter pays". The Council recognized that the costs incurred in preventing and suppressing nuisances fall as a matter of principle to polluter."[9] The European Community's commitment to the polluter pays principle was reaffirmed by Article 130 R of Single European Act and the Maastricht Treaty.[10]

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6 1972 Recommendation, Annex A (a) (4); 1974 Recommendation, 1(2).
7 C (89) 88 (Fiftal), OECD, 1989.
8 C (90) 177 (Final), OECD, 1991.
9 Stanley P. Johnson, Guy Corcelle, THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES (Kluwer

The draft recommendations regarding "cost allocation and action by public authorities on environment matters" sent by European Commission were adopted by European Council on 3rd March 1975. Some of the important rules provided in these recommendations regarding application of polluter pays principle are—

(i) All natural or legal persons governed by public or private law who are responsible for pollution must pay the cost of such measures as are necessary to eliminate that pollution or to reduce it.

(ii) A polluter is someone who directly or indirectly damages the environment or who creates conditions leading to such damages.

(iii) The purpose of charges shall be to encourage the polluter to take the necessary measures to reduce the pollution he is causing as cheaply as possible and or make him pay his share of the costs of collective measures, for example purification costs. Charges should however be fixed so that primarily they fulfill their incentive function.

(iv) Income from charges may be used either to finance measures taken by public authorities or to help finance installations set up by an individual polluter, provided that the later, at specific request of the public authorities, is seen to render a particular service to the community, by reducing his pollution level to below that set by the competent authorities.

(v) Polluters will be obliged to pay the charges and expenditure on pollution control measures (investment in anti-pollution installations and equipment, introduction of new processes, cost of running anti-pollution installations, etc.), even when these go beyond the standards laid down by public authorities. The costs to be borne by the polluter under polluter pays principle should include all the expenditure necessary to achieve an environmental quality objective including administrative costs directly linked to the implementation of anti-pollution measures.

C. *Conferences*

It was only at Rio in 1992 [11] that for the first time polluter pays principle received recognition as a basis of harmonization of environmental policy at national and international level. Principle 16 of Rio Declaration incorporates polluter pays principle.

[11] United Nations Conference on Environment and Development held at Rio de Janeiro from June 3-14, 1992.

Principle 16 of Rio Declaration states that "National authorities should endeavor to promote the internalization of environmental cost and use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with regard to the public interest and without distorting international trade and investment"[12]. Seeing the wordings 'endeavor' it can be said that Principal 16 of Rio Declaration is more of a guiding principle as it does not impose a strict obligation on States. The polluter pays principle as enunciated in Principle 16 of Rio Declaration is mainly concerned with pollution within the boundary of a State. Whether a State could be considered as a polluter to another State under polluter pays principle is far from being clear. However, it may be noted that polluter pays principle has been enumerated in some of treaties after Rio[13].

The polluter pays principle is critical in harmonizing environmental standards across countries, and is endorsed in Agenda 21 by urging governments to use "free market mechanisms in which the prices of goods and services ... increasingly reflect the environmental costs."[14]

"Plan of implementation" adopted at Johannesburg, 2002[15], points out polluter pays principle as one of measures which have to be adopted to promote sustainable patterns of production and consumption[16].

III. User Pays Principle

The basic idea underlying this new principle is that unrestrained consumption of natural resources is also responsible for environmental damage. Not only the polluters but the users also are responsible of environmental crisis. The central difference between polluter pays and user pays principles is that user pays applies to use of resources i.e. users, whereas

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12 S. Shanthakumar, Introduction to Environmental Law (Nagpur: Wadhwa and Company, 2005) at 383.

13 Preamble, Convention on Trans boundary Effects of Industrial Accidents, 1992: Paris Convention for the Protection of Marine Environment of NE Atlantic, 1992: Article 2(2)(b) and Preamble, London Protocol on Preparedness, Response, and Cooperation to Pollution Incidents by Hazardous & Noxious Substances, 2000.

polluter pays applies to release of pollutants i.e. to polluters. It may noted that by putting a price on consumption of natural resources can be more prudent approach as it can lead to more judicious utilization of limited natural resources. The official position of OECD also indicates a growing awareness of the need for prices to reflect the true costs of natural resources use[17].

IV. Sustainable Development

The basic premise underlining sustainable development is that economic development by ignoring the social and environmental concerns could not solve the problems faced by mankind. This basic premise leads to inevitable conclusion that all development activities should incorporate environmental concerns (minimizing and preventing environmental harms) in order to sustain their benefits.

The salient principles of "sustainable development" as held by the Indian Supreme Court are – Intergenerational equity, use and conservation of natural resources, environmental protection, precautionary principle, polluter pays principle, obligation to assist and co-operate, eradication of poverty, and financial assistance to developing countries.[18]

The relation between economic development and environmental protection justifies the use of economic instruments in environmental protection law and policy. The polluter pays principle which seeks to impose economic obligations on environment detrimental activities can be an effective measure to achieve sustainable development. The central role assigned to the polluter pays principle in overall context of sustainable development extend its scope to even preventive measures as polluter could be held liable for preventive measure.

V. Polluter Pays And Indian Judiciary

Indian judiciary has declared this principle as well established and a part of Indian environment jurisprudence. It may be noted that the polluter pays principle evolved out of "absolute liability principle" as laid down by Supreme Court in *Shriram Gas Leak* case.[19] The significance of this

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[17] OECD Council Recommendation of 31 March, 1989 Concerning the Management of Aquatic Resources: Integration, Demand, Management and Protection of Ground Waters C (89) 12 (final); The OECD Council Recommendation of 23 July 1992 on the Integrated Management of Costal Zones C (92) 114 (final).

[18] *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715.

[19] AIR 1987 SC 1086.

judgment lies in the court's formulation of the principle of the measure of liability viz. relating such measure to the magnitude and capacity of the enterprise, directing the industry either to shift from present location or evolve a green belt around it as a condition precedent to restart the industry. This innovative remedy evolved by the Supreme Court was an indirect recognition and application of the "Polluter Pays Principle".

This principle was for the first time, applied and defined in the case of *Indian Council for Enviro-Legal Action* v. *Union of India*.[20] The Supreme Court nicely weighed and balanced the conspectus of absolute liability and polluter pays principle. It was declared by the Court that the redemption of damaged environment is a part of the process of sustainable development and as such polluter is liable to pay the cost of individual sufferers as well as the cost of reversing the damaged ecology. Sincerity of the court came to the fore when it was pronounced that Ministry of Environment and forest must recover the money from the units (Polluters) and recovered money be used to repair the damage caused to the land and water in the area. As a result of which the plants and factories have been sold by State Government.[21]

The Court observed that sections 3 and 5 of the Environment (Protection) Act, 1986, empowered the Central Government to give directions and take measures for giving effect to this principle.[22]

In *Vellore Citizen Welfare Forum* v. *Union of India*[23], Supreme Court reiterated and declared in unequivocal terms that 'the precautionary principle' and the 'polluter pay principle' are part of environmental jurisprudence of this country.[24] The Court also observed that these principles have also been accepted as part of the customary international law, therefore, it automatically become a part of the basic jurisprudence of the land. In this case more than 550 tannery units were discharging untreated effluent, thereby causing water

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[20] AIR 1996 SC 1446 (in this case five chemical factories producing H-acid were discharging an azo dye and untreated toxic sludge into the open compound. This untreated waste percolated deep into the earth and caused water pollution of river water and underground water up to 70 feet below the ground within a radius of 7 miles of the Village Bichhari).

[21] Satish C. Shastri, *The Polluter Pays Principle and the Supreme Court of India*, 42(1) JOURNAL OF INDIAN LAW INSTITUTE, 2000 at 110.

[22] *Supra* n. 20.

[23] *Supra* n.18.

[24] Supreme Court referred to Articles 21, 48A and 51A (g) of Indian Constitution and other statutory provisions to justify the inclusion of these principles as part of Indian environmental law.

pollution. Considering the serious state of affair the court ordered for closure of industries involved in the tannery business. Supreme Court also directed the Central Government to constitute separate authorities under section 3(3) of Environment Act and directed the authorities to assess the loss to the ecology/ environment and recover the amount from the polluters.

The Court also ordered for imposing a fine of Rs.10, 000/- on each tannery of the area. The Court proposed the fine plus the compensation amount so recovered from the polluters be deposited under the head "Environment Protection Fund". This Fund could be utilized for compensating the affected persons identified by the 'Authority' and also for 'restoring the damaged environment.'[25]

To monitor the implementation of comprehensive directions by the Authority the Court suggested the constituting of a special bench "Green Bench" which in future would deal with environmental issues.

In *M.C. Mehta* v. *Union of India*[26], the Supreme Court reiterated the polluter pays principle. In this case, the Supreme Court ordered the polluting industries to shift away from the Taj Trapezium or to switch over to gas as fuel. Justice Kuldeep Singh gave a new dimension to the polluter pays principle. It was ordered by the Court that the various kinds of industries, numbering 292, if they opted to shift to other states/sites, would have to give 'compensatory benefit' to their workers.[27] Thus, the Court treated the workers of these polluting industries as victim and ensured that they should not suffer on account of an action against polluting industry. Thus, the Supreme Court has given a new dimension to environmental jurisprudence.

The Supreme Court applying the 'polluter pays principle' ordered compensation under the head for reversing the ecology/environment of affected area around Chilika Lake affected by aquaculture and Shrimp Culture industry.[28]

Supreme Court directed 'Span Motel' to pay compensation for restitution of environment/ecology in *M.C. Mehta* v. *Kamal Nath*[29]. The construction of motel has caused interference with natural flow of the river Beas and thereby causing extensive damage to environment and ecology in the area. In pursuance of court orders show cause notice was issued to

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25 *Supra* n. 18 at 2726.
26 AIR 1997 SC 734 (*Taj Trapezium* case).
27 *Id.* at 763.
28 *S. Jagannath* v. *Union of India*, AIR 1997 SC 811.
29 (1997) 1 SCC 388.

'Motel' ("Why pollution fine and damages be not imposed?") However, the 'Motel' argued that pollution fine could be imposed only after proper trial and conviction under relevant statutes. The Court accepted this argument of the 'Motel'.[30] However, the Court observed: "The powers of this court under Article 32 are not restricted and it can award damages in a PIL or writ petition as has been held in a number of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner."[31] In pursuance of this observation fresh notice, was directed to be issued to Span Motel.

Thus, the Court has extended the scope of 'polluter pays principle'. The polluter has to pay:

(i) damages for restoration of environment/ecology;

(ii) damages to those who have suffered loss on account of the act of offender; and

(iii) exemplary damages so that it act as a deterrent for others not to cause pollution in any manner.

Significantly, on March 15, 2002, the Supreme Court imposed a Rs.10 lac fine on 'Span Motel', for damaging environment and ecology in Kullu, Himachal Pradesh.[32] This fine is quite separate and apart from the cost of ecological/environment restoration.[33]

In *Research Foundation for Science Technology and Natural Resources Policy* v. *Union of India* [34], Supreme Court referred to polluter pays principle and held that illegal importers of hazardous waste oil were liable to pay the cost of destroying the said oil in proper manner as per the recommendation of Monitoring Committee.[35] The Court observed:

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30 *M.C. Mehta* v. *Kamal Nath* (2000) 6 SCC 213.

31 *Id.* at 224.

32 *M.C. Mehta* v. *Kamal Nath* (2002) 3 SCC 653.

33 *Ibid.*

34 *Research Foundation for Science Technology and Natural Resources Policy* v. *Union of India*, 2005 (1) SCALE 87.

35 The main task of this committee is to oversee that direction of the Court are implemented in timely manner. It would also oversee that the aspects to which Ministry of Environment and Forest has agreed are implemented in letter & spirit & without any laxity or delay in matter. See *Research Foundation for Science Technology Natural Resource Policy* v. *Union of India*, 2003 (9) SCALE 303 at 323.

"The polluter pays principle basically means that the producer of goods or other items should be responsible for the cost of preventing or dealing with any pollution that the process causes. This includes environmental cost as well as direct cost to the people or property. it also covers cost incurred in avoiding pollution and not just those related to remedying any damage. It will include full environmental cost and not just those which are immediately tangible. The principle also does not mean that the polluter can pollute and pay for it. The nature and extent of cost and the circumstances in which the principle will apply may differ from case to case."[36]

The significant words to note in above are "full environmental cost". The Supreme Court has emphatically urged a wide scope for polluter pays principle within environmental jurisprudence. The court also was justified in pointing out the flexible nature of the principle.

The Court also pointed out – "It is however, to be borne in mind that in India the liability to pay compensation to affected persons is strict and absolute and the rule laid down in *Ryland* v. *Fletcher* has been held to be not applicable"[37].

Thus, the Supreme Court through its landmark judgments has made 'polluter pays principle' a part of Indian environmental jurisprudence without any statutory requirement, thereby coming to rescue of those who have suffered due to pollution – be it man or nature.

VI. Public Liability Insurance Act

The 'no-fault' liability envisioned by Indian Judiciary has received legislative recognition through enactment of Public Liability Insurance Act of 1991 and National Environment Tribunal Act of 1995. The persistent effort made by judiciary towards tribunalization/environment courts thereby strengthening environment justice has met partial success. The tribunal envisioned under NETA of 1995 and National Environment Appellate Authority established under National Environment Authority Act of 1997 are the steps taken by legislature in this direction.

Public Liability Insurance Act has been enacted by the Government to provide quick relief to victims of any accidents arising out of hazardous substances. The source of the legislation has apparently been, to cover-up

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[36] *Supra* n. 34 at 98.
[37] *Id.* at 99.

the area, as suggested by the Supreme Court.[38]

The Act has been amended in 1992. By this amendment, the liability of the insurer has been limited to amount of premium. The insurance policy shall not be for less than the paid up capital amount of the hazardous unit and shall not exceed 50 crores.[39] In addition all the owners of hazardous units are to pay yearly an amount equal to the premium to environment relief fund. It may be noted, that the liability of the owner of hazardous unit is not limited.

The Act seeks to fulfill the aim of providing immediate relief to victims besides enabling the industry to discharge the liability to settle large claims arising out of major accidents through 'mandatory insurance'. Under section 4, every owner is under an obligation to take out insurance policies, before he starts handling any hazardous substance. Such policies are required to be renewed from time to time so long as such handling is continued.

Section 3 of the Act provides for no-fault liability and claimant shall not be required to plead and establish that death, injury etc. was due to any wrongful act, neglect or default of any person. However, the claims can be made within 5 years of the occurrence of the accident.[40] The time for disposal of claims is fixed at 3 months and insurer is obliged to deposit the amount of award within a period of 30 days of the announcement of award.[41] Where owner is likely to dispose of the property to avoid responsibility, the collector may issue temporary injunction to restrain such act.[42] Collector may make an award from the "Environment Relief Fund" established under section 7A. It may be noted that right to claim relief under Act is in addition to any other right to claim compensation in respect of death/injury/damage under any other law. However, the amount of relief paid under any other law shall be reduced by an amount of relief paid under this Act.[43] It may also be noted that the idea behind the Act is only to confer immediate relief according to the fixed scale provided in the schedule attached to the Act. Claims for full and final compensation are outside the purview of the Act.

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[38] See AIR 1990 SC 1480, wherein Justice Ranganathan suggested a fresh legislation to constitute a special forum with special procedure, conducive to expeditious determination and power, to grant interim relief by way of no-fault liability. Further it was suggested, by statute to provide compulsory insurance by such industries engaged in hazardous activities, against third party risk. Also, it was suggested to constitute Industrial Disaster Fund.

[39] Sec. 4 (2A), Public Liability Insurance Act, 1991.

[40] Section 6, *id.*

[41] See section 7, *id.*

[42] *Ibid.*

[43] Section 8, *id.*

Thus, Public Liability Insurance Act gives partial recognition to polluter pays principle. The liability has been imposed on the basis of no-fault, but this Act applies only to cases of hazardous industries. Also, by limiting the liability under the Act a compromise has been made between the need to provide immediate relief to victims and the concerns of polluters. As such the polluter pays principle has been effectuated only in a limited manner.

VII. Environmental Courts

The need to have environmental courts could hardly be overemphasized. The polluter pays principle being one important instrument of ensuring sustainable development require speedy decision making in order to protect the interests of victims and also the environment. The Supreme Court has repeatedly pointed the need of the specialized environmental courts having access to a combination of scientific and judicial inputs.

In *Indian Council for Enviro-Legal Action* v. *Union of India*[44], the Supreme Court articulated the need for environment courts in following words:

> "The experience shows that the prosecutions launched in ordinary courts under the provisions of the Water Act, Air Act and Environment Act, never reach their conclusion either because of the work load in these courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting these cases. Moreover, any order passed by the authorities under Water and Air Acts and Environment Act are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion. Very often, interim orders are granted meanwhile which effectively disable the authorities from ensuring the implementation of their orders. All this points to the need for creating environment courts which alone should be empowered to deal with all matters civil and criminal, relating to environment."[45]

A. National Environment Tribunal Act, 1995

The Indian judiciary's repeated emphasis on the necessity of alternative forum for settling environmental disputes received legislative endorsement by enactment of National Environment Tribunal Act, 1995.[46]

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[44] *Supra* n. 20.

[45] *Id.* at 1469.

[46] It may be noted that Environment Tribunal Bill was introduced in Parliament on 5th August, 1992. After a gap of almost three years the 'Bill' was reintroduced on 24th May, 1995. Ultimately on 17th June, 1995, the Bill received Presidential assent. However this Act has not been notified even after more than decade of its being passed by Parliament.

The Act provides for strict liability for damages arising out of any accidents occurring while handling hazardous substance and for establishment of National Environment Tribunal for expeditious disposal of cases arising from such accidents, with a view to giving relief and compensation for damages to person, property and the environment.[47]

Under section 3, the Act imposes liability on the owner of a hazardous enterprise to pay compensation in case of an industrial disaster on principle of no fault liability. This means that the claimant shall not be required to plead and establish the wrongful act, neglect or default of any person. Also, if the death, injury or damage cannot be attributed to any individual activity but is combined result of several activities, the Tribunal may divide the liability for compensation among those responsible for such activities on an equitable basis.[48]

The scope of the Act has been limited to only the handling of any hazardous substance. While defining accident under section 2(a), it says that accident means an accident involving fortuitous or sudden or unintended occurrence while handling any hazardous substance resulting in continuous or intermittent or repeated exposure to death of, or injury to any person or damage to any property or environment. It does not include an accident by reason of only war or radioactivity. Under section 2(f), hazardous substance has been defined as any substance or preparation which is defined as a hazardous substance in Environment (Protection) Act, 1986 and exceeding such quantity as specified by Central Government under Public Liability Insurance Act, 1991. This means that there is an attempt to restrict the definition of hazardous substance. It means that the damage caused by hazardous substances that have not been identified by Ministry of Environment and Forest (MOEF) as such or even if recognized by MOEF as hazardous but handled in quantities below the specified limits, is not covered under the ambit of the Act.

The power to establish National Environment Tribunal has been given to Central Government.[49] The Tribunal shall consist of a chairperson and such number of Vice-chairpersons, judicial members and technical members as the Central Government may deem fit. Each bench shall consist of one judicial member and one technical member.[50] However, a single member bench may also be set up.[51] A single member bench shall be devoid of

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47 See Preamble to National Environment Tribunal Act, 1995.

48 Section 3(3), *id.*

49 Section 8, *id.*

50 Section 9(2), *id.*

51 Section 9(4), *id.*

judicial or technical input depending upon the fact of presiding member's field. Thus, the order passed by such benches might lack judicial input or scientific expertise, the combination of which has been considered vital for speedy and efficient disposal of environmental litigation.

A person shall not be qualified for appointment as Chairperson unless he is or has been a judge of Supreme Court or a High Court. A Vice-chairperson with two years experience can also be appointed as Chairperson.[52] Any person who has held the post of Secretary to Government of India for at least two years can be Vice-chairperson.[53] This means that an administrator could be appointed as Chairperson. The appointment of an administrator to the post of Chairperson negates the concept of 'impartial tribunal' to adjudicate the dispute and it defeats the very object of this Act.

Section 10(4) lays down qualification for appointment of technical member. The said requirement is "adequate knowledge of or experience in or capacity to deal with administration, scientific and technical aspect relating to environment". This requirement of "adequate knowledge" is quite vague. This qualification leave an absolute unfettered discretion with Government to appoint anyone whom it wants to favor as any amount of knowledge will be adequate.

B. National Environment Appellate Authority Act

The National Environment Appellate Authority Act, 1997 provide for establishment of National Environment Appellate Authority. The Authority established under this Act can hear appeals against orders granting environmental clearance in designated areas where industrial activity is proscribed or restricted by regulations framed under Environment (Protection) Act, 1986. It means that the Authority can take up cases regarding the shifting of industries requiring statutory clearance. Thus, industries or industrial projects not requiring such statutory clearance (even though may generate legitimate environmental concern) are outside the ambit of the Act.

Under section 4, the Authority consists of a Chairperson, a Vice-chairperson and members not exceeding three. A person appointed as Chairperson should have been a judge of Supreme Court or a High Court. However, Vice-chairperson can be an administrator. Such person must have an expertise or experience in administrative, legal, managerial or technical

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[52] Section 10(1)(a)(b), *id.*
[53] Section 10(2)(b), *id.*

aspects of problems relating to environment. For appointment as member a person shall have knowledge or practical experience in the relevant areas. The appointment to these posts shall be made by President. It would have been better if prior consultation with Chief Justice of Supreme Court has been ensured.

In *A.P. Pollution Control Board* v. *M.V. Nayadu*[54], the Supreme Court regarded the Constitution of National Environment Appellate Authority as approximating an ideal forum with judicial as well as technical expertise to adjudicate on complex environmental issues.[55]

VIII. Conclusions

There can be no doubt about the necessity of polluter pays principle – as restoration of environment and compensating the victims of environmental harm both depend upon availability of financial resources. This principle may also be a catalyst in modifying the behavior of polluters. But it is too simplistic to assume that this principle by itself can induce socially and environmentally desirable activities. Further, it should not be forgotten especially in context of international environmental jurisprudence that many of environmental problems are result of past activities of developed economies. This pollution, which is a result of diffused activities of developed economies, is certainly posing a challenge - as developed countries are not very enthusiastic about applying this principle beyond their boundaries.

However, it should be remembered that the basic purpose of this principle is to guide and reform. It should be hoped that as this principle is applied more and more in relation to myriad human activities, its definition and scope would become more clear and concretized.

The application of polluter pays principle based on strict and absolute liability should not be seen as penalizing the polluter. Most of polluting activities are the by-product of production of some goods or services required by society. The pollution caused by such activities has to be translated in money terms under polluter pays principle thereby obliging the users of scarce natural resources to pay. Also, in the long run only those producers will succeed in the market who can reduce or minimize their costs under polluter pays principle. This will in turn promote the use of cleaner technologies and environmentally sustainable practices. Seen in this light, the overall impact of rigorous application of polluter pays principle at both local and global level could be to make the development activities as a catalyst even for restoration of environment.

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[54] AIR 1999 SC 812.

[55] *Id.* at 823.

IMPACT OF INTERNATIONAL LAW ON THE RIGHTS OF DISABLED IN INDIA

*Vipin K. Malhotra**

I. INTRODUCTION

Post World War II has seen radical changes in international law especially in the field of human rights with reference to the rights of women, children, and persons with disability. The paper is a brief attempt to analyze the impact of international law on the legislative and judicial process of India. The growing concern for the rights and participation of the disabled has led to various affirmative actions world wide in general and in countries like India in particular under the influence of such environment. The paper will discuss the underlying philosophical assumptions that are driving the process of change and the paradigm shift from charity to rights. It traces the growing influence of non-discrimination values and principles at the level of the United Nations. It also takes a close look at the variety of strategies used by a country like India to implement and place this paradigm shift into national operation, both in non-discrimination laws and in other ways.

II. THE SIGNIFICANCE OF VIEWING DISABILITY AS A HUMAN RIGHT ISSUE

With the paradigm shift from the medical to the social model of disability, disability was reclassified as a human rights issue under international law.[1] Reforms in this area were intended to provide equal opportunities for disabled people and to expose their segregation. National legal paradigms shifted even further, by the end of 20th century, from welfare law towards civil rights law. Several nations came forward with progressive laws towards the persons with disability. This new dimension of disability laws has been welcomed as a major milestone on the path towards eventual recognition of the human rights of disabled people.[2]

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* LL.B., 3rd year student, Law centre–II, Faculty of Law, University of Delhi, Delhi.

1 See for details, e.g., Victor Finkelstein, ATTITUDES AND DISABLED PEOPLE: ISSUES FOR DISCUSSION (New York: World Rehabilitation Fund, 1980); Michael Oliver, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (London: St. Martin's, 1990); Michael Oliver, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE (New York: St. Martin's, 1996); Jenny Morris, PRIDE AGAINST PREJUDICE: TRANSFORMING ATTITUDES TO DISABILITY (Philadelphia: New Society, 1991).

2 See United Nations General Assembly, IMPLEMENTATION OF THE WORLD PROGRAMME OF ACTION CONCERNING DISABLED PERSONS; Report Of The Secretary-General, U.N. Doc. A/54/388/Add.1 (1999).

Before we understand the context in recent perspective it is worth mentioning that a coherent ideology was evolved in the 1940s and 1950s, whereby the United Nations in its Universal Declaration of Human Rights[3] and the wider international community through two important international Covenants[4] approached the disability issue primarily from a medical and social welfare standpoint.[5] It was then thought that what persons with disabilities needed most was a medical cure. As a result, persons with disabilities received some medical attention, but remained socially isolated—in mental institutions, especially in the case of persons with mental disabilities.

In the 1970s, a broader "social model" emerged, recognizing that the medical model alone could not fully address the needs of persons with disabilities.[6] Instead of focusing on their physical disabilities. It sees the problem not as residing in the persons with disabilities themselves, but as resulting from structures, practices and attitudes that prevent the individual from exercising his or her capabilities. Thus, the social model gives priority

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3 The United Nations, which was founded on the principle of equality for all, extended its concern for persons with disability with same sense of equity. The Preamble to the Charter affirms the dignity and worth of every human being and gives primary importance to the promotion of social justice. Persons with disabilities are, *de facto*, entitled to all the fundamental human rights upheld by the Charter and other human rights instruments. Article 25 of the Declaration states that each person has "the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

4 Anti-discrimination principles were established by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which were adopted in 1966. Together they form the most comprehensive international code of binding legal provisions in the area of human rights. The two Covenants develop and supplement the provisions of the Universal Declaration, and the three instruments together make up what has come to be known as the International Bill of Human Rights. Disability is perhaps the area in which the importance of recognizing the indivisibility and interdependence of human rights and fundamental freedoms, as both Covenants do, is most evident and sharp.

5 Report of the United Nations Consultative Expert Group Meeting on INTERNATIONAL NORMS AND STANDARDS RELATING TO DISABILITY (Berkeley, 8-12 December, 1998) Division for Social Policy and Development, United Nations Department of Economic and Social Affairs, at 1.

6 *Id.* at 1-2.

attention to the way persons with disabilities want to live and to the right they have to participate fully and equally in society.[7]

A new approach to disability was adopted in 1970s. The concept of human rights for disabled persons began to become more accepted internationally. Two major declarations on the disabled were adopted by the General Assembly in the new decade. The Declaration on the Rights of Mentally Retarded Persons of 20 December 1971 provided a framework for protecting rights through national and international action. The Declaration stated that mentally retarded persons had, to the degree feasible, the same rights as other human beings, including a right to proper medical care and education, to economic security, to a qualified guardian, as required, to protection from exploitation and access to legal procedures. The Declaration stated that, if possible, mentally retarded persons should live with their families or with foster parents and should participate in various aspects of community life. Essentially, the Declaration paved the way for future comprehensive sets of principles, which would eventually seek to integrate persons with disabilities into society.

The Declaration on the Rights of Disabled Persons, adopted by the General Assembly on 9 December 1975, encouraged national and international protection of the rights of the disabled. Recognition was given to the fact that disabled persons were entitled to the same political and civil rights as others, including measures necessary to enable them to become self-sufficient. The Declaration reiterated the rights of disabled persons to education, medical services, and placement service. Realizing the need to promote the full participation of the disabled in the social life and development of their societies, the Declaration further recognized their right to economic and social security, to employment, to live with their families, to participate in social and creative events, to be protected against all exploitation, abuse or degrading behaviour, and to avail themselves of legal aid.

A. International Year For Persons With Disability (1981)

On 16 December 1976, the General Assembly declared the year 1981 as International Year of Disabled Persons (IYDP), stipulating that it would be devoted to integrate disabled persons fully into society.

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[7] The Declaration on Social Progress and Development, adopted on 11 December 1969, affirmed the fundamental freedoms and principles set forth in the Charter of the United Nations and emphasized the need to protect the rights and welfare of the disabled and the physically and mentally handicapped.

Once the year (1981) for persons with disability was earmarked, this was followed by the chain of events and programme, which comprehensively led to empowerment of the persons with disability and led to the calls for their full participation in the society. Various programs were declared, resolutions were passed and adhoc committees were set up for the prevention, rehabilitation and the integrations of the people with disability in the coming decades.

The International Year of Disabled Persons, 1981, was celebrated with numerous programmes, research projects, policy innovations and recommendations. Many conferences and symposiums were held during the Year, including the First Founding Congress of Disabled People International, held in Singapore from 30 November to 6 December. The Trust Fund for the International Year, established in 1977, collected over $510,000 in contributions from Member States.

B. World Programme of Action Concerning Disabled Persons (1982)

In 1982, immediately after IYDP 1981 was over the UN General Assembly adopted World Programme of Action concerning Disabled Persons. The Programme restructured disability policy into three distinct areas: prevention; rehabilitation; and equalization of opportunities.

The following definitions were developed from the perspective of the World Programme of Action Concerning Disabled Persons:

(a) Prevention is any measure aimed at preventing the onset of mental, physical and sensory impairments (primary prevention) or at preventing impairment, when it has occurred, from having negative physical, psychological and social consequences (secondary prevention);

(b) Rehabilitation is a goal-oriented and time-limited process aimed at enabling an impaired person to reach the optimum mental, physical and/or social functional level, thus providing the individual with the tools to change her or his own life. It can involve measures intended to compensate for a loss of function or a functional limitation (for example, by technical aids) and other measures intended to facilitate social adjustment or readjustment;

(c) Equalization of opportunities is the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health

services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all.[8]

Implementation of the Programme of Action, using multicultural and multidisciplinary approaches, was addressed by the General Assembly on 3 December 1982 and 22 November 1983. In a broad sense, implementation was sought through long-term strategies integrated into national policies for socio-economic development, preventive activities that would include development and use of technology for the prevention of disablement, and legislation eliminating discrimination regarding access to facilities, social security, education and employment. At the international level, Governments were requested to cooperate with each other, the United Nations and non-governmental organizations.

C. United Nations Decade of Disabled Persons: 1983 - 1992

The proclamation in December 1982 of the United Nations Decade of Disabled Persons (1983-1992) led to the comprehensive activities, designed to improve the situation and status of the disabled. Emphasis was placed on raising new financial resources, improving education and employment opportunities for the disabled, and increasing their participation in the life of their communities and country.

In 1984, Leandro Despouy of Argentina was appointed as Special Rapporteur to study the connection between human rights violations, violations of fundamental human freedoms and disability. He was to report biannually to the Sub-Commission on the particular human rights situation of disabled persons. His final report in which he recommended the establishment of an international ombudsman was submitted in 1991.

At this juncture, the United Nations also took itself to task; with the General Assembly noting that persons with disabilities would enjoy the same rights to employment as all other qualified citizens and that the United Nations itself would declare employment opportunities open to all persons, regardless of sex, religion, ethnic origin or disability.

The importance of these events could be summarized in the words of Margaret Joan Ante:

> The International Year of Disabled Persons, 1981, was a milestone in the long history of the struggle of people with disabilities against discrimination and segregation, and for equal rights. The World

[8] General Assembly Resolution 37/52 of 3 December 1982.

Programme of Action concerning Disabled Persons, the fruit of collective work by Governments and organizations, recognized disabled persons first and foremost as citizens vested with all the rights and obligations that this implied. ...The problems of disabled persons could not be isolated. Their solution depended on the recognition of the rights and needs of disabled persons, on the political commitment to resolve the problems, on the formulation and implementation of effective and integrated strategies."[9]

D. International Day of Disabled Persons

On 16 December 1992, the General Assembly appealed to Governments to observe 3 December of each year as International Day of Disabled Persons. The Assembly further summarized the goals of the United Nations regarding disability and asked the Secretary-General to move from consciousness-raising to action, placing the Organization in a catalytic leadership role which would place disability issues on the agendas of future world conferences.

In the same year, the Economic and Social Council endorsed the proclamation of 1993-2002 as Asian and Pacific Decade of Disabled Persons, a decision taken by the Economic and Social Commission of Asia and the Pacific, in order to effectively implement the World Programme of Action in the Asian and Pacific region.

III. The Standard Rules on Equalization of Opportunities for Persons with Disabilities, 1993

Eleven years later, after the World Programme of action concerning persons with disability was declared in 1993, the General Assembly unanimously adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities. The Standard Rules consist of 22 Rules aimed at ensuring that all persons with disabilities can exercise their rights in the societies where they live.

By adopting the World Programme of Action and the Standard Rules at the UN General Assembly, governments committed themselves to work towards the goal of equal opportunities for persons with disabilities. Although both instruments are "soft," i.e., non-binding, they have played a critical role in supporting the development of strategies, policies and programmes that advance the disability agenda locally, nationally and internationally. These

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[9] Margaret Joan Anstee, Director-General of the United Nations Office in Vienna and Head of Centre for Social and Humanitarian Affairs at the opening session of the global meeting of experts, Stockholm, Sweden, 17-22 August 1987.

developments had so much impact on the nations world wide that according to the results of a survey reported by Mr. Bengt Lindqvist, the Special Rapporteur on Disability of the Commission for Social Development, 81 percent of the respondent countries indicated that the Standard Rules had led to governmental initiatives promoting awareness and equality of persons with disabilities.[10]

In the past two decades, many governments enacted disability laws. The Asia-pacific region alone saw the enactment of the laws, including the Law of the People's Republic of China on the Protection of Disabled Persons in 1990, the Rehabilitation of Disabled Persons Act of Thailand in 1991, the Magna Carta for Disabled Persons of the Philippines in 1992, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of India in 1995, the Act for the Protection of the Rights of Persons with Disabilities of Sri Lanka in 1996, Ordinance on Disabled Persons of Vietnam in 1998 and the Disability Welfare Act of Bangladesh in 2001.

IV. Rights and Dignity of Persons with Disabilities:

A New International Convention

Since there were already a number of international instruments protecting the rights of persons with disabilities, the legitimate question arose why there was a need for new international convention. As indicated earlier, the World Programme of Action and the Standard Rules are important and useful tools, but they are not binding. Governments may or may not respect and use them. Though proved earlier they definitely influenced the policy making process amongst most of the nations. The disabled community however, concluded that what was required was a legally binding document, which would ensure that the human rights of persons with disabilities were recognized, protected, and reflected in national laws and practises—a new instrument that would be comprehensive and based on the input of the persons with disabilities themselves.

In 2001, af its 56th session, the General Assembly adopted Resolution 56/168, which called for the establishment of an ad hoc committee to "consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities."[11]

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[10] A/52/351 of 16 September 1997, para 27.
[11] General Assembly Resolution 56/168 of 19 December 2001.

Under this resolution an Ad Hoc Committee was established to develop a text proposal for the convention. Overarching principles and rights, equality in civil and political rights, equality in economic, social and cultural rights, monitoring mechanisms, and other issues were discussed.

In its current draft, the Convention spans over 25 articles, covering a range of important issues that affect the every day life of people with disabilities. For example under Draft Article 17 which covers the area of education, the Convention asserts, "States Parties shall ensure that where the general education system does not adequately meet the needs of persons with disabilities, special and alternative forms of learning should be made available (and that) any such special and alternative forms of learning should reflect the same standards and objectives provided in the general education system".

With regards to accessible voting draft Article 18 covering participation in political and public life asserts that "States Parties... shall undertake to protect the right of citizens with disabilities to vote by secret ballot." Influenced by these developments even in India, Election Commission has been asked to provide for the independent voting measures to the persons with disability, especially the visually challenged. Once completed, this Convention will help to aid all forms of advocacy work undertaken by the disability sector.

V. UNESCAP Declaration for Decade of Disabled Persons (1993-2002 and 2003-2012)

The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) in its commitment towards the developing society declared the Asian and Pacific Decade of Disabled Persons, 1993-2002, through a series of regional campaigns held annually since 1993 in Okinawa, Japan (1993), Manila, Philippines (1994), Jakarta, Indonesia (1995), Auckland, New Zealand (1996), Seoul, South Korea (1997), Hong Kong SAR, China (1998), Kuala Lumpur, Malaysia (1999), Bangkok, Thailand (2000), Hanoi, Vietnam (2001) and Osaka, Japan (2002). The Asian and Pacific Decade of Disabled Persons was extended for another decade, 2003-2012 by resolution 58/4 on Promoting an Inclusive, Barrier-free and Rights-based Society for People with Disabilities in the Asian and Pacific Region in the 21st Century, what is known as the Biwako millennium framework in achieving the full participation and equality of persons with disabilities.

Twenty seven countries adopted the Biwako Millennium Framework for Action toward an Inclusive, Barrier-free and Rights- Based Society for Persons with Disabilities in Asia and the Pacific (BMF) on 25-28 October 2002. The said Framework "encourages Governments to actively implement

the paradigm shift from a charity-based approach to a rights-based approach to the development of persons with disabilities and to move towards the human rights perspective, especially the perspective of the right to development for persons with disabilities, bearing in mind General Assembly resolution 56/168 of 19 December 2001 on a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities", which calls upon the State Parties to enact national laws towards the implementation of the Convention as a legal obligation, with a provision regarding technical support and strong international, regional and national monitoring mechanisms.

VI. Protection of the Rights of Persons with Disability: Indian Perspective

In view of the international development, India has also adopted a progressive attitude towards the rights of the persons with disability in its Constitution, progressive legislations and judicial activism.

A. Rights of Persons with Disability under Constitution of India

The opening word of the Preamble of the Constitution are "We, the people of India". The word "people", used in the Preamble, itself indicates that no discrimination was envisaged by the Constitution makers amongst the people of India on any ground whatsoever; be it religion, race, colour, creed, caste or even disability. People suffering from disability, whether they were blind, physically disabled or even mentally retarded, were included in the word "people" and an assurance was given in the Preamble "to secure to all its citizens: justice, social, economic and political" as also equality of status and of opportunity and to promote fraternity so as to uphold the dignity of the individual.

In order to achieve the objectives set out in the Preamble through the mechanism of the Constitution, certain very important and relevant provisions were incorporated such as, Articles 14,15 and 16 guaranteeing equality before law and equality of opportunity for *all* citizens in matters relating to employment or appointment to any office under the State. The Constitution also guaranteed "right to life" to all its citizens which means that every person including disabled has a right to live with dignity. This also means that the "disabled" like other citizens or people; possess all the basic human rights particularly because they are "human beings" though there was no direct reference to the rights of persons with disability in any of the articles.

However, Article 41 of the Constitution reads:

> The State shall, within the limits of its economic capacity and

development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 41, thus, makes effective provision for securing the Right to work to person suffering from disability. It is worth noting that international help to person suffering from disability started much later. Further, in view of the provisions contained in Articles 36 and 37, it is apparent that Article 41 is a mandate both to the Legislature and the Courts. Though, Article 41 does not confer a justiciable right, the Supreme Court has by its own interpretation, bearing in mind the goal of socio-economic justice, held that the Courts should so interpret a statute as will advance the objective underlying Article 41.[12]

In *Daily Casual Labour employed under P&T Department* v. *Union of India*[13], the Supreme Court observed that job security, was an ingredient of the right to work in view of the philosophy of socio-economic justice. Invoking Article 41, it has been held in many cases that if a person becomes "disabled" during the tenure of his service for any reason whatsoever, he cannot be thrown out of service; he has to be provided alternative job.

In spite of the Constitution provisions referred to above and the positive attitude of the judiciary, persons suffering from disability of one or the other kind were hardly provided any opportunity to lead a dignified life by opening the doors of employment to them or to secure opportunities for them in other spheres of life. The philosophy of the Constitution was hardly given any effective implementation so far as citizens suffering from disability were concerned until there was a global awakening brought about through the efforts of the United Nations which, to begin with proclaimed the Universal Declaration of Human Rights in 1948.

B. Legislative Actions

The last decades of the 20th Century saw the enactment of the four important legislations for the rehabilitation and welfare of people with disabilities. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act was passed in 1995. This is an important legislation that provides for both preventive and promotional aspects of rehabilitation such as education, employment and vocational training,

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[12] *Jacoab M. Puthuparambil* v. *Kerala Water Authority*, (1999) 1 SCC 28.
[13] (1998) 1 SCC 122.

reservation, research and human resource development, creation of barrier-free environment, inclusion and independent living.

The Rehabilitation Council of India Act 1992 led to the establishment of the Rehabilitation Council of India (RCI). The RCI is responsible for standardizing and monitoring training courses for rehabilitation professionals, granting recognition to institutions running courses, and maintaining a Central Rehabilitation Register of rehabilitation professionals. The RCI Act was amended in 2000 to give the RCI the additional responsibility of promoting research in rehabilitation and special education.

Mental Health Act, 1987 and The National Trust Act 1999 provide for the constitution of a national body for the welfare of people with autism, cerebral palsy, mental retardation, and multiple disabilities. The Act mandates promotion of measures for the care and protection of persons with these disabilities in the event of the death of their parents, procedures for appointment of guardians and trustees for persons in need of such protection, and support to registered organizations to provide need-based services in times of crisis to the families of the disabled.

The four legislations are comprehensive in spirit and together deal with all aspects pertaining to rehabilitation, training, employment, long-term settlement, human resource development and research and documentation.

Apart from these legislations, Modifications to the Unified Building Bye-laws, 1983, pertaining to the National Capital Territory of Delhi was set in motion in April 2002. These bye-laws are applicable to all new buildings, recreational areas and facilities used by the public. It does not apply to private domestic residence. These byelaws are an important factor in building a barrier free environment in the public places. Delhi Hat and Delhi Metro are some of the example of such efforts.

C. Judicial Decisions

Not only the legislative efforts have gone a long way in empowering the persons with disability by the above legislative measures, the judiciary has also interpreted the laws in a very progressive manner under the influence of International law.

In *Sheela Barse* v. *Union of India*[14], directions were issued by the Supreme Court that physically and mentally retarded children and abandoned or destitute children shall be lodged in protective or observation homes and if such children are accused of any offence, the investigation and trial against

[14] (1986) 3 SCC 632.

them be expedited by setting up juvenile courts in each District and a cadre of trained Magistrates for dealing with such cases be formed.

In *Daya Ram Tripathi* v. *State of U.P.*[15], it was held by the Supreme Court that if in an advertisement, issued by the U.P. Public Service Commission, one post in the Provincial Civil Service (Executive Branch) was reserved for physically handicapped persons and the appellant, namely, Daya Ram Tripathi, who was such a handicapped person, appeared in the Combined State Services Examination, held in 1982, pursuant to such advertisement and was declared qualified in that Examination, the Government could not deny him a suitable post in the PCS (Executive Branch). It was further observed that the Government having announced its declaration to rehabilitate physically handicapped persons, by reserving posts for them in all the services of the Government, could not later create needless hurdles. The cadre of the PCS (Executive Branch) was large enough to easily accommodate physically handicapped persons in suitable posts.

In *Godawari Bai* v. *DDA*[16], appropriate directions were issued by the Supreme Court for out of turn allotment of flats made by the DDA to the handicapped persons including the blind lady.

In *Death of 25 Chained Inmates in Asylum Fire in Tamil Nadu, In re* v. *Union of India and Others,*[17] taking *suo motu* cognizance of the death of 25 chained inmates in an asylum fire in Tamil Nadu, the Supreme Court issued directions to the Cabinet Secretary and the Union of India to indicate the policy, if any, framed under section 8(2)(b) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. In *National Federation of Blind* v. *Union Public Service Commission*[18], a Division Bench of the Supreme Court comprising of Justice Kuldip Singh and Justice N.M. Kasliwal directed the Government of India and Union Public Service Commission to permit blind and partially blind eligible candidates to compete and write Civil Services Examination in Braille-script or with the help of scribe. The Government of India was also commended to decide the question of providing preference/reservation to the visually handicapped persons in Groups "A" and "B" posts in Government and public sector undertakings expeditiously.

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[15] (1986) Supp. SCC 497.
[16] (1990) Supp. SCC 124.
[17] See (2002) 3 SCC 31.
[18] (1993) 2 SSC 411.

It is also appropriate to refer two judgements of the Delhi High Court. One is *Pushkar Singh* v. *University of Delhi*[19] and the other is *Shruti Karla* v. *University of Delhi.*[20] In the first case, the Executive Council of the University of Delhi had decided that there would be, without relaxation in required qualifications, 3% reservation for blind and orthopaedically handicapped candidates in teaching posts in the University and Colleges. The petitioners contended before the Delhi High Court that in spite of resolution of the Executive Council of the Delhi University, there was no reservation made for teaching posts, inasmuch as, no appointment of the physically handicapped had been made except in Dr. Ambedkar College. The High Court while allowing the writ petition directed the respondents to comply with the resolution of the Executive Council of the Delhi University with effect from the date of resolution so that the number of posts which have to be reserved for visually and orthopaedically handicapped persons are calculated subject wise and after ascertaining the number of posts, steps should be taken to fill up those posts from amongst the handicapped persons by adopting the regular selection procedure.

VII. Conclusion

Human rights are a matter of international concern and their advocates and guardians do exercise constructive influence across geographical and cultural boundaries. An increasing number of countries are opting for laws favorable to disabled people. Legislation establishes a coherent and comprehensive framework for the promotion of just and fair policies and their effective implementation. It creates formal procedures which hasten the process of full and total integration of the disabled in the society. United Nations and the efforts of world around have gone a long way in the recognition of civil rights of the persons with disability. India has responded positively to the international instruments to provide equal opportunity, protection of their rights and full participation in the socio-economic processes.

The Government, through its comprehensive and just legislation, has taken a lead to support the large community of people with disabilities in India and has provided a framework for the implementation of legal, progressive and economic activities. Without disabled people's rights being clearly entrenched in the law, there could be no progress in changing age old attitudes and improving the quality of life for people with disabilities.

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[19] 2001 (II) Apex Decisions (Delhi) 749.
[20] 2001 (II) Apex Decision (Delhi) 582.

The disabled should not be dependent any more on the charity of people. They should become an integral part of the society in every way. It is their right and the new law with emphasis on full participation declares, in no uncertain language, that they shall have it.

The Indian disability law treats disability, as a civil rights rather than a mere health and welfare issue. The law recognizes that the primary issue facing disabled people is their exclusion from the mainstream activities of the society and hence the emphasis in the law is on full integration and participation. It is discrimination, and not impairment, that disables people. The law recognizes the importance of consultation with disabled people on issues which directly or indirectly affect them. The government, therefore, has set up mechanisms for consultations with people with all types of disabilities.

One out of every ten people in India suffers from one form of disability or the other, that is they possess physical or mental impairment substantially limiting one or more of major life activities. In other words, 90 million of our countrymen live with, and learn to overcome in their own individual ways, problems which non-disabled can seldom understand. The law should enable not only one in ten people but also nine out of every ten people to lead their lives to their fullest potential. The law declares that disability need not be insurmountable as long as it can be properly understood and catered for. The law attempts to eradicate factors which produce low self-esteem in disabled people and empowers them to confront the insensitivity and ignorance of others.

The real danger now is that those who had been vigorously demanding its enactment might become complacent and think that the job has been done. The Act must be implemented in schools and colleges, in factories and workplaces, in transport and shopping Centres. People with disabilities, and those who care for them, must ensure that discrimination is outlawed and barriers are removed as much from the physical environment as from the attitudes of ordinary people. The real battle for the right to full citizenship and active participation of disabled people is ahead. The Act is comprehensive but must be enforced with sincerity and determination. There is a need for strong monitoring agency to see that their efforts are realized in totality. Here the role of international agencies would go a long way in liberating the barriers of persons with disability.

LAW OF TRADE MARKS IN INDIA – WITH INTRODUCTION TO INTELLECTUAL PROPERTY. By Ashwani Kumar Bansal. CLIPTRADE (Centre for Law, Intellectual Property and Trade), Delhi, 2006. Pp. lxix + 1306 + I-23, Rs. 1120/-.

The modern era is of high technological development, which has necessitated the establishment of huge commercial and business enterprises. Being the age of high technological advancement, to carry the competitive business, organizations requires numerous trade marks, brands, which have been made possible through innumerable trade names, inventions, and designs. Moreover, compared to the past, many industrial establishments and businesses today have gained the popularity of globalization which has been made possible because of very efficient communication systems. These days the business and commerce has become highly competitive and has crossed the political boundaries of the States. Such a scenario requires that whoever has invested his intellectual skills as an entrepreneur, his rights to run the business exclusively in his own trade names should be protected properly under the legal regime of the nation. We have witnessed in India a tremendous transformation of the industrial, commercial and business enterprises particularly after the reforms were introduced in the year 1992 in order to successfully compete in the free market economy in our globalized village. The economic development and the growth of economy, require advanced technological research and the methodology to protect the intellectual property rights. The Book under review is one of the authentic books on the subject on the law of trade marks in India. The book provides a brief discussion of the intellectual property rights in its first chapter.

The author states that intellectual property rights (IPRs) are an institution to protect the crucial part of capital including the valuation of the man-hours invested in the creation of certain types of objects which have been accepted as subject matter of intellectual property. It may be stated that intellectual property law is essentially a system to introduce order in industrial production and commercial activities by remunerating the initiator of ideas incorporated in products and assuring value to the investment made in the entities used to manufacture or

create those products. While discussing the intellectual property rights, the author has given the geneses of intellectual property rights, the subject matter of intellectual property, the nature of intellectual property rights and also the relation of intellectual property rights with human rights. The author also discusses the acquisition of intellectual property rights, their fair use and abuse and points out that intellectual property rights cannot be looked only from the point of view of acquisition and violation of intellectual property rights in which multinational companies of developed countries are interested. The author states that there is a need to appreciate the abuse of intellectual property rights together with the impact of intellectual property rights on development, growth, establishment and displacement of industries, strategies for all of the above and access to markets, without which the knowledge of intellectual property rights cannot be complete.

The present work is essentially about the law of trade marks in India. However, the same also provides a good discussion about the international relevance of trade marks with reference to the WTO-TRIPS. The author has elaborately discussed the fundamentals and legal concept of trade marks. The author provides for a clear picture about the products v. brands. The author very aptly states that what makes an enterprise succeed are not products but brands. The book also narrates different types of trade marks like trade marks simpliciter, certification marks, collective marks, textile marks and trade name or enterprise name. According to the author modern trade marks were born really in the second half of the nineteenth century, although their origin can be traced to some extent in the eighteenth century also in the cutlery trade.

Trade marks are important for enterprises and hence these are valuable intangible assets. The cost involved in having such assets are of two kinds: first, those connected with the registration and renewal of the trade marks and secondly, those involved in the advertising effect in creating and maintaining the economic value of the trade marks. The author points out that there is a difference between the economic and

Any stock of legally equal trade marks will contain the trade marks of unequal commercial value with different economic ages and life expectations. It may be pointed out that basically trade marks are national and territorial in nature. A trade mark enjoys protection by use or registration in each of the countries of operation separately under the law of the respective countries. There is no centralized or international protection or registration available except as discussed in Chapter 32 of the book under review which is not international registration or protection or protection to well known trade marks. But it has a semblance of international protection. Trade mark(s) of foreign countries are more often referred to as FTMs as they are introduced in foreign countries or are owned by foreigners.

In Chapters Four to Thirteen of the book the author discusses in detail, the need for registration of trade marks, licenses, the authorities under the Trade Marks Act, 1999 for the purposes of registration, the grounds for registration of the trade marks, the grounds for refusal to register trade marks, about the well known trade marks, the registration procedure and prohibition under the Trade Marks Act, 1999, the vested rights and concurrent registration and procedure of rectification and removal from the register of trade marks. In Chapter Fourteen to Twenty Five of the book the author discusses in detail about assignment and transmission of trade marks, the law of licensing of trade marks, trade mark licensing strategies and restricted practices, foreign trade marks in India, protection of trade marks by registration under the law, the protection of trade marks by copyright law and infringement and passing off under the law of trade marks. The author also discusses in Chapter Twenty Five the protection of domain names. Domain name is basically an address on the internet which is the address regime of the virtual world – it lets the rest of the world know where one is located on the internet. In Chapter Twenty Six the author discusses in detail about the injunction and other remedies against infringement of trade marks under the Trade Marks Act, 1999. Chapter Twenty Seven deals with the offences and penalties for infringement of trade marks available under the Trade Marks Act, 1999. In Chapter Thirty One the author has elaborately discussed about the WTO – Trade Marks related intellectual property rights and the comparative Indian trade marks law. The author

also discusses in Chapter Thirty Two the Madrid System of registration of marks and European Community trade marks.

The author has written a comprehensive standard work on the law of the trade marks in India with important reference to the international regime under the WTO and Madrid System. The book in its appendices provides ready references of the Trade Marks Act, 1999; The Geographical Indications of Goods (Registration and Protection) Act, 1999; The Trade and Merchandise Marks Act, 1958; The Emblems and Name (Prevention of Improper Use) Act, 1950; The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954; Agreement on Trade Related Intellectual Property Rights; Paris Convention for the Protection of Industrial Property; Madrid Agreement Concerning the International Registration of Marks; Trade Marks Law Treaty (1994); Nice Agreement Concerning International Classification of Goods and Services for the purposes of the Registration of Marks (1967); Trade Marks Rules, 2002; The Trade Marks Act, 1994 (U.K.) and Federal Trade Mark Act of 1946 (U.S.A.) (known as Lanham Act, 1946).

It's a voluminous work which is bound to be useful for the scholars, law students, law practitioners and industrial establishments. The reviewer has no hesitation in recommending the book to be kept in all law libraries.

*Harish Chander**

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

TEXT BOOK ON THE LAW OF EVIDENCE. By M. Monir. Seventh Edition by Manjula Batra. New Delhi : Universal Law Publishing Co., 2006. Pp. lxxxiv + 433, Rs. 250/-, ISBN : 81-7534-545-4.

Evidence means all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry; such statements are called oral evidence; all documents, produced for the inspection of the court, are called documentary evidence. Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc. for the purpose of inducing belief in the minds of the court or jury as to their contention is evidence.

As a part of procedure "evidence" signifies those rules of law whereby it is determined what testimony should be admitted and what should be rejected in each case, and what is the weight to be given to the testimony admitted. 'Evidence' means and includes the statements recorded by the police and deposition of the witnesses.

The object of adducing evidence is to prove a fact. When the law says that a particular kind of evidence would be conclusive as to the existence of a particular fact it implies that, that fact can be proved either by that evidence or by some other evidence which the court permits or requires to be advanced. Where such other evidence is adduced it would be open to the court to consider whether, upon that evidence, the fact exists or not. Where, on the other hand, evidence which is made conclusive is adduced, the court has no option but to hold that the fact exists.

Expert evidence, means evidence given to a court by a person skilled and experienced in some professional or technical sphere of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurement or similar means. This kind of evidence is commonly given by doctors, psychiatrists, chemists, architects, finger-print experts, and the like.

According to Black's Law Dictionary 'expert evidence' means evidence about a scientific, technical, or professional issue given by a person qualified to testify because of familiarity with the subject or special training in the field. It is also termed as 'expert testimony'. As per Wharton's Law Lexicon, 'experts' means witnesses who give evidence upon matters of their own professional knowledge, as distinguished from particular matters of fact, e.g., professed judges of handwriting, foreign lawyers as to foreign law or doctors as to the effects of drugs or poisons. The admissibility of such evidence rests upon the maxim *cuilibet in sua arete est credendant.*

The book under review is rich in case law as it contains all important English and Indian decisions on evidence. The sixth edition of the book was published in the year 2002 as short edition for lawyers and now the seventh edition has been brought out by Manjula Batra keeping in view the need of students.

The book in the beginning contains table of cases and subject index at the end for easy reference for the readers. The book indeed is a scholarly presentation of case law on the subject. The book, being valuable source of information on the subject, is worth keeping in all the libraries. Law students would find it particularly worthwhile to keep it in their libraries as a text book.

*K.D. Singh**

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

LAW OF INSOLVENCY. By Avtar Singh, Fourth Edition. Eastern Book Company, 2004. Pp. 259, Rs. 195/-.

The book under review, in its new edition endeavours to update the law of insolvency by incorporating all landmark judgments of Supreme Court and various High Courts of India. The previous edition of this book has had an enthusiastic response from lawyers and students alike. The updated edition of this widely commended work provides a comprehensive and exhaustive coverage of the subject with the help of decided cases, materials and background information on law of insolvency which is supplemented by commentary as well as cross references of cases detailed in footnotes.

Law of insolvency is an administrative law with the object of securing distribution of a debtor's estate among his creditors equitably and thereafter to release him under certain conditions from liability in respect of his debts and obligations. The jurisdiction of insolvency courts for getting the debtor adjudged insolvent commences on commission of any one of the acts of the insolvency by a debtor. Petition for insolvency can be filed at the behest of either the creditor or the debtor.

There is a common thread running through the various provisions of insolvency law that is liberation of the person of the debtor from the demands of his creditors while at the same time safeguarding the interests of the creditors. The author has, therefore, probably not divided the book into parts or chapters. It will be better if the book is divided into chapters to make it more comprehensible and understandable to the reader. The book, however, provides an indepth insight into its various provisions for thoroughly understanding the law of insolvency.

While starting with the objects of insolvency law, the author gives commentary on the sections which deal with the acts of insolvency. All the enumerated acts of insolvency have been explained elaborately by referring to statutory provisions and then discussing the case law on the topic. The authors grasp and understanding of the subject is reflected in the way the subject has been dealt with. But there is one important matter which the introductory portion of the book fails to mention. There are two major enactments which deal with the law of insolvency,

Provincial Insolvency Act, 1920 and The Presidency Towns Insolvency Act, 1909 which have been so enacted because of their different territorial jurisdiction. However, the author has nowhere mentioned about this fact and the commentary on the subject proceeds with this assumption that the reader is already aware of the same. Although a brief mention of the two enactments has been made in the preface to the fourth edition but that has also proceeded on the assumption of the readers being already aware of that.

Further the historical development and evolution of the law of insolvency has nowhere been mentioned. The factors which lead to the birth and growth of a law is equally important in understanding and appreciating any law to its fullest. It is hoped that this will be incorporated in the next edition of the book.

It was felt that the law of insolvency will become needless because of better sense of business responsibility of the traders, entrepreneurs and individuals. But in the course of time, more so because of the process of economic liberalization, individuals are facing competition from the foreign goods as well as the marketing strategies and products of multinational corporations. In this era of survival of the fittest, those who are unable to adjust to this new economic situation may fall in trap of indebtedness. Thus there is need to strengthen the law on this subject. The author also has expressed the same view in the preface but has not suggested any effective measures for strengthening the provisions of the law of insolvency so as to protect sinking businessman and safeguarding their lenders.

A thorough reading of the book signifies that though the book is not divided into chapters, it can be broadly classified into different topics: what are the acts of insolvency, who can be adjudged insolvents, the powers of the Court, on whose petition can a debtor be adjudged insolvent, the procedure of dealing with such petitions, effects of order of adjudication, subsequent proceedings till a debtor continues to be an insolvent as to how to control his person and property by annulment order or discharge, how to distribute his properties by receiver or Court, the effects of annulment and discharge, and the penalties and miscellaneous provisions of the two enactments.

The author has devoted a separate commentary on property which is covered under reputed ownership, a very significant aspect of the property of the insolvent. When a property is in the possession, order or disposal of a person, with the consent and knowledge of the true owner and under circumstances which create the impression that to all appearance and purposes he is the owner of that property then if such a person is adjudicated insolvent that property will vest in the receiver and will not revert to its true owner. This part of the book provides an exhaustive commentary and material on the subject elaborated by the case law of various High courts and Supreme Court.

The author has exhaustively dealt with all the aspects of the subject and has skillfully dealt with each aspect under both the enactments mentioned above by enumerating the corresponding section of the two enactments and then proceeding to give the case law under both enactments. The author deserves to be complemented for his remarkable coverage of the various aspects of the law of insolvency.

The book is also distinctive in its approach because of the way it has touched upon the other related laws which have a bearing or contradiction with its provisions. To illustrate: on page 68 after mentioning the provisions of Insolvency Act which place a bar and stay of suits and other legal proceedings by the creditors against an insolvent, the book on page 71 highlights that such bar does not operate against criminal proceedings under Indian Penal Code, 1860 or against criminal proceedings under section 138 of the Negotiable Instruments Act, 1881.

Written in a clear and lucid manner, the book is a reservoir of knowledge on the subject and has been formulated concisely. Much has been added in this edition to deal with the important developments on the law. Latest judicial decisions have been incorporated. The new addition, namely, appendices include Acts and Rules of various States and notifications. It provides a good treatise on the subject and is an invaluable source of reference for professionals and students alike.

*Neera Bharihoke**

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

FORM IV

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