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NEGOTIATING THE INTERNATIONAL AGREEMENT ON AGRICULTURE AFTER DOHA ROUND – INDIAN PERSPECTIVE

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I. INTRODUCTION

Agriculture sector was not subjected to international regulations under GATT 1947. Although there was no specific exclusion under the GATT jurisprudence, yet the two major agriculture producers of the world namely, the EEC and the USA managed to exempt themselves from the jurisdiction of GATT. Uruguay Round Negotiations (1986-95) culminated into a fortified and strengthened international rules to cater for a rule based system of regulating international trade in almost all sectors including agriculture and also led to the establishment of WTO and various other international agreements including the WTO Agreement on Agriculture besides, the GATT 1994 as a new incarnation.

The WTO Agreement on Agriculture (AoA) 1995, essentially centered on easiest issues leaving complex issues to be negotiated in future under its Article 20 which catalogued, *inter alia*, the effects of the reduction commitments on world trade in agriculture, non-trade concerns, special and differential treatment of developing country members, and the objective of establishing a market oriented agriculture trading system and what further commitments are necessary to achieve the long term objectives. The preamble of the AoA is equally emphatic that the long-term objective is to establish a fair and market-oriented trading system. For achieving the market-oriented trading system in world agriculture a reform process 'is needed for negotiating commitments on progressive reductions in agriculture and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agriculture markets', and 'committed to achieve specific binding commitments in each of the following areas: market access; domestic support; export competition; and to reaching an agreement on sanitary and phytosanitary issues'.

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The preamble makes it clear that while implementing the commitments on market access, developed country Members should take into account the particular needs and conditions of developing country Members by providing greater access for agriculture products of particular interest to the developing country Members, including the fullest liberalization of trade in tropical products. The preamble reiterates that reform programmes should be made in an equitable way among all Members, taking into account the non-trade issues, including food security, and the need to protect the environment. Further, the preamble underpinned the need for giving special and differential treatment (S&D) to developing countries as it is an integral part of negotiations.

To be concise, the three pillars of AoA Agreement are (i) increased market access for agriculture products, (ii) commitments to reduce domestic subsidies on agriculture production, and (iii) commitments to reduce export subsidies on agriculture products keeping in view the long-term objectives of the Agreement in establishing a market-oriented agriculture trading system as well as balancing the interest of less-developing Members in an equitable and fair manner.

The AoA Agreement was drafted essentially to deal with the protectionist policies of the developed countries which were not allowing the agriculture sector to sail under free market conditions, rather the protectionist policies of the developed countries were conceived either in the form of direct subsidies to farm sector and farmers or indirect ways of supports by budgetary outlays etc. For example, the total measurement of government support to agriculture for the OECD countries, the producer support estimate or PSE increased from US$247 billion during the period of 1986-1988 to US$400 billion in 1999. Agriculture subsidies and import quotas cost European Union taxpayers and consumers close to US$ billion during 1986-1988, the figure increased to US$130 billion in 1998. For the United States, the increased costs climbed from US$42 billion during 1986-1988 to US$48 billion in 1998. According to a Joint World Bank/ OECD study if developed countries terminated domestic and export farm subsidies, food prices would rise resulting in a shift of food production to lower-wage developing countries such as India. OECD would experience a net annual economic gain of US$50 billion (approximately) and developing

countries US$120 billion[1]. The United States in 1989 aids US$2.5 billion in commodity bonus under its Export Enhancement Programme (EEP) to agriculturists to boost the export sales of US$8.5 billion in agriculture products to 65 countries[2].

For the developing countries especially India, agriculture is a mainstay of more than 70% of its population for providing livelihood. It accounts for a quarter of the Gross Domestic Product (GDP). The percentage of rural population in India is the highest (72 percent in 2000) in the world and has not changed much compared to the situation two decades earlier[3].

Agricultural negotiations in WTO are of importance to India as 72% of its population are dependent for their livelihood on agriculture, the large majority of rural population survives on an annual per capita income of US $175 as compared to the current US$480 national per capita, 70% of the cultivable land is vulnerable to vagaries of monsoon, etc.

India at the very start of agricultural negotiations in the WTO (2001) submitted a detailed and comprehensive proposal[4]. It covered all aspects of the negotiations and remains one of the longest proposals ever submitted by any member.

In India, poverty reduction can be achieved better with rural rather than urban economic growth. It is also true that one percent increase in agricultural per capita GDP created a 1.61 percent increase in the per capita income of the poorest 20 percent of the population in 35 representative countries[5]. Agriculture growth helps in increasing wages, lowering food prices, increasing demand for consumer and intermediate services, facilitating development of agribusinesses, increasing reforms to labour and capital and

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1 UCTAD, AGRICULTURAL TRADE LIBERALIZATION IN THE URUGUAY ROUND: IMPLICATION FOR DEVELOPING COUNTRIES (2000).

2 USDA, *GAO Tell Senate Panel, EEP Programme should continue as Effective Trade Tool*, INTERNATIONAL TRADE REP., 291 (BNA,1990).

3 Garan Datt and Ravillion Martin. *Why Have Some Indian States Done Better Than others at Reducing Rural Poverty?* POVERTY, INCOME DISTRIBUTION, SAFETY NETS, MICRO CREDIT, WORKING PAPERS, 1594 (World Bank, Washington D.C. 1996).

4 G/AG/NG/W/102, 15 Jan. 2001.

5 C.Peter Timmer, *How will Do the Poor Connect to the Growth Process?* PAPER 178 (Harvard Institute for International Development, Cambridge, Mass. 1997).

improving the overall allocative efficiency of factor markets[6]. Growth of the agriculture sector is crucial for achieving a number of development goals such as enhancing overall economic growth and poverty reduction, improving food security and conserving natural resources.

Enhancing agricultural growth in developing countries requires integration with the world economy, provided the world markets are not distorted. Although the ratio of trade to GDP increased substantially in Europe and Central Asia as well as in Latin America after the WTO coming into existence, but the growth in this ratio in South Asia including India is less. It is therefore, suggested that the developmental framework for agriculture should ensure that economic policies are not biased against primary production and export, trade policies in developed countries are not biased against developing countries and public and private investments in infrastructure, technical development and credit are needed for modernizing production and improving competitiveness.

II. WTO AGREEMENT ON AGRICULTURE: AN ANALYSIS

A. Three Pillars of the W TO Agreement on Agriculture

The Agreement on Agriculture as already said is a modest first step towards serious reform of international rules governing trade in agricultural products. The Agreement is built on three pillars:

(i) increased market access for agricultural products;
(ii) commitments to reduce domestic subsidies on agricultural production; and
(iii) commitments to reduce export subsidies on agricultural products.

The Preamble to the Agreement conceives long-term objectives of the WTO members to establish a fair and market oriented agricultural trading system that includes substantial reductions in agricultural support and protection. Further, in implementing these commitments on market access, developed countries would take fully into account the particular needs and

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[6] Harry de Gorter, D Lugco and Laura Ingacio, *Domestic Support: Economics and Policy Instruments* in Mulinda D. Ingco and John D.Nash (eds.), AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT 1-22 (Washington D.C., World Bank and Oxford University Press 2004).

conditions of developing country members by providing for them greater opportunities and terms of access for their agricultural products in the markets of the developed country members of WTO.

There is a further, commitment of fullest liberalisation of trade in tropical agricultural products. These commitments as a reform programme are to be made in an equitable way among all WTO members taking into account non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of these negotiations and also to take into account the possible negative effects on the implementation of programme on the least developed and net-food importing developing countries. The objectives of the Uruguay Round negotiations are set out in the agricultural sector in the Ministerial Declaration on the Uruguay Round[7] and the long-term objectives of the reform process has been set in Mid-Term Review of the Uruguay Round.[8] The Agreement on Agriculture consists of twenty-one Articles with five Annexes.

B. Market Access

For the fifty years, it is established that the agricultural sector in international trade has been subjected to innumerable non-tariff barriers which have taken various shapes and forms such as quotas, variable import levies and voluntary import and export restraints. To remedy this situation, the Agreement on Agriculture requires:

1. a guaranteed minimum access level for all agricultural products;
2. the 'tariffication' of non-tariff barriers into tariff equivalents; and
3. the use of tariff-rate quotas to ensure that the market access commitments are honoured.[9]

WTO members in the Agreement on Agriculture have agreed to minimum access opportunities for products which are not significant imports of specific member countries. Access is based on three percent of domestic consumption in 1995 and increasing to five percent by 2000. If import

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7 BISD 33S/19, Part I, Section D.

8 MTN. TNC/11, pp. 6-7.

9 Article 4.

volume is greater than these thresholds, current market access levels are to be maintained. The minimum access commitments are designed to allow a modest level of trade in agricultural products to occur, where previously non-tariff barriers effectively blocked such trade, and/or where the new tariff equivalents are so high that they would continue to block all such access.

(i) *The Tariffication Process*

The tariffication process although is an important step for liberalisation of agricultural trade in future WTO negotiation, yet it is far from satisfactory solution. Guidelines for the calculation of tariff equivalents are contained in Annex 5 of the Agreement.[10] The tariff equivalent is generally the difference between the internal and external price for the product, expressed as an *advalorem* or specific duty rate. The external price is the average f.o.b. unit value price set by major exporters of the product, adjusted by adding insurance and freight costs.[11] The internal price is the prevailing wholesale price in the domestic market.[12] Article 4 of the Agreement on Agriculture prohibits members from maintaining, resorting to or reverting to non-tariff measures, old or new in order to eliminate the adverse effect that non-tariff barriers have had on agricultural trade. The process of tariffication requires members of the WTO to convert existing non-tariff measures into ordinary customs duties and to find them. Non-tariff measures identified in the Agreement include minimum import prices, quantitative import restrictions, discretionary import licensing, non-tariff measures maintained through state trading enterprises, voluntary export restraints; and similar border measures other than ordinary customs duties regardless of whether those measures were grandfathered under GATT 1947, maintained under GATT 1994 waivers, or listed in a country's Protocol of Accession to GATT 1994.[13]

The tariffication of the WTO Agreement on Agriculture replaces non-tariff barriers with tariff rate quota. Under a tariff-rate quota, one tariff rate applies to imported products up to a stated amount. The higher tariff rate applies to imported products in excess of that amount.

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10 See Annex 5.
11 Attachment to Annex 5 (2).
12 Attachment to Annex 5(4).
13 Article 4.2.

Thirty-seven WTO members have tariff rate quotas listed in their schedules with a total of 1,371 individual tariff quota commitments.[14] The average quota fill rate for the period 1995-1999 has been approximately 63 percent, that is, about one-third of all quotas are not filled in any given year. In addition, a significant number of quotas are reserved for specific countries and a great deal of flexibility exists with respect to the administration of those quotas that are open to all exporters. The fact of the matter is that world exports of agricultural products are concentrated in a handful of WTO members. A WTO member will assess duties on agriculture imports that are in excess of the minimum or current access level commitments for the imported product. For example, assume that during 1996-1998, a WTO member limited imports of butter to 10,000 tons, (subject to a tariff of four per cent *advalorem*) with the result that the WTO member's domestic market price for butter was 75 per cent above the world market price. Under tariffication, that WTO member might establish a tariff-rate quota for butter with an in-quota quantity of 10,000 tons and in-quota tariff-rate of four percent *advalorem* and apply an over-quota tariff of 75 per cent *advalorem*.

(ii) Tariff reduction

Under the WTO Agreement on Agriculture, the developed countries are required to reduce agricultural tariffs by an average of thirty six percent on a simple average basis over a six year period ending in 2000. In the case of developing countries the average reduction is twenty four per cent over a ten year period ending in 2004. The lower in-quota duty rates generally will not be reduced. All customs duty rates are to be bound, with developing countries establishing ceiling bindings where no bindings existed before the Uruguay Round. Least developed countries commit to tariff bindings on agricultural products, but are not required to make any further commitments to reduce tariffs.

In addition to the average tariff reductions, a minimum fifteen per cent tariff reductions must be made for each tariff line (ten per cent in the case of developing countries). In order to meet the overall thirty six percent tariff reduction commitments, members of WTO have reduced duties on import-

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14 WTO, Committee on Agriculture, Tariff and Other Quotas, BACKGROUND PAPER BY THE SECRETARIAT, G/AG/NG/5/7 (23 May, 2000) p.2.

sensitive agricultural products by fifteen per cent minimum and made greater reduction on products that are either less import-sensitive or in which there is little trade.[15]

C. Commitments on Domestic Subsidies

Article 7 of the Agreement on Agriculture read with Annex 2 to the Agreement comes to grips on the trade distorting aspects of domestic subsidies in the agricultural sector. The Agreement categorises domestic subsidies by placing them in three boxes: an exempt green box (permissible and non-countervailable); an excluded blue box (permissible, countervailing if they cause injury, but not subject to reduction commitments); or an amber box (permissible but countervailing if they cause injury, and subject to reduction commitments). There is no prohibited or red-box category for domestic subsidies. Article 3.2 of the Agreement imposes a standstill on the use of domestic subsidies; subject to the provisions of Article 6, a member shall not provide support in favour of domestic producers in excess of commitment levels specified in Section I of Part IV of the Schedule. Further having frozen the use of domestic subsidies, members agree in Article 6 of the Agreement to reduce their domestic subsidies in accordance with Part IV of the member's Schedule submitted at the conclusion of the Uruguay Round. For developed countries, that commitment is a reduction of the remaining non-exempt domestic subsidies by twenty percent from levels existing during 1986-88 base period in six equal annual installments. Developing countries are required to make reductions of 13.3 percent over ten years.[16] Least developed countries are not obliged to make any reduction, but must bind their levels of support.[17] Once all exempt duties have been accounted for and excluded, WTO members calculate their non-exempt domestic subsidies using a methodology called the Aggregate Measurement of support or 'AMS'. Exempt subsidies and the AMS are discussed below. Once the reductions have been implemented, members thereafter agree to bind their reductions in a Final Bound Commitment Level.

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15 Brosch, K.J., *The Uruguay Round Agreement on Agriculture* in Harvey M. Applebaum and Lyn M. Schlitt (eds), THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENT: UNDERSTANDING THE FUNDAMENTAL CHANGES 865 (1995).

16 Article 15.2.

17 *Ibid.*

D. Exempt 'Green Box' Subsidies

The Green Box subsidies are such subsidies which have a minimum trade distorting effect and as such are exempt from GATT/WTO disciplines.[18] Annex 2 of the Agreement on Agriculture provides that in order to qualify as an exempt or green box domestic subsidy two threshold requirements are to be met:

1. The subsidy in question must be provided through a publicly funded government programme that does not involve transfers from consumers; and
2. The subsidy must not have the effect of providing support to producers.[19]

Annex 2 lists twelve types of exempt subsidies, including the following:

- Generalised government service programmes in areas of research, pest and disease control, and training;
- Domestic stockpiling for food security and domestic aid purposes;
- Direct payment to producers in the form of decoupled income support (support that is not tied to production);
- Governments financial participation in income safety net and crop disaster insurance;
- Structural adjustment assistance provided through producer retirement programmes;
- Structural adjustment assistance provided through resource retirement programmes;
- Structural assistance provided through investment aids; and
- Payments under environment and regional assistance programmes.[20]

E. Excluded 'Blue Box' Subsidies

Article 6 of the Agreement on Agriculture, in addition to the green box subsidies exempted under Annex, 2 listed above excludes from the Aggregate Measurement of Support (AMS) calculation three other categories of

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18 Article 6.1.
19 Article 2.1.
20 Annex. 2.2-2.13.

domestic subsidies that have been described as 'blue box subsidies';

1. Certain developing country subsidies designed to encourage agricultural production;
2. Certain *deminimus* subsidies, and
3. Certain direct payments aimed at limiting agricultural production.

Article 6.2 of the Agreement excludes three types of government assistance, whether direct or indirect, from the AMS calculations:

— Investment subsidies which are generally available to low income or resource poor producers in developing member country;
— Investment subsidies which are generally available to agriculture;
— Subsidies to agricultural producers to encourage diversification from growing illicit narcotic drugs.

In keeping with the *deminmus* subsidies, Article 6.4 excludes from the AMS calculation;

1. product-specific domestic subsidies where the subsidy does not exceed 5 per cent of that member's total value of production of a basic agricultural product during the relevant year; and
2. Non-product specific domestic subsidies where such subsidies do not exceed 5 per cent of the value of that members total agricultural production. The applicable percentage for developing countries is 10 per cent.

The third type of 'blue box' subsidy is the direct payments made under production-limiting programmes and are excluded provided;

1. They are based on fixed area and yields;
2. They are made on 85 per cent or less of the base level of production; or
3. They are livestock payments made on a fixed number of head (Article 6.5(a) of the Agreement).

A WTO member may confer both green box and blue box subsidies on its farmers; however, the important distinction between excluded subsidies and exempt green box subsidies is that blue box subsidies are actionable under an importing member's countervailing law, whereas green box subsidies are not.

F. The Aggregate Measurement of Support (AMS) Calculation

Under the Agreement on Agriculture, all non-exempt, non-excluded domestic subsidies are calculated and reduced to a single figure, the Aggregate Measurement of Support (AMS).

Article 1(a) of the Agreement defines the AMS as follows:

The annual level of support expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product, or non-product-specific support provided in favour of agricultural producers in general, other than the support provided under programmes that qualify as exempt from reduction under Annex 2 of this Agreement, which is:

(i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a member's Schedule; and

(ii) with respect to support provided during any year of the implementation period and thereafter, calculated with the provisions of Annex 3 of this Agreement, taking into account the constituent data and methodology used in the tables of supporting materials incorporated by reference in Part IV of the member's Schedule.

The 'basic agricultural product' in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a member's Schedule and in the related supporting material.[21]

AMS subsidies includes both budgetary outlays and revenue foregone by governments.[22] Fees paid by producers are deducted from the AMS. A specific AMS expressed in monetary terms is established for each basic agricultural product. Once the AMS has been calculated, subsidy reductions of 20 per cent for developed countries over the six years from 1995 and 13.3 percent for developing countries were implemented over 10 years. Least developed countries were not required to make any reduction.

Although AMS is calculated on a product by product basis, the commitments for reductions apply to the aggregate amount. This allows

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[21] Article 1 (h).

[22] Article 1(e).

countries flexibility to shift support from one product to another, though they are required to keep within outer ceiling limits.

G. Export Subsidies in the Agreement on Agriculture

Article 3.3 of the Agreement provides that a member:

> Shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified herein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.

The Agreement on Agriculture, therefore, tightens its hold on export subsidies by prohibiting export subsidies in two instances:

1. Products that never received export subsidies in the 1986-90 base period may not receive them in the future; and
2. Export subsidies not listed in Article 9.1 are not permitted.

Article 9(1) lists the following export subsidies subject to reduction commitments:

(a) the provision by governments or their agencies of direct subsidies, including payments-in-kind to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;

(b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;

(c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;

(d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export production and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;

(e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(f) subsidies on agricultural products contingent on their incorporation in exported product.

By the end of the implementation period a member must be in full compliance with its budgetary and quantity reduction commitments.

H. Prevention of Circumvention of Export Subsidy Commitments

Article 10 of the Agreement on Agriculture prevents circumvention of the export subsidy reduction commitments in four ways. One, members agree not to circumvent the export subsidy reduction commitments through food aid except in conformity with Article 10(1); two, member agree to work towards the development of internationally agreed disciplines on export credits, export credit guarantees, and export insurance programmes.[23] Third, any member which claims that any quantity exported is in excess of a reduction commitment level is not subsidised must establish that no export subsidy, whether listed in Article 9 or not has been granted in respect of quantity of exports in question. Fourth, export subsidies not listed in paragraph I of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments, nor shall non-commercial transactions be used to circumvent such commitments.

I. Disciplines on Export Prohibitions and Restriction

Where any WTO member institutes any new export prohibition or restrictions on foodstuffs in accordance with paragraph (2) of Article XI of GATT it is incumbent on the member to observe the following provisions:

(a) the member instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on importing member's food security;

(b) the member has to give notice in writing before instituting an export prohibition or restriction in advance to the Committee on

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[23] Article 10.2.

Agriculture[24] communicating the nature, and duration of such a measure, and shall upon request consult other member/members and provides information who have a substantial interest as importer with respect of any matter related to the measure in question.

The above provision does not apply to a developing country member, unless the measure in question in taken by a developing country member which is a net food-exporter of the specific foodstuff concerned.[25]

J. Peace Clause—Hold Back Subsidies

Article 13 catalogues the exemptions during the nine-year implementation period ending 2006. During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures:

(a) domestic support measures that conform fully to the provisions of Annex 2 to the Agreement on Agriculture shall be;

(i) non-actionable subsidies for purposes of countervailing duties;

(ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and

(iii) exempt from actions based on non-violation or impairment of the benefits of tariff concessions accruing to another member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994.

Legal action against domestic and export subsidies under:

(i) Member's countervailing duty law;

(ii) the Agreement on Subsidies and Countervailing Measures; or

(iii) Article XXIII of GATT on the basis of 'adverse effects,' 'serious prejudice' or 'non-violation nullification and impairment, may be brought only under the following circumstances:

First, all green box domestic subsidies are exempt under all three types of legal action. Second, all non-exempt domestic subsidies that do not grant support to a specific product in excess of the amount received during 1992

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24 As established under the Agreement.

25 Article 12(2).

marketing year are exempt from action under (ii) and (iii). However, they are not exempt under (i) if they cause injury to a domestic industry producing a like product, in which case, they may be subject to an importing member's countervailing duty law. Third, all non-exempt domestic subsidies exceeding reduction commitments are subject to action under (i), (ii) and (iii). Fourth, export subsidies that conform to the Agreement's reduction commitments are exempt form action under (ii) and from 'adverse effects' and 'serious prejudice' actions under (iii) but are subject to a GATT, 'non-violation' and nullification 'impairment' action. If they cause injury to a domestic industry producing a like product, they also are subject to an importing members countervailing duty law, but 'due restraint has to be shown in initiating any countervailing measures.' Fifth, all export subsidies exceeding reduction commitments are subject to action under all three types of legal action.

K. Doha Round

Agricultural negotiations was part of the Doha Round of WTO Ministerial Conference launched in November 2001 and committed member governments to arrive at : (i) substantial improvements in market access; (ii) reduction of all forms of export subsidies with a view to phase out; and (iii) substantial reductions in trade distorting domestic support. Besides, the Doha Mandate also took note of non-trade concerns such as rural development and food security. Doha Ministerial Conference was followed by failed Cancum (September 2003) Ministerial Conference and subsequently the General Council of WTO after an intense negotiations developed a 'July Framework' (2004) which was considered as a significant step in, arriving at modalities. The 'July Framework' (2004) with respect to domestic support and export competition had the following features:

1. The overall reduction targets is cutting total trade distorting support calculated by adding final bound total AMS, *deminimis*, and Blue-Box using a fiered formula.
2. Twenty percent in the first year of implementation.
3. As far as AMS is concerned, the product specific AMS will be capped and greater cuts by countries providing higher levels of AMS.
4. De minimis will be cut and the extent of reductions in the *deminimis* to be negotiated – developing countries that allocate almost all de

minimis support for sustenance and resource poor farmers will be exempt.

5. The definition and criteria for inclusion in the Book will be revised.
6. The Blue Box criteria is to ensure that the measures are less trade distorting than AMS measures.
7. The Blue Box will be capped at 5 percent of the value of the agriculture production.
8. The Green Box criteria is to be reviewed.
9. Parallel elimination of all export subsidies, trade-distorting export of export credits, certain activities of State Trading Enterprises (STEs), bilateral food aid are also of great concern.
10. Export subsidies eliminated by annual instalments, taking into account coherence with internal reform steps of members.
11. Disciplines on export prohibitions and export restrictions to be negotiated.

On Special and Differential Treatment (S&D) the July framework allows for a longer implementation period and lower rate of reductions for domestic support. It also allows for continued access to Article 6.2 of which exempt measures are taken to achieve agriculture and rural development, and investment subsidies to resource poor farmers for calculation of current Total AMS. On export promotion the framework allows for a long period for phase out and benefit under Article 9.4 of AoA (Subsidies to reduce the cost of marketing exports of agricultural production, processing cost and costs of international transportation and freights, and internal transportation and freight charges on export shipments) to continue for a reasonable period after phasing out all forms of export subsidies. It also specifies that interests of net food importing countries are to be protected and STEs in developing countries will be given special considerations.

The Framework Agreement has moved in a positive direction on several aspects that are of considerable interest to developing countries. Caping product specific AMS, higher reduction by countries providing greater AMS, modification of criteria for Blue Box, and elimination of export subsidies are positive steps.

L. India's Perspective

India has been steering since the beginning of AoA negotiations till its failure in 2006, bold initiatives and have been constantly on the look out for a workable and acceptable solution in the overall perspectives of the claims of various stakeholders as well as the disadvantageous position of the less developing countries. The DDA and Round have raised high expectations for vulnerable sections of society who are looking at welfare gains from the round to steer them clear of deprivation and provide succor. India also believes in "win-win situation" where developed and developing countries could settle a workable, reasonable, and honourable settlement which could be salable to all the stakeholders and in case negotiations fail, it would risk the entire multilateral trade institutions to crumble and developed countries would be accused of such disaster.

The resumption of negotiations should be based on a shared understanding of clear principles namely,

(i) being firmly faithful to the Doha mandate, as elaborated by July 2004 Framework and the Hong Kong Ministerial Declaration

(ii) taking on board whatever has been agreed by members since the commencement of negotiations and

(iii) focus on negotiations rather than rhetoric. For India, it is important that Doha Round should be brought to a successful conclusion.

India for a successful conclusion should work for a balance between market opening and the development needs of the majority of the WTO members, but the onus of such a balance depends on the concessions and reduction commitments of the developed countries. The Government of India has been working overtime with its municipal stakeholders for developing responses to the issues arising out of AoA negotiations and pursuing its national interests by forgoing coalitions of developing countries such as G-20 on Agriculture, G-30 on special products and special safeguard mechanism under AoA negotiations[26].

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[26] Mr. Kamal Nath, Commerce and Industry Minister, Statement in Parliament, in reply to a question in Lok Sabha on 28th November 2006.

The G-20 and G-30 alliances on negotiations in agriculture, of which India is a member, have been emphasizing that the livelihood and standards of living of the poor farmers in developing countries (In India 72% of the population are engaged in farming and bulk of the farmers are engaged in subsistenance farming) are seriously jeopardized by the subsidies and market access barriers prevailing in international agricultural trade and any round that would be faithful to its development dimension must urgently redress this situation.

Towards safeguarding the interests of Indian agriculture and farmers, India has also been playing a key role in further strengthening the developing countries coalitions by bringing together the G-20, the G-33, the African Caribbean – Pacific countries and the Least Developed Countries to reinforce each others positions on issues of mutual interest. India has been emphasizing that specific and detailed proposals that have been made in domestic support and market access by the G-20, and on special products (SPS) and the Special Safeguard Mechanism (SSM) by the G-33 should ensure a final outcome consistent with the agreed negotiating mandate for substantial and effective reductions in trade-distorting domestic support. India has taken the position that the self designation of an appropriate number of SPS and an effective and operable SSM for safeguarding the vulnerable farm communities and proportionate lower tariff reductions commitments should be integral to the final outcome on agriculture.

M. An Analysis

After hectic meeting and consultations among nearly 30 trade ministers in Davos (Switzerland) during the last week of January 2007, the Director General of WTO has announced full resumption of negotiations on the Doha Work Programme of the WTO. The talks in Davos on the sidelines of the annual meeting of the World Economic Forum were preceded by intense bilateral talks within the G-6 countries (US, EU, Australia, Japan, India and Brazil) following the collapse of negotiations in the WTO in the last week of July 2006. Some reports indicate that the US and EU would have liked the negotiations to continue within a small group of countries which would then be brought to larger groups in the WTO when some concrete steps were involved. But India along with others developing countries preferred an inclusive and transparent multilateral format of negotiations in Geneva.

Talks have now been resumed in the various negotiating groups, though a parallel process of negotiations in small groups is also reportedly continuing[27].

The resumption of negotiations of the AoA, have been welcomed by the Members of WTO after the same was suspended on 16 November, 2006 and India has welcomed the resumption of negotiations as it believes that Doha Development Agend (DDA) is the most ambitious attempt in ensuring that the issue of development as core value of multilateralism, non-discrimination, predictability, stability, transparency are fully supportive of development. India believes that the success of the Doha Round would usher in welfare gains percolating down horizontally so that the economic disparities and maladies such as unemployment, low purchasing power, poverty and economic inequity could be tackled ushering in social harmony. India along with other developing countries has been stressing that the key to negotiations of DDA and Round is to ensure that the round delivers on development and help developing countries to integrate them into the world trading system taking advantage of opportunities. India having full faith in WTO dismisses the option of elimination of distortions in international agriculture through regionalism or other route; comparative advantage of developing countries should not be stifled by protectionism practised by developed countries in their agricultural markets. According to Indian posture in the AoA negotiations, the fresh initiatives should start tackling the peripheral issues before tackling the core issues and modalities.

The intensity of negotiation process is indication of high stakes involved in Agriculture negotiations in the WTO. The intricate negotiating process characterized by realignment of alliances through reconciliation's of positions among members reflects the complexity of issues with different members having varying degrees of sensitivities in different areas of the negotiations.

G-20 emerged as a reaction to the joint EU-USA paper of 13 August 2003 and played a major role in restoring the balance in these negotiations by shaping the July Framework for Modalities [WTO, WT/L/579/ Annexure I]. G-20 mainly challenged the three basic elements of the joint EU-US proposals:

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27 South North Development Monitor, Geneva, 6182, Feb.2, 2007: FINANCIAL TIMES LONDON, Jan. 28, 2007

(i) Modification of Blue Box criteria with a view to increasing domestic support entitlements of certain members.

(ii) Blended formula for tariff reductions.

(iii) Reneging from the commitments to phase out export subsidies on all products.

The July Framework for Modalities on Agriculture bears out the successful challenge mounted by the G-20 on these three elements:

First, any modification of the criteria of Blue Box has been made contingent upon agreement on additional disciplines to ensure that the Blue Box parpuents are less trade distorting than the AMS measure. The onus of bringing about consensus on modification of criteria of the Blue Box would fall.on the demanders for such a change. Any change for creating a new Blue Box, if ever accepted, will entail discussion on additional criteria, such as, product specific caps and reductions, price gap differentials, disciplines on accumulation of support on certain products and offset against transfers from AMS/ *de minimis*.

Second, the blended formula for tariff reduction, which was perceived as biased in favour of the tariff structures of its proponents enabling them to maintain the status quo, and at the same time, imposing an overly onerous burden of tariff reduction on developing countries, has been replaced with the tiered formula based on the principle of progressivity of tariff reductions through deeper cuts in higher tariffs. The principle that developing countries would undertake proportionally lesser tariff reduction commitments than their developed counterparts has also been explicitly enshrined.

Lastly, a firm commitment to an end date for phasing out export subsidies on all products has been secured. The principle of parallelism between the direct export subsidies and indirect subsidies in other export support programmes, which was used in the EU –US agreement to maintain each others export subsidy programmes has not given way to complete phase out of all trade distorting export subsidy programmes.

III. Agriculture

In agriculture, the negotiation has narrowed down to TDS and tariff. The base levels of TDS in the US and EU are $48 billion and euro 110 billion respectively (year 2000, the last year of notification). In July 2006

they had offered to reduce the levels to $23 billion and euro 33 billion respectively. The G-20 had proposed reduction by 70-80 per cent which would bring these levels to $12 billion and euro 27 billion respectively. There were expectations that the EU might be flexible. Now with the indication that the US might consider a level of $15 billion, the gap is not large. Tariff, in any case, has not been a hard issue as the EU has been the main target of attention in this regard and the EC, on behalf of the EC, has shown willingness to go up to a 53 percent reduction. The proposals of the G-20 and the US in this regard are for a 54 per cent and 66 percent reduction. Slightly more flexibility on the part of the EC appears likely.

Thus, the gap between the demand and offer has considerably narrowed down. The point to ponder over is whether this convergence will benefit developing countries in terms of protection of their farmers in the domestic market and expansion of their export prospects outside. The fear is that neither of these two objectives will be attained since a vast loophole and a wide escape route has not yet caught the full attention of developing countries. The US and EU may reduce their tariffs and TDS and at the same time, increase their green box subsidy without limit, thus neutralizing the effects of reduction of TDS and tariff.

This fear is real as is evident from the post-1995 practices of the US and EU. They fulfilled their obligations of reduction of reducible subsidies, i.e. the categories of subsidy they were obliged to reduce in agriculture but enhanced the subsidies that were immune from reduction. There is no reason to believe that they will not do the same again and use the loopholes and escape routes available in the newly emerging agreement to their advantage. In case of the EU, the common agriculture policy (CAP) of 2003 would shift a large bulk (about 75 percent) of the blue box subsidy to the green box. The latest five-year farm bill of the US stipulates additional payments (about $5.5 billion over a 10-year period) through the green box. Reports from the US indicate that this move is partially aimed at avoiding challenges in the WTO.[28]

The green box subsidy is immune from reduction in the WTO as it is presumed to be non-trade-distorting. This presumption is a mistake as the

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[28] WASHINGTON TRADE DAILY, Vol.16,No.24,Feb.1,2007.

subsidy, even though not strictly in the form of direct market intervention, enhances the staying capacity of the farmer in agriculture by its wealth effect and by assisting the farmer to take risk. It encourages and supports unviable agricultural production and thereby distorts agricultural trade.

A recent analytical and quantitative study by the United Nations Centre for Trade and Development (UNCTAD) India office shows the following four results without the green box subsidies in the major developing countries.[29]

(a) Agricultural exports of the US and EU will decrease by 39 and 45 percent respectively, while the exports of developing countries will increase by 22 percent;

(b) Agricultural production of the US and EU will decrease by $20.9 billion and $53.8 billion respectively, while the production in developing countries will increase by $41.9 billion;

(c) Agricultural employment will decrease in the US and EU by 2.4 and 5.8 percent respectively, while it will increase by 4 percent in developing countries; and

(d) Cost of production will rise in the US by 15 percent and in the EU by 17 percent.

It is thus necessary that developing countries firmly cast aside the myth that the green box subsidies are non-trade-distortive and set about having them eliminated or minimized. The July 2004 framework (WTO general council decision of August 1, 2004, Annex A, paragraph 16) which elaborates the mandate of the negotiation under the Doha Work Programme calls for a review and clarification of the criteria of the green box subsidy with a view to ensure that "they have no, or at most minimal, trade-distorting effects or effects on production". The G-20 has given some proposals on this but the proposals are not specific in terms of quantitative targets as those on TDS and tariff. Further, the G-20 has so far not insisted on integrating the green box criteria in the mainstream negotiation on agriculture. In fact, the G-20 members in the G-6 i.e. India and Brazil, appear to have allowed the G-6 negotiation on agriculture to be centered around tariff and TDS

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[29] UNCTAD INDIA *'Green Box Subsidies: A Theoretical and Empirical Assessment*, available at the website, www.unctadindia.org

without bringing in the green box criteria as an essential and compulsory part. It is important to insist that the green box is brought into the mainstream agriculture negotiation and given the same priority and importance as the tariff and TDS.

While major developed countries are firmly defending their green box, they are trying to weaken the provisions for SP that addresses the food security, livelihood security and rural development needs of developing countries. Reports from Davos indicate that there were pressures on developing countries to dilute their stand on SP but the G-33 (a group of 45 developing countries that have been actively championing special products and special safeguard mechanism), with active roles played by Indonesia, India and China, issued a firm warning in Davos that any such dilution would not be acceptable. Developing countries must continue to remain firm on two essential elements in SP: adequate coverage of the SP and adequate protection for them. The G-33 has given specific proposals which need to be pursued with full determination.

Domestic support: They were predicated upon the adoption of the Aggregate Measurement of Support (AMS) as a basis both for calculating the level of subsidy received by farmers in contracting Members and for measuring the reduction commitments to be undertaken. AMS was defined by Article 1(a) to mean 'the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general'. This was amplified by detailed rules in Anenx 3, which provided for the calculation of AMS on a product-specific basis, using 1986-8 as the base period. The URAA committed members, in the case of developed countries, to a reduction of 20 percent in the aggregate base AMS over six years. So-called 'green box' subsidies were exempt from the calculation of AMS and the reduction commitments, and there was a *de minimis* exclusion for product-specific domestic support which did not exceed 5 percent of the total value of production of that product in a given year or, for non-product-specific domestic support, which did not exceed 5 percent of the value of total agricultural production in a given year[30]. Exemption from reduction commitments was also conferred

[30] URAA Art. 6.4.

on direct payments made under certain production-limiting programmes, the so-called 'blue box'[31]. It may be noted that the availability of 'green box' exemption has proved a particularly important factor, both in terms of domestic policy development within the Community and elsewhere, and in terms of its significance as a focal point for dispute in the Doha Round. Those subsidies which did not fall within the 'green box' or 'blue box', and which were not *de minimis*, remained within the so-called 'amber box', subject to AMS reduction commitments. The URAA also required Members, in the case of developed countries, to reduce export subsidies by 21 percent by volume and 36 percent by value from a 1986-90 base.

The impact of any development in agriculture negotiations would be felt in India which maintains high bound rates, out of 82 diverse agricultural items ranging from cereals and pulses, cereal products, dairy products, plantation crops, to meat and poultry, sugar, agriculture, edible oils (both crude and refined), India maintains a bound tariff rate equal to 100 percent or more on 62 such items.[32]

In Doha Round of Negotiations on Agriculture (2002), the structure of AoA was not challenged, however, the negotiating positions of WTO Members fell into three categories:

1. The industrialized countries such as EU, Japan, Switzerland, Norway raised the issue of multifunctionality of agriculture in the sense that agriculture plays multifarious roles in maintaining rural communities, which are non-trade concern in agriculture, hence there needs a slow and dual process of reform in agriculture sector as such they were defensive in maintaining the three pillars of agriculture. Many of the developing countries especially African, Caribean and Pacific (ACP) countries which are dependent on preferential schemes of access for their products in the market of EU supported the idea of multifunctionality of agriculture.
2. The Cairs Group of agriculture exporting countries led by Australia and comprising Argentina, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, the

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[31] For developing countries, the *deminimis* percentage was 10 percent, *Ibid*., Art. 6.5.

[32] Ministry of Finance, Department of Revenue, New Delhi. Figures available on 1 January 2004.

Philippines, Thailand and supported by United States demanded aggressive liberalization of agriculture in all three pillars. The United States, although a major domestic support provided to its agriculture, showed all its willingness to reduce its domestic support provided other member's match its level of support and got increased access for its products in all markets, both developed and developing.

3. A group of developing countries (India, Pakistan, Turkey, Zimbabwe, Nicaragua, Kenya, Nigeria, Dominican Republic, Honduras, Elsalvador, Venezeula, Philippines, Indonesia and others) demanded substantial reductions in domestic support and export subsidies but were not willing to extend tariff reductions under the market access as these countries believed that a high proportion of their population being engaged in agriculture, the consequent food security and livelihood are of immense importance to them and hence the tariff reductions under market access could not be offered. The Group emphasized that the developed countries should liberalized agricultural trade taking into account the special and differential treatment of less developing countries. However, some developing countries were in a position to meet the competitiveness of their agricultural goods in the international market favoured the position taken by friends of multifuncionality of agriculture.

The Swiss formula was brought into the negotiations as the formula had 'the effect of compressing tariffs below the chosen coefficient. This formula suggested by Switzerland, was used to reduce industrial tariffs in developed countries during the Tokyo Round of Trade Negotiations. It has the effect of compressing all tariffs below the chosen coefficient with the result that higher tariffs are disproportionately reduced. The formula is: New Tariff=Existing Tariffs x Coefficient/ Existing Tariff + Coefficient. The value of coefficient is to be determined through negotiations. Swiss Formula was not acceptable to EU as it would have obliged EU to reduce their tariffs substantially believed to be anywhere between 50-150 percent to below 25 percent. EU preferred Uruguay Round approach [During Uruguay Round, the formula chosen for reductions in tariffs on agricultural products was an average reduction of 36 percent (24 percent for developing countries) with at least 15 percent (10 percent for developing countries) on each tariff line.]

The EU has over the years referred its Common Agriculture Policy (CAP) and the reforms of CAP(2003) has considerably reduced the gap between the applied and bound tariffs in its trade distorting (AMS) domestic support[33] where as the United States had under its Farm Security and Rural Investment Act, 2002, had increased its domestic support. As such the United States became a major user of export support programmes in the form of export credits, guarantees and insurance programmes.

The extreme positions of the three groups of countries was put to sorting out in a special session on Agriculture under the chairmanship of Stuart Harbinson[34] which proposed.

(a) elimination of export subsidies for at least 50 percent products in five years and for all products in nine years;

(b) rules based approach to discipline export credits, guarantees and insurance programmes;

(c) S&D for less developing countries in terms of longer implementation programme, and lesser commitments; and

(d) Continuation of the existing flexibilities enjoyed by less developing countries under Article 9.4 for subsidizing the cost of transport and marketing of export shipments of agricultural products for the duration of the implementation period of the Agreement.

Harbinson's proposal on domestic support meant reduction in AMS by 60 percent, copping of the product-specific support [support given to an individual within the AMS] at an average of 1999-2001 levels and reduction of *de-minimis* for developed countries by 50 percent, Blue Box payments to be capped and reduced to half, and some discipline on Green Box, such as de-coupled income support should be based not only on a fixed (as in the Uruguay Round Agreement) but also on unchanging historical base period. Under the S&D treatment for developing countries, the

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33 Art.1(a) of the AoA defines the AMS as: "Aggregate Measurement of Support" and AMS means the aggregate levels of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of basic agricultural product and non-product specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify an exempt from reduction……."

34 Draft Modalities Paper on 17 February, 2003 (WTO, TN/AG/W/1).

proposal proposed enhancement in the scope of Art.6.2 and Green Box Support as applied to developing countries.

Harbinson's proposals on market access conceived a tiered approach to tariff reductions using the principle of deeper cuts in higher tariffs, which meant that tariffs over 90 percent (120 percent for developing countries) would be cut by an average of 60 percent (40 percent for developing countries) with a minimum of 35 percent (27 percent for developing countries) per tariff live. Tariffs lower than or equal to 15 percent (20 percent for developing countries) would be cut by 40 percent (27 percent for developing countries) with a minimum per line of 25 percent (17 percent for developing countries). Developing countries were given further flexibility to designate few tariff lines as special products/ strategic products (SP) on which average reduction will be 10 percent with a minimum of 5 percent on each tariff line and no-tariff rate quota (TRQ) expansion. The existing TRQs were to be expanded to 10 percent (6.67 percent for developing countries) of their consumption level. Special safeguards (SSG) [Article 5 of the AoA enabling imposition of additional duty if the prices of imported products fall below a designated trigger or the volume of imports increased above the designated trigger] for developed countries to be eliminated at the end of the implementation period. For developing countries, the existing SSG were to be maintained and a new special safeguard mechanism (SSM), for addressing rural development, food livelihood security concerns, was proposed.

The Harbinson's proposals were resisted by United States and EU. United States opposed the proposals on the ground that market access was not fully addressed in the proposals where as EU and its friends of multifunctionality were skeptical that the proposals were to ambitious on market access and export subsidies.

The Harbinson's proposals were followed by an informal mini-ministerial meeting held at Montreal, Canada, July 2003 wherein it was felt that the extreme positions between the United States and EU need to be resolved before proceeding to the Ministerial Conference at Cancun scheduled for September, 2003. The US and EU came out with a joint proposal on August 13, 2003[35]. The joint proposal was opposed by a

[35] www.agtradepolicy.org/ output/ resource/ EC-US Joint text 13 August, 2003. pdf.

number of countries, at it was felt that the two countries had accommodated their own interests.

However, the joint proposals indicated a compromise of interests between EU and US policies on agriculture:

(i) A provision was made to enable members to take differential reduction commitments in the AMS based on their initial level of support. Since the EU had higher AMS in terms of its proportion of the value of total agriculture production than the United States, this methodology would enable the United States to undertake lesser commitments than the EU.

(ii) A maximum limit (cap) of 5 percent of the value of agricultural production of a member was proposed on the Blue Box (Art. 6.5 of the AoA), would oblige the EU to reduce its existing Blue Box payment by approximately 50 percent. This method of capping of support level was a departure from the capping method used in the Uruguay Round of "Capping" the applied levels in a historical period and reducing it further from that level.

The joint EU-US proposal on tariff reductions under the market access pillar was a blend of the Uruguay Round (initially proposed by the EU) and swiss formula (initially proposed by the US). It was proposed that a proportion of tariff lines would be subjected to the Uruguay type of average reduction with stipulated minimum reduction on each tariff lines and a proportion of tariff lines to be subjected to reduction by using the Swiss formula. On analysis, it was found that as the tariff structures of the EU and the United States are highly skewed with a small proportion of tariff lines at high levels, and many tariff lines at low or zero tariffs, it would have had small impact on tariff reductions, rather would have enabled EU to continue to protect its so called sensitive sectors, such as, sugar, cereals, meat and dairy products. The developing countries disagreed to the joint proposal as they felt that they would not be able to undertake substantial reductions of their tariffs due to their rural development, food and livelihood needs. The poorest of the developing countries along with other developing countries had bound their tariffs during the Uruguay Round a levels between 100-150 percent, the joint proposals would have forced these countries to make substantial tariff reduction commitments. On export competition, the

joint proposal would have enabled EU to continue with export subsidies on some products and eliminate it on some products. The United States extracted some concessions for itself by drawing a parallel between export subsidies and export credits.

A. Emergence of G-20 Alliance of Developing Countries

The Group comprised – 23 developing countries at Cancun, Argentina, Brazil, Chile, China, Columbia, Costa Rica, Cuba, El Salvador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Paraguay, Peru, Philippines, Thailand, South Africa and Venezuela–Post Cancun, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Peru left the Group but Zimbabwe, and Tanzania joined as new members.

The emergence of G-20 of developing countries was essentially by way of ructions to the EU and United States joint proposed as the developing countries felt that their interests have been overlooked. The G-20 put forward a proposal[36], the essence of which was that;

(a) Accepting the concept of harmonization of support in the AMS and its deeper reductions at higher levels, these reductions in AMS be undertaken on "product specific basis in order to avoid the shifting of such support across products;

(b) Deeper reductions commitments in domestic support on export oriented production;

(c) Elimination of blue box;

(d) Capping and/or additional disciplines on Green Box duict payments so that such payments are not trade-distorting and parking grounds for domestic support shifted from other boxes.

(e) Expansion in the scope of S&D treatment for developing countries and maintaining the *de-minimis* at the existing levels for developing countries.

B. Cancun Ministerial Meeting: 2003

At the Fifth Ministerial Conference at Cancun, Mexico during 10-14 September 2003, the acrimony between the US, EU on one side and the G-20 of developing countries on the other side led to the collape of Cancun

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36 WTO,WT/MIN(03)W/6

Ministerial Meeting, although a draft Cancun Ministerial text was tabled for discussion[37]. However, the hope of continuing with the negotiations was kept alive when ministers asked the Chairman of the General Council of WTO to continue marshalling the outstanding issue of negotiations[38].

After the Cancun failure, the outstanding issues which needed negotiations were : domestic support for which substantial reductions in total AMS are required; blue box should be capped which at present is unlimited and subsequently subjected to reduction commitments; market access, blended formula as suggested in Cancun draft[39] may be taken into consideration while accommodating the concerns of developing countries and reductions made in accordance with equity so that the burden of tariff reductions should not impose burdens on developing countries and extending developing countries, S&D treatment, export commitments, the commitment of phasing out all forms of export subsidies on all agricultural products by a certain date.

In 2004, three special sessions on agriculture were held to keep the negotiations on going. These three sessions saw the negotiations in groups such as United States, EU, G-20, Cairns Group, G-10, G-33 and LDC's group. At the same time some serious thinking crept up in some formal and informal notings to these groups, specially the letter of Robert Zoellick, USTR of 115am 2004, to all trade ministers[40], G-20 criticism of the blended formula[41], G-20 proposals on market access, 28 May, 2004[42], letter of EU Commissioner, Pascal Lamay and Franz Fishler dated 9th May 2004 to all trade Ministers[43]; Reiteration of the views of the Alliance for Strategic Products and Special Safeguard Mechanism[44].

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37 WTO; Job (03)/150/Rev.2, Annexure I.

38 WTO; WT/MIN(03)/W/24.

39 *Supra* n. 37.

40 www.abanet.org/intlaw/hubs/ programs/ Apring 0415-02-15.04.pdf.

41 WTO,TN/AG/GEN/9.

42 www.g-20.wire-gov.br/contendo/ proposals_Market01.htm.

43 Excerpts in <http://europa.eu.int/rapid.

44 G-33, A Group of developing countries which organized themselves for securing expansion of special products (SP) and (SSM) for developing countries. These countries are :Indonesia, Philippines, Korea, China, India, Turkey, Dominican Republic, Honduras, Panama, Nicaragua, Peru, Kenya, Zimbabwe, Nigeria, Venezuela, Cuba, Barbados, Jamaica, Mauritius.

C. Group of Five (FIPS)

Five interested parties joined together on the initiative of US and included Australia, Brazil, India and EU to be known as Group of Five to sort out the differences between them as these countries had high stakes in the negotiations. The Group of Five met many times on the sidelines of various Conferences such as OECD Conference in May 2004, UNCTAD XI in June 2004 and in Paris in July 2004 and in Geneva on 31st July 2004.

D. "July Framework" Agreement 2 August 2004

All the negotiations lead to 'July Framework' Agreement adopted by Members (WT/2/579) on 2 August 2004.

E. Export Competition

The main issues pertaining to the export competition were

(i) whether export subsidies on all agricultural products will be eliminated?

(ii) The developing countries were apprehensive that EU export subsides programme of sugar, meat and dairy products which is almost 85 percent would put the developing countries to disadvantage unless EU eliminates these subsidies.

(iii) EU was willing to eliminate subsidies provided full 'parallelism' on all forms of export competition including credit exports, food aid (used mainly by US) and state trading enterprises (used mainly by Canada and Australia) was also negotiated.

(iv) "Full parallelism" became a subject of acrimony between EU and USA, as EU proposals for complete elimination of export credit programmes, food aid be given only in fully grant form and state trading enterprises should not be given monopoly, however, US was not agreeable to eliminate export credits, and food aid programme, whereas Canada and Australia were completely in favour of retaining the monopoly of state trading enterprises.

(v) The developing countries proposed a rule based approach for elimination of export subsidies which however, was countered by the EU on the grounds *inter alia*, that the rule based approach would lead to a symmetrical commitments, and non transparency.

The Chairman in the first draft of the Framework Agreement[45] proposed elimination by an end date to be agreed, of the explicit credit subsidies, export credits, guarantees and insurance programmes and repayments periods beyond 180 days, disciplining of such programmes with repayments periods of up to 180 days covering, *inter alia*, payment of interests, minimum interest rates, minimum payment requirements and other elements, which can constitute subsidies or otherwise distort trade.

With regard to exporting state trading enterprises, trade distorting practices, such as export subsidies, government financing, and underwriting all losses will be eliminated.

The S&D treatment of less developing countries with regard to state trading enterprises in terms of receiving special consideration for maintaining the monopoly status in case they were used to preserve domestic price stability and ensuring food security was secured. The S&D provision regarding continuation of the provision of Article 9.4 of the AoA, to be continued for a reasonable period to be negotiated was also agreed.

F. Domestic Support

Proposed changed in the criteria of Blue Box (Article 6.5 of the AoA) especially the deletion of the "production limitation" condition of these programmes have been debated since the Cancun Ministerial Meeting. The concerns expressed in the negotiations on the counter cyclicai payments programme, provided in the US Farm Security & Rural Investment Act of 2002 in the Blue Box were considered as most trade distorting (AMS/*de minimis*) and farmers entitlements to receive counter cyclical payments fluctuate in response to changes in the price of the products which makes them closer to price support mechanisms classified as most trade distorting category of support (AMS).

The G-20 was willing to consider any change in the criteria of Blue Box provided:

(i) It is ensured that an effective overall cut will be made on all trade distorting support by establishing a clear level of departure from an overall cut and allow for the possibility of offsetting payments transferred from one box to another against their original entitlement levels.

[45] WTO, Job(04)/ 96.

(ii) It must be ensured that the payments classified as the Blue Box are genuinely less trade distorting than those under the AMS/ *de minimis*. G-20 was of the view that the creation of a new Blue Box should be explicitly conditioned upon the developments of additional criteria that will ensure that these payments are less trade distorting. Such criteria should include product specific caps and reductions, limiting the compensation of price variation, disciplines on accumulation of support on same products and offsets against transfers from AMS/ *de minimis*.

G. Market Access

Market access has been most contentious pillar. The blended formula contained in the joint EU-USA proposal of August 2003 was essentially to maintain the protectionist policies of the two countries and imposing an overly onerous burden of tariff reductions on developing countries. The G-20 issued a formula critique of the blended formula[46] describing it as fundamentally flawed and criticized it on two grounds:

(i) that it fails to deliver "substantial improvements in Market Access", specially for products protected by tariff peaks in developed countries, and

(ii) inequitable results arising from the application of blended formula on different tariff structures of developed and developing countries, and thereby putting an onerous burden of tariff reduction on developing countries. G-10, also expressed its reservation on the blended formula as it was not taking into account their sensitive tariff lines.

The EU and USA defended the blended formula and asserted that S&D was provided to developing countries in several respects: different distortion of tariff lines to each element, different reduction, coefficients, lesser reduction commitments in the tariff elimination element, recognition of the special products, longer implementation periods and access to a special safeguard mechanism.

The EU argued that the blended formula was designed to achieve substantial improvements in market access, while providing flexibility for countries to address their most sensitive tariffs through a combination of tariff cuts and TRQ expansion. USA was in favour of this formula as it would

46 WTO, TN/AG/GEN/9 dated 7th May 2004.

have ensured higher tariff reduction commitments on the part of developing countries in whose markets the export interests of US lie. The EU was in favour of the blended formula as it met with their defensive interests and were willing to work with developing countries with similar defensive interests to ensure that they were not called upon to make inordinately high tariff reductions.

The developing countries sensing that there interest have not been addressed in the blended formula came out with a proposal on 28th May 2004 setting out elements for developing a common formula for tariff reductions in both developed and developing countries. The essential elements of this approach were:

(i) that progressivity in tariff reductions through deeper cuts in higher tariffs; granting of flexibility to take into account the sensitive nature of some products; and

(ii) the formula should guarantee neutrality in respect of tariff structure and proportionality of tariff reductions between developed and developing members with developing members undertaking lesser tariff reductions commitments as to ensure a fair and equitable outcome.

The USA and EU after sensing strong opposition to the blended formula, reluctantly considered the possible alternatives at the FIPS Ministerial Meeting and finally abondon the blended formula for a "tired formula" reductions.

The July Framework, therefore, established that tariff reductions would be made through tiered formula that takes into account their different tariff structures. Further, progressivity in tariff reductions will be achieved through deeper cuts in higher tariffs and flexibility for sensitive products. S&D for developing countries will be an integral part of all elements and proportionality will be achieved by requiring lesser tariff reduction commitments from developing country members. The points of difference however, remained concerning the approach for tariff reductions within each tier/ band of the formula. The United States stressed on the use of Swiss formula within each band whereas many developing countries opposed it on the ground that given the harmonized tariff structures of developing countries, this will make it difficult to ensure proportionality of commitments between the developed and the developing countries.

Another contentious issue related to the selection and treatment of sensitive products especially for developed countries. The EU and G-10 Group of countries favoured in favour of large carve-out for sensitive products for which the additional market access commitments will be provided through expansion for tariff rate quota in lien of the stipulated tariff reductions.

The G-20's arguments against such a approach were that an unlimited carve out of this nature would make the tiered formula meaningless, as products with high tariffs, if declared sensitive, will be excluded from any meaningful tariff reductions and thereby transgressing the principle of progressivity to be achieved through deeper cuts in higher tariffs.

The first draft of the Framework Agreement of the Chairman of the Special Session on Agriculture of 16 July 2004 (WTO, Job (04)/96) seemed to take in to account the position of the EU and the G-10 in terms of the selection of sensitive products. He stated that the member of sensitive products would approximate to the number of tariff rate quotas in members schedules.

Through intense negotiations in the consultation held by the Chairman and the FIPS ministerial meeting in Geneva, the section on selection and treatment of sensitive products are substantially relised. Members ultimately decided that the number of tariff lines to be designated as sensitive should remain under negotiations in next phase, and the treatment of sensitive products should be determined in a manner that it does not under genuinethe objective of the tiered formula.

IV. Conclusions

The Doha Development Agenda is one of the most ambitious attempts in ensuring that the issue of development is firmly at the core of multilateral trading system. The fundamental principles of multilateral trading system namely, non-discrimination, predictability, stability and transparency are fully supportive of development. The success of the record could perhaps for the first time usher in welfare gains percolating down horizontally. Even those in the lowest structure of economic development can jostle for space in this incremental global growth. Most importantly; it would address maladies such as unemployment, low purchasing power, poverty thereby attenuating the economic inequity and ushering in social harmony.

The key to negotiations should be firstly to ensure that this round delivers for development and secondly helps developing countries to integrate into the world trading system. Agriculture would remain at the heart of negotiations since the livelihood of more than a billion resource poor farmers depend on it. For globalization, to entail win-win scenarios, the comparative advantage of developing countries should not be shifted by protectionism in their developed partners.

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*Suman Gupta**

I. Introduction

The use of copyrighted material in higher education is indispensable. Copyright issues in educational institutions are to multiply in the digital age, so framing a copyright education program and a copyright policy that addresses fair use and educate all members of the academics is necessary for the future. Copyright law is no longer an arcane specialty to be taught only to the law students or lawyers. It is neither practical nor cost efficient to consult a copyright lawyer about every copyright issue. The time has come to expand the education curriculum to include copyright law to prepare for an increasingly complex future.

The copyright education program will make every body aware about copyright law, and increase the knowledge of teachers, students and general users about the proper use of copyrighted materials. The extent to which permission to use a material is sought should be a matter of copyright policy. The policy should delineate which materials require permission before copying and which one qualifies for fair use. For materials that fall somewhere in between, a fair use analysis should be made to determine if permission is needed.

This paper overview the components of copyright education program and reviews the basic best practices that can be used in establishing copyright education programs.

II. Need for Copyright Education Program

Historically, copyright education developed from copyright management. Its purpose is to reduce the abuse of copyrighted materials and lessen the liabilities both institutional as well as individual. Many scholars

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advocate for broader discussion of copyright i.e., incorporating the social and ethical implications of copyright into its curriculum.[1]

The introduction and application of information literacy and Internet has highlighted the need for faculty and students to broaden their knowledge that how information is produced and consumed inside and outside the educational institutions. Increase in online access to resources and services in universities and academic institutions have made these institutions as Internet service providers. Campus networks and systems are used by 45% of students for downloading of copyrighted material files. As Internet service providers they have to limit their liability from the unknown infringing acts of its users. Thus, copyright has become the center of the academic enterprise: from the teaching of course materials purchased, licensed, borrowed or downloaded; to the ownership and authorship of faculty research, etc.

The challenges faced by today's researchers and research environment can only be met by developing an arsenal of definitions, skills, questions, perceptions and guidelines. Institutions need *copyright literacy* to address social, political, and technical world in which information use takes place.

It has become important for every institution:

- To give sufficient knowledge of copyright to faculty about their own publications.
- To give knowledge of copyright to students for their work products.
- To give knowledge of copyright so that they become responsible researchers, creators, and authors.

III. Why Teach Copyright

The awareness of faculty and students regarding copyright not only reduces the legal liability of academic institutions, but also encourages them to be more responsible scholars and to think critically about the resources they use. Because of the rapid growth in digital technologies it is time to highlight the need to educate the general public about copyright.

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1. See, e.g., Barbara L.Ludlow, *Understanding Copyright and Intellectual property in the Digital Age: Guidelines for Teachers, Educators and their Students*, 26 Teachers Educ. & Special Educ. 130 (2003).

Copyright education requires that a student must use the information and information resources ethically and legally. The teaching and learning of copyright focus on developing student skills for addressing legal requirements for the limitation of institutional liability. The copyright literate student understands many of the economic, legal and social issues surrounding the use of information and accesses and uses information ethically and legally. The copyright knowledge of the students should be developed to the extent that they may evaluate whether the software and services they use are legal? For it the students need a basic understanding of copyright law and its provisions. Educators need to know that how to incorporate those issues in the departmental curricula, syllabi and instructions[2].

In United States, the 1998 Digital Millennium Copyright Act was passed to limit the liability of academic institutions from the unknown infringing acts of its users. Later on in 2002, the Congress passed Technology Education and Copyright Harmonization (TEACH) Act. The TEACH Act addresses the needs of online educators and also provide a limit to the liability of academic institutions if infringing acts are discovered. However to claim such relief, certain conditions are to be met.

The TEACH Act requires that:[3]

- An institution institutes policies regarding copyright;
- Provide informational materials to faculty, students, and staff that accurately describe, and promote compliance with the copyright laws of the United States;
- Provides notice to students that materials used in connection with the course may be subject to copyright protection.

The TEACH Act moves further than the DMCA regarding requirements concerning copyright and the promotion of copyright in higher educational institutions. The TEACH Act not only requires articulated copyright policies by the educational institution; it also clearly requires that

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2. Association of College and Research Libraries (ACRL), *Information Literacy Competency Standards for Higher Education* 14(2000), available at http://www.ala.org/ala/acrl/acrlstandards/standards.pdf.
3. 17 USC S 110(2) (D) (i).

electronic transmission include a notice to students of the copyright status of the works used. Institutions have to meet these minimal legal guidelines to minimize legal liability.

In 2004, the Congress introduced Piracy Deterrence and Education Act of 2004 "*to enhance general copyright knowledge, to enhance criminal enforcement of the copyright laws, to educate the public about the application of copyright law to the Internet, and for other purposes.*"[4] It was proposed to spend $500,000 annually to establish a national Internet Use Education Program to increase awareness of infringement issues.

The social impact of copyright law is no longer just an interest of the librarian or the lawyer. Scholars and students are impacted by it. The research environment has become increasingly complicated through the use of digital information. Students need to acquire skills and knowledge to navigate in this environment without liability.

Prof. Jon M.Garon rightly said that:

> The ethics of the law must be grounded in fundamental notions of justice and fairness, for without this, the rules devolve into conveniences which will be obeyed only when punishment is close at hand. If the only reason to respect copyright is to avoid being caught, it has outlived its purpose.[5]

The online universe provides students with access to a plenty of scholarly and popular resources. Student's inability to comply with the copyright law or convention of attribution is due to lack of copyright teaching from faculty and the lack of guidance from institutional policies.

More and more students in the coming time may find them as subject to litigation brought by rights owners because of copyright infringement or illegal file sharing. The time has come that academic institutions must take

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4. H.R.4077, 108th Congress (introduced in the House of Representatives, March 31,2004), available athttp://frwebgate.access.gpo.gov/cgibin/useftp.cgi?Ipaddress=162.140.64.88&filename=h4077ih.pdf&directory=/diskb/wais/data/108_cong_bills.
5. Jon M.Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L REV1278, 1283 (2003).

on responsibility of creating copyright informed citizenry among their students.

A student must be taught to understand whether a use is legal or proper and he must also give attribution to the original author of the works he is using. Faculty must teach proper procedure of citation and the benefits of scholarly attribution. This will reduce the rise in cases of plagiarism.[6] Prof. Garon rightly asserts, "the future development of copyright will flow from technological innovation, legal constraints, and social norms."[7]

Faculty need a sophisticated understanding of copyright knowledge because many of its members use and make available to their students the third party developed course content. Till now the faculty avoided discussion on copyright education program, because they lack the expertise to address the topic.[8]

However, the growth of online education and instruction compel to focus on the application of intellectual property laws in distance education, particularly regarding the ownership of course materials. Faculty must have knowledge of basic copyright concepts, exclusive rights, fair use, authorship, work for hire, use of third party copyrighted work, exemption of certain public performances. Thus, there is an urgent need for professional development opportunities for faculty, administrators, and academic staff in copyright education.

IV. Developing successful copyright education program

To set the foundation for copyright literacy and copyright education programs, universities and colleges should develop policies for all constituents, i.e., staff, students and faculty. Crafting a copyright policy requires time and resources to consider salient issues and the positions of different groups. The ideal copyright policy should be accessible and easy to locate on the institution's website.

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6. See, Donald L. McCabe, Linda Klebe Trevino & Kenneth D. Butterfield, *Cheating in Academic Institutions: A Decade of Research*, 11 Ethics & Behavior 219, 220-22 (2001).
7. Garon, *supra* n. 5 at 1284.
8. Steven Smethers, *Cyberspace in Curricula: New Legal and Ethical Issues*, Journalism & Mass Communication, Educator, Winter 1998 at 15,19-21.

Historically, "copyright management" or "copyright education" include suggesting methods, setting limits and standards for using third-party copyrighted works. Examples of these activities are:

- Providing guide and guidelines to users;
- Providing postings near photocopy machines that remind users that the material they are using may be copyrighted;
- Guidelines for using and requesting inter-library loans or reserves;
- Guidelines for computer use;
- Guidelines for making copies for class room use;
- Guidelines for using video in course instruction;
- Guidelines for users on how to get permission to use the work of others, etc.

Some of these activities are voluntary and some are mandated by the law. These activities are important for the daily use of third-party copyrighted material.

Basic steps for developing a successful copyright education program are as follows:

- Discuss concerns and issues with librarians, faculty heads, IP Law teachers, administrators and university counsel;
- Arrange meetings of vested parties (departmental & student's representatives, information technology offices, librarians, administrators, university counsel, etc);
- Assess institutional needs, goals and concerns;
- Outline the approach, establish the process, plan for assessment of programming;
- Develop policies;
- Advertise and outreach to concerned (students, faculty, staff, etc.);
- Teach and deliver programmes;
- Assess programming; and
- Appoint copyright & research advisory committee.
- Cover these policies in student and faculty handbooks

The positive impact of these programs could be accomplished by offering incentives for further professional development in this area.

Administrators should be charged with setting the parameters to govern these policies. These policies should serve as reference points to manage problem when they arise. They are preventive measures that not only provide guidance but should also give procedures for adjudication.

The duties of copyright & research advisory committee range from overseeing the publication and distribution of materials on copyright, conducting workshops, policy development, assisting with faculty publications and patents, and making recommendations on copyright ownership questions.

The copyright education program should address various academic policies, like:

- Faculty ownership of course material, research and work for hire, etc.;
- Student ownership of course materials and research;
- University ownership of scholarship, course material, research or products;
- Internet and campus network use;
- Fair use guidelines;
- Software piracy;
- Specific Act (like US TEACH Act) guidelines;
- Reserve for print and electronic library and research materials;
- Academic integrity and plagiarism.

Policies should define the relevant issues and outline the consequences of violating policies. They should not live in a closed book or rarely accessed Web site. Institutional policies should be living documents that are printed in student and faculty handbooks, print on online syllabi for constant reference. It will be unfair to students to hold them accountable for policies that they cannot understand or do not know that they exist. Having students to sign and acknowledge that they have read and understand policies such as a *computer use policy to manage files sharing over campus networks* or *academic integrity policies* heightens their awareness and lessens cases of violations.

Various surveys have studied the student's behaviour and attitude toward uploading material and file sharing. They found that students have a

social pressure to upload files to sharing networks. Although, the institutions cannot stop student's file sharing activities, however the following suggestions may restrain such activities:

- Implement better technological controls into the hardware and software;
- Information programs for students about the financial and social impact of their behaviour;
- Develop and require a student to sign a "computer and Internet use" policy prior to receiving access to the Internet;
- Include statements informing the social and economic impact in hardware and software systems that facilitate file sharing of copy-protected media;
- Advice the Internet service providers to include copyright warnings and additional appropriate legal warnings.

V. Who Should Teach Copyright Education Program

Copyright education or copyright management raise awareness of the issues surrounding copyright and teach proper use of copyrighted material and media. This copyright education may be passive or active.

Passive copyright education provides users with tools that, when combined with self-study and application, can lead to a deeper understanding of copyright. Some of these tools are:

- Web sites
- Guides
- Guidelines
- Postings and Notices
- Brochures and posters.

Active copyright education may come in following forms:

- Workshops
- Face – to - face classroom instructions
- Online course modules
- Tutorials.

The 2000 Report[9] issued by a US Committee of national scholars made a call for broader copyright education. The committee could not decide on how extensive copyright education should be, and who should conduct the education.[10] However in speaking of the importance of copyright education the committee concluded:

> A better understanding of the basic principles of copyright law would lead to a greater respect for this law and greater willingness to abide by it, as well as produce a more informed public better able to engage in discussions about intellectual property and public policy.[11]

Copyright education, information and instruction can be offered jointly by libraries and librarians, administration at the university level, information technology departments, and course faculty.

Copyright law is fundamental to the function of all libraries that have traditionally served as a clearinghouse for copyrighted works. By nature they collect copyrighted books, journals, magazines, pamphlets, films, videos, learning objects, personal papers, etc. Once these materials are collected, they are made available in accordance with the copyright law and managed by copyright policies. To carry out their mission, libraries make their users aware of the laws, including copyright.

There is almost daily growth in the technologies provided by institutions to students. Because institutional liability increases with the support of these technologies, academic administrators can support a comprehensive copyright education program.

Information technology departments are partly charged with developing technology fluency so they may also support. In addition to information technology departments that manage campus-wide computer networks, other offices that may address the subject of copyright can be technology transfer offices, and offices set up to address copyright permission for the use of copyrighted works.

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9. National Research Council, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE (2000).
10. *Id.* at 17.
11. *Id.* at 217.

Faculty from several disciplines can address copyright and copyright related topics – for example, communications, computer science, ethics courses, research method courses and over all the intellectual property faculty.

Some other agencies that have a vested interest in copyright education may also help. For example, Library Association, Journalists Society, Broadcasting Society, Motion Pictures Association and various other collective societies. These associations provide guidance on the proper use of information through policy statements, conference presentations, and publications.

Other great resources are Rights holders' agencies. For example, associations representing book publishers, composers, software developers, filmmakers, musicians, and music publishers, etc. They work to protect their copyrights by providing suggested guidelines and procedures for users of their content and products.

To make the copyright education successful and conversant with law, the administrators must seek the professional help from attorneys specialized in intellectual property law. A successful program is where multiple entities, people and offices champion the cause of copyright awareness and education.

VI. What to Teach

Some of the subjects that must be included in the course material are: Basic copyright law and copyright policies; Intellectual property rights; fair use; Exemptions; Permissions for use; Public domain; First sale doctrine; Cyber law; Cyber ethics; Piracy, Plagiarism, citation, and attribution; Proper use of copyrighted media and multimedia works; Consequences of improper use of copyrighted work; Copyright and the Internet; File-sharing, e-reserve. The Center for Intellectual Property and Dr. Kelley created a video that can be used in online workshops and classes.[12]

Other subject areas for instruction can be need for reform of the copyright law for protected works. Copyright education play a role in

12. The Copyright Site, Teaching Ideas for Higher Education Faculty, available at http://www,thecopyrightsite.org/teaching/highered.html.

creating both the informed consumers and informed citizens who have a voice in the intellectual property policies that affect their lives. Copyright education create opportunities not only so that people can obey the law, but also that they can question the law when appropriate.

A simple understanding of the definition of copyright is no longer sufficient to navigate today's information landscape. Students and faculty need a functional level of copyright literacy.

The need to address fair use in higher education is acknowledged by the U.S Consortium for Educational Technology in University Systems (CETUS). CETUS proclaims:

> It is urgent, timely, and in the best interests of higher education that our universities raise a coordinated voice to address the topic that is known as the "fair use" of copyrighted works. ....It arises because of the changing dynamic between the broad sweep of "intellectual properties" and the deployment of powerful and rapidly evolving communications technologies and infrastructures. These developments have already demonstrated their significant consequences for higher education and will have more pervasive effects in the future.[13]

13. http:// www.cetus.org/fair4.html.

WOMEN'S RESERVATION BILL : RHETORIC OR REALITY

Kiran Gupta[*]

The Constitution (One Hundred and Eighth Amendment) Bill, 2008, commonly known as Women's Reservation Bill (WRB) seeking to earmark 33 percent of seats for women in Lok Sabha and State assemblies was introduced by the UPA Government in the Rajya Sabha on May 6th, 2008. The Bill aims at eliminating gender inequality and discrimination against women by political empowerment of women, so as to fulfill people's mandate of women empowerment as envisaged in the National Common Minimum Program of the government. Women's Reservation Bill has seen many highs and lows ever since its first appearance in September, 1996[1]. The Parliament of India has time and again witnessed ugly political stands and condemnable protests over the Women's Reservation Bill (WRB). Since its first appearance for seeking parliamentary approval in 1996, this reservation bill has undergone a roller coaster ride. Successive governments have placed it on the floor of the house, only to have it shelved[2]. The bill is now firmly on the national political agenda and political parties know that sooner or later, something will have to be done. It is for this reason that proposals and counter proposals are being suggested by our political leaders to show that at least publicly they are not hostile to the bill. But the repeated debacle of the bill in Parliament has now made it plain that the chances of its passage through Parliament are remote. Individualy, male MPs are apprehensive that it threatens to undercut their claims to their seats.

I. Need For Reservation

Our Constitution guarantees equality before law and assures equal protection of laws to all citizens irrespective of their caste, creed, religion, place of birth and sex[3]. It not only embodies in it the concept of gender

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1 Constitution (Eighty First Amendment) Bill, 1996.

2 Constitution (Eighty Fourth Amendment) Bill, 1998.

3 Constitution of India 1950, Article 14: The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

parity but expressly forbids discrimination based on sex[4]. It specifically provides for equality of opportunity between men and women in public employment and prohibits discrimination in such employment based on gender[5]. While guaranteeing equality of status and opportunity to women, the Constitution also provides for affirmative action in their favour. Article 15 (3) & (4) empowers the state to enact special provisions for women and children and Scheduled Castes / Scheduled Tribes and other socially and educationally backward Classes[6].

Various steps has been taken by the central as well as state governments to improve the status of women. At the National level, the policy an empowerment of women is a progressive measure[7]. At the international level, the series of world conferences on women have contributed to putting women's concern high on the global agenda. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels and the eradication of all forms of discrimination on the ground of sex are priority objectives of the international community[8].

To improve the situation of women, central and state governments are taking several initiatives for over all development, empowerment and welfare of women. Many policy and programmes are passed by government in this

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4 *Ibid.*, Article 15: (i) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

5 *Ibid.*, Article 16: (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.
(2) No citizen shall, on ground only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the state.

6 *Ibid.*, Article 15: (3) Nothing in this article shall prevent the state from making any special provisions for women and children. (4) Nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

7 See, Government of India, NINTH FIVE YEAR PLAN (1997-2002) Vol. II, p. 321; Government of India, TENTH FIVE YEAR PLAN (2002-2007) Vol. II, pp. 238-255.

8 Convention on the Elimination of all forms of Discrimination against Women, 1979; Convention on the Political Rights of Women, 1952.

regard[9]. But women's rights and women's equality cannot be achieved unless women in large numbers are visible and active, politically, socially and economically. There is a need to involve more women at decision making levels. There is a need to empower women politically. And by "Political Empowerment" mean a political system favoring the participation in and control by women of the political decision making process and in governance. This is an essential factor in promoting and maintaining policies and measures for the fulfillment of the goal of Indian democracy and the Constitution.

If we look at the history of one country we find that women's contribution was immense at the time of freedom struggle and they played major role in national movement. But with the freedom of the country, women started losing their political control and decision making power which they immensely exercised during freedom struggle. Representation of women in both the houses of parliament never ever exceed 10% mark. Therefore, to increase women's participation at political level a demand to have reservation for women in both the houses is going on.

Despite education and capability, women are not being given tickets, hence the need for reservation. Parliament is a people's representative body, and people mean men and women. What Parliament, therefore, do we have at present with just 50% of the people represented ? Lack of money, muscle power and mafia have prevented party men from giving them the tickets. In such a scenario unless a few seats are kept reserved for women, it would be very difficult for them to come into mainstream politics in good number. In 1974, the Report of the Committee on Status of Women highlighted the low number of women in political bodies and recommended that seats be reserved for women in panchayats and municipal bodies[10]. Two dissenting members of the Committee supported reservation of seats in all legislative

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9 NATIONAL POLICY FOR EMPOWERMENT OF WOMEN, 2001, Department of Women and Child Development, Ministry of Human Resource Development, Government of India.

10 TOWARDS EQUALITY: REPORT OF THE COMMITTEE ON THE STATUS OF WOMEN IN INDIA, Ministry of Education and Social Welfare, Department of Social Welfare, Government of India, 1974.

bodies[11]. The National Perspective Plan for Women (1988) recommended a quota of 30% in panchayats, municipalities and political parties[12]. The National Policy for Empowerment of Women (2001) stated that reservation shall be considered in higher legislative bodies[13].

Constitution 73rd and 74th Amendments of 1992 inserting Articles 243D[14] and 243T[15] which introduced Panchayats and Municipalities in the Constitution provides that not less than one third of the seats shall be reserved for women in every Panchayat and Municipality. It also provide that from amongst the seats reserved for SC/ST, not less than one-third seats shall be reserved for women belonging to SC/ST. The said Articles also provide that such seats reserved for women may be allotted by rotation to different constituencies. The consequence of these amendments is that about a million of rural and urban women came out of their houses and shoulder the responsibility of local welfare and governance.

The Constitution provides for reservation of seats in Lok Sabha and State Legislative Assemblies for SC/ST in proportion of their number in the population[16]. The Constitution makes no provision for reserving seats for women in Parliament and the State Legislature. Reservation of seats for women in Parliament and the State Legislature, therefore, requires constitutional amendment that calls for two-third members voting for the legistation.

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[11] The dissenting members were Lotika Sarkar and Vina Mazumdar.

[12] NATIONAL PERSPECTIVE PLAN FOR WOMEN – 1988-2000, Report of the Core Group set up by the Department of Women and Child Development, Ministry of Human Resource Development, Government of India. 1988

[13] *Supra* n. 9.

[14] Constitution of India 1950, Article 243D-(3) Not less than one third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

[15] Ibid., Article 243T-(3) Not less than one third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

[16] Constitution of India, 1950, Articles 330 and 332.

II. Historical Journey Of The Bill

Having provided reservation for women in Panchayats and Municipalities, demand was made to provide reservation for women on the same lines in the House of People and in the legislative assemblies of the states. To fulfill this popular demand the bill was first introduced during H.D. Deve Gowda's tenure in 1996.[17] It was shelved after BJP's Uma Bharti demanded a sub quota for OBCs in the draft legislation – a demand that has been articulated also by leaders like Mulayam Singh Yadav (SP), Lalu Prasad Yadav (RJD), Sharad Yadav (JD-U) and Ram Vilas Paswan (LJP). Some of them have even called for a sub quota for minorities. The 1996 Bill was examined by a Joint Committee of Parliament which recommended that seats be reserved for OBCs and also in Rajya Sabha and the State Legislative Councils. Since then, at least two serious attempts have been made to introduce the bill in Lok Sabha, with no success. NDA government during its tenure has introduced the bill in 1998 in the Lok Sabha but unfortunately it again seen the same drama.[18] The measure has remained a mirage for some 12 years.

The fate of the bill has been the same every time it has been tabled for approval in Lok Sabha – walkouts, adjournments of the house, the bill being ditched and the whole process being sent back to point zero. It has been a common practice that the political parties swear of supporting the bill but as soon as it is introduced in the house, an ugly game is played out by self acclaimed radical politicians with their vigorous protests, making it impossible for the proceedings to continue. On public front, every political party for the last few years has been assuring its support to the bill, which disarms women activists, but when it comes to practical grounds, we happen to see only the antagonism in their approach.

Twelve years later, the United Progressive Alliance (UPA) government, going by its common minimum programme, introduced the WRB on May 6th, 2008 in Rajya Sabha, though amid dramatic protests from certain political parties. The bill has this time being introduced in the Rajya Sabha so as to become a permanent element of the proceedings. This time,

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[17] Constitution (Eighty First Amendment) Bill, 1996.

[18] Constitution (Eighty Fourth Amendment) Bill, 1998.

Bhartiya Janta Party (BJP) and Left Front kept their words in supporting the bill. But a stern and condemnable protest was witnessed from Samajwadi Party's Mulayam Singh Yadav and Rastriya Janta Dal's Lalu Prasad Yadav. They felt that the bill would promote inequality in the society as it would accommodate the influential in the society and will not do any good to SC, ST and OBC women. They demanded separate reservation within reservation for the weaker sections of the society. The bill was referred to the Parliamentary Standing Committee of Law and Justice, headed by senior congress member of Parliament E.M. Sudarsana Natchiappan. The committee also has Brinda Karat of CPM, Najma Heptulla of BJP and Jayanti Natarajan of Congress as its members. In the standing committee the bill would be discussed in detail and members of different political parties could give their suggestions. Some MPs are personally threatened as they would lose their constituencies – centre of personal vested interest to women. Male MPs believe that introducing 33% reservation will, along with reservation for SC/STs, make 50% of seats unavailable to them. Which body of men will give up their seats to allow women to take over ? As one MP from the Telugu Desam said " Why should we agree to sign our own death warrant."

III. Highlights of the New Bill

Seen as corollary to the Panchayat Raj legislations that reserved one–third seats for women in local bodies the Women's Reservation Bill introduced in the Rajya Sabha by UPA government on May 6th, 2008 seek to reserve one–third, or 33 percent, seats for women in the Lok Sabha and state assemblies[19]. It also provides that one third of the total number of seats reserved for Scheduled Castes and Scheduled Tribes shall be reserved for women of those groups. Similar Bills have been introduced thrice before in 1996, 1998 and 1999 but lapsed with the dissolution of their respective Lok Sabhas[20]. Hence this time the Bill was introduced in the Rajya Sabha as it would not lapse even at the end of the government's tenure.

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[19] Constitution (One Hundred and Eighth Amendment) Bill, 2008.

[20] Constitution (Eighty First Amendment) Bill, 1996; Constitution (Eighty Fourth Amendment) Bill, 1998.

The Bill aims at eliminating gender inequality and discrimination against women, by political empowerment of women, so as to fulfill people's mandate of Women Empowerment as envisaged in the National Common Minimum Programme of the government. The main highlights of the Bill are:

(i) Reservation for women, as nearly as may be, one third seats of the present strength of the House of the People and Legislative Assembly of every state. The allocation of reserved seats shall be determined by such authority as prescribed by Parliament.

(ii) As nearly as may be one-third reservation for women including one-third the number of seats reserved for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assembly of every state to be reserved for women of that category.

(iii) Reservation for women in respect of nominations of members of Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States. Of the two seats in the Lok Sabha reserved for Anglo-Indians, one will be reserved for women in each of the two elections in a cycle of three elections.

(iv) Reservation for women in the Legislative Assembly of the National Capital territory of Delhi.

(v) Reserved seats may be allotted by rotation to different constituencies in the state or union territory. If a State or Union Territory has only one seat in the Lok Sabha, that seat shall be reserved for women in the 1st general election of every cycle of three elections. If there are two seats, each shall be reserved once in a cycle of three elections.

(vi) Reservation of seats for women should cease to have effect on the expiration of a period of fifteen years from the enactment of the Bill.

To give effect to the above proposals, the Bill provides for :

(a) Amendment of Articles 239AA, 331 and 333 and insertion of new articles 330A, 332A and 334A in the Constitution to provide for reservation for women in the House of the People and the Legislative Assemblies of the States; and

(b) To make consequential changes in certain other related enactments.

The Constitution (One Hundred and Eighth Amendment) Bill, 2008, introduced in Rajya Sabha and pending therein, has been referred to the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, headed by Dr. E.M. Sudarsana Natchiappan, Member, Rajya Sabha for examination and report.

A similar Bill was introduced in 1996, and examined by a Joint Committee on the Constitution (Eighty First Amendment) Bill, 1996 (Chairperson: Smt. Geeta Mukherjee). Whereas many of its recommendations have been included in the current Bill, recommendations on reservations for OBCs and in the upper Houses have not been included[21].

Key recommendations of the Joint Committee on the 1996 Bill and provisions of the 2008 Bill

Key Recommendations of Joint Committee on the Constitution (81st Amendment) Bill, 1996	**2008 Bill**
Reservation should be extended to Rajya Sabha and the Legislative Councils.	No
The reservation should be extended in the first instance for 15 years then reviewed to decide whether it should be continued.	Yes (no provision for review)
Reservation should be provided for women from Other Backward Classes after the Constitution extends reservation to OBCs.	No
Reservation to be extended to women of the Anglo-Indian community.	Yes
Provision should be made to reserve seats in cases where a state has less than three seats in the Lok Sabha or less than three seats are reserved for SC/STs.	Yes
Legislative Assembly of Delhi should be included. (Reservation in Puducherry Assembly requires only an ordinary Act).	Yes
Substitute the words 'not less than one-third' with 'as nearly as may be, one-third'.	Yes

[21] REPORT OF THE JOINT COMMITTEE ON THE CONSTITUTION (EIGHTY FIRST AMENDMENT) BILL, 1996. December 9, 1996.

The Bill in its original form was supported by feminists and women's activists. The proponents of the policy of reservation state that although equality of the sexes is enshrined in the Constitution, it is not the reality. Therefore, vigorous affirmative action is required to improve the condition of women. Also, there is evidence that political reservation has increased redistribution of resources in favour of the groups which benefit from reservation. A study about the effect of reservation for women in panchayats shows that women elected under the reservation policy invest more in the public goods closely linked to women's concerns. A 2008 study, commissioned by the Ministry of Panchayati Raj, reveals that a sizeable proportion of women representatives perceive an enhancement in their self-esteem, confidence and decision-making ability[22]. Some opponents argue that separate constituencies for women would not only narrow their outlook but lead to perpetuation of unequal status because they would be seen as not competing on merit.

IV. Objections To The Bill

Lets examine the tenability of the main objections raised and flaws pointed out in the Bill by its critics:

1. The Bill is discriminatory, arbitrary, undemocratic and unconstitutional. It is undemocratic as reservation of one-third of the seats for women in Parliament restricts the choice of voters in the reserved constituencies. This is yet another attempt by radical feminists to use their gender for furthering their own political interests, at the cost of the nation and ironically, other women. In a democratic set up there is no scope for reservation for women.

   As far as the constitutionality of the Bill is concerned, there is affirmative, substantial and specific constitutional mandate[23] for positive discrimination on the ground of sex for the benefit of women. Because of this constitutional protection, reservation for women cannot be challenged as violative of the Constitution. The insertion of clause (3) of Article 15 in relation to women is by way of recognition of the fact

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[22] Study on Elected Women Representatives in Panchayati Raj Institutions, Ministry of Panchayati Raj, Government of India, April, 2008.

[23] Constitution of India 1950, Article 15 (3).

that for centuries women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15 (3) has been placed within Article 15. Its object is to strengthen and improve the status of women[24]. It is because of this constitutional protection that reservation for women in Lok Sabha and state assemblies cannot be challenged as violative of the Constitution.

2. Reservation will result in proxy control. Reservation would result in politicians fielding their wives, daughters, sisters and daughter-in-laws as candidates for the reserved seats and use them as their agents of proxy control.

   If we take a long term view, we can say that this initial proxy control will give to actual exercise of power by women in future.

3. Reservation within Reservation – Demand for OBC and minority women quota – Reservation for OBC women has been a long standing demand in the Parliament. Since the WRB accepts the reservation of SC/ST women within the 33% set aside, it must also accept a cut off % for OBC women. On the same premise demand for a quota for women from the minority community was also made.

   This demand by some of our politicians as a virtual precondition to reservation for women in general seems to be incorrect. Unlike for SCs and STs, there is no constitutional reservation for OBCs in Lok Sabha and legislative assemblies. Concern for Backward classes is just one more excuse to stall the Bill yet again. It is just an attempt to stall the passing of the Bill.Feminists have been asking for women reservation across class, caste and community as they do not want to divide Indian womanhood into these compartments. The discrimination is not between different groups of women but between men and women since very few women are given party tickets to contest election.

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[24] GENDER JUST LAWS BULLETIN, No. 4 Dec, 1988, p. 10.

4. It has been pleaded that the bill is seriously flawed in so far as the rotational reservation of one third seats is concerned. The bill provides for rotation of reserved seats. The rotational system will mean every time a new set of constituencies will be declared as reserved for women. It is argued that rotation may not be as harmful at the local level as it would be at the state and national level. The pre-election nursing of a Lok Sabha or assembly constituency is a very demanding task that involves a very heavy investment on the part of the political parties and more so on part of individual aspirant. Rotational reservation of one-third exclusively for women would lead to a grave uncertainty for sitting MPs eroding their meticulously developed political base and leaving them no scope to pursue politics as a life-long mission. Rotation of reserved seats may reduce the incentive for an MP to work for his constituency as he could be ineligible to seek re-election from that constituency[25].

However, supporters of WRB insisted that MPs need not treat their constituency as their own private property and that nobody is indispensable. Every constituency turn by turn (i.e. by rotation) must get the chance to have a woman legislator representing it. There seems to be no flaw in rotational reservation.

V. Proposals And Counter Proposals

Though left parties support the Bill in its original form reserving a third of the existing number of seats, none of the other parties is supporting it. Government tried to build consensus on the Bill. A number of proposals and counter proposals at different time by different persons have been suggested. We must give serious consideration and thread bare discussion to them.

In July 2003, the then Lok Sabha speaker Manohar Joshi called a four party meet to arrive at a consensus on reservation Bill. Congress Deputy leader in the Lok Sabha Shivraj Patil suggested introduction of double-member constituencies in one-third of all parliamentary seats. Basically this means that 182 seats in parliament will be represented by two MPs, one

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[25] Madha Nanivadekar, *Dual. Member Constituencies : Resolving Deadlock on Women's Reservation*, Economic & Political Weekly, October 25, 2003.

of which has to be woman. This principle will work by rotation with one-third seats being changed after each general election. This proposal requires increasing the number of parliament seats by 1/3rd of its present strength. Initially, India had multi-member constituencies which included an SC/ST member. A 1961 Act converted all constituencies into single member constituencies[26]. The advantages of having dual-member constituencies are that it does not decrease the democratic choice for voters, does not discriminate against male candidates and make it easier for members to nurture constituencies. However, it's disadvantages are that the sitting members may have to share their political base and women member may become secondary person.

This proposal appeared somewhat acceptable at the four party meeting. However, later Congress and Left parties appear unwilling to support the dual-member constituencies on the ground that it would dilute the cause.

Women activists are aghast at this suggestion. They see it as one more dilatory tactic to stall the bill[27]. They claim that "if there has to be double member reservation, then all seats should be made double member". Problem is how to elect two candidates from one seat. Whether single vote will be counted for both the candidates.

The Election Commission has also put up a proposal to make it mandatory for political parties to nominate 33% women candidates with a state as a unit for the Lok Sabha and the district as a unit for the state assemblies. This would mean that in a state where there are 40 Lok Sabha seats, the party would have to nominate at least 13 women candidates, and in the state assembly elections, it would have to nominate one-third women candidates at the district level. The Election Commission's suggestion has the advantage that it does not bear the quota tag. Nor will they be faced with the problem of rotation of constituencies.

Politicians, however, are not very receptive to the EC's suggestion either. The Shiv Sena is opposed to it and Mulayam Singh Yadav is not willing to concede more than 20% seats for women. This proposal for its

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[26] The Two – Member Constituencies (Abolition) Act, 1961.

[27] Brinda Karat, *Alternative as Dilution*, OUTLOOK, May 17, 2003.

proper functioning require reservation of women in political party organizations from grass root level enrolment of party members right up to the national executives and parliamentary boards and parliamentary committees. Even then there is a possibility that party may allot tickets to women from those constituencies where it is having very little chance to win thereby denying them the chance to be present in the Parliament. There is no guarantee that a significant number of women would get elected. However, its advantages are:

Provide more democratic choice to voters
Allow more flexibility to parties to choose candidates and constituencies depending on local political and social factors
Can nominate women from minority communities in areas where this will be an electoral advantage
Allow flexibility in the number of women in Parliament

VI. Options Available

In August, 2005 Prime Minister Man Mohan Singh had held a meeting with leaders of NDA and other parties in which three proposals relating to Bill were discussed. First was to introduce the lapsed Bill providing one-third reservation for women. Second was to increase the strength of legislature to provide one third of the original number of seats to women. Third was to implement the proposal of Election commission of India making it mandatory for the recognized political parties to ensure putting of minimum agreed percentage of women in state assemblies and parliamentary election so as to allow them retain the recognition with EC as political party. However, no consensus was arrived at.

VII. Conclusion

Women represent 50% of the population, contribute to 2/3rd of the working hours and earn 1/10th of the world's income. This bill is not a bounty but an honest recognition of their contribution to nation building. We need to set a deadline on consensus building measures else we would end up with the annual feature of having more and more new proposals every year demanding an altogether new debate starting afresh in the new light, thus stalling the passage of the Bill forever.

As far as the women representation in the panchayati raj institutions and local bodies are concerned, in a very short period of time, elected women have played such a positive role that they now occupy more than 40 percent of the total seats in many states. Women's movements have always supported the cause of social justice and also reservations being extended to the OBC's in jobs and educational institutions while SC/ST rights are continued. It is unfortunate that leaders like Mulayam Singh Yadav and Lalu Prasad Yadav who are symbols of the struggle for social justice do not favour including women of all castes and communities within its beneficiary.

Let us hope that our parliamentarians allow the bill to be debated and decided upon in the Parliament and women's rights and their right to representation will be supported by all sections of the House and that the bill be passed. The onus is now on the parliamentarians to come out with the verdict in favor of this long awaited bill, which would work in the process of women empowerment.

DEVELOPMENT AND PROTECTION OF GEOGRAPHICAL INDICATIONS : A STUDY OF EMERGING ISSUES

Preet Singh and Jai Parakash***

I. INTRODUCTION

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share the benefits of scientific advancement. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[1] Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.[2] The establishment of universal society having equal opportunities for all the people has been sought by the International Covenant on Civil and Political Rights[3]. The states parties to the Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed :

(a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

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1 Universal Déclaration on Human Rights, 1948, Article 27.

2 *Ibid.*, Article 29.

3 International Covenant on Civil and Political Rights, 1966.

(b) to ensure an equitable distribution of world food supplies in relation to need,[4] taking into account the problems of both food-importing and food-exporting countries,

The states parties to the Covenant are required to recognize the right of everyone :

(a) to take part in cultural life;
(b) to enjoy the benefits of scientific progress and its applications;
(c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[5]

The steps to be taken by the states parties to the Covenant to achieve the full realization of these right shall include those necessary for the conservation, development and diffusion of science and culture.[6] The states parties to the Covenant have to recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Certain goods, whether, naturally found, agriculturally cultivated or manufactured in a particular territory of a country or a region or locality have specific characteristics with regard to taste, aroma or quality. These goods are marketed on the basis of their appellation of origin or geograpical indication. Paris Perfume, Scotch whisky, Russian vodka, French Champagne, Basmati Rice, Darjeeling Tea, Swiss Chocolates, Nagpur Orange, Kashmiri Apple, Bikaneri Bhujiya, Benaras Silk are some of the goods which have acquired a special importance on account of their association with indication of source. However, there has been growing tendency to use false or deceptive indication or source of goods to lure customers. For protecting and promoting the rights of the collective owners of the geographical indications, the activists are making concerted efforts at various platforms.

For protection of agricultural goods, natural goods or manufactured goods or any goods of handicraft or goods of industry including food stuff, measures respecting geographical indications are being debated to promote

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4 *Ibid.*, Article 11 (2).
5 *Ibid.*, Article 15(1).
6 *Ibid.*, Article 15(2).

the interests of the producers of the geographical indicators. The restriction on the unauthorized persons on misusing geographical indications would protect consumers from deception and would add to the economic prosperity of the producers of such goods and would also promote goods bearing Indian geographical indications in the export market. The Agreement on Trade Related Aspects of Intellectual Property Rights warrants that other countries are under no obligation to extend protection unless a geographical indication is protected in the country of its origin[7].

The issues regarding the definition of geographical indications are under active discussion at various platforms for giving a comprehensive definition, protection and promotion of the geographical indications. Taking a step in this direction, the TRIPS Agreement has adventured to define geographical indications as:

> indications which identify a good as originating in the territory of a WTO Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.[8]

II. Definition Of Geographical Indications

The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications of World Intellectual Property Organization[9] analysed various documents submitted by The World Intellectual Property Organization for designing comprehensive elements of the concept of geographical indications with a view to protect and promote the rights of the owners of the geographical indications. The Committee observed that the status of the variety of the systems of protection for geographical indications, the diversity of the terminology used in the legislative instruments and the lack of sufficient information on the regulations and national administrative procedures hampers the preparation of an overall analysis of the different elements on which the definition of geographical indications and their considerations are based[10].

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7 TRIPS Agreement, 1995.

8 *Ibid.*, Article 22.1.

9 Tenth Session Geneva, April 28-May 2, 2003.

10 *Ibid.*

The Committee deliberated upon the following fundamental issues, insofar as they were assessed in different ways at the international level before considering the different elements contained in the definition of geographical indications and their assessment in the different protection systems.

A. Alternative Elements and Quality

The TRIPS Agreement introduces an alternative "a given quality, reputation or other characteristic", whereas the definition of the appellation of origin under the Lisbon Agreement makes express reference to a combination of natural and human factors representing the quality and the distinguishing characteristics of the product.[11]

The determination of the quality of a specific product cannot be undertaken in overall terms at the global level according to harmonized and exhaustive criteria which would take account of the cultural diversity of the international community. This appreciation, therefore, appears to be derived from a factual approach and from the prerogative of the competent national authorities, based on the criteria which are specific and individual to them. In this regard, the WTO study[12] indicates that the reference to "quality" is formulated in a different manner, sometimes in the plural, in the various definitions appearing in different national legislations. For example, "established quality," "particular quality," "given quality," "specific quality," "special quality characteristics," "special outstanding quality distinguishing the product from generic products," superior quality/quality of the highest grade as determined in accordance with standards specified in the law for the product concerned or, as determined through customary use in the respective industry. Thus, the term "quality" appears less to imply a certain quality of the product – qualitative criterion – than a characteristic – legal criterion – allowing a product to be distinguished as a result of its geographical origin.[13] If the qualitative link is not sufficient, can it therefore be concluded that there is no geographical indication? Generally speaking, this approach prevails in relation to appellations of origin; i.e., if the characteristic qualities are essential only to a slight extent due to the geographical environment, protection cannot be

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[11] WIPO Standing Committee on Trade Laws, Industrial Designs and GI, para 4.

[12] WTO Document IP/C/W253, dated April 4, 2001, paras 40-41.

[13] *Supra* n . 11, para 7.

granted in the form of an appellation of origin. The qualitative link between a product and its geographical origin will be all the more difficult to evaluate since it will involve, for identification purposes, other subjective factors such as the quality of the ingredients used or the manufacturing process. Thus, the fact that a product is produced by a traditional method or that its production, preparation and processing has occurred in a particular geographical area can contribute to its "quality," but these factors may, in another specific case, not be decisive for another product.[14]

The requirement for a qualitative link between the geographical environment and the product as part of a cumulative interpretation of the elements of the definition would lead to a disadvantage for the countries whose geographical indications apply not to agricultural or crafts products but to industrial products. This link, which may have existed at the beginning of the manufacturing of an industrial product, may subsequently be broken to the extent that its existence is henceforth difficult to prove. Moreover, manufacturing traditions and human skills can be transferred from one geographical area to another, taking into account in particular increasing professional mobility and economic globalization[15].

The methods for manufacturing and obtaining the product should/may also be the subject of a precise description. This description must help to identify the product's personality. Thus, the description of the methods for obtaining the product should/may contain the description of the techniques implemented as well as the quality criteria of the final product, by demonstrating the particular features linked to the product. The description should relate to all the stages concerned with the location of a case including, where necessary, the packaging. For animal breeds, the following will, therefore, be mentioned: the breed, breeding practices of feeding, grazing, suckling, age of slaughter, maturation, classification of carcasses, pH, and so on. For plant productions, the varieties, dates of seeding and harvesting, harvesting periods, harvesting method, storage, dispatch, firmness, sugar level, etc. will be mentioned. Finally, for manufactured products, the description of the raw materials of the type of product, part of the selected product, etc., the description of the manufacturing process of preparation, drying, salting, etc. may be noted.[16]

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[14] *Ibid.*, para 9.

[15] *Ibid.*, para 10.

[16] *Ibid.*, para 10.

B. Reputation

The countries which have adopted the Lisbon model do not generally refer to reputation in their national legislation as an element linked to the geographical origin of the product, whereas the countries that base themselves on the TRIPS model do so systematically. The Lisbon model does not mention reputation as an element linking the product to the place. It appears rather that the reputation of the geographical location is based on the quality and characteristics of the product for which it is best known. As regards the countries whose legislation follows the TRIPS model, the study shows that several of them have adopted various forms of qualification standard such as "general reputation," "given reputation," "specific reputation," etc.[17]

C. Other Characteristics

The other characteristics of the geographical environment can be understood to include natural factors such as soil and climate, and human factors such as the particular professional traditions of the producers established in a given geographical area. The region demonstrates the interaction between the physical (natural) and human factors built up over time. The link to the "*terroir*" will therefore be manifold and will vary according to the products. Consequently, the basis of the relationship between the region and the typical characteristics of the product, at the different stages of manufacturing, conversion and production, should be accurately described. The typical characteristics of the product linked to the region include any objective or subjective characteristic which discriminates the product within its reference family, and refers both to the characteristics of the final product, the practices linked to the manufacturing of the raw materials, the conversion and production of the product, and the social and cultural representation which the producers and consumers of the product have. The analysis of these factors should define, in objective terms, the different components of the product such as the color, shape, texture, composition and so on. For manufactured products, this definition is made firstly on the raw agricultural material and, secondly, on the product resulting from manufacturing. The means used to define these characteristics may be bibliographical, through

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[17] *Ibid.*, para 42.

the interrogation of the producers themselves, or through physical, chemical and sensory analysis work (testing panels).[18]

D. Link with the Geographical Origin

It is most important for the justification of the elements of the definition to be made in the most objective manner possible with a view to giving the link a precise and specific form, since this constitutes the basis for the protection of a geographical indication. The grant of an exclusive right to a denomination is made only in so far as this right is justified by objective elements and forms of proof. The elements and proof set claims for the subject matter to seek protection by specifying the elements in methodological and practical manner.[19]

III. Developments In Geographical Indications Field

A. Identification of Geographical Indications

The geographical indications move beyond the concept of appellations of origin in important ways. First, geographical indications may be any indication identifying a particular region, locality, or country, including words and pictorial symbols; they do not have to be the place name itself. Thus, geographical indications may identify a good with any expression including, most likely, a place name or symbol that may be made to evoke a location. Geographical indications refer not only to products with quality characteristics that are attributable to a region but also to the reputation of a product. Thus, it is permissible to apply geographical indications to goods that enjoy reputations stemming from local innovativeness such as craft goods rather than physical characteristics emanating from climate or soil quality. However, this reputation needs to be tied to a geographical origin that may be uniquely identified in order to exclude others from its use.

There is a double lared structure of protection for geographical indications in TRIPS, keyed to the type of product, with wine and spirits achieving the highest protection. This structure emerged from interest-based bargaining in the Uruguay Round, with the main *demandeurs* being wine producers from the EU. However, given the relatively expansive scope, at least on paper, of coverage for geographical indications, many countries are

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[18] *Ibid.*, para 24.

[19] *Ibid.*, para 29.

considering the benefits of extending stronger protection to other goods, including foodstuffs, tobacco products, artisan goods, and even services. The question of extension lies at the center of controversy within ongoing TRIPS negotiations, which have made little leeway to date. Interestingly, this is by no means (and perhaps uniquely within the intellectual property arena) an issue pitting North versus South. Rather it is largely one in which some agricultural and food exporters see potential benefits for their producers through claiming distinctive place-based qualities, arrayed against other agricultural and food exporters that perceive their commercial interests lie in being able to imitate those quality characteristics and attach the same place names. Also significant are perceptions by some developing countries that geographical indications can play a useful role in defining and exploiting the products generated by collective knowledge. Close analysis of particular forms of intellectual property rights (IPRs) tends to frustrate economists for three simple reasons. First, such policies are inherently second-best interventions in a world of multiple distortions. As such, whether IPRs generate net benefits for a country depends on circumstances and time horizon, with the analysis often playing out against an unobservable counterfactual situation. Put differently, countries must find an appropriate balance the interests of inventors and creators (recognizing that these may be foreign entities) and the needs of the public for access to information, products, and services. Second, the precise regulatory standards in IPRs (e.g., the novelty requirement in patents and the scope of fair use in copyrights) are arcane and difficult to model in a systematic way. Third, and perhaps most important, relevant data generally are unavailable and cannot support definitive analysis.

B. Doha and TRIPS Agreement

The most general mandate of Article 22.2 of the TRIPS is that countries must permit interested parties to use legal means to prevent the identification or presentation of a good that would mislead consumers as to its true geographical origin and to prevent acts of unfair competition in this regard.[20]

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[20] Even more general are the TRIPS obligations of national treatment and MFN (Maskus, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY, Washington DC, Institute Of International Economics, 2000). See *"WTO Mandated Negotiations on Geographical Indications (TRIPS)* available at www.intracen.org/worldtradenet/docs.

WTO Members also must provide for refusal or invalidation of trademarks containing misleading geographical indications. These general requirements must be afforded to any product for which geographical indication protection might be sought. TRIPS calls for a higher level of protection for geographical indications for wines and spirits.[21] The Agreement requires WTO Members to prevent the use of geographical indications identifying wines and spirits that do not originate in the place indicated, even where the true place of origin is indicated or the geographical indication is used in translation or accompanied by such expressions as "kind", "imitation", or the like (Article 23.1). Further, it mandates negotiations concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members choosing to participate in the registration system.

WTO Members may permit continued use of a particular geographical indication, if it was used at least ten years prior to 15 April 1995 or in good faith before that date. Next, the restriction on misleading trademarks is waived where the trademark was registered, applied for, or acquired by use in good faith before the TRIPS phase-in periods expired or before the geographical indication is protected in its country of origin. Further, the terms that are generic within a territory need not be awarded geographical indication protection. In the end, members are not required to recognize geographical indications that are not protected in their country of origin or have fallen into disuse there.

The essential mandate for strong geographical indications were EU wine-producing countries, in particular France, which owned by far the largest number of registrations of appellations of origin under the Lisbon Agreement.[22]

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[21] Escudero, Sergoi, *International Protection of Geographical Indications and Developing Countries* , Working paper for UN Millenium Project Task Force on Trade, (2001) points out that wines have even stronger protection than spirits through protection against homonymous indications (Article 23.3 of TRIPS).

[22] As of December 31, 1999, France owned 508 registrations, or 66.3 percent. Virtually all of these were in wines, which accounted for 61.4 percent of registrations by product type. Other significant registrants were the Czech Republic, Bulgaria, the Slovak Republic, Hungary, Italy, and Cuba, while other significant products were spirits, agricultural goods, cheeses, ornamental products, and tobacco products. See, Escudero , *supra* n. 21.

Some relatively new wine-growing countries as the United States, Chile, and Australia, which had established the use of such place names as "Champagne" "Burgundy", and "Shiraz", were leery of strong retrospective protection for wines and succeeded in achieving the limitations mentioned. However, the EU insisted on the additional negotiations toward a registration system. In general, developing countries had no common or particular part to play in the negotiations up to that point, though India attempted to extend the scope for additional protection under Article 23 to beverages such as tea.[23] Work in the TRIPS Council since the Singapore Ministerial Conference in 1996 on geographical indications has focused on the question of extending this special protection for wines to other products. The negotiations began with a submission in 1998 by the EU to establish the mandated (in the EU's view) register for wines and spirits.[24] This proposal did not limit itself to wines and spirits, opening the door to extension to other products of interest to EU members, such as cheese, chocolates, beer, and embroidery designs. This open door lies at the heart of discussion by WTO Members on extension.

C. Claims of Rich Countries

For stacking claim, in 1999 a proposal was made by the United States, Japan, Canada, and Chile.[25] They argued that the EU proposal interfered with the right to choose appropriate national implementation methods and raised unreasonable administrative burdens.Their proposal focused on a voluntary register without legal effect, in which participating Members would agree to refer to the list when making decisions regarding national protection of particular geographical indications. Hungary submitted a communication in 2000 attempting a compromise, though it built on the EU approach.[26] Hungary argued that the EU's framework was consistent with the spirit of Article 23.4 but that opposition procedures should be transparent and effective, while allowing for consultations and binding arbitration for settling disputes. Its proposal also claimed that successfully challenged geographical

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[23] Watal, Jayashree, INTELLECTUAL PROPERTY RIGHTS IN WTO AND DEVELOPING COUNTRIES (London, Kluwer Law International, 2001).

[24] IP/C/W/107 and IP/C/W/107/Rev.1, available at http://docsonline.wto.org/gen_home.asp).

[25] IP/C/W/133 and IP/C/W/133/Rev. 1, available at http://docsonline.wto.org/gen--_home.asp.

[26] IP/C/W/234, available at http://docsonline.wto.org/gen--_home.asp.

indications should not be entered into the register, thereby removing them from obligated protection. This approach has gained adherents on both sides of the geographical indication registration debate.

What is the scope of products to be covered by a WTO register of geographical indications? The EU and Mexico, among others, have argued that spirits are covered in the ambit of Article 23, though other nations have disputed this claim. The EU prefers to keep the wording as open as possible in order to permit extension of geographical indications beyond wines and spirits. This approach is supported by numerous other countries, both developed and developing, including Switzerland, the Czech Republic, Bulgaria, Slovenia, India, Turkey, Egypt, Pakistan, Mauritius, and Sri Lanka, who have made joint representations.

No real progress has been made to help bridge the gap between the camps on either side of these issues.[27] A commitment at the Doha Ministerial Conference in November 2001 simply committed Members 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. ...issues related to the extension...to products other than wines and spirits will be addressed in the Council for TRIPS..." (Paragraph 18).[28] Presumably, this paragraph commits Members to negotiate in the Doha Round over at least the modalities, scope, and legal effect of a registration system for wines and spirits. It clearly opens the door for obligations in additional products as well. That the disagreements remain wide implies that cross-issue negotiations may be required to achieve consensus. Thus, in the Doha Round it is to be expected that the EU and other participants preferring a strong system will need to offer other concessions, especially in agriculture.

D. Economic Analysis

The searching aspect of the geographical indication debate is that there are both developed and developing nations on both sides. India, Sri Lanka, Turkey, Egypt, Slovenia, and other developing or transition economies have joined the EU and Switzerland in pushing for a strong and expansive

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[27] WTO, TRIPS Council (2002).

[28] "Ministerial Declaration" WT/MIN(01)/DEC/1, 20 November 2001.

registration system. On the other side are the United States, Canada, Japan, Australia, New Zealand, Chile, Argentina, and Mexico, among others.[29] It is evident that the former group sees advantage in protecting the place names associated with its distinctive products, even to the point of recovering such names as Basmati (India).[30] The latter have developed wine and food industries that produce close substitutes for goods that might be protected globally under a geographical indication registration system, raising their costs of marketing and litigation.

It is worth pointing out here that the United States is in the position of "second comer" in the competitive game and opposes a strict and comprehensive registration system. The submission on which it was joint author stated that "...free and fair imitation of a product often enhances the intrinsic value of the genuine geographical indication" and that extension to other products would not necessarily achieve more effective protection than would recourse to the basics in Article 22.[31]

This is not the kind of language one ordinarily associates with the United States Trade Representative or the U.S. Patent and Trademark Office. Many developing countries favor extension makes geographical indications rather unique in the panoply of intellectual property rights, most of which may be characterized loosely along a North-South as producer-consumer divide. This reflects the fact that some poor countries consider themselves to be net producers and exporters of geographical indication goods, perhaps especially in the future after registration is sorted out. When seen through the lens of comparative advantage, of course, this view is unsurprising. To a first approximation, geographical indications perforce refer to agricultural goods and beverages derived from agricultural products. Exclusive rights emanating

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[29] It should be noted that opposition to a rigorous registration system does not necessarily mean a recognition of the importance of GIs. Language in NAFTA, for example, provides protection for Mexican spirits (Tequila, Mezcal) and U.S. spirits (Kentucky Whiskey).

[30] Basmati is a protected GI in India and Pakistan and has been recognized within rice marketing regulations in the UK and Saudi Arabia. However, the term has been declared generic in the United States and U.S. authorities do not consider a label such as "American-grown Basmati" to be misleading or unfair competition. See Commission on Intellectual Property Rights.

[31] IP/C/W/289., available at http://docsonline.wto.org/gen--_home.asp.

from geographical production may enhance export prospects and raise value added (monopoly rents) for those regions that can establish distinctiveness of this kind. However, geographical indications also bear some scope for application to designs of carpets, embroidery, and the like, which may serve as an effective complement to the protection and exploitation of collective or traditional knowledge.

E. Economic Concept on Geographical Indications

The logic of supporting registration of trademarks is that information is costly to acquire and asymmetrically distributed between consumers and producers.[32] In the absence of legal means for excluding rivals from use of a distinctive mark, firms could not readily signal to consumers the identity of ultimate producers. As a result, the inability of consumers to assess the true quality of products on offer would eliminate some transactions in higher-quality goods, thereby reducing firm incentives to invest in quality. Put differently, in the absence of trademarks consumers would have higher search costs for finding quality of the desired level and, if they are risk averse in the presence of uncertain information, would consume less. The notion that firms have an incentive to establish and even improve the quality of their products under trademark protection is not without controversy but seems easily supported in market economies. It is evident that the expected benefits from exclusive rights are likely to rise with the underlying quality of products. The likelihood of imitation (infringement) is typically highest for high-quality goods because of their high price premium, raising the gains to firms from protection. Further, advertising costs are likely to be higher among high-end goods in order to convince consumers to sample products and establish attachments to them. In consequence, consumers reliably can assign high advertising budgets to quality under most circumstances.[33]

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[32] Akerlof , George A. *The Market for Lemons : Qualitative Uncertainity and the Market Mechanism Quality*, 84 JOURNAL OF ECONOMICS 488-500 (1970) is the canonical article on information asymmetries.

[33] Nelson, *Information and Consumer Behaviour*, 78 JOURNAL OF POLITICAL ECONOMY 311-329 (1970), Klein and Leffler, *Non-Governmental Enforecement of Contracts : The Role of Market Forces in Guaranteeing Quality* , 89 JOURNAL OF POLITICAL ECONOMY 615-641 (1981), and Fink, Smarzynska, and Spatareanu. *Product Quality, Trademarks and Trade* , World Bank Manuscript (2003).

Though, there are no formal studies or surveys, in many respects geographical indicatiions afford the same characteristics. As guarantees of the origin of products, they reduce consumer search costs. Moreover, unlike trademarks (which bear no direct guarantee of quality), geographical indications are required to be associated with inherent quality or reputation of a location or region. Thus, the information content in terms of quality is similar but more direct. The returns to investing in high-quality uses of regional characteristics (e.g., establishing high-end wines) surely are higher for premium locations, so one would anticipate a market-based ranking of locations to emerge. Indeed, Napa Valley within the United States and the Barossa Valley and Coonawarra District in Australia are renowned for the quality of most of their wines. Finally, like trademarks geographical indications do not protect underlying technology or knowledge; anyone is free to reverse engineer a product marketed solely under geographical indication protection. In this way, geographical indicaitons may be expected to have some pro-competitive and pro-development features. Most importantly, they should induce firms within regions to organize their innovation and production methods to achieve distinctiveness in flavor, color, design, or some other characteristics. These characteristics then become the basis for national and global marketing that can increase rents per unit of product. It is evident that firms in developed countries may have an advantage in meeting these costs but if the profit potential is real it should be possible to organize them in developing economies as well. For their part, global consumers gain from lower search costs, greater choice and a deeper continuum of quality. However, there are important differences between geographical indications and trademarks beyond the direct linkage with quality or reputation. Primarily, a trademark attaches to a firm regardless of its location. A geographical indication designates a particular area, within which many firms may have rights to its use. In this context a number of complications arise. First, even though a product may come from a region that has a particular reputation, the product of specific firms may still be differentiated by quality (and therefore require supplemental trademark protection). Some wines from Napa Valley are surely better than others, and their relative price premia reflect both the geographical designation and their individual reputations. In this context, geographical indications are hardly sufficient to encourage competition among member firms in quality; rather the firms might be expected to migrate toward some average or least-

cost quality. As such, geographical indications may not carry with them automatic pressures among firms to sustain quality.[34]

The very definition of how broad a region a geogrpahical indication should cover is difficult. Consider the use of a geogrpahical indication to register and protect traditional clothing designs. It is likely that many villages or provinces within a developing country have skilled artisans making such clothing. It might be sensible, therefore, to register a broad territory (even the country) as a geographical indication in order to economize on registration and marketing costs. However, the broader the territory, the more difficult is the coordination problem and the greater are the incentives to cheat on quality.

The fixed costs of organizing and sustaining a system of geographical indications are far higher than in the case of trademarks. Little surprise, then, that while there are hundreds of thousands of registered trademarks in the world, there are fewer than 1,000 registered geographical indications.[35] In this regard, small regions in poor developing economies may not be able to marshal the resources needed for an effective use of geographical indications on a global scale. Technical and financial assistance, both for identifying appropriate market niches and establishing the right forms of registration and marketing, may be central in this area of intellectual property rights. Some developing countries look to geogrpahical indications as an important mechanism for defining and protecting the commercial fruits of certain forms of traditional knowledge or collective knowledge. Undeniably there is a linkage here, for geographical indications may be scaled to incorporate all local users of knowledge regarding the exploitation of natural resources or design traditions. Indeed, geographical indications are the only form of IPR that provide this kind of collective right, albeit based on production location rather than underlying knowledge. Thus, there is scope for marrying these two concepts, which marriage bears potential for reducing poverty. Getting from

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[34] Put in more technical terms, firms availing themselves of a GI may have incentives to cheat on its reputation individually, with a joint "prisoner's dilemma" outcome of eroded quality over time. The evident solution to this free riding is a coordinated strategy within producer coalitions or associations that provide implicit or explicit punishments to defectors. Such associations themselves may be exclusionary, of course.

[35] Fink, Smarzynska, and Spatareanu, *supra* n. 33 and Escudero, *supra* n.21.

this observation to a practical outcome is liable to be quite difficult, however. The coordination costs noted above for geographical indications are of much higher magnitude in the area of traditional knowledge and it is not theoretically clear whether these costs would be offsetting or cumulative.[36]

IV. RECOMMENDATIONS

For realizing the rights of the owners of geographical specific products, concerted efforts in the following way are anticiapted to yield results :-

(1) We must support actively the initiatives to disaggregate information about rural production systems beyond generic data and the application of hierarchical and compatible classification systems.

(2) It is a matter of consideration that natural and cultural history institutions in developed countries harbor collections and documentation on developing country's local resources and products that should be made accessible through the integration, repatriation and dissemination of agronomical, biodiversity, ethnological and anthropological information.

(3) For getting better results, comparative studies on the economic and biological considerations are needed to identify optimal geographical indication sizes considering the financial and geographical thresholds above which a governing body can be sustained and beyond which it cannot be affordable, democratic and representative.

(4) Concerted efforts on basic and participatory research on resource description including natural, biological and genetic resources, landscapes and ecosystems to sustain solid management actions in the context of geographical indication production systems.

(5) It is legitimately stated that "a resource is not one until it is known to be one by a human group". This simple statement underlines the relevance of knowledge and practice, traditional and innovative, in order for the components of biodiversity to become resources. Such knowledge has

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[36] See, Luthria Manjula and Keith E. Maskus, *Protecting Industrial Inventions, Author's Rights and Traditional Knowledge, Relevance, Lessons and Unresolved Issues,* in Kathie Krumm (ed.), TRADE & POVERTY : A REGIONAL AGENDA (Washington DC : the world Bank, 2003) on administrative and coordination costs in traditional knowledge.

been the subject of illegitimate appropriation *i.e.* biopiracy and this is a legitimate concern for indigenous peoples, peasant organizations, civil society and academics, as well as developing country governments. Without minimizing the strategic importance of the issue, a negative consequence of prioritizing the patent debate has been that of neglecting the positive potential of collective forms of intellectual property in promoting the sustainable use of biological and genetic resources related to traditional knowledge.

(6) All out efforts should support innovation in the design of geographical indication governing bodies that includes space for a respectful relation with traditional governance structures when natural resources from communal lands or traditional knowledge is involved in the value chain of the GI.

(7) We must promote the creative use of traditional knowledge in geographical indication product development while providing resources for the timely and careful acknowledgement of governance over such knowledge. Geographical indication regulation should give particular attention to indigenous languages in decrees, regulations and registries when the traditional knowledge of indigenous peoples is involved.

(8) Universal respect and recognition for horizontal governance over biological resources and knowledge in order to empower small farmers in projects that support vertical integration is needed.

(9) We must maintain relationship between geographical indication governance, which is inherently regional, and collective governance over resources or knowledge at the local and community level. Assess the extent to which publication of product description and geographical indication recognition decrees may be useful as preventive protection for traditional knowledge, in particular food production related practices.

(10) For getting true value of the products, production systems that are market oriented *e.g.* cash crops or livestock are certainly a key component of poverty alleviation strategies in rural areas. Geographical indications can contribute to their economic success by providing a clear means of differentiation in the market. Economic growth will certainly contribute

to combatting poverty in peasant communities but it must be kept in mind that creating value does not necessarily mean that there will be adequate or fair distribution of wealth along the value chain. In fact, adding value to local crops and breeds may imply excluding part of the communities from accessing resources previously available, because quality controls and additional processing increase the price and value of raw materials and products.

(11) The modernized changes in food habits is unhealthy. Carbohydrate-rich diets are becoming more popular in developing countries, while diverse diets that are traditional in rural communities are being revalued as 'healthy' in developed countries. Thus, besides addressing food availability in both the rural and urban environments of developing countries, diversity and the intake of fresh leafy vegetables should be given priority

(12) As our end, food availability, in both quantity and quality, for peasants and rural populations but also for lower and middle classes in suburban and urban areas of developing countries needs to be carefully considered as part of the markets for geographical indication products. The exclusion of poor consumers from the value-added, quality-controlled high end niche markets would be an unacceptable consequence of geographical indication implementation in developing countries.

(13) At all levels, differentiation of various production and commercialization chains at least local, regional and national/exports is the only means by which geographical indication implementation in developing countries may avoid economic exclusion processes.

(14) From every corner, we must support developing countries in designing adequate differentiation strategies to avoid limiting access to geographical indication foodstuff for local and regional consumers e.g. differentiated presentations, quality grading, labeling and taxing schemes.

(17) It is a fact that when the registering of a geographical indication becomes a possibility for a small group of producers, it means that there is an existing or potential market for the product and a structure that is oriented towards commercialization. The main challenge for social and collective undertakings is to acquire professional management capabilities to meet

formal demands they have never confronted previously. For example, consumers are now used to certain ways of perceiving safety, and product presentation is one of the most important of these.

V. CONCLUSION

The determination whether particular countries or regions would benefit from a rigorous multilateral and extended system of registration of geographical indications is not at all straightforward. There is a strong need for close research in this area. which is not a very helpful statement at this point. It seems clear that geographical indications are most applicable to agricultural goods and foodstuffs. Their application to designs, services, and traditional knowledge are less concrete. The establishment of geographical indications on their own is likely not to be sufficient to provide significant incentives for building markets and exports. Complementary technical and financial assistance may be required. More centrally, other forms of IPRs in trademarks, trade secrets, design protection and competition regulation are required complements. Careful consideration needs to be paid to the tradeoffs between economies of large scale area geographical indications and problems of coordination. Because most conceivable geographical indications would implicate firms that are already producing with some access to the associated region or knowledge, instituting a system of geographical indications will generate significant redistribution of opportunities and wealth across actors. In light of these uncertainties it is surprising that so many developing countries are advocating for a multilateral registration system with strong legal effect. For most nations, especially the least developed ones, it is probably advisable at this point to maintain as much flexibility as possible. This would mean sticking with an Article 22-based interpretation of the scope of obligations, not linking themselves to the extensive registration system, and taking advantage of the limitations on geographical indications set out in TRIPS. This approach presumably would not exclude them from registering and enforcing what they consider to be important existing and new forms of geographical indications.

Identification and recognition of different markets is one of the most important challenges for small producers. Migration processes to developed countries create a situation in which physically distant markets may be culturally close and with increasing purchasing power, while cultural change in urban

consumers may create situations in which physically closer markets may be culturally distant. Thus, markets should be understood not only in terms of distance, scale or regulation but also in terms of cultural approaches, because an essential condition for origin-labelled products to be successful is that they be well-perceived and even culturally close to consumers.

LIBERALISM, DEVELOPMENT AND HUMAN RIGHTS OF WOMEN

*Vijay Kumar**

I. The Problem

Female population of our country constituted less than the male population according to 2001 census[1]. Sex ratio (females per 1000 males) was found to be 933 and the literacy percentage of the females was 54.16 as against 75.85 of the males[2]. Nearly 70% of the population living below the poverty line are women[3]. More than 90% women work in the informal sector where working conditions are poor and there are no legislative safeguards[4]. 89.5% of the female workers work in agricultural sector as landless labourers with no inheritance rights[5]. The harshness of the operational economic and social system vis-à-vis women is, indeed, quite perceptible.

Women in our society face harassment, deprivation and handicaps both in respect of person and property. The poor women engaged in various occupations as labourers mostly belonging to lower rung of the social ladder are quite vulnerable in this regard. The societal role in this respect is rooted in economic and social relations operational since hoary past. Consequently, women have been facing the problem of free and equal sharing of the material resources and comfort as well as the equality of treatment vis-à-vis men in family and individual relations. This brought about lop-sided societal relations and affected the developmental process, thus giving rise to the problem of balancing the interests of men and women belonging to various sections of the society. The effort in this paper is to view such a balancing in liberal perspective.

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1 Female population was 49,57,38,169 as against male population 53,12,77,078. See, Census of India 2001-Provisional Population totals – Paper (i) of 2001 (Series-10-Uttar Pradesh) pp.i and ii-iii.

2 *Ibid.*

3 See, Government of India, Tenth Five Year Plan (2002-2007) Vol. II, p. 245.

4 *Id.* at 247.

5 *Id.* at 246.

II. HISTORICAL AND PHILOSOPHICAL PERSPECTIVE

Historically, the position of women came to be degraded with the overthrowing of the traditional order of inheritance through the mother in the mother right gens in the hoary past. This was done by excluding descendants of the female members from the gens and transferring them to that of their father, thus allowing only the descendants of the male members to remain in the gens[6]. This gave rise to patriarchal society and the individual property relations.

Liberalism provides the philosophical base to individual property relations. Though, it involves questioning of the existing societal order based on conservatism, dictatorship, feudal hierarchical relations, class, race, caste and gender based discrimination, developmental process based on liberal thought has been evolutionary. In seeking to change property relations, it remained limited to distributive aspect alone without any basic change in production relations. Liberal philosophy may historically be linked to the questioning spirit of Socrates. It could not progress much in the cobweb of religious conservatism of the middle ages but the beginning of renaissance and scientific revolution in sixteenth and seventeenth centuries in western countries gave it a fillip. Reason questioned faith as the basis of human life and with it the basis of political formation of the society also came to be questioned. The monarchy had to face the onslaught of democratic forces and state's role in man's life came to be defined. Philosophers like John Locke[7] and Rousseau[8] redefined the theory of social contract expanding the individual freedom. The result was the documented development of human rights in Britain, France and U.S.A. viz. the Bill of Rights, 1689, The Declaration of the Rights of Man and of the Citizen, 1789 and the American Bill of Rights, 1791.

John Locke refutes Sir Robert Filmer's position that men are not naturally free because they are born in subjection to their parents. Filmer calls this authority of parents, Royal Authority – Fatherly Authority, Right of Fatherhood because God says, Honour Thy Father and Mother. Locke

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6 See, Karl Marx and Frederick Engles, SELECTED WORKS (1949) Vol. II, p. 197.

7 See, TWO TREATISES OF GOVERNMENT (reprinted with amendment 1964).

8 See, THE SOCIAL CONTRACT (translated and introduced by Maurice Cranston, 1968 reprinted 1972).

objects to leaving of 'thy Mother' by Filmer and being content with half[9]. He also denies Filmer's observation that God at the creation gave the sovereignty to the Man over the woman, as being the Nobler and Principal Agent in Generation[10]. He is of the view that the condition of conjugal society did not give absolute sovereignty and power of life and death over wife to the husband and the ends of matrimony do not require any such power in the husband[11]. He, however, maintains that the relations of wife, children, servants and slaves are subordinate relations vis-à-vis Master of a Family[12]. This brings in contradiction in his theory.

Rousseau regards the family as the first model of political societies, the head of the state bearing the image of the father and the people the image of his children. All are born free and equal, according to him[13]. Like Filmer, Rousseau does not mention mother here alongwith the father. This is obviously reflective of the effect of patriarchal family relations where mother plays the subordinate role vis-à-vis father.

In the economic field, liberalism found its expression in the theory of *laissez faire* basically propounded by Adam Smith[14] advocating the policy of non-interference by the government in economic matters and leaving them to the individual decision of the businessman. However, the classical or bourgeois liberalism advocating the policy had to give way to democratic and social liberalism particularly with Benthamite utilitarianism[15]. The *laissez faire* state came to be gradually replaced by the welfare state which became concerned with the removal of poverty and providing of social security, educational and employment opportunities to men and women equally.

The change in the character of economy, state and liberal philosophy affected the women's movement too. In UK and other western countries,

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9 See, John Locke, *supra* n. 7 at 162-163.

10 *Id.* at 198.

11 *Id.* at 339-340.

12 *Id.* at 341.

13 See, *supra* n. 8 at 50-51.

14 See, *The Wealth of Nations* in Alan Bullock and Maurice Shock (ed.), THE LIBERAL TRADITION – FROM FOX TO KEYNES 25-28 (1956).

15 Regarding the Principle of Utility, see, Jeremy Bentham, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-42 (Indian Economy Reprint 2004).

the traditional domestic roles and responsibilities of women – the prison of Victorian domestic ideology advocating different roles of men and women in the family – came to be challenged gradually from the late eighteenth century through the nineteenth and twentieth centuries by the feminists and Women's Liberation Movement in UK[16]. The liberal feminist writers[17] of the eighteenth and nineteenth centuries laid emphasis on equality between men and women in economic, social and political spheres. But the Radical feminist's main thrust of attack is on male domination which is at the basis of differences between men and women. Catherine Mackinnon lays emphasis on abortion in order to cope with structurally forced maternity which is a perpetuation of economic, domestic and sexual inequality[18]. In the same vein, Simone de Beauoir emphasizes control of their reproductive capabilities by women[19].

III. Policy Perspective

Basic developmental policy of our country is provided by the constitutional and Plan documents. The constitutional policy of social justice has been unfolded in the Preamble and the Fundamental Rights and Directive Principles of State Policy. Specific developmental goals have been laid down in Article 39 which, inter alia, provides for distributing the ownership and control of material resources of the community, and for prohibiting the concentration of wealth and means of production to the common detriment. It also provides for securing equal pay for equal work to both men and women and for protecting health and strength of men, women and children. Besides, constitutional protection for women extends not only in the directions for just and humane conditions and for maternity relief (Article 42) but also in prohibiting discrimination, inter alia, on the ground of sex [Article15 (1)]

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[16] See, Madeleine Arnot, Mirian David and Gaby Weiner, Closing the Gender Gap: Post War Education and Social Change (1999) pp. 33-34 and 66-68.

[17] See, Marry Wollstonecraft, A Vindication of the Rights of Women (1789); William Thompson, Appeal of One Half of the Human Race, Women, Against the Pretensions of the Other Half, Men, to Retain them in Political and Thence Civil and Domestic Slavery (1825, 1983): John Sturat Mill, The Subjection of Women (1869) and Harriet Taylor, The Enfranchisement of Women (1851) quoted in Wayne Morrison, Jurisprudence : From the Greeks to Post-Modernism 486-488 (First Indian Reprint, 1997).

[18] See, Wayne Morrison, *supra* n. 17 at 488-493.

[19] The Second Sex (1953) quoted in Wayne Morrison, *supra* n. 17 at 494-495.

and in empowering the state to make any special provision for women [Article 15 (3)].

So far as the plan policies are concerned, no separate policy for the welfare and development of women was laid down upto the Fifth Five Year Plan. The policies in respect of women were welfare oriented and overall developmental policy was lacking. It was in the Sixth Five Year Plan that the issue of women and development was taken up separately[20]. The Plan laid down three-fold strategy – of education, employment and health – and acknowledged the interdependence of these factors and their dependence on the total developmental process[21]. Acknowledging the women as the most vulnerable members of the family, the Plan adopted family as a unit of development[22]. However, the family centered developmental strategy had to be limited in scope. The thrust on education, health and employment of women continued in the Seventh[23] and Eighth[24] Plans. The Eighth Plan integrated the issues relating to women in the general developmental programmes so as to benefit the women[25].

In contrast to welfare and development approaches of the earlier Plans, the approach of the Ninth Plan was the empowerment of women as the agents of social change and development[26]. The thrust was on creating an enabling environment for women to exercise their rights, both within and outside home, as equal partners alongwith men[27].

The Tenth Plan continues the approach of the Ninth Plan in pursuing the National Policy for Empowerment (2001) through social and economic empowerment and gender justice, *inter alia*, in creating and enabling environment and eliminating all forms of gender discrimination and allowing women to enjoy *de jure* and *de facto* human, rights on par with men in all spheres – economic, social, political, civil, cultural etc[28].

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[20] See, Government of India, SIXTH FIVE YEAR PLAN (1980-85) pp. 423-429.
[21] *Id.* at 424.
[22] *Ibid.*
[23] See, Government of India, SEVENTH FIVE YEAR PLAN (1985-90) Vol. II, pp. 325-328.
[24] See, Government of India, EIGHTH FIVE YEAR PLAN (1992-97) Vol. II, p. 391.
[25] *Id.* at 391-392.
[26] See, Government of India, NINTH FIVE YEAR PLAN (1997-2002) Vol. II, p. 321.
[27] *Ibid.*
[28] See, Government of India, TENTH FIVE YEAR PLAN (2002-2007) Vol. II, pp. 238-255.

It may however, be mentioned that the developmental policies of the different Plans in the name of welfare, development and empowerment are not isolated. The basic issue is the overall improvement in standards of living of women leading to a dignified life. Since societal development itself depends on property relations, development of women too is related with these relations. Development of specific groups of women or in specific areas can hardly lead to overall development of women. Implementation of policies, besides, facing the built-in hurdles of economic and social system like poverty, illiteracy, casteism and corruption, is also marred by elitism and politicking. Elitism has been the hallmark of planning in South Asian countries[29]. The contents of the various laws like land reforms laws, debt relief laws and personal laws depict ample political manoeuvring. The women in general, could not therefore benefit much. It is the women belonging to upper stratum who could obviously benefit from such a planning.

IV. Legal Perspective

The protective legal frame work pertaining to women exists both at the national and international[30] levels. The legal system of our country is

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[29] See, Gunnar Myrdal, Asian Drama, An Enquiry into the Poverty of Nations, Vol. II 721 (1968).

[30] See, Declaration on the Elimination of Discrimination against Women (proclaimed by General Assembly Resolution 2263 (XXII) of 7 November 1967); Convention on the Elimination of all Forms of Discrimination against Women (Adopted by General Assembly Resolution 34/180 of 18 Dec. 1979 – Entry into force 3 Sept. 1981); Convention on the Political Rights of Women (opened for signature and ratification by General Assembly Resolution 640 (vii) of 20 Dec. 1952 – entry into force 7th July, 1954); Convention against Discrimination in Education (Adopted on 14th Dec, 1960 by the General Conference of the United Nations Educational, Scientific and Cultural organization – Entry into force 22 may 1962); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (opened for signature and ratification by General Assembly Resolution 1763 A(XVII) of 7th Nov, 1962 – Entry into force 9th Dec, 1964), Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (General Assembly Resolution 2018 (XX) of 1st Nov, 1965); Declaration on the Protection of Women and Children in Emergency and Armed Conflict (Proclaimed by General Assembly Resolution 3318 (XXIX) of 14th Dec, 1974); Convention (No.100) Concerning Equal Remuneration for Men and Women Workers for work of Equal Value (adopted on 29th June, 1951 by the General Conference of the International Labour Organization at its thirty-fourth session–entry into force 23rd May, 1953); Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation (adopted on 25th June, 1958 by the General Conference of the International Labour Organization at its forty-second session–entry into force 15th June, 1960).

rooted in the colonial past. The colonial legal system was status quoist in character and was not development or welfare oriented[31]. The post-independence legal system with declared constitutional goals based on social justice[32] took special care for welfare and development of women and their equal treatment with men[33]. However due to the nature of our economic and social system being feudal and caste-ridden, the operational system came to be characterized by conservatism. The legal measures pertaining to women in respect of person and property, though try to tackle the problems of women rooted in conservatism regarding the women as chattle, the personal laws remain grounded in traditionalism. It is this mind-set of treating women as chattle, which is basically responsible for criminal behaviour towards women in the form of rape, molestation, custodial and domestic violence and abortion of female foetuses[34]. This is no doubt violative of the dignity and freedom of women. The rape of a social worker in a village of Rajasthan led the Supreme Court to hold in *Vishaka case*[35] that this was violative of 'Right to life and Liberty' and right of 'Gender Equality' as also the right to practice any profession or to carry out any occupation, trade or business[36]. The Supreme Court also laid down certain guidelines in this case in order to ensure the prevention of sexual harassment of women in work places[37]. These guidelines, *inter alia*, include express prohibition of sexual harassment and its notifications, publication and circulation in appropriate ways; inclusion of rules/regulations prohibiting sexual harassment in the rules/ regulations of Government and Public Sector bodies relating to

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31 Although many laws came to be enacted during the tenure of four Law Commissions in the British period, they were merely regulatory in character e.g. The Code of Civil Procedure, 1859; The Code of Criminal Procedure, 1861, 1882 and 1898; The Indian Penal Code 1860, The Police Act, 1861; The Evidence Act 1872; The Indian Contract Act, 1872; The Negotiable Instruments Act, 1881 and The Transfer of Property Act, 1882.

32 See, Preamble, Part III, and Part IV particularly Articles 38 and 39 [Clauses (b) and (c)].

33 See, Articles 14,15,16, clauses (a) (e) and (f) of Article 39, 243-D and 243-T.

34 It has been reported that in India about 10 million female foetuses may have been aborted over the past two decades according to a survey. See, THE TIMES OF INDIA, Lucknow, Jan. 10, 2006, p. 11.

35 *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

36 *Id.* at 3012.

37 *Id.* at 3016-3017.

conduct and discipline and in the standing orders in respect of private employers; initiation of criminal proceedings and disciplinary action; and creation of complaints mechanism besides creating awareness and providing appropriate conditions[38]. The duty in this respect has been cast upon the employer or other responsible persons in such places. It is however, worth mentioning that the immediate cause for bringing the petition as a class action in this case was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. The moot question is – how these guidelines are going to help the women social workers who work and live in feudal surroundings in villages. It may be pointed out that the penal law of our country already contains provisions against sexual harassment including rape[39] even then the cases of sexual harassment and rape continue to occur. The reason for such incidents have, therefore, to be searched in the economic and social conditions of the society and not in the inadequacy of the law as the Supreme Court has sought to do in this case[40]. No law can give protection to women if a society does not have built-in attitude of respecting a woman's dignity as a person and not viewing her merely as an object of lust and reproduction. Such a built-in attitude is traditionally lacking in our society.

The recently enacted 'The Protection of Women from Domestic Violence Act, 2005' should be seen in the background of economic and social relations operational in our society. The Act has knit the web of protection officers, police officers, service providers, magistrates and shelter homes for preventing domestic violence. Domestic violence against women being basically a consequence of patriarchal family relations, unemployment, poverty and illiteracy, can hardly be tackled effectively by complaint mechanism. Even the role of National Commission for Women and Human Rights Commission remains limited for the same reason.

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[38] *Ibid.*

[39] For instance, see The Indian Penal Code, 1960 – section 509 providing punishment for word, gesture or act intended to insult the modesty of a women; section 354 providing punishment for assault or criminal force to woman with intent to outrage her modesty and sections 375 to 376D relating to rape. Also see, section 377 providing punishment for unnatural offences.

[40] According to the Supreme Court, the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places. See *supra* n. 35 at 3015-3016.

The discriminatory attitude towards women is more pronounced in religion based personal laws and behavioral pattern set for women[41]. Hindu law even perpetuates caste based discrimination as is clear from the following observation of the Supreme Court :

> Hindu Law is clear on the subject that if a Shudra women is turned out of the house by her husband, or she willfully abandons him and is not pursued to be brought back as wife, a divorce infact takes place, sometimes regulated by custom, and then each spouse is entitled to rearrange his/her life in marriage, with other marrying partners[42].

Section 7 of the Hindu Marriage Act, 1955 validates all customary rites and ceremonies, even the discriminatory ones against women, such as, giving of a girl in marriage to the boy as a chattle, thus affecting their human rights adversely. It is this concept of treating the girl as a chattel for purposes of marriage which forms the basis of the dowry system and determines the behavioural pattern of the spouses during the married life. In Altekar's view, as a consequence of regarding the women as chattle in pre-historic times, it was the bride's father and not the bridegroom's who was regarded as justified in demanding a payment at the time of marriage since the bride's family was deprived of her services[43]. He maintains that the dowry system is connected with the conception of marriage as a *dana* or gift. Since a religious gift is usually accompanied by a gift in cash or gold, the gift of the bride also was accompanied by a gift in cash or gold[44]. The bride being given in marriage as a gift has obviously to play a servient role along with her family members *vis-à-vis* her bridegroom who being the taker plays a dominant role along with his family members. This also explains the perpetuation of the dowry and the dowry crimes. It is these servient and

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41 Manusmriti does not allow independence to women and instructs the men to keep the women in subjugation. There must always be man to protect the woman-father in childhood, husband in young age and son in old age and after the death of her husband. See, Dr. Chaman Lal Gupta (ed.), MANUSMRITI (in Hindi, 1991) pp. 191-192 and 325-326. Like wise, Kautilya instructs never to trust women. See, Sri Bhartiya Yogi (ed.), KAUTILYA ARTHASHASHTRA (in Hindi, 1988) p. 802.

42 *M. Govindaraju* v. *K. Munisami Gounder,* AIR 1997 SC 10 at 11.

43 See, A.K. Altekar, POSITION OF WOMEN 69 (1956).

44 *Id.* at 71.

dominant roles of the wives and husbands respectively which necessitated dowry and gave rise to criminal behaviour by the husbands and their families on non-fulfillment of their greed. Though the Dowry Prohibition Act, 1961 provides for imposing penalty for giving or taking[45] and for demanding dowry[46], the effect of section 3(1) providing for punishment and fine for giving or taking or for abetting the giving or taking of dowry is diluted by section 3(2). Section 3(2) exempts the presents listed as per rules even at the time of a marriage to the bride and bridegroom without any demand having been made in that behalf. However, in case of the presents made by or on behalf of the bride or any person related to the bride, such presents should be of customary nature and should not be of excessive value in view of the financial status of the person by whom or on whose behalf such presents are given. This validates the listed customary presents from the bride's family to the bridegroom and his family. The problem of dowry is, indeed, deep rooted in the social fabric of society. It is for this reason that the Supreme Court while directing the governments to devise means for creating honest, efficient and committed machinery for the purpose of implementation of the Dowry Act and the Rules *inter alia*, observed :

> The conscience of the society needs to be fully awakened to the evils of the dowry system so that the demand for dowry itself should leave to loss of face in the society for those who demand it. We have no doubt that our young and enlightened women would rise to the occasion to fight the evil which tends to make them article of commerce. We also hope that our educated young males would refuse to be sold in the marriage market and come forward to choose their partners in life in a fair manner.[47]

Under sub section (2) of section 18 of the Hindu Adoptions and Maintenance Act, 1956, a Hindu wife is entitled to claim maintenance and live separately from her husband on certain grounds, *inter alia*, if he has any other wife living and if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere. But under

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[45] See, section 3(1).

[46] See, section 4.

[47] *In re : Enforcement and Implementation of Dowry Prohibition Act, 1961*, AIR 2005 S C 2375 at 2378-2379.

sub section (3) of Section 18, the wife is not entitled to separate residence and maintenance from her husband if she is unchaste (or ceases to be a Hindu by conversion to another religion). This indeed derecognizes the wife as a person.

The Adoptions and Maintenance Act is discriminatory against women in respect of adoption too. It allows a male Hindu to take a son or daughter in adoption and in case he has a wife living with the consent of his wife unless she has renounced the world or has ceased to be a Hindu or has been declared of unsound mind by the court[48]. But it does not so allow a married female to take a son or daughter in adoption. A married female can adopt only when her marriage has been dissolved or whose husband is dead or has renounced the world or ceased to be a Hindu or has been declared of unsound mind by the court[49]. This denotes that a married female can adopt only when she is in the state of 'unmarried female'. Likewise, the mother's right to give the child in adoption too is circumscribed. She may give the child in adoption if the father is dead or has incurred certain disabilities[50]. But the father can give in adoption with the consent of the mother unless the mother has incurred certain disabilities[51].

Preference for male is also shown by the Hindu Minority and Guardianship Act, 1956 in respect of natural guardianship of a minor. According to section 6(a), the natural guardian of a Hindu minor in the case of a boy or unmarried girl is father, and after him the mother.[52]

However, the Supreme Court diluted its effect of gender-inequality by interpreting the word 'after' to mean 'in the absence of and not after the life time. The word 'absence' too was given broader connotation referring to the father's absence from the care of the minor's property or person for any reason whatever[53].

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[48] See, the Hindu Adoptions and Maintenance Act, 1956, section 7.
[49] *Id.* section 8.
[50] *Id.* section 9(3).
[51] *Id.* section 9(2).
[52] Also see, section 7 conferring natural guardianship of an adopted son to the adoptive father and after him to the adoptive mother.
[53] See, *Githa Hariharan v. Reserve Bank of India*, AIR 1999 S C 1149 at 1152. Also see, *Jijabai Vithalrao Gajre v. Pathan Khan*, AIR 1971 S C 315.

Under Muslim Law, polygamy and one sided triple talaq[54], do affect the dignity and freedom of women as also the gender equality adversely[55]. However, the permission for polygamy in Quran is with strict conditions[56] and there is no Quranic injuction or compulsion for polygamy as observed by the Supreme Court in *Javed* v. *State of Haryana*[57]:

> The Muslim Law permits marrying four women. The personal law no where mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would by irreligious or offensive to the dictates of religion.

Despite the enactment of the Dissolution of Muslim Marriages Act, 1939 giving Muslim women right to seek divorce on several grounds, Muslim

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[54] Dr. Asghar Ali Engineer maintains that triple divorce is not a Quranic injunction and the Prophet has also strongly disapproved of this form of divorce. He also points out that the validity of triple talaq is not accepted by Hanbali, Maliki, Ahle-Hadith and Shiah Muslims. See *Who is for a common civil Code?* HINDUSTAN TIMES, New Delhi Aug. 3, 2003 p. 10. Also see, M.R. Zafar, *Unilateral Divorce in Muslim Personal Law*, in Tahir Mahmood (ed.), ISLAMIC LAW IN MODERN INDIA, (Indian Law Institute, New Delhi 1972), pp. 167-174; and B.R. Verma's MOHAMMEDAN LAW IN INDIA AND PAKISTAN revised by Justice B. Malik & R.B. Sethi (1978) pp. 192-5 and 192-6.

[55] In A.G. Noorani's view the Anglo-Mohammedan law on marriage and divorce now in force is oppressive to women and is contrary to Islam. See, *Keep the faith,* HINDUSTAN TIMES, New Delhi, July 30, 2003, p. 10. Similarly Swapan Das Gupta points out that the Muslim personal laws that operate in India violate the tenets of human rights and justice. See, *Ghetoo blaster,* HINDUSTAN TIMES, New Delhi, Aug 4, 2003. p. 8. Recently The All India Shia Personal Law Board approved a model Nikahnama (marriage agreement) giving Shia women the right to seek divorce on the ground of physical or mental torture. In terms of Nikahnama, both husband and wife have the right to initiate divorce proceedings. See, Sumitra Deb Roy, HINDUSTAN TIMES, New Delhi, Nov 27, 2006 p. 1 and the TIMES OF INDIA, Lucknow, Nov 27, 2006, p. 1. However, Tahir Mahmood maintains that the said Nikahnama only states the basic principles of Shia Jafari law of conjugal rights. See, *Reform Friendly,* THE TIMES OF INDIA, Lucknow, Dec. 11, 2006, p. 5.

[56] Polygamy has been permitted in Quran only in particular circumstances and with rigorous and difficult conditions. See, Asghar Ali Engineer, *supra* n. 54.

[57] AIR 2003 S C 3057 at 3070.

husband's unilateral right to divorce solely based on his will remains unaffected. Exercise of his will by the husband in the form of triple talaq has the effect of dissolving the marriage without any decree of a judge even though such a will may be capricious and without just cause[58].

Divorce gives rise to the problem of maintenance of women and children. Before the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 nullifying the *Shahbano case*[59], the Supreme Court had been emphatic in holding that the divorced wife was entitled to a reasonable amount of maintenance under the personal law and the Criminal Procedure Code, 1973 (ss. 125-127)[60].

The 1986 Act[61] has the effect of diluting the remedy available to the Muslim divorced woman in giving the divorced woman and her former husband an option to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973[62]. This means that the divorced woman can have remedy now either under personal law or under the Code but not under both. Since such an option to be governed by the provisions of the Code requires the declaration of both the parties, the divorced wife loses this remedy if her former husband does not agree to this. However, this does not affect the right of the children of Muslim parents to claim maintenance under section 125 of the Code. They are entitled to claim maintenance under the said section for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of females

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58 See, *Jahangir Khan* v. *Syed Abdur Rahman*, 20 ALJ 1923 All 128, 64 IC 943 quoted in Kashi Prasad Saxena, MUSLIM LAW AS ADMINISTERED IN INDIA & PAKISTAN (1963) p. 261.

59 *Mohd. Ahmad Khan* v. *Shahbano Begam*, AIR 1985 S C 945. The Supreme Court in this case held that there is no conflict between the provisions of section 125 of The Criminal Procedure Code and those of Muslim personal law regarding Muslim husband's obligation to provide maintenance for her divorced wife unable to maintain herself. The divorced wife unable to maintain herself is entitled to take recourse to section 125 of the Code even after the expiration of the period of Iddat.

60 See, *Bai Tahira* v. *Ali Hussain Fissalli Chotia*, AIR 1979 S C 362 and *Fuzlun bi* v. *K. Khadervali*, AIR 1980 S C 1730.

61 The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been upheld in *Daniel Latifi* v. *Union of India*, AIR 2001 S C 3958.

62 See, Muslim Women (Protection of Rights on Divorce) Act, 1986, section 5.

till they get married[63]. This right is not restricted, affected or controlled by divorced wife's right to claim maintenance for maintaining the infant child/ children in her custody for a period of two years from the date of birth of the child concerned under section 3(1) (b) of 1986 Act[64].

The debate about wearing of veil by Muslim women[65] is inextricably linked with the debate about traditionalism and modernism. The traditional concept about women is akin to the concept of chattel irrespective of religion they belong to. There has been dilution of such a concept in religious communities and societies where modern education has penetrated more.

It may be mentioned that the vast number of women could not benefit from the women specific welfare laws. The Maternity Benefit Act, 1961 having a limited applicability in agriculture does not cover vast number of women agricultural workers. Besides, they are paid unequally despite the applicability of the Equal Remuneration Act, 1976. Though women have been given inheritance rights in property[66] including agricultural land[67] along with men, they still face discrimination due to patriarchal norms.

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[63] *Noor Sabha Khatoon* v. *Mohd. Quasim,* AIR 1997 S C 3280 at 3285.

[64] *Ibid.*

[65] For instance, see Renuka Narayanan, *In the Spirit of Islam,* HINDUSTAN TIMES, New Delhi, Nov. 2, 2006, p. 10 and Sadia Dehlvi, *Hijab and the truth behind it*, HINDUSTAN TIMES, New Delhi, Nov. 5, 2006, p. 10. Also see Pervez Iqbal Siddiqui, *Veiled support for Shabana's stand*, THE TIMES OF INDIA, Lucknow, Oct. 30, 2006, p. 1.

[66] For instance, see, The Hindu Succession Act, 1956. sections, 8,9,10,14,15,16 and the Schedule. Section 23 which gave only right of residence to the female heir in the dwelling house and not to claim its partition unless the male heirs chose to divide their respective shares therein, has been omitted w.e.f. 9.9.2005. Likewise, section 24 debarring certain widows from inheriting the property if they remarried, has also been omitted w.e.f. 9.9.2005.

[67] For instance, see, the U.P. Zamindari Abolition and Land Reforms Act, 1950, sections 171,172 and 174 providing for succession in case of males and females separately with different heirs consonant with patriarchal norms. The interest of female inheriting property from a male bhumidar remains limited under section 172 of the Act as on her marriage or death or abandonment or surrender of the holding, the property reverts back to the last male bhumidar from whom she had inherited and devolves upon his nearest surviving heir under section 171 of the Act.

V. CONCLUSION

The problems of women in our country are deep-rooted in the economic and social fabric. The liberal constitutional values could neither permeate the religion based family laws nor the societal values. Consequently, the process for development of women being based on individual property relations and liberal thought could not lessen the hold of patriarchal relations in the society much. Its beneficial effect, if any, remains limited to upper rung of the societal ladder. Various discriminatory laws and practices particularly based on religion continue to be operational affecting the human rights of women adversely. Even the welfare laws could not benefit the poor women due to political maneuvering and the built-in hurdles of poverty, illiteracy, caste-ridden and feudal nature of society and the operational patriarchal norms.

STRENGTHENING OF THE ELECTION PROCESS IN INDIA : PROBLEMS AND ISSUES

*Mahavir Singh Kalon**

I. INTRODUCTION

For building the confidence and to institutionalize the sense of democracy in the people, an independent body to monitor the election process of a country is very much anticipated. The democratic set up of our country has a variety of cultures, religions, clans, missionary sects, etc. which have emotionally percolated to the root of our civilization to influence, to any extent, the election process of our nation. The election process, for better management of a democratic set up in a civilized way, needs discernible co-operation from all corners of the society. There is separation of powers under the Constitution of India so that each and every organ could operate in its own domain with competence and independence, but the organs of the Constitution time and again attempt to encroach upon the autonomy of other organs and hence the courts have to intervene for maintaining the confidence of the people in the democratic set up. To monitor the holding of free and fair election in our country, the Constitution provides for constitution of an autonomous Election Commission[1].

Since long, the Election Commission has been in controversy for determining its significant role in giving more responsible government to the people of India. The democratic process, in India, is getting institutionalized because of the progress in all sectors and the initiatives advanced by academicians, jurists and political leaders have also enthused the common people to assert their right in the governance of the country. The Election Commission of India has been tasked to monitor the democratic process of India with an enliven role of sensitizing the people about their constitutional rights for strengthening the governance of the country. But the over-ambitiousness of the civil servants to assert their constitutional position time and again has raised the issues of abuse of the autonomy by the Commission. These issues are getting recognition from various corners of vested interests

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1 Constitution of India, 1950, Article 324.

and the matter of autonomy is getting complicated and thought provoking for the jurists. In this article, an attempt has been made to discuss various aspects for strengthening the autonomy of Election Commission in particular and democracy of our country in general.

II. Composition Of The Election Commission

Article 324, clause (2) provides that the Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix. Until Parliament makes any law in that behalf, the Chief Election Commissioner and other Election Commissioners are appointed by the President. When any other Election Commissioner is so appointed, the Chief Election Commissioner shall act as the Chairman of the Election Commission.[2] The President may also appoint, after consultation with the Election Commission, such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of its functions.[3] The conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine. These rules, however, are subject to any law made by Parliament in this respect.[4] The Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment.[5] The Election Commissioners and Regional Commissioners cannot be removed from office before the expiry of their term except upon the recommendations of Chief Election Commissioner.

Initialy the Election Commission was a single member body. However, the observation of the Supreme Court of India in case of *S.S. Dhanoa v. Union of India*[6] and certain controversial decisions taken by the Chief Election Commission resulting in various confrontation between the Commission and the Government of India, gave an adventure to the

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2 Article 324 (3).
3 Article 324 (4).
4 Article 324 (5).
5 *Ibid.*
6 AIR 1991 SC 1745.

Government of India to provide for a multi-member Election Commission. The President of India promulgated the Chief Election Commissioner and Election Commissioners (Conditions of Service) Amendment Ordinance 1993, to amend the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991. Later on, the Ordinance was replaced by the Act passed by Parliament in 1994, which came into force on January 1, 1994. The Ordinance made Chief Election Commissioner on a par with other Election Commissioners and provided that business of the Commission would be transacted on the basis of unanimous decision and in case of difference of opinion, on the basis of opinion of the majority. The Supreme Court, in the case of *T.N. Seshan* v. *Union of India*[7] , unanimously upheld the constitutionality of the Act equating the status, powers and authority of the two Election Commissioners with that of the Chief Election Commissioner. The Court further held that the Chief Election Commissioner did not enjoy a status superior to other Election Commissioners even though there were differences between the service conditions of both of the occupants. The scheme of Article 324, it was held, clearly provided for a multi-member body comprising of the Chief Election Commissioner and other Election Commissioners.

III. Chief Election Commissioner: Equal or Superior

The Chief Election Commissioner has hit the headlines recently[8]. Therefore it may be apposite to find out the actual legal position of the Chief Election Commissioner in relation to Election Commissioners.

By a reading of Article 324(2), it is clear that the Chief Election Commissioner is a must. However, the number of other Election Commissioners may be optional. Presently, the Election Commission consists of the Chief Election Commissioner and two other members. In view of Article 324(3), the CEC shall be the Chairman. The correct legal position as laid down by the Supreme Court in *T.N. Seshan* v. *Union of India*[9] is as follows:

The provision that the ECs and the Regional Commissioners once

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7 (1995) 4 SCC 611.

8 Justice S. Mohan, April 10, 2009, The Hindu, New Delhi.

9 *Supra* n. 7.

> appointed cannot be removed from office before the expiry of their tenure except on the recommendations of the Chief Election Commissioner *ensures their independence*. Of course, the recommendation for removal must be based on intelligible, and cogent considerations, which would have relation to efficient functioning of the Election Commission. That is so because this privilege has been conferred on the Chief Election Commissioner to ensure that the Election Commissioners as well as the Regional Commissioners are not at the mercy of political or executive bosses of the day. This check on the executive's power to remove is built into the second proviso to clause (5) to safeguard the independence of not only these functionaries but the Election Commission as a body.

The second proviso to Article 324(5) states categorically that the Election Commissioners shall not be removed from office except on the recommendation of the Chief Election Commissioner. At this juncture, the question may arise whether the Chief Election Commissioner can assume a superior status to Election Commissioners, or is equal with them. In first of the cases that arose, *S.S. Dhanoa* v. *Union of India*[10] the Supreme Court held:

> It is necessary to bear these features in mind because although clause (2) of the article states that the Commission will consist of both the Chief Election Commissioner and the Election Commissioner if and when appointed, it does not appear that the framers of the Constitution desired to give the same status to the Election Commissioners as that of the Chief Election Commissioner. The Chief Election Commissioner does not, therefore, appear to be primus inter pares, i.e. first among the equals, but is intended to be placed in a distinctly higher position.

Had the law rested there, the Chief Election Commissioner could of course claim to enjoy a superior status. But later, in the case of *T.N. Seshan* v. *Union of India*[11], this view was not accepted. In this case, the Supreme

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[10] *Supra* n. 6.

[11] *Supra* n. 7.

Court held:

> While it is true that under the scheme of Article 324, the conditions of service and tenure of office of all the functionaries of the Election Commission have to be determined by the President unless determined by law made by parliament, it is only in the case of the Chief Election Commissioner that the first proviso to clause (5) lays down that they cannot be varied to the disadvantage of the Chief Election Commissioner after his appointment. Such a protection is not extended to the Election Commissioners. But it must be remembered that by virtue of the Ordinance the Chief Election Commissioner and the Election Commissioners are placed on a par in the matter of salary etc. Does the absence of such provision for Election Commissioners make the Chief Election Commissioner superior to the Election Commissioners?

In the case of the Chief Election Commissioner he can be removed from office in like manner and on the like ground as a Judge of the Supreme Court whereas the Election Commissioners can be removed on the recommendation of the Chief Election Commissioner. That, however, is not for an idea for conferring a higher status on the CEC. To so hold is to overlook the scheme of Article 324 of the Constitution. It must be remembered that the Chief Election Commissioner is intended to be a permanent incumbent and, therefore, in order to preserve and safeguard his independence, he had to be treated differently. That is because there cannot be an Election Commission without a Chief Election Commissioner. That is not the case with other Election Commissioners. They are not intended to be permanent incumbents, Clause (2) of Article 324 itself suggests that the number of Election Commissioners can vary from time to time. In the very nature of things, therefore, they could not be conferred the type of irrevocability that is bestowed on the Chief Election Commissioner. If that were to be done, the entire scheme of Article 324 would have to undergo a change. In the scheme of things, therefore, the power to remove in certain cases had to be retained.[12]

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[12] *Supra* n. 8.

Having insulated the Chief Election Commissioner from external political or executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his Election Commissioners and even Regional Commissioners by enjoining that they cannot be removed except on the recommendation of the Chief Election Commissioner. This is evident from the following statement found in the speech of Sri K.M. Munshi in the Constituent Assembly when he supported the amended draft submitted by Dr. Ambedkar:

> We cannot have an Election Commission sitting all the time during those five years doing nothing. The Chief Election Commissioner will continue to be a whole time officer performing the duties of his office and looking after the work from day to day but when major elections take place in the country, either provincial or Central, the Commission must be enlarged to cope with the work. More members therefore have to be added to the Commission. They are, no doubt, to be appointed by the President. Therefore, to that extent their independence is ensured. So there is no believed that these temporary Election Commissioners will not have the necessary measure of independence[13].

Since the Election Commissioners were not intended to be permanent appointees, they could not be granted the irrevocability protection of the Chief Election Commissioner, a permanent incumbent, and, therefore, they were placed under the protective umbrella of an independent Chief Election Commissioner. This aspect of the matter escaped the attention of the learned Judges who decided the *Dhanoa case*[14].

Merely because the Chief Election Commissioner is obliged to act as a chairman, could it be said that he is a superior? That question is answered in the negative by the Supreme Court in *Seshan case.*[15] This leads us to the conclusion that Chief Election Commissioner and the Election Commissioners enjoy equal status. The object of clause (5) is that Election Commissioners cannot be removed from office except on the recommendation of the Chief Election Commissioner.

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[13] Constituent Assembly Debates.
[14] *Supra* n. 6.
[15] *Supra* n. 7.

The scheme of article 324 of the Constitution shows that it provides for the setting up of an independent body or commission which would be permanently in session with at least one officer, namely, the Chief Election Commissioner, and left it to the President to further add to the Commission such number of Election Commissioners as he may consider appropriate from time to time. Clause (3) of article 324 makes it clear that when the Election Commission is a multi member body, the Chief Election Commissioner shall act as its Chairman. What will be his role as a Chairman has not been specifically spelt out by the said article. Clause (4) of this article further provides for the appointment of Regional Commissioners to assist the Election Commission in the performance of its functions set out in clause (1).

By the first proviso to clause (5) of article 324, the Election Commissioners and the Regional Commissioners have been assured independence of functioning by providing that they cannot be removed except on the recommendation of the Chief Election Commissioner. Of course, the recommendation for removal must be based on intelligible, and cogent considerations which would have relation to efficient functioning of the Election Commission. That is so because this privilege has been conferred on the Chief Election Commissioner to ensure that the Election Commissioners as well as the Regional Commissioners are not at the mercy of political or executive bosses of the day. It is necessary to realize that this check on the executive's power to remove is built into the second proviso to clause (5) to safeguard the independence of not only these functionaries but the Election Commission as a body. If, therefore, the power were to be exercisable by the Chief Election Commissioner as per his whim and caprice, the Chief Election Commissioner himself would become an instrument of oppression and would destroy the independence of the Election Commissioners and the Regional Commissioners if they are required to function under the threat of the Chief Election Commissioner recommending their removal. The Chief Election Commissioner must exercise this power only when *forced by unavoidable* reasons, which are conducive to efficient functioning of the Election Commission.

The Chief Election Commissioner cannot exercise his power *suo motu* because the members of the Commission are of equal status. If *suo motu* power is conferred on the Chief Election Commissioner, it will amount to

an assumption of superiority, which is not warranted and will obliterate the equality. However, it is logical to conclude that if the Election Commission is to function as a body, such *suo motu* recommendation by the Chief Election Commissioner would nullify the function of the Commission. The Election Commissioners will be more interested in dancing to the tune of Chief Election Commissioner and try to be in his good books. This cannot be the intent of the Constitution under Article 324(5). Such a situation will never be conducive to an effective functioning of the Commission. The conclusion, therefore, is inescapable that the power of recommendation cannot be exercised *suo motu*.[16]

IV. Strengthening of Electoral System

There are many pillars of democracy, including an independent judiciary, a free press, and free and fair elections. In our country, the first two are intact to a great extent, but not the third. It is open secret that most reprehensible efforts are made by the political parties to acquire the support of criminals to win elections. In the 14th Lok Sabha, as many as 93 MPs had criminal charges pending against them. Their trial proceedings have not attained finality.[17]

Many a times, the initiatives have been advanced to cleanse the election process from various illegal *modus operandi*. But the decisive resistance of the political parties to obstruct the building of consensus on de-criminalizing the elections, restrictions on the role of money power in elections have deprived the democratic process of our country to govern the people to the extent which was dreamt of by the framers of the Constitution of India. Some facts which halt our democratic process to be sound and healthy are :-

A. Elections Criminalized

Section 8 of the Representation of the Peoples Act, 1951 requires a conviction for a period of two years to disqualify a candidate from contesting. If one is found guilty of offences under special laws, one would

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[16] *Supra* n. 8.

[17] K.K. Venugopal, *Re-democratising the electoral system*, The Hindu, April 9, 2009, p. 8.

stand disqualified irrespective of the period of sentence. The principle that is relied upon to protect the candidate from disqualification when serious charges are pending is that of criminal jurisprudence – that a person is presumed innocent unless found guilty. However, this is only for the purpose of preventing punishment by way of incarceration or fine. There is no fundamental right to contest an election to Parliament or Legislative Assembly[18]. A statute can take away the right of such a person to contest, on the basis of the higher principle of maintaining the purity of elections. Under criminal law, there are at least three stages at which an accused can be relieved of charges. A magistrate trying an offence has first to take cognizance of the charge-sheet and then satisfy himself that prima facie an offence has been made out, after applying his mind to the statements and the documents annexed to the Police Report. The case could be closed at this stage. Thereafter, the accused has an opportunity at the time of framing of charges to show that no prima facie case is made out or that no reasonable grounds exist to suspect him of the commission of the offence. He would then be discharged. Lastly, an accused could seek quashing of charges under Section 482 of the Criminal Procedure Code. It would, therefore, be incorrect to apply the presumption of innocence, in a wooden fashion, to the issue of disqualification of a candidate contesting elections without taking note of the damage that otherwise would be caused to the democratic process. Section 8 of the Representation of Peoples Act will have to be amended so that a person against whom charges have been framed by a court for an offence mentioned in Section 8(1), or a person who is charged with an offence which carries a sentence of imprisonment of more than two years, would stand disqualified. However, it is only in a case where the charge-sheet has been filed a year prior to the notification of elections that disqualification should apply. Otherwise a rival could easily file a false case and have a charge-sheet framed, leaving no time for the accused to get a discharge or have the charge-sheet set aside.

In the absence of such an amendment to Section 8 of the Representation of People Act, the Supreme Court in 2002 delivered a

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[18] *K. Prabhakaran* v. *P. Jayarajan*, AIR 2005 SC 688; *Kuldip Nayar* v. *Union of India* (2006)7SCC1.

judgment in *Union of India* v. *Association of Democratic Reforms*[19] requiring every candidate to disclose, at the time of filing of nomination, any charges pending against him for offences that may involve punishment for a period above two years or otherwise. It will be a great day for India if, instead of an amendment to the Representation of Peoples Act, 1951, every party obtains from prospective candidates a statement of the pending criminal cases against them and allots the ticket only to such among them who possess a clean record. Perhaps Section 29-A[20] should be amended to incorporate in the Constitution and objectives of all parties that no candidate with criminal charges pending against him would be allotted the ticket.

B. Funding of Elections

We notice that the money power has been stultifying the roots of democracy of our country. The courts have pointed out the consequences of permitting wealth and affluence to dominate the electoral process. Vast contributions by corporations and companies continued to flow into the coffers of political parties until 1969, when a total ban was imposed through Section 293-A of the Company Act[21]. The statement of objects and reasons of the Amendment said : "A view has been expressed that such contributions have a tendency to corrupt political life and to adversely affect the healthy growth of democracy in the country. It is, therefore, proposed to ban such contributions. In 1985, there was a sea change in the thinking when, through a further amendment to Section 293-A[22], the ban was lifted with a view to permitting the corporate sector to play a legitimate role within the defined norms in the functioning of our democracy. The ban, however, continued in respect of government companies. Companies in the private sector could donate upto five per cent of their average profit for the previous three years to a party.

When the 1969 amendment banning contributions to parties was passed, it was said that such contributions have a tendency to corrupt political life and to adversely affect the health of democracy in the country. Time cannot neutralize the effect of these words. The real solution is to snap

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19 (2002)5SCC 294.

20 The Representation of Peoples Act, 1951.

21 The Company Act, 1956.

22 *Ibid.*

the link between donor and political party so that parties do not offer promises and favours in return for money. Corporate contributions should be put in an election fund maintained by the government, from which money will be distributed on the basis of guidelines to parties. The alternative is the levy of a surcharge on income tax paid by corporations so that they fulfill their role in a democracy.

As in many countries of the world, the ideal situation is state funding of elections. It is partly to achieve the objective of state funding that Sections 39-A, 78-A, and 78-B were added to the Representation of People Act, 1951. Section 39-A provides for equitable sharing of time on cable TV networks and other electronic media by recognized parties. Section 78-A provides for free supply of electoral rolls to recognized parties, and Section 78-B for the supply of certain items to candidates. No provision is made to implement Section 78-B.

C. Effect of the Model Code of Conduct

The Election Commission has been responsible for bringing about order and discipline in elections. The model code of conduct has evolved over time into a stringent deterrent against malpractices and deviations. The regulation and control of the poll throughout the country is an exercise that cannot be replicated by any country, however advanced the technology. The fact that all the votes are counted in a day, and the results announced, is itself amazing. The independence and integrity of the Election Commission and of its machinery bode well for Indian democracy. It is an unhappy part of history that morality in the public life has been declining and one of the pillars of democracy is likely to be eroded.

V. Conclusion

The common people are under illusion that the democratic initiatives have been destined to improve their lot but in reality the developers of the democratic incentives are concentrating upon the grabbing and smuggling the public wealth. The media, jurists and spirited NGOs can sensitize the people to instill recognition for their votes so that they could serve as a spark plug to give robust start boost to the democratic process.

For stabilizing the democracy of India, a decisive step on the part of the common people to make accountable the political leaders is a minimal

standard in this high speed age of scientific temperament. To facilitate a quicker response to the problem of electoral system, the public through a concerted opinion should pressurize the government to legislate the provisions for cleansing the electoral system so that the criminals could be debarred, the money could not play a decisive role, the election commission could also monitor the democratic process with an autonomous sense thereby giving a strong and stable government to the people of India.

THE UNITED NATION DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A MAJOR VICTORY OR DEFEAT FOR INDIGENOUS PEOPLES?

*Topi Basar**

I. INTRODUCTION

The term "Indigenous Peoples" has no universal standard or fixed definition, but can be used about any ethnic group who inhabit the geographic region with which they have the earliest historical connection. There is no International agreement on the definition of Indigenous Peoples although there have been several attempts to define or describe indigenous peoples. A working definition of it has been formulated by Jose Martinez Cobo, the United Nations Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Indigenous Communities, Peoples and Nations as:

> Indigenous Communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sections of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sections of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their own cultural patterns, social institutions and legal systems.[1]

The term "Indigenous" is defined by characteristics that relate to the identity of a particular people in a particular area, and that distinguish them culturally from other people or peoples.

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1 Henriksen, John B, *Implementation of the Right of Self-Determination of Indigenous Peoples*, INDIGENOUS AFFAIRS (Copenhagen: International Work Group for Indigenous Affairs) III 2001, pp. 6-21.

Other related terms for Indigenous Peoples include aborigines, aboriginal peoples, native peoples, first peoples, first nations and autochthonous (this last term having a derivation from Greek, meaning "sprung from the earth"). Indigenous Peoples may often be used in preference to these or other terms, as a neutral replacement where these terms may have taken on negative or pejorative connotations by their prior association and use. It is the preferred term in use by the United Nations and its subsidiary organizations. The term "Indigenous" has the common meaning of "having originated in and being produced,growing, living, or occurring naturally in a particular region or environment.Therefore,in a purely adjectival sense any given people, ethnic group or community may be described as being Indigenous in reference to some particular region or location.[2]

II. Meaning of "Aboriginal"

The word Aboriginal appeared in English since at least 17th century and means "First or earliest known, indigenous", In Latin Aborigines is derived from "Abs" meaning from and "Oregon" which means origin and beginning.

III. Key Facts

Indigenous Peoples worldwide number between 300-500 million, embody and nurture 80% of the world's cultural and biological diversity, and occupy 20% of the world's land surface[3].The Indigenous Peoples of the world are very diverse. Most of them live in remote areas in the world. Indigenous Peoples are divided into at least 5000 peoples ranging from the forest peoples of the Amazon to the tribal Peoples of India and from the Inuit of the Arctic to the Aborigines in Australia[4].Very often they inhabit land which is rich in minerals and natural resources. In some countries, Indigenous Peoples form the majority of the population, others comprise small minorities.

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2 *Who are indigenous peoples?* FACTSHEET, UNPFII, http://www.un.org/esa/socdev/unpfi/documents/

3 http://www.unfpa.org/rights/people.htm.

4 *Indigenous Issues*, International Work Group on Indigenous Affairs. See, http://www.iwgia.org/.

Indigenous Peoples represent over 4000 different languages of the 6700 languages that are believed to exist today. Most of the Indigenous languages are considered to be endangered, meaning they are at a high risk of being replaced by dominant languages by the end of the twenty-first century.

The Amazon River Basin is about 7 percent of the world's surface area but harbors more than half of the world's biodiversity. The Amazon River is also home to about 400 different indigenous groups.[5]

Indigenous Peoples are the inheritors and parishioners of unique cultures and ways of living. They have retained social, cultural, traditional, economic and political characteristics that are distinct from those of the dominant societies in which they live. Indigenous Peoples are often marginalized and discriminated against because their language, religion, culture, physical characteristics and their whole way of life were different and perceived by the dominant society as being inferior.

IV. Issues and Problems

Despite their cultural differences, the various groups of indigenous peoples around the world share common problems related to their rights as distinct people. Indigenous Peoples are the disadvantaged descendants of those peoples that inhabited a territory prior to colonization or formation of the present state. Indigenous peoples around the world have sought recognition of their identities, their ways of life and their right to traditional lands and resources, yet through out history, their rights have been violated. Indigenous peoples are arguably among the most disadvantaged and vulnerable groups of people in the world today.

Today many Indigenous Peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. They face serious difficulties such as the constant threat of territorial invasion and murder, the plundering of their resources, cultural and legal discrimination, as well as a lack of recognition of their own institutions. Indigenous Peoples have prior rights to their territories, lands and resources, but often these have been taken from them or are threatened. They have distinct cultures and economies compared to those of the dominant society. Indigenous Peoples' self-identification as indigenous is a crucial part of their identity.

[5] http://en.wikipedia.org/wiki/Amazon_Basin.

All Indigenous Peoples through out world have one thing in common they all share a history of injustice. They were victims of genocide, torture and slavery and denied the right to participate in governing processes of their own states. They have been subjected to new kinds of political conquest and economic plunder in their own native states.

Indigenous Peoples are concerned with preserving land, traditional knowledge, protecting language, culture, customs and traditions and promoting all these to younger generation. They seek greater say and participation in the current state structures and process of development. Like all cultures and civilizations, Indigenous Peoples are always adjusting and adapting to changes in the world. Indigenous Peoples recognize their common plight and work for their self-determination, a cherished dream for them.

V. ROLE OF UNO

The international community now recognizes that special measures are required to protect the rights of the world's indigenous peoples.

Amongst all the International bodies, it's the United Nation Organization which has taken up the issues of Indigenous Peoples as an important agenda. It has been catalyst for many initiatives related to indigenous peoples. In 1982 the Working Group on Indigenous Populations was established as a subsidiary organ to the Sub-Commission on the promotion and protection of Human Rights. Its mandate was:

- To facilitate and encourage dialogue between governments on fundamental freedoms of indigenous peoples.
- To review events relating to the promotion and protection of human rights and fundamental freedoms of indigenous peoples.
- To give particular attention to changes in international standards relating to the human rights of indigenous peoples.

The Working Group has produced some important studies, e.g. a "Study on Indigenous Peoples and their Relationship to land", but the most important achievement has been the formulation and adoption of UN Declaration on Indigenous Peoples.

In April 2000 the United Nations Commission on Human Rights adopted a resolution to establish the United Nations Permanent Forum on

Indigenous Issues (PFII) as an advisory body to the Economic and Social Council with a mandate to review indigenous issues.

The International Day of the World's Indigenous People is celebrated on 9th August every year as resolved by the General Assembly of United Nations. The Assembly has also proclaimed 2005-2014 as the Second International Decade of the World's Indigenous Peoples[6]. The main goal of the new decade will be to strengthen international cooperation around resolving the problems faced by indigenous people in areas such as culture, education, health, human rights, and the environment, the social and economic development.

VI. Other accredited organizations

Various organizations are devoted to the preservation or study of indigenous issues. Of these, several have widely-recognized credentials to act as an intermediary or representative on behalf of indigenous peoples' groups, in negotiations on indigenous issues with governments and international organizations. These include:

- African Commission on Human and Peoples' Rights(ACHPR)
- Society for Threatened Peoples International(STP)
- International Work Group for Indigenous Affairs(IWGIA)
- Indigenous Peoples of Africa Co-coordinating Committee(IPACC)
- Movement in the Amazon for Tribal Subsistence and Economic Sustainability
- Survival International
- Indigenous Dialogues
- Cultural Survival
- Asia Pacific Indigenous Youth Network[7]

VII. United Nations Declaration on the Rights of Indigenous Peoples

After more than two decades of negotiations between governments and indigenous peoples' representatives, the UN General Assembly adopted

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[6] WGIP(2001), Indigenous Peoples and the United Nations System, Office of the High Commissioner for Human Rights, United Nations Office at Geneva.

[7] http://en.wikipedia.org/wiki/indigenous_peoples.

the Declaration on the Rights of Indigenous Peoples on 13 September 2007.The Declaration establishes a universal framework of minimum standards for the survival,dignity,well-being and rights of the world's indigenous peoples.

The UN Declaration was adopted by a majority of 143 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions.[8]

VIII. Nature of the Declaration

The UN Declaration on the Rights of Indigenous Peoples is a non-binding text. Nevertheless, the Declaration reflects a growing international consensus concerning the content of the rights of indigenous peoples. It is a step forward in the consolidation of international mechanisms for the protection of the human rights of all persons, to which all the Members of the UN are committed.

IX. Important Provisions of the UN Declaration

The UN Declaration on the Rights of Indigenous Peoples[9] ("the Declaration") contains 46 articles in total. It sets out both individual and collective rights which are of fundamental importance to the overall development of Indigenous Peoples. The Declaration can act as a guiding light to the Nations in establishing suitable mechanisms of protection for its indigenous population within their state. Some of the important provisions are:

a) Right to individual or collective human rights and fundamental freedoms of Indigenous Peoples[10].

b) Right to freedom and equality and the right to be free from any kind of discrimination.[11]

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[8] India has voted in favour of the Declaration. Australia, Canada, New Zealand and the US who voted against it have substantial population of indigenous peoples in these countries. The 11 abstentions were: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine. See, http://www.un.org/news/press/docs/2007/ga10612.doc.htm.

[9] For full text of the " Declaration on the rights of the indigenous Peoples"; see Resolution adopted by the General Assembly, Sixty-first session, Agenda item 68.

[10] *Id.*, Art.1.

[11] *Id.*, Art.2.

c) Right to self–determination of political status, economic, social and cultural development.[12]

d) Right to autonomy or self-government.[13]

e) Every indigenous individual has the right to a nationality.[14]

f) Right to life, liberty, security, physical and mental integrity. Freedom from any act of genocide and violence.[15]

g) Right against forced assimilation or destruction of their culture, dispossession of lands, territories or resources, forced population transfer, and racial or ethnic discrimination.[16]

h) Relocation of the indigenous peoples only with free, prior and informed consent on just and fair compensation.[17]

i) Right to maintain, protect and develop the past, present and future manifestations of their cultures. Restitution of cultural, intellectual, religious and spiritual property taken without their prior and informed consent.[18]

j) Right to establish and control educational systems and institutions and indigenous children's right to all forms of education without discrimination[19].

k) State shall promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.[20]

l) Right to establish their own media in their own languages. States shall ensure that State as well as private owned media duly reflect indigenous cultural diversity.[21]

m) Right to enjoy full rights given under applicable international and domestic labour laws. States shall protect indigenous children from

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[12] *Id.*, Art.3.
[13] *Id.*, Art.4.
[14] *Id.*, Art.6.
[15] *Id.*, Art.7 (1), (2).
[16] *Id.*, Art. 8(1),(2).
[17] *Id.*, Art. 10.
[18] *Id.*, Art. 11 (1),(2).
[19] *Id.*, Art. 14 (1),(2).
[20] *Id.*, Art.15 (2).
[21] *Id.*, Art.16 (1),(2).

economic exploitation, hazardous work which will be harmful to the child's health and interfere with his education.[22]

n) Right to participate in decision-making through their representatives and to maintain and develop their own indigenous decision-making institutions.[23]

o) Right to engage freely in all their traditional and other economic activities and right to just and fair redress on deprivation of their means of subsistence and development[24].

p) States shall pay particular attention to rights and special needs of indigenous elders, women, youth, children and persons with disabilities and protection against all forms of violence and discrimination[25].

q) Right to maintain and conserve their traditional medicines and health practices, medicinal plants, animals and minerals.[26]

r) Right to maintain their distinctive spiritual relationship with their lands, territories, waters, coastal seas and other resources[27].

s) Right to fair and equitable compensation for confiscation of indigenous peoples lands, territories and resources.[28]

t) Right to the conservation and protection of environment assisted by the States with effective measures.[29]

u) No military activities shall take place in the lands or territories of indigenous peoples without effective consultations with them[30].

v) Right to maintain and protect traditional knowledge, traditional cultural heritage, human and genetic resources, seeds, medicines, flora and fauna, folklores, literatures, designs, sports, traditional games, visual and performing arts. The right to have intellectual property over these matters.[31]

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22 *Id.*, Art.17 (1),(2),(3).
23 *Id.*, Art. 18.
24 *Id.*, Art. 20.
25 *Id.*, Art. 21 and 22 (related provisions).
26 *Id.*, Art.24 (1) [protection to traditional knowledge on medicine]. Also see, Art.31.
27 *Id.*, Art.25, also see, Arts.26 and 27.
28 *Id.*, Art.28 (1),(2).
29 *Id.*, Art.29
30 *Id.*, Art.30 (1),(2).
31 *Id.*, Art. 31(1),(2).

w) States shall obtain their informed consent prior to the approval of any project affecting their lands or territories and other resources.[32]

x) Right to determine their own identity or membership as per their customs and traditions and the right to obtain citizenship of the States in which they live.[33]

y) Indigenous Peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.[34]

z) Indigenous Peoples divided by international borders will have right to maintain and develop contacts with other peoples across borders for spiritual, cultural, political, economic and social purposes.[35]

aa) States shall honor and recognize treaties, agreements and other constructive arrangements concluded with the Indigenous Peoples.[36]

bb) States in consultation and cooperation with Indigenous Peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.[37]

cc) Indigenous Peoples have the right to have access to financial and technical assistance from states and through international cooperation, for the enjoyment of the rights contained in this Declaration.[38]

dd) The United Nations System and its specialized agencies and other intergovernmental organizations shall work together to the full realization of the Declaration by mobilizing financial cooperation and technical assistance.[39]

ee) The UN, its bodies, including the Permanent Forum on Indigenous

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[32] *Id.*, Art. 32(1),(2),(3).
[33] *Id.*, Art.33 (1),(2).
[34] *id.*, Art.34.
[35] *Id.*, Art.36 (1),(2).
[36] *Id.*, Art.37(1),(2).
[37] *Id.*, Art.38.
[38] *Id.*, Art. 39.
[39] *Id.*, Art.41.

Issues and States shall promote respect and full application of this Declaration and follow up its effectiveness.[40]

ff) The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.[41]

gg) Nothing in this Declaration may be construed as diminishing or extinguishing the rights Indigenous Peoples have now or may acquire in the future.[42]

hh) Nothing in this Declaration may be interpreted by anybody to engage in activity contrary to the Charter of the UN or to impair the territorial integrity or political unity of sovereign and independent states. The rights set forth in this Declaration shall be subject to such limitations as determined by law and in accordance with international human rights obligations.[43]

X. Critical appraisal of the Declaration

The Declaration is undoubtedly one of the United Nation's most important initiatives for indigenous peoples. Its adoption by 143 Nations give the strongest indication yet that the international community has committed themselves to the protection of indigenous peoples all over the world. While this Declaration will not be legally binding on States who voted in its favour, and will not, therefore, impose legal obligations on governments.However, the Declaration will carry considerable moral force.

What is seem to be lacking in the Declaration is that it does not define "Indigenous People" in the text.In the light of some controversies with respect to the use of this term the Declaration should have contained an Internationally recognized definition of indigenous peoples.

Most of the provisions of the Declaration are already adopted in the States Constitution and Human Rights Legal Instruments in various forms as a basic or minimum human rights standards.It seems that article 46 of the Declaration which recognize the states territorial integrity or political unity

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[40] *Id.*, Art. 42.
[41] *Id.*, Art. 43.
[42] *Id.*, Art. 45.
[43] *Id.*, Art. 46 (1),(2),(3).

and sovereignty appealed to majority of the states who voted in favour of the Declaration.

The Declaration is the first comprehensive International instrument dealing with indigenous peoples.It covers almost all aspects of the lives of indigenous peoples.Deficiency if any can be rectified in the domestic legislations when the Declaration is given effect by the states.

The given quotation aptly apply to the current Declaration-

A treaty, in the minds of our people, is an eternal word. Events often make it seem expedient to depart from the pledged word, but we are conscious that the first departure creates logic for the second departure, until there is nothing left of the word[44].

XI. WHY SOME COUNTRIES VOTED AGAINST THE DECLARATION?

Australia, Canada, New Zealand and the United States have voted against the Declaration on different grounds. In Australia, the indigenous Australians includes both the Torres Strait Islanders and the Aboriginal and its population was estimated to be 458,500, or 2.4% of the total population[45]. Aboriginal and Torres Strait Islander people are disadvantaged across a range of socio-economic factors reported in the 2001 Census. They experienced lower incomes than the non-indigenous population, higher rates of unemployment, poorer educational outcomes, higher rates of ill health and lower rates of home ownership.

These facts fail to explain why Australia did not favour the Declaration. Australia's representative said his Government had long expressed its dissatisfaction with the references to self-determination and their potential to be misconstrued, on the extension of indigenous intellectual property rights

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[44] Declaration of Indian Purpose (1961) American Indian Chicago Conference.

[45] As per census (by Australian Bureau of Statistics) Aboriginal and Torres Strait Islander people have inhabited Australia for around 60,000 years. They are ethnically and culturally different from one another. Historically , aboriginal people are from mainland Australia and Tasmania.Torres Strait Islanders come from the islands between the tip of Queensland and Papua New Guinea.The rest of Australia's people are migrants or descendants of migrants,who have arrived during the past two centuries from some 200 contries.[source: Australian Government, Department of Foreign Affairs and Trade].

as unnecessary under current international and Australian law and expressed concerns that the Declaration places indigenous customary law in a superior position to national law.[46] They are of the view that, "There should only be one law for all Australians and we should not enshrine in law practices that are not acceptable in the modern world."[47] They seem to have taken a very narrow view of Self-determination applying it only to situations of decolonization and where a particular group with a defined territory was disenfranchised and was denied political or civil rights. The distinctiveness of people's identity and their rights to preserve their heritage should have been duly acknowledged.

Canada has over 1.3 million Aboriginal populations in 2001; it represents 4.4% of the total population.[48]Canada's aboriginals face problems such as housing shortages, higher teenage pregnancy and suicide rates, and lower life expectancy and school graduation rates than the non-aboriginal population. An estimated 40% of the aboriginal population lives in poverty, compared with 15.7% of the country as a whole.[49] Aboriginal people now total 16.4 percent of all AIDS cases in Canada.[50] Canada said that while it supported the spirit of the Declaration, it contained elements that were "fundamentally incompatible with Canada's constitutional framework. They took objection particularly to articles 19 which required governments to secure the consent of indigenous peoples regarding matters of general public policy and articles 26 and 28 which could allow for the re-opening or repudiation of historically settled land claims. They regarded the document as "unworkable in a western democracy under a constitutional government." It is believed that Canada has worked hard at the UN to persuade other

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[45] Matters of Urgency : United Nations Declaration on the Rights of Indigenous Peoples, Senate Hansards,10 September 2007.

[46] Quoting Mal Brought, Australia's Minister for Families, Community Services and Indigenous Affairs, referring to the provision regarding the upholding of indigenous peoples' customary legal systems.

[47] Aboriginals of Canada are: North American Indian,Metis and Inuit. Their population has good growth rate.

[48] Reported in BBC news, *Canada Outlines native cash deal*, November 2005.

[49] Reported in CBC news, *Aboriginal People: Canada's most vulnerable population.*

[50] *Aboriginal Women Protest Ottawa's Refusal to back UN Declaration*, published on CBC news, Canada.

countries to withdraw their support of the Declaration. Joseph Ole Simulate coordinator of the African Regional Indigenous Caucus, described Canada's actions at the UN as "a crime against indigenous people globally, and a crime against indigenous people in Canada". The decision of the Canadian government to vote against it is receiving wide criticism nationally and internationally. Ellen Gabriel, president of Quebec Native Women, said "Canada presents itself as a defender of human rights, but it's not living up to that reputation. It's kind of hypocritical of Canada not to support this Declaration".[51] The International Indigenous Women's Forum passed a resolution calling on all nations to back aboriginal rights.

The indigenous peoples of USA are called Native Americans, American Indians, Indians, Amerinds, Indigenous, Aboriginal or Original Americans, Alaska Natives. It makes up 2 percent of the population, with more than 6 million people identifying themselves as such and 1.8 million are registered tribal members.[52]

In its explanation for not voting in favour the Unites States says that the States had been given no opportunity to discuss it collectively. The Declaration had been adopted by the Council in a splintered vote. The Declaration should have been written in terms that were transparent and capable of implementation. They had problems with many of its provisions such as, Self-determination, lands and resources, redress and the nature of the Declaration which were found to be flawed. The text as a whole was unacceptable to them.[53]

The Maori, New Zealand's indigenous population, migrated from Polynesia around 1000 years ago. They comprise 14% of New Zealand's Population. It is a multicultural South Pacific nation.[54] New Zealand's Minister

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[51] Alaska Natives are: Yupik,Inupiat Eskimos,Aleuts.There are also many southwestern US tribes as Yaqui,and Apache. See, *Indigenous Peoples of the Americas*, Wikipedia.

[52] Position of the US (explanation of vote by Advisor Robert Hagen and document), *Observations of the United States with respect to the Declaration on the rights of indigenous Peoples*.

[53] Refer, http:www.stats.govt.nz/census/default.htm.

[54] *Maori Party's head in the clouds*, New Zealand's government press release ,via scoop.co.nz,14 September 2007.

of Maori Affairs described the Declaration as "toothless", and said, "There are four provisions we have problem with, which make the Declaration fundamentally incompatible with New Zealand's constitutional and legal arrangements." Article 26 in particular, he said, "appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous. This ignores contemporary reality and would be impossible to implement."[55]In reply, the Maori Party leader Pita Sharpies said it was "shameful to the extreme that New Zealand voted against the outlawing of discrimination against indigenous people; voted against justice, dignity and fundamental freedoms for all."[56]

Overall, it was unfortunate that New Zealand with such high percentage of indigenous population voted against the Declaration. The same can be said about Canada, USA and Australia. It was a historical opportunity for all to take a meaningful and effective action at home and abroad to promote the rights of indigenous people based on its existing human rights obligations and commitments. The USA's view that States have not been given enough opportunity to discuss the Declaration is not tenable in view of the fact that the Declaration was the product of over two decades of negotiations. Ironically, Canada originally played an important leadership role in the UN working group that finalized the text. However, since the election of the Conservative government, Canadian officials lobbied to have the Declaration re-opened for further negotiation and to encourage other states to oppose its adoption. It also must be noted that much of the supporters of the document have been European countries with few indigenous citizens, such as Denmark and Germany, and much of Latin America, whose record of respecting indigenous rights is often poor. The adoption of the Declaration is a positive sign for the indigenous peoples of these countries.

"If a few states do not accept the Declaration, then it would be a reflection on them rather than the document," said Les Malabar, an aboriginal leader from Australia, before the resolution was presented to the General Assembly.

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[55] NZ indigenous rights stance 'shameful'- Maori Party,stuff.co.nz,14 September 2007.

[56] Rights' Indigenous Declaration still powerful, GALDU.

When the Declaration was only in draft form before its adoption, it was the basis for the formulation of the indigenous People's Rights Act in the Philippines and also used as a framework for changing constitution in Latin America.[57]

The Declaration is not legally binding, but it represents a dynamic instrument of international norms that will help to protect indigenous peoples from discrimination and marginalization. Even the Universal Declaration of Human Rights is/was non-binding. Now many parts of it are customary international law. It's not perfect and violations still occur, but it's there. It's a global rallying point for change and justice. We have criminal penal provisions in the states which are legally binding on every person, but it doesn't mean crime is not there anymore. The importance of the adoption lies in the fact that until now much of the content of emerging norms on indigenous rights have been contested and controversial. The Declaration is now solid evidence of evolving standards pertaining to indigenous peoples in international law. The adoption of the Declaration by the General Assembly is confirmation of the crystallizing of these rights into a widely accepted normative framework.

XII. Indian position on Indigenous Peoples

The government of India refers to indigenous peoples as "Scheduled Tribes", however, Adivasi has become the popular term for India's indigenous or tribal peoples. It is a Sanskrit word meaning "original people".

In the 2001 census, 84.33 million persons were classified as members of Scheduled Tribes, corresponding to 8.2% of the total population. The census lists 461 groups recognized as tribes, while estimates of the number of tribes living in India reach up to 635.While the number of members of the largest tribes, such as the Gonds, Santals, Oraon, Bhils or Nagas go into the million others, such as the Onge or the Great Andaman's, are on the brink of extinction.[58]

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[57] Highest concentration of tribal people in India is in the central region,where more than 50% of the tribal people live. The highest ethnic diversity among the indigenous and tribal population is in the north-eastern region where more than 220 distinct groups have been identified. They comprise approximately 12% of the total indigenous population of India. Source-IWGIA, International Work Group for Indigenous Affairs.

[58] MP Jain, Indian Constitutional Law (5th ed.) p. 1399 to 1400.

The Constitution of India provides specific measures for the protection and promotion of the social and economic interests of the Scheduled Tribes. Thus, the Legislatures have been empowered to impose restrictions on the Fundamental Rights guaranteed by Articles 19(1) (d), 19(1) (e) and 19(1)(f) in the interests of the Scheduled Tribes, in order that movement of people from developed areas to tribal areas may be restricted so that the tribal people are not exploited by outsiders. Laws have, therefore, been enacted prohibiting the entry of non-tribal's into the tribal areas without permits, living of non-tribal's permanently in tribal areas, and transfer of tribal land to non-tribals. Further to protect the interests of the tribal people who are simple and less-politically conscious, separate provisions have been made for the administration of the tribal areas under Articles 244 of the Constitution. Reservation of seats can also be made for them in educational institutions and government services under Articles 15(4), 16(4), 41, 46 and 335.[59]

By voting in favor of the Declaration India has shown its serious commitment to continue its work for the promotion and protection of indigenous peoples' rights.[60]

XIII. UN Permanent Forum on Indigenous Issues (UNPFII)

Established by the Commission on Human Rights in April 2000, is an advisory body to the Economic and Social Council. The mandate of the Permanent Forum is to discuss indigenous issues related to culture, economic and social development, education, the environment, health and human rights. It has hailed the Declaration as a major victory after a long struggle of indigenous peoples for their rights as distinct peoples and cultures.

XIV. What is the significance of the Declaration?

Many of the rights in the Declaration require new approaches to global issues, such as development, decentralization and multicultural democracy. Countries will need to pursue participatory approaches in their interactions with indigenous peoples that will require meaningful consultations and the building of partnerships with indigenous peoples.

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[59] For explanation in voting for the Declaration by India, refer; General Assembly GA/10612 at http://www.un.org/news/press/docs/2007/ga10612.doc.htm

[60] For explanation in voting for the Declaration by India, refer; General Assembly GA/10612 at http://www.un.org/news/press/docs/2007/ga10612.doc.htm

XV. Concluding Remarks

The effective implementation of the Declaration would test the commitment of states and the whole international community to protect, respect and fulfill indigenous peoples' collective and individual human rights. The correct way to interpret the provisions of the Declaration is to read it in its entirety or in a holistic manner and to relate it with existing international law. The text does not represent the sole viewpoint of the United Nations, nor does it represent the viewpoint of the entire world's indigenous people. It was based on mutual respect. It contained no new provisions of human rights which states have not heard of. It was based on rights that had been approved by the United Nations system but which had somehow, over the years, been denied to indigenous peoples. It was a framework for states to protect and promote the rights of indigenous people without exclusion or discrimination. It ought not to be treated as a mere Declaration with no power of enforcement. If it were so, why did USA, Canada, Australia and New Zealand backed out? They would have simply ratified it to avoid any adverse public criticism. The fact that these four states with large number of indigenous peoples had lobbied vigorously to derail the adoption of the Declaration says a lot about its significance.

Various NGOs, representatives of Indigenous Peoples and Civil Societies of the world who were actively lobbying for the adoption of the Declaration for over twenty years call it a historical moment for them.They regard the Declaration as equal to the Universal Declaration of Human Rights adopted by the General Assembly of the United nations on December 10,1948.

The Declaration was "a major victory" indeed but the real test will be whether countries will implement it or not. It will ultimately depend upon the strong political will of the states.

The best way to conclude would be by referring to a beautiful quote below-

> *We are not myths of the past, ruins in the jungle ,or zoos.We are people and we want to be respected, not to be victims of intolerance and racism.*
>
> —Rigoberta Menchu, Guatemala Nobel Peace Prize Winner,1992.

AN ANALYSIS OF THE PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT AT WORK PLACE BILL, 2007

*Ritu Gupta**

"They were helpless. We were helpless as we too stood by and watched as one by one they were dismissed. It was this sense of helplessness that made us pick up this issue of legislation for sexual harassment".[1]

I. INTRODUCTION

In the wake of changed socio-economic scenario, avalanche of gender based crime and apathy of the system towards the same have been the foremost constraints in the path of women's emancipation. Sexual harassment of women at workplace is one such crime that not only violates their sense of dignity and right to earn a living in healthy environment but also is against their fundamental rights as well as basic human rights. It may be attributed to conflicting ideologies and troubled social conditions in a country like India which may again be due to increased influx of women in almost every profession, till hitherto conventionally monopolized by men. This has brought about a sea change, both qualitative and quantitative, in workplace equations, generating and spreading thereby, virus of this malaise and to find or develop anti-virus to undo its presence continues to elude us. Constitutional commitments translated and implemented through various planning processes, legislations, policies and programs for more than six decades couldn't perhaps, significantly contribute to check the menace. Moreover, plethora of available age old provisions under various enactments and legislations also proved inadequate.

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1 Technical report for discussion at ILO Japan Regional Tripartile Seminar on ACTION AGAINST SEXUAL HARASSMENT AT WORK IN ASIA AND THE PACIFIC MALAYSIA 43 (2001).

II. VISHAKA: DAWN OF NEW ERA

In *Vishaka*[2] for the first time, in the realm of judicial interpretation, the Apex Court identified, defined and expressed serious concern over the issue while giving a whole new dimension and meaning to the serious issue. As has been pointed out, once it is accepted that for achieving justice adapting to change is imperative, the question that arises is as to how these changes may be effected. No doubt, one method is to incorporate such changes through legislation. However, in the absence of legislation, [S]uch changes are to be judicially recognized and taken note of the conceptual tinkering and use of equity are the accepted judicial methods. Sir Henry Maine propounded the classic thesis that what he called 'progressive societies' develop beyond the point at which 'static societies' stop through the use of fiction, equity and finally legislations. The judgment in the case of *Vishaka* itself is recognition of change through judicial method. [3]

The judgment was unique in more than one ways as for the first time the Hon'ble Supreme Court recognized sexual harassment as a gender based specific discrimination thereby, creatively expanding the scope and understanding of human rights, traversing the existing limited interpretations. For the first time, in the absence of enacted domestic law, Supreme Court interpreted that the International Conventions and norms are to be read as part of the fundamental rights. Supreme Court acknowledged and reiterated the factual position that the existing civil and penal laws in India do not adequately provide for protection of women from sexual harassment at workplace specifically and that enactment of such legislation may take considerable time, certain guidelines were evolved by the Apex Court as a *'stop-gap'* arrangement which were to be of binding nature under Article 141[4] of the Constitution. Instead of restricting the accountability to an individual offender, the Supreme court extended the responsibility to eliminate the discriminatory sexual conduct to institutions, in this case, the work place.

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[2] *Vishaka* v. *State of Rajasthan,* AIR1997 SC 3011;(1997)6 SCC 241.

[3] *Saurabh Kumar Mallick* v. *The Comptroller & Auditor General of India,* (2008) 151 DLT 261.

[4] Article 141– Law declared by Supreme Court to be binding on all courts– The law declared by the Supreme Court shall be binding on all courts within the territory of India.

In the judgment, the Supreme Court relied, to a great extent, upon CEDAW[5]. Ordinarily, mere adoption or ratification of an international treaty or convention by the Government does not automatically become part of the law of the land. A due procedure is to be complied with for it to acquire the status of law which along with various other requirements and formalities includes drafting and passing of the bill by the Parliament[6]. Till that time, that treaty or convention simply remains an international commitment of Government of India without necessarily having any national ramifications. These procedural formalities act as barricades in the path of direct absorption of such international conventions, even if ratified by India, in the local legal system. The Apex Court broke all these shackles, creating history thereby, when it held that if any such commitment is made by the Government at any international forum, it shall be binding on it even within the country and the same shall be treated as part of the national law unless there is a law, already in existence within the country, which is in direct conflict with such a law. In the later case, the international convention could not be treated as part of the Indian law till such law was either amended or replaced by the legislature.[7]

As far as guidelines in *Vishaka* are concerned, things went on smoothly since there were no local laws in existence dealing with the issue of sexual harassment at workplace. In the light of these facts and circumstances, the Supreme Court laid that the international commitment undertaken by the Indian Government by ratifying CEDAW shall be treated as an integral part of the law of the land.

The Supreme Court explained its position by stating that it was not an attempt by the Apex Court to encroach upon the legislative function by trying to create law. Rather, it was, by this judgment, simply declaring the existing law so as to fill up the void in the national juridical framework and the same shall be applicable or valid till the legislation embarks on the exercise of drafting a law on the issue[8].

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5 Convention on Elimination of All forms of Discrimination Against Women 1979.
6 Article 247, The Constitution of India.
7 *Supra* n.2.
8 *Ibid.*

III. Post –Vishaka Period

After 1997, the guidelines in *Vishaka* continued to be the law, on the issue, required to be followed throughout the nation. These guidelines appeared as silver lining in the clouds of national legal horizon, enabling the victims of sexual harassment, especially students from universities and colleges, to break the shroud of silence, raise their voice to bring private woes suffered by them into public arena and demand for appropriate action against the menace. By then, response of the employers including university authorities, in such cases, by and large used to be to sweep such cases under the carpet. In rare cases, if the victim dared to raise voice against the perpetrator, the authorities often victimized the complainant further, on false and frivolous allegations.

These unique guidelines had a steady impact as it coerced, to certain extent, government departments and few educational institutions to adopt and implement the same by setting up complaints committees. Moreover, these guidelines along with various concerned ministries, departments and NGOs became the fountain-head of awareness generation spearheading the movement for demand of a specific legislation on this sensitive issue.

Years after *Vishaka* judgment was pronounced, the government neither took any initiative to bring any legislation nor devised any regulatory mechanism, as such, for proper implementation of the guidelines. Supreme Court's extraordinary initiative of evolving those guidelines was not only being violated grossly but was being widely disregarded. Neither the employers, whether private or public, bothered to set up Complaints Committees nor any legislative body woke up to amend the existing service rules as desired by the Supreme Court in the said judgment. The scene was equally dismal and gloomy in those public sector organizations as well, where such committees, though set up, did not function properly and effectively.

IV. Contribution Of Ngo's

The *status quo* might have continued for longer but for the prudence of few spirited souls and handful of women and civil society organizations, who having analyzed the situation and grasping the intensity and gravity of the matter, took up the cause with great concern and seriousness. These organizations not only publicized this social issue to create awareness

amongst the masses but also pushed hard for the creation and implementation of legislation on the subject at an early date. Increased fervour of protest towards the issue was vividly felt. Coverage and importance by media also brought the matter to limelight.

Meanwhile, another pronouncement by the Supreme Court came as a ray of hope in such depressing and gloomy scenario expanding the scope of these guidelines further. It not only added new dimensions to the movement but also helped it to scale newer heights[9]. The court in this case not only accepted the definition of 'sexual harassment' as laid down in *Vishaka* but went on to determine the content of the sexual harassment, holding that 'any action or gesture which, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment[10].

It was almost at the same time when National Commission for Women took up the much-awaited task of formulating a comprehensive legislation to deal with the menace of sexual harassment at work place. The task of drafting a bill was handed over to a group of civil society activists and members of certain NGO's who finally in August 2001 drafted a bill that was submitted to the Ministry of Human Resource Development, Department of Women and Child Development, Government of India, that amended it further. Suggestions were also invited from the interested public-spirited organizations, individuals and the public at large. The draft was widely circulated and discussed by and amongst various women rights organizations. The National Commission for Women also conducted regional as well as national consultations with various groups so as to analyse the bill as precautionary measure. As a result, it instead of being a criminal bill moved to its current form of a bill with civil remedies[11].

A drafting committee comprising of lawyers, NGO members and activists from across the country was constituted by NCW to consider and review the alternate draft prepared by the women organizations. A final draft

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[9] *Apparel Export Promotion Council* v. *A.K. Chopra*, AIR 1999 SC 625.

[10] Venkat Iyer, DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW 142 (Butterworths, New Delhi, 2002).

[11] The Protection of Women Against Sexual Harassment at Workplace Bill, 2007; Annexure A

of the said Bill was prepared after incorporating relevant suggestions and recommendations and was submitted again to the Department of Women and Child development, Government of India, for final approval.

The Sexual Harassment of Women at their Work Place (Prevention) Bill, 2003 *prima facie* appeared to be a modified and improved version but was still inadequate on certain aspects. Many women organizations expressed serious reservations regarding many of its provisions and even anticipated backfires like employers refraining from hiring women at all. Taking note of the same, the bill was re-worked by a drafting committee convened by the NCW, with the membership of women's groups.[12]

V. The Turning Point

In the meantime, an incident of sexual harassment proved to be a turning point in the entire episode when in MS University, Baroda, a girl student was sexually harassed by a Professor. The protests by the victim generated a lot of hue and cry and few women organizations, in her support, wrote condemnation letters to the Chief Justice of India. Treating one such letter by Dr. Medha Kotwal of 'Aalochana' as Writ Petition, the Supreme Court issued notices to the Central Government, all State Governments and the Union Territories to report to it, the steps and measures taken by them in furtherance and compliance of the *Vishaka* guidelines. Every government, in question, filed an affidavit stating various steps and measures taken by them to implement the guidelines. The court then asked the petitioners and other organizations to file a rejoinder stating the charges / additions, if any, to the said guidelines. A nation-wide process of discussion and debate was further initiated so as to enable the Governments to prepare rejoinders to be submitted in the said case. To ensure national participation in strengthening the guidelines, a series of consultations were organized afresh, which ultimately brought positive results. The Supreme Court, in this matter, passed very significant interim order in May 2004, declaring thereby, the Complaints Committee under *Vishaka* to be the disciplinary body in cases of sexual harassment and that the enquiry conducted by such Complaints Committee would be final. The Apex Court also held that an

[12] B.P.Singh, Human Rights in India; Problems and Perspective (Deep & Deep Publications Pvt. Ltd., 2004.)

employer can punish or acquit the accused based on reports of panels without any further inquiry. When *Medha Kotwal's* case came up before the Supreme Court for further directions, the Solicitor General of India made a statement on behalf of the Central Government that the Government was extremely serious in bringing and enacting a law on the subject and pleaded for grant of some time so that the organizations could study the draft Bill and make appropriate and suitable recommendations. This plea of the government was accepted and the case was adjourned.

Expressing grave concern over non-implementation of its judgment relating to sexual harassment at work place, the Supreme Court directed the chief secretaries of all the states to inform it whether they have set up Committees in all the departments and institutions, having over 50 staff members, to deal with such complaints[13]. The bench also pointed out that the number of complaints received and the steps taken by the respective government in these complaints were not mentioned. It was further held.

> [w]omen have now to work under the most disadvantageous service conditions in certain establishments and cases of their sexual exploitation are also increasing day by day. Working women are very often sexually harassed at the work places by their male employers, bosses, colleagues and others but these cases are not reported by them quite often for fear of social ostracism, family pressure or reprisal through threats and discriminatory treatment. As a result, the working women often feel insecure at their work places. [T]hough the Supreme Court judgment is there, no law however, has been enacted to deal exclusively with this issue, which is of vital importance for the working women through out the country[14].

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[13] *Medha Kotwal Lele* v. *Union of India*, WP(Cri.) No.173-177/1999 decided on 26.4.2004. A bench of Balakrishnan and Raveendran JJ. noted that all the states were parties to the proceedings in *Vishaka* Case. It was held that '[t]here must be a state level officer, that is, either the secretary of the Woman and Child Welfare Department or any other suitable officer who is in charge and concerned with the welfare of women and children in each state.

[14] *Ibid.*

Meanwhile, attempts were on to prepare a bill on the subject and to have a general consensus about the same. Due to lack of zeal and vigour, or perhaps due to other vivid political or technical factors, these efforts could not bear fruit and aborted prematurely. After the lapse of previous bills, in March 2006, 'The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Bill, 2006' was proposed, which also could not see the light of day and met with the same fate as of its predecessors.

Finally 'The Protection of Women Against Sexual Harassment at Work Place Bill, 2007' was brought with further improvements, modifications and more lucid and effective objectives. Unlike the previous bills, this one defines 'sexual harassment' in a more wholesome and comprehensive manner. The definitions in the Act symbolizes how constant toil, relentless efforts and workouts by activist organizations, NGO's, Government departments and suggestions/ comments of public spirited persons along with the precedents of apex court cumulatively culminate in a more meaningful legislation being proposed at the end of the day.

This model draft appears to be more in tandem with the demands of the present day society. Moreover, the bill symbolizes India's commitments under the United Nations 'Convention for the Elimination of all forms of Discrimination Against Women' (CEDAW) and its acceptance, if made, of the recognition of women's basic rights as human rights that was included in the Vienna Accord 1994 and the Beijing Women's Conference 1995.

VI. Analysis Of 'The Protection Of Women Against Sexual Harassment At Work Place Bill, 2007'

This bill titled, 'The Protection of Women against Sexual Harassment at Work Place Bill, 2007', unlike its predecessors, is objective, comprehensive and precise. The bill is preventive and remedial in nature for the cases falling within the definition of sexual harassment as provided and connected or incidental matters. Hence, this is a unique welfare legislation dealing with the sensitive issue which is not dealt with by any previous legislation.

(i) Definitions

The definitions of various terms used in the Bill have been provided in the clauses (a) to (l)of section 2.

Section 2(a) defines an 'aggrieved woman' as any woman employee, facing sexual harassment of any sort at her workplace. More often than not, in common parlance, the term 'victim' is used for such woman just like in the case of any other form of gender-based violence.

It is pertinent to mention here that the criterion of an aggrieved woman under the pending bill is the existence of such a relationship between the victim and the perpetrator that should qualify to fit into 'employer-employee' relationship.

The use of the term 'aggrieved woman' itself makes it aptly clear that it is very much like any other woman specific legislation and that the contours of the bill do not aim at any other type of harassment except the most prevalent form of it where undoubtedly the female happens to be the aggrieved party. Moreover, such woman may be senior in status as well since, as such, no restriction has been imposed that aggrieved woman employee has to be inferior in status as compared to the perpetrator.[15]

If the intention of the makers would have been to broaden the horizons of the proposed bill so that it may also cover men facing sexual harassment or an altogether distinct but rare category, that is, the same sex harassment, then the appropriate term to define the victim would be the 'aggrieved person' or 'aggrieved party' in that situation.

Section 2(b) prescribes for the definition of 'Appropriate Government' and submits that it can be either the Central Government or the State Government. Definitions of Chairperson, Committee and District Officer has been provided in Clauses (c), (d), and (e) of Section 2 respectively.

Section 2(f) defines "employee" as any person who is employed at any workplace working on temporary, regular, ad-hoc or daily wage basis. Modes or forms of appointment find mention in the same sentence, which is, either directly or through some agent including a contractor, may be with or without the knowledge of the principal. The said definition further takes into consideration monetary implications, that is, the person so employed would be an employee even if the work done by him remains unpaid, is

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[15] *Saurabh Kumar Mallick* v. *The Comptroller & Auditor General of India*, (2008) 151 DLT261.

voluntary or involuntary type of initiative. The terms of employment may be either explicit or implicit. The definition also includes a domestic worker, a co-worker, a contract worker, probationer, trainee, and apprentice or by any other name called.

Thus, irrespective of the designation, terms of employment, financial implications, nature of work and mode of appointment, any person so employed shall be covered under the definition of employee.

The 'employer' is defined in Section 2(g) of the Bill. As per the definition, in relation to any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate government or a local authority, the head of the department of such place would be considered as the employer for the purposes of this Bill. The focal point here is that the word used here is 'head' of the department or organization that may include supervisor; manager or any such officer as may be specified by the Government or local Competent Authority. The said officer should not only be responsible for the management of affairs of the company or organization but should head the organization/ department in the capacity of chairman, director, or chief executive of that unit.

The definition of employee under the proposed legislation is too vast and in an attempt to be exhaustive, it becomes vague and ambiguous and as such renders the same ineffective, exposing its weaknesses and grey areas. To establish the relationship between the employer and employee, although consideration plays an important role but even in the absence of consideration, as per this provision, there may exist such relationship of employer and employee between the harasser and the victim.The existence of such relationship of employer and employee may be an important factor but it should not be the sole criterion as there may be situations that sans few of the requisites mentioned above.

Hence, the real test should be the nature of the job and/ or terms governing their mutual relationship. Moreover, one party by virtue of its status or relationship with the other party is in such a dominant position so as to exercise undue influence over that other party, thereby, indulging in such a behavior that may fall within the definition of sexual harassment. Probationers, trainees, apprentices and students are few such examples who are the worst sufferers. Umpteen numbers of cases are being reported from the education

sector on daily basis about the victimization of the students by the teacher but no specific provision has been incorporated in the Bill in this regard.

The phrases 'Person working on a voluntary basis or otherwise', 'type of voluntary work' and 'the nature of job' need elaborations since the same have not been explained satisfactorily.

Section 2(l) defines 'work place' as any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society. Further, the definition also brings any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, unit or service provider carrying on commercial, professional, vocational, educational, industrial or financial activities including production, supply, sale, distribution or service within its ambit.

No definition of 'work place' was provided either in the Conduct Rules devise by NCW or in the decision of the Apex Court in *Vishaka's* case. As per the Dictionary meaning, Workplace is a person's place of employment of work setting in general.[16] Place of employment is further defined as the location at which work done in connection with a business is carried out; the place where some process or operation related to the business is conducted.[17]

The test laid down by the Tribunal in *Saurabh* case is that of proximity from the place of work and control of the management over such residence with further rider that such residence has to be an extension or a contiguous part of the working place to come within the ambit of workplace. The proximity from the place of work and the control of the management over such residence where working woman is residing is relevant and determining factor. Any incident of sexual harassment would *ipso facto* bring it within the definition as if the misconduct of sexual harassment has taken place in the workplace. The definition of workplace cannot be generalized to include all residences within the meaning and ambit of workplace, as it would lead

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[16] BLACK'S LAW DICTIONARY, 8th Edition, Thomson West, 2004, p.1638.
[17] *Id.* at 1187.

to an absurdity and also an anomalous situation, which maybe chaotic due to the fact that sometimes an employee resides in his own arranged accommodation far from the workplace. Another instance is of Government pool accommodation away from the workplace. In such an event, any sexual harassment of working women would not come within the ambit of a workplace.

The Tribunal was, thus, of the view that it was not necessary that a workplace would be only a place where actually office work is performed. Any extension of place of work or any institution whether a hostel or a mess where the employer has control over management would be treated as workplace by giving wider connotation of the expression. The precise test on the basis of the aforesaid discussion is formulated in the following words:-

> .....The test of a workplace is that the place where sexual harassment has been alleged is a place in the proximity of working activity and under immediate control of the employer, relating to which affairs have been managed by the Government

Each incident of sexual harassment in the context of workplace has to be determined in its facts and circumstances. At the same time, definition of workplace cannot be generalized to include all residences within the meaning and ambit of workplace, as it may lead to absurdity. The Tribunal has itself observed that the notion of workplace would not extend to those accommodation, which may be even government pool accommodation but far away from the workplace. The test laid down to determine a particular place is workplace or not, as per the Tribunal, are the following:-

(a) Proximity from the place of work;

(b) Control of management over such place/residence where working woman is residing; and

(c) Such a 'residence' has to be an extension or contiguous part of working place.

The aforesaid parameters laid down by the Tribunal would only provide general guidelines and would not be determinative factors. It is difficult to define the term 'workplace' in straight jacket and as mentioned above, in the facts and circumstances of each and every case one will have to determine as to whether a particular place where the alleged incident

happened can be treated as workplace or not.[18]

A dwelling house or any place visited by the employee arising out of or during and in the course of employment also amounts to a workplace as per the definition in section 2(l) of the Bill which is very much in consonance with the latest judgment of the Delhi High Court[19].

Despite the fact that the ambit of the definition of workplace has been widened enormously so as to enable it to embrace every possible sector and place; yet there is enough scope that it can be enriched further.

Moreover, some of the major victims of sexual harassment are service beneficiaries (who do not fall within the definition of employees) such as students in educational and research institutions, patients in hospitals, customers in banks etc. The bill though includes these in a peripheral manner, does not focus on such victims. Thus, there is a scope to amend the definition further, so as to cover these crucial areas that do not find a mention in the present definition.

It may be pointed out that section 2(l)(iv) appears quite ambiguous as it includes the phrase 'any place' which is of wide amplitude and may bring market, third party's residence/ work place or corridors of metro, airport, bus stop or railway station in to its sweep[20]. This renders it rather impossible to establish or measure the extent of relationship and confuses the distinction between the harassment by employer or by any visitor at work place or any other place visited by the employee in the course of employment. The same should be refined further by incorporating relevant words or phrases so as to restrict the possible numerous interpretations.

Another important aspect of the definition of 'workplace' is that unorganized sector has also been included. It simply means that all private unincorporated enterprises including own account enterprises engaged in any agriculture, industry, trade and/or business sectors are covered so as to widen the scope of the Bill and extend the security provided by these provisions to a large number of employees working in private sector. All

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18 *Supra* n. 15.

19 *Ibid.*

20 Section 2 (l) (iv) includes any place visited by the employee arising out of, or during and in the course of, employment.

possible sectors have been illustrated in the Schedule[21] appended at the end of the proposed Bill.

Section 2 (l) (v) lays down the definition of 'unorganized sector' and again the definition is too exhaustive to cover every possible enterprise like agriculture; construction; handloom; fish, poultry and animal husbandry; tea, coffee, rubber, cashew plantation, processing, horticulture and sericulture; forest and allied activities, tree climbing, coir, home based work; vendors; handicrafts, services (traditional & modern); shops and establishments; transport & allied; salt pans; small scale and cottage industries; domestic; loading unloading goods sheds, yards, markets and tailoring etc.[22] Though the framers have tried to rectify the lacunae from the previous bills on this subject by bringing every possible unorganized sector in to its sweep but this exercise has rendered it complicated and bulky. Hence the definition should be made more simplified and aptly clear by earmarking those areas which may fall within the definition of workplace.

(ii) Prevention of sexual harassment at work place

Section 3 provides for prevention of sexual harassment at work place[23]. The bill has more or less, adopted the definition given in *Vishaka* that was initially taken from CEDAW, which is rather an inclusive definition and does not claim to be exhaustive one. It not only covers preferential and detrimental treatment in employment but also covers implied or overt threat about the present or future employment status, *quid pro quo* and hostile work environment and every kind of humiliating conduct causing

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[21] Schedule of the Bill.

[22] *Ibid.*

[23] Sec.3. No woman employee at a work place shall be subjected to sexual harassment including unwelcome sexually determined behavior, physical contact, advances, sexually coloured remarks, showing pornography, sexual demand, request for sexual favours or any other unwelcome conduct of sexual nature whether verbal, textual, physical, graphic or electronic or by any other actions, which may include, -

(i) implied or overt promise of preferential treatment in employment; or
(ii) implied or overt threat of detrimental treatment in employment; or
(iii) implied or overt threat about the present or future employment status;
(iv) conduct which interferes with work or creates an intimidating or offensive or hostile work environment; or
(iv) humiliating conduct constituting health and safety problems.

health and safety problems. This section aims at preventing any kind of such behaviour which violates the dignity of working woman.

(iii) Constitution of internal complaints committee

Chapter II of the Bill contains sections 4 to 6 where the constitution of internal complaints committee and local complaints committee has been dealt with.

Section 4 talks about the constitution of the Internal Complaints Committee. Use of word 'shall' makes it mandatory and obligatory for the employer to form such a committee. The proviso to clause (1) of Section 4 explains it further that if the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Committee shall be constituted at all administrative units or offices.

Such committee should comprise of a Chairperson, from amongst employees, who shall be a senior level woman, committed to the cause of women. In case a senior level woman employee is not available, the Chairperson shall be appointed from a sister organization or a non-governmental organization, not less than two members from amongst employees committed to the cause of women or who have had experience in social work; one member from amongst such non-governmental organisations or associations or other interests committed to the cause of women, as may be specified.

The proviso to the said clause makes it clear that at least fifty per cent of the members so nominated shall be women.

Clause 3 of the said Section specifies the tenure of the Chairperson and every member of the Committee that shall not exceed in any case three years from the date of their nomination as may be specified.

Clause 4 of the Section provides for allowances or remuneration of the Chairperson and members of the Committee that they shall be entitled to such allowances or remuneration as may be prescribed.

The last clause 5 of Section 4 provides that in situations where the Chairperson or any member of the Committee contravenes the provisions of section 14, such Chairperson or member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual

vacancy shall be filled by fresh appointment in accordance with the provisions of this section.

(iv) Appointment of district officer

Section 5 provides that the appropriate Government may appoint a District Magistrate or Additional District Magistrate or the Collector or Deputy Collector as a District Officer for every District.This provision talks about appointment of a District Officer, as explained, in every district so as to carry out the functions of the bill. No fresh appointments are to be made as far as the district officer under the bill is concerned. Those who are already serving the government on the prescribed posts are to be designated as district officers. It is not specified whether such officers are to be given additional charge or called on deputation and the same may be decided as per the directions of the competent authority in this regard.

The complaints committee under *Vishaka* was the disciplinary body in cases of sexual harassment and the enquiry as conducted by this committee would be final. Internal complaints committee has been held to be the competent enquiry authority by the Apex Court.[24]

(v) Constitution of local complaints committee

Section 6 deals with the constitution of local complaints committee in every block in those situations where constitution of the Committee under sections 4 and 5 is not possible or practicable or where the complaint is against the employer himself. Section 6(2) of the Bill provides for the Constitution of such committees that shall have four members including Chairperson and three members in the manner as detailed hereunder:

One Chairperson, mandatory to be a female, nominated by the Government dedicated to the cause of women. One member, nominated by appropriate Government from registered trade unions or workers associations functioning in that block. Two other members, of whom at least one should be a female, to be appointed from some NGO's or associations or other interests, committed to the cause of women, as may be specified.

Clause (3) provides for the term of appointment which should not exceed a period of three years from the date of appointment.

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[24] *Medha Kotwal Lele v. Union of India*, Writ Petition (Cri.) No. 173-177/ 1999.

Remuneration of the respective members of the committee, as prescribed, is dealt with in clause (4) while jurisdiction of the committee is provided in clause 5. Clause 6 of the section 6 provides that a fresh appointment shall be made, in case, if any of the members including the chairperson of the committee contravenes provisions of section 14 of the bill.

(vi) Mechanism of filing a complaint

The *locus standi* of filing complaint in such cases has been relaxed and the aggrieved woman can herself make a complaint or if not feasible due to some reason, can lodge complaint through her legal heir or such 'other person as may be prescribed'. The phrase 'such other person' in this provision leads to absurdity and ambiguity, as the same requires some explanation to enable one to understand the intention of the legislature in this regard[25].

(vii) Conciliation

The bill proposes to empower the committee to take steps to settle the issues through conciliation[26]. It is a welcome move so as to avoid unnecessary litigation specifically in those cases where misunderstanding or clash of egos or lack of communication and other related but unresolved issues are the real causes behind such complaints. Sometimes talking sternly to the perpetrator or a warning may sort out the cases. At the same time, it should be ensured that it would be resorted to only at the request of victim otherwise that warning may prove fatal or a death blow for that relationship, thereby, adding to the woes.

In those cases, where conciliation as per section 8 is not arrived at or any term or condition of the conciliation arrived at has not been complied with by the respondent, as per the information provided by the aggrieved woman, the Committee or the Local Committee shall proceed to make inquiry into the complaint[27]. The said Committee is empowered in this regard. Such enquiry should be completed within a period of 90 days and if, due to any reason could not be completed within the specified period, the District Officer or the employer may take such actions as may be prescribed.[28]

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[25] Section 7.
[26] Section 8.
[27] Section 9.

(viii) Recommendations of the committee

On a written request made by the aggrieved woman, the Committee, while the enquiry is pending, may recommend for the transfer of either the aggrieved woman or the respondent or grant leave or any other relief to her as may be prescribed.[29]. On the recommendation of the committee, the employer or the district officer may take such necessary action as deemed proper. Again, the phrase 'such necessary action' is not supplemented by any explanation. It needs to be pondered over yet again.

(ix) Submission of enquiry report

The Committee shall submit a report of its findings, on the completion of enquiry, to the employer or the District Officer. It shall recommend not to take any action if the allegation against the respondent is not proved. Where such allegations are found to be true, the Committee may make following recommendations to the employer or the District Officer:

(i) Action for misconduct as provided by the service rules and if such rules not applicable, in the prescribed manner;

(ii) Compensation to be paid to the aggrieved woman or her legal heirs by the respondent directly or by deducting prescribed amount from his salary.

The employer or the District Officer shall act upon the recommendations within a period of 90 days. He may alter the recommendation, in consultation with the Committee and the concerned parties. The time period is again 90 days, for the executant authority, to act upon those recommendations.[30]

(x) Malicious or false complaint

If the complaint or any evidence produced by any witness proves to be false, action is to be initiated by the employer or the District Officer, against the complainant or the witness, as per the service rules applicable or in such manner as prescribed[31]. Provisions for punishment for false or malicious complaint or false evidence have been incorporated in section 12

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[28] *Ibid.*

[29] Section 10.

[30] Section 11.

[31] Section 12.

which would not only deter frivolous complaints but at the same time may have deterrent effect for the genuine witnesses or/ and on the complainants who may not gather enough evidence to prove her case.

(xi) Compensation for the victim

Section 13 of the Bill prescribes the factors to be considered by the committee while determining the amount of compensation for the victim[32]. The committee would be required to consider the mental trauma, pain, suffering and emotional distress suffered by the victim as well as the loss in the career opportunity due to the incident of sexual harassment. Medical expenses, if any, incurred by the victim for physical or psychiatric treatment need to be considered. The Bill further provides for taking in to consideration the income and financial status of the perpetrator and feasibility of such payment either in lump sum or in installments.

All the factors mentioned above are material and relevant so as to determine the extent of loss and enable the Committee to decide a reasonable amount as compensation.

(xii) Maintenance of confidentiality and privacy of the victim

The identity and addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and enquiry proceedings, recommendations of the Committee or the Local Committee, as the case may be, and the action taken by the employer under the provisions of this proposed Act shall be kept confidential. Only the information regarding the justice secured to any victim of sexual harassment may be disseminated without disclosing the identity and address of the aggrieved woman, respondent and witnesses[33]. The provisions of Right to Information Act remain inapplicable to such proceedings.

(xiii) Penalty for violation of section 14

If the confidential information is disseminated or made public, as prohibited under section 14, the responsible person shall be liable for penalty, in accordance with the provisions of the service rules applicable to the said person or where no such service rules have been made, in the prescribed manner[34].

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[32] Section 13.

[33] Section 14.

[34] Section 15.

(xiv) Appeal

The provision for appeal for the aggrieved by any order passed under any of the above provisions find place in section 16 of the said bill, 2007. This is in consonance with the provisions of the service rules applicable to the said person or where no such rules exists, in such a manner as may be prescribed[35].

(xv) Duties of the employer

The employer is entrusted with certain duties under Section 17. It is duty of the employer under this Act to provide a safe working environment at the workplace. The office order as regards to the constitution of sexual harassment Complaint committe should be displayed at any conspicuous place. Workshops and training programs to sensitize the members should be conducted from time to time. He should not only provide necessary facilities to the Committee or the Local Committee, as the case may be, to deal with the complaint and conduct enquiry; but also ensure the attendance of respondent and witnesses before that Committee. He should make available complete information, with regard to the complaint, to the Committee.

Sections 18 to 22 contain miscellaneous provisions on various other related issues.

(xvi) Preparation of annual report

The Complaint Committee shall prepare an annual report, as prescribed, and submit it to the employer[36].

(xvii) Record of cases

Every year, whatever cases on the subject were filed or judgments were delivered under this Act, shall be mentioned in the annual report by the employer[37].

(xviii) Furnishing information to the government

In the interest of the public or the women employees at a work place, the government may ask the employer or district officer to furnish in writing the relevant information about sexual harassment and authorize any officer

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[35] Section 16.
[36] Section 18.
[37] Section 19.

to inspect the records in this regard. Such authorised officer shall submit a report on the completion of inspection within the prescribed period. It is the duty of employer and district officer to make available all relevant information, records and other documents in their possession which may be needed to carry out such inspection.[38]

(xix) Punishment

Section 21 of the proposed bill provides for the penalty clause and prescribe punishment for the employer or the district officer in case of their failure to constitute the committee as per the requirement of section 4 (1) or to take action under section 11, 12 or 19. This section also prescribes punishment for the contravention and attempt or abetment to contravene the other provisions of the Act or the rules made there under. In such cases the employer or the district officer shall be punished with fine which may extend to Rupees ten thousand.

(xx) Rules making power

Section 22 of the proposed bill is an enabling provision that gives rule making power to the central government. The central government may by notifications in the official gazette make rules to carry out the provisions of the bill. However the power of the central government is restricted by clause 2 of section 22 whereby the area of making rules by way of notifications is specified. The central government has been empowered to make rules with respect to the allowances, remuneration to be paid to the chairperson or the members of the committee. The central government, further, would be empowered to make the rules with respect to the making of complaint, the enquiry thereof, the action to be taken by the employer or the District officer, the relief to be recommended or the manner of action to be taken under various provisions of the Act, for filing of appeal and rules with respect to the annual report to be prepared by the committee.

Sub section 3 of section 22 of the Act provides that the rules made by the central government would be tabled for at least 30 days before both the houses of the Parliament when the same is in session or for two or more consecutive sessions taken together and as such, the rule making power given to the central government is not absolute but subject to the scrutiny

[38] At least 15 such complaints were reported in various newspapers in 2007 from various educational institutions and universities through out the country.

by the both houses of the parliament and approval or modifications therefrom without prejudice to the validity of anything previously carried out under such rule.

Sub Section 4 of section 22 in the similar fashion provides for placing the rules made under this Act by the State Government before both houses of the legislature or where there is only one house before such house for the scrutiny or modifications, if any.[39] However it is ironical that while the enabling provision under section 22 of the proposed bill vests the rule making power only in the Central Government, at the same time, sub section 4 of the same section speaks about the rules made by the State Government. As such there is no provision in the proposed legislation delegating such power or authority in the State Governments. Thus, the provisions of the Bill are ambiguous and would raise questions with regard to the constitutional validity of the rules so made by any such state government.

VII. Issues To Be Addressed Before Enactment

The bill contains many ambiguities and omissions that need rectifications and improvements to avoid any controversies that may crop up later after its enactment such as:

- There is widespread sexual harassment indulged in by professionals such as doctors, lawyers and others which not necessarily be at work place but at any other place where inter or intra professional relationship may exist. For instance, a lawyer may be harassed by an entirely unrelated lawyer in the court premises. It may be the situation faced by a young doctor or nurse or chartered accountant or a manager. Provisions addressing such issues are needed to be incorporated with the idea that at least statutory bodies, for example, Bar Council of India, Medical Council of India or All India Council for Technical Education (AICTE) etc. start treating it as professional misconduct. Since professionals do not fall within the definition of either employer or employee, they cannot be removed, suspended or dismissed. Moreover, they are governed by their respective Codes of Conduct. Hence necessary amendments may be made in their

[39] J. S. Verma, J., in second annual convention of Women Power Connect, A national organization of women's group. Available at www.indianexpress.com, Posted Online, Aug. 18, 2007.

respective legislations. Myopic vision in this regard may prove to be fatal.

- It is trite to say most women who are subjected to sexual harassment or molestation have to undergo a harrowing time while being cross examined when irrelevant questions pertaining to their past sexual history are asked. The present bill does not extensively deal with the protection of such victims during interrogation or cross-examination.
- Educational Institutions have, so far, not been included under its ambit where from the maximum numbers of complaints have been reported in the recent past.[40]
- In case of unorganized sectors, appropriate bodies have not been identified to judge employer – employee relationship or to determine who will be the person carrying out these duties for women employed in such sectors.
- Armed and Para military forces have not been brought under the ambit of this law.

Justice J. S. Verma, who penned the *Vishaka* judgment, severally criticized the bill for its vague and loose definitions[41]. He said, "it's been exactly a decade since the judgment was passed on August 13, 1997, but the present Bill does not seem to have improved upon it any way," adding that the bill of this nature should stress on prevention rather than punishment. Displeased with the lack of implementation of the mechanisms for sexual harassment, Justice Verma said that it was imperative that any new legislation should also include a "monitoring mechanism" to check on the constitution and functioning of the complaints committees. It is evident that more than half the complaints submitted to the committees were rejected by the 'preliminary enquiry'. The new legislation has to ensure that such means can not be adopted to deny women justice.[42] With the bill in its present form, most women will not have the confidence of raising their voice against

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[40] Soma Sen Gupta of SANHITA in second annual convention of Women Power Connect, A national organization of women's group. Available at www.indianexpress.com, Posted Online, Aug. 18, 2007.

[41] Priyea Narula, in second annual convention of Women Power Connect, A national organization of women's group. Available at www.indianexpress.com, Posted Online, Aug. 18, 2007.

[42] *Supra* n.1, at 106-107.

harassment at the work place. The bill has to incorporate these suggestions before it is passed and takes final shape.[43]

Cynics and analysts apprehand that like other women oriented legislations, this one would also remain mere paper tiger and would not be useful as victimized woman may not like to make their private wounds public and would continue to suffer in silence due to inadequate safety measures for them. Moreover section 12 of the Bill may deter them from filing any case as the victim may not be in a position to prove her allegations. Also, they feel that the Act may be misused and instead of being a tool, it may become a weapon in the hands of the women to victimize their male bosses and colleagues.

As per an ILO publication, while drafting legislation, to provide explicit legal protection against sexual harassment, following elements should be addressed –

"Development and adoption of a nationally accepted explicit definition of sexual harassment";

"Delineate clearly the liability of the employer and the alleged harasser; provide affirmative duties to act towards the prevention of sexual harassment;

ensure fair, clear and suitable procedures of due process for both accused and claimant covering filing and hearing of complaints, investigations, evidence, burden of proof, protection of confidentiality and privacy;

protection against victimization; provide for wide range of damages, remedies and sanctions that both punish and deter harassing conduct; supplement legislation with guidelines;

[and] establish an administrative body or mechanism with resources and competence to handle complaints and promote application of the law.[44]

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[43] This is part of the recommendations made by the taskforce on Judicial Impact Assessment (JIA) set up in 2007 as per the Supreme Court Order in the Salem Advocate Case. The taskforce was headed by Justice M. Jagannadha Rao, retired Supreme Court Judge and former Chairperson, Law Commission. The report, given to the law ministry is to be presented to Supreme Court in July 2008. India will be the second country after USA to implement this concept.

[44] N. R. Madhava Menon, Member, Judicial Impact Assessment, THE TIMES OF INDIA, June 19, 2008.

Few of these important elements remain unaddressed in the proposed legislation such as burden of proof, protection against victimization or retaliation, deterrent provisions and supplemental guidelines.

The increase in work load of courts in implementing new legislation and providing financial support to the judiciary is also to be taken in to consideration.[45] Further before enacting a new law, three things should be considered i.e. the requirement of additional money, creation of more courts and appointment of additional judges to implement the law.

VIII. Conclusion

In the absence of a comprehensive legislation, it had been very difficult for victims of sexual harassment at work place to define her sufferings. Moreover, provisions of none of the existing statutes define and cover it in its real soul and spirit so as to address the issue in a desired manner. Notwithstanding the above, the present bill, unlike the previous bills, is neither incomplete nor hypocritical. It appears to touch this social aberration in a correct manner and approach. Undoubtedly, it looks at the issue of sexual harassment as a human rights issue and right of a woman to work in an environment free of any kind of harassment, discrimination and violence of any kind. The proposed legislation recognizes a social wrong that has for long been socially ignored and indirectly endorsed by not handling such sensitive issue properly or considering it to be a trivial matter.

The bill, if passed with the necessary amendments, would be an apt illustration of a comprehensive legislation which should be welcomed for its progressive spirit and content. It may also act as a weapon in the hands of aggrieved women if implemented with all precautionary measures. It is a sort of social welfare legislation which should be enacted not only for the sake of women but for the progress of the society as a whole. Moreover, it would also help the Government in fulfilling its international commitments under CEDAW.

No society can claim to be developed and civilized which breeds the collective culture of silence and tolerance to such discriminatory conduct.

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[45] Aditi Choudhary, *Protection of Women from Domestic Violence Act, 2005: Balancing Gender Equations*; XXVII Delhi Law Review 2005, p.115.

If implemented with true spirit and force, it can be said without any reservations that it will be able to attain its objectives and will have positive and wider impacts for the positive growth of the country, society and humankind as a whole. Such a law will at least be a starting point for a long-term battle against sexual harassment.

The bill outlawing the sexual harassment in the work place has been making rounds in various interactions for years, buoyed by the 1997 landmark case but it has failed to catch Parliament's eye yet again this past year. There has been no further indication by the Parliament as yet whether the bill would be tabled in the current session of the Parliament. The country must wake up from the deep slumber and enact legislation in this area with a strong and effective implementation mechanism so that avalanche of crime against women could be curbed. Moreover, adaptability is truly a condition *sine qua non* of the continued existence of a legal system.[46] When the behaviour of people has moved away from the law, with a sufficient degree of permanence, tensions arise with varying results. In such cases, the law itself may be stretched to take account of the development... [I]n these ways, *evolution gives direction to future developments because the purpose of law is to secure justice and not merely to grapple with semantics.*[47]

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[46] R.M.W. Dias, JURISPRUDENCE 305 (4th edition, Butterworths, 1994).

[47] J.S. Verma, Former CJI, Supreme Court, in Foreward to Markandey Katju, LAW IN THE SCIENTIFIC ERA: THEORY OF DYNAMIC POSITIVISM, (Universal Law Publishing Co., 2000).

JUDICIAL REFLECTIONS ON EXERCISE OF STATUTORY POWERS BY THE GOVERNOR

*K.D. Singh**

The Indian Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under this system the President is the constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Similarly, under the Cabinet system of Government as embodied in the Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.

At this state it is apposite to refer Articles 74 and 163 of the Constitution. Article 74, *inter alia*, states that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. Article 163, *inter alia*, states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, *except insofar as he is by or under the Constitution required to exercise his functions or any of them in his discretion.*

Thus, it is manifest that the Constitution confers some discretionary powers upon the Governor (in contradistinction to the position of President and Cabinet System) where he can act in his discretion without the aid and advise of the Council of Ministers. A quick glance at the Constitution and various judgments will bring out the following functions where the Governor can act on his own discretion :

(i) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under the Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final [Article 163(2)].

(ii) Special responsibilities of the Governor under Articles 371A(1)(b), 371A(1)(d), 371A(2)(b) and 371A(2)(f).

(iii) Para 9(2) of the Sixth Schedule in relation to determination of amount of royalties payable by licensees or lessees prospecting for, or extracting minerals, to the District Council.

(iv) Under Article 239(2) which states that where a Governor is appointed an administrator of an adjoining Union Territory he shall exercise his functions as such administrator independently of his Council of Ministers.

(v) Article 356 states that the Governor can send a report to the president that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. In making a report under Article 356 the Governor will be justified in exercising his discretion even against the aid and advice of Council of Ministers.

(vi) Under Article 200 also the Governor may act irrespective of any advice from the Council of Ministers in reserving for consideration any Bill which in his opinion if it became law, would so derogate from the powers of the High Court as to endanger the position which the High Court is designed to fill under the Constitution.

Besides the above, the President or Governor would be justified in acting without aid and advice of Council of Ministers where the Constitution specifically provides that the President/Governor would act only according to the opinion of the constitutional functionaries. In this connection, a reference can be made to Article 103 which specifically provides that the President acts only according to the opinion of the Election Commission. This is when any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in Clause (1) of Article 102. Similar provisions are made in case of disqualification of members of House of the legislature of a State under Article 192 which specifically provides that the Governor shall obtain the opinion of the Election Commission before giving any decision on any question as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in Clause (1) of Article 191, and shall act according to such opinion.

One more instance of such powers can be traced in Article 217(3) which provides that if any question arises as to the age of a judge of High Court, the same shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

Thus it is plain that under our cabinet system the President as well as the Governor are the constitutional or formal heads. The President as well as the Governor exercise their powers and functions conferred on them by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the President/Governor is required by or under the Constitution to exercise his functions in his discretion and further subject to specific functions assigned to the President/Governor which are exercisable by them after consultation with the named constitutional functionaries as stated above.

Over and above, the position so explained and exceptions elaborated, the Supreme Court in *Samsher Singh* v. *State of Punjab*[1], further declared few well-known exceptional situations illustratively where the President or Governor can act without the advice of Council of Ministers as under :

(a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House;

(b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office;

(c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step.

It may, however, be stated that the aforementioned exceptional situations were highlighted by Justice V.R. Krishna Iyer in his separate but concurring opinion. The main judgment was delivered by Chief Justice A.N. Ray for himself and four other judges. The separate but concurring judgment was delivered by Justice V.R. Krishna Iyer for himself and Justice Bhagwati. It appears that the third situation envisaged by justice Iyer did not find any explicit or implicit concurrence with the main judgment and hence cannot

be treated as binding. Even otherwise conferment of such wide power of great moment to the President/Governor in a Parliamentary democracy to their discretion, on their subjective satisfaction may subvert the constitutional scheme as it is fraught with dangerous proportions.

The present paper focuses on yet another penubral area of exercise of statutory powers by Governor under our constitutional scheme. The reasoning will apply, *mutatis mutandis*, to the exercise of statutory powers by the President.

A brief survey of case law on the subject will be appropriate.

In *Hardwari Lal* v. *GD Tapase*[2], a Full Bench of the Punjab and Haryana High Court was to consider whether the Governor in his capacity as the Chancellor of Maharshi Dayanand University was to act under Maharshi Dayanand University Act, 1975 (Haryana Act No.25 of 1975) in his official capacity as Chancellor or with aid and advice of the Council of Ministers. The Full Bench, after elaborate consideration of the provisions of the Act and the statutes, came to observe that the Act and the statutes intended that the State Government would not interfere in the affairs of the University[3]. The State Government is an authority quite distinct from the authority of the Chancellor. The State Government cannot advise the Chancellor to act in a particular manner. The University, as a statutory body, autonomous in character, has been given certain powers exercisable by the Chancellor in his absolute discretion without any interference from any quarter. In the appointment of the Vice-Chancellor or the Pro-Vice-Chancellor, the Chancellor is not required to consult the Council of Ministers. Though *by virtue of his office as Governor, he becomes the Chancellor of the University, but while discharging the functions of his office, he does not perform any duty or exercise any power of the office of the Governor individually*. However, while discharging the functions as a Chancellor, he does every act in his discretion as Chancellor and he does not act on the aid and advice of his Council of Ministers. The performance of the functions and duties under the Constitution with the aid and advice of the Council of Ministers is distinct and different from his discharge of the powers and duties of his office as Chancellor of the University. Under the

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[2] AIR 1982 P&H 439.

[3] *Id.*, para 121 at 476.

Act and the statute, the Chancellor has independent existence and exercises his powers without any interference from any quarter. Therefore, the office as a Chancellor held by the Governor is a statutory office quite distinct from the office of the Governor. Same view was taken by the Andhra Pradesh High Court in *Kiran Babu* v. *Govt. of AP*[4]. In *Ram Nagina Singh* v. *S.V. Sohni*[5] the question was as to the appointment of a Lokayukta under Section 3 of the Bihar Lokayukta Act, 1974 to be made by the Governor in his capacity as Governor of the State, with the aid and advice of the Council of Ministers. The language of Section 3(1) of the said Act provides that "the Governor shall by warrant under his hand and seal appoint a person to be known as the Lokayukta of Bihar". Considering the language in that provision and the scheme of the Act for removal of the Lokayukta, the Division Bench came to hold that the Governor, with the aid and advice of the Council of Ministers, discharges the function in the appointment of the Lokayukta under Section 3 of that Act. In the light of the language therein, there is little difficulty in upholding the correctness of the decision but it renders little assistance to the present controversy.

The Supreme Court approved the ratio *of Hardwari Lal's case in Bhuri Nath* v. *State of J&K*[6]. In this case the question which fell for consideration before the Supreme Court was whether the Governor exercises the powers under the Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 as executive head of the State or in his official capacity as the Governor of the State of Jammu and Kashmir. The administration, management and governance of the Shrine and the Shrine Fund are vested in the Board consisting of the Chairman and members nominated by the Governor. The Governor is the *ex-officio* chairman.

The Supreme Court after analyzing the Act held that in terms of the statute he is required to exercise his *ex-officio* power as Governor to oversee personally the administration, management and governance of the shrine. It was observed that the decision taken by him would be his own on his personal satisfaction and not on the aid and advice of the Council of Ministers.

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4. AIR 1986 AP 275

The exercise of powers and functions under the Act is distinct and different from those exercised formally in his name for which responsibility rests only with his Council of Ministers headed by the Chief Minister[7].

The court further held :

The constitutional mechanism, i.e., cabinet system of Government is devised for convenient transaction of business of the executive power of the State. Though constitutionally the executive power of the State vests in the Governor, he does not, unless the Constitution expressly conferred on him, personally take the decision. The decisions are taken according to business rules at different levels and ultimately the decision rests with the authority specified in the business rules and is expressed to be taken in the name of the Governor. In substance and in reality, decisions are taken by the Council of Ministers headed by the Chief Minister or the Minister or Secretary as per business rules. But they are all expressed to be taken by the Council of Ministers in the name of the Governor and authenticated by an authorized officer. The Governor being the constitutional head of the State, unless he is required to perform the function under the Constitution in his individual discretion, the performance of the executive power, which is coextensive with the legislative power, is with the aid and advice of the Council of Ministers headed by the Chief Minister.

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As posed earlier, the question is : When the Governor discharges the functions under the Act, is it with the aid and advice of the Council of Ministers or in his official capacity as the Governor? The legislature is aware of the above constitutional mechanism of governance. Equally, the legislature of Jammu and Kashmir, while making the Act would be presumed to be aware that similar provisions in the Endowment Acts exist in other States in India. Section 86 read with Section 95 of the Andhra Pradesh Charitable Hindu Religious Institutions and Endowments Act, 1966 gives

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[7] *Id.*, para 24 at 765.

power to "the State Government" to dissolve the Board of Trustees of Tirumala Tirupati Devasthanams and the Board of Trustees of other institutions and reconstitution thereof. Similarly, in Bihar Hindu Religious Trusts Act, 1950, Sections 7 and 8 give power to the State Government for appointment of the members of the Board and Section 80 empowers the State Government to dissolve the Board. The Bombay Public Trusts Act, 1950 confers similar powers on the State Government under Sections 56-D, 56-G, 56-H and 56-R. The Orissa Hindu Religious Endowments Act, 1959 contains similar provisions conferring power on the State Government, vide Section 4 thereof, for constitution of the Board. The U.P. Shri Kashi Vishwanath Temple Act, 1983 is yet another Act where the entire responsibility is saddled on the Governor.

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It would be clear that the legislature entrusted the powers under the Act to the Governor in his official capacity. It expressly states that he would preside over the meetings of the Board. If he is a non-Hindu, his nominees, an eminent qualified Hindu will be his substitute to preside over the functions. As seen, no distinction between the Governor and executive Government is made by the legislature in the relevant provisions in the Act. Under Sections 9, 11 and 12 of the Act, though the Governor acts as repository of the sovereign power of the State, the phraseology employed therein does not indicate that power is given to the Council of Ministers and the Governor is to act on its advice as executive head of the State. It is an admitted position that prior to the Act, Dharmarth Trust was in management and administration of the Shrine and the properties attached thereto.

Thus, the Supreme Court, held that the legislature entrusted the powers under the Act to the Governor in his official capacity and thus the decision is his own decision on his personal satisfaction and not on the aid and advice of the Council of Ministers.

A five judges Bench of the Supreme Court in *MP Special Police*

Establishment v. *State of MP*[8] missed an opportunity to decide this issue by an authoritative pronouncement. In the instant case the question directly and squartly pertained to exercise of statutory powers by the Governor. In this case sanction was applied for from the Governor for prosecution of two ministers of the Government of MP under sanction 197 of the Code of Criminal Procedure, 1973 for offences under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and also for the offences of criminal conspiracy punishable under Section 120-B of the Indian Penal Code, 1860.

The Governor granted the sanction on his own discretion contrary to advice tendered by the Council of Ministers. Accused ministers filed writ petitioner under Article 226/227 of the Constitution before the MP High Court. A single judge of the MP High Court held that the Governor could not act contrary to the "aid and advice" of the Council of Ministers and thus allowed the writ petitions. An *intra*-court Letters Patent Appeal filed by the prosecution before the Division Bench of the HC was also dismissed upholding the reasoning and judgment of the Single Judge. Hence the appeal before the Supreme Court.

The SC in this case posed the right question to decide the case as follows :

> The question for consideration is whether a Governor can act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for prosecution of Ministers for offences under the Prevention of Corruption Act and/or under the Indian Penal Code.

However, while deciding the issue, the Supreme Court completely misdirected itself and sidestepped rather ignored the issue and proceeded to decide the same on the ground of bias implicit in the process. It is submitted the issue which squarely to be decided was exercise of statutory powers by the Governor under Section 197 of CrPC, 1973. The SC had to decide the issue whether the Governor can act on his own discretion or on the aid and advice of Council of Ministers. The question of bias would arise later. The issue was larger having bearing upon the exercise of statutory

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[8] (2004) 8 SCC 788.

powers by the Governor. In exercise of such powers possibility of bias may arise, not only when he has to act on the aid and advice of Council of Ministers but even otherwise. That is a separate and subsequent issue and law on that is also no longer *res integra*.

Thus after misdirecting itself in law the SC allowing the appeal held:

> However, on those rare occasions where on facts the bias becomes apparent and/or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors, the Governor would be right, on the facts of that case, to act in his own discretion and grant sanction[9].

These sweeping observations create new exceptions not hitherto recognized by the SC even in *Samsher Singh's*[10] and clothes the Governor to act on his own discretion ignoring the aid and advice of Council of Ministers if the bias becomes apparent or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors. Thus the Governor has been exalted to the position of Super CM and appellate authority over the decisions of the Council of Ministers – an absurd situation not envisaged by the Founding Fathers. The decision is bad and is not supported by any authority.

In *fine*, it is clear the area in this branch of law, though not clear, yet veers to the proposition that the statutory powers may be exercised by the Governor on his own discretion and for this conclusion an analysis of the statute in question also plays a vital role in deciding whether powers are to be exercised by the Governor on his own discretion or otherwise.

LIABILITY OF MEDICAL PROFESSIONALS UNDER THE CRIMINAL LAW : RECENT JUDICIAL TRENDS

*Sushila**

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit[1]. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to a person and that person has not consented to suffer such harm[2]. Section 93 saves from criminality certain communications made in good faith[3].

It would be in order to preface this discussion with the law laid down by the Privy Council in *John Oni Akerele* v. *The King*[4]. A duly qualified medical practitioner gave to his patient the injection of Sobita which consisted of sodium bismuth tartrate as given in the British Pharmacopoea. However, what was administered was an overdose of Sobita. The patient died. The doctor was accused of manslaughter, reckless and negligent act.

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1 The Indian Penal Code, 1860
Section 88. Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

2 The Indian Penal Code, 1860 Section 92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.

3 The Indian Penal Code, 1860
Section 93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

4 AIR 1943 PC 72.

He was convicted. Their Lordships quashed the conviction. On a review of judicial opinion and an illuminating discussion on the points which are relevant here, what their Lordships have held can be summed up as under:

(i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State.

(ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a Court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. … There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.

(iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinion.

The most favourable view of the conduct of an accused medical man has to be taken, for *it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.* (Emphasis supplied)

Their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved.

The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in criminal law. In *Kurban Hussein Mohamedalli Rangawalla* v. *State of Maharashtra*[5],

while dealing with Section 304A of IPC[6], the following statement of law by Sir Lawrence Jenkins in *Emperor* v. *Omkar Rampratap*[7], was cited with approval:

> To impose criminal liability under Section 304A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans;* it is not enough that it may have been the *causa sine qua non.*

K.N. Wanchoo, J., speaking for the Court, observed that the above said view of the law has been generally followed by High Courts in India and was the correct view to take of the meaning of Section 304A. The same view has been reiterated in *Kishan Chand & Anr.* v. *State of Haryana*[8].

In *Juggankhan* v. *State of Madhya Pradesh*[9], the accused, a registered Homoeopath, administered 24 drops of stramonium and a leaf of Dhatura to the patient suffering from guinea worm. The accused had not studied the effect of such substances being administered to a human being. The poisonous contents of the leaf of Dhatura, were not satisfactorily established by the prosecution. The Supreme Court exonerated the accused of the charge under Section 302, IPC. However, on a finding that stramonium and Dhatura leaves are poisonous and in no system of medicine, except perhaps Ayurvedic system, the Dhatura leaf is given as cure for guinea worm, the act of the accused who prescribed poisonous material without studying their probable effect was held to be rash and negligent act. It would be seen that the profession of a Homoeopath which the accused claimed to profess did not permit use of the substance administered to the patient. The accused had no knowledge of the effect of such substance being

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6 The Indian Penal Code, 1860 Section 304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

7 4 Bom LR 679.

8 (1970) 3 SCC 904.

9 (1965) 1 SCR 14.

administered and yet he did so. In this background, the inference of the accused being guilty of rash and negligent act was drawn against him. The principle which emerges is that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is *prima facie* acting with rashness or negligence.

Dr. Laxman Balkrishna Joshi v. *Dr. Trimbak Bapu Godbole & Anr.*[10], was a case under the Fatal Accidents Act, 1855. It does not make a reference to any other decided case. The duties which a doctor owes to his patients came up for consideration. The Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties, *viz.*,

(a) a duty of care in deciding whether to undertake the case,

(b) a duty of care in deciding what treatment to be given and

(c) a duty of care in the administration of that treatment

A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor *without taking the elementary caution of giving anaesthesia to the patient.* The doctor was held guilty of negligence and liable for damages in civil law.

In the year 1996, there are three reported decisions available. *Indian Medical Association* v. *V.P. Shantha & Ors.*[11], is a three-Judge Bench decision. The principal issue which arose for decision by the Court was

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[10] (1969) 1 SCR 206.

[11] (1995) 6 SCC 651.

whether a medical practitioner renders 'service' and can be proceeded against for 'deficiency in service' before a Forum under the Consumer Protection Act, 1986. The Court dealt with how a 'profession' differs from an 'occupation' especially in the context of performance of duties and hence the occurrence of negligence. The Court noticed that medical professionals do not enjoy any immunity from being sued in contract or tort (i.e., in civil jurisdiction) on the ground of negligence. However, in the observation made in the context of determining professional liability as distinguished from occupational liability, the Court has referred to authorities, in particular, *Jackson & Powell* and have so stated the principles, partly quoted from the authorities:

> In the matter of professional liability professions differ from occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control.
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> In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. (See: Jackson & Powell on Professional Negligence, 3rd Edn., paras 1-04, 1-05, and 1-56).[12]

In *Poonam Verma* v. *Ashwin Patel &* Ors.[13], a doctor registered as medical practitioner and entitled to practise in Homoeopathy only, prescribed an allopathic medicine to the patient. The patient died. The doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practise in homoeopathy only, was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a

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[12] *Ibid.*.

[13] (1996) 4 SCC 332.

prohibited field and prescribed the allopathic medicine to the patient causing the death, his conduct amounted to negligence *per se* actionable in civil law. *Dr. Laxman Balkirshna Joshi's* case[14] was followed. Vide para 16, the test for determining whether there was negligence on the part of a medical practitioner as laid down in *Bolam's*[15] case was cited and approved.

In *Achutrao Haribhau Khodwa and* Ors. v. *State of Maharashtra and Ors.*[16], the Court noticed that in the very nature of medical profession, skills differ from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession. It was a case where a mop was left inside the lady patient's abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive. Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the abdomen of the lady. The doctrine of *res ipsa loquitur* was held applicable 'in a case like this'.

M/s. Spring Meadows Hospital & Anr. v. *Harjot Ahluwalia through K.S. Ahluwalia & Anr.*[17], is again a case of liability for negligence by a medical professional in civil law. It was held that an error of judgment is not necessarily negligence. The Court referred to the decision in *Whitehouse* v. *Jorden*[18], and cited with approval the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence:

> The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill

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14 *Supra* n.10.
15 [1957] 1 WLR 582.
16 (1996) 2 SCC 634.
17 (1998) 4 SCC 39.

that the defendant holds himself out as having and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence.[19]

It is pertinent here to quote some of the conclusions arrived at by the authors of *Errors, Medicine and the law*[20] highlighting the link between moral fault, blame and justice with reference to medical profession and negligence. The same are quoted below :

(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrong-doings may be a matter of dispute, but their necessity in principle from a moral point of view, has been accepted. Distasteful as punishment may be, the social and possibly moral, need to punish people for wrong-doing, occasionally in a severe fashion, cannot be escaped. A society in which blame is over-emphasized may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable.[21]

(ii) Culpability may attach to the consequence of an error in circumstances where sub-standard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable.[22]

(iii) Before the Court faced with deciding the cases of professional negligence there are two sets of interests which are at stake: the

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[19] *Ibid.*

[20] Alan Merry & Alexander McCall Smith, *ERRORS, MEDICINE AND THE LAW* at 241-48.

[21] *Id.* at 242-243.

[22] *Id.* at 245.

interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks.[23]

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrong doing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high, a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness.[24]

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between, (a) *accidents* which are life's misfortune for which nobody is morally responsible, (b) *wrongs* amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e., wrongs) calling for punishment on account of being *gross* or of a *very high degree* requires

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[23] *Id.* at 246-247.

and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society.[25]

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.[26]

In *Dr. Suresh Gupta* v. *Govt. of NCT of Delhi & Anr.*[27], the patient was operated by a plastic surgeon for removing his nasal deformity. While conducting the operation the surgeon gave incision at wrong part due to which blood seeped into the respiratory passage and the patient expired. The post-mortem report was that the cause of death was asphyxia resulting from blockage of respiratory passage by aspirated blood consequent upon surgically inside margin of nasal septum. The surgeon was prosecuted under Section 304A of the IPC. On approaching the High Court, it refused to quash the criminal proceedings. The doctor approached the Supreme Court submitting that even if the entire case of the prosecution was accepted, there was no case for convicting him. Allowing the appeal, the Supreme Court held :

> For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". It is not merely lack of necessary care, attention and skill. The decision of the House of Lords in *R* v *Adomako* relied upon on behalf of the doctor elucidates the said legal position and contains following observations :
>
> > Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State.

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[25] *Ibid.*

[26] *Jacob Mathew* v. *State of Punjab & Anr.*, AIR 2005 SC 3180.

[27] (2004) 6 SCC 422.

Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable. This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to risk of landing themselves in prison for alleged criminal negligence. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence. No doubt in *Suresh Gupta's case*, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be not introducing a cuffed endo-tracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage. This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligence as to make him criminally liable. Between civil and criminal liability of a doctor causing death of his patient the court

has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing, i.e., a higher degree of morally blameworthy conduct. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable. The following concluding observations of the learned authors in their book on medical negligence[28] are apt on the subject and a useful guide to the courts in dealing with the doctors guilty of negligence leading to death of their patients :

> Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrong doing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high – a standard traditionally described as gross negligence. Further, it held that blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate use, however, distorts tolerant and constructive relations between people. Some of life's misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute

[28] *Supra* n. 20 at 247-48.

grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis.

After examining all the medical papers accompanying the complaint, the Court found no case of recklessness or gross negligence made out against the doctor to compel him to face the trial for offence under Section 304A of the IPC. As a result the Supreme Court allowed the appeal and set aside the impugned orders of the Magistrate and of the High Court and quashed the criminal proceedings pending against the doctor.

In *Jacob Mathew's*[29] case, one Jiwan Lal Sharma suffering from cancer was admitted in a private ward of CMC Hospital, Ludhiana on 15-02-1995. On 22-02-1995 at about 11pm he felt difficulty in breathing. His brother contacted duty nurse who in turn called some doctor to attend to the patient but no doctor turned up for about 20 to 25 minutes. Then, Dr. Jacob Mathew and Dr. Ellen Joseph arranged an oxygen cylinder and connected it to the mouth of the patient but the breathing problem increased further. The cylinder was found to be empty. No other gas cylinder was available in the room. Patient's brother brought one cylinder from adjoining room but there was no arrangement to make the gas cylinder functional. In-between, 5 to 7 minutes were wasted. By this time another doctor came and declared the patient dead. On a report by the deceased's son, a case was registered under Section 304A IPC. The magistrate framed charges against the two doctors. Sessions' Court dismissed the revision petition. Then the doctors approached High Court for quashing FIR and all subsequent proceedings.

It was submitted before the High Court that there was no specific allegation of any act of omission or commission against the accused persons in the entire plethora of documents comprising the challan papers filed by the police against them. The learned single judge who heard the petition formed an opinion that the plea raised by the appellant was available to be urged in defence at the trial and, therefore, a case for quashing the charge was not made out. An application for recalling the above said order was moved which too was dismissed. Feeling aggrieved by these two orders, the appellant filed appeal by special leave before the Supreme Court.

[29] *Supra* n. 26.

The matter came up for hearing before a Bench of two learned judges of the Court. Reliance was placed by the appellant on two judges Bench decision of the Supreme Court in *Dr. Suresh Gupta's* case[30]. The Bench hearing the appeal doubted the correctness of the view taken in *Dr. Suresh Gupta's* case and expressed an opinion that the matter called for consideration by a Bench of three Judges.

The referring Bench in its order dated 09.09.2004 has assigned two reasons for their disagreement with the view taken in *Dr. Suresh Gupta's* case which are as under :

(1) Negligence or recklessness being 'gross' is not a requirement of Section 304A, of IPC and if the view taken in *Dr. Suresh Gupta's* case is to be followed then the word 'gross' shall have to be read into Section 304A IPC for fixing criminal liability on a doctor. Such an approach cannot be countenanced.

(2) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degree of rashness or negligence, violence would be done to the plain and unambiguous language of Section 304A. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved.

The order of reference has enabled the Supreme Court to examine in depth the concept of 'negligence', in particular 'professional negligence' and as to when and how it does give rise to an action under the criminal law. Accordingly, the Supreme Court in *Jacob Mathew's case*[31] after discussing the issues summed up the conclusions as under :

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.

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[30] *Supra* n. 27.
[31] *Supra* n. 26.

Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three : 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings : either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practises. A highly skilled professional may be

possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in *Bolam's case*[32] holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher, i.e., gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has, if at all, a limited application in trial on a charge of criminal negligence.

Thus the Supreme Court agreed with the principles laid down in *Dr. Suresh Gupta's* case[33] and reaffirmed the same. The Supreme Court further

[32] (1957) 1 WLR 582 at 586.

laid down the Guidelines for Prosecuting Medical Professionals as follows :

> As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.[34]
>
> We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.[35]

And lastly, the Court held that Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, the court proposed to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal

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[33] *Supra* n. 27.
[34] *Supra* n. 26.
[35] *Ibid*.

negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced *prima facie* evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in Government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying *Bolam's* test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.[36]

Thus, the Supreme Court has been pragmatic and considerate in dealing with the criminal liability of the medical practitioners for medical negligence, but not in the least lenient as some of the medical practitioners might like to believe. The judgment erects safeguards against indiscriminate prosecution, but it does not shield them from criminal liability if any of them is negligent.

PHARMACEUTICAL PATENTS: INDIA AND BEYOND

*Abhinav Bhalla**

"The idea of a better-ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and death."

– Mrs. Indira Gandhi at the World Health Assembly in 1982

I. INTRODUCTION

Probably the most controversial aspect of India becoming the member of the WTO has been the advent of product patents in the field of pharmaceuticals. The Indian pharmaceutical industry flourished under the Patent Act, 1970 which provided only for process patents of drugs. The industry achieved remarkable progress during this period and is now a source of low cost generic drugs to the entire world. The role of private investment in the field of research and development of pharmaceutical drugs cannot be denied. Moreover, it is easy for small firms to reverse engineer the drugs and enjoy the fruits of someone else's work and millions spent on the research and development (R&D) of such drugs. Thus, economically it is not viable for research firms to develop new drugs without the provision of adequate patent protection.

Patent protection to new innovations is based on the concept of *quid pro quo*. The innovator is given exclusive right to use or exercise and commercially exploit an invention for a certain period and in consideration he discloses the information about the invention to the world at large which becomes a public property once the patent period is over. Patent protection not only stimulates future innovators but also promotes investment in the innovation and allows it to be made into a commercial product.

The Indian pharmaceutical industry has special significance in the case of pandemics such as AIDS. The Antiretroviral (ARV) drugs marketed by firms from developed countries, which offer product patents on drugs, are

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priced exorbitantly. The Indian generic drug manufacturers, on the other hand, are offering these drugs at 5% of that price. This difference in price while maintaining similar quality of the drugs made India the pharmacy of the developing world.

The scenario in India changed with the Patent (Amendment) Act, 2005, which was enacted to comply with the provisions of TRIPS Agreement. TRIPS Agreement aims at establishing minimum standards for Intellectual Property Rights for the WTO member countries. The members have to provide for product patent protection for all the products including pharmaceuticals within the specified time period. This created a lot of hue and cry. The general feeling being that this will lead to pharmaceutical companies charging exorbitant prices for their patented drugs and this in turn will lead to public health crisis in the developing countries which rely heavily on the cheap generic copies of the patented drugs produced in India. Although a lot of policy changes are being brought about due to the pressure being put by various NGOs on the governments but it is still uncertain if these are going to be of any major help. This paper provides an outline of the Indian patent law related to the pharmaceutical drugs along with the amendments brought about by the TRIPS agreement. It analyses the implications of the controversial law and what could be its long-term effects in the developing world. It goes on to analyse the ways available in the TRIPS agreement itself to go around this problem.

II. History of The Indian Patent Law

Patent laws were first promulgated in India in 1856, a year before her first war of independence in 1857. These laws were modified from time to time, and more stable patent and design laws were enacted in 1911. At that time the patent laws were the same as followed in England and therefore were at par with the laws of most advanced countries. These laws were revisited after India got her independence in 1947 and it was decided that the laws required some changes in order to meet the social and economic needs of the country, with a large population of poor people who did not have easy access to medicines and other advancements of science. At the same time there was the desire to be self-reliant in many areas of technology and this led to serious efforts towards nurturing science and technology in India. The patent laws were revised and the Patent Act, 1970 was enacted,

which did not allow patenting of substances emanating as a result of chemical reactions. Product patents were allowed except in respect of drugs, chemicals and food items. However, process patents are granted for drugs, food items and chemicals.

The Patent and Design Act,1911 provided for product patents of drugs but were excluded from the 1970 Act. This exclusion was introduced to secede India's dependence on imports for bulk drugs and formulations and provide for development of a self-reliant indigenous pharmaceutical industry.

III. The Effect Of Patent Act, 1970

The Indian Patent Act of 1970[1] came into force in 1972. At that time, the national sector was very small, estimated at less than 25% of the domestic pharmaceutical market. Of the top ten firms by retail sales, only two were Indian firms and the rest were subsidiaries of multinationals. Much of the country's pharmaceutical consumption was met by imports. The Act specifically excluded patent coverage for pharmaceutical products and only admitted process patents for a period of 5 or 7 years. In essence, the India Patents Act gave only very limited protection to research-based pharmaceutical companies. Imitating firms only had to avoid patented processes to copy a newly developed drug. It is, however, in most cases very easy to modify or circumvent a patented process in order to avoid infringement. Without product patents, protection of new drugs was very limited. Moreover, because of the various restrictions related to process patents, protection was even further reduced. As a result, the number of patents granted per year fell by three-quarters[2] over the following decade, from 3,923 in 1970-71 (of which 629 were to Indian applicants, 3,294 to foreign applicants) down to 1,019 in 1980-81 (349 Indian, 670 foreign). Supported by the regulatory environment, such as created by Drug Price Control Order (DPCO, 1970), by 1991, Indian firms accounted for 70% of the bulk drugs and 80% of formulations produced in the country. Of the top ten firms by 1996 pharmaceutical sales, six were now Indian firms rather than the subsidiaries of foreign multinationals. Domestic firms produced about

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1 Available at: http:// www.patentoffice.nic.in

2 Peoples' Commission on Patent Laws for India, Report of the Peoples' Commission on Patent Laws for India, New Delhi: Centre for Study of Global Trade System and Development, 2003.

350 of the 500 bulk drugs consumed in the country. Employment in the pharmaceutical sector was estimated to have reached almost half a million by 1995.

IV. The TRIPS Agreement

A. How it came into being

The World Trade Organization (WTO) and the TRIPS Agreement were created in the framework of the General Agreement on Tariffs and Trade (GATT) and agreed upon in 1994. The TRIPS Agreement is undoubtedly the most significant development in intellectual property, together with the creation of the World Intellectual Property Organization (WIPO) at the 1968 Stockholm Conference[3]. TRIPS, which set the minimum standard for IPR protection among the WTO members, became final after many negotiations between 1986 and 1994. The first proposal that had similarities with the final TRIPS Agreement was tabled by the EC in March 1990, and was entitled "Draft Agreement on Trade-Related Aspects of Intellectual Property". The US closely followed with a very similar draft, which also carried the same title. Consultations between the two had probably preceded the tabling of both documents. Many countries disagreed with the proposals in full or in part, filing additional proposals. What the developing countries were especially concerned about was the inclusion of pharmaceutical products in the agreement.

In June 1990 the Chairman of the negotiations put forward a draft called "Chairman's draft" or "Composite draft text", which included and combined all of the suggested proposals. Developing countries opposed an all-encompassing agreement on intellectual property, especially as they felt that the proposal by the Chairman adopted an overall structure that was very similar to that of the EC and the US proposals. During further discussions it was clear that the question of protection of pharmaceutical products through patents was one of the major issues to be resolved. However, with a new draft of TRIPS presented by the Chairman, the reactions were mainly positive and although pressure still existed for changes,

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[3] Mirza, Zafar WTO/TRIPs, Pharmaceuticals and Health: Impacts and Strategies, The Society for International Development, SAGE Publications, 1999: http://www.sagepub.co.uk/journals/Details/issue/sample/a010932.pdf

few amendments were made before the final TRIPS Agreement was adopted at Marrakech in 1994. Regarding pharmaceutical patents, the two parties mainly opposing the agreement were India and the American pharmaceutical industry. Although it was not a party to the Agreement, the American pharmaceutical industry was a powerful lobbyist. The industry felt that it was not receiving the immediate protection it wanted because of the transition rules, which stretched the transition periods for least developed countries (LDCs) even further. India was, and still is, concerned about restrictions on compulsory licensing of patents, found in TRIPS, Article 31. It seems evident that the two could not have found a draft with which they were both satisfied[4].

It is commonly known that TRIPS was formulated when the industrialized countries, as a result of pressure from the pharmaceutical, software and phonogram industrial lobbies, forced the agenda to have the standard of protection for IPRs universalised and recognised as a trade issue.

The Preamble to the agreement recognises that IPRs are private rights. But it also recognises the underlying public policy objectives and the special needs of the developing countries to have flexibility in implementing the provisions of TRIPS. The protection of the rights of the patentees however is not the sole concern of TRIPS. TRIPS provide flexibilities for governments to fine-tune the protection granted in order to meet social and economic goals. Article 7 of TRIPS on *Objectives* speaks of the mutual advantage of both producers and users of technological knowledge and stresses the need for a balance of rights and obligations. TRIPS recognises in Article 7 that the protection and enforcement of IPRs should be "conducive to social and economic welfare." Again Article 8 on *Principles*, empowers the member countries to adopt measures to "protect public health and nutrition, and to promote the public interest in sectors of vital importance ..." and "to prevent the abuse of intellectual property rights by right holders." Such measures are however required to be consistent with the provisions of TRIPS.

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[4] TRIPS, pharmaceuticals and public health: http://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm

B. TRIPS Agreement and the Indian pharmaceutical patents

India, as a member of the World Trade Organization (WTO), has to comply with the provisions set forth in the TRIPS Agreement. The main provisions of TRIPS as they relate to pharmaceutical patents can be summarized as follows[5]: Among the general obligations, Articles 3 and 4 of TRIPS require member governments to apply the principles of national treatment, i.e. equal treatment of nationals and non-nationals, and most-favored-nation (MFN) treatment, i.e. equal treatment of foreigners regardless of their country of origin. With respect to patents, Article 27.1 of TRIPS states that "...patents shall be available for any invention, whether products or processes, in all fields of technology...," which clearly encompasses pharmaceutical products. Moreover, "...patents shall be available... whether products are imported or locally produced," which means that importation counts as working the patent. Article 31 addresses the use of patented subject matter without the authorization of the rights holder, e.g., through compulsory licenses. Although it ties such unauthorized use to specific conditions, legal interpretations of Article 31 vary and it has been argued that national governments have some leeway in designing rules regulating the grant of compulsory licenses. Article 33 sets a uniform minimum term of patent protection of 20 years counted from the filing date. Article 34.1 specifies that the burden of proof in case of process patent infringement rests with the defendant, i.e. the party accused of patent infringement. Finally, Article 41.1 requires member governments to "...ensure that enforcement procedures... are available under their national laws so as to permit effective action against any act of infringement of intellectual property rights..." and Article 62.2 obligates members to "...ensure that the procedures for grant or registration ...permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection."

The provisions of TRIPS became applicable to all signatories by the beginning of 1996. However, Articles 65.2 and 65.4 of the TRIPS Agreement entitle developing countries to a four-year transition period in implementing all obligations (except for obligations pertaining to national and

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[5] The WTO website's gateway to TRIPS: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm

MFN treatment) and an additional five-year transitional period for product patents in fields of technology that were not protected at the date of application of the Agreement. Accordingly, India had to amend its patent law to allow for the grant of pharmaceutical product patents by 2005. Article 70.3 does not require member countries to extend protection to subject matter in existence before the introduction of a new law, i.e. patent protection would not apply retroactively. Articles 70.8 and 70.9, however, also specify that members should "...provide ...a means for which patents for [pharmaceutical and agricultural chemical products] can be filed" (this 'means' is often referred to as a 'mail-box'). Moreover, for such 'mail-box' applications "...exclusive marketing rights shall be granted ...for a period of five years after obtaining market approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that ...a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member." To that extent the exclusive marketing rights related to 'mail-box' applications and exclusive rights conferred by a regular patent title are practically the same, Articles 70.8 and 70.9 effectively offset the transition period with regard to pharmaceutical product patents.

Thus India went through three stages to comply with the TRIPS provisions[6]:

1) Introduction of a "mail box" facility from January 1, 1995 to receive and hold product patent applications in the fields of pharmaceuticals (and agricultural chemicals). Such applications were not processed for the grant of a patent until the end of 2004. But Exclusive Marketing Rights (EMRs) could be obtained for those application if a patent has been granted in some other WTO member country and the application has not been rejected in the country as not being an invention.
2) Compliance, from January 1, 2000 with other obligations of TRIPS, namely, those related to rights of patentee, term of patent protection, compulsory licensing, reversal of burden of proof and so on, and

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6 Sudip Chaudhuri, *Trips Agreement And Amendment of Patents Act In India*, EPW, August 2005.

3) Introduction of full product patent protection in all fields including pharmaceuticals from January 1, 2005. All the product patent applications held in the mail box are also required to be taken up for examination from January 1, 2005.

C. Apprehensions to TRIPS

A number of new medicines that are vital for the survival of millions are already too costly for the vast majority of people in poor countries. In addition, investment in R&D towards the health needs of people in developing countries has almost come to a standstill. Developing countries, where three-quarters of the world population lives, account for less than 10% of the global pharmaceutical market. The implementation of TRIPS is expected to have a further upward effect on drug prices, while increased R&D investment that aims at addressing health needs in developing countries, despite higher levels of intellectual property protection, is not expected. One-third of the world population lacks access to the most basic essential drugs and, in the poorest parts of Africa and Asia, this figure climbs to one half[7].

Access to treatment for diseases in developing countries is problematic either because the medicines are unaffordable, have become ineffective due to resistance, or are not sufficiently adapted to specific local conditions and constraints.

Many factors contribute to the problem of limited access to essential medicines. Unavailability can be caused by various factors such as logistical supply and storage problems, substandard drug quality, etc. Despite the enormous burden of disease, drug discovery and development targeted at diseases in poor countries has virtually ground to a standstill because drug companies in developed and developing nations simply cannot recoup the cost of R&D for products to treat diseases that abound in developing countries. Of the 1,223 new drugs approved between 1975 and 1997, approximately 1% (13 drugs) specifically treats tropical diseases[8].

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[7] R. Chaudhuri, B. Chatterjee and P.S. Mehta, *TRIPs and Pharmaceuticals: Implications for India*, Consumer Unity & Trust Society (CUTS) Briefing Paper: http://www.cuts-india.org/1997-8.htm#Pharmaceutical%20 Industry%20in

[8] Brown, Eric. *TRIPS: India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*. European Journal of International Law (1998). Nov, 2002: http://www.ejil.org/journal/ Vol9/No1/sr1f.html

Medecins sans Frontieres (MSF), together with other non-governmental organizations (NGOs), formulated the following concerns related to TRIPS[9]:

- Increased patent protection leads to higher drug prices. The number of new essential drugs under patent protection will increase, but the drugs will remain out of reach to people in developing countries because of high prices. As a result, the access gap between developed and developing countries will widen.
- Enforcement of WTO rules will have a negative effect on local manufacturing capacity and will remove a source of generic, innovative, quality drugs on which developing countries depend.

It is unlikely that TRIPS will encourage adequate R&D in developing countries for diseases such as malaria and tuberculosis, because poor countries often do not provide sufficient profit potential to motivate R&D investment by the pharmaceutical industry.

Developing countries are under pressure from industrialized countries and the pharmaceutical industry to implement patent legislation that goes beyond the obligations of TRIPS. This is often referred to as "TRIPS plus." TRIPS plus is a non-technical term which refers to efforts to extend patent life beyond the twenty-year TRIPS minimum, to tighten patent protection, to limit compulsory licensing in ways not required by TRIPS, or to limit exceptions which facilitate prompt introduction of generics.

Industrialized countries and World Intellectual Property Organization offer expert assistance to help countries become TRIPS-compliant. This technical assistance, however, does not take into account the health needs of the populations of developing countries. Both of these institutions are under strong pressure to advance the interests of large companies that own patents and other intellectual property rights.

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[9] *A Matter of Life and Death: The Role of Patents in Access to Essential Medicines.* MEDECINS SANS FRONTIERES CAMPAIGN FOR ACCESS TO ESSENTIAL MEDICINES. Nov, 2002: http://www.accessmedmsf.org/upload/ReportsandPublications/291020011614133/dohacol.pdf

V. Indian Pharmaceutical Industry And Its Role In The Third World

The highly organized Indian pharma industry is in the forefront of scientific industries, with a wide range of capabilities in the technological and drug manufacturing fields. The Indian pharma industry is estimated to be worth about $10 billion, with an 8-9% annual growth rate. It is one of the leading industries among the Third World countries, and is highly respected for its quality, technology, and range of drugs manufactured and supplied at competitive prices. Export markets primarily propel the growth of the Indian pharma industry. India exports its drugs to more than 65 countries[10].

According to *McKinsey*,[11] Indian pharma exports contribute US $3.2 billion out of the annual turnover of $5 billion, with the industry further assured to grow at $25 billion by 2010. Indian pharma industry's share in value terms in the global market is estimated to be at 1% (13th rank), while in volume terms, it is 8% (4th rank). India also has the largest number (74) of US Food & Drug Administration (USFDA) approved drug manufacturing facilities outside the US. There were 126 Drug Master Files (DMFs) filed by Indian companies, which was higher than the combined DMFs of China, Italy, Spain and Israel. Indian companies, on an average, account for 35% of all DMF applications in the US. The Indian companies' share in the domestic market has witnessed continuous growth from nearly 20% in 1970 to 70% in 2005. In terms of revenue, Ranbaxy Laboratories leads the Indian pharma companies, while Cipla and Dr. Reddy's Laboratories stand second and third respectively[12].

The ability of the Indian firms to produce generic versions of the modern drugs is a boon to the developing and least developed countries. Many of the third world countries do not have the technology and the

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[10] *Indian Pharma Revenues to Touch $25 Billion by 2010,* The Economic Times, 1 May 2001.

[11] *Four Opportunities in India's Pharmaceutical Market,* The McKinsey Quarterly, No.IV, 1996.

[12] Jean O Lanjouw, *The Introduction of Pharmaceutical Product Patents in India: 'Heartless Exploitation of the Poor and Suffering'?,* Yale University, Economic Growth Center, Center Discussion Paper No. 775, August 1997.

economic capacity to produce these drugs. Indian generics account for almost half of the ARVs used in the developing world[13]. Thus, there is a lot on stake for these countries. Exporting of generic drugs to third world countries is already a low profit activity, now with the new patent laws these exports, using the concept of compulsory licensing, are bound to become extremely difficult and costly, if not altogether impossible. The drugs, which acquired patent before January 1, 1995 do not come under the effect of the product patent regime brought about by the amendment in the patent law of India. This means that the Indian pharmaceutical firms for the time being can continue manufacturing the generic versions of those drugs and supply to the third world countries that are in dire need of those drugs. The problem will escalate later when resistance to the current drugs will be developed and the law will prevent production and export of the generic versions of the subsequent generations of these drugs including ARVs and it will be in the hands of the firm with the patent of that drug to decide the price, which will not be low considering there will be no competition from the generic drug manufacturers.

VI. Concept Of "Ever-Greening"

Ever-greening, in one common form, occurs when a brand-name manufacturer literally "stockpiles" patent protection by obtaining separate 20-year patents on multiple attributes of a single product. These patents can cover everything from aspects of the manufacturing process to tablet colour, or even a chemical produced by the body when the drug is ingested and metabolized by the patient. When ever-greening through patent strategies, the originator manufacturer simply keeps adding patents to the product, which may not be legitimate even, essentially forcing the generic manufacturer to wait for all the patents to expire[14].

Ever-greening of pharmaceutical drugs is prevented under section 3(d)[15] of the Indian Patent Act of 1970:

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[13] Shadlen, Ken, DESTIN, *Patents, India, and HIV/AIDS treatment*, LSE, LSEAIDS, Update 4, April 2005

[14] Andrade, Chittranjan, Nilesh Shah and Sarvesh Chandra, *The new patent regime: Implications for patients in India,* March 2007: http://www.indianjpsychiatry.org/article.asp?issn=0019-5545;year=2007; volume=49; issue=1;s page=56; epage=59; aulast=Andrade

Section 3- What are not inventions. The following are not inventions within the meaning of this Act, -

[...]

(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of the substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;

Explanation. For the purposes of this clause, salts, esters, ethers, polymorphs, metabolities, pure form, particle size, isomers, mixture of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy;

Thus, the Indian law does not grant patents to incremental innovations although there is a huge pressure on the government to allow ever-greening. The argument is that molecules are patented very early during the process of drug discovery, but unique clinical characteristics or benefits are not discovered until much later, when clinical trials are conducted, if at all. Therefore, it is unreasonable to ask that unique characteristics of a slightly altered molecule be described at the time of the application for the patent, itself.

A government-appointed committee on patent laws, headed by R.A. Mashelkar[16], a former chief of the Council for Scientific and Industrial Research, favored the grant of patents to all incremental innovations made to a drug, but not to frivolous ever-greening. The report was widely interpreted to permit most forms of ever-greening. The report was withdrawn in February 2007, after it was discovered that a part of the report was lifted, without acknowledgement and verbatim, from a paper published by a UK-based organization which had been funded by the pharmaceutical industry.

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[15] *Supra.* n.1.

[16] MASHELKAR COMMITTEE REPORT available at: http://www.patentoffice.nic.in/ipr/patent/mashelkar_committee_report.doc

Some excerpts from the report:

> [...]
>
> Granting patents only to NCEs or NMEs and thereby excluding other categories of pharmaceutical inventions is likely to contravene the mandate under Article 27 to grant patents to all 'inventions'. Neither Articles 7 and 8 of the TRIPS Agreement nor the Doha Declaration on TRIPS Agreement and Public Health can be used to derogate from this specific mandate under Article 27. (5.6)
>
> Article 1 of the TRIPS Agreement requires compliance to the provisions of the Agreement, while TRIPS plus provisions are optional. This would mean that limiting grant of patents to pharmaceutical substances to new chemical entities only, and excluding new forms of crystals, polymorphs, etc., if they satisfy the criteria of patentability, is not consistent with TRIPS Agreement. (5.7)
>
> [...]
>
> It is important to distinguish 'ever-greening' from what is commonly referred to as 'incremental innovation'. While 'ever-greening' refers to an extension of a patent monopoly, achieved by executing trivial and insignificant changes to an already existing patented product, 'incremental innovations' are sequential developments that build on the original patented product and may be of tremendous value in a country like India. Therefore, such incremental developments ought to be encouraged by the Indian patent regime. (5.10)

Interestingly, according to the submissions of various Indian pharmaceutical industries in the report, such as Ranbaxy, it would be in the long-term interest of Indian companies, which have far less resources, to go in for early commercialization of their incremental innovations[17].

A. Novartis Case

From 1995 to 2005, when the "mail-box" and exclusive marketing rights (EMRs) provisions were in force in India, contrary to the apprehensions, only a few applications for EMR were filed in India. But the one granted to an MNC, Novartis, for an anti-cancer drug, imatinib mesylate (Novartis' brand name: Glivec) created a

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[17] *Ibid.*

controversy[18]. Under Article 70(3) of TRIPS, a WTO member country has no obligation to provide protection (through patents or EMRs) for any subject matter which has fallen into the "public domain" before WTO came into being, i.e., before 1 January, 1995. Patent information published in the US FDA Orange Book shows that Novartis' patent for the new chemical entity, imatinib mesylate was granted in USA before 1995.A number of Indian companies have been manufacturing and marketing generic versions before the EMR was granted to Novartis in November 2003. Compared to the price of Rs 120000 per month for the Novartis's product, generic versions cost between Rs 9000 and Rs 12000. The EMR sought and granted to Novartis is for modification of the crystal form of imatinib mesylate (beta-crystal form). Novartis' EMR relates to this modified form for which it got patent and marketing approval in Australia during 2001-03. Novartis filed suits against the generic companies in the Madras High Court. The latter passed an interim order restraining six Indian companies from manufacturing and marketing imanitib mesylate. What was basically being contested was whether secondary patents obtained after 1995 for a new chemical entity patented before 1995 can be used to prevent generic companies from producing the drug. After 2005 deadline, when the mail-box applications came to be reviewed by the patent office, the patent to Novartis AG's Glivec was rejected in January 2006 under section 3(d) of the Act. Novartis challenged the rejection of patent to Glivec as well as the legal provision that allowed for this contending that the said section was not compliant with the WTO's TRIPS agreement and violated the Indian Constitution as it was "vague" and gave arbitrary powers to the patent authority[19].

On August 6, 2007 the court dismissed Novartis petition and observed that the relevant section was neither "vague or ambiguous", nor did it give the patent authority arbitrary powers. The section has "in-built material" to guide patent authorities to take a decision on an application. The judges said when the TRIPS itself provides for a dispute settlement mechanism, the courts have no jurisdiction to decide whether the amended section violates Section 27 of the agreement.

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[18] Sudip Chaudhari, THE WTO AND INDIA'S PHARMACEUTICALS INDUSTRY (New Delhi: Oxford University Press; 2005).

[19] Novartis Glivec patent case information center:http://www.novartis.com/newsroom/india-glivec-patent-case/index.shtml

The court's decision was cheered by health activists and patients groups as a landmark decision that would ensure the availability of cheap generic or off-patent drugs. Tido von Schoen-Angerer, director of MSF Campaign for Access to Essential Medicines, said, "This is huge relief for millions of patients and doctors in developing countries who depend on affordable medicines from India."[20]

B. Roche Controversy

Recently, the Chennai patent office in India granted a patent to an anti-HIV drug, valganciclovir, to F Hoffman-La Roche Ltd, a Swiss drug maker, without hearing groups opposed to monopoly protection given to the medicine. A Mumbai-based NGO, Lawyers Collective that works for AIDS patients' access to medicines in India, plans to file a case against the patent controller of India and the Chennai patent office.

Lawyers Collective had filed a pre-grant opposition to the valganciclovir patent application of Roche in 2006 on the ground that the drug was a pre-1995 molecule. Valganciclovir, which was invented by Roche in 1994, was patented first in Switzerland the same year. The drug, sold by Roche as Valcyte internationally, nevertheless, was granted the India patent. Roche charges about $9,900 for a three-month treatment for valganciclovir and has reduced the price to $1,800 for NGOs and customers in Sub-Saharan African and LDCs[21].

The patent will prevent Indian generic drug maker Cipla Ltd, which is currently developing a generic version of the said drug. There are no other generic copies of the drug, used by HIV patients to ward off infection.

C. South African Dispute

Responding to the alarming growth of HIV infections in the country, South Africa passed a law in 1997 giving the government "blanket powers to...produce or import cheap alternatives to the brand-name drugs for HIV and other diseases." Since producers of generics do not need to invest money in research, they can sell at a fraction of the cost of patented drugs. This

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[20] *Court rejects Novartis challenge of patent law, Glivec Case*, MINT, August 7, 2007.

[21] *Lawyer group to challenge patent for Roche's anti-HIV drug*, Pharma Controversy, MINT, September 26, 2007.

fraction can be as little as six percent. Thirty-nine pharmaceutical companies raised a court challenge to prevent South Africa from implementing the law. John Barton, former chair of the UK Commission on Intellectual Property Rights, observes that this move "became a public relations debacle for the industry." A multitude of NGOs, including Oxfam and Medecins Sans Frontieres (MSF), sharply criticized the pharmaceutical companies for attempting to restrict health access. With pressure mounting, the companies eventually dropped their challenge, "after threats that the amount of public support for the development of the relevant drugs would be publicized in the hearings." Despite the victory, the South African government has been criticized for moving too slowly on resolving its AIDS epidemic since then.

D. Brazilian Example

In 1996, the Brazilian government began offering free ARV therapy to people with AIDS. As the costs of this program grew, the government expanded its health budget and increased its production and import of generics. Brazil also used the threat of compulsory licensing – authorizing companies to produce generic copies of patented drugs – to force patent-holders to cut prices. As a result, drug prices in Brazil were much lower than other countries and the government succeeded in cutting AIDS mortality rates by 50 percent. In response to Brazil's actions, the US filed a complaint with the WTO in early 2001, accusing the government of violating TRIPS.

As in the case of South Africa, the move backfired. In April 2001, all members of the UN Human Rights Commission except the US supported a Brazilian resolution asking nations not to "deny or limit equal access for all persons to preventive, curative or palliative pharmaceutical or medical technologies used to treat pandemics such as HIV/AIDS." The US withdrew the complaint in June 2001, saying it would pursue the issue in bilateral talks[22].

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[22] Jayashri Kulkarni, *Brazilian Pharma Market: A Veritable Goldmine for Generic Players?* www.pharmabiz.com, August, 2004.

VII. Flexibilities In Trips

A. Eligibility for patenting

Government can refuse to grant patents for three reasons that may relate to public health[23]:

- inventions whose commercial exploitation needs to be prevented to protect human, animal or plant life or health (Article 27.2)
- diagnostic, therapeutic and surgical methods for treating humans or animals (Article 27.3a)
- certain plant and animal inventions (Article 27.3b)

Under the TRIPS Agreement, governments can make limited exceptions to patent rights, provided certain conditions are met. For example, the exceptions must not unreasonably conflict with the normal exploitation of the patent (Article 30).

B. Compulsory licensing

Compulsory licensing is when a government allows someone else to produce the patented product or process without the consent of the patent owner. In current discussion, this is associated with pharmaceuticals, but it could also apply to patents in any field.

The agreement allows compulsory licensing as part of the agreement's overall attempt to strike a balance between promoting access to existing drugs and promoting research and development into new drugs. But the term compulsory licensing does not appear in the TRIPS Agreement. Instead, the phrase "other use without authorization of the right holder" appears in the title of Article 31. Compulsory licensing is only part of this since other use includes use by governments for their own purposes. Compulsory licensing and government use of a patent without the authorization of its owner can only be done under a number of conditions aimed at protecting the legitimate interests of the patent holder. For example[24]: Normally, the person

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[23] WTO, September 2006, *TRIPS and Pharmaceutical Patents*, Fact Sheet, Geneva: World Trade Organization.

[24] Coriat, Benjamin and Fabienne Orsi, *Pharmaceutical Patents, Generic Drugs and Public Health Under The TRIPS Agreement*, DRUID summer conference, Copenhagen June, 2003.

or company applying for a license must have first attempted, unsuccessfully, to obtain a voluntary license from the right holder on reasonable commercial terms (Article 31b). If a compulsory license is issued, adequate remuneration must still be paid to the patent holder (Article 31h).

However, for national emergencies, other circumstances of extreme urgency or public noncommercial use (or government use) or anticompetitive practices, there is no need to try for a voluntary license (Article 31b). Compulsory licensing must meet certain additional requirements[25]. In particular, it cannot be given exclusively to licensees (e.g. the patent-holder can continue to produce), and usually it must be granted mainly to supply the domestic market.

The TRIPS Agreement does not specifically list the reasons that might be used to justify compulsory licensing. In Article 31, it does mention national emergencies, other circumstances of extreme urgency and anti-competitive practices but only as grounds when some of the normal requirements for compulsory licensing do not apply, such as the need to try for a voluntary license first. (Doha declaration 5(b) and (c)).

C. Compulsory license and data exclusivity

Pharmaceutical companies have to submit test and clinical data to the national health authorities to obtain marketing approval for a new drug. The national health authorities keep the innovator data confidential against " unfair commercial use" for a certain time period, thus barring generic manufacturers from using the submitted innovator data for the stipulated period.

Most often, companies use data exclusivity provisions to seek a period of monopoly in a country even if it does not have any patents on the product in the country. As such, data exclusivity provisions have considerable implications for developing countries like India. So far, India has not introduced provisions pertaining to data exclusivity in the three amendments to the Patents Act, 1970. India is now considering amendments to the Drugs

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[25] Jayashree Watal, *Introducing Product Patents in the Indian Pharmaceutical Sector: Implications for Prices and Welfare*, WORLD COMPETITION: LAW AND ECONOMICS REVIEW, 1996.

& Cosmetics Act, 1940 and the Indian Insecticides Act, 1968 incorporating provisions for data protection[26].

Once data exclusivity is introduced, generic companies would have to do their own safety and efficacy tests. The huge cost involved in this exercise could result in generic companies being barred from producing a generic version of a product for a period extending effectively beyond 20 years. It may also result in the ineffective use of a compulsory license due to data exclusivity provisions, were such a license issued to a generic manufacturer.

D. Parallel Imports

Parallel or grey-market imports are not imports of counterfeit products or illegal copies. These are products marketed by the patent owner or with the patent owner's permission in one country and imported into another country without the approval of the patent owner.

The legal principle here is 'exhaustion', the idea that once company A has sold a batch of its product, its patent rights are exhausted on that batch and it no longer has any rights over what happens to that batch.

The TRIPS Agreement simply says that none of its provisions, except those dealing with nondiscrimination (national treatment. and most-favoured-nation treatment), can be used to address the issue of exhaustion of intellectual property rights in a WTO dispute.[27] In other words, even if a country allows parallel imports in a way that another country might think violates the TRIPS Agreement, this cannot be raised as a dispute in the WTO unless fundamental principles of non-discrimination are involved. The Doha Declaration clarifies that this means that members can choose how to deal with exhaustion in a way that best fits their domestic policy objectives. (Article 6 and Doha declaration 5(d)).

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[26] Prabuddha Ganguli, GEARING UP FOR PATENTS: THE INDIAN SCENARIO (Hyderabad: Universities Press (India) Ltd, 1998).

[27] Carlos Correa, INTEGRATING PUBLIC HEALTH CONCERNS INTO PATENT LEGISLATION IN DEVELOPING COUNTRIES. Geneva: South Centre, 2001.

E. "Bolar" Exception

Many countries use this provision to advance science and technology. They allow researchers to use a patented invention for research, in order to understand the invention more fully.

In addition, some countries allow manufacturers of generic drugs to use the patented invention to obtain marketing approval, for example from public health authorities without the patent owner's permission and before the patent protection expires. The generic producers can then market their versions as soon as the patent expires. This provision is sometimes called the 'regulatory exception' or "Bolar" provision (Article 30). This has been upheld as conforming to the TRIPS Agreement in a WTO dispute ruling. In its report adopted on 7 April 2000, a WTO dispute settlement panel said Canadian law conforms to the TRIPS Agreement in allowing manufacturers to do this. (The case was titled Canada Patent Protection for Pharmaceutical Products). Such experimental use of patented product had come into contention in the case of *Roche Product Inc* v. *Bolar Pharmaceutical Co Inc.*[28]

VIII. Doha Declaration

Some governments were unsure of how these TRIPS flexibilities would be interpreted, and how far their right to use them would be respected. The African Group (all the African members of the WTO) was among the members pushing for clarification.

A large part of this was settled at the Doha Ministerial Conference in November 2001.[29] In the main Doha Ministerial Declaration of 14 November 2001, WTO member governments stressed that it is important to implement and interpret the TRIPS Agreement in a way that supports public health by promoting both access to existing medicines and the creation of new medicines. They therefore adopted a separate declaration on TRIPS and Public Health. They agreed that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. They underscored countries ability to use the flexibilities that are built into

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[28] 221 USPQ 937.

[29] The Doha Declaration on TRIPS and Public Health: http://www.wto.org/english/tratop_e/trips_e/healthdeclexpln_e.htm.

the TRIPS Agreement, including compulsory licensing and parallel importing. And they agreed to extend exemptions on pharmaceutical patent protection for least-developed countries until 2016.

On one remaining question, they assigned further work to the TRIPS Council to sort out how to provide extra flexibility, so that countries unable to produce pharmaceuticals domestically can obtain supplies of copies of patented drugs from other countries. (This is sometimes called the "Paragraph 6" issue, because it comes under that paragraph in the separate Doha declaration on TRIPS and public health).

Importing under compulsory licensing ("paragraph 6" issue)

Article 31(f) of the TRIPS Agreement says products made under compulsory licensing must be predominantly for the supply of the domestic market. This applies to countries that can manufacture drugs, it limits the amount they can export when the drug is made under compulsory license. And it has an impact on countries unable to make medicines and therefore wanting to import generics. They would find it difficult to find countries that can supply them with drugs made under compulsory licensing. The legal problem for exporting countries was resolved on 30 August 2003 when WTO members agreed on legal changes to make it easier for countries to import cheaper generics made under compulsory licensing if they are unable to manufacture the medicines themselves.[30] When members agreed on the decision, the General Council chairperson also read out a statement setting out members shared understandings on how the decision would be interpreted and implemented. This was designed to assure governments that the decision will not be abused.

The decision actually contains three waivers:

- Exporting countries obligations under Article 31(f) are waived, any member country can export generic pharmaceutical products made under compulsory licenses to meet the needs of importing countries.
- Importing countries' obligations on remuneration to the patent holder under compulsory licensing are waived to avoid double payment. Remuneration is only required on the export side.

[30] The 30 August 2003 decision on importing and exporting under compulsory licence: http://www.wto.org/english/news_e/pres03_e/pr350_e.htm.

- Exporting constraints are waived for developing and least-developed countries so that they can export within a regional trade agreement, when at least half of the members were categorized as least developed countries at the time of the decision. That way, developing countries can make use of economies of scale.

Carefully negotiated conditions apply to pharmaceutical products imported under the system. These conditions aim to ensure that beneficiary countries can import the generics without undermining patent systems, particularly in rich countries. They include measures to prevent the medicines from being diverted to the wrong markets. And they require governments using the system to keep all other members informed, although WTO approval is not required. At the same time phrases such as "reasonable measures within their means" and "proportionate to their administrative capacities" are included to prevent the conditions becoming burdensome and impractical for the importing countries.

India, along with several other potential exporting countries changed their laws and regulations in order to implement the waivers and to allow production exclusivity to exports under compulsory license. Section 92A (1)[31] of the amended Patent Act reads:

> *Section 92A(1)*- Compulsory license shall be available for manufacture and export of patented pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory license has been granted by such country or such country has, by notification or otherwise, allowed importation of patented pharmaceutical products from India.

IX. Conclusion

Serious effort is needed, from the governments and the NGOs, to prevent further escalation of the pandemics such as HIV/AIDS, Cancer, TB, Malaria, etc. It cannot be denied that TRIPS came into being because of the pressure from various Trans National Corporations through their governments. The developing countries are not yet ready for product patents in pharmaceuticals. Even in countries like Switzerland, Italy and Japan,

[31] *Supra* n.1.

product patents in pharmaceuticals were introduced in the late seventies when the drug industry was fully established and developed there. The present scenario will adversely affect the public health in all the developing and least developed countries. Doha Declaration is a step in the right direction but it is still not clear if it will bring about the necessary results. Moreover, it does not cover all the aspects and the export and import of drugs under the compulsory license is still ambiguous. How much are the lives of people living in poor countries worth is a question worth discussing. The developing nations need to work together as a unit while the developed nations need to understand the implications of their own agendas.

India is a major force as a producer of cheap pharmaceutical drugs to be used domestically as well as in other developing countries. The provisions of the amended patent law of India makes it theoretically possible for it to continue playing the role it was playing prior to TRIPS, i.e. of the major producer of generic drugs for the developing world but what happens in reality remains to be seen. Moreover, the task is bound to become laborious in case of new chemical entities patented after January 1, 1995. Even in that case it must be made sure that the generics are made available in the market as soon as the patent expires and frivolous "ever-greening" should be avoided.

Flexibilities available in the TRIPS itself needs to be utilized to the fullest. The provision of compulsory license is a potent tool towards achieving the objective of access to medicine for all. Public health is a major issue and should not be left in the hands of those who only seek profit out of such misery.

JUVENILE JUSTICE SYSTEM AND EXTENT OF JUVENILE DELINQUENCY IN INDIA

*Nawaz-ul-Haque**

I. INTRODUCTION

More than a century ago, Abraham Lincoln said:

A child is a person who is going to carry on what you have started. He is going to sit where you are sitting, and when you are gone, attend to those things you think are important. You may adopt all the policies you please, but how they are carried out depends on him. He is going to move in and take over your churches, schools, universities and corporations. The fate of humanity is in his hands[1].

The problem of juvenile delinquency is not new. It occurs in all societies simple as well as complex, that is, wherever and whenever a relationship is affected between a group of individuals leading to maladjustments and conflict.

In a developing country like India the problem of juvenile neglect and delinquency is considerably low but gradually increasing according to the National Crime Record Bureau Report 2007. What is worrying more is that the share of crimes committed by juveniles to total crimes reported in the country has also increased in last three years. Considering the magnitude of the problem and issues involved, analysis indicates that the number of factors for neglect and delinquency are mostly common and interrelated, based on socio-economic and psychological reasons. Poverty, broken homes, family tensions, emotional abuse, rural-urban migration, break-down of social values and joint family system, atrocities and abuses by parents or guardians, faulty educational system, the influence of media besides the unhealthy living conditions of slums and such other conditions explain the phenomena of juvenile delinquency. The neglect of children by their parents,

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1 Wrobleski.M,Henry, AN INTRODUCTION TO LAW ENFORCEMENT AND CRIMINAL JUSTICE 540-541 (Thomson learning, USA 2000).

family, society and the nation create detrimental effect on their physical, mental growth and over all development. Needless to say that most of the factors causing delinquency are in plenty in the Indian context and any attempt to prevent and control them can be fruitful for society. After all, the children represent the nation and the coming future of the country. Even international instance like UN Standard Minimum Rules for the Administration of Juvenile Justice, also known as Beijing Rules, 1985 and UN Convention on the Rights of Child, 1989, are notable and has articulated the global consensus on giving special attention to the children who come in conflict with law. In the above context, this paper tries to highlight the growth and development of juvenile justice system in India, constitutional provisions, Juvenile Justice Act, 2000 and extent of delinquency in India.

II. HISTORICAL BACKGROUND

It was Pope Clement XI, who first introduced, in 1704, the idea of 'the correction and instruction of profligate youth' in institutional treatment. Subsequently Elizabeth Fry and her associates mobilized resources to establish separate institutions for juvenile offenders. Consequently, in Britain, Reformatory Schools Act and Industrial Schools Acts were brought on statute book.

The move to establish special courts for juveniles was initiated, for the first time, in 1847, in United States of America. However, the first 'Juvenile Court' could be established, only in 1899, in Chicago under Juveniles Offenders Act. In England the first Juvenile Court was set up in 1905.

The first probation law was enacted in the State of Massachusetts, USA, in 1878 and in England in 1887.

The term 'Juvenile justice' was used for the first time by the legislature by the state of Illinois, USA, in 1899, while passing the Juvenile Court Act. The approach underlying this law was that juvenile offenders should not be meted out the same punitive and retaliatory treatment as adults but rather given individual attention for their own protection as well as that of the society[2].

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[2] Chinte,C.l., *Fifty Years Of Juvenile Court* in M.Bell (ed.), CURRENT APPROACHES TO DELINQUENCY (New York: National Probation and Parole Association 1949).

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The word 'Juvenile' has been derived from Latin term 'juvenis' meaning thereby Young.

The term 'delinquency' has also been derived from the term do (away from) and liqueur (to leave). The Latin initiative "delinquere' translate as to emit in its original earliest sense.

According to Reckless, the term 'juvenile delinquency' applies to the "violation of criminal code and /or pursuit of certain patterns of behavior disapproved of for children and young adolescents"[3]. Thus, both age and behavioral infractions prohibited in the statutes are important in the concept of juvenile delinquency. Caldwell prefers to leave the term vague and includes within it all acts of children, which tend them to be pooled indiscriminately as wards of the state[4].

'Juvenile delinquency' when employed as a technical term rather then merely a descriptive phrase is entirely a legislative product....', But generally speaking, the term refer to a large variety of behavior of children and adolescent which the society does not approve of, and for which some kind of admonishment, punishment or corrective measure is justified in the public interest[5].

In India, which has a long history of Juvenile legislation, most statutory provisions have followed, more or less, the British pattern. The English idea of providing separate treatment for juvenile offenders was passed on to India in the last quarter of the nineteenth century. The Apprentices Act, 1850 is chronologically the first law meant to deal with the children in distress who are to be trained for trade and industry. Even the penal laws such as the Indian Penal Code, 1860 exempts children under the age of seven years from criminal responsibility (Section 82). It also exempts children between the age of seven to twelve years, who have not attained sufficient maturity of understanding to judge the nature and consequences of their conduct, from criminal responsibility (Section 83). The Act also provides some protection to the children from the evil designs of the adults (Section 363-A).

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3. Reckless, Walter, HAND BOOK OF PRACTICAL SUGGESTIONS FOR THE TREATMENT OF ADULT AND JUVENILE OFFENDERS (Government of India, 1956).
4. Caldwell, CRIMINOLOGY, p-357.
5. BLACK LAW DICTIONARY (1999, seventh edition, west group).

The Reformatory School Act enacted in 1876 and later modified in 1897, was the next landmark legislation in the treatment of juvenile delinquents. It empowered local government to establish reformatory schools. Under the Act, the sentencing court could detain boys in such institutions for a period of two to seven years but they would not be kept in the reformatory schools after they had attained the age of eighteen years. There was also a provision to license out boys over fourteen years of age if suitable employment could be found. In Bombay Presidency, the Act was applicable to boys under sixteen years of age, while elsewhere it applied to boys under fifteen years of age.

The Code of Criminal Procedure of 1898 provided specialized treatment for juvenile offenders. The Code also envisaged the commitment of juvenile offenders up-to the age of fifteen years to Reformatory Schools and provided probation for good conduct to offenders up-to the age of twenty one. Subsequent Indian children Acts passed by the Presidencies and provinces maintained this thinking. These laws contained provisions for the establishment of a specialized mechanism for the identification of handling and treatment of children and juveniles. In this regard, recommendations of the Indian Jails Committee, 1919-20, gave an added impetus to legislative action. In the post independence period, the Government of India was seized of the problems among others, of juvenile justice particularly in the centrally administered union territories. This is what led to the Children Act1960. The law was in full force in all the UTs, but the states, not having juvenile legislation, were free to adopt it. As would be expected, at this stage, juvenile justice in the country was uneven and had varying standards, norms and practices. These problems were sought to be removed through the Juvenile Justice Act 1986. The law was in force throughout the country[6].

On the other hand, the concept, approach and methodology of juvenile justice were under going some basic changes, as is indicated by the Beijing Rules and the UN Convention on Rights of the Child. This led to the formulation of the Juvenile Justice (Care and Protection of Children) Act, 2000, which was exhaustively amended in 2006 by Act No.33 of 2006.

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[6] JUVENILE JUSTICE SYSTEM & RIGHTS OF CHILD (2003, Paryas Institute of Juvenile Justice) pp. 9-20.

III. International Concern

The Second UN Congress on Prevention of Crime and Treatment of Offenders in 1960 stated that juvenile delinquency should be understood as the commission of an act, which when committed by an adult above a prescribed age would constitute an offence in law. The Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders held in Venezuela in 1980 discussed further and in detail the problem of juvenile delinquency. They decided that there should be the Standard Minimum Rules for the Administration of Juvenile Justice. Every child has its human rights and they should not be denied to it by anybody. Hence, they said that there should be laws to protect the right of the children. Consequent to it, it was accepted that special attention should be given to the steps initiated to prevent delinquency among children and also to homeless and street children in the urban setting. The need for giving special attention to youth criminality was also given due importance and emphasis. The nature of youth criminality in semi-urban and rural areas was considered. Further, the following areas were discussed at the meeting at Beijing (May 14 to 18, 1985) which examined the Standard Minimum Rules for the Administration of Juvenile Justice.[7]

A 'child' is defined in the UN Convention on the Rights of the Child (CRC) as a person under the age of 18. This includes infancy, early childhood, middle childhood and adolescents.

The UN Convention on Rights of the Child, 1989 draws attention to four sets of civil, political, social, economic and cultural rights of every child.[8] These are:

(i) Right to survival: Which includes the right to life, the highest attainable standard of health, nutrition, and adequate standards of living. It also includes the right to a name and a nationality.

(ii) Right to protection: Which includes freedom from all forms of exploitation, abuse, inhuman or degrading treatment, and neglect

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7 UNICEF, United Nations Standard Minimum Rules for the Administration of Juvenile Justice(Beijing Rules) (New Delhi, UNICEF, 1985).

8 UNICEF,United Nations Convention on Rights of The Child, (New Delhi, UNICEF 1989).

including the right to special protection in situations of emergency and armed conflicts.

(iii) Right to development: Which includes the right to education, support for early childhood development and care, social security, and the right to leisure, recreation and cultural activities.

(iv) Right to participation: Which includes respect for the views of the child, freedom of expression, access to appropriate information, and freedom of thought, conscience and religion.

The Convention provides the legal basis for initiating action to ensure the rights of children in society. Relevant articles from the UN Convention on the Rights of the Child are

Article 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

a) The inducement or coercion of a child to engage in any unlawful sexual activity;
b) The exploitative use of children in prostitution or other unlawful sexual practices;
c) The exploitative use of children in pornographic performances and materials.

Article 35: States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form.

Article 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Any child primarily on account of his dependence and vulnerability deserves to be completely looked after by others. As a child, he needs support and care to survive since the nature does not provide to the human infant any protection at all. The need to survival and protection continues till the child attains maturity and adulthood. The child being the nursery of all civilization and all human potential has to be provided with various institutional and non-institutional system of development which consists of programs pertaining to education, life skills, nutrition, health, shelter and most important, the right to childhood.

IV. Constitutional Provisions

After Independence, the constitutional provisions have inspired the developments in the field of juvenile justice. 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.[9]

Article 15 (3): Permits the State to make special provisions for children and women

Article 23: Prohibits the traffic in human beings and forced labour

Article 24: Forbids the employment of children below the age of 14 years in factories, mines and other hazardous occupations

Article 39 (e): Directs the State to safeguard the tender age of children from entering into jobs unsuited to their age and strength forced by economic necessity

Article 39 (f): Directs the State to secure facilities for the healthy development of children and to protect childhood and youth against exploitation and moral and material abandonment.

Article 45: Requires the State to provide free and compulsory education to all children up to age of 14 years.

Article 47: states it is the duty of the state to raise level of nutrition and standard of living.

Parliament has enacted the 86th Constitutional Amendment in 2002 and made Right to Education a fundamental right.

V. Judicial Efforts

The judiciary in India plays very important role and has passed many significant judgments in favor of child rights.

In *Sheela Barse v. Union of India*,[10] The Supreme Court issued directions to the state government to set up necessary observation homes where children accused of an offence could be lodged, pending investigation and trial will be expedited by juvenile courts.

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[9] Narender Kumar, CONSTITUTIONAL LAW OF INDIA (Pioneer Publication, Delhi, 2003).

[10] AIR 1986 SC 1733. Bartol, Curt r. &Bartol, Anne m., JUVENILE DELINQUENCY-A SYSTEM APPROACH 117-149 (Eaglewoodcliff, New Jersey, Prentice Hall-inc.,1989).

In *Sheela Barse v. Secretary, children Aid Society,*[11] The Supreme Court commented upon setting up dedicated juvenile courts and special juvenile court officials and the proper provision of care and protection of children in observation Homes.

In *Vishal Jeet* v. *Union of India,*[12] The Supreme Court issued appropriate directions on a PIL to the state Governments and all 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.

In *M.C. Mehta* v. *State of Tamil Nadu,*[13] Supreme Court pronounced upon the constitutional perspective of abolition of Child labor and issued appropriate guide lines to the Government of India with respect to compulsory education, health, nutrition, etc of the child laborers.

In *Sakshi* v. *Union of India,*[14] Supreme Court directed the government/ Law commission to conduct a study and submit a report on the means of curbing child abuse.

VI. Juvenile Justice (Care And Protection Of Children) Act, 2000

The Act is a central Act, which came into force on April 1, 2001, through out the country. It is based on (i) provisions of the Indian Constitution; (ii) United Nations Convention on Rights of the Child, 1989; (iii) United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules); (iv) United Nations Rules for the Protection of Juveniles deprived of their Liberty, 1990.

The Juvenile Justice Act, in its preamble itself signifies the need of the child care by providing that it is an Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly

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[11] AIR1987 SC 656.
[12] AIR 1997 SC 699.
[13] (1999) 6 SCC 591.
[14] AIR 199 SC 1412.

approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment. Recently the exhaustive amendments of 2006, and rules framed in the year 2007 is credit worthy as it incorporates many aspects regarding juveniles.

Salient features of Juvenile Justice (Care and Protection of Children) Act, 2000

- The age for boys and girls has been uniformly raised to 18 years in accordance with the UN CRC.
- It deals separately with two categories of children i.e. 'child in need of care and protection' and 'juvenile in conflict with law'. A 'child in need of care and protection' is a child who due to various reasons are found in difficult circumstances and are in danger of survival and growth. The 'juvenile in conflict with law' are those juveniles who are alleged to have committed an offence. The Act provides separate treatment in the matter of institutional care, legal adjudication and disposition of cases.
- The Competent Authority in relation to 'child in need of care and protection' is Child Welfare Committee and in relation to 'juvenile in conflict with law' is Juvenile Justice Board.
- The members of the Committee in the Board have been given magisterial power.
- The social workers and the representative of the NGOs having prescribed qualifications under the Act can now become member of the Competent Authority.
- For the 'juvenile is conflict with law', the Act envisages to establish Observation Homes and Special Homes. For the 'child in need of care and protection', provision has been made to establish Comprehensive Children's Homes. While the Shelter Home and the After-Care Organizations may be established for juveniles or children. The Shelter Home shall be exclusively established and run by the voluntary sector with the assistance from the government. All others Homes can either be established or run by the government in association with the voluntary organizations.

- The representatives of voluntary organizations and social workers can become members of Advisory Committee.
- New mode of dispositional alternatives like counseling and community services have been incorporated for the juveniles in accordance with Beijing Rule.
- A new chapter on rehabilitation and social re-integration comprising of adoption, foster care and sponsorship has been added.
- The police has been assigned specialized role in accordance with Beijing Rules. A Special Juvenile Police Unit (SJPU) shall be set-up in every police station. A police officer of the rank not below an Assistant Sub-Inspector (ASI) shall be designated as Child Welfare Officer. He shall be assisted by two local voluntary social workers.
- A new concept of Social Audit has been introduced in accordance with Beijing Rules.
- Besides police, the social worker and the voluntary organization have role in production of children before the Child Welfare Committee.
- A child himself/herself can appear before the Competent Authority and demand his/her rights.
- The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board at every six months, and shall direct the Board to increase the frequency of its sittings or may cause the constitution of additional Boards.
- Juvenile/child cannot be kept in police lock-up or jail.
- Effort shall be made to release the juvenile on bail or probation.
- Enquiry to be completed within a period of four months from the date of its commencement unless the period is extended by the JJB/CWC, else for reason to be recorded
- The state governments (under section 68 of the Act) are directly responsible for the implementation of the Act.

VII. Extent Of Delinquency In India

The statistics of juvenile crimes in the country against total crime in the country indicates steady decline in early 1990s and static in late 1990s and then again rose significantly in early 2000 and still increasing gradually. It has been observed that children at the threshold of adulthood -in the age groups of 16-18 years are more prone to taking up criminal activities. This increase may be partly attributed to inclusion of delinquent boys from 16 to 18 years for the first time as per new definition of Juvenile Justice Act, 2000. The table below gives a clear picture of the rate of juvenile delinquency under the Indian Penal Code (IPC), incidence of juvenile (SLL) crimes in India and juveniles apprehended under IPC and SLL (age wise) during the period 1990 to 2007.[15]

Year	Juvenile Crimes	% to total crimes*	Juvenile (SLL) crimes	% to total crimes*	Juveniles Apprehended under IPC and SLL & their age AGE(in years)			
					Number	7 - 12	12 - 16	16 - 18
1990	15, 230	0.9	14,799	0.45	30, 816	11.9	76.5	11.5
1991	12, 588	0.8	22,143	0.66	29, 591	19.7	63.8	16.4
1992	11,100	0.7	7,532	0.21	21, 358	16.1	69.3	14.7
1993	9, 465	0.6	7,199	0.19	20, 067	19.6	67.0	13.5
1994	8, 561	0.5	5,962	0.15	17, 203	21.5	64.3	14.3
1995	9, 766	0.6	5,255	0.12	18, 793	18.0	63.9	18.1
1996	10, 024	0.6	5,719	0.12	19, 098	18.3	59.6	22.1
1997	7, 909	0.5	4,408	0.09	17, 796	15.4	68.4	16.2
1998	9, 352	0.5	6,007	0.14	18, 923	17.6	61.0	21.3
1999	8, 888	0.5	5,569	0.18	18, 460	21.9	55.9	22.3
2000	9, 267	0.5	5,154	0.15	17, 982	18.3	63.3	18.4
2001	16,509	0.9	8,332	0.23	33,628	10.9	37.9	51.2
2002	18,560	1.0	8,981	0.23	35,779	12.5	38.7	48.7
2003	17,819	1.0	7,867	0.20	33,320	10.8	35.1	54.2
2004	19,229	1.0	5,756	0.13	30,943	6.8	40.1	53.1
2005	18939	1.0	6,662	0.20	32,681	5.0	40.1	54.9
2006	21088	1.1	4,729	0.14	32,145	5.0	39.0	56.0
2007	22865	1.1	4,756	0.12	34,527	4.2	35.1	60.7

** Percentages*

[15] National Crime Records Bureau, Report (New Delhi, 2007).

The number of juvenile crimes in 2007 increased by 8.4 per cent over 2006 with 22,865 crimes registered during 2007, up from 21,008 in 2006. Out of 34,527 juveniles apprehended in year 2007, 29,771(86.2%) were arrested under IPC crimes while 4,756 (13.8 %) arrested for committing SLL crimes. It is observed that during 2007, 1,460 juveniles were apprehended in the age group of 7-12 years, 12,114, juveniles were apprehended in the age group of 12-16 years whereas bulk of juveniles (20,953) were arrested under the age group of 16-18 years. The percentage share of juveniles apprehended under these age groups was 4.2%, 35.1% and 60.7% respectively. However, their share in the IPC is small, and it is even smaller in SLL crimes. A large number of juveniles (68.4%) belong to the poor families. (Income below 25000/) Main IPC offences in which they are reported to be involved are hurt, theft, burglary, riot and molestation. Similarly, main SLL offences are gambling, excise and Prohibition

Type of juvenile (IPC) offences in the year 2007.

OFFENCE	INDIA
Attempt to murder	547
Murder	672
Rape	746
Molestation	476
Riot	1440
Burglary	2603
Theft	5,606
Hurt	3,810
others	5,418

In presenting these facts, the idea is to point out the weakening of figures, the motives for conformity to social norms and the disruption of social relationships and social bonds. Despite preventive legislation, the problem of delinquency continues unabated. It is therefore, necessary that children should be the focus of development. Since they have only one opportunity to grow and develop, while the handling of a child is recognized as delinquent. Though a formal Juvenile Justice system may be justifiable to a certain extent, there must be some concrete and comprehensive plan of action. It should be evolved for the well being and welfare of all children who, due to various situational compulsions, are totally marginalised or left out of the social stream. We also need to evolve an appropriate policy framework for the protection, care and development of neglected children involving the active cooperation and participation of individuals, groups, communities and civil society at large. Keeping this in view, a few suggestions may be offered.

VIII. Problems In Administration Of Justice

There are several problems which encountered in the effective administration of justice regarding juvenile delinquency. First, most of the States are yet to constitute juvenile courts to cover all the districts as required under the Juvenile Justice Act, 2000. As a result, the powers of such courts are being exercised by other authorities who may not have special knowledge of child psychology and child welfare. Though this provision may be legally tenable, yet it may run contrary to the spirit of law. The mandatory requirement of honorary social workers on the panel of juvenile courts and efforts may be made that magistrates appointed on juvenile court must have special knowledge of child psychology and child welfare as laid down under the Act. Second problem area is the the approach of the agencies involved in the system are penal not social and reformatory which is against the best interest of child theory.

IX. Preventing Juvenile Delinquency

It is widely believed that early-phase intervention represents the best approach to preventing juvenile delinquency. Prevention requires individual, group and organizational efforts aimed at keeping adolescents from breaking the law. Some focus on punitive prevention intended to frighten potential offenders by making sure they understand the possibility of severe punishment and also explaining them the negative aspects of an offence to a delinquent and attempting to reconcile offenders and their victims. Through the economic sector, development programmes with income generation opportunities, professional training and vocational education are the areas which can help and prevent youth involvement in delinquent activities. Involvement of NGOs and local community can also help in preventing juvenile gang delinquency.[16]

X. Suggestions

- Control of delinquency needs effective implementation of Juvenile Justice Act, with full public awareness and proper orientation and training to professionals and law enforcement agencies.
- Application of UN Rules for Juveniles Deprived of their Liberty (1990)
- Advocacy for various legal provisions provided for juveniles.

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[16] Juvenile Delinquency, World Youth Report (2003) pp.200-201.

- A proper mechanism should be created to assess the needs and requirements of the juveniles and it should be reviewed regularly.
- The approach of the agencies like police involved in the system may be more of reformative character rather than pure penal. The objective may be to reform the delinquents, rather than just to punish them.
- Government should put more emphasis on useful and attractive beneficial long-term schemes for Juveniles so that they feel motivated to join main stream of the society and regain their self-confidence, which is generally lost because of the callous attitude of the society.
- State Governments and Union Territories administrations should encourage and provide support to voluntary organization to start or modernize juvenile services including community services.
- Longer association of community and voluntary organizations in the schemes of Government programs like nutrition for all, literacy, health, eradication of child labour, etc. shall help to a great extent to weed out delinquency.
- All the stakeholders should give coordination and networking, as the aims of juvenile justice could be achieved mainly through concentrated and co-ordinate functioning.

CHAWLA'S ELECTIONS : LAW AND PRACTICE. NINTH EDITION By Kiran Gupta & Mr. P.C. Jain, Bahri Brothers, Delhi, 2009. Pp. lxxii + 1645, Rs. 1695/-.

Independent India, having chosen the path of democratic governance, set up a number of institutions when its Constitution was ushered in 1950 and one of them was the Election Commission of India, whose task it was to conduct elections to the parliament and state legislatures in a free and fair manner. In the last more than five decades of its existence, the Election Commission has carved a unique niche for itself, contributing its mite to the strengthening of the democratic credential of a pluralistic India. The Indian elections are universally hailed as free and fair and have generated a global interest in recent years because of the sheer volume and size of the operations.[1]

The roots of democracy have been firmly established in India and it is considered as one of the most stable democracies in the world. Democracy is one of the inalienable basic features of the Constitution of India and forms part of its basic structure.

Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his parliament plus political choice of his proxy. Although the full flower of participative government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions.[2]

The concept of democracy as visualized by the Constitution presupposes the representation of the people in parliament and state legislature by the method of election.[3]

The book under review on law of elections is very aptly divided into two sections.

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[1] Gopalaswami N. in Foreword to V.S. Rama Devi and S.K. Mendiratta, HOW INDIA VOTES : ELECTION LAWS, PRACTICE AND PROCEDURE (2006) at xi.

[2] *Mohinder Singh Gill* v. *Chief Election Commissioner*, AIR 1978 SC 851.

[3] *N.P. Ponnuswami* v. *Returning Officer*, AIR 1952 SC 64.

Section I entitled as "Election Laws : Commentary" is further divided in six parts.

Part-I is headed as 'Introductory' and contains two chapters. Chapter 1 deals with principles and rules of interpretation in the context of election law. Chapter 2 elucidates words and phrases used in election laws and thus demystifies the legal jargon.

Part-II is entitled as 'Elections : General Aspects' and incorporates six chapters (Chapters 3-8). Chapter 3 deals with the law relating to election to parliament and of the president. This chapter explains lucidly 'proportional representation by means of a single transferable vote' system. Chapter 4 provides, with a wealth of case law, detailed commentary on the law pertaining to election to the state legislatures. Chapter 5 deals with election machinery at three levels, viz., Election Commission, Machinery at the Field Level and Conduct of Elections. Jurisdiction and powers of Election Commission is a nebulous area, however, the authors have dealt with this contentious topic flawlessly and have provided sufficient guidelines to those who are entrusted with the task of conducting elections and the courts alike. Chapter 6 deals with and provides valuable material on the allocation of seats and delimitation of constituencies. Provisions of the Delimitation Act, 2002 have been explained and analysed in a simple and analytical manner. Chapter 7 explains the law relating to electoral rolls and the last chapter 8 in Part-II dilates on recognition / derecognition of and donation to political parties and election symbols.

Part-III is entitled as 'Conduct of Election' and is further divided into ten chapter (Chapters 9-18). These chapters with detailed synopsis at the beginning of each chapter deal with the procedure and law for conducting entire elections, viz., starting with the issue of notification to counting of votes and publication of result. Model Code of conduct for the Guidance of Political Parties and Candidates has been discussed as a separate chapter which also includes the complete text thereof.

Part-IV is structured on 'Disputes Regarding Elections' and is further divided into seven chapters (Chapters 19-25). These chapters deal with the Election Petitions *in extenso*. Election petitions are highly technical and hence have to be drafted and presented in a manner provided strictly under the laws. Any deviation, however trivial, may render the petition vulnerable

and thus avoids judicial scrutiny. The present part provides excellent help to the practicing lawyers in this branch of law with valuable tips. A separate treatment at the end of the part is given to the jurisdiction of courts in election cases.

Part-V is designed on 'Corrupt Practices and Electoral Offences' and is divided into eight chapters (Chapters 26-33). Purity of election process is paramout and is essential for a successful democracy. Issues relating to corrupt practices, bribery, undue influence, appeal on the ground of religion, race, caste, etc., promotion of enmity or hatred and booth capturing, publication of false defamatory statement and electoral offence have been discussed and analysed with the help of detailed case law in this part.

Part-VI is headed as 'Anti-Defection Law' and provides deep insight into this controversial branch of election law. Recent amendments and judgments on the topic have been incorporated in this part making it a ready reckoner for lawyers, judges and politicians.

Section II is compendium of constitutional provisions (relating to elections), Acts of Parliament, Rules, Orders etc. and thus obviates the need for lawyers to have an election manual separately. The reviewer, however, feels that the title of this section as 'Statutory Provisions' is a little odd considering the fact that in part one thereof constitutional provisions have been incorporated.

The book is quite exhaustive on the topics covered and serves both as 'commentary on election law' and 'election manual'. The up-to-date revision of the book, incorporating the cases and amendments to the laws, makes it a useful literature for the students, lawyers, judges, academics and parliamentarians.

The reviewer has no doubt that the book is a treasure of information on the subject. The price of the book (though commensurate with the volume) is on the higher side. Be that as it may, considering the wealth of information, the price spent is a good investment and will fetch good return and rich dividends.

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